

High court to rule on sodomy laws ✓

Case challenges Texas law concerning same-sex couples

By Frank J. Murray
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The Supreme Court is scheduled to decide as early as today whether to revisit its historic 1986 decision allowing states to prosecute homosexuals for sodomy.

The appeal, brought by Lambda Legal Defense and Education Fund, challenges the Texas law barring oral or anal sex between people of the same sex, a distinction Lambda says violates the U.S. Constitution's equal protection clause by officially stigmatizing homosexuals for "loving behavior" that others practice legally.

"Only same-sex couples can run afoul of the Homosexual Conduct Law, which — true to its name — uses the definition of a gay sexual orientation to trigger illegality," said the plea to reverse misdemeanor convictions of John Lawrence and Tyron Garner.

The Texas law "flatly forbids lesbians and gay men from engaging in basic forms of sexual expression that are open to and wholly legal for heterosexuals," Lambda said in its court filings.

Houston prosecutor William J. Delmore III said the "rational basis" test often applied to such court challenges will determine that a state legislature may take biological differences into account and "rationally draw a distinction between two individuals of the same sex performing an act, and two individuals of the opposite sex performing the same act."

He said the charge has rarely, if ever, been prosecuted because most such cases involve public lewdness — which is a Class A misdemeanor, much more serious than the Class C misdemeanor in the Lawrence and Garner cases.

"Every two years at least one

bill is filed in the legislature seeking to repeal the statute, and each legislative session the effort to repeal it has failed," Mr. Delmore said.

On June 8, 2000, a three-judge panel of the state District Court of Appeals declared that the law violated the Texas Constitution. That decision was reversed nine months later by the full court.

In its plea to the Supreme Court, Lambda argued that sodomy is widely practiced, citing a 1994 study by University of Chicago researchers who said 79 percent of all men and 73 percent of all women engaged in oral sex, while 26 percent of men and 20 percent of women engaged in anal sex.

The organization, which specializes in issues affecting homosexuals, implored the justices to look beyond the Texas law and use the case to reverse its 1986 *Bowers v. Hardwick* case. That 5-4 decision allowed prosecution of homosexuals under Georgia's since-discarded sodomy laws, which covered heterosexuals as well.

Lambda says many other states and the District of Columbia had also changed their stance since then and that only 13 states retain anti-sodomy laws. Nine, including Virginia's, apply to all. Texas and Kansas laws limit the ban to homosexuals, and Missouri and Oklahoma courts exclude consensual heterosexuals from enforcement.

"It's not just a relic on the books," Lambda legal director Ruth E. Harlow said of the 1860 Texas sodomy law, revised in 1973 to exclude heterosexuals.

Ms. Harlow denied that the issue was set up as an intentional test case but said her organization became involved before the men lost their motions to dismiss the case as uncon-

stitutional violations of privacy and equal protection. They pleaded no contest in Houston's criminal court, where each was fined \$200 plus \$141.25 in court costs.

"It's not like we wanted this case; these fellows really never wanted this to happen to them," she said, recounting the false report to police by neighbor Roger Nance that a "crazy man with a gun" was in Mr. Lawrence's apartment. Mr. Nance served two weeks in jail for making the false police report.

Deputy Sheriff Joseph Quinn said he entered through an unlocked door and found the men engaged in anal sex. Mr. Garner, now 35, and Mr. Lawrence, now 59, condemned their arrests as "sort of Gestapo."

The men say they were smeared by conviction for an offense involving "moral turpitude," which would require them to register as sex offenders if they move to Idaho, Louisiana, Mississippi or South Carolina, and limits their right to work in Texas as an athletic trainer, doctor, registered nurse, speech pathologist, interior designer, bingo operator, school bus driver or liquor salesman.

"By this law, Texas imposes a discriminatory prohibition on all gay and lesbian couples, requiring them to limit their expressions of affection in ways that heterosexual couples, whether married or unmarried, need not," Ms. Harlow said, invoking the 1965 *Griswold v. Connecticut* decision that barred states from outlawing a married couple's contraceptive use.

"Enforcement of such laws involves police tactics, including inspections of the specific physical details of sexual conduct to verify criminal violations, that are repugnant to any system of ordered liberty," she said.