

No. SJC-08539

IN THE SUPREME JUDICIAL COURT
OF THE
COMMONWEALTH OF MASSACHUSETTS

GAY & LESBIAN ADVOCATES & DEFENDERS,
JOHN DOE, MARK MERANTE, ADRIEN SAKS, SUE
HYDE, JUSTIN DEABLER, BETH JACKLIN, CARL
KOECHLIN,
N. TYSON SMITH-RAY, AND TIM SMITH-RAY,

Plaintiffs-Appellants,

v.

THOMAS F. REILLY, IN HIS CAPACITY AS
ATTORNEY GENERAL OF THE COMMONWEALTH OF
MASSACHUSETTS; MARTHA COAKLEY, IN HER
CAPACITY AS DISTRICT ATTORNEY OF
MIDDLESEX COUNTY; RALPH MARTIN, IN HIS
CAPACITY AS DISTRICT ATTORNEY OF SUFFOLK
COUNTY,

Defendants-Appellees.

BRIEF OF AMICI CURIAE
MASSACHUSETTS PSYCHOLOGICAL ASSOCIATION, NATIONAL
ASSOCIATION OF SOCIAL WORKERS, MASSACHUSETTS CHAPTER OF THE
NATIONAL ASSOCIATION OF SOCIAL WORKERS, AMERICAN PUBLIC
HEALTH ASSOCIATION, SEXUALITY INFORMATION AND EDUCATION
COUNCIL OF THE UNITED STATES,

(Additional Amici continued on inside cover)

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JUSTICE RESOURCE INSTITUTE HEALTH LAW INSTITUTE, TAPESTRY
HEALTH SYSTEMS, AND AIDS PROJECT WORCESTER

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INTEREST OF AMICI CURIAE

The *Amici Curiae* joining this brief -- Massachusetts Psychological Association, National Association of Social Workers, Massachusetts Chapter of the National Association of Social Workers, American Public Health Association, Sexuality Information and Education Council of the United States, National Alliance of State & Territorial AIDS Directors, AIDS Action Committee of Massachusetts, Fenway Community Health Center, Latino Health Institute, Alliance For Young Families, Health Quarters, Dimock Community Health Center, Justice Resource Institute Health Law Institute, Tapestry Health Systems, and AIDS Project Worcester -- consist of a wide range of psychological, social work, public health, medical, and sexuality education organizations. A description of each of the *Amici* is contained in Addendum A to this brief.

Amici have first-hand knowledge of the counterproductive and harmful effects on public health and individual mental health caused by criminal sodomy statutes, whether enforced or unenforced. By stigmatizing and condemning acts of intimate sexual expression between consenting adults, M.G.L. c. 272, §§34 & 35: (1) undermine public health efforts to prevent HIV and other sexually transmitted diseases;

(2) stigmatize some individuals with disabilities who, because of their disability, may only be able to engage in sexual intimacy through acts prohibited by these laws; and (3) harm the psychological health of gay and lesbian people and promote antigay prejudice and violence. *Amici* submit this brief to bring to the Court's attention the body of scientific knowledge relevant to the issues this case presents.

STATEMENT OF THE ISSUE

Amici accept the Statement of the Issue as set forth in the brief of the plaintiff-appellant.

STATEMENT OF THE CASE

Amici accept the Statement of the Case as set forth in the brief of the plaintiff-appellant.

STATEMENT OF FACTS

Amici accept the Statement of Facts as set forth in the brief of the plaintiff-appellant.

SUMMARY OF ARGUMENT

1. The very existence of the Massachusetts sodomy laws, M.G.L. c. 272, §§34 & 35, undermines public health goals to eradicate HIV and other sexually transmitted diseases. Scientific and clinical data indicate that engaging in the acts prohibited by these laws is a normal, healthy part of most American adults' intimate sexual lives. While healthy sexuality is a

fundamental aspect of human existence, the prevention of sexually transmitted diseases remains a critical public health challenge. The prevention of sexually transmitted diseases requires candid discussion between health care providers and patients about an individual's sexual history, sexual practices, and willingness to change risky sexual behaviors. Yet, the criminalization of oral and anal sex between consenting adults creates a powerful stigma, which impedes the open and honest communication between health care providers and patients necessary for disease prevention. (pp. 4-15).

2. Sodomy laws also interfere with healthy sexual expression for some persons with disabilities. Because individuals with certain disabilities may only be able to express sexual intimacy through behaviors proscribed by sodomy laws, M.G.L. c. 272, §§34 & 35 brand these individuals as inferior to able-bodied persons. (pp. 16-17).

3. While M.G.L. c. 272 §§34 & 35 stigmatize sexual behavior commonly engaged in by heterosexuals as well as gays and lesbians, sodomy laws have emerged as a primary means of condemning gay and lesbian people. (pp. 17-23). Sodomy laws have historically been used to target and discriminate against gays and lesbians.

Laws such as M.G.L. c. 272, §§34 & 35 pin a label of criminality on all gays and lesbians, which both creates and reinforces prejudice and stigmatization. Mental health professionals agree that the message of condemnation resulting from such laws can result in significant adverse mental health. (pp. 23-27). In addition, sodomy laws promote a climate in which anti-gay violence is pervasive by creating a milieu that informs society that gay people's lives are inferior and that gay and lesbian individuals are acceptable targets of attack. (pp. 27-29).

ARGUMENT

I. THE MASSACHUSETTS SODOMY LAWS HARM PUBLIC HEALTH EFFORTS TO PREVENT HIV AND OTHER SEXUALLY TRANSMITTED DISEASES.

M.G.L. c. 272, §§34 & 35 make it a felony for any person in this Commonwealth to engage in consensual anal or oral sex.¹ These statutes, on their face, are

¹ M.G.L. c. 272, §34 proscribes "the abominable and detestable crime against nature." This statute has been interpreted to apply to anal intercourse. See *Commonwealth v. Gallant*, 373 Mass. 577, 587 (1977). M.G.L. c. 272, §35 proscribes engaging in "any unnatural and lascivious act." §35 applies to oral and anal contact, fellatio, and cunnilingus. See *Commonwealth v. Balthazar*, 366 Mass. 298 (1974); *Commonwealth v. Deschamps*, 1 Mass. App. Ct. 1 (1992); *Commonwealth v. LaBella*, 364 Mass. 550 (1974). These two statutes are collectively referred to in this brief as the "Massachusetts sodomy laws" or the "prohibited acts."

gender neutral. In practice, they have been applied to both male-male and male-female sexual relations.²

A. The Massachusetts Sodomy Laws Criminalize Healthy Acts of Sexual Intimacy Which Are Engaged in by Substantial Percentages of the Adult Population.

Mental health professionals agree that the ability to engage in sexually expressive behavior between consenting adults, including oral and anal sex, is critical to forging healthy relationships. In fact, scientific data indicate that a substantial percentage of adult American men and women, regardless of gender or sexual orientation, engage in the intimate sexual acts proscribed by the Massachusetts sodomy laws. For example, a 1994 study of a representative sample of the United States found that 80-90% of men and women born between 1948 and 1974 engaged in oral sex. See Edward Laumann *et al.*, *The Social Organization of Sexuality: Sexual Practices in the United States* (1994) at 102-

² Sodomy laws originated in medieval religious condemnation of any nonmarital, nonprocreative sexual behavior. These prohibitions then made their way into English secular criminal law. See Nan Hunter, *Life After Hardwick*, 27 Harv. C.R.-C.L. L. Rev. 531, 533 (1992). In colonial America, nonprocreative, nonmarital sexual practices, whether engaged in by male-male or male-female, were punished. See John D'Emilio and Estelle Freedman, *Intimate Matters: A History of Sexuality in America* at 15-38 (1997).

104.³ The Laumann study also found that 25.6% of men and 20.4% of women had engaged in anal intercourse. Laumann, *supra* at 99. See also Morton Hunt, *Sexual Behavior in the 1970s* (1974) at 204 (approximately 25% of heterosexuals in the 25 to 34 age group had engaged in anal sex).

The intimate sexual acts proscribed by the Massachusetts sodomy laws are not considered to be harmful to either an individual or to society.⁴ Engaging in oral or anal sex does not result in mental or physical dysfunction. See APA/NASW Brief, *supra* note 4, at §II B, ¶3 (citing DSM IV). To the contrary, mental problems associated with such sexual expression, whether engaged in by heterosexual or gay people, are

³ See also Philip Blumstein & Pepper Schwartz, *American Couples: Money, Work, Sex* (1983) at 236 (in study conducted in the early 1980s, 72% of heterosexual couples, 79% of lesbians, and 84% of gay men reported having oral sex).

⁴ The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) ("DSM IV"), which provides authoritative diagnostic descriptions of mental disorders used by health care practitioners, does not include as pathological sexual syndromes either oral or anal sex between different sexes or the same sex. See Brief *Amicus Curiae* of the American Psychological Association, the National Association of Social Workers, and the Tennessee Chapter of the National Association of Social Workers in *Campbell, et al. v. Sundquist, et al.*, Court of Appeals of Tennessee, Middle Section, October 5, 1995 (hereinafter, "APA/NASW Brief") §II B, ¶3, at <http://www.apa.org/pi/lgbc/policy/campbellsundquist.html>.

usually the product of social condemnation of those who practice it.⁵

B. By Criminalizing And Stigmatizing Oral And Anal Sex, the Massachusetts Sodomy Laws Undermine the Key Public Health Strategy for the Control of HIV And Other Sexually Transmitted Diseases.

The prevention of sexually transmitted diseases is a critical public health mandate in the Commonwealth and in this country. Each year, approximately 12 million sexually transmitted diseases occur in the United States.⁶ The United States Centers for Disease Control and Prevention (CDC) estimates that there are 800,000 to 900,000 people currently living with HIV⁷ in the United States.⁸ Each year, 40,000 new HIV

⁵ See APA/NASW Brief, *supra* note 4, at n. 60 (citing John Gonsiorek, *Social Psychological Concepts in the Understanding of Homosexuality*, in *Homosexuality: Social, Psychological and Biological Issues* at 115-119 (Paul et al. eds., 1982)).

⁶ See *The Hidden Epidemic: Confronting Sexually Transmitted Disease* at 1 (Thomas Eng & William Butler eds. 1997).

⁷ HIV, the Human Immunodeficiency Virus, is the causative agent of Acquired Immune Deficiency Syndrome (AIDS). HIV may be transmitted through the exchange of semen. See CDC, *HIV Infection and AIDS: An Overview* (May 2001) at <http://www.niaid.nih.gov/factsheets/hivinf.htm>. Other modes of HIV transmission are: perinatally from an infected mother to an infant during pregnancy or childbirth; or by direct exposure to contaminated blood or blood products. *Id.*

⁸ See CDC, *Update: A Glance at the HIV Epidemic* (December 2000) at <http://www.cdc.gov/nchstp/od/news/At-a-Glance.pdf>.

infections occur in this country.⁹ There have been 753,907 AIDS cases in the United States since the beginning of the epidemic; 438,795 deaths have been reported due to AIDS as of June, 2000.¹⁰ Massachusetts reports 12,874 individuals living with HIV or AIDS as of June 1, 2001.¹¹

This public health challenge is particularly pressing for young people in Massachusetts. Adolescence is a period of high risk for sexually transmitted diseases.¹² Adolescents have the highest rates of sexually transmitted diseases of any age group, accounting for approximately 25% of all cases annually.¹³ In addition, nearly one-fifth of people diagnosed with AIDS in Massachusetts are in their twenties or younger and most were infected through unsafe sexual activity.¹⁴ Because it takes eight to

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Massachusetts Department of Public Health, *Massachusetts HIV/AIDS Surveillance Program* (June 1, 2001) at <http://www.state.ma.us/dph/cdc/aids/aidsre.pdf>.

¹² See Mark Schuster et al., *Communication Between Adolescents and Physicians About Sexual Behavior and Risk Prevention*, 150 *Archives of Pediatrics and Adolescent Medicine* 906, 906 (1996).

¹³ See *The Hidden Epidemic*, *supra* note 6, at 1.

¹⁴ See Massachusetts Department of Education, *1999 Massachusetts Youth Risk Behavior Survey* at 24 (May 2000) (hereinafter "MYRBS") at <http://www.doe.mass.edu/lss/yrbs99/toc.html>.

eleven years on average for HIV infection to result in an AIDS diagnosis, it is likely that many of these young people became infected with HIV when they were teenagers.¹⁵ Moreover, someone with an active sexually transmitted disease is more likely than a person without an STD to become infected with HIV if exposed to the virus.¹⁶

The key public health strategy for the control of HIV and other sexually transmitted diseases has been to: (1) encourage people to discuss sexual history, sexual practices, and sexual risk behaviors with physicians, mental health counselors, and other providers; (2) screen individuals for the presence of HIV or other sexually transmitted diseases; (3) counsel people about altering risky sexual behaviors in order to prevent transmitting the disease to others; and (4) ensure that patients receive available treatments.¹⁷

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Many sexually transmitted diseases, such as syphilis, gonorrhea, and chlamydia, may be contracted through unprotected oral and anal sex. See CDC, *Sexually Transmitted Diseases, Facts and Information*, at http://www.cdc.gov/nchstp/dstd/disease_info.htm#GenInfo. These diseases are fully preventable through counseling about safer sexual practices. All of these diseases are also fully treatable if detected. *Id.* Unlike many other sexually transmitted diseases, however, there is no cure available or on the horizon for HIV. Counseling about modification of risky practices is therefore the only

It is therefore imperative that a patient or client be comfortable volunteering honest information about sexual practices, including oral or anal sex, to a physician, psychologist, social worker, school guidance counselor, or other provider. In turn, health care providers must be at ease asking detailed questions about patients' sexual histories and discussing modifications to sexual behavior.¹⁸ Indeed, studies indicate that frank discussion about sexual practices and education about risk reduction results in dramatic changes in sexual behavior, thereby reducing the risk of HIV transmission.¹⁹

means of controlling sexual transmission of HIV. HIV is highly unlikely to be transmitted, even by an infected person, if medically approved guidelines for safer sex practices are followed. See CDC, *HIV and Its Transmission* (January 31, 2000) at <http://www.cdc.gov/hiv/pubs/facts/transmission.htm>.

¹⁸ See, e.g., Schuster, *supra* note 12, at 912 ("If physicians do not discuss their patients' sexual experiences, they will have a hard time diagnosing STDs and targeting prevention advice to their patients' individual experiences and needs."); Joel Frost, *Taking a Sexual History With Gay Patients*, in *Psychotherapy in Therapists on the Frontline: Psychotherapy With Gay Men in the Age of AIDS* at 168-169 (Steven Cadwell, Robert Burnham, and Marshall Forstein, eds., 1994) ("Education about safer sexual practices is impossible without specific and detailed information from one's patient about his sexual practice ... Not gathering a sexual history may actually put these patients at increased risk by allowing gay men to continue to practice unsafe sex.").

¹⁹ See Marshall Becker and Jill Joseph, *AIDS and Behavioral Change to Reduce Risk: A Review*, 78 *Am. J. Pub. Health* 394 (1988); Leon McKusick et al.,

The Massachusetts sodomy laws are a major impediment to public health disease prevention efforts. Criminalization conveys the condemnation of the state and the community.²⁰ Laws that make acts of intimate sexual expression a felony inevitably lead to stigma and shame.²¹ Indeed, the very words of the Massachusetts sodomy laws communicate powerful social disapprobation. For example, the word "abominable" in §34 means "utterly loathsome or detestable."²² The word is derived from the Latin *ab homine*, meaning "away from man, inhuman, beastly."²³ The word "unnatural" in

Longitudinal Predictors of Reduction in Unprotected Anal Intercourse Among Gay Men in San Francisco: The AIDS Behavioral Research Project, 80 Am. J. Pub. Health 978 (1990).

²⁰ See Hillary Greene, *Unenforced Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 Yale Law & Policy Review 169, 183 (1997) (quoting Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 405 (1958) (A crime is "conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.")).

²¹ See e.g., *Commonwealth v. Dee*, 222 Mass. 184, 188 (1915) (noting generally the stigma of criminality); Edwin Schur & Hugo Adam Bedau, *Victimless Crimes* (1974) at 29-32 (discussing the damaging social and psychological effects of criminalization).

²² See Webster's II New Riverside University Dictionary (1988).

²³ See The Oxford English Dictionary, Vol. I (1978) (noting also that this derivation of "abominable" has "influenced the use and has permanently affected the meaning of the word").

§35 means "[n]ot in accordance or conformity with the physical nature of persons or animals ... abnormal; monstrous."²⁴ Thus, the Massachusetts sodomy laws are a principal cause of a milieu in which oral and anal sex are still often regarded with shame or disgust.²⁵

Courts have recognized that the stigma resulting from the criminalization of any healthy private sexual expression undercuts public health efforts to control disease. See *State v. Saunders*, 381 A.2d 333, 342 (N.J.2d 1977) (observing that because "any successful program to combat venereal disease must depend upon affected persons coming forward for treatment," criminalization of fornication "can only deter people from seeking such necessary treatment."). See also *Campbell v. Sundquist*, 926 S.W.2d 250, 264 (Tenn. App. 1996) (in case overturning same-sex sodomy statute, Court noted that "due to fear of prosecution" some gay

²⁴ See The Oxford English Dictionary, Vol. XI (1978).

²⁵ Studies have amply demonstrated patients' reluctance to discuss sexual practices with doctors. See Bradley Boekeloo et al., *Young Adolescents' Comfort With Discussion About Sexual Problems With Their Physician*, 150 Archives of Pediatrics & Adolescent Medicine, 1146, 1146 (1996) (half of adolescents responded that they would "be uncomfortable talking to [their] physician if they had a sexually transmitted disease or some other sexual problem"); Schuster, *supra* note 12, at 911 ("communication between adolescents and physicians about sexual behavior and risk prevention appears not to meet the standards for routine health care recommended by the medical profession").

people do not report or seek treatment for sexually transmitted diseases, while others are "reluctant to be tested to determine if they are infected"); *Commonwealth v. Wasson*, 842 S.W.2d 487, 489-90 (Ky. 1992) (crediting expert testimony that criminal statute proscribing homosexual sodomy "offers no benefit in preventing the spread of [AIDS] and can be a barrier to getting accurate medical histories, thus having an adverse effect on public health efforts"). As the CDC recently noted in the context of HIV:

Because most HIV-infected persons probably will adopt safer sexual behaviors after the diagnosis of HIV infection [], increasing the number of infected persons who know their serostatus is an important prevention goal. However, HIV-infected persons who fear being stigmatized are typically reluctant to acknowledge risk behaviors [and] avoid seeking prevention information.

See CDC, *HIV-Related Knowledge and Stigma-United States 2000*, 49 *Morbidity and Mortality Weekly Report* 1062, 1064 (2000).

In addition to interfering with important provider-patient communication about sexuality, sodomy laws also interfere with broader AIDS public education efforts. Educators who encourage safer sex practices as alternatives to risky behavior may fear that they are advocating criminal conduct. In turn, individuals may be reluctant to attend HIV and STD prevention

presentations for fear that they are admitting to engaging in criminal activity. By enshrining in our criminal law antiquated sexual taboos, the continued existence of sodomy laws harms efforts to control public health crises.²⁶

II. THE MASSACHUSETTS SODOMY LAWS IMPEDE THE INTIMATE SEXUAL EXPRESSION OF SOME PERSONS WITH DISABILITIES.

Some individuals with disabilities are not able to engage in penile-vaginal intercourse.²⁷ For these individuals, the expression of sexual intimacy may well only be physically possible through behaviors proscribed by the Massachusetts sodomy laws.

Sodomy laws, however, stigmatize these individuals and interfere with full rehabilitation efforts. As one health care specialist has noted, "because sexual fulfillment is an admittedly important dimension of human life ... exploration of sexual alternatives ...

²⁶ While this Court has said that c. 272, §35 is inapplicable to the private consensual conduct of adults (see 366 Mass. at 302), that statement -- even if followed by law enforcement -- does nothing to address the stigma arising from the proscriptions against the "abominable and detestable crime against nature" and "unnatural and lascivious acts" in §§34 & 35.

²⁷ See John Banja et al., *Moral Sensitivity, Sodomy Laws, and Traumatic Brain Injury Rehabilitation*, 8 *Journal of Head Trauma Rehabilitation* 116, 118 (1993).

is a key rehabilitation objective." *Id.* at 117-118.²⁸ Yet, sodomy laws "unwittingly assign the sexual needs of persons with disability to an inferior status relative to that enjoyed by able-bodied persons." Banja, *supra* note 27, at 118.²⁹ In addition, the stigma created by sodomy laws will inevitably deter many rehabilitation counselors from exploring healthy modes of sexual expression with clients with disabilities. See Banja, *supra* note 27, at 117.

III. THE MASSACHUSETTS SODOMY LAWS PROMOTE HOSTILITY, DISCRIMINATION AND VIOLENCE AGAINST GAY AND LESBIAN PEOPLE.

A. Even Where Sodomy Laws, Such as M.G.L. c. 272, §§34 & 35, Are Gender Neutral, They Are Used to Condemn Homosexuality.

While M.G.L. c. 272 §§34 & 35 continue to stigmatize sexual behavior commonly engaged in by heterosexuals as well as gays and lesbians, sodomy laws

²⁸ It should be noted that the effects of a wide range of health conditions may require individuals to express their sexuality through modes other than penile-vaginal intercourse. See, e.g., Lorna Butler et al., *Conceptualizing Sexual Health in Cancer Care*, 1 *Western Journal of Nursing Research* 638 (1998); Michael Arrington, *Sexuality, Society, and Senior Citizens: An Analysis of Sex Talk Among Prostate Cancer Support Group Members*, 4 *Sexuality & Culture* 45 (2000).

²⁹ The continued existence of sodomy laws are thus viewed not only as a social anachronism, but as a major gap in efforts to remove barriers to full participation in society for persons with disabilities. See *Americans With Disabilities Act*, 42 U.S.C. §12101 et

have also emerged in contemporary times as a primary means of condemning gay people as inferior and undeserving of society's tolerance and protection. See Diana Hassell, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 Tex. L. Rev. 813, 848 (2001). As one scholar has observed, "As sodomite becomes synonymous with homosexual, homosexual becomes synonymous with sodomite, pinning a criminal label on all gay men and lesbians." Christopher Leslie, *Creating Criminals: The Injuries Inflicted By "Unenforced" Sodomy Laws*, 35 Harv. C.R.-C.L. L. Rev. 103, 112 (2000). The Massachusetts Appeals Court understood this phenomenon when it observed that the existence of G.L. c. 272, §34 (the "abominable and detestable crime against nature") "obviously" created a "potential for prejudice" by jurors in criminal cases involving sexual acts between persons of the same sex. See *Commonwealth v. Proulx*, 34 Mass. App. Ct. 494, 497 (1993).

How the linkage between sodomy and gay and lesbian people came about is a complex question without any certain answers. At the same time, scholars have identified historical phenomena in the late nineteenth and early twentieth centuries that point toward an

seq. (ensuring access to social goals and opportunities for people with disabilities).

explanation. First, although the behaviors and desires that we now call "homosexual" existed in earlier eras, the concept of "homosexuality" as a social and cultural construct was not developed until the late nineteenth century.³⁰ Before the late 1800s, "sexuality - whether tolerated or condemned - was something a person did, not what he or she was." Goldstein, *supra* note 30, at 1087.³¹ The word "homosexual" and the "idea that the homosexual was a different kind of person were developed by late-nineteenth-century sexologists proposing medicalized causation theories for sexual behavior." Hunter, *supra* note 2, at 537; See also D'Emilio, *supra* note 30, at 15-18.

Second, urbanization and industrialization in the late nineteenth century created significant changes in

³⁰ See generally Anne Goldstein, *History, Homosexuality, and Political Values: Searching For the Hidden Determinants of Bowers v. Hardwick*, 97 Yale L. J. 1073, 1087-1089 (1988); Hunter, *supra* note 2, at 536-537; John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States 1940-1970* at 10-20 (1983).

³¹ As D'Emilio explains, while there is evidence of same-sex erotic behavior in the colonies, "nothing indicates that men or women thought of themselves as 'homosexual' ... Nor did they conceive of homosexual acts as different in essence from other sexual transgressions - such as adultery, fornication, or bestiality - that occurred outside the sanctioned bonding of husband and wife." See D'Emilio, *supra* note 30, at 10.

American's social structure and sexual mores.³² Urbanization and industrialization loosened the pre-existing norm that procreation was the only permissible purpose of sexual relations.³³ These same socioeconomic processes simultaneously created a climate in which a class of people who recognized their erotic interest in members of the same sex began to congregate in urban spaces and patronize institutions that fostered a group life. See D'Emilio, *supra* note 30, at 12.

Once the link between sodomy laws and homosexuality was made in this country, that link has been reinforced and perpetuated by the historical use of sodomy laws to target and discriminate against gays

³² See D'Emilio, *supra* note 30, at 11; William Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 Iowa L. Rev. 1007, 1017-1022 (1997).

³³ As Professor Eskridge has explained, "Where sex in small towns and farms could be closely monitored by family and neighbors and was tied to procreation for economic reasons, sex in the city focused more on pleasure than procreation [and] large families were not as desirable for urban dwellers." See Eskridge, *supra* note 32, at 1018. See also D'Emilio, *supra* note 30, at 11 (observing that the family no longer had the same function as an economic unit, but "became instead an affective entity that nurtured children and promoted the happiness of its members. Birth rates declined steadily, and procreation figured less prominently in sexual life ...Affection, intimate relationships, and sexuality moved increasingly into the realm of individual choice").

and lesbians. For example, sodomy laws have been used as justification for police harassment of gay men and lesbians.³⁴ Thousands of gay men across the United States were arrested for sodomy law violations throughout at least the 1960s.³⁵ During the 1950s, sodomy laws formed the foundation of Senator Joseph McCarthy's case to root out homosexuals from government employment. A Senate Subcommittee in 1950 declared that "those who engage in acts of homosexuality and other perverted sex activities are unsuitable for employment in the Federal government."³⁶ In addition, the federal government used the existence of sodomy laws to deny employment to gay men and lesbians requiring security clearances. See, e.g., *Dew v. Halaby*, 317 F.2d 582, 586 (D.C. Cir. 1963) (citing North Carolina sodomy statute, Court held that

³⁴ See Christopher Leslie, *Creating Criminals: The Injuries Inflicted By "Unenforced" Sodomy Laws*, 35 Harv. C.R.-C.L. Rev. 103, 128 (describing history of police practices including blackmail, and deterring individuals from going to gay bars by sending in plainclothesmen to seduce older patrons into agreeing to violate state sodomy laws).

³⁵ *Id.* at 128.

³⁶ See Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va. L. Rev. 1551, 1565-66 (1993) (quoting Senate Subcommittee on Expenditures in the Executive Department, Subcommittee on Investigations, Employment of Homosexuals and Other Sex Perverts in Government, 81st Cong.; 2d Sess.; 1950, S. Doc. 241, serial 11401).

government could fire man who had sexual experiences with other men because "conduct of a criminal or immoral nature was sufficient cause for removal of any employee"); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1365 (N.D. Cal. 1987), *rev'd*, 895 F.2d 563 (9th Cir. 1990) (government justified denying gay people security clearances because of the belief that homosexuality demonstrated a "lack of regard for the laws of society").

Sodomy laws have even been used as a basis to deny a parent custody of her child. See, e.g., *Bottoms v. Bottoms*, 249 Va. 410, 419 (Va. 1995) (stating that "[c]onduct inherent in lesbianism is punishable as a Class 6 felony . . . thus, that conduct is another important consideration in determining custody").³⁷ As Hunter has concluded, "new social understandings have converted sodomy into a code word for homosexuality." See Hunter, *supra* note 2, at 542.

B. Sodomy Laws Harm the Psychological Health of Gays And Lesbians And Reinforce Prejudice And Discrimination.

Whatever the original purpose of sodomy laws, today they are used to "stamp gay men and lesbians with

³⁷ The existence of sodomy laws have also been used as a justification to deny licenses to doctors, attorneys and other professionals and as a basis not to hire

a 'badge of inferiority.'" See Leslie, *supra* note 34, at 115.³⁸ The weight of criminal sanction has caused one commentator to characterize sodomy laws as "emotional violence on the self-esteem of homosexuals, who are effectively told by the statute that their ways of loving one another are criminal, unnatural, deviant, immoral, and worthy of punishment."³⁹ As leading mental health experts have concluded: "By criminalizing core aspects of their intimate sexual lives, [sodomy laws] serve[] to stigmatize gay people as 'deviants'

qualified gays and lesbians in teaching positions. See Leslie, *supra* note 34, at 139.

³⁸ The existence of pervasive discrimination and prejudice against lesbians and gay men has been well documented. See, e.g., Leslie, *supra* note 34, at 137-161; Evan Wolfson, *Sexual Orientation Discrimination*, in *Employment Discrimination: Law and Litigation* at ch. 28 (Merrick T. Rossein ed., 1993); Gregory Herek, *The Psychology of Sexual Prejudice*, 9 *Current Directions in Psychological Science* 19, 19 (2000) (noting long history of stigmatization); Gregory Herek, *Stigma, Prejudice, and Violence Against Lesbians and Gay Men in Homosexuality: Research Implications for Public Policy* (hereinafter "*Homosexuality*") at 60 (John Gonsiorek & James Weinrich eds., 1991) (citing studies which indicate that "[i]nstitutional and personal hostility toward lesbians and gay men is a fact of life in the United States today."). While Massachusetts has very recently enacted laws prohibiting discrimination on the basis of sexual orientation in employment, housing, places of public accommodation, credit, and services (see M.G.L. c. 151B §§4(1), (3B), (3C), (6), (7) & (14); M.G.L. c. 272, §98), discrimination and intolerance have by no means been eliminated.

³⁹ See Terry Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 *Utah L. Rev.* 209, 234 n. 116 (1994).

and reinforce[] unfounded but widely held stereotypes about them. This process results in prejudice - often called 'homophobia' - against lesbians and gay men."⁴⁰ While the majority of gay people successfully cope with the stresses created by stigma and develop a positive identity based upon their sexual orientation,⁴¹ a small group of gay people does not successfully cope with the stigma and prejudice associated with homosexuality.

Mental health professionals agree that negative societal attitudes are related to adverse mental health. The stigma which is perpetuated by sodomy statutes can fuel internalized feelings of self-hatred and inferiority and cause many individuals to live their lives in isolation, hiding their core identity from friends and family.⁴² Youth are particularly

⁴⁰ See APA/NASW Brief, *supra* note 4, at §III, B(1) (citing H. Becker, *Outsiders: Studies in the Sociology of Deviance* (1963); Ilan Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. Health & Soc. Behav. 38 (1995)).

⁴¹ Studies indicate that these gay people are psychologically well adjusted. See generally John Gonsiorek, *Mental Health Issues of Gay and Lesbian Adolescents*, 9 J. Adolescent Health Care 117 (1988); Sue Kiefer Hammersmith and Martin Weinberg, *Homosexual Identity: Commitment, Adjustment, and Significant Others*, 36 Sociometry 56 (1973).

⁴² See Herek, *Stigma, Prejudice and Violence*, *supra* note 38, at 73-74 (discussing psychological consequences and challenges as a result of society's hostility toward lesbians and gays); Ilan Meyer & Laura Dean, *Internalized Homophobia, Intimacy, and Sexual Behavior Among Gay and Bisexual Men in Stigma and*

vulnerable to the adverse effects of social condemnation. It has been estimated that gay and lesbian youth are three times more likely to attempt suicide than their heterosexual peers and may account for 30% of suicides among youth annually.⁴³ In addition, studies also indicate that a positive self-image with regard to homosexuality is a critical factor for gay men to successfully implement HIV prevention strategies.⁴⁴

Sexual Orientation: Understanding Prejudice Against Lesbians, Gay Men, and Bisexuals (hereinafter "Stigma & Sexual Orientation") at 160, 162-163 (Gregory Herek ed., 1998) (discussing that even prior to a person's realization of their own homosexuality, gay and lesbian people internalize society's antihomosexual attitudes to varying degrees which can threaten psychological well-being); Joanne DiPlacido, *Minority Stress Among Lesbians, Gay Men, and Bisexuals: A Consequence of Heterosexism, Homophobia, and Stigmatization*, in *Stigma & Sexual Orientation* at 147 (concluding that internalized homophobia resulting from society's antihomosexual biases can give rise to depression, substance abuse, and suicide).

⁴³ Robert Garofalo et al., *Sexual Orientation and Risk of Suicide Attempts Among a Representative Sample of Youth*, 153 *Archives of Pediatrics and Adolescent Medicine* 487, 490 (1999) (survey among public high school students in Massachusetts found gay and lesbian youth 3.4 times as likely to have attempted suicide as heterosexual youth); Scott Hershberger et al., *The Impact of Victimization on the Mental Health and Suicidality of Lesbian, Gay and Bisexual Youths*, 31 *Developmental Psychology* 65, 66 (1995).

⁴⁴ See John Gonsiorek et al., *AIDS Prevention and Public Policy: The Experience of Gay Males*, in *Homosexuality* (Gonsiorek & Weinrich eds., 1991), at 230-43

Ironically, the stigmatization created by sodomy laws also undermines one of the key ways in which social intolerance is reduced. Research demonstrates that personal contact with an openly gay person is one of the strongest determinants of heterosexuals' tolerance and acceptance of gay people.⁴⁵ Yet, such disclosure is deterred most often by fears of stigmatization and other consequences that follow. The stigmatization reinforced by sodomy laws thus reinforces anti-gay prejudice.

C. Sodomy Laws Promote Violence Against Lesbians And Gay Men.

A study commissioned by the National Institute of Justice (the research arm of the Department of Justice) concluded that gays and lesbians "are probably the most frequent victims [of hate violence today]."⁴⁶ Violence against lesbians and gays has been demonstrated to be qualitatively more severe than violence associated with non-bias crimes.⁴⁷ Moreover, antigay hate crimes not

⁴⁵ See Gregory Herek & Eric Glunt, *Interpersonal Contact and Heterosexuals' Attitudes Toward Gay Men: Results From a National Survey*, 30 J. Sex Research 239, 239 (1993).

⁴⁶ See Kendall Thomas, *Beyond the Privacy Principle*, 92 Colum. L. Rev. 1431, 1464 (1992); Leslie, *supra* note 34, at n. 119.

⁴⁷ See Michael Bell & Raul Vila, *Homicide in Homosexual Victims*, 17 Am. J. Forensic Med. & Pathology 65, 68 (1996); Chris Bull, *Connect the Dots*, Advocate, August 31, 1999 at 26 ("vast majority of attacks on gay men

only have serious physical and psychological consequences for victims, but also victimize an entire class of people because they "assail the victim's identity and intimidate other group members." See Gregory Herek, *Hate Crimes Against Lesbians and Gay Men*, 44 *American Psychologist* 948, 948 (1989).

Sodomy laws promote a climate in which anti-gay violence is pervasive. As one commentator has observed, "sodomy laws create the milieu that informs society, especially adolescents, that the lives of gay people are not worthy." See Leslie, *supra* note 34, at 123. Thus, the "fact that some of [gay people's] acts remain criminal is closely connected with the perception that they are acceptable targets of violence."⁴⁸ Sodomy laws may also permit assailants to view their victims as outlaws who are to blame for the

are exceptionally violent and random") (quoting Jack Levin, director of the Brudnick Center on Violence at Northeastern University).

⁴⁸ See Pam Sailors, *Morality and the Law: Bowers and the Right to Privacy*, 4 *Sexuality and Culture* 3, 12 (2000) (quoting Martha Nussbaum, *Sex and Social Justice* at 193 (Oxford University Press 1999)). See also, Gregory Herek, *The Context of Anti-Gay Violence: Notes on Cultural and Psychological Heterosexism*, 5 *Journal of Interpersonal Violence* 316, 316, 320 (1990); Thomas Reinig, *Sin, Stigma and Society: A Critique of Morality and Values in Democratic Law and Policy*, 38 *Buff. L. Rev.* 859, 898 (1990) ("Sodomy legislation has the effect of reinforcing and perpetuating this stigmatization of gay people and, consequently, the prejudices and hatred of homophobes and queer-bashers.").

brutality the assailant has committed.⁴⁹ Studies also indicate that of those victimized by hate crimes, lesbians and gay men are especially reluctant to report such crimes to the police or seek redress through the criminal justice system. See Kevin Berrill and Gregory Herek, *Primary and Secondary Victimization in Anti-Gay Hate Crimes*, 5 *Journal of Interpersonal Violence* 401, 401-403 (1990). This understanding creates a lower risk of arrest which in turn facilitates anti-gay violence and makes gays and lesbians more attractive victims for assailants. See Leslie, *supra* note 34, at 125. As such, the abolition of laws that criminalize consensual sexual conduct between adults is a key recommendation of policymakers seeking to curtail anti gay violence. See Berrill & Herek, *Primary and Secondary Victimization*, *supra* at n. 402.

CONCLUSION

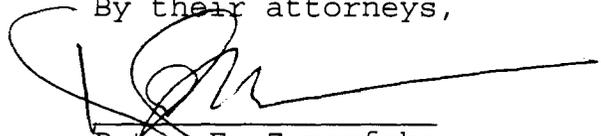
For the foregoing reasons, *Amici* request that this Court rule that M.G.L. c. 272, §§34 & 35 are unconstitutional and strike them in their entirety.

⁴⁹ See Leslie, *supra* note 34, at 124 (perpetrators of violence against gay men and lesbians rationalize their violence as vigilante enforcement of sodomy laws); Kogan, *supra* note 39, at 233 (homosexuals are "viewed as outlaws whose crime escapes state punishment").

Respectfully submitted,

AMICI CURIAE
MASSACHUSETTS
PSYCHOLOGICAL
ASSOCIATION, ET AL.

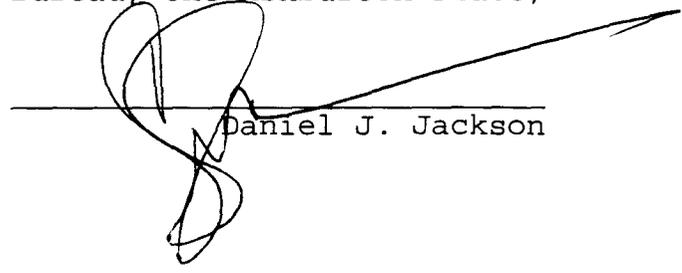
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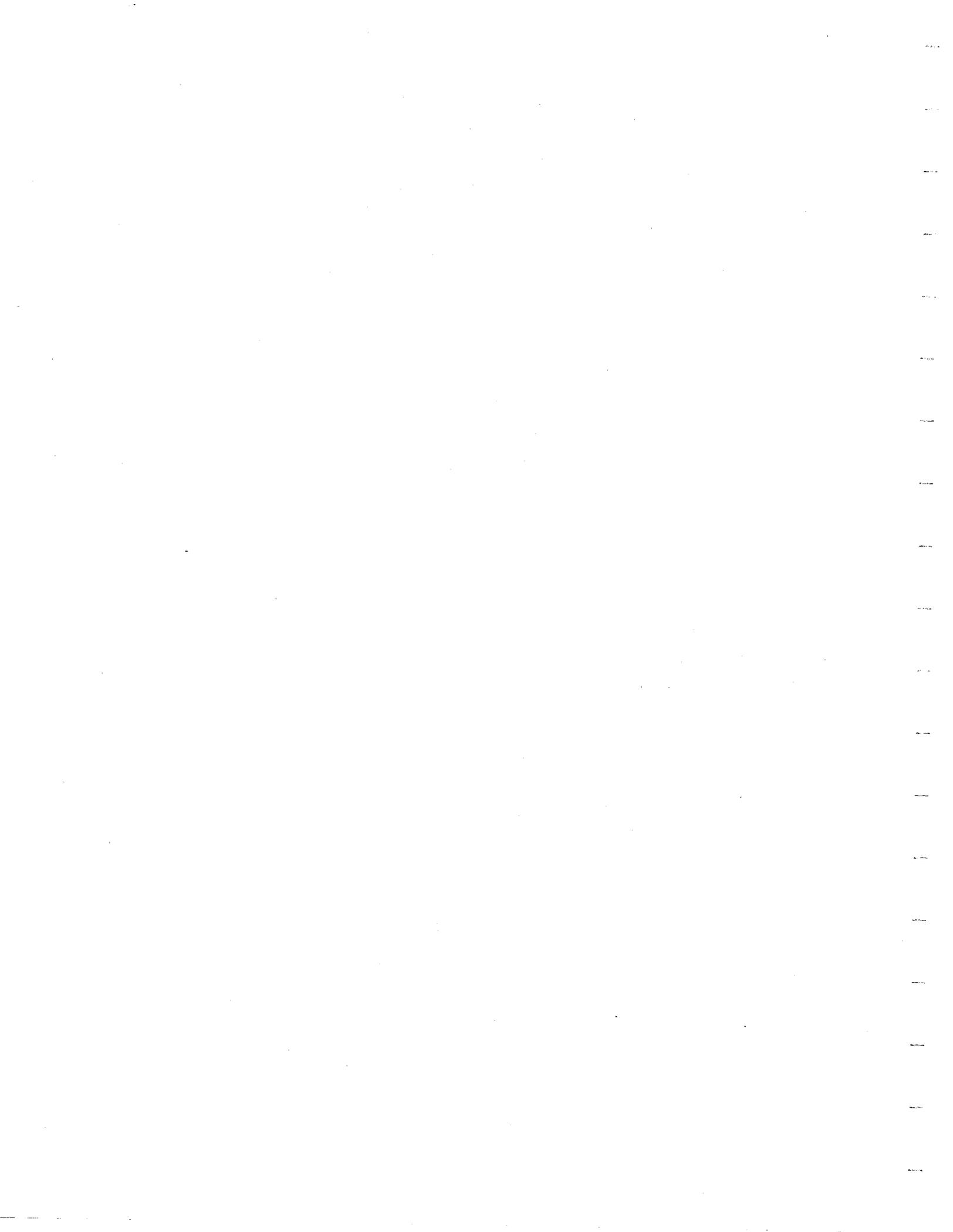
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CERTIFICATE OF SERVICE

I, Daniel J. Jackson, hereby certify that I served the within brief by regular mail, postage prepaid, on June 25, 2001, on Pamela L. Hunt, Assistant Attorney General, and James J. Arguin, Assistant Attorney General, Commonwealth of Massachusetts, Office of the Attorney General, Criminal Bureau, One Ashburton Place, Boston, MA 02108.



Daniel J. Jackson



APPENDUM A

DESCRIPTION OF AMICI CURIAE

AIDS Action Committee of Massachusetts

Founded in 1983, AIDS Action Committee of Massachusetts is New England's leading provider of AIDS services, education, and advocacy. AIDS Action currently provides a wide range of confidential services free of charge to more than 2,100 men, women, and children living with HIV disease. The agency works to stem the spread of the AIDS epidemic through neighborhood-based prevention education efforts. AIDS Action also advocates at the federal, state, and local level for responsible laws and policies affecting people living with HIV and AIDS.

AIDS Project Worcester, Inc.

AIDS Project Worcester, Inc. (APW), established in 1987, is a not-for-profit corporation committed to combating the epidemic of HIV/AIDS in Central Massachusetts and to addressing the needs of families and individuals infected with and affected by HIV disease through service, prevention, education, advocacy and outreach. In addition, APW operates in partnership with a wide range of community organizations, as well as with government agencies at the local, state and national levels to provide consumers with the most comprehensive array of services and responsible laws and policies affecting people living with HIV/AIDS.

Alliance for Young Families

The mission of the Alliance for Young Families is to provide statewide leadership to prevent adolescent pregnancy and to promote quality services for pregnant and parenting teens and their children through policy analysis, education, research, and advocacy. The Alliance is a statewide member organization comprised of over 100 agencies that offer teen pregnancy prevention programming or provide services to pregnant and parenting teens.

American Public Health Association

The American Public Health Association (APHA) is a national organization devoted to the promotion and protection of personal and environmental health. Founded in 1872, APHA is the largest public health organization in the world, representing all disciplines and specialties in public health. APHA also publishes the *American Journal of Public Health* as well as numerous books related to state-of-the-art scientific research.

Dimock Community Health Center

Dimock Community Health Center (Dimock) is the city's largest minority-owned, comprehensive community-directed health and human services agency serving a primarily minority, low-income population in Roxbury, Dorchester, Mattapan, and the surrounding areas. Dimock serves over 40,000 clients annually. Services are offered in a culturally competent environment with a staff reflective of the diversity of the community: 95.6% of Dimock clients and 79.0% of staff are people of color (61.5% African-American, 13.3% Latino, and 4.2% Haitian).

Fenway Community Health

Fenway Community Health is a community-based health center with a national reputation for excellence. Since 1971, Fenway has provided comprehensive, high-quality health care that is sensitive to the needs of lesbians, gay men, and bisexual and transgender individuals. Fenway also serves those who live and work in our diverse neighborhood, including many students, seniors, and people of color. Fenway provides full-scale medical, mental health, and addictions services as well as offers complementary therapies such as acupuncture, chiropractic, massage, and nutrition services. Fenway's Research and Evaluation Department conducts epidemiological and behavioral research on HIV prevention and transmission. For years, Fenway has been on the national forefront on HIV and STD prevention and education efforts.

Massachusetts' current sodomy statutes adversely affect many of Fenway's patients. These sex laws, which criminalize and stigmatize sexual behavior, often deter people from seeking HIV or STD testing as well as create barriers in obtaining general health care and education. In addition, the statutes highlight and support bigotry against gay, lesbian, bisexual, and transgender people (GLBT). Many GLBT people seek Fenway's services in the aftermath of anti-GLBT violence; they tell stories of societal prejudice, harassment, and violence that are supported and encouraged by sodomy laws. Furthermore, the presence of such laws creates psychosocial stressors for GLBT people thereby affecting their mental health.

Health Quarters

Health Quarters is a nonprofit health education and medical organization serving Northeastern Massachusetts. Health Quarters' mission is to promote sexual health and well being, and prevent unintended pregnancy and sexually transmitted diseases. Health Quarters has five locations in Beverly, Lynn, Malden, Reading, and Haverhill, and also provides health educators for schools, shelters, youth services, and parents' groups in fifty towns throughout Northeastern Massachusetts. Health Quarters is dedicated to providing services to people with no or limited health insurance.

Justice Resource Institute Health Law Institute

Justice Resource Institute, Inc. (JRI) is a not-for-profit organization founded in Massachusetts in 1973 by activists who recognized an urgent need to provide health and social services to disenfranchised populations. Among those whom JRI serves are individuals with mental health and substance use problems, the homeless, and individuals in transition from the criminal justice system. In 1991, JRI established JRI Health to provide services to people living with HIV disease and AIDS and those at greatest risk of infection. JRI Health is a multi-service human service organization which provides housing,

case management, primary medical and mental health treatment, outreach and other social services. In 1993, JRI Health established the Health Law Institute to meet the legal needs of its clients.

Latino Health Institute

The Latino Health Institute (LHI) was founded in 1987 by Latino health professionals and community activists in an effort to address the lack of effective health programming for Latinos in Massachusetts. LHI is the leading Latin American public health organization in the Commonwealth and in New England.

LHI addresses the health of Latin Americans through direct service, policy, and research. LHI provides direct health care, disease prevention, and social support services to more than 30,000 families and individuals annually. LHI also researches and documents the health status and needs of Latino Americans and advocates for policies and practices to improve that health of Latino Americans in the Commonwealth. The American Public Health Association Latino Caucus recently awarded LHI recognition for Outstanding Community Based Organization.

Massachusetts Psychological Association

The Massachusetts Psychological Association represents approximately 2,200 licensed psychologists statewide. The Association's mission is to promote psychology as a science, a practice, and a means of promoting human welfare.

The National Alliance of State and Territorial AIDS Directors

The National Alliance of State and Territorial AIDS Directors (NASTAD) is the only national public health organization in the United States that focuses exclusively on the HIV/AIDS epidemic. Founded in 1992, the organization represents the chief HIV/AIDS program administrators who are responsible for managing federally funded and state-funded HIV/AIDS

prevention, health and housing programs in every state. NASTAD members administer HIV prevention and surveillance programs funded by the Centers for Disease Control and Prevention including HIV counseling and testing, partner notification and referral, individual level and community-based HIV prevention interventions, and focused prevention efforts servicing populations at risk. NASTAD members also coordinate the administration of the federal Ryan White CARE Act Title II programs, which organize systems of health care for low-income individuals with HIV disease in every state.

As an organization whose focus is on preventing the occurrence of HIV, NASTAD is deeply concerned that bias and stigma toward people living with HIV disease undermine public health practice and efforts to prevent HIV transmission. The criminalization of sexual behavior has a significant detrimental effect on HIV prevention efforts by sustaining a statutorily supported stigma. To reduce the incidence of HIV infection, people must feel comfortable accessing prevention services including education, counseling, testing, and health care. Laws that criminalize and stigmatize sexual behavior may help contribute to the spread of HIV by deterring people from seeking testing. Patients may refrain from talking candidly with their doctors about their sexual history and practices in order to avoid that stigmatization associated with criminalized acts, thereby hindering diagnoses and treatment of HIV. Education on how HIV is transmitted is one of the most important steps in preventing the spread of the disease. Sodomy laws serve as an obstacle to frank discussions about the relationship between sexuality and HIV transmission and should be repealed.

**National Association of Social Workers and the
Massachusetts Chapter of the National Association of
Social Workers**

The National Association of Social Workers (NASW) was established in 1955 as a nonprofit professional association. It is the largest social work association in the world, with more than 160,000 members, and chapters in every state and

internationally. The Massachusetts Chapter has over 8,200 members. NASW has formally opposed discrimination against gay men and lesbians. Current NASW policy affirms the association's commitment "to work toward full social and legal acceptance and recognition of lesbian and gay people." Sodomy laws are frequently used to harass or intimidate gays and lesbians. In addition, sodomy laws act as a disincentive to sexually active persons seeking health care.

Tapestry Health

Tapestry Health is a multi-service health and human service agency serving four counties of Western Massachusetts. Its programs include reproductive health services, HIV/AIDS prevention and education services, a school for pregnant and parenting teens, a WIC program, and several other initiatives, all designed to educate and give people the tools to prevent disease and promote well being.

Sexuality Information and Education Council of the United States

For nearly four decades, SIECUS - the Sexuality Information and Education Council of the United States - has served as the national voice for sexuality education and sexual rights. SIECUS believes that sexuality is a natural and healthy part of life and that all people have the right to the information, skills, and services they need to make responsible sexual decisions. SIECUS provides comprehensive sexuality information and education programs and curricula. SIECUS's work includes an AIDS education project, and the development of Guidelines for Comprehensive Sexuality Education in schools. Archaic laws that single out private, intimate behavior between two consenting persons hinder the promotion of sexually healthy behaviors and attitudes.