
IN THE
Supreme Court of the United States

October Term, 1969

No. **1722**

ALVIN LEON BUCHANAN,
TRAVIS LEE STRICKLAND,

Cross Appellants,

vs.

HENRY WADE, District
Attorney of Dallas
County, Texas,

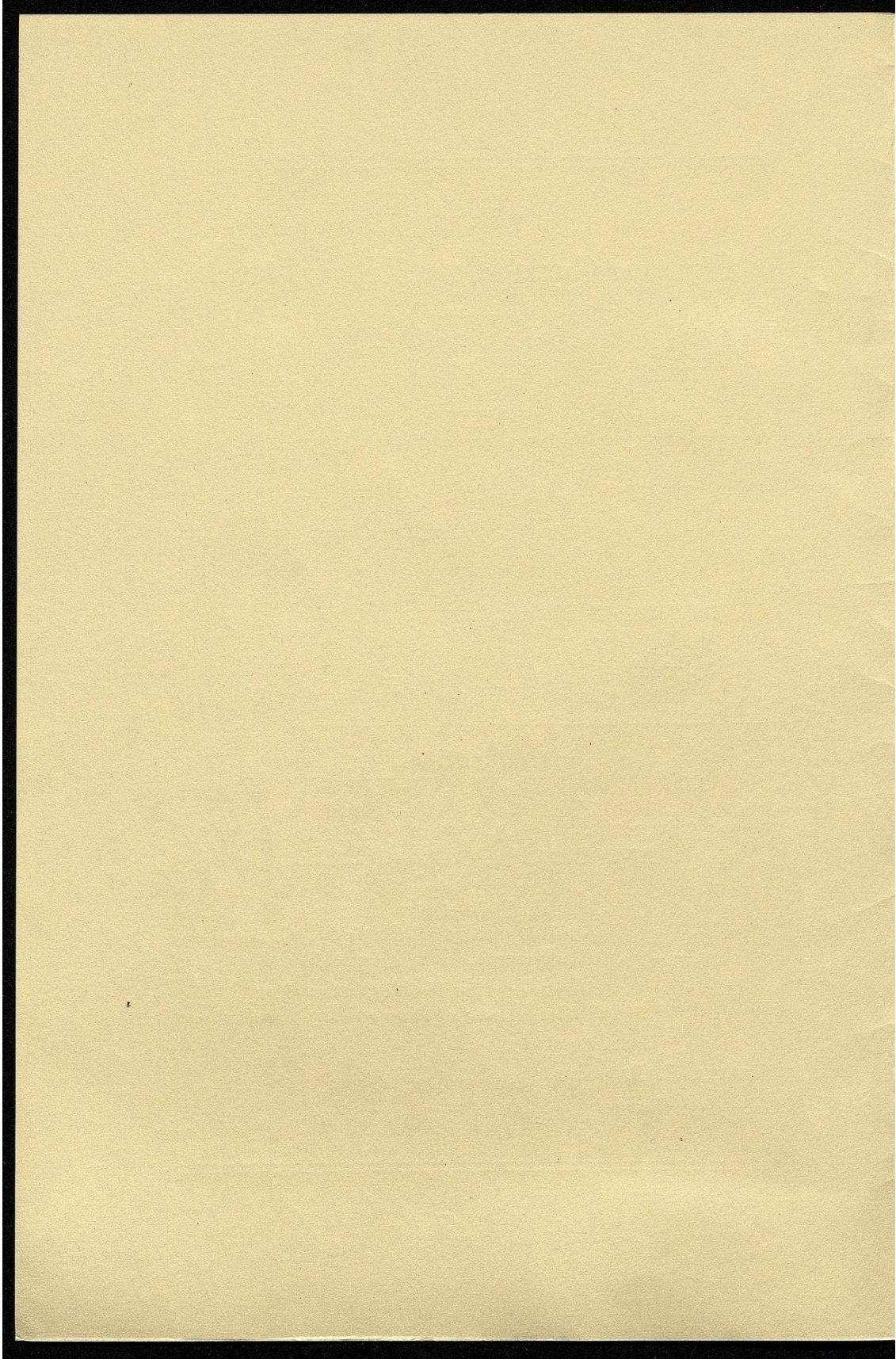
Cross Appellee.

MOTION OF
NORTH AMERICAN CONFERENCE OF
HOMOPHILE ORGANIZATIONS
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
AND BRIEF AMICUS CURIAE

HUGH B. MUIR
4119 Dietz Farm Circle N. W.
Albuquerque, New Mexico 87107

*Attorney for the North American
Conference of Homophile Organizations*

WALTER E. BARNETT
of Counsel



IN THE
Supreme Court of the United States

October Term, 1969

No.

ALVIN LEON BUCHANAN,
TRAVIS LEE STRICKLAND,

Cross Appellants,

vs.

HENRY WADE, District
Attorney of Dallas
County, Texas,

Cross Appellee.

MOTION OF
NORTH AMERICAN CONFERENCE OF
HOMOPHILE ORGANIZATIONS
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
AND BRIEF AMICUS CURIAE

The North American Conference of Homophile Organizations (hereinafter denoted as NACHO) moves for leave to file a brief amicus curiae in this case in support of the cross appellants' jurisdictional statement.

Counsel for cross appellants has consented to the filing of such brief, but counsel for cross appellee, Henry Wade, has refused his consent.

INTEREST OF THE CONFERENCE

NACHO is an unincorporated association of organizations established in various cities of the United States to protect and promote the welfare of American citizens who are homo-

sexual. The Conference meets annually, usually in August; it exists to coordinate information and efforts on the national scale to improve American society's understanding of homosexuality and to better the lot of America's homosexual community.

The issue in this case, whether the State of Texas may constitutionally make a crime of sexual conduct which is not procreative, is of concern not only to individual homosexuals, such as the cross appellants, and to married couples, such as the appellees in this case (Mr. and Mrs. Gibson), but also to all persons everywhere in this country who feel a need and a desire to express their love or attraction for another human being in other than normal ways. All states of the union and the District of Columbia, except Illinois, have criminal laws similar to that of Texas which is here in controversy. Thus, the threat of criminal prosecution for abnormal sex acts is a matter of deep concern to all homosexuals and to those who are interested in their welfare, including the organizations that belong to NACHO and their individual members. A list of the organizations accredited to the 1969 conference is appended to this brief.

REASON FOR FILING A BRIEF AMICUS CURIAE

The cross appellants contend that the State of Texas may not constitutionally make a crime of sexual conduct that occurs in private between consenting, competent adults, whether or not it is procreative in nature, and that the State of Texas, although it may validly regulate such conduct occurring in public places, may not in doing so discriminate against homosexuals or impair general rights of privacy. NACHO asks leave to supplement their arguments by emphasizing the crucial importance of a determination of these issues to the lives of all homosexuals in America.

THE NATIONAL IMPORTANCE OF THE QUESTIONS PRESENTED

The most thorough investigation of human sexuality yet made in the United States, Kinsey *et al.*, *Sexual Behavior in the Human Male* (1948) and *Sexual Behavior in the Human Female* (1953), demonstrates that human sexuality is not a unitary phenomenon. The same point is made by the group of

experts who submitted to the National Institute of Mental Health in October, 1969, the *Final Report of the Task Force on Homosexuality* (the so-called Hooker Report). The figure published in the Kinsey studies of the percentage of white American males who are exclusively homosexual throughout their lives is 4% ; the figure for those who are exclusively homosexual for at least a three-year period during their lives is 8% ; and for those who have had homosexual physical contact to the point of orgasm at any time during their lives, 37%. The approximate comparable figures for females are 1-3%, 3-5%, and 13%. Although later studies are not as complete, they tend to confirm the Kinsey estimates of the number of persons involved. If there were added to these figures the percentage of persons who engage in oral-genital or anal-genital contact only with persons of the opposite sex, the total percent of the American populace who have at one time or another in their lives violated felony statutes like that of Texas could well exceed 50%.

Although all the people represented by these large figures have cause to fear prosecution so long as such statutes remain on the books, it is the homosexuals preeminently, and male homosexuals in particular, who have reason to be afraid. It is common knowledge that such statutes are almost never enforced against married couples or female homosexuals (lesbians), and are rarely enforced against non-married heterosexual conduct. The statutes exist primarily to punish, harass and otherwise denigrate the male homosexual, to make him feel inferior, unworthy, and an outlaw of society. That these statutes, together with other, non-legal, forces, generally succeed in accomplishing this objective is the testimony of psychologists, psychiatrists and psychotherapists around the country, and of the Hooker Report in particular. There is much evidence that the neurotic maladjustment which many homosexuals exhibit is not so much traceable to the condition of homosexuality itself, but to these repressive laws and attitudes of society. It is true that such laws are not often enforced even against male homosexuals except when minors, the use of force or threats, or a public place is involved, but this is the result not so much of a conscious policy of law enforcement authorities as of the difficulty of obtaining sufficient evidence to convict, or even a complaint, in other cases. That the majority of homosexuals avoid situations involving such factors is

borne out by the studies that have been made. The great majority of homosexuals wish to be respectable and law-abiding citizens, and recognize that society has a legitimate interest in proscribing sexual conduct involving the three factors just mentioned. Yet even the most scrupulous avoidance of such situations does not diminish the fear and apprehension that every homosexual carries always with him—of being caught, branded publicly as a “pervert”, imprisoned, and saddled with a disabling criminal record for the rest of his life.

Every homosexual knows, and the experts in human psychology know, that no homosexual ever chose to be or become such. It is something that just happened in the process of growing up, which most of them are unable consciously to recognize or acknowledge until it is too late to change. It is futile for society to demand that the true invert confine his conduct to married heterosexuality, just as futile as to demand that one who likes vanilla ice cream and is allergic to chocolate give up vanilla and confine himself to chocolate. Of course, it may be replied that society does not make that demand, but rather demands that he either confine himself to married heterosexuality or else remain continent. But remaining continent in one's sexual life is not the equivalent of abstaining from eating ice cream. The hunger drive, being a purely physical drive, can be satisfied by other means than ice cream. The sex drive, on the other hand, being primarily emotional and only secondarily physical, can only be satisfied with another human being; and if the only other human being to which a person feels emotional and physical attraction is a member of his own sex, then demanding that he confine his satisfactions to members of the opposite sex is equivalent to imposition of complete continence. The fact that some saintly figures in recorded history have managed to achieve complete continence is irrelevant. Such self-restraint cannot be demanded of the common run of mankind. If the proportions in our society were reversed, so that homosexuals were in a position to legislate against all heterosexual intercourse, the outrage to the human personality would be readily apparent.

Despite the numbers of persons who have, according to the figures above noted, violated the criminal law, the chances of legislative reform of these laws are very slim in most states. The pressures of religious opinion, and the fear of being thought to be a “queer”, deter many people who would favor

reform from pressing for it. These factors also operate powerfully to keep legislators from proposing or voting for reform of these criminal laws; and it hardly takes an expert in political science to observe that the typical legislator will go to any length to avoid even the appearance of favoring "immorality" or "vice". Another important fact is that many people are simply unaware that such criminal laws, proscribing sex acts between consenting adults in private, exist. And too often, those most directly affected, the homosexuals, are too afraid of exposure to make their voices heard. Even if they were to do so, however, the issue has no appeal at the ballot box.

Even if the possibility of reform of the law by legislation were a viable one, the NACHO and its component organizations believe that that alternative need not be pursued, because the laws in question are unconstitutional. They establish a religious view of sexual morality in violation of the establishment clause of the First Amendment (made applicable to the states through the Fourteenth); they impose criminal penalties for the symptoms of an involuntary status (sexual inversion, or homosexuality), in violation of the Eighth Amendment's prohibition against cruel and unusual punishment (made applicable to the states through the Fourteenth); they violate the right of privacy, a right which is within the penumbra of the First Amendment and which is secured to the people by the Ninth Amendment; they constitute an unreasonable denial of individual liberty because they serve no reasonable purpose relative to public health or welfare, and therefore they deny to all affected persons substantive due process of law in violation of the Fourteenth Amendment; and finally, since they prohibit homosexuals from engaging in the only modes of sexual satisfaction open to the latter, they deny these people equal protection of the law in violation of the Fourteenth Amendment.

CONCLUSION

Since there has never been, to the knowledge of NACHO and its counsel on this brief, any full and complete consideration by the federal courts of these questions of the constitu-

tionality of the sodomy laws under the United States Constitution, and since the determination of such questions is vital to the chances of millions of Americans for a life that is reasonably happy and free from fear, the NACHO respectfully urges that this Court note probable jurisdiction of the cross appeals.

HUGH B. MUIR
4119 Dietz Farm Circle N.W.
Albuquerque, New Mexico 87107

*Attorney for the North American
Conference of Homophile Organizations*

WALTER E. BARNETT
of Counsel

APPENDIX

List of Organizations Accredited to the 1969 North American Conference of Homophile Organizations

1. Cincinnati Mattachine Society, Cincinnati, Ohio
2. Circle of Friends, Dallas, Texas
3. Cleveland Mattachine Society, Cleveland, Ohio
4. Council on Equality for Homosexuals, New York, New York
5. Dayton Mattachine Society, Dayton, Ohio
6. Dorian Society of Seattle, Seattle, Washington
7. Homophile Action League, Philadelphia, Pennsylvania
8. Institute for Social Ethics, Hartford, Connecticut
9. Kalos Society, Hartford, Connecticut
10. Lincoln-Omaha Council on Religion and the Homosexual, Lincoln, Nebraska
11. Mattachine Midwest, Chicago, Illinois
12. Mattachine Society of New York, New York, New York
13. Mattachine Society of Washington, Washington, D.C.
14. One, Inc., Los Angeles, California
15. Phoenix Society for Individual Freedom, Kansas City, Missouri
16. Society for Individual Rights, San Francisco, California
17. Student Homophile League, New York, New York
18. Tangents Group, Los Angeles, California
19. Texas Educational Homophile Movement, Houston, Texas
20. West Side Discussion Group, New York, New York