

April 5, 2012

Memorandum of Support from Lambda Legal Defense and Education Fund for Bill S.323/A.1008.

(S.323: introduced by Senator Montgomery/A.1008: introduced by Assembly Member Clark)

AN ACT to amend the civil practice law and rules, the criminal procedure law and the executive law, in relation to the use in evidence of the fact of possession of a condom.

A Statement in Support:

Lambda Legal Defense and Education Fund (“Lambda Legal”) supports passage of S.323/A.1008, which would prevent police and prosecutors from using possession of condoms as evidence of prostitution and prostitution-related offenses. Passing this bill is critical to protecting the health of New Yorkers, especially members of communities disproportionately impacted by the human immunodeficiency virus (HIV), including gay and bisexual men, transgender people, at-risk youth and sex workers. An extensive, high-quality legislative analysis of the need for the bill has been completed by Columbia Law School’s Sexuality and Gender Law Clinic (available at http://www.law.columbia.edu/null/download?& exclusive=filemgr.download&file_id=155215). As indicated by that analysis and the experience of other governments in the United States and abroad – as well as common sense – condoms are not probative of criminal charges targeting commercial sex. Confiscating condoms as evidence contradicts decades of public health efforts and contributes to New York’s high rates of sexually transmitted infections, unintended pregnancies, and the state’s severe HIV epidemic. The national Centers for Disease Control and Prevention reports that New York State leads the nation in diagnoses of late-stage HIV disease, or acquired immune deficiency syndrome (AIDS).¹ Simply put, HIV and other sexually transmitted infections are serious public health concerns, and discouraging or deterring individuals from possessing condoms is dangerous, irresponsible, and unsound public policy.

Lambda Legal is the oldest and largest national civil rights organization committed to achieving full recognition of the rights of lesbians, gay men, bisexuals, transgender (LGBT) people, and HIV-positive individuals. Since the earliest days of the HIV crisis, Lambda Legal has been on the vanguard, combating misconceptions, stigma, and bias while advocating for people living with HIV to be treated fairly.² Our organization won the first HIV discrimination lawsuit in the nation, and we continue to fight for fairness and understanding – including laws and policies grounded in respect for civil rights and

¹ See <http://www.cdc.gov/hiv/topics/surveillance/basic.htm#area>.

² See Lambda Legal, *HIV Stigma and Discrimination in the U.S.: An Evidence-Based Report* (2010), http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_hiv-stigma-and-discrimination-in-the-us_1.pdf.

for sound science and medicine -- inside and outside of the courtroom. As our advocacy advances, we remain acutely aware of the importance of government's taking an appropriate role to support HIV prevention. Unfortunately, current police and prosecutorial practices involving condoms as evidence of prostitution undermine public health and safety. Thus leading advocates for populations most severely affected by HIV have voiced their support for this bill.³

The nation's leading public health advocates have long advanced the position that when people carry condoms, they exhibit responsibility and prudence. A condom is a proven, indispensable tool for protection against HIV and other sexually transmitted diseases.⁴ Dr. Joycelyn Elders, former Surgeon General of the United States, responded almost two decades ago, in 1994 after a detractor dubbed her "condom queen." She told the New York Times, "If I could be the 'condom queen' and get every young person who is engaged in sex to use a condom in the United States, I would wear a crown on my head with a condom on it! I would!"⁵ Another former Surgeon General, Dr. David Satcher, advocated condom distribution in his federal report in 2001: "Community interventions have involved changing community norms and the distribution of condoms to reduce unwanted pregnancies and STDs, including HIV. Such interventions have the advantages of reaching large numbers of people at a relatively low cost...."⁶

New York City has historically been a leader in condom use to protect health. Since 1971, the New York City Department of Health and Mental Hygiene has distributed free

³ See, e.g., Human Rights Watch, *available at*: http://www.hrw.org/sites/default/files/related_material/2012.02.27%20Memorandum%20of%20Support%20for%20Bill%20S.323A.1008%20on%20Possession%20of%20Condoms%20as%20Evidence.pdf; Gay Men's Health Crisis, *available at*: <http://www.sexworkersproject.org/downloads/2011/20110316-gmhca1008-memo-in-support.pdf>; Safe Horizon, *available at*: <http://www.sexworkersproject.org/downloads/2011/20110324-safe-horizon-a1008-memo-in-support.pdf>; Center for Constitutional Rights, *available at*: <http://www.sexworkersproject.org/downloads/2011/20110316-ccr-a1008-letter-of-support.pdf>; New York Civil Liberties Union, *available at*: <http://www.sexworkersproject.org/downloads/2010/20100510-nyclu-a10893-memo-in-support.pdf>; Columbia Law School's Sexuality and Gender Law Clinic, *available at*: http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=164294. A more comprehensive list of advocacy organizations' memorandums of support of the bill is available at: <http://www.sexworkersproject.org/campaigns/2011/new-york-condom-bill/>.

⁴ See Centers for Disease Control and Prevention, *Condoms and STDs: Fact Sheet for Public Health Personnel* (2011), <http://www.cdc.gov/condomeffectiveness/latex.htm> (last visited March 16, 2012) (stating that "(l)atex condoms, when used consistently and correctly, are highly effective in preventing the sexual transmission of HIV").

⁵ Claudia Dreifus, *Joycelyn Elders*, NEW YORK TIMES MAGAZINE, Jan. 30, 1994, *available at*: <http://www.nytimes.com/1994/01/30/magazine/joycelyn-elders.html?scp=1&sq=joycelyn%20elders&st=nyt&pagewanted=1>.

⁶ David Satcher, *The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior*, July 9, 2001, *available at*: <http://www.surgeongeneral.gov/library/sexualhealth/call.pdf>.

condoms to New York City residents through a program now known as NYC Condom.⁷

With the onset of the HIV epidemic a decade later, the Department expanded this distribution, recognizing that condoms are essential in the fight against HIV transmission.⁸

Penalizing condom possession directly contravenes effective public health policy. It contradicts decades of government health policy that has sensibly and aggressively pushed for condom usage and, in New York City, has resulted in the distribution of more than two hundred million free condoms since the program's inception.

Using condoms as evidence of criminal conduct further exposes communities that have historically been both hard-hit by HIV and subjected to intense police scrutiny. The practice disproportionately affects transgender women, who experience such a high rate of false targeting by police as sex workers in New York City that it was the subject of a 2005 campaign by Amnesty International.⁹ According to Human Rights Watch, an organization dedicated to defending and protecting human rights, transgender women routinely report in interviews that their condoms have been confiscated by police.¹⁰ The effect on New York's lesbian, gay, bisexual, transgender, and questioning ("LGBTQ") youth, a group vastly overrepresented in homeless youth populations,¹¹ is potentially devastating, as homeless LGBTQ youth face a heightened risk of sexual exploitation.¹² Individuals who are already at risk of exploitation should not be further deprived of condoms that could protect their lives. Following this logic, leading activists working to protect people subjected to human trafficking consistently maintain that considering condoms as criminal evidence harms victims of sex trafficking. According to Safe Horizon, one of the country's leading providers of services to survivors of human

⁷ See New York City Department of Health and Mental Hygiene, NYC Condom (2012), <http://www.nyc.gov/html/doh/html/condoms/condoms-more.shtml> (last visited March 16, 2012). Just recently, NYC Condom announced the winner of a campaign to design the newest NYC Condom wrapper, as seen on the website. The winner is a condom with a power switch on it, acknowledging the power condoms grant to their possessors.

⁸ *Id.*

⁹ See Amnesty International, "Stonewalled - Still Demanding Respect," <http://www.amnesty.org/en/library/asset/AMR51/001/2006/en/f420c754-d46f-11dd-8743-d305bea2b2c7/amr510012006en.pdf>.

¹⁰ Human Rights Watch, Memorandum of Support from Human Rights Watch for Bill: S.323/A.1008, http://www.hrw.org/sites/default/files/related_material/2012.02.27%20Memorandum%20of%20Support%20for%20Bill%20S.323A.1008%20on%20Possession%20of%20Condoms%20as%20Evidence.pdf.

¹¹ See National Gay and Lesbian Task Force, Lesbian, Gay, Bisexual, and Transgender Youth: An Epidemic of Homelessness, *available at*: http://www.thetaskforce.org/downloads/reports/reports/HomelessYouth_ExecutiveSummary.pdf (detailing that twenty to forty percent of all homeless youth identify as lesbian, gay, bisexual, or transgender in spite of the fact that only three to five percent of the United States identifies as lesbian, gay or bisexual).

¹² See Lambda Legal and Child Welfare League of America, Getting Down to Basics – Tools to Support LGBTQ Youth in Care, Working with Homeless LGBTQ Youth, http://data.lambdalegal.org/publications/downloads/gdtb_working-with-homeless-lgbtq-youth.pdf (stating that "LGBTQ homeless youth are physically or sexually victimized on average by seven more people than non-LGBTQ homeless youth.").

trafficking, passage of the bill will give people who are currently being trafficked the ability to negotiate for their sexual safety by invoking their right to use condoms.¹³

Given police and prosecutorial practices jeopardizing the health and safety of New Yorkers, in this instance the legislature must act to protect public welfare. Lambda Legal urges the New York State legislature to pass S.323/A.1008.

¹³ Safe Horizon, Memo of Support for A.1008/S.323,
<http://www.sexworkersproject.org/downloads/2011/20110324-safe-horizon-a1008-memo-in-support.pdf>.