SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants submit this Supplemental Brief to address the Supreme Court's recent decision in Lawrence v. Texas, 123 S. Ct. 2472 (2003), in which the Court overruled Bowers v. Hardwick, 478 U.S. 186 (1986), and struck down a law prohibiting intimate conduct by lesbians and gay men. The Court's decision in Lawrence affects one of the issues before the Court in this case, i.e. whether Chapter 21 of Title 53 of the Pennsylvania Consolidated Statutes ("the 1999 Act") violates the equal protection guarantees of the federal or Pennsylvania Constitutions.

As argued fully in defendants' brief in opposition to Pitt's motion, the 1999 Act must be struck down as a violation of equal protection under any level of scrutiny because, although neutral on its face, it was motivated by an impermissible purpose – to disadvantage lesbians and gay men by denying them the ability to obtain equal partner health benefits. Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Center, 473 U.S. 4342 (1985); Dep't of Agric. v. Moreno, 413 U.S. 528 (1973). And Pitt's justification for the law – "maintaining state control over the budgets of those educational institutions that are funded by state tax dollars" (Pitt Brief, at 17) must be rejected under even the most deferential review because the terms of the Act do not and could not achieve this end. The Act shields only one small line item in university budgets – health benefits – from the effect of any applicable municipal ordinances. Pitt offered no explanation for why only municipal ordinances affecting employee health benefits are singled out. Cleburne, 473 U.S. at 448-50 (striking zoning restriction on homes for the mentally disabled that was purported to further city interests such as avoiding traffic congestion

and fire hazards because there was no explanation for excluding these homes but not other multiple resident facilities such as nursing homes and fraternity houses).

Although the 1999 Act fails even ordinary rational basis review, it is clear after Lawrence that the law must be examined more closely than that.

In Lawrence, the Court recognized for the first time that lesbians and gay men have the same liberty interest in forming intimate, personal relationships as heterosexuals have. Lawrence, 123 S. Ct. at 2478 ("The liberty protected by the Constitution allows homosexual persons the right to make [the] choice" to enter into intimate, personal relationships), id., at 2481-82 (for gay people, intimate adult relationships are part of the enduring personal bonds that give meaning to life just as they are for heterosexuals). Thus, "[p]ersons in a homosexual relationship may seek autonomy for [making personal decisions regarding family relationships, among others], just as heterosexual persons do." Id. Gay people have the right to enter into these important personal relationships and "still retain their dignity as free persons." Id., at 2478.

Now that the Court has recognized a liberty interest in forming same-sex relationships, governments may not penalize the exercise of this right absent an important justification that is narrowly tailored. Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).[1] The 1999 Act was aimed at penalizing people who are in same-sex relationships by

[1]In Shapiro, the Court struck down Connecticut's one year residency requirement for eligibility for certain government benefits, holding that this policy unconstitutionally disadvantaged people based on their exercise of the right to travel interstate. "[A]ny classification which serves to penalize the exercise of [a fundamental right], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." Shapiro, 394 U.S. at 634; see also LaFleur, 414 U.S. at 647-48 (striking school policy requiring pregnant teachers to take maternity leave without pay starting five months before the

denying university employees equal partner health benefits for same-sex partners. Since Pitt could not even come up with a justification that would satisfy the most deferential review, it clearly cannot pass heightened scrutiny.

Moreover, as Justice O'Connor explained in her concurring opinion, in Romer, Cleburne and Moreno, the Court applied a "more searching" form of rational basis review because there was evidence of or reason to infer legislative animus against the disadvantaged group. Lawrence, 123 S. Ct. at 2485 (O'Connor, J., concurring).[2] As discussed in defendants' brief, there is ample evidence that the 1999 Act was motivated by a desire to deny equal benefits to people in same-sex relationships, and thus, "more searching" review is warranted.

Regardless of how one characterizes the form of scrutiny applicable to laws that disadvantage same-sex relationships, it is now clear that courts must give such laws some kind of meaningful examination. Lawrence is a powerful statement of the Court's disapproval of laws that make gay people second-class citizens. While the decision was based on privacy grounds, it was driven by the goal of furthering equality for lesbians and gay men. The Court chose to strike down Texas' law under the due process clause to ensure that all sodomy laws, even those that are facially neutral, would be invalidated because if any laws criminalizing homosexual conduct remained valid, it would be ". . . . an invitation to subject homosexual persons to discrimination

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expected birth of the child).

[2]This description is consistent with the premise for deferential rational basis review— "absent some reason to infer antipathy even improvident decisions will eventually be rectified by the democratic process . . . ." Vance v. Bradley, 440 U.S. 93, 97 (1979); F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 314 (1993). But where there is reason to believe that a classification discriminates for its own sake, this rationale for such deference disappears.

both in the public and the private spheres." Id., at 2482.[3] The Court's strong statements opposing discrimination against gay people and mandating respect for gay relationships reflect the Court's regret for the painful legacy of Bowers, in which the Court, in 1986, had endorsed government disapproval of gay people through the criminalization of their relationships. Bowers' "continuance as precedent demeans the lives of homosexual persons". Lawrence, 123 S. Ct. at 2482. Lawrence seeks to correct that mistake and undo the damage. In an extraordinary step, the Court not only overruled Bowers, but declared "Bowers was not correct when it was decided, and it is not correct today." Id., at 2484. The Lawrence opinion was written not just to explain why it struck down Texas' sodomy law, but to restore gay people to full citizenship.

After Lawrence, it is clear that, at a minimum, laws that disadvantage gay people or their relationships cannot be reviewed with the same degree of deference given to parking rules or property taxes. All such laws must be carefully examined, and the 1999 Act fails such examination.

At oral argument on the pending motion, Defendants urged that "It's time to stop paying lip service to what's right….It's time to do the right thing." In the intervening three months, the United States Supreme Court has removed any doubt what the right thing is.

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[3] See also id. ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."); Limon v. Kansas, 71 U.S.L.W. 3794 (June 27, 2003) (vacating and remanding, in light of Lawrence, conviction under a Kansas law that penalizes young adults for sex with minors, but which is only applicable to same-sex sexual activity; the only cert. issue was an equal protection claim).

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