No. 02-102

IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS
Respondent,

On Writ of Certiorari
To the Court of Appeals of Texas
Fourteenth District

BRIEF IN SUPPORT OF RESPONDENT ON BEHALF OF *AMICI CURIAE* TEXAS PHYSICIANS RESOURCE COUNCIL, CHRISTIAN MEDICAL AND DENTAL ASSOCIATIONS AND CATHOLIC MEDICAL ASSOCIATION

Glen Lavy
(Counsel of Record)
ALLIANCE DEFENSE FUND
15333 North Pima Road, Suite 165
Scottsdale, Arizona 85260
(480) 444-0020

Attorneys for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*

Amici are medical organizations that believe public health policy should be based upon scientific evidence rather than political expediency. They believe that the medical research clearly demonstrates the harmful nature of same-sex sodomy, and that compassionate, caring physicians should discourage such harmful behavior. *Amici* submit this brief to inform the Court of the public health concerns associated with same-sex sodomy.[1]

The Texas Physicians Resource Council is a statewide network of Christian physicians and dentists made up of approximately 500 members. Its purpose is to address medically related ethical issues that affect Texas families, including issues relating to homosexuality.

The Christian Medical and Dental Associations ("CMDA") are national organizations made up of the Christian Medical Association and the Christian Dental Association, with over 17,000 members. CMDA promotes evidence-based medicine and addresses policies on healthcare issues. Many CMDA members are involved in treating sexually transmitted diseases worldwide through medical missions to third world countries.

The Catholic Medical Association upholds principles of the Catholic faith and morality as related to the science and practice of medicine, and applies principles of faith and morality to modern medical science and practice.

SUMMARY OF ARGUMENT

Because Petitioners are not members of a suspect or quasi-suspect class, the standard of review for their equal protection challenge to the Texas same-sex sodomy law is rational basis.

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[1]All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

Under rational-basis review, the Texas legislature's motivation for enacting the same-sex sodomy law is irrelevant. Petitioners have the burden of negating every reasonably conceivable basis for treating same-sex sodomy different from opposite-sex sodomy. They have not done so. In fact, they have not even created a record from which this Court could conclude that the Texas same-sex sodomy law is without a rational basis. In order for the Court to reject the rational bases proffered by Respondent and the various *amici curiae*, it would have to weigh *de novo* complex, apparently contradictory evidence, without the benefit of expert testimony or cross examination. That is not an appellate function.

Texas has a legitimate interest in regulating public health, and the CDC has identified sexually transmitted diseases ("STDs") as a public health problem. Sodomy is an efficient method of transmitting STDs. And regardless of the reason, same-sex sodomy is far more effective in spreading STDs than opposite-sex sodomy. Multiple studies have estimated that 40 percent or more of men who practice anal sex acquire STDs. In fact, same-sex sodomy has resulted in the transformation of diseases previously transmitted only through fecally contaminated food and water into sexually caused diseases–primarily among those who practice same-sex sodomy.

The issue under rational-basis review is not whether Texas should be concerned about opposite-sex sodomy, but whether it is reasonable to believe that same-sex sodomy is a distinct public health problem. It clearly is.

ARGUMENT

I. THE LACK OF A RECORD WOULD REQUIRE THIS COURT TO ENGAGE IN *DE NOVO* FACT-FINDING IN ORDER TO ACCEPT PETITIONERS' EQUAL PROTECTION CLAIM

A. Petitioners Must Negate Any Reasonably Conceivable Basis for the Same-sex Sodomy Law

As explained in detail in the brief for *amicus curiae* American Center for Law and Justice, Petitioners are not members of a suspect class.[2] Absent membership in a suspect class, the Petitioners' equal-protection challenge to the Texas sodomy statute is subject to rational-basis review. Under rational-basis review, "the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification." *Board of Trustees of the University of Alabama v. Garret*, 531 U.S. 356, 367 (2001) (citations and internal quotation marks omitted).

Amici American Public Health Association ("APHA"), et al. ("Public Health *Amici*"), misconstrue the burden of proof in an equal protection challenge under rational basis review.[3] They contend that a public health interest[4] cannot justify the Texas sodomy law because the State has not defended on that ground, and there is no proof that the legislature relied upon that ground in enacting the statute. APHA *Amicus* Brief at 5-7. However, because this Court "never require[s] a legislature to articulate its reasons for enacting a statute, *it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature*." *Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (emphasis added).

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[2]Indeed, the record is silent as to whether Petitioners consider themselves homosexuals. Even if they are homosexual, the *amicus curiae* brief of Concerned Women for America explains that homosexuals are neither politically powerless nor identifiable by an immutable characteristic.

[3]Public Health *Amici* overstate the case when they claim that "Texas has consistently maintained that the sole 'legitimate state interest' furthered by the Homosexual Conduct Law is 'preserving public morals.'" APHA *Amicus* Brief at 5. The sources cited support the statement that public morals is all the State has argued, but not that it disclaimed other interests.

[4]HIV/AIDS is the only disease that the Public Health *Amici* address in any detail. The public health interest identified in this brief is far broader in scope.

Thus, for purposes of rational basis review, it makes no difference whether the State has ever relied upon a conceivable basis for a public interest; the only issue is whether the challengers have negated every conceivable basis. They have not.[5]

B. Petitioners Have Failed to Create a Record to Challenge Reasonably Conceivable Bases for the Statute

Same-sex behavior is not like a racial classification when it comes to establishing equal protection claims. It was unnecessary for African-Americans to create a record to prove that they were similarly situated with white or Anglo-Americans in cases like *McLaughlin v. Florida*, 379 U.S. 184 (1964). As the Court explained:

> [W]e deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitution-

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[5]Public Health *Amici*'s reliance upon *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975), to argue that a public health concern cannot support a statute unless the interest was expressed in legislative history, is misplaced. *See* APHA *Amicus* Brief at 7. *Weinberger* addressed sex-based discrimination, which receives heightened scrutiny, and the opinion does not even mention rational basis as a standard of review. Furthermore, subsequent legislative history, upon which the APHA also relies, has little bearing on original legislative intent, and no bearing on whether a statute supports a legitimate public interest. *See Central Bank of Denver, N.A. v. First Interstate Bk. of Denver, N.A.*, 511 U.S. 164, 187 (1994) ("failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute'") (citation omitted). Because Texas already had a law against same-sex sodomy when additional penalties were proposed, the failure to make punishment more severe does not mean that the legislature decided that same-sex sodomy does not implicate public health concerns. *Cf.* APHA *Amicus* Brief at 6 (arguing that the legislature rejected public health arguments).

> ally suspect," and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose.

McLaughlin, 379 U.S. at 191-92 (citations omitted). In view of the Fourteenth Amendment, there was no reason to weigh evidence about whether racial minorities should be treated differently–the United States Congress and a majority of the states had already made that determination. There is no similar constitutional determination for same-sex behavior.

Petitioners made no effort in the trial court to prove a lack of rational relationship between the sodomy law and legitimate public interests. Furthermore, they have created no record from which this Court could conclude that the Texas same-sex sodomy law is without a rational basis.

C. Petitioners Are Asking the Court to Find Facts *de novo*

Absent record evidence to negate every conceivable basis to support the statute, Petitioners are, in effect, asking this Court to engage in *de novo* fact finding. They are asking the Court to weigh medical evidence, without the benefit of expert testimony or cross examination, and find that same-sex sodomy does not raise a public health concern. That is not an appellate function nor even a judicial function. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (Court of Appeals "should not simply have made factual findings on its own"); *FCC v. Beach Communications*, 508 U.S. at 313 ("equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices").

Indeed, the legislature is far better positioned for resolving disputes about moral issues and the public health than are courts. That is why Texas courts defer to the legislature on matters of public concern. *Lens Express, Inc. v. Ewald*, 907 S.W.2d 64, 69 (1995) ("'[T]he question of what is a "suitable" law is not within the power of a court to decide. By its very

nature, it is a political question committed to the legislature because it calls for pure public-policy decisions beyond a court's competence'") (citation omitted); *see also Baker v. Wade*, 774 F.2d 1285, 1287 (5th Cir. 1985) (reversing holding that Texas sodomy statute violated equal protection clause: "The finding of the district court, to the effect that no rational basis exists for prohibiting this manner of sexual conduct, is a legislative finding and not an adjudicative fact finding"). This Court should likewise defer to the legislature. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid").

II. THE PROHIBITION OF SAME-SEX SODOMY IS RATIONALLY RELATED TO THE STATE'S INTEREST IN PUBLIC HEALTH

A. The State Has a Legitimate Interest in Regulating Public Health

This Court has long recognized the validity of state regulation of public health and morality.[6] *Railroad Co. v. Husen*, 95 U.S. 465, 470-71 (1877) (state's police power "is generally said to extend to making regulations promotive of domestic order, morals, health and safety"). Soon after ratification of the Fourteenth Amendment, this Court held that it did not affect a state's police power:

> But neither the [Fourteenth] amendment–broad and comprehensive as it is–nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people . . . .

[6]This brief will address only the public health interest, since the State and other *amici* are addressing the public morality interest.

Barbier v. Connolly, 113 U.S. 27, 31 (1884); *see also L'Hote v. City of New Orleans*, 177 U.S. 587, 596 (1900) ("It has been often said that the police power was not by the Federal Constitution transferred to the nation, but was reserved to the states, and that upon them rests the duty of so exercising it as to protect the public health and morals"). The Court has continued to recognize the valid exercise of police powers promoting public health and morality in recent years. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000) ("Erie's efforts to protect public health and safety are clearly within the city's police powers"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation").

B. Same-sex Sodomy Raises Public Health Issues

1. STDs in general

The incidence and prevalence[7] of sexually transmitted diseases have grown exponentially since the sexual revolution of the 1960's and 1970's. The Centers for Disease Control ("CDC") estimates that "more than 65 million [Americans] are currently living with an incurable sexually transmitted disease (STD). An additional 15 million people become infected with one or more STDS each year, roughly half of whom contract

[7]It is important to distinguish between incidence and prevalence of diseases. Incidence refers to "the development of new cases of a disease in a population free of the disease," while prevalence refers to "the number of persons who have a disease in a population at one point in time." Gary D. Friedman, M.D., S.M., *Medical Usage and Abusage: "Prevalence" and "Incidence*," 84 Annals of Internal Medicine 502, 502 (1976). As the prevalence of a disease increases, absent intervention, the incidence will increase as well. But if a majority of a susceptible population has contracted a disease with no cure, the incidence ultimately will decrease until new people are added to the risk pool. Thus, a decline in the incidence of a disease does not necessarily mean that it is no longer a public health concern.

lifelong infections." *Tracking the Hidden Epidemics: Trends in STDs in the United States 2000* at 1 (citation omitted).[8] As the CDC noted in its most recent STD surveillance report, "'[a]ll Americans have an interest in STD prevention because all communities are impacted by STDs and all individuals directly or indirectly pay for the costs of these diseases. *STDs are public health problems . . . .*'" CDC, *Sexually Transmitted Disease Surveillance 2001* at v, Division of STD Prevention (September 2002) (citation omitted; emphasis added).[9]

The CDC has identified men who have sex with men as among the groups that "are most vulnerable to STDs and their consequences . . . ." *Id.* at 39 (Introduction to "Special Focus Profiles"). One reason that men who have sex with men are at high risk of STDs is the nature of anal sex. Anal sex is not the same as sexual intercourse because of the differences between the vagina and the anus.[10] "The vagina is surrounded by thick muscular tissue which distends and changes shape to accommodate the erect penis during intercourse." Jeremy Agnew, *Some Anatomical and Physiological Aspects of Anal Sexual Practices*, 12 Journal of Homosexuality No. 1, 75, 91 (Fall 1985). The nature of these muscles make them "capable of protecting against abrasion during intercourse . . . ." *Id.* In contrast, the anus has a far more limited capacity to expand because it is firmly attached to the tail bone, and it is vulnerable to tears at its point of attachment. Because the anus is surrounded by veins and arteries, any tears may lead to substantial bleeding. *See* Keith L. Moore, CLINICALLY ORI-

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[8]Available at www.cdc.gov/nchstp/dstd/Stats_Trends/Trends2000.pdf.

[9]Available at www.cdc.gov/std/stats/TOC2001.htm.

[10]Texas Penal Code § 21.01(3) defines "sexual intercourse" in a medically correct sense as "any penetration of the female sex organ by the male sex organ." Anal sex does not qualify as sexual intercourse under Texas law or medical definitions. *See* STEDMAN'S POCKET MEDICAL DICTIONARY 151 (coitus), 381 (sexual intercourse) (1987).

ENTED ANATOMY 385 (2nd ed. 1985). Accordingly, receptive anal sex may cause physical trauma to the anus and the rectum:

> the lining of the rectum consists of a single layer of [membranous cellular tissue] with numerous goblet [mucous secreting] cells. The function of this thin layer is to promote the absorption of water and electrolytes. In spite of the limited protective capacity of secreted mucus from the goblet cells, the mucosa is incapable of much mechanical protection against abrasion. . . .
>
> . . . One of the commonest problems associated with anal sexual activity is tearing of the anal canal. The external anal sphincter is biologically intended to have material pass through it out of the body. The sudden or forceful insertion of objects in the "reverse" direction stimulates the anal reflex and produces a natural tendency of the sphincter to contract to prevent insertion. Unlike the vagina, the anus and rectum lack a natural lubricating function, and insertion of unlubricated objects or inadequate dilation prior to the insertion of large objects can result in the tearing of perianal and anal canal tissue.

Agnew, 12 Journal of Homosexuality at 91; *see also* Stephen E. Goldstone, M.D., THE INNS AND OUTS OF GAY SEX: A MEDICAL HANDBOOK FOR MEN 4 (1999) ("An anal tear can occur during the initial phase of anal sex"); William G. Eckert, M.D., & Steven Katchis, *Anorectal Trauma*, 10 The American J. of Forensic Medicine and Pathology 3, 5 (1989) (anal sex "can cause tears and resultant bleeding or other complications").

The frequency or total number of instances of receptive anal sex appears to have an influence on the degree of trauma and the likelihood of contracting STDs. As noted in the Journal of Homosexuality:

> Frequent anorectal sexual activity, whether it is repeated anal intercourse, frequent enemas, or continued

> insertion of objects into the rectum, may cause irritation of the rectal mucosa and produce a variety of anorectal problems. Symptoms may include anorectal pain, diarrhea, overproduction of mucus, flatus, purulent discharge, intestinal cramps, painful defecation, fecal leakage, hemorrhoids, anal or rectal ulceration and fissures, pruritus ani, or varying degrees of rectal prolapse.

Agnew, 12 Journal of Homosexuality at 90-91. A study of incontinence among men who practice receptive anal sex "revealed an excess of minor anal incontinence amongst anoreceptive homosexual men. Over a third of AR subjects reported some degree of anal incontinence or urgency of defaecation [sic]." A.J.G. Miles, et al., *Effect of Anoreceptive Intercourse on Anorectal Function*, 86 Journal of the Royal Society of Medicine 144, 146 (March 1993). The study also found a cumulative effect from repeated anal sex: "The correlation between maximum resting pressure and estimated number of partners suggests that the damage to the internal sphincter is a cumulative effect." *Id.*; *see also* Goldstone, INNS AND OUTS at 19 ("Repeated injuries cause cumulative damage and, in later life, may lead to incontinence").

The nature of the anus and rectum and the trauma that may accompany receptive anal sex makes anal sex an efficient mode of transmitting disease. Injuries to the anal canal during anal sex are not necessarily considered serious absent complicating factors. *See* A.W. Martin Marino, M.D., & Hugo W.N. Mancini, M.D., *Anal Eroticism*, Surgical Clinics of North America No. 3, 513, 515 (June 1978) ("Tears of the anal canal may be a consequence of anal intercourse and, if so, will usually heal spontaneously"). However, anal tears cause bleeding, and thus the mixing of blood with other bodily fluids, feces and any disease organisms present. The result is the transmission of numerous STDs, including a number of diseases that are not ordinarily transmitted sexually. The diseases transmitted include anal gonorrhea, syphilis, anal warts, herpes simplex

virus and enteric [intestinal] pathogens, including giardiasis, shigellosis, amebiasis and hepatitis B. *Id*. at 514; Anne Rompalo, M.D., *Sexually Transmitted Causes of Gastrointestinal Symptoms in Homosexual Men*, 74 Medical Clinics of North Am. No. 6, 1633, 1634-35 (November 1990); William F. Owen, Jr., M.D., *Sexually Transmitted Diseases and Traumatic Problems in Homosexual Men*, 92 Annals of Internal Medicine 805 (1980). The enteric pathogens historically have not been transmitted sexually, but have become somewhat common among men who have sex with men: "These infections are [usually] associated with the ingestion of fecally contaminated food or water. Certain sexual practices, especially analingus, may allow direct exposure to these pathogens and thus promote transmission of *Campylobacter, Shigella, Salmonella, Entamoeba histolytica, Giardia*, and several other enteric pathogens." Anne M. Rompalo, M.D., *Diagnosis and Treatment of Sexually Acquired Proctitis and Proctocolitis: An Update*, 28 Clinical Infectious Diseases Suppl. 1, S84, S87 (1999); Marino & Mancini, 58 Surgical Clinics of North America at 514 ("Giardiasis, shigellosis, and amebiasis are being reported with increasing frequency in homosexual males").

The prevalence of these sexually transmitted diseases among men who have sex with men led to the coining of a concept called the "gay bowel syndrome." Henry L. Kazal, M.D., et al., *The Gay Bowel Syndrome: Clinico-Pathologic Correlation in 260 Cases*, 6 Annals of Clinical and Laboratory Science, No. 2, 184, 185 (1976). The "gay bowel syndrome" ultimately was used to describe over 50 infections or conditions. Michael Scarce, *Harbinger of Plague: A Bad Case of Gay Bowel Syndrome*, 34 Journal of Homosexuality No. 2, 1, 7 (1997). Critics of the concept pointed out that the diseases were not limited to men who have sex with men, not all of the diseases included in the concept occur in the bowel, and the diseases do not technically constitute a "syndrome." *Id*. at 7-

12.[11] However, the point of the concept of the "gay bowel syndrome" was that physicians were beginning to identify sexually transmitted diseases that had not previously been associated with sexual activity. *See* N. Sohn, & J.G. Robilotti, *The Gay Bowel Syndrome: A Review of Colonic and Rectal Conditions in 200 Male Homosexuals*, 67 American J. of Gastroenterology 478, 478 (1977). "Gay bowel syndrome" became a short-hand way of referring to the newly-identified STDs, which were often combined with more familiar STDs among men who have sex with men. *See* Thomas C. Quinn, M.D., *Gay Bowel Syndrome: The Broadened Spectrum of Nongenital Infection*, 76 Postgraduate Medicine, No. 2, 197, 197 (1984); Owen, 92 Annals of Internal Medicine at 805.

Despite criticisms of the "gay" in "gay bowel syndrome," there is a definite association between sexually transmitted enteric pathogens and men having sex with men:

> Several enteric infectious agents, including hepatitis A, Shigella, Entamoeba histolytica, Giardia lamblia, Enterobius vermicularis and, perhaps, Salmonella, have become increasingly apparent in homosexual men. Enteric pathogens may be sexually transmitted by ingestion during oral anal sexual exposure (anilingus), or when fellatio or anal insertive intercourse occurs with a partner whose penis has been contaminated by previous anal intercourse. Anorectal disease in homosexual men may thus be caused by a variety of enteric pathogens, as well as by the common sexually transmitted pathogens . . . .

Thomas C. Quinn, M.D., et al., *The Etiology of Anorectal Infections in Homosexual Men*, 71 The American Journal of Medicine 395, 395 (1981) (citations omitted). Quinn et al. noted that

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[11]Scarce attacked the concept of "gay bowel syndrome" as "blatant medical homophobia." *Id*. at 2.

"[i]n New York City, the prevalence of infection with giardiasis and/or amebiasis ranged from 30 percent to 40 percent in homosexual men." *Id*. at 400 (citations omitted). Moreover, "[i]n San Francisco, Seattle and New York, from 30 percent to 70 percent of the patients with shigellosis were homosexual men." *Id*. at 401 (citations omitted). Hepatitis B virus ("HBV") was also more prevalent in men who have sex with men:

> Serologic surveys of groups of homosexual men have shown that 50% to 75% have evidence of previous or current infection with HBV, and it has been estimated that in the United states alone more than 100,000 homosexual men are carriers of hepatitis B surface antigen (HbsAg). Only parenteral drug users have comparable rates of infection. *Prevalence rates for homosexual men exceed those for heterosexual partners of HbsAg-positive persons*, suggesting that the sexual activities of homosexual men lead to a greater frequency of exposure to infectious virus or provide more efficient routes of transmission.

Neil E. Reiner, M.D., et al., *Asymptomatic Rectal Mucosal Lesions and Hepatitis B Surface Antigen at Sites of Sexual Contact in Homosexual Men with Persistent Hepatitis B Virus Infection: Evidence for de facto Parenteral Transmission*, 96 Annals of Internal Medicine 170, 170 (1984) (citations omitted; emphasis added). Although rates of HBV have decreased, the CDC recently reported that men who had sex with men (1-2

percent)[12] accounted for nearly one-third of the sexually-transmitted cases of HBV. *Tracking the Hidden Epidemics* at 23.[13]

There is some evidence that certain STDs among men who have sex with men are different from and perhaps more dangerous than similar STDs among other populations. A recent report from Seattle, Washington confirmed prior studies which found that anorectal chlamydial and gonococcal (gonorrhea) infections in men who have sex with men involve different strains of the disease than those found among heterosexuals in the same area. William M. Geisler, M.D., et al., *Epidemiology of Anorectal Chlamydial and Gonococcal Infections Among Men Having Sex With Men in Seattle: Utilizing Serovar and Auxotype Strain Typing*, 29 Sexually Transmitted Diseases No. 4, 189, 194 (April 2002). These differences have been prevalent for twenty years. *Id*. at 194. The most alarming finding is that a significant amount of these strains of disease among men who have sex with men in the Seattle area are resistant to

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[12]A 1993 report from the Alan Guttmacher Institute found that only 1.1% of 3,321 men surveyed were exclusively homosexual, and only 2.3% had engaged in sex with another man *in the prior ten years*. John O.G. Billy, et al., *The Sexual Behavior of Men in the United States*, Family Planning Perspectives, Alan Guttmacher Institute (March/April 1993). Another random survey found that about 2 percent of the men surveyed had sex with a man in the prior 12 months. Robert T. Michael, et al., SEX IN AMERICA: A DEFINITIVE SURVEY 175 (1994). A survey of 34,706 students in grades 7-12 found that 1 percent reported any homosexual experience. Gary Remafedi, et al., *Demography of Sexual Orientation in Adolescents*, 89 Pediatrics No.4, 714, 719 (1992). No random survey has found significantly higher percentages of men who have sex with men on a regular basis.

[13]Forty percent of acute HBV infections "were attributed to high-risk heterosexual practices–more than one partner in the prior six months, history of other STDs–and 18 percent were associated with homosexual activity." *Id*. The rest of the HBV infections were not transmitted sexually.

several antibiotics.[14] *Id*. at 191; *see also* Quinn, et al., 71 The American J. of Medicine at 398 (suggesting that anorectal gonorrhea in homosexuals tends to be resistant to penicillin).

There have been numerous reports assuming that men who have sex with men are practicing "safer" sex, and that rates of serious STDs have declined. *See* Rompalo, 28 Clinical Infectious Diseases at S84 (citing studies). In fact, in late 2001, the CDC reported that syphilis was on its way to being eliminated. CDC Press Release, *U.S. Syphilis Rate Declines to All-Time Low in 2000*, Office of Communication (Nov. 28, 2001).[15] However, rates of high-risk behavior and STDs among men who have sex with men have risen dramatically over the past several years. Slightly less than a year after its press release reporting an all-time low rate of syphilis, the CDC reported an increase in syphilis rates of "15.4 percent between 2000 and 2001, an increase that coincided with outbreaks among gay and bisexual men in several U.S. cities." CDC Press Release, *Overall Syphilis Rate Rises for First Time Since 1990*, Office of Communication (Nov. 1, 2002).[16] The increase in syphilis among men who have sex with men was reportedly dramatic in a number of cities, including at least San Francisco, Los Angeles, New York, Chicago, Denver, Minneapolis and Columbus, Ohio. *See* CDC, *Primary and Secondary Syphilis–United States, 2000-2001*, 51 Morbidity and Mortality Weekly Report ("MMWR") No. 43, 971, Table 2 (Nov. 1, 2002); *see also San Francisco Monthly STD Report*, San Francisco Department of Public Health (August 2002) (more than double the number of cases, and "[m]ore than 90% of early syphilis cases are among

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[14]The incidence of the infections among men who have sex with men was also significant in that the infections increased considerably from 1997-1999 in comparison with 1994-1996. *Id*. at 190.

[15]Available at www.cdc.gov/od/oc/media/pressrel/r011128.htm.

[16]Available at www.cdc.gov/od/oc/media/pressrel/r021101b.htm.

gay and bisexual men");[17] Associated Press Newswires, *Syphilis Outbreak in Los Angeles County Leads to Calls for More Testing*, 12/27/02 APWIRES 02:40:00 ("The number of syphilis cases reported by gay men in Los Angeles County has increased 62 percent"); Christine Haughney, *Syphilis Rises Among N.Y. Gay Men; Experts Fear Data Point to Increase in Risky Sexual Activity*, The Washington Post, 2002 WL 101064118 (Sept. 27, 2002) (CDC "reported that syphilis cases in the city more than doubled . . . and 81 percent of the cases the health department surveyed involved men with male partners"); Jimmy Greenfield, *Syphilis Outbreak Raises HIV Fears*, Chicago Tribune, 2002 WL 102895528 (Nov. 19, 2002) (although the number of cases in Chicago decreased, "the percentage of cases involving gay or bisexual men soared to 57 percent from 15 percent"); Bill Scanlon, *Spike in Syphilis Alarms Officials*, Rocky Mountain News, 2002 WL 9108181 (Aug. 1, 2002) ("syphilis is surging in the Denver area, especially among gay men"); Associated Press Newswires, *Cases of Syphilis Among Gay and Bisexual Men Increases*, 10/1/02 APWIRES 04:27:00 ("MINNEAPOLIS (AP) - Syphilis cases among gay and bisexual men in Minnesota have increased tenfold this year compared with last, according to the state health department"); Editorial & Comment, *Fighting Syphilis*, The Columbus Dispatch, 2002 WL 100598949 (Sept. 23, 2002) ("Syphilis cases in men jumped an astounding 80 percent last year, more than offsetting a dramatic decrease among women of almost 29 percent").[18]

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[17]Available at www.dph.sf.ca.us/Reports/STD/STD0208.pdf.

[18]STDs, and in particular HPV (human papilloma virus), appear to be associated with anal cancer. Accordingly, men who have sex with men have a significantly higher risk of anal cancer in comparison with men who do not. Mads Melbye, et al., *Changing Patterns of Anal Cancer Incidence in the United States, 1940-1989*, 139 American J. of Epidemiology No. 8, 772, 778 and Table 2 (1994). The risk of anal cancer is even higher for AIDS victims. Goedert, J.J., et al., *Spectrum of AIDS-associated Malignant*

2. HIV

Even worse than the concerns about syphilis itself is the threat of HIV as the result of syphilis infections. One of the consequences of a high prevalence of syphilis and other STDs in men who have sex with men is that "STDs, and the behaviors associated with them, increase the likelihood of acquiring and transmitting HIV infection . . . ." CDC, *Sexually Transmitted Disease Surveillance 2001* at 65 (Special Focus Profile, "STDs Among Men Who Have Sex with Men"). In regard to syphilis, the "lesions increase risk of HIV transmission between two and five times . . ." CDC Press Release, *Overall Syphilis Rate Rises for First Time Since 1990*. Indeed, in Chicago, "[u]p to 70 percent of gay and bisexual men infected in recent outbreaks have tested positive for HIV . . . ." Greenfield, *Syphilis Outbreak Raises HIV Fears*. Therefore, the increases in syphilis infections among men who have sex with men is no minor health concern.

"With the emergence of AIDS and identification of HIV, unprotected anal intercourse was reported to be the most efficient mode of sexual transmission of HIV infection." Anne M. Rompalo, M.D., *Diagnosis and Treatment of Sexually Acquired Proctitis and Proctocolitis: An Update*, 28 Clinical Infectious Diseases Suppl. 1, S84, S84 (1999); *see also* Goldstone, INNS AND OUTS at 16 ("an anus is the highest-risk place for STDs"). That is particularly problematic for men who have sex with men, for a survey of 5,000 homosexual men in 4 metropolitan areas found that "over 80% had engaged in receptive anal intercourse with at least some of their partners in the previous two years." R.A. Kaslow, et al., *The Multicenter*

Disorders, 351 The Lancet 1833, 1836 (June 20, 1998). A history of anal sex appears to increase the risk of anal cancer for men and women. Frisch, M., et al., *Sexually Transmitted Infection as a Cause of Anal Cancer*, 337 New England Med. J. No. 19, 1350, 1352-53 and Table 2 (1997).

AIDS Cohort Study: Rationale, Organization and Selected Characteristics of the Participants, 126 American J. of Epidemiology No. 2, 310 (1987). Despite the small number of men who have sex with men (*supra* note 12), the CDC has reported that "[r]esearchers estimate that men who have sex with men (MSM) still account for 42 percent of new HIV infections annually in the United States and for 60 percent of all new HIV infections among men." *Tracking the Hidden Epidemics* at 4. But these percentages are likely significantly underestimated for several reasons. First, they do not appear to include the number of men in the risk category of men who inject drugs *and* have sex with men. Second, the risk category has not been identified in nearly a third of cases reported to the CDC of HIV in men, and in 2001 the risk category was not identified for 51% of new cases of HIV in men. CDC, *U.S. HIV and AIDS Cases Reported Through December 2001*, Year-end edition Vol. 13, No. 2, Table 6.[19] Perhaps more importantly, a recent CDC study found that most HIV-infected men who have sex with men *do not know they have HIV*:

> More than three-fourths of young gay and bisexual men infected with HIV were unaware of their status–including 91 percent of African-American MSM–and may have unknowingly transmitted the virus to their partners, according to a study led by CDC's Duncan McKellar. Researchers surveyed 5,719 MSM between the ages of 15 and 29 in six major U.S. cities, of whom 573 tested positive for HIV; 440 men (77 percent) were unaware of their infection. . . . Of the 440 men who were unaware of their infection, 59 percent perceived themselves to be at low or very low risk of being infected.[20]

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[19]Available at www.cdc.gov/hiv/stats/hasrl302.htm.

[20]The number of HIV positive men who are unaware of their condition renders irrelevant Public Health *Amici*'s argument that "there is no risk of transmission where both partners are free of the virus." APHA Brief at 16.

CDC Press Release, *New CDC Studies Shed Light on Factors Underlying High HIV Infection Rates Among Gay and Bisexual Men*, 2-3, CDC Office of Communication (July 10, 2002).[21] In another study reported in the same Press Release, "researchers found the rate of new HIV infections among men who have sex with men (MSM) to be *nine times higher* than among women and heterosexual men." *Id*. at 1 (emphasis added).

Men who have sex with men may be responsible for a significant amount of heterosexual transmission of HIV as well, for nearly 41 percent of women with AIDS acquired it from men. CDC, *Basic Statistics*, Division of HIV/AIDS Prevention.[22] It is unlikely that many American men acquire HIV from women because HIV is not easily transmitted from females to males. *See* Bruce Voeller, Ph.D., *AIDS and Heterosexual Anal Intercourse*, 20 Archives of Sexual Behavior No. 3, 233, 264 (1991) ("female partners infected anally (or any other way) are much less likely to communicate HIV sexually to their partners than are anal-receptive homosexual or bisexual males . . . Western females *tend* to be terminators in infectivity chains") (emphasis original).[23] Thus, many of the men who infect females are likely to have acquired HIV/AIDS by having sex with men. *See id.* at 237 (noting risk from bisexual men).

3. Oral sex

Oral sex also results in the spread of HIV/AIDS and other STDs. According to the CDC, HIV, "[h]erpes, syphilis, gonorrhea, genital warts (HPV), intestinal parasites (amebiasis), and hepatitis A are examples of STDs which can be transmitted during oral sex with an infected partner." CDC, *Preventing the*

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[21] Available at www.cdc.gov/od/oc/media/pressrel/r020710.htm.

[22] Available at www.cdc.gov/hiv/stats.htm. Of the total of 141,048 cases of AIDS in females, 57,396 are from heterosexual contact.

[23] African men are more likely than American men to acquire HIV from females because of the prevalence of untreated STDs in Africa. *Id*.

Sexual Transmission of HIV, the Virus that Causes AIDS: What You Should Know about Oral Sex, HIV/AIDS Update (December 2000).[24] A number of the diseases associated with men who have sex with men, particularly the enteric pathogens, are most likely transmitted through an oral/anal or penile/anal/oral route. Marino & Mancini, 58 Surgical Clinics of North America at 514 ("Sexual transmission of [enteric pathogens] is a possible consequence of oro-anal, ano-genital, and genito-oral contact either separately or in sequence"). One study expressed surprise at finding that oral-anal sex "was the single most important practice associated with infection [with hepatitis B surface antigen] . . . ." Reiner, et al., *Asymptomatic Rectal Mucosal Lesions and Hepatitis B Surface Antigen at Sites of Sexual Contact in Homosexual Men . . .*, 96 Annals of Internal Medicine at 170. Human herpes virus 8, "a necessary etiologic agent of Kaposi sarcoma," also appears to be spread by oral sex between men who have sex with men (but seldom in opposite-sex couples). Dennis H. Osmond, Ph.D., et al., *Prevalence of Kaposi Sarcoma-Associated Herpesvirus Infection in Homosexual Men at Beginning of and During the HIV Epidemic*, 287 Journal of the Am. Medical Ass'n No. 2, 221 (2002).

C. Same-sex Sodomy Is More Harmful to the Public Health than Is Opposite-sex Sodomy

1. Men who have sex with men

A large body of medical literature gives vocal testimony to the high rate of STDs and enteric diseases among men who have sex with men in comparison with the population at large. *See, e.g.*, Mitchell Bernstein, M.D., *Sexually Transmitted Diseases Including AIDS*, American Society of Colon and

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[24]Available at ftp://ftp.cdcnpin.org/Updates/oralsex.pdf. The CDC defines "oral sex" as oral-penile, oral-vaginal or oral-anal contact. *Id.*

Rectal Surgeons, 1999 Core Subjects (1999);[25] Rompalo, *Diagnosis and Treatment of Sexually Acquired Proctitis and Proctocolitis: An Update*, 28 Clinical Infectious Diseases at S84; Voeller, *AIDS and Heterosexual Anal Intercourse*, 20 Archives of Sexual Behavior at 264-65; Rompalo, *Sexually Transmitted Causes of Gastrointestinal Symptoms in Homosexual Men*, 74 Medical Clinics of North Am. at1633; Reiner, et al., *Asymptomatic Rectal Mucosal Lesions and Hepatitis B Surface Antigen at Sites of Sexual Contact in Homosexual Men with Persistent hepatitis B Virus Infection: Evidence for de facto Parenteral Transmission*, 96 Annals of Internal Medicine at 170; William W. Darrow, Ph.D., et al., *The Gay Report on Sexually Transmitted Diseases*, 71 American J. of Pub. Health No. 9, 1004 (1981); Quinn, et al., *The Etiology of Anorectal Infections in Homosexual Men*, 71 The American J. of Medicine at 395; Owen, *Sexually Transmitted Diseases and Traumatic Problems in Homosexual Men*, 92 Annals of Internal Medicine at 805; Richard R. Babb, M.D., *Sexually Transmitted Infections in Homosexual Men*, 65 Postgraduate Medicine No. 3, 215 (1979). As an insurance company recently stated in its magazine for physicians, "if you do not know your patient's sexual orientation, you may not connect their symptoms to a *host of diseases and conditions more commonly associated with GLBT persons*." Aetna, 4 Physician News, 3 (December 2002) (emphasis added).

2. Men who have sex with women

Several relatively recent studies have attempted to show that there is more opposite-sex sodomy than same-sex sodomy. *See, e.g.*, Janice I. Baldwin, Ph.D., & John D. Baldwin, Ph.D., *Heterosexual Anal Intercourse: An Understudied, High-Risk Sexual Behavior*, 29 Archives of Sexual Behavior No. 4, 357 (2000); Daniel T. Halperin, Ph.D., *Heterosexual Anal Inter-*

[25]Available at www.fascrs.org/coresubjects/1999/std/std.html.

course: Prevalence, Cultural Factors, and HIV Infection and Other Health Risks, Part I, 13 AIDS Patient Care and STDs No. 12, 717 (1999); Pamela I. Erickson, Dr.P.H., et al., *Prevalence of Anal Sex Among Heterosexuals in California and Its Relationship to Other AIDS Risk Behaviors*, 7 AIDS Education & Prevention No. 6, 477 (1995); Voeller, *AIDS and Heterosexual Anal Intercourse*, 20 Archives of Sexual Behavior at 233.[26]

Even if the reports of anal sex among opposite-sex couples are accurate, which is questionable (as noted below), that does not place opposite-sex sodomy on the same level of public health concern as same-sex sodomy.[27] The risks associated with anal sex for opposite-sex couples is simply not the same as for same-sex couples. The extent of STDs associated with same-sex sodomy is likely related to the high frequency of sex, anonymous or multiple sex partners, and other high-risk behaviors. *See* Rompalo, 74 Medical Clinics of N. Am. at 1634. In contrast, "most women are less likely than MSM to be sexually involved with someone who is HIV-positive, have numerous sexual partners, or to engage in high frequencies of anal intercourse or other AIDS/STD-related risk behaviors

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[26]Public Health *Amici*'s citation of Pamela Bean, *Containing the Spread of HIV Infection among High-Risk Groups*, 21 American Clinical Laboratory 19 (June 2002), for a study demonstrating the prevalence of opposite-sex couples having anal sex is puzzling. *Cf.* APHA *Amicus* Br. at 13. Bean did not purport to study the prevalence of anal sex, but made a passing reference to a 1960's study by Masters and Johnson, which was by no means representative–Masters and Johnson studied couples who were willing to be observed while having sex. *See* Robert T. Michael, SEX IN AMERICA: A DEFINITIVE SURVEY 21-22 (1994).

[27]In fact, if there is an extensive amount of opposite-sex sodomy, that only serves to highlight the greater health risk of same-sex sodomy, since the few men who have sex with men have such a high percentage of certain STDs.

. . . ."[28] Halperin, 13 AIDS Patient Care and STDs at 721. Moreover, as Voeller pointed out, Euro-American women are not effective at spreading HIV, even through anal sex. 20 Archives of Sexual Behavior at 264-65. Thus, the HIV risk for heterosexuals is minimal unless women have sex with men who have also had sex with men. *See id.* at 237 ("Bisexual men pose possibly greater risk to women," and women who have sex with bisexual men are more likely to engage in anal sex); CDC *Basic Statistics* (less than 5% of men with AIDS were exposed heterosexually; nearly 3 times as many women were exposed to AIDS heterosexually). In addition, "[t]o date, sexually transmitted anorectal infections have not been reported as a consequence of" anal sex among opposite-sex couples. Rompalo, 28 Clinical Infectious Diseases at S85.[29]

There may be far less sodomy among opposite-sex couples than the above studies estimate. One might well anticipate that those who truly believe their sexual behavior is private would be unwilling to discuss it with strangers, and there is evidence to support that expectation. As Baldwin & Baldwin pointed out, several studies have "found that more liberal and sexually experienced people are more likely to volunteer for studies of

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[28]High frequencies of receptive anal sex have been associated with increased risk of HIV transmission. In a study of 114 women in the Bronx who had steady partners with AIDS, "[t]he *number of episodes of anal intercourse* was the only independent predictor of HIV seropositivity ($p < 0.01$) in a multiple logistic regression analysis of various sex practices." Voeller, *AIDS and Heterosexual Anal Intercourse*, 20 Archives of Sexual Behavior at 235 (emphasis original).

[29]The quotation is somewhat ambiguous as to whether the author is referring to all opposite-sex couples who practice anal sex or just college students and adolescents, which were the closest antecedents to the author's pronoun ("these subpopulations"). Regardless, the medical literature does not identify anorectal infections among opposite-sex couples as comparable to those who practice same-sex sodomy. If anorectal infections were common among opposite-sex couples, they would surely be found in college students and adolescents who reportedly practice anal sex.

sexual behavior than are conservative people . . . ." Baldwin & Baldwin, 29 Archives of Sexual Behavior at 367. Accordingly, a less than 100 percent response rate to a sexual survey "could bias [] results and show more sexual activity than would have been found if all [survey recipients] had responded." *Id*. Of the two studies cited above that actually undertook a survey of anal sexual behavior, Baldwin & Baldwin had a response rate of 53-55 percent, and Erickson, et al., had a response rate of 47 percent. *Id*.; Erickson, et al., 7 AIDS Education and Prevention at 479.[30] Thus, the reported prevalence of heterosexual anal or oral sex may be exaggerated.[31] *Cf*. Thomas A. Peterman, M.D., et al., *Risk of Human Immunodeficiency Virus Transmission from Heterosexual Adults with Transfusion-Associated Infections*, 259 Journal of the American Medical Ass'n No. 1, 55, 57 (1988) ("Unlike studies of gay men or female partners of bisexual men, this study found no evidence of an association of infection with anal-receptive intercourse, but anal intercourse was infrequent in this study population") (citations omitted).

3. Women who have sex with women

Research regarding diseases associated with same-sex behavior in women "has only recently begun," so the public

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[30]The only random sex survey to date that has had a fairly high response rate is the National Health and Social Life Survey, which had less than an 80 percent response rate. Robert T. Michael, et al., *Sex in America: A Definitive Survey* 30, 33 (1994). In fact, the response rate was only 72 percent if Appendix A to the book correctly reports the number of participants at 3,159. *Id*. at 247.

[31]One researcher observed that "in discussing heterosexual anal intercourse with many hundreds of physicians–chiefly in obstetrics and gynecology–most seem embarrassed or even shocked that such practices occur, or that they, as physicians, ought to intrude into them a [sic] part of patient care." Voeller, 20 Archives of Sexual Behavior at 241. If hundreds of physicians are shocked to hear that opposite-sex couples have anal sex, perhaps the prevalence is far less than Voeller believes–the physicians would surely not be shocked if they themselves engaged in the practice.

health implications of female homosexual conduct are not as well documented as for men. Kathleen M. Morrow, Ph.D., Jenifer E. Allsworth, A.B., *Sexual Risk in Lesbians and Bisexual Women*, 4 Journal of the Gay and Lesbian Med. Ass'n No. 4, 159 (2000). Nevertheless, female same-sex conduct does impact public health. "Although the risk of transmission of certain STDs between women remains unclear, it has been reported that human papillomavirus (HPV) occurs among women who self-identify as lesbian, as do trichomoniasis and anogenital warts among those who report never having had sex with men." *Id*. at 159 (citations omitted). In addition, "[p]robable female-to-female transmissions of HIV have been reported in the medical literature since 1984." *Id*. (citations omitted). In their original research, Morrow and Allsworth found that:

> A majority of respondents reported multiple episodes of unprotected sex every month that involved the potential exchange of body fluids linked to the transmission of HIV and other STDs (i.e., vaginal secretions and semen) as well as possible exposure to blood through menstrual fluid and engaging in S/M activities. Furthermore, women who self-identify as lesbian or bisexual reported other factors often associated with the transmission of HIV and other STDs, including the previous diagnosis of STDs and multiple sex partners. In fact, 26 % reported a previous STD diagnosis . . . .

Id. at 163.[32] The authors concluded that their research "not only confirms that lesbian and bisexual women engaged in sexual behaviors traditionally accepted as risky by the prevention community, but also engaged in high frequencies of sexual risk behaviors that, although not proven vehicles of HIV transmis-

[32]The STDs reported include "crabs," gonorrhea, chlamydia, genital herpes, genital warts and syphilis. *Id*. at 161, Table I.

sion, could potentially bring the AIDS epidemic into a low prevalence community."[33] *Id*. at 164.

Women who have sex with women have also been found to be at increased risk for bacterial vaginosis ("BV"). Barbara J. Berger, et al., *Bacterial Vaginosis in Lesbians: A Sexually Transmitted Disease*, 21 Clinical Infectious Diseases 1402 (1995). Researchers at a public women's clinic and a private practice in New York City examined 101 women who have sex with women, including 21 "pairs":

> The concordance between the sexual partners with respect to vaginal secretions strongly suggests that BV is sexually transmitted in lesbians. The prevalence of BV in our population of lesbians (29%) can be compared with lower prevalences seen in a university health service gynecology clinic (19%) and a family practice clinic (17%) and with prevalences seen in sexually transmitted diseases clinics (24%-37%).

Id. at 1403 (citations omitted). BV is also associated with other infections: "bacterial vaginosis is believed to be the cause of one-third to one-half of all infectious vaginal conditions." Richard L. Sweet, M.D., *Gynecologic Conditions and Bacterial Vaginosis: Implications for the Non-Pregnant Patient*, 8 Infectious Diseases in Obstetrics and Gynecology 184,185 (2000). Moreover, "[d]ata from several large-scale studies suggests a potential role for BV in HIV transmission." *Id*. at 188. Women with BV appear to be at significantly higher risk of contracting HIV than women without BV. *Id*.

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[33]The authors noted that there is an assumption that women who have sex with women are at lower risk than other sexually active persons, but "[t]he actual mechanisms of female-to-female sexual transmission remain essentially unknown . . . ." *Id*. They also suggested the possibility that the large number of female AIDS victims whose risk category has not been identified may be the result of the CDC not tracking "data relevant to female-to-female transmission." *Id*. at 160.

4. HIV/AIDS

Public Health *Amici* attempt to equate HIV/AIDS risk for opposite-sex couples with the risk in same-sex sodomy. APHA *Amicus* Brief at 12. They assert that sexual intercourse is "an increasingly common means of HIV transmission in the United States," and "the leading route of HIV transmission" world-wide.[34] *Id*. As already noted, Euro-American women tend to be the end of an HIV infection chain, and do not tend to pass HIV to men. Voeller, 20 Archives of Sexual Behavior at 264-65. The worldwide mode of transmission is not pertinent to America because there are fewer STDs among American men who have sex with women. *Id*. at 264.

More importantly, Public Health *Amici* misleadingly mix statistics regarding HIV and AIDS.[35] After asserting an increase in HIV transmission through sexual intercourse, they cite a CDC report about a sharp decline in AIDS among men who have sex with men. APHA Brief at.12. However, before discussing the sharp decline in AIDS, the CDC report noted that "[s]ince the use of highly active antiretroviral therapy []

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[34]The sources cited do not support the proposition that sexual intercourse is "an increasingly common means of HIV transmission in the United States." As an article co-authored by the current CDC director, Dr. Julie Louise Gerberding, pointed out, the probability of HIV transmission (without condoms) for receptive anal sex is 0.8-3.2 percent, for receptive sexual intercourse is 0.05-0.15 percent, and for insertive anal sex or sexual intercourse is 0.03-0.09 percent. Mitchell H. Katz, M.D. and Julie Louise Gerberding, M.D., M.P.H., *Postexposure Treatment of People Exposed to the Human Immunodeficiency Virus Through Sexual Contact or Injection-Drug Use*, 336 New England J. of Medicine No. 15, 1097 (1997).

[35]HIV and AIDS are not the same thing, although HIV is a precursor to AIDS. AIDS "is the late stage of infection with [HIV] and is characterized by severe immunosuppression and co-infection with other opportunistic agents." Texas *HIV/STD Annual Report 2001* at 5, Texas Dept. of Health Bureau of HIV & STD Prevention. Current drug therapy "delays the progression from HIV infection to AIDS." *Id*.

became widespread during 1996, trends in AIDS incidence have become less reflective of underlying trends in HIV transmission," and that "HIV surveillance data have not been available nationwide . . . ." CDC, 13 *HIV/AIDS Surveillance Report* No. 2, 5 (Sept. 25, 2002).[36] Thus, the current incidence of AIDS has little bearing on the incidence of HIV transmission. In addition, although the CDC reported that heterosexual transmission of AIDS "seems to have increased" from 1998 to 2001, the 2001 number of heterosexual transmissions was less than the 1996 number, and far fewer than the new AIDS cases among men who have sex with men. *Id*. at 35 and Table 27.

Public Health *Amici* point to "an 'increasing spread of new infections among females'" in Texas. APHA Brief at 13 (quoting Texas *HIV/ STD Annual Report 2001*, Texas Dept. of Health Bureau of HIV & STD Prevention[37]). They also note that "women now account for half of all reported cases of adult HIV infection." *Id*. (citing CDC, *Basic Statistics*). What the Public Health *Amici* leave out (in purporting to provide the Court with "accurate scientific information," *id*. at 1) is far more significant than what they said. Men who have sex with men, perhaps 2 percent of the U.S. population (*supra* note 12), account for 60 percent of Texas men with HIV/AIDS, 63 percent of the cumulative number of AIDS cases in U.S. men, and over 51 percent of all U.S. AIDS cases. Texas *HIV/STD Annual Report* at 9; CDC, *Basic Statistics*.[38] It is hardly disputable that the incidence and prevalence of HIV/AIDS is substantially higher among men who have sex with men than in the community at large, and that the disproportionate statistics

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[36]Available at www.cdc.gov/hiv/stats/hasr1302.pdf.

[37]Available at www.tdh.state.tx.us/hivstd/legislature/2001.pdf.

[38]These numbers include men who have sex with men and inject drugs. In Texas approximately 7.5 percent of men with HIV/AIDS inject drugs and have sex with men; nationwide, the percentage of men with AIDS who inject drugs and have sex with men is about 7.7 percent.

are the result of "anal sex combined with multiple partners." Gabriel Rotello, SEXUAL ECOLOGY: AIDS AND THE DESTINY OF GAY MEN 75 (1998). That alone makes same-sex sodomy an overwhelming public health issue.

D. There Is No Foundation for the Argument that the Sodomy Law Impedes the Effectiveness of AIDS Prevention Efforts

Public Health *Amici* misleadingly claim that there has been a decrease in HIV transmission rates among men who have sex with men as states have decriminalized sodomy laws. APHA Brief at 19 and n.12 (citing CDC). The CDC report cited actually refers to a reduction in the incidence of new AIDS cases as a result of the widespread use of highly active anti-retroviral therapy. CDC, 13 *HIV/AIDS Surveillance Report* at 5. In fact, the evidence shows an *increase* in HIV transmission rates among men who have sex with men. And the Public Health *Amici*, particularly the APHA, should know this–the APHA recently published an article in its journal that referred to data that "suggest that rates of new [HIV] infections may be starting to increase." Richard J. Wolitski, et al., *Are We Headed for a Resurgence of the HIV Epidemic Among Men Who Have Sex With Men?*, 91 American J. of Pub. Health No. 6, 883 (2001); *see also* CDC, *HIV Incidence Among Young Men Who Have Sex With Men–Seven U.S. Cities, 1994-2000*, 50 MMWR No. 21, 440, 440 (2001) ("Twenty years after the first report on [HIV] infection in the United States, studies of [STDs] and sexual behaviors suggest a resurgent HIV epidemic among men who have sex with men"); CDC Press Release, *New CDC Studies* ("In one of the largest studies on HIV incidence in the U.S., CDC researchers provided *further evidence of high rates of HIV infection among gay and bisexual men*. . . . The researchers estimated that 4.8 percent of MSM were infected annually") (emphasis added).

It is also misleading to suggest that "educational efforts" about "safer sex" are successfully reducing the risk of HIV/AIDS. *Cf.* APHA Brief at 19 (citing articles from 1994 and 1996). Any public health organization should be well aware that "successes" from the hundreds of millions of dollars spent on AIDS education are ephemeral. As the APHA's journal reported, "[d]ata from the Multicenter AIDS Cohort Study show that over a 2-year period, 47% of men returned to unprotected receptive anal intercourse and 44% returned to unprotected insertive anal intercourse." Wolitski, 91 American J. of Pub. Health at 884. Moreover, the CDC has been reporting "increases in unsafe sexual behavior" among men who have sex with men in cities with major educational efforts for the past several years. CDC, *Increases in Unsafe Sex and Rectal Gonorrhea Among Men Who Have Sex With Men–San Francisco, California, 1994-1997*, 48 MMWR No. 3, 45, 45 (1999).[39]

There is no evidence–and in particular no record evidence–that the same-sex sodomy law prevents Texans from seeking or obtaining accurate public health information about HIV transmission. *Cf.* APHA Brief at 20.[40] The UNAIDS handbook

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[39]It may be that some young men are actively seeking HIV infection. *See* Gregory A. Freeman, *Bug Chasers: The Men Who Long to Be HIV+*, Rolling Stone 915 (February 6, 2003) (estimating that 25% of new HIV cases are the result of "bug chasing"). Lesbian writer Tammy Bruce suggests that public health officials' retractions or denials of quotations in *Bug Chasers* was the result of "extraordinary pressure" by "gay activist[s]." Tammy Bruce, *Bug Chasers and the Thought Police*, NewsMax.com (Jan. 29, 2003), www.newsmax.com/archives/articles/2003/1/29/95042.shtml.

[40]Nor is there evidence that the Texas law prevents patients from being honest with their physicians or prevents them from getting tested or seeking treatment. *Cf. id*. at 21. The only source cited that relied on evidence rather than speculation involved 3 men discussed in a 1992 article. *See* Scott Dunbar & Susan Rehm, *On Visibility: AIDS, Deception by Patients, and the Responsibility of the Doctor*, 18 Journal Med. Ethics 180 (1992). And one case, *Campbell v. Sundquist*, 926 S.W.2d 250, 263-64 (Tenn. Ct. App. 1996), relied upon "evidence" (3 men?) provided by *amicus* APHA.

quoted by the Public Health *Amici* may have relevance for Saudi Arabia, but not for Texas. For example, Dallas County has made "anonymous HIV counseling and testing" available for years. CDC, *Condom Use and Sexual Identity Among Men Who Have Sex With Men–Dallas, 1991*, 42 MMWR No. 1, 7, 7 (1993). Moreover, Texas spent over $23 million on prevention efforts in 2001. Texas *HIV/STD Annual Report 2001* at 4.

IV. RATIONALITY DOES NOT REQUIRE TEXAS TO TREAT SAME-SEX SODOMY LIKE OPPOSITE-SEX SODOMY

The issue under rational-basis review is not whether opposite-sex sodomy raises public health issues, but whether same-sex sodomy does. "A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller v. Doe*, 509 U.S. 312, 321 (1993) (citation and internal quotation marks omitted). Rather, legislative "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting others." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955). That is what the Texas legislature did in 1973 when it chose to decriminalize opposite-sex sodomy, but to retain the criminal prohibition of same-sex sodomy. Texas may have made a bad decision in decriminalizing opposite-sex sodomy. But the Fourteenth Amendment does not require the State to take an all-or-nothing approach to legislation.

The same-sex sodomy law need not be supported by any empirical evidence that it has actually furthered a public interest. *See FCC v. Beach Communications, Inc.*, 508 U.S. at 315. However, it is noteworthy that Texas does not have the same extent of HIV/AIDS among men who have sex with men as San Francisco, where same-sex sodomy is legal, and even glorified through events like the San Francisco Folsum Street Fair. Compare Texas *HIV/STD Annual Report 2001* at 9

(approximately 60 percent of cumulative AIDS cases in men are MSM) with San Francisco Dept. of Pub. Health, *HIV/AIDS Epidemiology Annual Report 2001* at 9, HIV/AIDS Statistics and Epidemiology Section (over 94 percent of cases in men and 90 percent of all AIDS cases are MSM).[41] Furthermore, as a British study noted, the legalization of same-sex sodomy in England correlated with an upsurge in a variety of STDs among men who have sex with men. J.L. Fluker, *A 10-year Study of Homosexually Transmitted Infection*, 52 British J. of Venereal Disease No. 3, 155 (1976).

CONCLUSION

For the foregoing reasons, the Court should affirm the ruling of the Texas Court of Appeals.

Respectfully Submitted,

Glen Lavy
(Counsel of Record)
ALLIANCE DEFENSE FUND
15333 North Pima Road, Suite 165
Scottsdale, Arizona 85260
(480) 444-0020
Attorneys for *Amici Curiae*

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[41] Available at www.dph.sf.ca.us/Reports/STD/HIVAIDSAnnlRpt2001.pdf. The percentages include men who have sex with men and inject drugs (7.5% in Texas and 13% in San Francisco).