

IN THE SUPREME COURT OF CONNECTICUT

SC 17677

STATE OF CONNECTICUT,
Appellant,

v.

JOHN M.,
Appellee.

ON APPEAL FROM THE APPELLATE COURT OF CONNECTICUT

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,
in support of *Appellant*
Urging Reversal

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES.....iii

INTEREST OF AMICUS1

ARGUMENT1

I. THE JUDGMENT OF THE APPELLATE COURT SHOULD BE REVERSED BECAUSE THE STATUTE IN QUESTION IS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST AND THEREFORE IS CONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION1

II. *LAWRENCE v. TEXAS* SHOULD NOT BE APPLIED TO THE INSTANT CASE BECAUSE IT IS SELF-LIMITING.....7

CONCLUSION.....9

TABLE OF AUTHORITIES

Cases:	Page(s)
<i>Bowers v. Hardwick</i> , 478 U.S. 186 (1986)	4
<i>Hernandez v. Robles</i> , 2006 N.Y. Lexis 1836 (July 6, 2006).....	5
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003).....	4, 7, 8
<i>Louisville Gas & Electric Co. v. Coleman</i> , 277 U.S. 32 (1928).....	6
<i>State v. John M.</i> , 94 Conn. App. 667, 894 A.2d 376 (2006).....	1-7
<i>State v. Rao</i> , 171 Conn. 600, 370 A.2d 1310 (1976).....	3, 5

OTHER SOURCES

U.S. Const. amend. XIV, § 1	2
Conn. Gen. Stat. § 53a-72a (a) (2) (2006).....	1, 2
Conn. Gen. Stat. § 46b-21 (2006).....	2

INTEREST OF THE AMICUS CURIAE

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. The NLF is concerned about the outcome of this case because of its effect on Equal Protection Clause jurisprudence.

This brief is filed pursuant to an application for Leave to File a Brief *Amicus Curiae*.

ARGUMENT

I. THE JUDGMENT OF THE APPELLATE COURT SHOULD BE REVERSED BECAUSE THE STATUTE IN QUESTION IS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST AND THEREFORE IS CONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

The Appellate Court held that there is no rational basis for the prohibition of heterosexual, but not homosexual, intercourse between kindred persons. *State v. John M.*, 94 Conn. App. 667, 684 (App. Ct. 2006). The court so held despite its admission that it is not limited to rational bases proffered by the State nor to those the legislature actually acted upon. *Id.* at 687. Thus, “the test is whether [a] court can conceive of a rational basis for sustaining the legislation; [it] need not have evidence that the legislature actually acted upon that basis.” *Id.* (internal quotation marks and citations omitted).

The court could have and should have noted the rational basis provided by the state interest in protecting potential children from the stigma society would lay upon them for being the product of an incestuous relationship. Proscription of heterosexual, rather than homosexual, intercourse between kindred persons contained in Connecticut General Statutes § 53a-72a (a) (2) (LEXIS through 2006 Supplement) is rationally related to this state interest because only heterosexual intercourse can produce children. In order to

protect the psychological well-being and best interests of potential children, the state must be allowed to make this classification. The court below failed to take the potential child into account during its equal protection analysis and thereby missed an important and legitimate state interest.

To set the context, this lawsuit was brought under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution which states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. The state statute in question makes it a felony to engage “in sexual intercourse with another person whom the actor knows to be related to him or her within any of the degrees of kindred specified in section 46b-21.” Conn. Gen. Stat. § 53a-72a (a) (2) (Lexis through 2006 Supplement). Section 46b-21 provides: “No man may marry his mother, grandmother, daughter, granddaughter, sister, aunt, niece, stepmother or stepdaughter, and no woman may marry her father, grandfather, son, grandson, brother, uncle, nephew, stepfather or stepson.” Conn. Gen. Stat. § 46b-21 (Lexis through 2006 Supplement).

The defendant asserted “that homosexual relationships are not included among those delineated in § 46b-21 . . . [and] argue[d] that, by proscribing only heterosexual intercourse between kindred persons, § 53a-72a (a) (2) treats kindred persons who engage in same sex relations differently.” *John M.*, 94 Conn. at 676 (App. Ct. 2006). For purposes of its equal protection analysis, the court below found “that kindred persons engaged in homosexual relations are similarly situated to those engaged in heterosexual relations.” *Id.* at 678.

The court then determined the correct standard of review based upon that assumption. It noted that the Supreme Court of the United States has not recognized homosexuals as a suspect classification nor has it found same-sex relations to be a fundamental right; therefore, the proper standard of review is the rational basis test. *Id.* at 683-84.

Under this standard of review, the statute in question must be rationally related to a legitimate state interest. “The question of classification is primarily one for the legislature, and the courts will not interfere unless a classification presented by statute is clearly irrational and unreasonable.” *Id.* at 688 (quoting *State v. Rao*, 171 Conn. 600, 603 (1976)).

The Appellate Court did not find the State’s ground for prohibiting heterosexual intercourse between kindred persons—“the prevention of genetic defects due to inbreeding”—to be a reasonable one. *Id.* at 690. Inbreeding would only be a problem for persons related by consanguinity, yet the degrees of kindred described in § 46b-21 also include persons related by affinity. The court held that “[t]o accept the state’s proffered basis would require us to turn a blind eye to the fact that the statute applies to persons incapable of inbreeding. Even more significantly, it would require us to presume that the legislature, aware of this critical distinction, chose to ignore it.” *Id.* at 689.

The court then looked at other conceivable bases for the proscription of heterosexual, rather than homosexual, intercourse between kindred persons contained in § 53a-72a (a) (2) including moral disapprobation, domestic peace and purity, and the integrity of the family. The court however, found none of those bases to be valid. *See Id.* at 693. As *Amicus* has stated however, the court failed to analyze the psychological costs to the potential child that would result from societal stigma.

In its analysis of conceivable bases for the proscription of heterosexual, rather than homosexual intercourse, the court relied heavily on *Lawrence v. Texas*, 539 U.S. 558 (2003). The court noted that the U.S. Supreme Court in *Lawrence* abandoned the rational basis it had previously used in *Bowers v. Hardwick*, 478 U.S. 186 (1986), i.e., society's belief that certain forms of sexual behavior were immoral and unacceptable. *John M.*, 94 Conn. App. at 691. The court quoted the *Lawrence* Court's holding that the

rationale of *Bowers* does not withstand careful analysis. In his dissenting opinion in *Bowers*[,] Justice Stevens [stated that] . . . the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here.

Id. (quoting *Lawrence*, 539 U.S. at 577-78) (alterations in original).

Therefore, the court below held that, under *Lawrence*, avoiding the “morally undesirable consequences of sexual relations between persons within the prohibited degrees of relationship” by itself, “provides an insufficient basis for upholding the classifications contained therein.” *Id.* at 692. But the State has more at interest than simply prohibiting relations the majority finds immoral; it also has a duty to protect the welfare of the potential children of those relationships—children that can only be produced by the proscribed heterosexual relationships. The state legislature could rationally decide that, for the welfare of the potential children, it is important to proscribe heterosexual relations between kindred persons.

Because the legislature could rationally decide this, the court should not interfere. This Court has stated that “the test . . . is whether this court can conceive of a rational basis for sustaining the legislation; we need not have evidence that the legislature actually acted

upon that basis,” *id.* at 687 (internal quotation marks and citations omitted), and “[t]he question of classification is primarily one for the legislature, and the courts will not interfere unless a classification presented by statute is clearly irrational and unreasonable.” *Id.* at 688 (quoting *Rao*, 171 Conn. at 603 (1976)).

Supporting *Amicus*’ rational basis analysis is the recently decided Court of Appeals of New York case *Hernandez v. Robles*, 2006 N.Y. Lexis 1836 (July 6, 2006) in which that court held that the New York Constitution does not compel recognition of marriages between members of the same sex. In *Hernandez*, the “plaintiffs claim[ed] that, by limiting marriage to opposite-sex couples, the New York Domestic Relations Law violate[d]” the Due Process and Equal Protection Clauses of the State Constitution. *Hernandez*, 2006 N.Y. Lexis 1836 at *4. In its analysis, the New York court first determined whether the challenged limitation could be defended as a rational legislative decision. The court found that, among other reasons, “the legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not.” *Id.* at 6.

Similarly, in the instant case, the Connecticut legislature could rationally decide that, for the welfare of the children, it is more important to proscribe heterosexual intercourse between kindred persons than homosexual intercourse between kindred persons. Protecting the welfare of children is a legitimate state interest. Unlike in *Lawrence*, where the Supreme Court found the heterosexual/homosexual distinction to be arbitrary, there is a rational relationship between *Amicus*’ proffered state interest and the proscription of heterosexual intercourse found in § 53a-72a (a) (2). This classification then, based on a

rational choice by the legislature, is not “clearly irrational and unreasonable,” *John M.*, 94 Conn. App. at 688.

In its conclusion, the Appellate Court quoted the words of Justice Holmes regarding the drawing of legal distinctions. “But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature *must be accepted* unless we can say that it is very wide of *any reasonable* mark.” *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting) (emphasis added). The Appellate Court continued: “Under § 53a-72a (a) (2), sexual intercourse between a stepfather and stepdaughter is prohibited, but sexual intercourse between a stepfather and stepson is not. We can conceive of no rational basis for that distinction. Indeed, it is very wide of any reasonable mark.” *John M.*, 94 Conn. App. at 694. On the contrary, as *Amicus* has discussed *supra*, protecting the welfare of the potential child that can only result from heterosexual intercourse is a rational basis for the distinction. As the court in *Hernandez* found, protecting the welfare of children is not unreasonable. The distinction is not “very wide of any reasonable mark.” Therefore, as Justice Holmes declared, the decision of the legislature must be accepted.

For these reasons, this Court should recognize that § 53a-72a (a) (2) does not violate the Equal Protection Clause of the Fourteenth Amendment and vacate the opinion of the Appellate Court.

The appellate court made an additional error when it examined the legislative history to determine if the state’s proffered basis for the classification was valid. The court only looked at the history of the amendment to § 53a-72a that changed the title of the crime from incest to sexual assault in order to protect the incest victim. The court noted that,

“[t]he legislative record is silent as to the state’s proffered basis for the classification at issue in the present appeal.” *Id.* at 687. Of course it is. It’s the record of the name change from incest to sexual assault. The record the court should have reviewed is the record for the original incest statute. The court should have determined what could have motivated the legislature to proscribe incest—not to change its name to sexual assault. A rational motivation is the prevention of genetic defects, the type of defects that can only result from inbreeding—i.e., heterosexual incest—the state’s proffered basis.

II. *LAWRENCE v. TEXAS* SHOULD NOT BE APPLIED TO THE INSTANT CASE BECAUSE IT IS SELF-LIMITING.

As noted above, the Appellate Court relied heavily upon *Lawrence* in its decision. However, *Lawrence* is self-limiting and has no application to the instant case. The *Lawrence* Court noted the narrow question it was deciding: “We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.” 539 U.S. at 564. Justice O’Connor, in her concurrence, noted that Texas had not asserted any interests “such as national security or preserving the traditional institution of marriage.” *Id.* at 585 (O’Connor, J., concurring). The instant statute, however, while making heterosexual incest a felony, is not about criminalizing private consensual behavior based on morality alone, but is also about protecting the welfare of the potential child that results from that behavior—also a state interest not at issue in *Lawrence*. The ruling in *Lawrence* should be limited to statutes dealing solely with criminalizing behavior previously thought to be immoral, not to those statutes that deal with protecting the welfare of others.

In *Lawrence*, “[t]he question before the Court [was] the validity of a Texas statute

[that made] it a crime for two persons of the same sex to engage in certain intimate sexual conduct.” *Lawrence*, 539 U.S. at 562. The Court concluded that under the Due Process Clause of the Fourteenth Amendment, homosexuals had a liberty interest to engage in private intimate conduct. *Id.* at 578-79. The Texas statute that criminalized such behavior deprived them of this liberty and was therefore unconstitutional. *Id.*

The Court noted that the Texas statute sought to “control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.” *Id.* at 567. The Court analyzed the long standing history of condemnation of homosexual conduct as immoral but found that those considerations did not answer the question before it. *Id.* at 571. “The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.” *Id.* The Court held that the majority could not.

The *Lawrence* Court focused on the stigma that attaches when protected conduct is made criminal. “When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.” *Id.* at 575. Additionally, the Court found that the stigma imposed by a criminal statute was not trivial: “The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions.” *Id.* These, as well as other consequences of criminal conviction, added to the Court’s reasoning that criminalizing the behavior based on the governing majority’s view of morality could not stand.

The above considerations distinguish *Lawrence* from the instant case. While *Lawrence* prohibits the criminalizing of a protected liberty under the Due Process Clause of the Fourteenth Amendment based solely on the majority's view of morality, the statute in the instant case proscribes conduct (heterosexual incest) that 1) is based on protecting the welfare of potential children, and 2) is nowhere described as a protected liberty interest.

For the reasons described above, *Lawrence* is limited to those cases proscribing liberty interests based on the majority's view of morality and should not apply to the instant case.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Appellate Court regarding the constitutionality of § 53a-72a (a) (2).

Respectfully Submitted,
this 4th day of August, 2006

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**CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 67-2**

Case No. SC 17677

I certify that the brief complies with all the provisions of rule 67-2 of the Connecticut Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of the National Legal Foundation in the case of *State v. John M.*, SC 17677 on all required parties by depositing the required number of paper and electronic copies in the United States mail, first class postage, prepaid on August 4th, 2006, addressed as listed below. The required number of paper copies were filed by hand delivery.

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