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Libertarians Join Liberals in Opposing Sodomy Law

By LINDA GREENHOUSE

WASHINGTON, March 17 — The constitutional challenge to the Texas "homosexual conduct" law that the Supreme Court will take up next week has galvanized not only traditional gay rights and civil rights organizations, but also libertarian groups that see the case as a chance to deliver their own message to the justices.

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The message is one of freedom from government control over private choices, economic as well as sexual. "Libertarians argue that the government has no business in the bedroom or in the boardroom," Roger Pilon, vice president for legal affairs at the Cato Institute, said today, describing the motivation for the institute, a leading libertarian research organization here, to file a brief on behalf of two gay men who are challenging the Texas law.

Dana Berliner, a lawyer for the Institute for Justice, another prominent libertarian group here that also filed a brief, said, "Most people may see this as a case purely about homosexuality, but we don't look at it that way at all." The Institute for Justice usually litigates against government regulation of small business and in favor of "school choice" tuition voucher programs for nonpublic schools.

"If the government can regulate private sexual behavior, it's hard to imagine what the government couldn't regulate," Ms. Berliner said. "That's almost so basic that it's easy to miss the forest for the trees."

The Texas case is a challenge to a law that makes it a crime for people of the same sex to engage in "deviate sexual intercourse," defined as oral or anal sex. In accepting the case, the justices agreed to consider whether to overturn a 1986 precedent, *Bowers v. Hardwick*, which upheld a Georgia sodomy law that at least on its face, if not in application, also

applied to heterosexuals.

While the Texas case has received enormous attention from gay news media organizations and other groups that view the 1986


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From left, Tyrone Garner, John G. Lawrence and a lawyer, Mitchell Katine, in 1998. Mr. Garner and Mr. Lawrence were arrested when found having sex in Mr. Lawrence's apartment in Houston.

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decision as particularly notorious, it has been largely overshadowed in a busy Supreme Court term by the challenge to the University of Michigan's affirmative action program. The justices accepted both cases on the same day last December, and briefing has proceeded along identical schedules. The Texas case will be argued March 26 and the Michigan case six days later, on April 1.

Although libertarian-sounding arguments were presented to the court as part of the overall debate over the right to privacy in the *Bowers v. Hardwick* case, they were not the solitary focus of any of the presentations then. The Institute for Justice had not yet been established, and the Cato Institute, which dates to 1977, had not begun to file legal briefs. Whether the arguments will attract a conservative libertarian-leaning justice like Clarence Thomas, who was not on the court in 1986, remains to be seen.

More traditional conservative groups have entered the case on the state's side, among them the American Center for Law and Justice, a group affiliated with the Rev. Pat Robertson that is a frequent participant in Supreme Court cases.

The split among conservatives demonstrates "a diversity of opinion among our side," Jay Alan Sekulow, the center's chief counsel, said today. He said the decision to come in on the state's side presented a "tough case, one that we approached with reluctance." He said he decided to enter the case after concluding that acceptance of the gay rights arguments by the court might provide a constitutional foundation for same-sex marriage.

The marriage issue also brought other conservative groups into the case on the state's side. "The Texas statute is a reasonable means of promoting and protecting marriage — the union of a man and a woman," the Family Research Council and Focus on the Family told the court in a joint brief.

While the Texas case underscores the split between social and libertarian conservatives, it is evident at the same time that the alliance between the libertarians and the traditional civil rights organizations is unlikely to extend further. The two are on opposite sides in the University of Michigan case, with both the Cato Institute and the Institute for Justice opposing affirmative action while nearly every traditional civil rights organization has filed a brief on Michigan's side. The Bush administration, which filed a brief opposing the Michigan program, did not take a stand in the Texas case.

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