No. 82-1724

IN THE

Supreme Court of the United States

October Term, 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER,

Respondent.

ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS.

Motion for Leave to File Brief and Amicus Curiae Brief of the National Association of Business Councils; the Federation of Parents and Friends of Lesbians and Gays; Lesbian and Gay

(Cover Continued on Inside Front Cover)

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Question Addressed.

Since the decision of the State Court below was based upon that State Court's construction of a state statute, was certiorari improvidently granted?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Motion for Leave to File Brief.

The undersigned, as counsel for the organizations and individuals listed above, respectfully move this Court for leave to file the attached brief as *amicus curiae*.

Amici organizations and individuals have all worked in the area of human rights both within and outside the focus of sexual civil liberties.

The *National Association of Business Councils* is organized under the District of Columbia Non-Profit Corporation Act. The purposes of the corporation include promoting the common business interests of its members and the acceptance of gay businesses and gay business councils in the business and professional community at large. Members of NABC include business and professional organizations located in cities throughout the United States. Members of these organizations assert the importance of their right to travel among the various states for business as well as personal purposes without undue restrictions limiting their re-

lationships with their domestic partners or intimates during that travel. They ask the court to recognize the needs of all human beings to intimacy, and the needs of businesses to be able to send their employees, not only on "business trips," but also for extended periods of time, including permanent transfers, to the states which most benefit the particular business. The restrictions in some states against intimate physical activity between non-married couples can have a chilling effect on the willingness of employees to travel or move into those states. The problem is exacerbated in the case of homosexuals, who cannot, by law, be married. Relegation of these people to lives of celebacy is inappropriate and cruel. If the *Onofre* decision is to be reviewed by this Court, it should be in a case which properly raises and addresses all of these important issues.

The *Federation of Parents and Friends of Lesbians and Gays, Inc.* is a non-profit, tax-exempt, all volunteer organization of member groups throughout the United States. The purposes of the Federation and its members groups include supporting the full human rights and civil rights of lesbians and gays, assisting parents in their effort to understand, accept, and support their children with love and pride, and providing education for individuals and the community at large on the nature of homosexuality so that many of the myths and stereotypes which cause fear and discrimination may be dispelled. Like the National Association of Business Councils, the FPFLG is concerned about the right of those with a minority sexual orientation to travel and to live in and among the various states without unnecessary and unduly restrictive state interference. The context for the FPFLG, however, is not protection of business interests but protection of the family. Labelling persons with a minority sexual orientation as criminals in certain states keeps many children from staying near or even visiting the families of

their parents and other relatives. Such laws encourage ''ghettoization'' in jurisdictions which accept human diversity without criminal sanctions. Far from destroying the family, the decriminalization of the conduct of those with a minority sexual orientation would lead to a fuller maintenance of the integrity of the family unit and promote family unity, which *is* an appropriate activity of government. These issues should be addressed in a case which raises them. The present case does not.

The *Lesbian and Gay Interfaith Alliance* is a national association of Judeo-Christian religious organizations having a special outreach to the lesbian and gay community. Member groups include organizations with the following denominational affiliations: Methodists, Episcopalians, Lutherans, Seventh Day Adventists, Friends, United Church of Christ, United Fellowship of Metropolitan Community Churches, and World Congress of Gay and Lesbian Jewish Organizations. Members of this organization assert that First Amendment Establishment Clause arguments should be addressed to this Court in a proper case before the Court reviews the constitutionality of laws which have a direct impact on the private sexual activities of unmarried adult couples. They assert that the origin of the ''sodomy'' laws is ecclesiastical (as suggested in the dissent of Judge Sutin in *State v. Trejo*, 494 P.2d 173 (N.M. App. 1972); *State v. Bateman*, 547 P.2d 6 (Ariz. 1976); and *Doe v. Commonwealth's Attorney*, 403 F.Supp. 1199 (E.D.Va. 1975), *aff'd without opinion*, 425 U.S. 901 (1976)) and that the state has no valid secular interest in criminalization of such conduct. To validate such laws, therefore, is to assist religious sects in promoting their particular concept of morality over others — whether minority or majority — with a different view. While these issues are not squarely before the Court in the present case, a decision on the constitutional

issues raised in *Onofre* without benefit of participation by all those with a real interest throughout the United States, would be a disservice to the integrity of the law in this country and to the fundamental concepts of Freedom of Religion and Separation of Church and State.

National Gay Rights Advocates is a non-profit legal services corporation which advocates equal rights for, and defends against infringements of constitutional and civil rights of, lesbians and gay men throughout the United States. *Lawyers for Human Rights* is an affiliate of the Los Angeles County Bar Association and was organized in 1976 to provide a focal point from which to address human rights issues, including those which have an impact on the gay and lesbian community. It is made up of judges, attorneys, and law students from diverse backgrounds. Both of these organizations are interested in the same issues as specified above, namely, the right to travel interstate, the promotion of the family, and Separation of Church and State. They also feel that the present case does not present constitutional issues, but that the issues suggested by footnote 2 of the Petitioner's Petition should be addressed only in a case in which those issues are clearly set forth.

All of the individuals named as *Amici* have also worked toward human rights and the integrity of the law as it relates to sexuality. They also concur in and adopt the statements of interest of the organizations described above. In addition, they assert that the laws which still criminalize private consenting adult sexual behavior are scientifically, medically, and psychologically unsound and are based upon myths, stereotypes, and fears which can be replaced with accurate information when the proper case is brought before this Court. A decision on the constitutionality of such laws in the present case would be without the benefit of clearly specified and drawn issues and, therefore, without the full

participation of those interested parties with the expertise and knowledge necessary to provide the court with the fullest possible record upon which to base its decision.

Respectfully submitted,

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Brief Amicus Curiae.

Interest of Amici.

The interest of the *Amici* is set forth in the attached motion for leave to file.

Preliminary Statement.

In 1980, the New York Court of Appeals invalidated that State's consensual sodomy law. That law had proscribed "deviate sexual intercourse." *People v. Onofre,* 51 N.Y.2d 476. This Court denied a petition for a writ of certiorari in 1981. 451 U.S. 987.

While the State has statutes which specifically proscribe sexually soliciting minors, creating a public nuisance, using obscene language, and harassing or annoying others, there is no statute specifically addressing solicitation of "deviate sexual intercourse." Rather, the New York Penal Law contains a "general solicitation" statute which makes it a crime to solicit a crime.

Therefore, when consensual sodomy was no longer a crime in the State, neither was soliciting that conduct, unless the solicitation satisfied the elements of one of the other crimes mentioned above.

There remained extant in the New York Penal Law, however, a proscription against loitering — or lingering — in a public place for the purpose of engaging in or soliciting "deviate sexual intercourse."

When "deviate sexual intercourse" was a crime, so were the more inchoate anticipatory acts. One step removed from the act was inviting someone to engage in the act. Two steps removed was lingering in a public location with the intent to invite someone to engage in the act.

When "deviate sexual intercourse" was no longer a crime, the question remained whether the anticipatory conduct to what was now a lawful act could still be criminalized. Solicitation was not a problem because the general solicitation law did not apply to lawful acts. But the loitering law remained to be construed by the state courts. The arrest of Robert Uplinger on August 7, 1981, shortly after the *Onofre* decision became final, provided that opportunity.

Mr. Uplinger was arrested for inviting an undercover vice-officer home to engage in an oral sex act. The invitation came in the context of a longer conversation between the two. Although the conversation took place in a public location, there was no evidence that anyone other than the two participated in or heard it.

After Mr. Uplinger was convicted, appeals eventually took the case to the New York Court of Appeals which, in a very short memorandum decision, construed the loitering statute as necessarily a companion to the consensual sodomy statute which had been invalidated earlier. It also affirmed and acknowledged that the purpose of the statute was not

to control harassment or offensive accosting but to control activity anticipatory to a crime. The Court of Appeals concluded that the loitering statute had to fall because there was no basis for the State's continuing ''to punish conduct anticipatory to the act of consensual sodomy'' after consensual sodomy became legal. The New York court held the loitering statute invalid.

Statutory Provisions.

All sections refer to New York Penal Law:

130.38 Consensual sodomy: ''A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person.''

100.00 Criminal solicitation, third degree: A person is guilty ''when, with intent that another person engage in conduct constituting a crime, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct.''

240.35-3 Loitering: A person is guilty ''when he: . . . 3. Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate sexual nature . . . .''

240.20 Harassment: A person is guilty ''when, with intent to harass, annoy or alarm another person: . . . 2. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or 3. He follows a person in or about a public place or places; or . . . 5. He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.''

240.20 Disorderly conduct: A person is guilty ''when, with intent to cause public inconvenience, annoyance or alarm or recklessly creating a risk thereof: 1. He engages

in fighting or in violent, tumultuous or threatening behavior; or 2. He makes unreasonable noise; or 3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or . . . 5. He obstructs vehicular or pedestrian traffic; or 6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or 7. He creates a hazardous or physically offensive condition by an act which serves no legitimate purpose.''

Summary of Argument.

Certiorari in this matter was improvidently granted, and the present case and Petitioner's petition for writ of certiorari do not adequately raise federal constitutional questions. Further, a review at this time of the case of *People v. Onofre,* 51 N.Y.2d 476 (1980), *cert. den.,* 451 U.S. 987 (1981), would be inappropriate and a violation of principles this Court has previously held binding.

Finally, the integrity of our federal system of government is reflected in the deference paid by the United States Supreme Court to the decisions of the high courts of the various states whenever possible. That integrity is on trial directly in the present case.

ARGUMENT.

I.

THIS CASE IS NOT A PROPER VEHICLE FOR REVIEW OF *ONOFRE*.

The Rules of the Supreme Court[1] require that a petition for writ of certiorari set forth the questions presented for review. There is no doubt that the ''two questions presented'' in the petition in *Uplinger* on their face do not involve *Onofre*. Indeed, it is only in a footnote[2] that review is suggested with respect to *Onofre*. The fact that Petitioner did not include this request in the ''questions presented'' seems to support the position of amici curiae that *this record* does not raise the question of *Onofre*'s validity.

There is additional language in the Petition in which the Petitioner further ratifies the *Onofre* decision for the purposes of the present review. For example, on page 8 of the Petition, the Petitioner urges that ''[t]he present [loitering] statute does not attempt to control private sexual activities.'' Private sexual activity was a major concern of the *Onofre* decision. Nonprivate sexual activity is regulated or prohibited by statutes other than that which was the subject of *Onofre*.[3] Thus, the Petitioner admits that the present case does not hinge on *Onofre* conduct.

On page 10, the petition reads: ''If we acknowledge that a right of privacy exists which *necessarily includes the right*

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[1]Rule 21 of the Rules of the Supreme Court provides that the petition for writ of certiorari shall contain ''(a) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition or fairly included therein will be considered by the Court.''

[2]Petition, p. 6, fn. 1.

[3]The New York statutory scheme in this area is discussed *infra* at pages 8, 11.

of an individual to engage in whatever sexual practices he desires in the confines of his own home, . . .'' (Emphasis supplied.) Therefore, petitioner bases his arguments on the premise that the *Onofre* decision was correct.

In short, in the context of the *Uplinger* case, *Onofre* was not properly presented to this Court for review. While the brief in opposition to the petition for certiorari and other *amicus curiae* briefs attempt to bulwark the validity of *Onofre*, this can only be attributed to an excess of caution. Two factors are crucial. First, the failure of the Petitioner adequately to raise the question. And second, the fact that the present case was not a federal constitutional holding, and this Court, therefore, should not exercise jurisdiction in the matter.[4]

It is also extremely significant that the Petitioner, in his present brief submitted to this Court, has abandoned any interest in requesting that this Court review *Onofre* or its constitutional issues.

Because the constitutional and human issues presented in *Onofre* are so substantial and significant to a large portion of the population of this country, because sex is itself so fundamental and important to the human condition, because of the ecclesiastical nature of the sex taboos discussed in *Onofre*, and because of the realities of the commonplace nature of some of the previously proscribed activities, review in the United States Supreme Court should not be through the back door by way of a footnote in a petition.

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[4]In addition, while *amici* recognize that a denial of certiorari may not signify approval or disapproval, it should be noted that *Onofre* discussed in detail the constitutional questions of privacy and equal protection and was extensively briefed before the New York Court of Appeals and subsequently before this Court on petition for certiorari; yet certiorari was denied without dissent by this Court in 1981. (451 U.S. 987) There is no reason to reopen *Onofre* at this time.

If the Court desires to review those issues, such review should be in a case in which the issues *are* clearly presented. Only then will all interested parties have adequate notice of the questions before the Court. Only then will they be able to establish their interest and to participate fully. A decision on the *Onofre* issues would have an impact on many fundamental rights affecting many people, including, for example, the right of unmarried couples to travel interstate throughout the United States. The nature of the federal system combined with constitutional principles of personal liberty require that all inhabitants of the country be free to travel throughout the entire breadth of the United States uninhibited by laws which unreasonably burden or restrict this movement. *Shapiro v. Thompson,* 394 U.S. 618; *United States v. Guest,* 383 U.S. 745. This is just one area of many which demands to be briefed and argued adequately before the United States Supreme Court should undertake to review and decide the *Onofre* issues. In the present case, the constitutional issue of *Onofre* are *not* clearly before the Court.

II.

THE HOLDING IN *UPLINGER* WAS BASED UPON A STATUTORY AND NOT A CONSTITUTIONAL CONSTRUCTION.

The statutory history of Penal Law (P.L.) 130.38 (the *Onofre* statute) is informative as to the legislative purpose behind that enactment. The Temporary Commission on Revision of the Penal Law and Criminal Code had recommended dropping all proscriptions against private acts of consensual sodomy. The legislature restored the consensual sodomy offense because deletion thereof might ostensibly be construed as legislative approval of deviate conduct. 51 N.Y.2d at 489.

The heart of the state proscription against the private sexual conduct of unmarried consenting adults was therefore removed when the consensual sodomy law was invalidated

in *Onofre*. The *Uplinger* case simply removed an artery which had received its life from that excised heart.

In other words, in *Uplinger* the Court of Appeals, in a very summary decision, construed P.L. 240.35, subd. 3, as a ''companion statute to the consensual sodomy statute (P.L. 130.38).'' Such a construction of the law, whether or not erroneous, is clearly not a concern of the Supreme Court. The State has construed its own laws, and, as the cases mandate, this Court considers itself bound by the State's construction, especially when it does no more than to hold that one statute is necessarily a ''companion'' to another. After the *final* arbiter as to the statutory — not constitutional — construction of the statute has thus construed it, neither the petitioner nor the federal courts may override that statutory construction. Therefore, all of the petitioner's arguments quarreling with the State Court's construction are misplaced and should be presented to the state legislature.[5]

Based upon the fact that the loitering statute was a ''companion'' to the consensual sodomy statute, and since the former merely punished conduct anticipatory to the latter, the New York Court of Appeals simply refused to sever the two related laws. When the primary law fell, the secondary statute, inextricably intertwined with the other, naturally and logically followed. The non-severability of these companion statutes is reasonable in light of the entire statutory scheme discussed below. In any case, the State's high court has the power to make such a determination without fear of federal review. All of the other constitutional arguments in this case are surplusage.[6]

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[5]The New York Court of Appeals suggested as much in *Uplinger*. 58 N.Y.2d at 937.

[6]It is further submitted that the ruling of the New York Court of Appeals was not bottomed on constitutional issues presented in *Onofre* but rather on the *fact* that the sodomy law was previously invalidated; under its construction of the loitering statute (set forth in detail *infra*), the New York court was precluded from doing other than what it did by the doctrine of *stare decisis*.

III.

NOT ONLY IS THE STATUTORY CONSTRUCTION OF THE NEW YORK COURT AUTHORITATIVE, IT IS ALSO REASONABLE.

A. The State Court's Construction Is Authoritative and Non-Reviewable.

As this Court stated in *Gregg Dyeing Co. v. Querry,* 286 U.S. 472, at 480:

> "When the Supreme Court of the State has held that two or more statutes must be taken together, we accept that conclusion as if written into the statutes themselves."[7]

This Rule is in line with a long history of cases declaring that the highest court of a state is the final authority in interpreting the meaning and effect of state laws.[8]

Once a state court has interpreted its own statutes, the federal courts, including this Court, "follow its construction, subject to the inquiry whether the statute as construed is consistent with the Constitution of the United States." *Anglo American Provision Co. v. Davis Provision Co.,* 191 U.S. 373, 374 (1903). For purposes of deciding constitutional questions, the Supreme Court must take a state statute as though it read precisely as the high court of that State has interpreted it. *Minnesota v. Probate Court,* 309 U.S. 270.[9]

Likewise, in *O'Brien v. Skinner,* 414 U.S. 524, 531 (1973), in determining the constitutionality of statutes gov-

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[7]*Citing Herbert v. La.*, 272 U.S. 312, 317, and *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 73.

[8]*See: Howe Mach. Co. v. Gage,* 100 U.S. 676.

[9]*See also: Landmark Communications v. Virginia,* 435 U.S. 829; *New York v. Ferber,* .... U.S. ...., 102 S.Ct. 3348.

erning absentee ballots in New York, This Court stated that "it is not our function to construe a state statute contrary to the construction given it by the highest court of a State."

B. The State Court's Construction Is Reasonable.

The New York Court of Appeals made three critical statements regarding judicial construction of the loitering statute prior to declaring the statute unconstitutional.

First, the specific loitering law "must be viewed as a companion statute to the consensual sodomy statute . . . ." 58 N.Y.2d at 936.

Second, "[t]he object of the loitering statute is to punish conduct anticipatory to the act of consensual sodomy. * * * [I]t was aimed at proscribing overtures . . . leading to what was . . . an illegal act." 58 N.Y.2d at 937.

These first two statements are consistent with the legislative history of the loitering law. When the statute was first introduced in March of 1964, Assembly Bill A-5376 (later numbered A-6187) proscribed loitering to solicit or engage in any "lewd or sexual act."[10] The statute as it exists now reflects the amendments which resulted in the loitering proscription's application solely to "deviate sexual intercourse", or consensual sodomy.

Third, "the challenged statute may not be characterized as a harassment statute. * * * [I]t was aimed at proscribing overtures, not necessarily bothersome to the recipient, . . ." 58 N.Y.2d at 937. When testing a state law's validity, the United States Supreme Court may *not* give the law some significance which the State's highest court has expressly stated it does not have. *Orr v. Allen,* 248 U.S. 35.

The New York court's construction is also consistent with the entire legislative statutory scheme contained in the penal

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[10]At section 250.15(3) of Assembly Bill A-6187.

law relating to sexual and offensive conduct and speech:

* ''Personal Harassment'' is proscribed by P.L. 240.25;

* ''Soliciting Public Sexual Conduct'' is prohibited by P.L. 245.00 coupled with P.L. 100.00;

* ''Disorderly Conduct,'' P.L. 240.20, proscribes use of obsence or abusive language in public;

* ''Sexual Solicitation of a Minor'' is criminalized in P.L. 100.05;

* ''Criminal Nuisance'' is prohibited by P.L. section 240.45.

To use the loitering law for any of *these* purposes would be logically contrary to legislative intent in that the elements of the criminal laws specifically designed for these areas could be avoided, including, in some cases, specific intent.[11]

Under the reasonable construction of the law as contained in *Uplinger,* the loitering statute *was* a companion statute with the sole purpose of criminalizing and punishing anticipatory conduct or speech designed to lead to a criminal act, that is, loitering connected with overtures leading to the illegal act of consensual sodomy. It was not a nuisance or harassment statute, and to treat it as such would circumvent the legislation specifically provided for nuisance or harassment. All other areas implicated, including prostitution, public sexual activity, and sex with minors, are also the subject of well-focused statutes specific to those areas.

It thus follows logically and, perhaps, necessarily, as a matter of statutory construction, that this loitering statute must fall with the demise of the consensual sodomy law. At least there is no question but that this issue lies within the particular province of the New York Court of Appeals to decide.

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[11]Such as in the harassment and disorderly conduct statutes.

IV.

THIS COURT SHOULD AVOID DECIDING UNNECESSARY CONSTITUTIONAL ISSUES AND SHOULD, THEREFORE, DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED.

If a case can be decided without reaching constitutional issues, it should be so decided; only out of necessity for adjudication of rights of litigants actually before the court are constitutional judgments justified. *Broadrick v. Oklahoma,* 413 U.S. 601, 611 (1973), including a reference to *Marbury v. Madison,* 1 Cranch 137, 178 (1803). Therefore, certiorari *was* improvidently granted.

When it becomes apparent that the opinion of a state court may have been based on state law, the appropriate action for this Court is to dismiss the writ.

In *Lynch v. People of New York ex Rel. Pierson,* 293 U.S. 52, the New York Appellate Division annulled a tax determination, citing cases decided under the Fourteenth Amendment to the United States Constitution. The Court of Appeals affirmed that action without giving an opinion. The Supreme Court dismissed the writ of certiorari as having been improvidently granted. While it recognized that it might "be surmised" that the State decision rested on federal grounds, the Court stated that "jurisdiction cannot be founded upon surmise . . . . [I]f it does not appear upon which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, the Court will not take jurisdiction." *Lynch, supra,* at 54-55.

It has long been the policy of this Court to avoid deciding constitutional issues if there are other suitable grounds upon which the case may be decided.

As the Court stated in *Rescue Army v. Municipal Court,* 331 U.S. 549, 568 (1946):

> "From *Hayburn's Case,* 2 Dall. 409, to *Alma Motor Co. v. Timken Detroit Axle Co.* [329 U.S. 129] . . . this Court has followed a policy of strict necessity in disposing of constitutional issues. The earliest exemplifications . . . rose in the Court's refusal to render advisory opinions and in applications of the related jurisdictional policy drawn from the case and controversy limitation. . . . The same policy has been reflected continuously not only in decisions but also in Rules of Court and in statutes made applicable to jurisdictional matters, including the necessity for reasonable clarity and definiteness, as well as for timeliness in raising and presenting constitutional questions."

If, in its avoidance of a more lengthy opinion, the court in *Uplinger* created ambiguities or any lack of clarity as to its reasoning, *Rescue Army, supra*, would seem to dictate that the lack of "reasonable clarity and definiteness" as to the "constitutional questions" should result in the conclusion that certiorari was improvidently granted. Certainly, if the *Uplinger* decision *were* based upon constitutional issues, the opinion does not inform anyone as to whether the decision is based upon privacy, equal protection, due process, or some First Amendment consideration. Neither this Court nor any counsel addressing it has sufficient information upon which to properly argue or decide the correctness of unspoken reasoning for possible unmentioned constitutional bases for the holding.

This policy of deciding constitutional questions only when necessary and only when clearly and adequately presented has not been limited to jurisdictional issues, as the Court also has:

> "developed, for its own governance in cases within its jurisdiction, a series of Rules under which it has avoided passing upon a large part of all constitutional questions

> pressed upon it for decision.'' *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (concurring opinion of Brandeis, J. joined by Cardozo, Stone and Roberts, JJ.).

This policy requires that if the case before it *may* be decided on statutory grounds, this Court should avoid reaching the constitutional issues presented. As the Court stated in *Giler v. Louisville and Nashville R. Co.*, 213 U.S. 175, 191:

> ''[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.''

In the instant case a review of the opinion of the New York Court of Appeals reveals that the case turned on whether the loitering statute was severable from the consensual sodomy statute. In calling the loitering statute a ''companion'' statute and, as a result, invalidating it, the Court of Appeals was deciding the severability issue in the negative. The Court thus declined to transform the statute to have a purpose different from that which it had determined the legislature intended. To do otherwise, the Court would have had to engage in judicial legislation. The only real issue before the United States Supreme Court now is the correctness of that statutory determination by the New York Court of Appeals.

In fact, in order to reach the constitutional issues raised in *Onofre* and discussed in the other briefs submitted to the Court, this Court must be willing to give a purely advisory opinion.

Rescue Army v. Municipal Court, 331 U.S. 549 (1946), was similar in its posture to the case presently pending before this Court. In *Rescue Army*, the California court, in an opinion ''ambiguously incorporating parts of an opinion in another case,'' sustained the state code sections involved

"without identifying provisions of the code or passing on questions of local procedure."

In dismissing that case, this Court declined to exercise its jurisdiction to pass on constitutional issues since they were presented in an abstract and speculative form and since the State Court did not clearly interpret numerous ambiguous and interdependent provisions of the intricate chapter out of which they arose. This Court stated that constitutional issues should be considered only when they are presented "in clean-cut and concrete form, unclouded by a serious problems of construction relating to either the terms of the questioned legislation or to its interpretation by the state courts."[12]

V.
CONCLUSION.

Amici Curiae herein argue that the *Uplinger* opinion presents issues of statutory construction rather than constitutional questions. The New York Court of Appeals has not in the past been at a loss for words in the area of constitutional analysis; yet, in *Uplinger,* it reached its decision in three paragraphs without mentioning any specific constitutional rationale. The lack of constitutional analysis is further indication that the invalidation of the loitering statute was not on constitutional grounds but rather because the purpose of the loitering statute in the statutory scheme was

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[12]See also: *Belcher v. Stengel,* 429 U.S. 118, 119 (1976) (". . . it appears that the question framed in the petition for certiorari is not in fact presented by the record now before us."); *Atchley v. California,* 366 U.S. 207 (1961) (". . . we conclude that the totality of circumstances did not warrant bringing the case here."); *Kimbrough v. United States,* 364 U.S. 661 (1961) (". . . we have concluded that this question is not presented with sufficient clarity in this case."); and *Needelman v. United States*, 362 U.S. 600 (1960) (". . . we conclude that the record does not adequately present the questions tendered in the petition.").

to punish solicitations of consensual sodomy when consensual sodomy had been against the law.

Perhaps, under certain circumstances, public solicitation of non-criminal sexual activity might be the subject of valid proscription, such as when such public speech is aimed at harassing or offending others or where it constitutes some sort of nuisance or public danger. In the case of the New York law, however, other specific criminal statutes cover all of these concerns, and use of the loitering statute in these areas avoids the specific ingredients which the New York legislature chose to require as elements of those crimes.

The New York Court of Appeals, therefore, correctly viewed the loitering statute's purpose solely as criminalizing conduct anticipatory to an illegal act. When the ultimate act was no longer illegal, the speech anticipating it, and lingering in a location with the purpose of uttering such speech anticipating it, could not remain a crime. While the Court was not specific about any constitutional rationale for such a holding, it was very specific about the statutory construction which led the Court to its conclusion. Statutory construction is all we are clearly confronted with in the opinion, and this is a matter which this Court has consistently held to be within the non-reviewable discretion of the State Court.

For all of the foregoing reasons, *Amici Curiae* herein urge this Court to dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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JAY M. KOHORN,
Center for Education and
Legal Advocacy,
Attorneys for Amici.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of December, A.D. 1983

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