Supreme Court Hears Texas Sodomy Case 3/26/2003

By Peter LaBarbera

LaRue Offers Assessment as Pro-Homosexual Groups Push 'Animus,' Equal Protection Arguments

WASHINGTON — The Supreme Court heard arguments Wednesday on whether Texas' anti-sodomy statute violates the U.S. Constitution, with pro-family groups arguing that if the law is overturned, it will pave the way for "gay marriage."

Homosexual activists are hoping that the high court will essentially overturn its 1986 decision, *Bowers v. Hardwick*, in which it ruled 5-4 that there is no constitutional right to sodomy. They are pinning their hopes on the Fourteenth Amendment, which guarantees equal protection under the laws, and an expanded right to privacy derived from the high court's divisive abortion rulings. The pro-homosexual friend-of-the-court briefs challenge the Texas law for banning oral and anal sodomy between homosexuals but not for heterosexual couples, chalking it up to "animus" and "prejudice" against homosexuals as a class of people.

Texas law prohibits "deviate sexual intercourse" between people of the same sex. It is one of four sodomy laws in the United States that ban homosexual sodomy. Nine other states ban sodomy in general. The *Lawrence* case stemmed from the arrest and conviction of John Lawrence, 55, and Tyron Garner, 31, for engaging in sodomy in their home on the night of September 17, 1998. Police had arrived at Lawrence's apartment after answering a prank burglary call from a neighbor. They were fined $200 each.

[**Editor's note**: at presstime, Jan LaRue, chief counsel of Concerned Women for America (CWA), who filed an *amicus* brief for CWA and attended the Supreme Court oral argument Wednesday, offered this assessment of the proceedings:

> "Victory in this case depends on two justices, Sandra Day O'Connor and Anthony Kennedy. Both were noticeably quiet during oral argument. Each asked a question related to the Court's 1986 decision in *Bowers v. Harwick*, which upheld a Georgia statute that applied to both opposite-sex and same-sex sodomy. The Court ruled that there is no fundamental constitutional right to engage in sodomy. The petitioners here are asking the Court to overrule *Bowers*, which it is unlikely to do.
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> "The crux of the case rests on the equal protection challenge because the Texas statute criminalizes only same-sex sodomy. O'Connor asked whether a statute that covered both would violate equal protection. The Court has to be convinced that there is a rational basis for the statute. The briefs on our side give them several. We need to pray that O'Connor and Kennedy will read these briefs."]

LaRue dismisses equal protection claim

LaRue dismissed the "gay" lobby's equal protection argument in the *amicus brief* she authored for CWA:

> The Texas statutes at issue do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The statutes are facially neutral in that they prohibit same-sex "deviate sexual intercourse." They criminalize conduct, not status. The statutes do not discriminate on the basis of sexual orientation or sex (gender) because they apply equally to two women or two men regardless of their orientation. Even if the statutes discriminated on the basis of sexual orientation, for equal protection purposes, sexual orientation is not entitled to anything more than rational basis scrutiny.

"Rational basis" scrutiny means that the defendants need only show that legislators had a rational basis for

enacting the law. A homosexual rebuttal brief by the homosexual lawyers' group Lambda Legal Defense and Education Fund (LLDEF) argued that there was no rational basis for treating homosexual sodomy different from heterosexual sodomy.

"[T]he law expressly treats identical conduct differently depending on who is engaging in it," states the Lambda Legal reply brief. "There is no permissible justification for that classification, even under the most deferential equal protection review."

But Glen Lavy, a Harvard-educated lawyer with the Arizona-based Alliance Defense Fund (ADF), which coordinated the pro-family briefs, found a clear rational justification for the Texas law in the many health risks linked especially to homosexual sex acts. In a brief on behalf of thousands of Christian doctors, Lavy writes:

> Texas has a legitimate interest in regulating public health, and the CDC [Centers for Disease Control and Prevention] has identified sexually transmitted diseases ("STDs") as a public health problem. Sodomy is an efficient method of transmitting STDs. And regardless of the reason, same-sex sodomy is far more effective in spreading STDs than opposite-sex sodomy. Multiple studies have estimated that 40 percent or more of men who practice anal sex acquire STDs. In fact, same-sex sodomy has resulted in the transformation of diseases previously transmitted only through fecally contaminated food and water into sexually caused diseases–primarily among those who practice same-sex sodomy.
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> The issue under rational-basis review is not whether Texas should be concerned about opposite-sex sodomy, but whether it is reasonable to believe that same-sex sodomy is a distinct public health problem. It clearly is.

Lavy's brief on the health risks associated with homosexuals is available, along with 15 other pro-family *amici*, on the Alliance Defense Fund website. The pro-homosexual *amici*are available on Lambda Legal's website. Two conservative-minded libertarian groups, the Cato Institute and Clint Bolick's Institute for Justice, filed briefs in support of striking down the Texas sodomy law. So did the Log Cabin Republicans, a homosexual group, and the Republican Unity Coalition, an organization that hopes to make homosexuality a "non-issue" in the GOP.

Matt Staver, president and general counsel of the Florida-based Liberty Counsel writes in another *amicus* brief that "The issue in this case is *not* the persecution of a political minority. It is the right and duty of states to regulate conduct deemed harmful to society."

Most Supreme Court watchers agree with LaRue and believe the key swing votes on the *Lawrence*case are Justice O'Connor, who many expect to retire during President Bush's first term, and Justice Kennedy. In 1996, Kennedy and O'Connor alienated social conservatives by joining the 6-3 decision striking down Colorado's Amendment 2, which would have invalidated and prohibited laws based on "sexual orientation" in the state.

Scud attack on marriage?

LaRue said the homosexual activists' case against the Texas sodomy law "is about firing scud missiles at the institution of marriage."

"The petitioners are claiming that states have no right to enact moral laws and they want the Court to reverse its 1986 ruling in *Bowers v. Hardwick*, which held that there is no constitutional right to engage in homosexual sodomy," LaRue said. "What Justice White said then is still true: To claim that homosexual sodomy is a fundamental constitutional right, 'implicit in the concept of ordered liberty,' is 'at best facetious.'"

"It doesn't take a genius in legal warfare to understand how an adverse ruling on either of those issues impacts the defense of marriage," LaRue concluded.

"Advocates of homosexual behavior would like to use this case to advance their agenda. They want to legalize same-sex 'marriage,' to lift restrictions on homosexual conduct in the military, to legalize adoption by same sex couples, and to restrict free speech rights of individuals who have faith-based objections to endorsing, funding, or supporting homosexual behavior," said ADF lawyer Jordan Lorence, who is probably the most experienced pro-family attorney in the nation in arguing against "gay"-inspired litigation.

Robert Knight, director of the Culture and Family Institute, an affiliate of Concerned Women for America, said, "Marriage transcends even civil law. It was instituted by God, and the law has recognized its uniqueness and

protected marital intimacy as sacred. Such attempts to steal the moral capital of marriage and apply it to other sexual relationships cheapen marriage and undermine societal protection for this irreplaceable institution."

Knight, one of the draftsmen of the federal Defense of Marriage Act, continued, "Ruling for sodomy would encourage a highly dangerous act that is linked to the spread of HIV and other diseases. It could also remove another roadblock to homosexual activism in schools and radically undermine the morale of our armed forces, where sodomy is currently banned."

Lambda Legal dismissed the marriage argument as a "chimera" in its reply brief.

Bowers is clear

Jonathan Turley, a specialist on privacy law at George Washington University (who was widely quoted during the 2000 presidential election fiasco), said the Supreme Court rarely reverses itself. But Turley told the *Atlanta Journal-Constitution* that many in his field would love to see *Bowers v. Hardwick* overturned.

"If you were to take a poll of constitutional scholars on their Top 10 worst decisions of the modern era, the vast majority would have this case on their list," he said.

Pro-family advocates have often cited *Bowers* as evidence that there is no constitutional right to homosexual acts, which helps explain the huge attention *Lawrence* has received from the "gay" side.

The following are excerpts in the majority decision in *Bowers* written by Justice White:

> The Constitution does not confer a fundamental right upon homosexuals to engage in sodomy....
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> There should be great resistance to expand the reach of the Due Process Clauses to cover new fundamental rights. Otherwise, the Judiciary necessarily would take upon itself further authority to govern the country without constitutional authority. The claimed right in this case falls far short of overcoming this resistance....
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> Sodomy laws should not be invalidated on the asserted basis that majority belief that sodomy is immoral is an inadequate rationale to support the laws....
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> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road. ...
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> Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

LaRue's *amicus* brief for CWA makes the following arguments, among others:

> · The statutes are directed at conduct and do not discriminate on the basis of sexual orientation, sex or "gender."
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> · The statutes do not violate a fundamental right of privacy or discriminate against a suspect class with an immutable characteristic such as race, alienage or ancestry.

· Homosexuals who have tremendous political, cultural and economic power do not meet the criteria of a suspect class.

· If the Court were to grant suspect status on the basis of sexual conduct or orientation, it would open the door to other groups making the same claim based on their sexual "orientation," such as pedophilia.

· Protecting public health, safety and morals is a rational, if not compelling, reason to prohibit same-sex deviant sexual intercourse.

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