

IN THE SUPREME COURT OF THE STATE OF ALASKA

RECEIVED

Supreme Court No. S-10459

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ALASKA CIVIL LIBERTIES UNION,  
DAN CARTER and AL INCONTRO,  
LIN DAVIS and MAUREEN LONGWORTH,  
SHIRLEY DEAN and CARLA TIMPONE,  
DARLA MADDEN and KAREN WOOD,  
AIMEE OLEJASZ and FABIENNE PETER-CONTESSA,  
KAREN STURNICK and ELIZABETH ANDREWS,  
THERESA TAVEL and KAREN WALTER,  
CORIN WHITTEMORE and GANI RUTHELLEN, and  
ESTRA BENSUSSEN and CAROL ROSE GACKOWSKI,

Appellants,

v.

STATE OF ALASKA, and  
MUNICIPALITY OF ANCHORAGE,

Appellees.

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Appeal from the Superior Court of the State of Alaska,  
Third Judicial District at Anchorage  
The Honorable Stephanie Joannides  
Case No. 3AN-99-11179 CI

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APPELLANTS' RESPONSE TO  
APPELLEE STATE OF ALASKA'S SUPPLEMENTAL BRIEF

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## ARGUMENT

In response to Appellants' supplemental brief discussing the significance of *Lawrence v. Texas*<sup>1</sup> in this appeal, Appellee State of Alaska filed a supplemental brief in which it argued, among other things, that *Lawrence* did not involve a fundamental right and therefore was a rational basis review case.<sup>2</sup> Appellee State of Alaska's argument is incorrect.

In *Lawrence*, the Supreme Court did not establish a new fundamental right. Rather, it made clear that the long-established fundamental right to personal autonomy in matters of private conduct protects lesbian and gay couples just as it protects heterosexual couples.

In framing the inquiry, the Supreme Court stated that *Lawrence* "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."<sup>3</sup> Tellingly, the Court identified *Griswold v. Connecticut*<sup>4</sup> to be "the most pertinent beginning point" of the inquiry.<sup>5</sup> The Court explained that *Griswold* invalidated a law prohibiting the use of contraceptives

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<sup>1</sup> 123 S. Ct. 2472 (2003).

<sup>2</sup> Appellee State of Alaska's Supp. Brf. at 5.

<sup>3</sup> *Lawrence*, 123 S. Ct. at 2476.

<sup>4</sup> 381 U.S. 479 (1965).

<sup>5</sup> *Lawrence*, 123 S. Ct. at 2476.

because it violated the fundamental “right to privacy” of married couples.<sup>6</sup> The Court then explained that *Eisenstadt v. Baird*,<sup>7</sup> *Roe v. Wade*,<sup>8</sup> and *Carey v. Population Servs. Int'l*<sup>9</sup> made clear that the fundamental right to privacy is neither reserved to married couples nor limited to the use of contraceptives.<sup>10</sup> Rather, the fundamental right to privacy encompasses the fundamental “right of a [person] to make certain fundamental decisions affecting her destiny.”<sup>11</sup>

The fact that the Supreme Court based its holding in *Lawrence* on its holdings in *Griswold*, *Eisenstadt*, *Roe*, and *Casey* confirms that it was invoking the fundamental right to privacy.<sup>12</sup> Far from being “the most pertinent beginning point,” its explanation of this line of cases would have been entirely beside the point if *Lawrence* had been a rational basis review case. In a substantive due process case, rational basis review is not appropriate where the liberty interest at issue “resembl[es] ‘the individual’s freedom of choice with respect to certain basic matters of procreation,

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<sup>6</sup> *Id.* at 2477.

<sup>7</sup> 405 U.S. 438 (1972).

<sup>8</sup> 410 U.S. 113 (1973).

<sup>9</sup> 431 U.S. 678 (1977).

<sup>10</sup> *Lawrence*, 123 S. Ct. at 2477.

<sup>11</sup> *Id.*

<sup>12</sup> *See id.* (describing the right to privacy at issue in *Eisenstadt* as a “fundamental” human right[.]”) (emphasis added); *id.* (stating that *Roe* “confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person”) (emphasis added).

marriage, and family life.”<sup>13</sup> The liberty interest at issue in *Lawrence* is precisely the type of liberty interest that is encompassed by the fundamental right to privacy: the liberty interest in entering into intimate relationships, whether lesbian or gay or heterosexual.

As the Supreme Court further explained, *Planned Parenthood of S.E. Pa. v. Casey*<sup>14</sup> “again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education”<sup>15</sup> – or, put another way, “the autonomy of the person in making these choices”<sup>16</sup> – because “[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected the Fourteenth Amendment.”<sup>17</sup> In *Lawrence*, the Court ultimately held that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”<sup>18</sup> Thus, the liberty interest of lesbian and gay couples in entering into intimate relationships falls squarely within the long-established fundamental right to personal autonomy in matters of private conduct.

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<sup>13</sup> *Harrah Indep. Sch. Dist. v. Martin*, 440 U.S. 194, 198 (1979) (per curiam) (quoting *Kelley v. Johnson*, 425 U.S. 238, 247 (1976)); see also *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>14</sup> 505 U.S. 833 (1992).

<sup>15</sup> *Lawrence*, 123 S. Ct. at 2481.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* (quotation omitted).

<sup>18</sup> *Id.* at 2482.

It is significant that, in overruling *Bowers v. Hardwick*,<sup>19</sup> the Supreme Court adopted the analysis of Justice Stevens in his dissent in *Bowers*.<sup>20</sup> In doing so, the Court concluded that, just as “individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment,”<sup>21</sup> so too are individual decisions by lesbian and gay persons. Indeed, when the Court stated that its description of the right at issue in *Bowers* as a “fundamental right [of] homosexuals to engage in sodomy” had been in error, it did so *not* on the basis that “the liberty at stake” was *less* than “fundamental” but rather on the basis that its description of the right *understated* its basic character as a right to personal autonomy in matters of private conduct.<sup>22</sup>

In its supplemental brief, Appellee State of Alaska isolates language from *Lawrence* stating that the law at issue “further[ed] no legitimate state interest which [could] justify its intrusion into the personal and private life of the individual”<sup>23</sup>

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<sup>19</sup> 478 U.S. 186.

<sup>20</sup> *Lawrence*, 123 S. Ct. at 2484.

<sup>21</sup> *Id.* at 2483 (quotation omitted).

<sup>22</sup> *Id.* at 2478.

<sup>23</sup> *Id.* at 2484.

and attempts to use it to establish that *Lawrence* was a rational basis review case.<sup>24</sup> The language must not be read out of context. The preceding sentences continue the Court's use of fundamental rights language, including language stating that "[the petitioners'] right to liberty under the Due Process Clause gives them a full right to engage in their conduct without intervention of the government."<sup>25</sup> Because the Court recognized an infringement of a substantive liberty interest, it could not have applied rational basis review. Moreover, in its defense of the law at issue, the State of Texas never argued that it had any compelling interest in criminalizing same-sex sodomy; it argued only that it had a legitimate interest in doing so.<sup>26</sup> Thus, there was no need for the Court to evaluate whether the asserted interest was compelling. Regardless, by holding that the asserted interest was not *even* legitimate, the Court necessarily also held that it was not compelling. Thus, the language to which Appellee State of Alaska points in no way establishes that *Lawrence* was a rational basis review case.

*Lawrence* overruled *Bowers* because the law at issue intruded upon the "realm of personal liberty which the government may not enter,"<sup>27</sup> a realm protected by the fundamental right to personal autonomy in matters of private conduct defined by *Griswold*, *Eisenstadt*, *Roe*, *Carey*, *Casey*, and, now, *Lawrence*.

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<sup>24</sup> Appellee State of Alaska's Supp. Br. at 5; see also *Standhardt v. Superior Ct.*, 77 P.3d 451, 457 (Ariz. Ct. App. 2003).

<sup>25</sup> *Lawrence*, 123 S. Ct. at 2484.

<sup>26</sup> See Respondent's Br., *Lawrence v. Texas*, 2003 WL 470184.

<sup>27</sup> *Id.* at 2484 (quotation omitted).

For the foregoing reasons, as well as those set forth in their previously submitted briefs, Appellants respectfully request that this Court reverse the ruling of the trial court.

Respectfully submitted,



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**APPELLANTS' MOTION FOR LEAVE TO FILE RESPONSE TO APPELLEE STATE OF ALASKA'S SUPPLEMENTAL BRIEF**

Pursuant to Alaska R. App. P. 503, Appellants respectfully move the Court for leave to file the attached response to Appellee State of Alaska's supplemental brief. In support of their motion, Appellants state as follows:

1. In response to Appellants' supplemental brief discussing the significance of *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), in this appeal, Appellee State of Alaska filed a supplemental brief in which it argued, among other things, that *Lawrence* did not involve a fundamental right and therefore was a rational basis review case.

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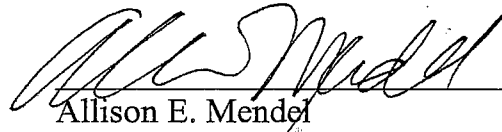
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2. Because *Lawrence* did in fact involve a fundamental right, Appellants seek leave to file the attached response to Appellee State of Alaska's supplemental brief to clarify this one point.

For the foregoing reasons, Appellants respectfully request that the Court grant their motion for leave to file the attached response to Appellee State of Alaska's supplemental brief in this appeal.

Respectfully submitted,

Dated 12/8/03



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 8<sup>th</sup> day of December 2003, true and correct copies of Appellant's Motion for Leave to File Response to Appellee State of Alaska's Supplemental Brief and Appellant's Response to Appellee State of Alaska's Supplemental Brief were served by mail on the following:

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