

**IN THE SUPREME COURT OF ARKANSAS**

**LARRY JEGLEY, in his official capacity, and  
on behalf of himself and all other similarly situated**

**APPELLANTS**

v.

**No. 01-815**

**ELENA PICADO, et al.**

**APPELLEES**

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**APPEAL FROM THE SIXTH DIVISION CIRCUIT COURT  
OF PULASKI COUNTY, ARKANSAS**

**HONORABLE DAVID B. BOGARD**

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**BRIEF AMICUS CURIAE OF THE  
AMERICAN PSYCHOLOGICAL ASSOCIATION,  
THE ARKANSAS PSYCHOLOGICAL ASSOCIATION,  
THE NATIONAL ASSOCIATION OF SOCIAL WORKERS,  
AND THE ARKANSAS CHAPTER OF THE NATIONAL  
ASSOCIATION OF SOCIAL WORKERS  
FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
IN SUPPORT OF APPELLEES AND THE RULING OF THE COURT BELOW**

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**TABLE OF CONTENTS**

	<b>PAGE</b>
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
INTRODUCTION AND SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	3
I.    THE PROSCRIBED SEXUAL CONDUCT IS A NORMAL PART OF THE INTIMATE RELATIONS OF AMERICANS .....	3
II.   SAME-SEX SEXUAL CONDUCT IS AN IMPORTANT PART OF LONG-TERM INTIMATE RELATIONSHIPS FOR MANY GAY MEN AND LESBIANS .....	4
A.    The Definition Of Sexual Orientation .....	5
B.    The Distribution Of Homosexuality And Heterosexuality In The Population .....	6
C.    Sexual Orientation Is Generally Not Chosen And Is Resistant To Change .....	7
D.    Many Gay Men And Lesbians, Like Their Heterosexual Counterparts, Form Long-Lasting Intimate Relationships .....	10
E.    Gay Men And Lesbians As Parents .....	13
F.    The Sexual Conduct Proscribed By Section 5-14-122 Is An Important Element Of Most Same-Sex Relationships .....	14
III.  SECTION 5-14-122 DIRECTLY HARMS GAY MEN AND LESBIANS IN OTHER WAYS AND UNDERMINES PUBLIC HEALTH MEASURES .....	15
A.    Homosexuality Is Not A Disorder .....	16
B.    Section 5-14-122 Is Likely To Reinforce Hostility, Discrimination, And Violence Against Lesbians And Gay Men .....	18
C.    Section 5-14-122 Is Psychologically Damaging To Gay Men And Lesbians .....	20
D.    The Statute Is Likely To Interfere With Law Enforcement Efforts To Deter Violent Crimes Against Gay Men And Lesbians .....	21
E.    The Statute Interferes With Health Education Efforts Designed To Encourage Safer Sexual Practices .....	22
CONCLUSION .....	25

## TABLE OF AUTHORITIES

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<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954) .....	18
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**INTRODUCTION AND SUMMARY OF ARGUMENT**

Under the Arkansas sodomy statute, Ark. Code Ann. § 5-14-122 (“Section 5-14-122”), a person may be charged with and convicted of a crime for engaging in noncommercial and consensual intimate conduct with another adult in the privacy of the home.<sup>1/</sup> The law criminalizes such conduct only when both persons involved are of the same sex. Identical conduct is not unlawful when engaged in with a person of the opposite sex. The lower court

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<sup>1/</sup> Ark. Code Ann. § 5-14-122 provides:

- (a) A person commits sodomy if such person performs any act of sexual gratification involving:
- (1) The penetration, however slight, of the anus or mouth of an animal or person by the penis of a person of the same sex or an animal; or
  - (2) The penetration, however slight, of the vagina or anus of an animal or a person by a body member of a person of the same sex or animal.
- (b) Sodomy is a Class A misdemeanor.

held that the statute violates the right to privacy and the right to equal protection of the laws, both guaranteed by the Arkansas Constitution.

*Amici* submit this brief to bring to the attention of the Court relevant empirical and scientific research, which has undergone the rigors of peer review, about human sexuality and sexual orientation. This research demonstrates that the conduct penalized by Section 5-14-122 is a normal part of the intimate relationships of Americans, and is engaged in by opposite-sex as well as same-sex couples. Yet, although the conduct involved is identical, Arkansas law singles out an individual for punishment based solely on the sex of the persons involved.

Beyond penalizing normal sexual conduct based solely on the respective genders of the participants, Section 5-14-122 prohibits sexual relations that are of central importance to the private intimate relationships of homosexual persons, or gay men and lesbians, i.e., those whose sexual orientation is directed to others of the same sex. Scientific research demonstrates that homosexual orientation is generally not experienced as a voluntary choice and is highly resistant to change. Like people with a heterosexual orientation, people with a homosexual orientation commonly form long-lasting, committed, and loving partnerships in which sexual intimacy plays an important role. By banning such sexual intimacy between persons of the same sex, laws such as Section 5-14-122 directly impinge on these fundamental intimate relationships.

Furthermore, the statute directly harms gay and lesbian persons in other ways. It is important to stress that homosexual orientation is not a disease or disorder. Nonetheless, gay and lesbian people face substantial prejudice that can be psychologically harmful to what are otherwise healthy individuals. By singling out same-sex intimate conduct for punishment, Section 5-14-122 further stigmatizes such individuals, reinforces harmful and sometimes violent prejudices against them, and interferes with law enforcement efforts to deter violent crimes against them. The prohibition also undermines various public health goals, such as combating the spread of acquired immunodeficiency syndrome (AIDS).

## ARGUMENT

### **I. THE PROSCRIBED SEXUAL CONDUCT IS A NORMAL PART OF THE INTIMATE RELATIONS OF AMERICANS.**

Section 5-14-122 proscribes a wide range of sexual conduct that is a normal part of the lives of many Americans, both heterosexual and homosexual. Although the prohibition applies to a man only if his partner is a man, and it applies to a woman only if her partner is a woman, social scientific research shows that identical sexual conduct is also frequently engaged in by male-female couples. Thus, the law distinguishes between identical conduct based solely on the respective genders of the individuals involved.

One very common type of conduct penalized by Section 5-14-122 when performed by same-sex couples is oral sex, both fellatio and cunnilingus.<sup>2/</sup> Oral sex is frequent among opposite-sex couples as well as same-sex couples. In 1994, a group of researchers centered at the University of Chicago conducted the most comprehensive survey available of American sexual practices, based on a representative sample of American adults between ages 18 and 60, called the National Health and Social Life Survey. See E. Laumann, *The Social Organization of Sexuality: Sexual Practices in the United States* (1994) (“NHSL Survey”). The NHSL Survey found that 77% of adult males had performed oral sex on a partner, while 79% percent had received oral sex from a partner. *Id.* at 98. Among women, 68% had performed oral sex, while 73% had received oral sex. *Id.* In the same study, 27% of men and 19% of women reported that they had performed active oral sex in their most recent sexual experience, and 28% of men and 20% of women reported that their partner had performed oral sex on them in their most recent sexual experience. *Id.*

This finding is consistent with results obtained in other studies. For example, in a 1991 survey of U.S. males ages 20-39, 75% had performed oral sex on a partner, and 79% had

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<sup>2/</sup> Fellatio is oral stimulation of the penis, while cunnilingus is oral stimulation of the vulva or clitoris.

received oral sex from a partner. J.O.G. Billy *et al.*, *The Sexual Behavior of Men in the United States*, 25 *Family Planning Perspectives* 52, 57 (1993). Another study of 300 couples found that 93% of heterosexual couples had engaged in oral sex. P. Blumstein & P. Schwartz, *American Couples' Money, Work, Sex*, at 236 (1983).

Another type of conduct penalized by Section 5-14-122 is anal intercourse or any other slight penetration of the anus by any body part, when two persons of the same sex are involved. Research indicates that significant numbers of heterosexuals engage in that activity as well. The NHSLS Survey found that 26% of men and 20% of women had engaged in anal intercourse. NHSLS Survey, *supra*, at 99. In another study, 20% of males ages 20-39 reported that they had engaged in anal sex. *Sexual Behavior of Men, supra*, at 56. Based on a review of the published literature and analysis of survey data, one study concluded that approximately 25% of U.S. adults have engaged in heterosexual anal intercourse. S.N. Seidman & R.O. Reider, *A Review of Sexual Behavior in the United States*, 151 *Am. J. Psychiatry* 330 (1994); *see also* B. Powis *et al.*, *Heterosexual Anal Intercourse, Health Risks and Drug Use*, 14 *Drug and Alcohol Review* 223 (1995).

In sum, scientific research confirms the finding of Judge Bogard in the court below that many opposite-sex couples engage in the very same conduct that Section 5-14-122 penalizes when performed by same-sex couples. *See* A. 286 (Order on Parties' Cross-Motions for Summary Judgment).

## **II. SAME-SEX SEXUAL CONDUCT IS AN IMPORTANT PART OF LONG-TERM INTIMATE RELATIONSHIPS FOR MANY GAY MEN AND LESBIANS.**

Although the sexual conduct at issue is common throughout society, Section 5-14-122 prohibits that conduct only when engaged in by two persons of the same sex. By penalizing same-sex sexual activity, the law criminalizes an aspect of private physical intimacy that is a core component of the long-term, committed relationships entered into by many same-sex couples, just as sexual intimacy is important to many committed heterosexual relationships.

Thus, the statute does not simply prohibit sexual conduct; it impinges on fundamental intimate relationships.

A complete and accurate understanding of sexual orientation is essential for evaluating the impact of Section 5-14-122 on fundamental private relationships. Sexual orientation refers to whether one is sexually, emotionally or romantically attracted primarily to men, women, or both. Persons with a homosexual orientation – gay men and lesbians – are primarily attracted to members of the same sex, whereas heterosexuals are primarily attracted to members of the opposite sex. Long-term, committed, sexual relationships are fundamentally important to the lives of heterosexuals, gay men, and lesbians. Heterosexuals generally form such relationships with people of the opposite sex. Gay men and lesbians generally form such relationships with people of their same sex. Most people generally do not experience their sexual attractions as a choice, and sexual orientation is highly resistant to change. Thus, by prohibiting sexual intimacy between same-sex partners, Section 5-14-122 directly impinges on these most fundamental personal bonds for gay men and lesbians.

A. The Definition Of Sexual Orientation.

Sexual orientation refers to the tendency to experience erotic or romantic responses to men, women, or both, and the resulting sense of oneself. *See The Definition and Scope of Sexual Orientation*, in *Homosexuality: Research Implications for Public Policy* (J. Gonsiorek & J. Weinrich eds., 1991). It is usually understood in terms of three categories: heterosexual – having sexual and romantic attractions primarily to members of the other sex; homosexual – having sexual and romantic attractions primarily to members of one’s same sex; and bisexual – having a significant degree of sexual and romantic attractions to both men and women. Sexual orientation encompasses a variety of phenomena, including specific sexual acts; patterns of sexual attractions to men, women, or both; patterns of romantic and emotional bonding with men, women, or both; the personal sense of self as heterosexual, homosexual, or bisexual; public identities as heterosexual, homosexual or bisexual; and membership in a community

defined by sexual orientation, e.g. the gay or lesbian communities. G. Herek, *Homosexuality*, in 4 Encyclopedia of Psychology 149 (A.E. Kazdin ed., 2000).

Sexual orientation is not simply about sexual conduct. Because sexual attraction and expression are important components of romantic relationships, sexual orientation is integrally linked to the close bonds that humans form with others to meet their personal needs for love, attachment, and intimacy. These bonds are not based only on specific sexual acts. They also encompass nonsexual physical affection, shared goals and values, mutual support and ongoing commitment. In addition, one's sexual orientation is closely related to important personal identities, social roles, and community memberships. For heterosexuals, the identities and roles include those of husband, wife, father and mother. Most heterosexuals experience their sexuality, their romantic and affectional relationships, and their social roles and community memberships based upon those relationships as a central component of who they are, that is, their sense of self or identity. G. Herek, *Why Tell If You're Not Asked? Self-Disclosure, Inter-Group Contact, and Heterosexuals' Attitudes Toward Lesbians and Gay Men*, in *Out In Force: Sexual Orientation and the Military* 197, 201-02 (G. Herek et al. eds., 1996). Many homosexual persons also define themselves in terms of their roles as partners in committed relationships and as parents. See *infra* Sections II.D. and II.E. In addition, being gay or lesbian is itself often an important personal identity, one that is commonly associated with membership in a minority community. Herek, *Why Tell If You're Not Asked?*, *supra*.

B. The Distribution Of Homosexuality And Heterosexuality In The Population.

The exact proportions of heterosexuals, homosexuals, and bisexuals in the adult population of the United States is not known. Because homosexuality and bisexuality are stigmatized in American society (see Section III(B), below), many individuals are reluctant or unwilling to reveal that they are not heterosexual, even in anonymous surveys. Consequently, researchers generally assume that estimates of the distribution of sexual orientation in the population underestimate the actual proportion of non-heterosexuals. See e.g., NHLSLS Survey,

*supra*, at 284; S.M. Rogers & C.F. Turner, *Male-Male Sexual Contact in the USA: Findings From Five Sample Surveys, 1970-1990*, 28 J. Sex Research 491, 513-14 (1991).

Different surveys have also measured different aspects of sexual orientation and, consequently, have reached different estimates. The NHSLS researchers found, for example, that approximately 5% of men and 4% of women reported having had sex with a same-sex partner since age eighteen. NHSLS Survey, *supra*, at 303; *see also* Rogers & Turner, *Male-Male Sexual Contact, supra*, at 513-14 (estimating that at least 5-7% of U.S. men experienced same-sex sexual contact during adulthood); D. Black *et al.*, *Demographics of the Gay and Lesbian Population of the United States*, 37 *Demography* 139, 141-42 (2000) (finding that approximately 5% of men and 4% of women had at least one same-sex sexual experience since age eighteen, and approximately 3% of men and 1% of women reported sexual experiences in the preceding year exclusively with partner of same sex). A larger proportion of respondents – approximately 8% of men and women alike – reported that they experienced attraction to persons of their own sex, considered the prospect of sex with a same-sex partner appealing, or both. NHSLS Survey, *supra*, at 305.

C. Sexual Orientation Is Generally Not Chosen And Is Resistant To Change.

There is no consensus among scientists about the exact causes of sexual orientation, whether heterosexual, bisexual, or homosexual. Regardless of those causes, however, research shows that most gay men and many or most lesbians do not experience their sexual orientation as the result of a voluntary choice, and that sexual orientation is highly resistant to change. Thus, for persons who are sexually attracted only to members of their own sex, laws like Section 5-14-122 that prohibit same-sex sexual conduct leave no opportunity for sexual intimacies or the committed relationships that depend on such intimacies.

Current scientific and professional understanding is that the core feelings and attractions which form the basis for adult sexual orientation typically emerge between middle childhood and early adolescence without any necessary prior sexual experience. *See* R.C. Savin-

Williams, “. . . *And Then I Became Gay*”: *Young Men’s Stories*, at 1-19 (1998) (reviewing research); A. Bell, M. Weinberg & S. Hammersmith, *Sexual Preference: Its Development in Men and Women* 186-87 (1981); *see also* G. Remafedi *et al.*, *Demography of Sexual Orientation in Adolescents*, 89 *Pediatrics* 714 (1992) (reporting data from a study of Minnesota public school students in grades 7-12 conducted in 1986-7, finding that only 39% of those identifying as homosexual reported any homosexual experience); R.C. Savin-Williams & L.M. Diamond, *Sexual Identity Trajectories Among Sexual-Minority Youths: Gender Comparisons*, 29 *Archives of Sexual Behavior* 419 (2000) (reporting data from a sample of 164 sexual-minority young adults, aged 17-25 years, and finding that first recognizing one’s same-sex attractions preceded first same-sex sexual experience by, on average, approximately 6 years for males, and 7 years for females).

Most gay men and many or most lesbian women do not experience their sexual orientation as the result of a voluntary choice. For example, in a study that included a community-based sample of 60 gay men and 66 lesbians, 80% of the gay men and 62% of the lesbians said they had “no choice at all” about their sexual orientation. *See* G. Herek, *et al.*, *Correlates of Internalized Homophobia In a Community Sample of Lesbians and Gay Men*, 2 *J. Gay and Lesbian Med. Ass’n* 17 (1998). The same researchers conducted a larger study, the main findings of which have been published, that included 898 gay men and 980 lesbians. G. Herek *et al.*, *Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay & Bisexual Adults*, 67 *J. Consulting and Clinical Psychology* 945 (1999). In that larger study, 72% of the gay men and 48% of the lesbians reported having “no choice,” and another 13% of the gay men and 20% of the lesbians reported “very little choice” about being gay or lesbian (unpublished data from Herek *et al.*, *Psychological Sequelae, supra*, on file with the APA). *See also* R.C. Savin-Williams, *Gay and Lesbian Youth: Expressions of Identity* 77, 79 (1990) (reporting data from a study of 317 gay, lesbian, and bisexual young adults and teens, and finding that on average, they perceived their sexual orientation to be beyond their conscious

control, with males expressing this belief more strongly than females); S. Rosenbluth, *Is Sexual Orientation A Matter of Choice?*, 21 *Psych. of Women Quarterly* 595, 603 (1997) (reporting data from a sample including 45 women currently in lesbian relationships, and finding that 40% said they did not choose the sexual orientation of their current relationship or did not choose to be a lesbian).

Research and the clinical experience of amici's members also indicate that, once established, sexual orientation is resistant to change. Nonetheless, several groups and individuals have offered clinical interventions – sometimes called “conversion” or “reparative” therapies – that purport to change sexual orientation from homosexual to heterosexual. Upon reviewing reports on such attempts, one scholar concluded that – aside from the ethical concerns relating to any such therapy – there is no reliable evidence that “sexual orientation is amenable to redirection or significant influence from psychological intervention.” D. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 *J. of Consulting & Clinical Psychology* 221, 224 (1994).

All major mental health organizations have adopted policy statements cautioning the profession and the public alike about the potential abuses of such treatments. These include amici APA and NASW, as well as the American Psychiatric Association, the American Academy of Pediatrics, and the American Counseling Association. See American Psychological Association, *Resolution on Appropriate Therapeutic Responses to Sexual Orientation* (1998); National Association of Social Workers, *Policy Statement: Lesbian, Gay, and Bisexual Issues* (approved 1996); American Psychiatric Association, *Position Statement: Psychiatric Treatment and Sexual Orientation* (1998) (hereinafter “*Psychiatric Policy Statement*”); American Academy of Pediatrics, *Homosexuality and Adolescence* (1993) (hereinafter “*Pediatrics Policy Statement*”); and *Action by American Counseling Association Governing Council* (1999).<sup>37</sup> For

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<sup>37</sup> These policy statements are reproduced on amicus APA's website at

(continued...)

example, the policy statement the American Academy of Pediatrics advises: “Therapy directed specifically at changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation.” *Pediatrics Policy Statement, supra*. Similarly, the statement of the American Psychiatric Association explains: “The potential risks of ‘reparative therapy’ are great, including depression, anxiety and self-destructive behavior.” *Psychiatric Policy Statement, supra*. The psychiatrists’ group also observed that “[m]any patients who have undergone ‘reparative’ therapy related that they were inaccurately told that homosexuals are lonely, unhappy individuals who never achieve acceptance or satisfaction.” *Id.*

D. Many Gay Men And Lesbians, Like Their Heterosexual Counterparts, Form Long-Lasting Intimate Relationships.

Like their heterosexual counterparts, many gay men and lesbians form long-lasting, committed intimate relationships. Empirical studies using non-representative samples typically report that a substantial proportion of respondents are currently involved in a committed relationship (e.g., approximately 40%-60% of gay men and 45%-80% of lesbians), and the vast majority have been involved in such a relationship at some time in their lives. Bell & Weinberg, *supra*; Harry, *Gay Male and Lesbian Relationships*, in *Contemporary Families and Alternative Lifestyles: Handbook on Research & Theory* 21 (Macklin & Rubin 1983); G. Herek, *et al.*, *Correlates, supra*, at 20 (60%); L. Peplau & S. Cochran, *Value Orientations in the Intimate Relationships of Gay Men*, 6 *J. Homosexuality* 1 (1981) (41%); J. Spada, *The Spada Report* (1979); L. Peplau, *et al.*, *Women in Love: Attachment and Autonomy in Lesbian Relationships*, 34 *J. Soc. Issues* 7 (1978) (61%); E.D. Rothblum & R. Factor, *Lesbians and Their Sisters as a Control Group: Demographic and Mental Health Factors*, 12 *Psychological Science* 63 (2001); *see also* L. Peplau *et al.*, *Gay and Lesbian Relationships*, in *The Lives of Lesbians, Gays and Bisexuals: Children to Adults* 250-73 (R.C. Savin-Williams & K.M. Cohen eds., 1996); L.

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<sup>3/</sup> (...continued)

<http://www.apa.org/pi/lgbc/publications/justthefacts.html> (accessed Oct. 23, 2001).

Kurdek, *Lesbian and Gay Couples*, in *Lesbian, Gay, and Bisexual Identities Over the Lifespan*, at 243-61 (A.R. D'Augelli & C.J. Patterson eds., 1995). Like many heterosexual married couples, many gay male and lesbian couples have endured for decades. See, e.g., Bryant & Demian, *Relationship Characteristics of American Gay and Lesbian Couples: Findings from a National Study*, 1 *J. Gay & Lesbian Soc. Services* 101 (1994); L. Kurdek, *Assessing Multiple Determinants of Relationship Commitment in Cohabiting Gay, Cohabiting Lesbian, Dating Heterosexual and Married Heterosexual Couples*, 44 *Family Relations* 261 (1995); D. McWhirter & A. Mattison, *The Male Couple: How Relationships Develop* 285, 286 (1984); L. Peplau, *Research on Homosexual Couples: An Overview*, 8 *J. Homosexuality* 3, 4 (1982); Raphael & Robinson, *The Older Lesbian: Love Relationships and Friendship Patterns*, 3 *Alternative Lifestyles* 207 (1980); C. Silverstein, *Man to Man: Gay Couples in America* (1981).

Some information about lesbian and gay couples has become available from the 2000 U.S. Census, which allowed individuals to indicate that they were a member of a same-sex couple living together in the same house. Because of concerns about stigma – as well as lack of widespread information about this portion of the census form – it is likely that many such couples did not identify themselves as such on the census form. In addition, the census form permitted reporting only of cohabiting couples, thereby excluding non-cohabiting couples. Consequently, findings from the census data represent a low estimate of the number of same-sex couples in the United States. Nevertheless, the Associated Press reported a preliminary analysis of the census data showing that same-sex couples head approximately 600,000 homes in the United States, with at least one same-sex couple in 99% of the nation's counties. *Households Headed By Gays Rose in the 90's, Data Shows*, *New York Times*, Aug. 22, 2001, at A17.

Research examining the quality of intimate relationships shows that gay and lesbian couples do not differ from heterosexual couples in their satisfaction with the relationship. See R. Mackey, et al., *Psychological Intimacy in the Lasting Relationships of Heterosexual and Same-Gender Couples*, 43 *Sex Roles* 201 (2000); L. Kurdek, *Differences Between*

*Heterosexual-Nonparent Couples and Gay, Lesbian and Heterosexual-Parent Couples*, 22 J. Family Issues 727 (2001). “Empirical research has found striking similarities in the reports of love and satisfaction among contemporary lesbian, gay and heterosexual couples.” L. Peplau & L. R. Spaulding, *The Close Relationships of Lesbians, Gay Men and Bisexuals*, in *Close Relationships: A Sourcebook* 114 (Hendrick & Hendrick eds., 2000). Thus, a review of the literature on gay and lesbian couples concluded that “[r]esearch has shown that most lesbians and gay men want intimate relationships and are successful in creating them. Homosexual partnerships appear no more vulnerable to problems and dissatisfactions than their heterosexual counterparts.” L. Peplau, *Lesbian and Gay Relationships*, in *Homosexuality: Research Implications for Public Policy* 195 (J. Gonsiorek & J. Weinrich eds., 1991); *see also* Kurdek, *Differences Between, supra* (finding no differences between gay and lesbian couples and heterosexual couples without children on individual personality differences, views on relationships, conflict resolution, and satisfaction). A major study of heterosexual and gay couples in the United States concluded in the early 1980s that “[c]ouplehood, either as a reality or an aspiration, is as strong among gay people as it is among heterosexuals.” Blumstein & Schwartz, *supra*, at 45; *see also* Peplau & Cochran, *Value Orientations, supra*.

Social science research demonstrates that gay and lesbian relationships share principal elements of the heterosexual marital relationship. Like married people, gay and lesbian couples form deep emotional attachments and commitments. *See* Blumstein & Schwartz, *supra*; L. Peplau, *Research on Homosexual Couples: An Overview*, 8 J. Homosexuality 3, 5 (1982); L. Peplau *et al.*, *Satisfaction in Lesbian Relationships*, 8 J. Homosexuality 23, 27-28, 34-35 (1982); Larson, *Gay Male Relationships*, in *Homosexuality: Social, Psychological and Biological Issues* 233-47 (Paul *et al.* eds., 1982); Peplau & Amaro, *Understanding Lesbian Relationships*, in *Homosexuality: Social, Psychological and Biological Issues* (Paul *et al.* eds., 1982); Peplau & Cochran, *Value Orientations, supra*. Married heterosexual couples, gay male couples, and lesbian couples face similar issues – such as equity, loyalty, stability, intimacy, and love – and

go through similar processes to deal with these issues. *See generally* L. Kurdek, *Areas of Conflict for Gay, Lesbian and Heterosexual Couples: What Couples Argue About Influences Relationship Satisfaction*, 56 *J. Marr. & Family* 923 (1994); L. Kurdek, *Conflict Resolution Styles in Gay, Lesbian, Heterosexual Non-parent and Heterosexual Parent Couples*, 56 *J. Marr. & Family* 705 (1994); McWhirter & Mattison, *supra*; Blumstein & Schwartz, *supra*; Peplau & Amaro, *supra*, at 237-39; Peplau, *Homosexual Couples*, *supra*, at 4-5; Cardell *et al.*, *Sex-Role Identity, Sex Role Behavior, and Satisfaction in Heterosexual, Lesbian and Gay Male Couples*, 5 *Psychology of Women* 488 (1981).

E. Gay Men And Lesbians As Parents.

Many gay men and lesbians are also parents. The consistent conclusion drawn from two decades of scientific research conducted on gay and lesbian parents and their children is that these children demonstrate no deficits in intellectual development, social adjustment or psychological well-being from children raised by heterosexual parents. Green & Bozett, *Lesbian Mothers and Gay Fathers*, in *Homosexuality: Research Implications for Public Policy* 197, 213 (J. Gonsiorek & J. Weinrich eds., 1991); *see also, e.g.*, C. Patterson, *Children of Lesbian and Gay Parents*, 63 *Child Dev.* 1025 (1992); D. Flaks *et al.*, *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 *Developmental Psychol.* 105 (1995); R. Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 *Am. J. Psychiatry* 692 (1978); M. Kirkpatrick *et al.*, *Lesbian Mothers and Their Children: A Comparative Study*, 51 *Am. J. Orthopsychiatry* 545 (1981).

A recent article surveying the scientific studies on this issue reported no differences between children raised by lesbians and those raised by heterosexuals with respect to self-esteem, anxiety, depression, behavioral problems, performance in sports, school and friendships, use of counseling, unsociability, hyperactivity, or emotional difficulty. J. Stacey & T. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 *Am. Soc. Rev.* 159, 169, 171 (2001).

To the extent that the authors of that article reported results from prior studies suggesting that there might be some differences between children raised by homosexual and those raised by heterosexual parents, the data suggesting the differences were generally not statistically significant and were often contradicted by other studies. *See id.* at 168-69 & n.9. The authors also reported that “in studies of matched lesbian and heterosexual couples, women in every category – heterosexual birth mother, lesbian birth mother, non-biological lesbian social mother – all score about the same as one another, but all score significantly higher than the men on measures having to do with the care of children.” *Id.* at 175. Finally, the authors reported data suggesting that non-biological lesbian mothers have stronger parenting skills than both biological and non-biological heterosexual fathers, but observed that such differences “may have more to do with gender than with sexual orientation.” *Id.* at 174.

F. The Sexual Conduct Proscribed By Section 5-14-122 Is An Important Element Of Most Same-Sex Relationships.

Sexuality is an important aspect of most enduring gay and lesbian relationships. For same-sex couples, just as for heterosexual couples, sex functions as a complex bond between the partners, and “[h]aving sex is an act that is rarely devoid of larger meaning for a couple. It always says something about partners’ feelings about each other, what kind of values they share, and the purpose of their relationship.” Blumstein & Schwartz, *supra*, at 193. For most couples, “a good sex life is central to a good overall relationship.” *Id.* at 201, 205-06; *see also* L. Kurdek, *Sexuality in Homosexual and Heterosexual Couples*, in *Sexuality in Close Relationships* 177-91 (K. McKinney & S. Sprecher, 1991); McWhirter & Mattison, *supra*, at 262. Gay and heterosexual couples are thus similar in such fundamental respects as their emotional makeup, the importance of the relationship to the individual, and the role of sexuality in the relationship.

Just as it is normal to many heterosexual relationships, the sexual conduct proscribed by Section 5-14-122 is among the primary forms of sexual expression for gay people. Surveys have shown that oral sex is a primary vehicle for sexual expression for both gay men and

lesbians, and that anal intercourse is a primary means of sexual expression for many gay men. *See, e.g.*, NHSLS Survey, *supra*, at 318; Blumstein & Schwartz, *supra*, at 236; *see also* McWhirter & Mattison, *supra*, at 277; Bell & Weinberg, *supra*, at 328-30.

The prohibited sexual conduct is not considered by mental health professionals to be “pathological” – that is, it is not detrimental to an individual’s happiness or functioning. *See infra* Part III.A. Moreover, engaging in a variety of forms of sexual expression, including oral and anal sex, does not result in mental or physical dysfunction. To the contrary, Section 5-14-122 criminalizes for gay and lesbian couples forms of sexual expression that often enhance the quality of their lives and give expression to their most intimate relationships. *See* Blumstein & Schwartz, *supra*, at 239-40 (finding that, among lesbian and gay male couples, engaging in oral sex was positively correlated with relationship satisfaction).

In sum, Section 5-14-122 bans primary forms of sexual expression for those persons who have a homosexual orientation. The impact of this provision upon the privacy of individuals and their long-term intimate relationships is difficult to overestimate. Efforts to punish such a deeply rooted part of individuals’ most significant intimate relationships are striking in light of the body of scientific data demonstrating that the sexual conduct in question is normal for men and women, regardless of their sexual orientation.

### **III. SECTION 5-14-122 DIRECTLY HARMS GAY MEN AND LESBIANS IN OTHER WAYS AND UNDERMINES PUBLIC HEALTH MEASURES.**

The harm worked by laws like Section 5-14-122 goes beyond the prohibition on sexual expression that is central to gay men’s and lesbians’ intimate relationships. Such statutes stigmatize gay and lesbian persons and thereby reinforce the sometimes violent prejudices that confront them. In understanding that stigma and the injuries it inflicts, it is important to bear in mind that homosexuality itself is not a disease or disorder. Rather, anti-homosexual prejudice inflicts psychological stress – and, at times, physical violence – on individuals who are otherwise healthy and well-adjusted. Section 5-14-122 contributes to that harm. It is also likely to undermine law enforcement efforts to detect and prosecute hate crimes against gay men and

lesbians due to their sexual orientation. Finally, by threatening penal sanctions against normal sexual conduct, the law encourages clandestine sexual activity that undermines efforts to prevent sexually transmitted diseases, including HIV-infection and AIDS.

A. Homosexuality Is Not A Disorder.

The psychiatric, psychological, and social-work professions long ago concluded that homosexual orientation is not a disorder.<sup>4f</sup> Scientific data collected during the latter half of the twentieth century consistently failed to find any link between homosexuality itself and psychological disorders. See J. Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality*, in *Homosexuality: Research Implications for Public Policy* 115, 115-36 (J. Gonsiorek & J. Weinrich eds., 1991) (concluding that “homosexuality in and of itself bears no necessary relationship to psychological adjustment”); see also B. Reiss, *Psychological Tests in Homosexuality*, in *Homosexual Behavior: A Modern Reappraisal* 296 (J. Marmor ed. 1980); M. Hart, et al., *Psychological Adjustment of Nonpatient Homosexuals: Critical Review of the Research Literature*, 39 *J. Clinical Psychiatry* 604 (1978).

In 1973, in recognition that scientific data do not indicate that a homosexual orientation is inherently associated with psychopathology, the American Psychiatric Association’s Board of Directors voted to remove homosexuality from the Association’s diagnostic and statistical manual of mental disorders (“DSM”). That Board’s resolution stated that “homosexuality *per se* implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.” *Resolution of the American Psychiatric Association* (Dec. 15, 1973), reprinted in

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<sup>4f</sup> A mental disorder is “a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (*e.g.*, a painful symptom) or disability (*i.e.*, impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.” American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, at xxxi (4<sup>th</sup> ed. Text Revision 2000).

131 Am. J. Psychiatry 497 (1974). That decision was upheld by a vote of the Association's membership the following year. *Amicus* American Psychological Association took the same position in 1975 and urged all mental health professionals to help dispel the stigma of mental illness that had been associated with homosexual orientation. See American Psychological Ass'n, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975). *Amicus* National Association of Social Workers has a similar policy. See NASW, *Policy Statement on Lesbian and Gay Issues* (approved by NASW Delegate Assembly, Aug. 1993), reprinted in NASW, *Social Work Speaks: NASW Policy Statements* 162, 162-65 (3d ed. 1994).<sup>5f</sup>

It is important to note, however, that although homosexuality is not a mental disorder, societal *prejudice* against gay men and lesbians can cause them psychological harm. Anti-gay prejudice, discrimination, and stigma can create significant stress for gay and lesbian people, which cause psychological problems. These problems can be exacerbated by the fact that, because of stigma, gay men and lesbians often have less access to social support and other resources that assist heterosexuals in coping with stress. See J. DiPlacido, *Minority Stress Among Lesbians, Gay Men, and Bisexuals: A Consequence of Heterosexism, Homophobia, and Stigmatization*, in *Stigma and Sexual Orientation: Understanding Prejudice Against Lesbians, Gay Men, and Bisexuals* 138-59 (1998) (reviewing research on negative impact of stigma on gay men and lesbians); see also S.D. Cochran & V.M. Mays, *Relation Between Psychiatric*

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<sup>5f</sup> Of course, some gay men and lesbians, like some heterosexuals, manifest psychological problems associated with their sexuality. See Gonsiorek, *Empirical Basis, supra*, in *Homosexuality, supra*, at 135 ("Because sexual expression is one of the most intimate, psychologically rich, and complex of all human interactions, it is not surprising that individuals who are troubled or disturbed will likely manifest problems in their sexual relationships, regardless of sexual orientation."). However, homosexuality itself is not a mental disorder or a cause of mental disorders.

*Syndromes and Behaviorally Defined Sexual Orientation in a Sample of the U.S. Population*, 151 *Amer. J. of Epidemiology* 516 (2000); S.D. Cochran & V.M. Mays, *Lifetime Prevalence of Suicide Symptoms and Affective Disorders Among Men Reporting Same-Sex Sexual Partners: Results from NHANES III*, 90 *Am. J. Pub. Health* 573 (2000).<sup>6/</sup>

Some of the ways in which laws like Section 5-14-122 contribute to societal prejudice and the resulting psychological harm to gay men and lesbians are canvassed in Sections III.B. and III.C below.

B. Section 5-14-122 Is Likely To Reinforce Hostility, Discrimination, And Violence Against Lesbians And Gay Men.

Lesbians and gay men in the United States are the victims of extensive discrimination, interpersonal prejudice, and violence because of their sexual orientation. *See, e.g.,* M.V.L. Badgett, *Money, Myths and Change: The Economic Lives of Lesbians and Gay Men*, (2001); Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview*, in *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* (G. Herek & K. Berrill eds., 1992); G. Herek *et al.*, *Psychological Sequelae*, *supra*; G. Herek, *Sexual Prejudice*, *supra*. Although the specific forms of prejudice against different minority groups vary, the psychological processes underlying heterosexuals' prejudices against gay people are similar to those underlying other prejudices, such as whites' prejudices against blacks, and Christians' prejudices against Jews.<sup>7/</sup> Social scientists have used similar theories and methods to understand all of these forms of prejudice. *See, e.g.,* G. Herek, *Stigma, Prejudice, and Violence Against Lesbians and Gay Men*,

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<sup>6/</sup> As courts and psychologists alike have long recognized, *see Brown v. Board of Education*, 347 U.S. 483, 494-95 (1954); J. Jones, *Prejudice and Racism* 138-40 (1972), legal restrictions imposed on a disfavored minority group can place considerable stress on members of that group.

<sup>7/</sup> The commonalities between anti-gay attitudes and other forms of prejudice are also noted in standard psychology textbooks. *See* S. L. Franzoi, *Social Psychology* 225-66 (2d ed. 2000); K. Gergen & M. Gergen, *Social Psychology* 140-41 (1981).

in *Homosexuality: Research Implications for Public Policy* 60-80 (J. Gonsiorek & J. Weinrich, eds., 1991); G. Herek, *Sexual Prejudice, supra*.

As with racism and anti-semitism, anti-homosexual prejudices are influenced by societal norms and values. Society communicates particular attitudes to its members in many ways, including through its laws. In addition to their specific impact on individuals, laws that penalize specific forms of sexual expression reinforce individual hostility against the people who practice such behaviors – in this case gay people. G. Herek, *The Social Context of Hate Crimes: Notes on Cultural Heterosexism*, in *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* 89-104 (G. Herek & K. Berrill eds., 1992). Empirical research consistently demonstrates that having personal contact with an openly gay person is one of the most powerful influences on heterosexuals' tolerance and acceptance of gay people. See G. Herek & J. Capitanio, "Some of My Best Friends": *Intergroup Contact, Concealable Stigma, and Heterosexuals' Attitudes Toward Gay Men and Lesbians*, 22 *Personality & Soc. Psychol. Bull.* 412 (1996) (reporting data from national representative sample showing that heterosexuals with gay or lesbian friends or family members have significantly more favorable attitudes toward gay people than heterosexuals without such relationships); G. Herek & E. Glunt, *Identity and Community Among Gay and Bisexual Men in the AIDS Era: Preliminary Findings From the Sacramento Men's Health Study*, in *AIDS, Identity, and Community: The HIV Epidemic and Lesbians and Gay Men* 55-84 (G. Herek & E. Glunt eds., 1995) (same); W. Schneider & I. Lewis, *The Straight Story on Homosexuality and Gay Rights*, 7 *Pub. Opinion* 16, 16-20, 59-60 (Feb.-Mar. 1984) (same). Moreover, research suggests that reduction of prejudice is more likely to occur when a gay man or lesbian directly discloses her or his sexual orientation to a heterosexual friend or family member, compared to when the heterosexual guesses or learns about it from a third party. Herek & Capitanio, "Some of My Best Friends" *supra*, at 416. Such disclosure is inhibited most often by fears of stigma in the form of prejudice, social ostracism, discrimination, or violence. M.V.L. Badgett *et al.*, *Pervasive Patterns of Discrimination Against Lesbians and*

*Gay Men: Evidence From Surveys Across the United States* 51-73 (1992); Herek, *Why tell if you're not asked?* ..., *supra*, at 198-209. By reinforcing such stigmatization, sodomy laws inhibit disclosure by gay people of their sexual orientation. This prevents heterosexuals from interacting with openly gay people which, in turn, reinforces anti-gay prejudice.

C. Section 5-14-122 Is Psychologically Damaging To Gay Men And Lesbians.

In addition to reinforcing societal prejudice by criminalizing core aspects of their intimate sexual lives, laws like Section 5-14-122 foster a climate in which gay men and lesbians feel compelled to conceal, or lie about, their sexual orientation. It also serves to stigmatize gay people, thereby reinforcing unfounded but widely held stereotypes about them. This process results in prejudice – often called “homophobia” – against lesbians and gay men. G. Herek, *Social Context of Hate Crimes*, *supra*; G. Herek, *The Psychology of Sexual Prejudice*, 9 *Current Directions in Psychological Science* 19 (2000).

Lesbians and gay men have been found to manifest better mental health to the extent that they feel positively about their sexual orientation and have integrated it into their lives through coming out and participating in the gay community. A. Bell & M. Weinberg, *supra*; S. Hammersmith & M. Weinberg, *Homosexual Identity: Commitment, Adjustment and Significant Others*, 36 *Sociometry* 56 (1973); G. Herek & E. Glunt, *Interpersonal Contact and Heterosexual's Attitudes Toward Gay Men: Results from a National Survey*, 30 *J. Sex Research* 239 (1993); J. Leserman *et al.*, *Gay Identification and Psychological Health in HIV-Positive and HIV-Negative Gay Men*, 24 *J. Applied Soc. Psychology* 2193 (1994). Being able to disclose one's sexual orientation to others also increases the availability of social support, which is important for mental health. By proscribing sexual conduct that is central to the sexual lives of many gay men and lesbians, however, laws like Section 5-14-122 encourage gay men and lesbians to hide and dissimulate their sexual orientation. For this reason, the statute has negative implications for the mental health of gay men and lesbians.

By forcing them to hide their sexual orientation, the statute may also affect the physical health of gay men and lesbians. Research indicates that hiding or actively concealing significant aspects of the self can have negative effects on physical health, whereas disclosure of such information to others can have positive health outcomes. Herek, *Why Tell If You're Not Asked*, *supra*, at 211-12. One recent study of HIV-negative gay men demonstrates the potential health risks associated with having to hide one's sexual orientation. S. Cole, *et al.*, *Elevated Physical Health Risk Among Gay Men Who Conceal Their Homosexual Identity*, 15 *Health Psychology* 243 (1996). Over a five year period, the researchers observed that those men who concealed their homosexuality were approximately three times more likely to contract various infectious diseases and cancer, than gay men who did not conceal their identity. *Id.* By controlling for other factors, the researchers concluded that this dramatic difference resulted from the psychological inhibition of personal identity. *Id.*

By reinforcing the societal pressure against them, the statute exacerbates the stress that lesbians and gay men already experience as members of a stigmatized group. Research indicates that acutely experiencing such stress, *e.g.*, through incidents of prejudice or discrimination, is associated with heightened psychological distress among gay men and lesbians. I. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 *J. Health & Soc. Behav.* 38 (1995) (finding that gay men who experienced high levels of minority-related stress were also two to three times more likely to suffer from high levels of psychological distress compared to other gay men); Herek *et al.*, *Psychological Sequelae*, *supra* (finding that victims of anti-gay assaults within the previous five years manifested significantly higher levels of psychological distress compared to gay and lesbian victims of comparable physical assaults unrelated to sexual orientation and to gay men and lesbians who experienced no such victimization).

D. The Statute Is Likely To Interfere With Law Enforcement Efforts To Deter Violent Crimes Against Gay Men And Lesbians.

The Hate Crimes Statistics Act, Pub. L. No. 101-275, codified at 28 U.S.C. § 534 (note), *as amended*, Pub. L. No. 104-155 (July 3, 1996), originally enacted in 1990, mandates the

collection of data by the federal government for crimes based on race, ethnicity, religion, disability, and sexual orientation. This law, and the enactment of statutes enhancing penalties for crimes motivated by group bias, *see, e.g.*, Pub. L. No. 103-322, codified at 28 U.S.C. § 994 (note) (Sept. 13, 1994) (mandating enhanced sentences for federal hate crimes, including crimes based on victim's actual or perceived sexual orientation), reflect the government's response to a nationwide upsurge in the incidence of violent crimes against minority groups. G. Herek & K. Berrill, *Primary and Secondary Victimization in Anti-Gay Hate Crimes: Official Response and Public Policy*, in *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* 289 (G. Herek & K. Berrill eds., 1992); G. Herek, *Hate Crimes Against Lesbians and Gay Men: Issues for Research and Policy*, 44 *Am. Psychologist* 948 (1989). In order for these laws to be effective, however, victims must volunteer information about the bias-related nature of an attack to law enforcement authorities. In many cases, gay male and lesbian victims of anti-gay assaults are unlikely to report the crime. Surveys indicate that a substantial proportion of gay people who are victimized in anti-gay crimes do not inform the police. Herek & Berrill, *supra*; Herek *et al.*, *Psychological Sequelae, supra*. Victim's concerns about anti-gay police bias and stigmatization as a result of public disclosure of their sexual orientation are important factors in deciding whether or not to report a crime. Herek *et al.*, *Victim Experiences in Hate Crimes Based on Sexual Orientation* *Journal of Social Issues* (In Press). In states with sodomy laws, such as Arkansas, self-identification is likely to be perceived by victims as subjecting themselves to the risk of "secondary victimization" from law enforcement officials and others who learn about the victim's sexual orientation. Herek & Berrill, *supra*, at 401-13.

E. The Statute Interferes With Health Education Efforts Designed To Encourage Safer Sexual Practices.

By interfering with efforts intended to advise the public how to minimize the danger of contracting the human immunodeficiency virus (HIV), the cause of AIDS, the statute interferes with public health goals.

Since the early years of the AIDS epidemic, public health officials and AIDS educators have actively encouraged the practice of safer sex among individuals potentially at risk for HIV infection. A major focus of safer sex education for men who have sex with other men is to promote the use of condoms during anal sex when there is any chance that either partner is infected with HIV. Institute of Medicine, *Confronting AIDS: Directions for Public Health, Health Care, and Research* (1986); *AIDS: Sexual Behavior and Intravenous Drug Use* (C.F. Turner *et al.* eds., 1989). Education programs promoting safer sex practices among gay and bisexual men led to significant reductions in AIDS-related risk behaviors in the early 1990s. M. Becker & J. Joseph, *AIDS and Behavioral Change to Reduce Risk: A Review*, 78 *Am. J. Pub. Health* 394, 394-410 (1988); *see also, e.g.,* L. McKusick *et al.*, *Longitudinal Predictors of Reductions in Unprotected Anal Intercourse Among Gay Men in San Francisco: The AIDS Behavior Research Project*, 80 *Am. J. Pub. Health* 978 (1990); J. Martin *et al.*, *The Impact of AIDS on a Gay Community: Changes in Sexual Behavior, Substance Use, and Mental Health*, 17 *Am J. Community Psychology* 269 (1989).

However, recent studies suggest a resurgence of high-risk sexual behavior, especially among younger men who have sex with other men. L.A. Valleroy *et al.*, *HIV Prevalence and Associated Risks in Young Men Who Have Sex with Men*, 284 *Am. J. Pub. Health* 198 (2000); R.J. Wolitski *et al.*, *Are We Headed for a Resurgence of the HIV Epidemic Among Men Who Have Sex with Men*, 91 *Am. J. Pub. Health* 883, 884 (June 2001); *see also* J.A. Catania *et al.*, *The Continuing HIV Epidemic Among Men Who Have Sex with Men*, 91 *Am. J. Pub. Health* 907 (June 2001) (concluding from a study in four U.S. urban centers with representative samples of men who have sex with men that the AIDS epidemic continues “unabated among some subsegments” of the community).

The fact that a vaccine for HIV is not yet available, and is not likely to become available in the near future, magnifies the importance of continuing to promote effective HIV prevention programs. C.R. Waldo & T.J. Coates, *Multiple Levels of Analysis and Intervention in HIV*

*Prevention Science: Exemplars and Directions for New Research*, 14 AIDS S18 (Sept. 14, 2000). Recent research has shown that interventions targeting gay and bisexual men can be highly successful in reducing risk behavior when they enlist local leaders to communicate information about why and how to practice safer sex, and when they focus on building a stronger sense of positive identity and community among gay and bisexual men. A key component of such programs is providing information and encouragement for safer sex practices, such as condom use during anal intercourse. J.A. Kelly, *et al.*, *Randomized, Controlled, Community-Level HIV-Prevention Intervention for Sexual-Risk Behavior Among Homosexual Men in US Cities*, 350 Lancet 1500-5 (Nov. 22, 1997); S.M. Kegeles, *et al.*, *Mobilizing Young Gay and Bisexual Men for HIV Prevention: A Two-Community Study*, 13 AIDS 1753 (1999).

Under the statute, however, educators who encourage safer sex practices are likely to be advising on how best to participate in criminal behavior, and individuals who attend educational presentations on risk reduction may fear that they are admitting to engaging in criminal activity. Thus, health educators attempting to implement effective HIV prevention programs are placed in the untenable position of having to contend with a law that undercuts, rather than aids, their efforts on behalf of the public health.

**CONCLUSION**

For the foregoing reasons, *amici* urge this Court to affirm the decision of the court below.

Respectfully submitted,

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