

## LEGISLATIVE PROPOSAL

From: LGBT Law Section

To: Legislative Policy Subcommittee of State Bar of Texas Board of Directors

Re: Legislative Proposal to conform Texas law in light of *Lawrence v. Texas*, 539 U.S. 558 (2003), *Obergefell v. Hodges*, 576 U.S. 644 (2015), and the final judgment in *De Leon v. Perry*, No. SA-13-CA-00982-OLG (W.D. Tex., July 7, 2015)

Date: May 31, 2020

### **Wording of proposed legislation**

Attached are a bill and a joint resolution drafted by counsel at the Texas Legislative Council at the request of members of the 85th Legislature.

### **Explanation**

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court of the United States reviewed the constitutionality of section 21.06 of the Texas Penal Code. On June 26, 2003, the Court struck down section 21.06 as unconstitutional under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

In *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Supreme Court of the United States reviewed a decision of the Court of Appeals for the Sixth Circuit, which had upheld state laws in Michigan, Ohio, Kentucky, and Tennessee restricting marriage to opposite-sex couples. Like those states in the Sixth Circuit, Texas has both a constitutional (article I, section 32) and a statutory provision (Family Code section 6.204) limiting marriage to opposite-sex couples. On June 26, 2015, the Supreme Court struck down such laws and held that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The Texas federal case pending at the time of *Obergefell* was *De Leon v. Perry*, 975 F. Supp.

2d 632, 665 (W.D. Tex. 2014), *aff'd*, 791 F.3d 619 (5th Cir. 2015). On remand, the district court signed a final judgment on July 7, 2015 stating in part:

It is hereby ORDERED, ADJUDGED, and DECREED that:

- 1) Any Texas law denying same-sex couples the right to marry, including Article I, §32 of the Texas Constitution, any related provisions in the Texas Family Code, and any other laws or regulations prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983;
- 2) Defendants are permanently enjoined from enforcing Texas's laws prohibiting same-sex marriage; and
- 3) Any taxable costs in this case are assessed against the Defendants.

Texas is bound by the final judgment in *De Leon* as well as by the Supreme Court's *Obergefell* decision.

The attached bill and joint resolution propose to remove those sections of the Constitution, Family Code, and Penal Code struck down by the *Lawrence* and *Obergefell* decisions, as well as references in other statutes to these provisions. Additionally, the Family Code and Health and Safety Code contain multiple provisions that assume marital and family relationships are based solely upon opposite-sex marriage. The attached bill drafted by counsel from the Texas Legislative Council with input from the LGBT Law Section conforms Texas law to both *Lawrence* and *Obergefell*, recognizing the legal issues being faced daily by Texas courts as a direct result of those opinions.

#### **Similar Legislation / Statement Regarding Prior Draft Legislation**

At this time, the LGBT Law Section is unaware of any similar legislation being considered by the Texas Legislature in the next legislative session.

This is the third time proposed legislation will be suggested to members of either the House or the Senate conforming Texas law to *Obergefell* by removing constitutional and Family Code provisions restricting marriage to opposite-sex couples and conforming the Family Code and Health

and Safety Code to the concept that marriage can include same- or opposite-sex couples. Prior legislation was offered in both the Texas House and Senate as follows:

85th Legislature (2017)	H.B. 573	(Rep. Thompson) (includes 21.06 provisions)
	H.B. 1663	(Reps. Dutton and Reynolds)
	S.B. 236	(Sen. Menéndez) (Family Code section 6.204 repeal and 21.06 provisions only)
	S.B. 157	(Sen. Hinojosa and Rodríguez)
	S.B. 251	(Sen. Rodríguez) (includes 21.06 provisions)
	S.J.R. 16	(Sens. Rodríguez, Garcia, Hinojosa, Whitmire) (repeal of Texas Constitution article I, section 32)
86th Legislature (2019)	H.B. 978	(Rep. Beckley, Mary González, Israel, Julie Johnson, and Reynolds) (includes 21.06 provisions)
	S.B. 153	(Sen. Rodríguez) (includes 21.06 provisions)
	H.J.R. 64	(Reps. Beckley, Bernal, Bucy, Israel, and Ramos) (repeal of Texas Constitution article I, section 32)
	S.J.R. 9	(Sen. Rodríguez) (repeal of Texas Constitution article I, section 32)

No similar legislation conforming Texas law to the *Obergefell* decision has been considered prior to 2017 by any section or committee of the State Bar. The Section will be happy to supply the committee with information on the legislative history of the bills and joint resolution listed above.

Prior legislation to repeal Penal Code section 21.06, and at times references to section 21.06, has been offered in both the Texas House and Senate as follows:

Pre-*Lawrence* legislation to repeal section 21.06:

64th Legislature (1975)	H.B. 759	(Rep. Washington)
73rd Legislature (1993)	H.B. 652	(Reps. Maxey and Danburg)
75th Legislature (1997)	H.B. 1329	(Reps. Danburg, Ehrhardt, and Maxey)
76th Legislature (1999)	H.B. 337	(Rep. Danburg)

77th Legislature (2001)	H.B. 389	(Reps. Maxey and Ehrhardt)
	H.B. 687	(Reps. Danburg and Maxey)

This is the ninth time the section has proposed legislation for the repeal of Penal Code section 21.06 following the *Lawrence* decision. In 2005, 2007, 2009, 2011, 2013, 2015, 2017 and 2019 the State Bar Board of Directors approved this proposal and included it in the State Bar’s legislative package. In each session, the bill that was filed not only included the repeal of Penal Code section 21.06, but also included the repeal of references to Penal Code section 21.06 in Health and Safety Code sections 85.007(b) and 163.002:

79th Legislature (2005)	H.B. 3215	(Rep. Coleman)
80th Legislature (2007)	H.B. 1326	(Rep. Coleman)
81st Legislature (2009)	H.B. 3036	(Reps. Coleman and Farrar)
82nd Legislature (2011)	H.B. 604	(Rep. Farrar)
	H.B. 2156	(Rep. Coleman)
83rd Legislature (2013)	H.B. 1701	(Rep. Farrar)
	H.B. 3232	(Rep. Coleman)
	S.B. 538	(Sens. Rodríguez and Ellis)
84th Legislature (2015)	H.B. 553	(Rep. Moody)
	H.B. 1523	(Rep. Farrar)
	H.B. 2057	(Rep. Coleman)
	S.B. 148	(Sen. Rodríguez)
85th Legislature (2017)	H.B. 96	(Rep. Moody)
	H.B. 573	(Rep. Thompson) (includes same-sex marriage provisions)
	H.B. 1848	(Rep. Coleman)
	S.B. 166	(Sens. Rodríguez, Garcia, and Whitmire)
	S.B. 236	(Sen. Menéndez) (includes Family Code section 6.204 repeal)
	S.B. 251	(Sen. Rodríguez) (includes same-sex marriage provisions)
86th Legislature (2019)	H.B. 978	(Rep. Beckley, Mary González, Israel, Julie

	Johnson, and Reynolds) (includes same-sex marriage provisions)
H.B. 980	(Reps. Beckley, Coleman, Jessica González, Mary González, Israel, and Reynolds)
S.B. 152	(Sens. Rodríguez, Johnson, and Whitmire)
S.B. 153	(Sen. Rodríguez) (includes same-sex marriage provisions)

To date, none of the post-*Lawrence* bills have progressed past a favorable committee recommendation. The Section will be happy to supply the committee with information on the legislative history of the bills listed above.

In the 84th Legislature (2015), the Section is aware of two bills that were filed to repeal the Family Code’s prohibition against same-sex marriage: H.B. 130 (Rep. Anchia) and S.B. No. 98 (Sen. Hinojosa). The Section is also aware of two joint resolutions that were filed to repeal the constitutional prohibition against same-sex marriage: H.J.R. 34 (Rep. Coleman) and S.J.R. 13 (Sen. Rodríguez). None of this legislation received a committee hearing.

### **Economic Impact**

As the Section has argued in the past, keeping void laws “on the books” costs the state and local government money. The “homosexual conduct” law was used in a 2009 incident in El Paso as possible grounds for the police to arrest patrons who were kissing in a restaurant, resulting in a law suit against the City. *De Leon v. City of El Paso*, 353 S.W.3d 285, 287–89 (Tex. App.—El Paso 2011, no pet.); Darren Meritz, *Controversial Kiss: Chico’s Tacos Security Firm Responds to Protests*, EL PASO TIMES (July 10, 2009). The suit has since been settled. Daniel Borunda, *‘Chico’s Five’ Settle Suit for Improved Police Training*, EL PASO TIMES (May 16, 2012).

It is completely foreseeable that failure to conform the laws of Texas to the unambiguous decisions in *Lawrence* and *Obergefell* will continue to waste scarce public funds. The laws are void,

and should be repealed.

### **Conclusion**

A void statutory provision “must be considered as never having been enacted.” *Sanders v. State Dep’t of Pub. Welfare*, 472 S.W.2d 179, 181 (Tex. Civ. App.—Corpus Christi 1971, writ dism’d w.o.j.); *Genzer v. Fillip*, 134 S.W.2d 730, 732 (Tex. Civ. App.—Austin 1939, writ dism’d judm’t cor.). An unconstitutional statute is utterly void and shall be treated as if “it had never been passed.” *Reyes v. State*, 753 S.W.2d 382, 383 (Tex. Crim. App. 1988). An unconstitutional statute is void ab initio, not merely from the date of the decision branding it unconstitutional. *Id.* at 383–84. Moreover, a decision of the Supreme Court of the United States constitutes the Supreme Law of the Land. *Cooper v. Aaron*, 358 U.S. 1 (1958).

### **Verification**

I, Elliot Beck, chair of the LGBT Law Section, hereby verify that all sections and committees of the State Bar have been sent this proposed legislation for comment. No comments have been received as of this date. I will supplement this proposal with any comments that may be received immediately following the deadline for such comments.

---

Elliot Beck  
r.elliott.beck@gmail.com

May 31, 2020