No. 21-

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL RAY SENN,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Does a criminal law which provides for increased punishment based solely on an offender's status as married violate his or her right to equal protection under the Fourteenth Amendment?

PARTIES

Petitioner: Michael Ray Senn

Respondent: The State of Texas

RELATED PROCEEDINGS

There are no related proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Ray Senn respectfully petitions for a writ of certiorari to review the judgment of the Texas Second Court of Appeals. The Texas Court of Criminal Appeals, the court of last resort in the State of Texas, denied a petition for discretionary review. *See In Re Senn*, 2020 Tex. App. LEXIS 8188 (Tex.Crim. App. May 12, 2021).

OPINION BELOW

The unpublished opinion of the Seventh Court of Appeals of Texas at Fort Worth is captioned as *Senn v. State (Senn VII)*, 2020 Tex. App. LEXIS 8188 (Tex. App.—Fort Worth October 15, 2020, mem. op., not designated for publication, pet. ref'd). A copy of the judgment and opinion is provided in Appendix A. In Appendix B, Counsel has provided a copy of the order from the Texas Court of Criminal Appeals denying his petition for discretionary review. Finally, Counsel provided in Appendix C the trial court judgment in cause number 1308222R in the 213th District Court, Tarrant County Texas.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(1). *See also* Sup. Ct. R. 13.1. The Texas Court of Criminal Appeals, the state court of last resort, denied discretionary review on May 12, 2021. The petition is therefore timely under Rule 13.1 of the Supreme Court Rules. *See In Re Senn*, 2020 Tex. App. LEXIS 8188 (Tex.Crim. App. May 12, 2021). *See* Sup. Ct. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides, in relevant part, that:

> [n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 22.011(f) of the Texas Penal Code sets out the penalties for sexual assault. It provides, in relevant part:

> (f) An offense under this section is a felony of the second degree, except that an offense under this section is:
>
> > (1) a felony of the first degree if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from being married under Section 25.01.

Section 25.01 of the Texas Penal Code proscribes Bigamy. The statue provides, in relevant part:

> (a) An individual commits an offense if:
>
> > (1) he is legally married and he:
> >
> > > (A) purports to marry or does marry a person other than his spouse in this state, or any other state or foreign country, under circumstances that would, but for the actor's prior marriage, constitute a marriage; or
> > >
> > > (B) lives with a person other than his spouse in this state under the appearance of being married; or
> >
> > (2) he knows that a married person other than his spouse is married and he:

> (A) purports to marry or does marry that person in this state, or any other state or foreign country, under circumstances that would, but for the person's prior marriage, constitute a marriage; or
>
> (B) lives with that person in this state under the appearance of being married.

STATEMENT OF THE CASE

Relevant Facts and Proceedings in Trial Court

This petition arises on direct appeal of Petitioner's criminal conviction for sexual assault in the State of Texas. Petitioner was tried and convicted in a jury trial of sexual assault (Count 1), and prohibited sexual conduct with a biological descendant (Count 2). *See* (CR 174-176); (4 RR 123-124.) The evidence showed at trial that in approximately 2011 Petitioner had "sexually assaulted and impregnated his adult biological daughter." *Senn VII*, 2020 Tex. App. 8188 at *1. Both sexual assault and prohibited sexual conduct typically provide for a maximum penalty of twenty years imprisonment. *See* Tex. Penal Code §§ 22.011(f); 25.02(c),

But on the sexual assault count, the State sought an enhanced penalty under Section § 22.011(f)(1) of the Texas Penal Code because he had been married to another person at the time of the assault. In support of the enhancement, the State admitted a copy of Petitioner's marriage license into evidence. (St. Ex. 3); (3 RR 116.) The jury found in the affirmative on this special issue, which catapulted the penalty range from 2-20 years imprisonment to 5-99 years, or life. Texas Penal Code §§ 12,32; 12.33; 22.011(f); 22.011(f)(1). The jury ultimately sentenced Petitioner to Life imprisonment

for the enhanced sexual assault count. (CR 174-176; 184-196); (4 RR 123-124; 5 RR 94.) He was sentenced to 20 years imprisonment for prohibited sexual conduct. (CR 184-196); (5 RR 94.)

Direct Appeal

Petitioner appealed, raising *inter alia* an as-applied equal protection challenge to the Section 22.011(f)(1) penalty provision. For five years Petitioner's case has oscillated between the Second Court of Appeals and the Texas Court of Criminal Appeals. *See Senn v. State* (*Senn I)*, 551 S.W. 3d 172, 183 (Tex. App.—Fort Worth 2017), *vacated State v. Senn*, (*Senn II),* No. PD-0145-17, 2017 Tex. Crim. App. Unpub. LEXIS 800 at * 1 (Tex. Crim. App. Nov. 22, 2017) (not designated for publication); *Senn v. State*, *(Senn III*) No. 02-15-00201-CR, 2018 Tex. App. LEXIS 3528 (Tex. App.—Fort Worth May 17, 2018) (op. on remand); *Senn v. State (Senn IV)*, 2018 Tex. App. LEXIS 8722 at *1 (Tex. App.— Fort Worth Oct. 25, 2018 (op. on remand and reh'g), *rev'd*, *Lopez v. State (Senn VI)*, 600 S.W. 3d 43, 50 (Tex. Crim. App. 2020); *Senn v. State* (*Senn VII)*, 2020 Tex. App. LEXIS 8188 (Tex. App.—Fort Worth 2020 pet.ref'd) (mem. op., not designated for publication).

In *Senn VII*, the Second Court of Appeals denied Petitioner's as-applied equal protection challenge on the merits. *See Senn VII*, 2020, Tex. App. LEXIS 8188 at *19-20. Petitioner timely filed a petition for discretionary review with the Texas Court of Criminal Appeals. Among his claims, he requested that the Court review the lower court's resolution of his equal protection claim. The Court denied the petition without

written order. *See In Re Senn*, 2020 Tex. App. LEXIS 8188 (Tex.Crim. App. May 12, 2021).

This petition for certiorari follows.

REASONS FOR GRANTING THE PETITION

Introduction

This petition presents "an important question of federal law" which requires the intervention of this Court. Sup. Ct. R. 10(c). It concerns a legislative classification which provides for significantly enhanced criminal penalties based on an offender's marital status alone. In Texas an individual faces roughly a five times stiffer penalty range for sexual assault if he or she happens to be married at the time of the sexual assault. *See Lopez v. State*, 600 S.W. 3d 43, 48 (Tex. Crim. App. 2020) (Section 22.011(f) enhancement "was satisfied if the State proves the defendant was legally married to someone other than the victim of the sexual assault").

This Court has found differential punishment based on marital status violates equal protection. *See Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (Massachusetts criminal law that prohibited distribution of contraception to unmarried individuals but allowed married persons access to contraception violated equal protection). Absent intervention of this Court, a married person in Texas faces a life sentence for a crime that would otherwise have been no longer than 20 years had he or she been unmarried. Texas Penal Code §§ 12,32; 12.33; 22.011(f); 22.011(f)(1).

I. A married individual in Texas faces a higher penalty range for sexual assault than an unmarried individual.

The penalty enhancement at issue is the so-called bigamy provision of the sexual assault statute, Texas Penal Code § 22.011(f). Added to the sexual assault statute in 2005, the Texas "Legislature crafted the bigamy provision to target fundamentalist Mormons involved in bigamous relationships with children." *State v. Rousseau*, 396 S.W. 3d 550, 553 (Tex. Crim. App. 2013). Section § 22.011(f)(1) provides that the enhanced penalty will apply "if the victim was a person whom the actor was prohibiting from marrying or purporting to marry, or with whom the actor was prohibited from living under the appearance of being married under Section 25.01." Section 25.01 proscribes the offense of bigamy.

While the text of § 22.011(f)(1) cross-references the bigamy stsatute, the Court of Criminal Appeals has held that the State need not prove a defendant actually engaged in bigamy to trigger the enhancement. *Lopez*, 600 S.W. 3d at 46 (enhancement "does not require proof that the defendant actually engaged in bigamy"). The enhancement will apply so long as the bigamy statute "*would* forbid a marriage or purported marriage between a defendant and a victim if the defendant was legally married to someone else at the time of the sexual assault." *Lopez,* 600 S.W. 3d at 46 (emphasis added). Thus, in this case, because Petitioner was married to another at the time of the sexual assault, he is good for the enhanced penalty according to the Court due to the fact that he *would be* forbidden from marrying the victim under § 25.01 had he tried. This reading, as the Court well understands, means that the enhancement

will apply so long the State proves that the defendant was married to another at the time of the sexual assault. *See Lopez*, 600 S.W. 2d at 47 ("[w]e conclude that imposing a higher degree of punishment to deter sexual assault by a married defendant does not lead to absurd results that the Legislature could not have intended"); *Id.* at 49 ("[t]he evidence that Senn was married to another when he sexually assaulted the victim was sufficient to enhance punishment under Section 22.011(f)").[1]

When the Court then turned to Petitioner's sufficiency claim, it rejected the contention that the enhancement requires proof of bigamous conduct. *Id.* at 49 ("[t]he evidence that Senn was married to another when he sexually assaulted the victim was sufficient to enhance punishment under Section 22.011(f)").[2] The Court of Criminal Appeals remanded to the Second Court of Appeals to consider Petitioner's remaining claims, including his equal protection claim. *Id.* at 50. Critically, however, the Court of Criminal Appeals effectively rejected Petitioner's equal protection claim when it reasoned through its interpretation of the statute.

When interpreting the scope of the statute, the Court relied heavily on its earlier

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[1] In *Lopez,* Petitioner's case had been consolidated with Lopez and another defendant, Rodriguez. *See Lopez, 600* S.W. 3d at 43.

[2] The State did not rely on a theory that the victim's consanguinity to Petitioner triggered the enhancement, nor could it have. During the pendency of this appeal, the Court of Criminal Appeals held that the version of the statute under which Petitioner had been convicted did not extend to consanguinity. *See Arteaga v. State*, 521 S.W. 3d 329 (Tex. Crim. App. 2017). In 2019, the statute was amended to provide for an enhanced statutory penalty based on consanguinity. *See* 22.011(f)(2); Melissa's law, 2018 86th Leg. R.S., ch. 738 § 2, sec. 22.011(f), Tex. Sess. Law. Serv. 2049, 2050.

decision in *Estes v. State*, 546 S.W. 3d 691, 701 (Tex. Crim. App. 2018) in reasoning that its married-status-only reading would not lead to absurd results. *See Lopez*, 600 S.W. 3d at 47. It merits emphasis that *Estes* involved a similar as-applied equal protection challenge to the one presented here. Like Petitioner, the penalty enhancement was applied solely because the defendant had been married; there was no proof of bigamy. *Estes*, 546 S.W. 3d at 694. However, unlike in Petitioner's case, the victim had been a child.[3] *Id.* In *Estes*, the Court concluded that the defendant's equal protection rights were not violated because the enhancement was "rationally related to the State's interest in protecting children from sexual exploitation." *Estes*, 546 S.W.3d at 700. In the Court's view, a married person could carry "a certain aura of trustworthiness, specifically in regard to children" and "might be perceived, by at least some parents, as being less likely to make sexual advances upon their children." *Id.* at 700-701.

But in *Lopez*, the Court justified its marriage-only interpretation of the penalty provision by shifting away from the protection-of-children rationale seemingly essential to *Estes*; it focused instead on the sanctity of marriage. *See Lopez*, 600 S.W. 3d at 48-50. The Court observed that in *Estes* it had discussed "a strong societal connection between the union of marriage and the ideas of family, home, safety, stability, and security." *Lopez,* 600 S.W. 3d at 47 (citing *Estes*, 546 S.W. 3d at 701). Because "a

[3] Similar to *Estes*, the other two joined defendants in *Lopez* involved sexual assaults of children. *See Lopez*, 600 S.W. 3d at 48, 50.

married defendant may abuse these deeply-rooted beliefs even if the victim is an adult," the Court found that "much of the reasoning [from *Estes*] would apply equally to an adult victim." *Id.* The Court concluded that "imposing a higher degree of punishment to deter sexual assault by a married defendant" did "not lead to absurd results that the Legislature could not have intended." *Id.*

On remand, the Second Court of Appeals took its cue from the Court of Criminal Appeals and washed away distinction regarding the age of the victim in its equal protection analysis. The court of appeals even stated that the "basic facts before us are the same as those in *Estes*—a married man was convicted of sexual assault." *Senn VII*, 2020 Tex. Appl. LEXIS 8188 at *20. It then concluded, strangely, that the statute as applied to Petitioner was "rationally related to the State's interest in *protecting children"*—even though the victim in this case had been an adult. *Id.*

The Court of Criminal Appeals then declined Petitioner's request to review the decision below. *See In Re Senn*, 2020 Tex. App. LEXIS 8188 (Tex. Crim. App. May 12, 2021). Petitioner submits the highest state court declined discretionary review because it has already spoken on the issue. With *Lopez*, the Court of Criminal Appeals has insulated Section 22.011(f)(1) from any equal protection challenge based on a defendant's married status. In *Rousseau*, the Court had earlier rejected a facial equal protection challenge on the basis that the statute had "at least one valid application: the punishment of bigamists who sexually assault their purported spouses." *Rousseau*, 396 S.W 3d at 558. But *Lopez* made clear that bigamous conduct is not even necessary

to trigger the penalty. *Lopez*, 600 S.W. 3d at 46 (enhancement "does not require proof that the defendant actually committed bigamy"). Further, the Court further indicated that differential treatment based solely on a defendant's marital status would pose no constitutional problem. Reasoning from *Estes*—where the Court had rejected an as-applied equal protection challenge based on marital status where the victim was a child—it now concludes that "a higher degree of punishment to deter sexual assault by a married defendant" will not yield absurd results "*even if his victim is an adult*." *Lopez*, 600 S.W. 3d at 47 (emphasis added).

Petitioner submits that the Court of Criminal Appeals is gravely mistaken. A differential penalty for sexual assault based solely on married status is absurd, and violates the Equal Protection Clause of the Fourteenth Amendment. The State cannot have a legitimate interest in imposing a five-times harsher punishment on Petitioner solely based on his status as married. The "evil, as perceived by the State"—sexually assaulting an adult—"would be identical" regardless of whether the offender was married. *Eisenstadt*, 405 U.S. at 454. A state may not accord differential treatment to persons "on the basis of criteria unrelated to the objective of that statute." *Id; see City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985) ("[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").

Petitioner submits that enforcement of the sexual assault penalty against him because he is married cannot withstand even a rational basis review of his equal

protection claim. But this Court's precedent suggests a heightened standard of review should apply in any event. In the equal protection context, strict scrutiny applies to those classifications which "impinge upon the exercise of a fundamental right." *See Plyler v. Doe*, 457 U.S. 202, 217 (1982). Marriage has long been recognized as one such fundamental right. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967). ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival.") *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("the right to marry is of fundamental importance for all individuals").

One judge in *Estes* recast the burden on marriage as the denial of "the ability to commit sexual assault or bigamy" during marriage, *Estes*, 546 S.W. 3d at 717 (Newell, J., concurring and dissenting). Petitioner respectfully submits that this does not fairly characterize the nature of the infringement; sexual assault is illegal regardless of marital status. The burden on marriage comes from using that status as a proxy to make a criminal penalty five times more severe for the exact same conduct. A similar burden would arise if a statute provided increased criminal punishment if it were shown that an offender had children, or had used contraception in the past. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (identifying having children and using contraception as among those rights recognized to be fundamental rights and liberty interests).

Alternatively, even if the statute does not warrant strict scrutiny, the marital

classification should be reviewed for intermediate scrutiny. The Supreme Court has applied intermediate scrutiny to statutory schemes which proscribe differential treatment based on the "legitimacy" of a child—whether the child was born inside or outside a marriage. *See, e.g., Mills v. Habluetzel*, 456 U.S. 91,99 (1982); *Pickett v. Brown,* 462 U.S. 1, (1983) *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Like the penalty provision here, these schemes used marital status as a proxy for differential treatment.

Petitioner easily prevails under either circumstance, regardless of whether the victim was an adult or a child. For a law to pass muster under strict scrutiny, it must be "narrowly tailored to serve a compelling state interest." *FEC v. Wis. Right to Life*, Inc. 551 U.S. 449 (2007). To survive intermediate scrutiny, a classification must serve "important governmental objectives" that is "substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Here, the legislative history conclusively establishes that the Section 22.011(f) enhancement sought to protect "children from the blight of bigamy and polygamy." *Arteaga*, 521 S.W. 3d at 337 (discussing legislative history); *Rosseau*, 396 S.W. 3d 550, 553 (Tex. Crim. App. 2013) (Appellee's "exhibits suggest that the Legislature crafted the bigamy provision to particularly target fundamentalist Mormons involved in bigamous relationships with children"). While protecting children from bigamy is no doubt a compelling and important interest, the statute is drawn far too broadly to satisfy the tailoring requirements of strict or even intermediate scrutiny.

In an effort to target bigamists, the Legislature, as interpreted by the Court of

Criminal Appeals in *Lopez*, subjected all married persons to heightened punishment without attaching any requirement that those married people be engaged in bigamous behavior. Requiring proof of bigamous conduct would have been a viable, less restrictive alternative to subjecting all married people to the differential penalty. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 846 (1997) (statute does not survive strict scrutiny if less restrictive alternative available). To satisfy the tailoring requirement under intermediate scrutiny, there must be a reasonable, proportional fit between the means and ends. *See Board of Trustees of State Univ. of NY v. Fox*, 492 U.S. 469, 480 (1989); *In re R.M.J.* 455 U.S. 191, 2013 (1982). Subjecting all married people to a penalty five times more serious in an effort to target a significantly smaller subset class of bigamists fails to satisfy the requirement that the fit be reasonable and proportional to the legislative objective.

This case provides the perfect vehicle to address whether a differential criminal penalty based solely on a defendant's marital status comports with equal protection. Petitioner was convicted in Texas of sexual assault. Based solely on his status as a married individual, Petitioner received a life sentence. Had Petitioner been unmarried at the time of the offense, he would have been looking at only 2-20 years imprisonment. *See* Texas Penal Code § § 12.33; 22.011(f). Absent the intervention of this Court, married individuals face up to life in prison for conduct which subjects unmarried individuals to no more than 20 years in prison. The Court should grant certiorari and ultimately invalidate this patently unconstitutional criminal penalty.

CONCLUSION

Petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

DATE: June 23, 2021

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner, Michael Ray Senn, pursuant to Sup. Ct. R. 39.1, asks for leave to file the accompanying Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*. Counsel has represented Petitioner as his court-appointed counsel in the trial court and on direct appeal pursuant to Article 1.051 of the Texas Code of Criminal Procedure. Counsel has attached copies of the appointments to this motion.

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PROOF OF SERVICE

I, William R. Biggs do certify on this date, June 23, 2021, I served the foregoing Motion for Leave to Proceed In Forma Pauperis, and Petition for Writ of Certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served. I have served the Supreme Court of the United States via United States mail, with first-class postage prepaid. The remaining parties listed below were each served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid. I am a member of the bar of this Court.

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