No. _____

In The
Supreme Court of the United States

TANYA RAMIREZ,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Texas, Thirteenth District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is TEXAS PENAL CODE §21.12, which criminalizes an otherwise legal sexual relationship, unconstitutional in its infringement upon a constitutionally-protected fundamental right?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no governmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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CITATIONS TO THE OPINIONS AND ORDERS BELOW

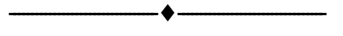
The decision of the Texas Court of Criminal Appeals refusing Appellant's petition for discretionary review (*In re Ramirez*, 2018 Tex.Crim.App. LEXIS 232 (Tex.Crim.App. June 6, 2018)) is unreported.

The decision of the Texas Thirteenth Court of Appeals affirming the Trial Court and over-ruling Appellant's sole issue (*Ramirez v. State*, No. 13-16-00069-CR, 2018 Tex. App. LEXIS 873 (Tex. App.—Corpus Christi, 2018, *pet. ref'd*)) is published. Petitioner did not file a motion for rehearing or for *en banc* reconsideration.

The decision of the Trial Court denying Petitioner's pre-trial motion asking the Court to declare TEX. PEN. CODE §21.12 unconstitutional (Cause No. 14CR2649-A, August 4, 2015) is unreported.

STATEMENT OF JURISDICTION

The Texas Court of Criminal Appeals denied Petitioner's petition for discretionary review on June 6, 2018. Jurisdiction in this Court is therefore proper by writ of certiorari pursuant to 28 U.S.C. §1257(a), as Petitioner is a "party to any civil or criminal case, before or after rendition of judgment or decree."



APPLICABLE LAW

TEX. PEN. CODE §21.12(a), Improper Relationship Between Educator and Student, as follows:

An employee of a public or private primary or secondary school commits an offense if the employee (1) engages in sexual contact, sexual intercourse, or deviate sexual intercourse with a person who is enrolled in a public or private primary or secondary school at which the employee works; (2) holds a certificate or permit issued as provided by Subchapter B, Chapter 21, Education Code, or is a person who is required to be licensed by a state agency as provided by Section 21.003(b), Education Code, and engages in sexual contact, sexual intercourse, or deviate sexual intercourse with a person the employee knows is: (A) enrolled in a public primary or secondary school in the same school district as the school at which the employee works; or (B) a student participant in an educational activity that is sponsored by a school district or a public or private primary or secondary school, if: (i) students enrolled in a public or private primary or secondary school are the primary participants in the activity; and (ii) the employee provides education services to those participants; or (3) engages in conduct described by Section 33.021, with a person described by Subdivision (1), or a person the employee knows is a person

described by Subdivision (2)(A) or (B), regardless of the age of that person.[1, 2]

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[1] TEX. PEN. CODE §21.12(a), as it was written, effective on the date of Petitioner's conviction. At the time of Petitioner's conviction, §21.12 criminalized sexual relationships between teachers/educators and students who were enrolled in the same school district where the educator (teacher) was employed. Effective September 1, 2017, §21.12 was amended to include every single student enrolled in any public or private school in the ***entire State of Texas***, regardless of the geographic location of the teacher, the school, the school district and/or the student.

[2] Effective September 1, 2017, TEX. PEN. CODE §21.12(a) was amended to read as follows:

> An employee of a public or private primary or secondary school commits an offense if the employee (1) engages in sexual contact, sexual intercourse, or deviate sexual intercourse with a person who is enrolled in a public or private primary or secondary school at which the employee works; (2) holds a position described by Section 21.003(a) or (b), Education Code, regardless of whether the employee holds the appropriate certificate, permit, license, or credential for the position, and engages in sexual contact, sexual intercourse, or deviate sexual intercourse with a person the employee knows is: (A) enrolled in a public or private primary or secondary school, other than a school described by Subdivision (1); or (B) a student participant in an educational activity that is sponsored by a school district or a public or private primary or secondary school, if students enrolled in a public or private primary or secondary school are the primary participants in the activity; or (3) engages in conduct described by Section 33.021, with a person described by Subdivision (1), or a person the employee knows is a person described by Subdivision (2)(A) or (B), regardless of the age of that person.

STATEMENT OF THE CASE AND RELEVANT FACTS

This is a case about the State of Texas infringing upon and criminalizing a citizen's fundamental rights of privacy, procreation and intimacy, by enacting legislation that criminalizes an intimate sexual relationship between consenting adults. In Texas, TEX. PEN. CODE §21.12 makes it a crime for two consenting of-age adults to have sex.[3] The crime is not the act of sexual contact or intercourse in-and-of-itself. Instead, it is the relationship between the consenting adults that makes the sexual contact illegal. When one of the consenting adults is employed in the same school, or school district, where the other consenting adult is enrolled as a student, the otherwise lawful intimate relationship becomes a felony.

At the time of Petitioner's conviction, TEX. PEN. CODE §21.12 made it a felony for Petitioner, who was a teacher, to have a sexual relationship with a consenting adult student because (1) she was employed where the consenting adult student was enrolled, and (2) she was a teacher employed in the same school district where the consenting of-age student was enrolled. Such is true whether or not the educator was ever in a position of authority over the student, or even

[3] Improper Relationship Between Educator and Student, TEX. PEN. CODE §21.12, is a second degree felony. In Texas, a second-degree felony is punishable by imprisonment in the Texas Department of Criminal Justice for a term of not more than 20 years or less than 2 years.

interacted with the student at school or in the district.[4] The uncontested facts in the instant case are as follows: (1) in Texas, a "child" is defined as a person younger than 17 years of age, hence making the legal age of consent 17;[5] (2) Petitioner was a teacher/educator at a secondary school – King High School – in Corpus Christi, Texas; (3) Petitioner was indicted in two counts of violating TEX. PEN. CODE §21.12 (a second degree felony); (4) Petitioner plead guilty to Count One (T.P. was a 17-year-old male) and no contest to Count Two (B.J. was an 18-year-old male); (5) both students were male high school students who were enrolled in the same school where Petitioner taught; (6) both students were of consenting legal age in Texas at the time of the alleged sexual contact; (7) Petitioner was not married to either student; (8) Petitioner was not either students' teacher at any time; and (9) the sexual contact alleged to have occurred took place in the privacy of Petitioner's home.

On January 11, 2016, pursuant to a plea bargain agreement, Petitioner plead guilty to Count One, and no contest to Count Two, and was sentenced to five years for each count to run concurrently, in the institutional division of the Texas Department of Criminal

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[4] Although it does not apply to Petitioner's case, according to the legislation at the time of her conviction, she would still have been committing a crime if she was teaching at a different school in the same district as the student was enrolled, regardless of the geographic location of the student, the school and the teacher, and regardless of whether the two ever came into contact with one another at school or in a school-related capacity.

[5] TEX. PEN. CODE §22.011(c)(1).

Justice.[6] Petitioner argues that all citizens' fundamental rights to privacy, procreation and intimacy are protected under the Due Process Clause of the Fourteenth Amendment, and any law infringing upon a person's fundamental right – such as the right to have consensual sex with another adult – is subject to a strict scrutiny review.

ARGUMENT FOR ALLOWING THE WRIT

This Court protects individual liberties from unwarranted governmental interference through the Due Process Clause of the Fourteenth Amendment. *See Washington v. Glucksberg*, 521 U.S. 702, 720-721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). The Due Process Clause provides citizens with a heightened protection against interference by the government with regard to certain fundamental rights and liberty interests, such as the right to marry, the right to have children, the right to direct education and upbringing of one's children, the right to marital privacy, the right to use contraception, the right to bodily integrity, and the right to abortion. *Id.* at 720; *see also Reno v. Flores*, 507 U.S. 292, 301-302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18

[6] Petitioner's sentence of confinement was suspended and she was placed on probation for a period of seven years and assessed a fine of $4,000.00.

L. Ed. 2d 1010 (1967); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952).

The standard of scrutiny the Court applies to legislation challenged on due process grounds depends upon whether or not the statute in question implicates a fundamental right. *Glucksberg*, 521 U.S. at 721. Intermediate scrutiny has been applied to laws involving two quasi-suspect classes: legitimacy and gender. Under intermediate scrutiny, a law must be substantially related to an important governmental interest. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). Economic or social welfare legislation receives rational basis review. *Disabled Am. Veterans v. United States Dep't of Veterans Affairs*, 962 F.2d 136, 141 (2d Cir. 1992). On the other hand, if a fundamental right is implicated, the Court analyzes the statute by determining if the legislation is justified by a compelling governmental interest, *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), and the legislative act must be narrowly

drawn to express only the legitimate state interests at stake. *Roe v. Wade*, 410 U.S. 113, 155, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); citing to *Griswold v. Connecticut*, 381 U.S. at 485; *Aptheker v. Secretary of State*, 378 U.S. 500, 508, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964); *Cantwell v. Connecticut*, 310 U.S. 296, 307-308, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); and *Eisenstadt v. Baird*, 405 U.S. at 463-464. Strict scrutiny requires that the enacted legislation, "must be the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. ___, 134 S. Ct. 2518, 2530, 189 L. Ed. 2d 502 (2014). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000); *Reno v. ACLU*, 521 U.S. 844, 874, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).

Statutes evaluated under a strict scrutiny review rarely survive. Here, as applied to Petitioner's conviction, §21.12 made it a crime for a teacher to have a sexual relationship with any student who is enrolled in the same school district where the educator is employed.[7] If an intimate relationship exists between a teacher and student (in the same school or even the same school district), a crime is committed regardless of the student's age, regardless of the geographic location of the two, and regardless of whether or not the

[7] Since the September 1, 2017, change in legislation, the restriction extends to any school district in Texas, meaning the teacher commits a crime even if she is employed in a completely different school district than the adult student is enrolled in.

teacher was ever in a position of authority over the student. Because §21.12 implicates and criminalizes the fundamental rights of privacy, procreation and intimacy, the proper standard of review is strict scrutiny and this statute should be struck down because it cannot pass that test.

A. The Rights to Privacy, Procreation and Intimacy are Fundamental Rights

The Due Process Clause protects fundamental rights and guarantees certain areas or zones of privacy regarding decisions individuals may make without unjustified governmental interference. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-685, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977) (citing the right of personal privacy in decisions relating to marriage, procreation, contraception, family relationships, child rearing and education). Procreation is one of the basic civil rights of man and fundamental to the very existence and survival of the human race. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. at 541. The decision to procreate holds a particularly important place in the history of the right of privacy, a right first explicitly recognized in an opinion holding unconstitutional a statute prohibiting the use of contraceptives, *Griswold v. Connecticut*, *supra*, and most prominently vindicated in the context of contraception, *Eisenstadt v. Baird*, *supra*, and abortion, *Roe v. Wade*, 410 U.S. at 152; *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973). According to the *Eisenstadt* Court, "[i]f the right of privacy means anything, it is the right of the

individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. at 453. *See Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969). *See also Skinner v. Oklahoma ex rel. Williamson*, *supra*; *Jacobson v. Massachusetts*, 197 U.S. 11, 29, 49 L. Ed. 643, 25 S. Ct. 358 (1905).

In *Roe*, the importance of procreation has been explained on the basis of its intimate relationship with the constitutional right of privacy which the Supreme Court has recognized. *Roe v. Wade*, 410 U.S. at 152-154. In *Roberts v. United States Jaycees*, the United States Supreme Court addressed the First Amendment with regard to intimate association, holding it protects an individual's freedom to enter into and maintain certain intimate human relationships. *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). In *Glucksberg*, the Court quite emphatically states as follows:

> The Due Process Clause protects "certain fundamental rights and personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and "many of those rights and liberties involve the most intimate and personal choices a person may make in a lifetime."

Washington v. Glucksberg, 521 U.S. at 726, citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. at 846-851. And, if *Glucksberg* was not clear

enough, this Court's ruling in *Obergefell v. Hodges* – a 2015 landmark case holding that the Fourteenth Amendment requires a State to license same-sex marriage – reaffirmed that individuals have certain fundamental rights, including the right to use or not use contraception; the right to make decisions regarding family relationships; the right to procreation; the right to rear children; the right to marry; the right to education; and the right to intimacy, intimate conduct and the right to make intimate choices. *Obergefell v. Hodges*, 576 U.S. ___, ___, 135 S. Ct. 2584, 2599-2602, 192 L. Ed. 2d 609 (2015). In *Obergefell* this Court points out that *Lawrence*[8] confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, and states, "[t]he fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs." *Obergefell v. Hodges*, 135 S. Ct. at 2597, citing to *Eisenstadt v. Baird*, 405 U.S. at 453; *Griswold v. Connecticut*, 381 U.S. at 484-486.

In *Skinner* this Court held that "strict scrutiny" of state discrimination affecting procreation "is essential," for "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. at 541. Based upon such clear precedence, it would seem beyond question that privacy, procreation and intimacy are

[8] *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

fundamental rights – fundamental rights which §21.12 infringes upon. To the contrary, in its January 31, 2018, Opinion, the Texas Thirteenth Court of Appeals erroneously held that adult consensual sex is ***not*** a fundamental right, applying the rational basis test. (App'x. pp. 1-11). As such, Petitioner asks this Court to again announce that all individuals – regardless of their employment – have a fundamental right to privacy, procreation and intimacy, and that two consenting adults have a fundamental right to private consensual sex.

While *Lawrence* and the instant case both involve a criminal statute criminalizing private and consensual sexual conduct between adults, the *Lawrence* Court specifically declined to determine whether a sodomy law would violate the substantive component of the Due Process Clause – thereby triggering a strict scrutiny review – reasoning that it was an issue that did not need to be decided at that time. *Lawrence v. Texas*, *supra*. Instead, the *Lawrence* Court reviewed the Texas statute under the Equal Protection Clause of the Fourteenth Amendment and simply applied only a "rational basis" review – which is the wrong test to apply when analyzing a *fundamental* right. In the instant case, Petitioner relies upon *Obergefell* which unequivocally decided that choices concerning contraception, family relationships, procreation, child rearing, marriage, education and intimacy are all decisions among the most intimate that an individual can make and are fundamental rights protected by the Constitution. *Obergefell v. Hodges*, 135 S. Ct. at 2599-2602. In simple terms, the *Lawrence* Court avoided the question of whether

sexual intimacy between two consenting adults is a fundamental right, in the context of criminalizing the act. The *Obergefell* Court, although not dealing with a criminal statute, clears up this question and tells us that intimacy between consenting adults *is* a fundamentally protected right. While in *Lawrence* this Court did not find it necessary to apply the higher standard of strict scrutiny, in her case, Petitioner now asks this Court to do just that. As applied to Petitioner, and anyone else in her shoes, TEX. PEN. CODE §21.12 infringes upon a person's fundamental right to privacy, procreation and intimacy by criminalizing the acts of consenting adults who choose to engage in a private sexual relationship.

B. A Strict Scrutiny Review Applies to Fundamental Rights

The fundamental liberties announced by this Court include most of the rights enumerated in the *Bill of Rights*. *Obergefell v. Hodges*, 135 S. Ct. at 2597; *see also Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). "In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell v. Hodges*, 135 S. Ct. at 2597. *See also Eisenstadt v. Baird*, 405 U.S. at 453; *Griswold v. Connecticut*, 381 U.S. at 484-486. The Courts have a judicial duty to identify and protect fundamental rights by exercising reasoned judgment in identifying interests of people which are so fundamental that the State must accord them its

respect. *Obergefell v. Hodges*, 135 S. Ct. at 2598; citing *Poe v. Ullman*, 367 U.S. 497, 542, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961). While history and tradition guide the process of constitutional analysis, history and tradition do not set the outer boundaries of the Court's inquiry. *Obergefell v. Hodges*, 135 S. Ct. at 2598. *See also Lawrence v. Texas*, 539 U.S. at 572. A fundamental right or liberty interest is one that is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Chavez v. Martinez*, 538 U.S. 760, 775, 123 S. Ct. 1994, 2005, 155 L. Ed. 2d 984 (2003). If a challenged statute interferes with a "fundamental right," then the Court should uphold its constitutionality only if it is narrowly tailored to serve a compelling state interest. *Cannady v. State*, 11 S.W. 3d 205, 215 (Tex.Crim.App. 2000); *State v. McNutt*, 405 S.W. 3d 156, 161-162 (Tex. App.—Houston 2013, *pet. ref'd*). Strict scrutiny is applied to laws burdening fundamental rights or targeting suspect classes. Fundamental rights include those derived explicitly or implicitly from the Constitution itself. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973). To survive strict scrutiny, a statute must be suitably tailored to serve a compelling governmental interest. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. at 440. As stated by one Court:

> Strict scrutiny is applied when the classification involves a suspect classification, i.e., race, *McLaughlin v. Florida*, 379 U.S. 184, 191-92, 13 L. Ed. 2d 222, 85 S. Ct. 283 (1964); ancestry, *Oyama v. California*, 332 U.S. 633, 644-46,

> 92 L. Ed. 249, 68 S. Ct. 269 (1948); and alienage, *Graham v. Richardson*, 403 U.S. 365, 372, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971); or categorizations impinging upon a fundamental right, i.e., privacy, *Roe v. Wade*, 410 U.S. 113, 154-64, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973); marriage, *Zablocki v. Redhail*, 434 U.S. 374, 383-87, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978); voting, *Bullock v. Carter*, 405 U.S. 134, 144, 31 L. Ed. 2d 92, 92 S. Ct. 849 (1972); travel, *Shapiro v. Thompson*, 394 U.S. 618, 627, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969); and freedom of association, *NAACP v. Alabama*, 357 U.S. 449, 460-62, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958). To withstand strict scrutiny a statute must be precisely tailored to serve a compelling state interest. *Plyler v. Doe*, 457 U.S. 202, 216, 217, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982).

Hoffman v. United States, 767 F.2d 1431, 1435 (9th Cir. 1985).

A court may hold a statute unconstitutional either because it is invalid "on its face" or because it is unconstitutional "as applied" to a particular set of circumstances. *Ada v. Guam Soc'y of Obstetricians and Gynecologists*, 506 U.S. 1011, 1012, 121 L. Ed. 2d 564, 113 S. Ct. 633 (1992) (Scalia, J., dissenting). If a statute is unconstitutional as applied, the State may continue to enforce the statute in different circumstances but the statute is prevented from future application in a similar context. *Id*. If a statute is unconstitutional on its face, it is rendered utterly inoperative and the State

may not enforce the statute under any circumstances. *Id*.

Traditionally, a plaintiff's burden in an as-applied challenge is different from that in a facial challenge. In an as-applied challenge, the plaintiff contends that the application of the statute in the particular context in which she has acted would be unconstitutional. *Id*. Therefore, the constitutional inquiry in an as-applied challenge is limited to the plaintiff's particular set of circumstances. *Women's Med. Prof. Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir. 1997).

"In comparison, the Court explained in *Salerno* that [a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [an Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since the United States Supreme Court has not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d at 193-194, quoting *United States v. Salerno*, 481 U.S. 739, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987).

The Fourteenth Amendment forbids the government to infringe upon fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. *Glucksberg*, 521 U.S. at 721. Because

§21.12 infringes upon a fundamental right, it must be reviewed under strict scrutiny and can only survive if it advances a compelling state interest *and* if it is the least restrictive method to carry out such interest. *See Lawrence v. Texas, supra*. When a statute implicates a fundamental right, it is the proponent of the law that bears the burden of demonstrating that the statute satisfies this high standard. *See Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989). In addition, the State must satisfy such burden by looking at the laws' "actual purpose[s]" rather than hypothetical justifications. *See Shaw v. Hunt*, 517 U.S. 899, 908 n.4, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996).

If history repeats itself, the State will argue to this Court that the purposes of §21.12 are (1) preventing sexual exploitation of Texas schoolchildren, (2) preserving an educational environment conducive to learning, and (3) protecting schoolchildren from someone using his or her position of trust or authority over an adult student to procure sex. Even though the State has seemingly valid reasons for supporting §21.12, these arguments, while well intentioned, simply cannot pass the strict scrutiny test. Petitioner argues that as applied to her – and any other employee or educator who violates §21.12 by having sexual contact with an adult student – the State fails to meet its burden to show that the statute is narrowly tailored to advance a compelling state interest.[9]

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[9] Petitioner develops this argument in depth below.

C. TEX. PEN. CODE §21.12 Does Not Survive Strict Scrutiny

Under strict scrutiny, a regulation of expression may be upheld only if it is narrowly drawn to serve a compelling governmental interest. *Ex parte Thompson*, 442 S.W. 3d 325, 344 (Tex.Crim.App. 2005). When a fundamental right is implicated, the Court analyzes the statute by determining if the legislation is justified by a compelling governmental interest, and whether that statute is narrowly tailored to achieve its goals with the least interference possible. *Roe v. Wade*, *supra.* When a State enacts legislation that intentionally or unintentionally places a burden upon a fundamental right, "it must justify that burden by showing that it is the least restrictive means of achieving some compelling state interest." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 578, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993), quoting *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 718, 67 L. Ed. 2d 624, 101 S. Ct. 1425 (1981); *see also Wisconsin v. Yoder*, 406 U.S. 205, 215, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972). In his concurrence in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, Justice Blackmun explains:

> A State may no more create an underinclusive statute, one that fails truly to promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct than necessary to achieve its goal. In the latter circumstance, the broad scope of the statute is unnecessary to serve the interest, and the statute fails for

> that reason. In the former situation, the fact that allegedly harmful conduct falls outside the statute's scope belies a governmental assertion that it has genuinely pursued an interest of the highest order.

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. at 578. Here, the Texas legislature has enacted legislation that is both overinclusive and underinclusive. Section 21.12 is underinclusive because it fails to protect all schoolchildren since it applies only to individuals enrolled in public or private schools *and* §21.12 is overinclusive because it protects adults who still happen to be in school which is more than what is necessary to achieve the statute's goal.

1. Preventing Sexual Exploitation of Texas Schoolchildren

Preventing sexual exploitation of Texas "school children" is not the least restrictive means available to carry out the State's interest because it is both overinclusive and underinclusive. First, §21.12 is not aimed at preventing exploitation of *only* children. While preventing exploitation of children is likely a compelling governmental interest, in the instant case, we are not talking about a child or children. This statute criminalizes consensual sex between two consenting adults (pursuant to its 2017 revision, the teacher and student could conceivably live and work in different cities across the state from one another) as well as between adults and children. A statute that is designed to protect the class of individuals it intends to protect, as

well as a class it is not designed to protect, is overly-broad and thus unconstitutional.

In the absence of §21.12, there are numerous statutes (which are not overinclusive) in place in Texas that appropriately and effectively prevent sexual exploitation of *children*. For instance, if an adult school teacher has sexual contact with a "child" – even a child who is homeschooled or not enrolled in any type of school *at all* – the state has adequate statutory remedies, such as TEX. PEN. CODE §§22.011 *Sexual Assault*, 21.02 *Continuous Sexual Abuse of Young Child or Children*, 21.11 *Indecency with a Child*, etc.

The state should be concerned with protecting *all* children and not only schoolchildren. But assuming the state *is* concerned with *preventing sexual exploitation*, then why does the state legislature not pass laws criminalizing sex between a professor and a 17-year-old college student, an employer and an employee, or even a law professor and a law student? In each of these scenarios, the employer, professor, or "educator" has a great deal more power over the future of the student (or employee), as well as the livelihood of the individual, than a high school teacher has over a high school student who might be enrolled in a school on the other side of the city or state. But, the state legislature does not see fit to criminalize these relationships and place the college professor who has sex with her student in prison for 20 years. This is because there is adequate penal protection in place in the event that the college student or the employee having sex with his professor or boss is a child and/or is being forced to

have sex against his will. What is the difference between a 17-year-old or 18-year-old high school student who has sex with his teacher, and a 17-year-old or 18-year-old college student who has sex with his professor? In Texas, the difference is that the high school teacher faces 20 years in prison and the college professor, or employer, face no repercussions, other than perhaps disciplinary action.[10] Therefore, §21.12 must be overinclusive because it encompasses far more protected conduct than necessary to achieve any purported goal, the broad scope of the statute is unnecessary to serve the government's interest, and thus, the statute must fail.

Second, §21.12 is underinclusive because it "fails truly to promote its purported compelling interest." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. at 578. According to this Court, we have to ask ourselves if the harmful conduct – *sexually exploiting Texas schoolchildren* – falls outside of the statute's scope? Here, the answer is yes. Under the statute as applied to Petitioner, a school teacher may still lawfully have sexual contact with a student just as long as that student is not enrolled in the same school district where the teacher teaches. Under the revised version

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[10] In Texas, Texas Administrative Code, Title 19, Part 7, Rule §247.2 Code of Ethics and Standard Practices for Texas Educators states: . . . (3)(F) Standard 3.6. "The educator shall not solicit or engage in sexual conduct or a romantic relationship with a student or minor." Therefore, the Texas legislature has enacted adequate rules and discipline to deal with teachers who have sex with students. In the instant case, Ms. Ramirez surrendered her teaching license at the time of her conviction.

of the statute, a school teacher may still lawfully have sexual contact with a student just as long as that student is not enrolled in a public or private school (i.e. the student can be homeschooled). In Texas, at the time of Petitioner's conviction, a teacher was free to have sexual escapades with as many 17-year-old, 18-year-old, 19-year-old or 20-year-old students as she could get her hands on, just as long as the students were all enrolled in different school districts. After the 2017 revision of §21.12, teachers may still lawfully have sexual escapades with students, so long as the students are homeschooled. Therefore, as applied to Petitioner, §21.12 makes it lawful in Texas for a teacher to sexually exploit any (age 17 or older) Texas "schoolchild," just as long as the "schoolchild" being exploited was enrolled in a different school district or homeschooled, thus the actions of a teacher who chooses to follow this law and only have sex with "schoolchildren" enrolled in a different district, or being homeschooled, literally contradicts the very interest the government purports it is trying to achieve.

2. Preserving an Educational Environment Conducive to Learning

We have to ask ourselves if the harmful conduct – *creating an educational environment that is not conducive to learning* – falls outside of the scope of the statute, thus making the statute underinclusive. Does this statute fail to truly promote its purported compelling interest – *preserving an educational environment conducive to learning*? Does the statute encompass more

protected conduct than necessary to achieve its goal, thus making the statute unnecessary to serve the state's interest?

The state bears the burden of showing that this is the least restrictive means of achieving some compelling state interest. Again, §21.12 now criminalizes sexual conduct between a teacher and a student enrolled in any school in Texas, even when both are of consenting age. In Texas, the legislature has already passed separate legislation that punishes a certified teacher for engaging in sexual activity with her student, regardless of the age of the student.[11] Further, it goes without saying that there must be a less restrictive way to achieve a quality learning environment than throwing a teacher who has a consensual sexual relationship with an adult away in a prison cell for 20 years – especially considering that under revised §21.12, the teacher and student could viably be at two different schools in two different cities across the state from one another and never once interact with one another on school property, at the same school, or at a school function. Theoretically, a 22-year-old teacher (living in Corpus Christi, Texas) and an 18-year-old high school senior (living in Dallas, Texas) could be in Mexico for Spring Break, have consensual sex, and the result for the unsuspecting teacher is 20 years in prison – even though this teacher has absolutely no influence over the adult student's learning environment. If this is appropriate legislation, then why is the

[11] Texas Administrative Code, Title 19, Part 7, Rule §247.2 "Code of Ethics and Standard Practices for Texas Educators."

teacher the only one who faces prison time? In the instant case, T.P. recorded his sexual encounter with Petitioner on video without Petitioner's knowledge, and promptly disseminated the video in a group text which then went viral on YouTube. Is the student's act of secretly videotaping his sexual encounter, sending sex videos to 11 other students, posting the videos on YouTube, and gossiping about the alleged sexual incident at school not disruptive to the learning environment? In fact, in the instant case, the student is the only one who caused any disruption in the school *at all*, therefore, he should really be the one on trial – if this is what the legislature truly intended.

3. Petitioner was Not in a Position of Authority

The State will likely contend that §21.12 preserves the special learning environment because it protects all high school students, regardless of their age, from the sexual advances of teachers who have special authority and control over such students. Even if the relationship is consensual, the statute protects only students in a secondary school (high school), both minors and adults, from people who have power, authority, or control over them on a day-to-day basis. As previously queried, why does the Texas state legislature not pass laws criminalizing sex between a professor and a 17-year-old college student, an employer and an employee, or even a law professor and a law student? In each of these scenarios, the employer, professor, or "educator" has a great deal more power over the

future of the student (or employee), as well as the livelihood of the individual, than a high school teacher has over a high school student who might be enrolled in a school on the other side of the city or state. But, in Texas, the state legislature does not see fit to criminalize these relationships and places the college professor who has sex with her student in prison for 20 years. This is, again, because there is adequate penal protection in place in the event that the college student or the employee having sex with his professor or boss is a child and/or is being forced to have sex against his will. Assuming that the State has asserted a compelling state interest and assuming that §21.12 advances that interest, this Court must determine whether the statute is the least restrictive method available to carry out the State's interest. While Petitioner agrees that the State has a clear and proper role to protect students from forcible sexual conduct, and sexual abuse by adults, Petitioner argues that criminal statutes, including those proscribing indecent exposure, rape, statutory rape, and the like, are in existence to protect students, including those being homeschooled, as well as the public, from precisely such harms. Petitioner also agrees that the State has an interest in protecting adult students from the sexual advances of teachers. But §21.12, which criminalizes adult consensual sex, is not the least restrictive method available to carry out the State's interest. Moreover, the State's interest is already advanced in TEX. PEN. CODE §43.25(b),[12] which

[12] TEX. PEN. CODE §43.25(b), Sexual Performance by a Child (a strict liability statute) provides the following:

prohibits a person in a position of trust from employing, authorizing, or inducing a child younger than 18 years of age to engage in sexual conduct or a sexual performance. In the instant case, Petitioner was never in a position of authority over either student. In fact, as applied to anyone in Petitioner's shoes, §21.12 makes it a crime for a teacher and student to have sexual contact, even when they work and are enrolled in schools across town or across the state from one another. Effectively, a teacher could have sexual contact with an adult student whom she never once came across at work/school. How can a teacher be in a position of authority over a student she has no contact with in relation to her position as an educator? She simply cannot be in such a position. The 2017 revised version of the statute more invasively infringes upon educators' fundamental rights by unconstitutionally criminalizing consensual sex with every single student (not being homeschooled) in the State of Texas. As applied in this case, and to every case involving an adult student, §21.12 infringes upon a fundamental right and is not the least restrictive method available for the promotion of a state interest, which renders the statute unconstitutional.

> A person commits an offense if, knowing the character and content thereof, he employs, authorizes, or induces a child younger than 18 years of age to engage in sexual conduct or a sexual performance. A parent or legal guardian or custodian of a child younger than 18 years of age commits an offense if he consents to the participation by the child in a sexual performance.

In summary, §21.12 implicates a fundamental right, it is not narrowly tailored, it fails to use the least restrictive means of achieving a compelling state interest, and thus fails to pass strict scrutiny review. While the statute may perhaps be well-intentioned, its far-reaching implications are simply unconstitutional.

D. Judicial History of Tex. Pen. Code §21.12

Appellant would proffer to this Court that this is not the first time this issue has come up in Texas. The constitutionality of §21.12 has been questioned in previous cases.[13] In *Ex parte Morales*, the State appealed a District Court finding that §21.12 *is* unconstitutional. The Trial Court dismissed the indictment, but the Appellate Court reversed that decision analyzing the statute under a rational basis standard. In *Morales*, the Appellate Court found that the statute was not facially unconstitutional. The problem with Morales' argument was that it heavily relied upon the decision in *Lawrence*, using it to urge the Court to recognize the fundamental right to engage in sexual conduct with a consenting adult, and to declare §21.12 void as it violates the substantive component of the Due Process Clause of the Fourteenth Amendment. As

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[13] *Ex parte Morales*, 212 S.W. 3d 483 (Tex. App.—Austin 2006, *pet. ref'd*); *Berkovsky v. State*, 209 S.W. 3d 252 (Tex. App.—Waco 2006, *pet. ref'd*); *In re Shaw*, 204 S.W. 3d 9 (Tex. App.—Texarkana 2006, *pet. ref'd*); *Toledo v. State*, No. 01-15-00559-CR, 2017 Tex. App. LEXIS 3023 (Tex. App.—Houston 2017, *no writ*); and *Colleps v. State*, No. 02-12-00396-CR, 2014 Tex. App. LEXIS 3631, 2014 WL 1324422 (Tex. App.—Fort Worth 2014, *no pet.*).

previously discussed regarding *Lawrence*, this Court specifically declined to determine whether a sodomy law would violate the substantive component of the Due Process Clause, thereby triggering a strict scrutiny review, reasoning that it was an issue that need not be decided in that case. *Lawrence v. Texas*, *supra*. Instead, the *Lawrence* Court reviewed the statute under the Equal Protection Clause of the Fourteenth Amendment and simply applied only a "rational basis" review – which is the wrong test when analyzing a *fundamental* right. Therefore, the argument presented by *Morales* was incorrect and inapplicable to his, and this, case. *Ex parte Morales*, 212 S.W. 3d 483, 492 (Tex.App.—Austin 2006, *writ ref'd*).

Here, Petitioner does not make that same mistake or misstep. Instead, Petitioner understands that an individual has a fundamental right to privacy, procreation and intimacy, protected by the Due Process Clause. And, that strict scrutiny is the proper standard of review of any fundamental right implicated in a criminal statute.

In a different Texas case challenging the constitutionality of §21.12, the *Toledo* Court made a mistake similar to Morales. In *Toledo*, the defendant invoked both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to redress state action criminalizing consensual adult sex, relying heavily upon *Lawrence.* Again, the *Lawrence* Court declined to determine whether a sodomy law implicates a fundamental right under the Due Process Clause, and instead reviewed the statute under the Equal

Protection Clause of the Fourteenth Amendment applying the rational basis test. The *Toledo* Court reasoned that, "Lawrence did not categorize the right to sexual privacy as a fundamental right." *Toledo v. State*, No. 01-15-00559-CR, 2017 Tex. App. LEXIS 3023 (Tex. App.—Houston 2017). While the *Toledo* Court is correct in its assertion that, "Lawrence did not categorize the right to sexual privacy as a fundamental right," the *Lawrence* Court explicitly chose not to do so. In its opinion, the *Lawrence* Court even points out that the issues decided in that case did not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused, and therefore the Court only needed to apply the lower rational basis standard of review. *Lawrence v. Texas*, 539 U.S. at 578. In short, *Lawrence*, *Toledo*, and *Morales* are cases which were all reviewed under a completely different standard than Petitioner relies upon in the instant case. Additionally, *Lawrence* and *Morales* were decided prior to this Court's ruling in *Obergefell* and for some unknown reason, the *Toledo* Court completely failed to consider the *Obergefell* opinion, either because counsel failed to raise it, or because the Court just decided to ignore it. Regardless, Petitioner now asks this Court to correct such mistake.

In another case questioning the constitutionality of §21.12, the defendant's First Amendment argument failed based on his failure to cite ***any*** Texas law recognizing a fundamental privacy right to consensual sexual conduct between adults. *Berkovsky v. State*, 209 S.W. 3d 252, 254 (Tex. App.—Waco 2006, *pet. ref'd*).

Petitioner does not make such misstep in the instant case.

In yet another Texas case questioning the constitutionality of §21.12, the defendant actually asked the Court to apply the rational basis test (rather than asking it to apply strict scrutiny). *Colleps v. State*, No. 02-12-00396-CR, 2014 Tex. App. LEXIS 3631, 2014 WL 1324422 *7 (Tex. App.—Fort Worth 2014, *no pet*.). The *Colleps* Court, relying purely upon *Morales* and *Lawrence*, reasoned that the *Lawrence* Court held that Lawrence's right to privacy – which protects personal decisions related to marriage, procreation, contraception, family relationships, child rearing, and education – had not yet been extended to sexual conduct or intimate relationships generally and is not a fundamental right to which strict scrutiny applies. *Morales*, 212 S.W. 3d at 491-494 (citing *Lawrence v. Texas*, 539 U.S. at 578).

Again, in the instant case, Petitioner relies heavily upon *Obergefell* which unequivocally decided that choices concerning contraception, family relationships, procreation, child rearing, marriage, education and intimacy are all decisions among the most intimate that an individual can make and are fundamental rights protected by the Constitution. *Obergefell v. Hodges*, 135 S. Ct. at 2599-2602. In simple terms, the *Lawrence* Court completely avoided the question of whether sexual intimacy between two consenting adults is a fundamental right, in the context of criminalizing the act. The *Obergefell* Court, although not dealing with a *criminal* statute, clears up this question and tells us

that intimacy between consenting adults *is* a fundamentally protected right.

Appellant argues that (1) she has a fundamental right to privacy, procreation and the right to engage in private, consensual acts of sexual intimacy with an adult, (2) she had sexual intercourse with consenting adult(s), (3) the act(s) took place in the privacy of her own home, (4) as applied to Appellant, a statute criminalizing consensual sexual conduct between adults is unconstitutional, and (5) the State of Texas cannot show a compelling governmental interest or that this statute is the least restrictive method to carry out the State's interest.

E. Similar Statutes Declared Unconstitutional in Other States

1. Arkansas Statute is Declared Unconstitutional

In 2012, the Arkansas Supreme Court struck down, on constitutional grounds, ARK. CODE ANN. §5-14-125(a)(6), which, like §21.12, criminalized a sexual relationship between a teacher and a consenting adult student. Like Petitioner, Paschal was a high school teacher who was accused of having a sexual relationship with a consenting, of-age student enrolled at the high school where he taught. The *Paschal* Court held, as applied in that case, that a teacher has a fundamental right to engage in private, consensual, non-commercial acts of sexual intimacy with an adult student, noting that while Paschal's conduct could be

considered reprehensible, "the fundamental right to privacy implicit in our law protects all private, consensual, noncommercial acts of sexual intimacy between adults." *Paschal v. State*, 2012 Ark. 127, 388 S.W. 3d 432 (Ark. Sup. Ct. 2012), citing *Jegley v. Picado*, 349 Ark. 600, 632, 80 S.W. 3d 332, 350 (2002). The *Paschal* Court further held that §5-14-125(a)(6) infringes on the teacher's fundamental right to privacy, reasoning that while the State has a compelling interest to protect adult students from sexual advances of teachers, and assuming §5-14-125(a)(6) advances that compelling interest, a statute criminalizing adult consensual sex is not the least restrictive method available to carry out the State's interest, and thus is unconstitutional. *See Paschal*, *supra*.

2. Alabama Statute is Declared Unconstitutional

An Alabama Circuit Court struck down, on constitutional grounds, ALA. CODE §13A-6-81(a) which, like §21.12, criminalized a sexual relationship between a teacher and a consenting adult student. On August 10, 2017, the Circuit Court of Morgan County, Alabama, issued a combined opinion holding ALA. CODE §13A-6-81(a) unconstitutional; *State of Alabama v. Carrie Cabri Witt*, Case No. CC-2016-001349.00, and *State of Alabama v. David Thomas Solomon*, Case No. CC-2016-001264.00. The Court held that the statute was unconstitutional as applied to the two defendants who were both teachers accused by indictment of having sexual intercourse with students who were of legal

consenting age. In the Court's opinion, it reasoned that the Alabama statute was unconstitutional because it criminalized intercourse between a teacher and any consenting adult student regardless of whether the teacher was ever in a position of authority, grooming, abuse, coercion, or lack of consent. Like Petitioner, the Defendants were high school teachers, each accused of having a sexual relationship with a consenting, of-age student, and like in this case, the State did not prove that either teacher was ever in a position of authority, grooming, abuse, coercion, or lack of consent.

There is no question that the right to privacy, procreation and intimacy are fundamental and constitutionally protected rights, and even if there was a question, in its 2015 *Obergefell* opinion, this Court clearly says they are, so strict scrutiny must apply. Section 21.12 is a statute infringing upon a teacher's fundamental and constitutionally protected rights by criminalizing private and consensual acts of sexual intimacy. It is both overinclusive and underinclusive, which means it is *not* narrowly tailored to serve a compelling governmental purpose. There are numerous statutory remedies in Texas that *are* narrowly tailored to serve the very compelling governmental purposes §21.12 intends to serve, but fails. It is for these reasons §21.12 should be held facially unconstitutional, as applied to Petitioner, and as applied to any case involving the consensual sexual conduct between competent, consenting adults.

CONCLUSION

For the reasons explained above, Petitioner asks that her Petition for Writ of Certiorari be granted, and that she be given the opportunity to present her arguments before the Court.

Respectfully submitted,

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