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national news

Double whammy

Georgia Supreme Court upholds sodomy law; federal appeals court vacates landmark gay association ruling

by Richard Shumate

The Georgia Supreme Court on March 11 turned back a legal challenge to the state's sodomy law, saying the statute was constitutional and served a compelling state interest in furthering the public's "moral welfare."

And the bad news for gays and lesbians in Georgia didn't stop there. Three days earlier the 11th U.S. Circuit Court of Appeals in Atlanta voted to vacate a landmark December decision by a three-judge panel that held that gays and lesbians have a constitutionally protected right to intimate association. Now the full court, believed to be much more conservative than the panel that initially ruled in the case of *Shahar vs. Bowers*, will rehear the matter.

Frustrated by repeated failures to get the Georgia Legislature to repeal the sodomy law, gay rights advocates had turned to the courts, hoping to duplicate successes in three other Southern states—Kentucky, Tennessee and Louisiana—where courts have recently struck down sodomy laws. Going into the case, the Georgia high court was seen as split between two judges who were sympathetic, two who were not and three swing votes.

But the votes of the three swing judges, all of whom are up for reelection in November, were cast in favor of upholding the law, a 5-2 majority.

"We can only wonder if it was considered too risky to overturn the sodomy law," says Larry Pellegrini, chair of the lesbian and gay rights chapter of the Georgia chapter of the

American Civil Liberties Union, which helped push the challenge through the courts. "It would add insult to injury to find out we were a political sacrificial lamb again."

Perhaps the only bright spot for gay rights advocates was a blistering and eloquent dissent to the decision by Justice Leah Sears, who has been mentioned as a possible future appointee to the U.S. Supreme Court.

"No significant state interest can justify the legislation of norms simply because a particular belief is followed by a majority," Sears wrote. "By upholding the sodomy statutes on public morality grounds, the majority opinion makes the right to privacy wholly dependent upon [majority] approval—a result that has absolutely no place whatsoever in constitutional jurisprudence."

Sears and Justice Carol Hunstein, who are the only women on the court, voted to overturn the sodomy law as a violation of the right to privacy guaranteed in the Georgia Constitution. All five men on the court voted to uphold it.

The test case involved L. Chris Christensen, who was convicted by a jury on the charge of solicitation of sodomy and sentenced to one year of probation.

He had been approached at an Interstate highway rest area by an undercover police officer and agreed to accompany the officer to a nearby hotel for oral sex. The agreement involved no exchange of money, and Christensen was arrested before any sexual contact took place. The officer was in the rest area as part of a sting operation launched by the Rockdale County Sheriff's Department after it received complaints from men who said they had been approached by other men looking for sex.

Christensen and his attorneys argued that the sodomy law violated the Georgia Constitution's right to privacy and that his conviction for merely discussing sodomy with another consenting adult also violated his free speech rights.

They noted that the suggested sex act was to have taken place behind closed doors in a hotel, not in the public areas of the rest area. And they also argued that the law, which in Georgia applies to heterosexuals engaging in oral or anal sex as well as gay men and lesbians, is unfairly enforced. A lower state court in another case has held that the law can't be applied to consenting heterosexuals.

In a case involving Georgia's sodomy statute, the U.S. Supreme Court ruled in 1986 that the federal Constitution's right of privacy does not prohibit states from outlawing consensual sodomy. But like many other states, the privacy provisions in Georgia's Constitution are stronger than those in the U.S. Constitution.

In fact, Georgia's Supreme Court was the first state high court to set out a specific right to privacy, more than 60 years before the U.S. Supreme Court did.

Gay rights advocates had hoped the court would strike down the law based on state not federal law. In the past three years the Kentucky Supreme Court and lower courts in Tennessee and Louisiana have invalidated sodomy laws based on the grounds of state privacy rights.

Christensen's attorneys can ask the U.S. Supreme Court to reconsider the ruling. Pellegrini says no decision has yet been

made as to whether that request will be made.

In the case of *Shahar vs. Bowers* the 11th U.S. Circuit Court of Appeals granted a request by Georgia Attorney General Michael Bowers to hear the case "en banc," which means all 12 judges who sit on the court will make the final decision.

In December 1995 a panel of three appellate court judges held that lesbian attorney Robin Shahar of Atlanta had a right to intimate association with her partner, Fran Shahar. The judges ordered a trial court to determine if Bowers violated that right in 1991 when he rescinded a job offer to Robin Shahar after discovering that the Shahars were planning a religious commitment ceremony. The panel also said the trial court would have to use a strict legal standard that would have made the case difficult for Bowers to win.

The ruling marked the first time that a federal appeals court has ever found a right to intimate association for gay men and lesbians, a potentially landmark decision.

While it is unusual for an appeals court to vote to hear a case "en banc," Shahar and her attorneys say they were not surprised by the ruling, given the controversial nature of the case.

However, involving more judges in the decision will change the political mix in a case that carries the potential for political explosion. The full 11th U.S. Circuit Court contains a majority of judges appointed by Presidents Reagan and Bush, while the panel that ruled in Shahar's favor was made up of judges appointed by Presidents Carter and Johnson.

No matter how the appeals court rules, the effect may be minor. Both sides have vowed to take this case all the way to the U.S. Supreme Court.



In 1995 a federal appeals court held that lesbian attorney Robin Shahar of Atlanta had a right to intimate association with her partner, Fran Shahar.

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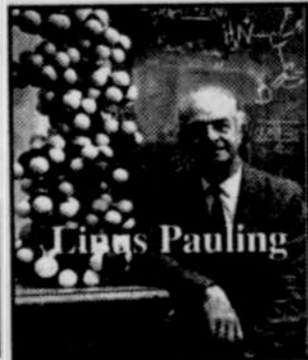
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