NO. A12-0058

State of Minnesota
In Supreme Court

State of Minnesota,

Appellant,

vs.

Daniel James Rick,

Respondent.

BRIEF OF AMICI CURIAE, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA, CENTER FOR HIV LAW AND POLICY, LAMBDA LEGAL DEFENSE AND EDUCATION FUND AND OUTFRONT MINNESOTA

Teresa Nelson (#269736)
AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA
2300 Myrtle Avenue, Suite 180
St. Paul, MN 55114
(651) 645-4097, Ext. 122

Leslie Cooper (NY #2759835)
Chase Strangio (NY #4879466)
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004

Scott A. Schoettes (IL #6282105)
Christopher R. Clark (IL #6236859)
LAMBDA LEGAL DEFENSE AND EDUCATION FUND
105 West Adams, Suite 2600
Chicago, IL 60603

Attorneys for Amici Curiae American Civil Liberties Union, et al.

Lori Swanson
MINNESOTA ATTORNEY GENERAL
1800 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101-2134

Michael O. Freeman
Elizabeth R. Johnston
HENNEPIN COUNTY ATTORNEY'S OFFICE
C-2000 Government Center
300 South Sixth Street
Minneapolis, MN 55487

Attorneys for Appellant State of Minnesota

(Additional counsel listed on following page)

2013 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

Landon J. Ascheman
Grant Smith
ASCHEMAN & SMITH, LLC
500 Laurel Avenue
St. Paul, MN 55102

Attorneys for Respondent
Daniel James Rick

Benjamin Feist
GRELL & FEIST LLC
825 Nicollet Mall, Suite 1648
Minneapolis, MN 55402

Alan E. Schoenfeld
WILMERHALE
7 World Trade Center
250 Greenwich Street
New York, NY 10007

Susan Friedman
Christopher Babbitt
Gerard Sinzdak
WILMERHALE
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006

Attorneys for Amici Curiae Association of Nurses in AIDS Care, et al.

Lynn Mickelson
MINNESOTA AIDS PROJECT
1400 Park Avenue
Minneapolis, MN 55404

Jerry A. Burg
The Uptown Business Center
3009 Holmes Avenue South
Minneapolis, MN 55408

Attorneys for Amicus Curiae
Minnesota AIDS Project

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STATEMENT OF INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a not-for-profit, non-partisan, membership-supported organization dedicated to the protection of civil rights and liberties. The ACLU has over 500,000 members nationwide. Through the ACLU AIDS Project, founded in 1986, the ACLU works to defend the constitutional rights of people living with HIV to be free from discrimination by the government, and to ensure that the governmental response to the HIV epidemic is supported by accurate information, rather than fear, prejudice or stereotype. The American Civil Liberties Union of Minnesota (ACLU-MN) is the statewide affiliate of the ACLU and has more than 8,500 members in the state of Minnesota. Its purpose is to protect the rights and liberties guaranteed to all Minnesotans by the state and federal constitutions and state and federal laws.

The Center for HIV Law and Policy (CHLP) is a national legal and policy resource and strategy center for people with HIV and their advocates. CHLP's interest in this case is consistent with its mission to reduce the impact of HIV on vulnerable and marginalized communities and to secure equal treatment under the law for all individuals living with HIV and other disabilities. CHLP believes that inconsistent and unbalanced interpretation and application of the criminal law to

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[1] Counsel certifies that this brief was authored in whole by listed counsel for *amici curiae* ACLU, et al. No person or entity other than *amici curiae* made any monetary contribution to the preparation or submission of the brief. This brief is filed on behalf of the ACLU, et al., which was granted leave to participate as amicus by this Court's Order dated December 19, 2012.

individuals with HIV reinforces prejudice and undermines government-funded HIV prevention and treatment campaigns.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and people living with HIV (regardless of their sexual orientation) through impact litigation, education and public policy work. Founded in 1973, Lambda Legal has been working on behalf of people living with HIV since the very early days of the HIV/AIDS epidemic. Lambda Legal brought the first HIV discrimination lawsuit in the country on behalf of a New York City physician who faced eviction because he treated patients with HIV, and has since appeared as counsel or *amicus curiae* in scores of cases in state and federal courts, raising the civil rights and liberty interests of people living with HIV. Lambda Legal has a strong interest in ensuring that U.S. laws and policies support and protect the rights of people living with HIV, do not further engender stigma and discrimination against them, and do not create additional barriers to care and treatment for HIV or to the end of the HIV/AIDS crisis in this country.

For 25 years, OutFront Minnesota has been the leading organization in Minnesota working statewide for full equality for lesbian, gay, bisexual, and transgender individuals and their families, through a combination of advocacy, education, and direct service. OutFront Minnesota remains painfully aware that HIV/AIDS continues to be a significant health concern in our state,

disproportionately affecting gay and bisexual men, and in particular, gay and bisexual men of color. Strong public policies that affirm full LGBT equality and that approach HIV/AIDS from the perspective of reason, instead of misinformed fear, are mutually-reinforcing; public policies that stigmatize LGBT people or people with HIV/AIDS ultimately harm both populations.

ARGUMENT

Amici agree with the defendant that Minn. Stat. § 609.2241 subd. 2(2) cannot reasonably be interpreted to apply to sexual conduct. We write to explain that the state's interpretation of the law as prohibiting individuals with communicable diseases from engaging in sexual conduct even after disclosing the condition to a partner would run afoul of the federal and state constitutions. So interpreted, the law would infringe upon the constitutionally protected right to make intimate and personal decisions related to sex and procreation, would be void for vagueness, and would discriminate on the basis of sex in violation of the right to equal protection. Thus, not only principles of statutory interpretation but also the principle of constitutional avoidance warrant the interpretation argued by defendant.

I. THE STATE'S CRIMINALIZATION OF SEXUAL CONDUCT UNDER MINN. STAT. § 609.2241 SUBD. 2 (2) VIOLATES THE CONSTITUTIONALLY PROTECTED RIGHT TO MAKE INTIMATE AND PERSONAL DECISIONS RELATED TO SEX AND PROCREATION

Both the federal and state constitutions protect the right of individuals to make intimate and personal decisions including decisions related to sexual

conduct—both procreative and non-procreative—in the context of private, adult, consensual acts. The state's interpretation of Minn. Stat. § 609.2241 subd. 2(2) as reaching sexual conduct directly burdens this right by prohibiting people with HIV from engaging in any sexual activity that involves the transfer of sperm. Stunningly, it makes it a crime for an HIV-positive man to have sexual intercourse with his wife in an attempt to have children together even if he has informed her of his condition. There is no government interest that can justify this extraordinary intrusion into the "private realm of family life," *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), for all individuals living with HIV, particularly given the extremely low risk of transmission in many circumstances and medical advances that allow HIV-positive people with access to proper care and treatment to live long and healthy lives.

a. The Federal and State Constitutions Protect Against Intrusion Into the Intimate and Personal Decisions of Consenting Adults Concerning Sex and Procreation.

It is well settled that the Due Process Clause of the Fourteenth Amendment "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). These include the right to make decisions related to procreation and to engage in sexual intimacy, whether procreative or not. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (recognizing the importance of procreative decision-making as "one of the basic civil rights of man fundamental to the very existence and survival of the race."); *Lawrence v. Texas*, 539 U.S. 558, 577 (2003)

("'...individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause... [T]his protection extends to intimate choices by unmarried as well as married persons.'" (citations omitted)); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) ("[B]ecause the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.").

The United States Supreme Court has long recognized that there is a "realm of personal liberty which the government may not enter." *Lawrence*, 539 U.S. at 577; *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that the marital relationship "l[ies] within the zone of privacy created by several fundamental constitutional guarantees."); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending privacy protections of *Griswold* to unmarried couples); *Prince*, 321 U.S. at 166 (recognizing that the Court's decisions protecting parental decision-making "respected the private realm of family life which the state cannot enter"). As Justice Kennedy explained in *Lawrence*, "[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places" and it "presumes an autonomy of self that includes freedom of...certain intimate conduct." *Lawrence*, 539 U.S. at 562. This constitutional protection "involves liberty of the person both in its spatial and in its more transcendent dimensions." *Id.*

The right to make decisions about childbearing has long been understood as central to liberty and deserving of protection from government intrusion. *Skinner*, 316 U.S. at 541; *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart" of the right of privacy); *Eisenstadt*, 405 U.S. at 453 (recognizing the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"). In striking down an Oklahoma law that required the sterilization of individuals convicted of certain criminal offenses, the Court in *Skinner* recognized that "the right to have offspring" is "a sensitive and important area of human rights" and that the state's attempt to deprive individuals of that right can "have subtle, farreaching and devastating effects." *Skinner*, 316 U.S. at 536, 541. The decision of consenting adult partners about whether and how to conceive a child is burdened when the state criminalizes the decisions of HIV-positive individuals who elect to engage in natural reproduction with a consenting partner.[2]

The Supreme Court has made clear that the zone of privacy afforded protection under the Due Process Clause reaches the right to engage in non-procreative sexual activity as well. *See, e.g., Lawrence*, 539 U.S. 558 (striking down law criminalizing same-sex sexual intimacy); *Eisenstadt*, 405 U.S. 438

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[2] Catherine Hansenss et al., HIV Law & Policy Center, *Pregnancy & HIV: Medical and Legal Considerations for Women and Their Advocates* 15-23 (December, 2009) (discussing the use of timed intercourse and pre-exposure prophylaxis to allow for couples where the male partner is HIV-positive to engage in natural procreation and the low-risk of transmission from an HIV-positive mother to her child during pregnancy and delivery with proper treatment and cesarean delivery).

(striking down law denying access to contraception to unmarried couples). In *Roberts*, the Court highlighted the protection afforded to the "choices to enter into and maintain certain intimate human relationships." *Roberts*, 468 U.S. at 617-18. The Court recognized that the constitutional shelter given to such "personal bonds" reflects the understanding that individuals draw much of their emotional enrichment from close ties with others, and "protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.* at 619. In *Lawrence*, the Court recognized that sexual relationships can involve deep personal bonds and are deserving of the protection identified in *Griswold*, *Roberts* and their progeny. *Lawrence*, 539 U.S. at 567 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."). Thus, the Court held, the "right to liberty" gives couples "the full right to engage in their conduct without intervention of the government." *Lawrence*, 539 U.S. at 578.

This Court has recognized that the Minnesota Constitution also protects "intimate, personal" decisions about sex and procreation. *Women of the State of Minnesota v. Gomez*, 542 N.W.2d 17, 27 (Minn. 1995) (right of privacy under the Minnesota Constitution encompasses procreative decision-making). In fact, this Court has held that the Minnesota Constitution provides more expansive privacy protections than the federal constitution. *Id.* at 30 ("We find that this is one of those limited circumstances in which we will interpret our constitution to provide

more protection than that afforded under the federal constitution."); *State v. Davidson*, 481 N.W.2d 51, 58 (Minn.1992) ("[T]he privacy guaranteed under [A]rt. I, §§ 1, 2 and 10 is broader than the privacy right read into the comparable federal constitutional provision.")

b. Burdens on the Personal and Intimate Decision-Making of Consenting Adults Are Subject to Heightened Scrutiny Under Both the Federal and State Constitutions.

The United States Supreme Court has applied strict scrutiny to laws burdening fundamental rights, including the right to procreate. *See, e.g., Griswold*, 381, U.S. at 503-04 ("statutes regulating sensitive areas of liberty do, under the cases of this Court, require 'strict scrutiny'"); *Carey*, 431 U.S. at 686 ("where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests").[3] In *Carey*, which involved a New York law that imposed restrictions on the distribution of contraceptives, the Court held that strict scrutiny applies whether a state law burdens an individual's procreative decision-making by "substantially limiting access to the means of effectuating that decision" or by outright prohibiting the decision. *Carey*, 431 U.S. at 688-89.

The Court in *Lawrence* also used a form of heightened scrutiny in striking down the Texas criminal sodomy law that infringed upon the right of gay and

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[3] The Supreme Court has departed from the traditional strict scrutiny analysis with respect to the right to choose to have an abortion, which is now protected under an "undue burden" standard. *See Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 852, 876-79. However, strict scrutiny remains the standard for evaluating the right to procreate and bear a child. *Id.* at 858-59.

lesbian persons to engage in sexual intimacy. The Court assessed whether the intrusion on the right was justified by the government's asserted rationales. *Lawrence*, 539 U.S.at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."). This balancing of interests has been used by the Court in a number of other cases involving substantive due process protections. *See, e.g., Sell v. United States*, 539 U.S. 166 (2003) (balancing individual's interest in refusing psychotropic drugs against the government's interest in trying a competent criminal defendant for a nonviolent crime); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846-49 (1992) (balancing individual interest in choosing to have an abortion against the various government interests asserted).

The state's suggestion that the Court in *Lawrence* may have applied rational basis review misconstrues the terms of art employed by the Court in its application of heightened scrutiny. State Br. 35. Several federal circuit courts of appeal have recognized that *Lawrence* was a heightened scrutiny case. *See, e.g., Cook v. Gates*, 528 F.3d 42, 52 (1st Cir. 2008) ("[W]e are persuaded that *Lawrence* did indeed recognize a protected liberty interest for adults to engage in private, consensual sexual intimacy and applied a balancing of constitutional interests that defies either the strict scrutiny or rational basis label."); *Witt v. Department of Air Force*, 527 F.3d 806, 816-17 (9th Cir. 2008) ("We cannot reconcile what the Supreme Court did in *Lawrence* with the minimal protections

afforded by traditional rational basis review…[and w]e therefore conclude that *Lawrence* applied something more than traditional rational basis review.")

Like the United States Supreme Court, this Court has applied strict scrutiny to restrictions on rights deemed fundamental under the state constitution, including the right of individuals to make intimate and personal decisions about their lives. *Gomez,* 542 N.W.2d at 30 (applying strict scrutiny in striking down restriction on state funds for abortion services where funds provided for childbirth services); *see also SooHoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007) (applying strict scrutiny to a statute allowing court ordered grandparent visitation with a child over a fit parent's objections); *cf. Doe v. Ventura*, No. MC 01-489, 2001 WL 543734 *6 (Minn. Dist. Ct. May 15, 2001) (state trial court applied strict scrutiny in striking down a criminal sodomy law as an impermissible infringement of the fundamental rights of consenting adults to engage in sexual conduct).

c. The State's Intrusion Into the Personal and Intimate Decision-Making of Consenting Adults Does Not Survive Heightened Scrutiny.

The burden placed on the personal and intimate decision-making of consenting adults by the state's interpretation of the statute as applying to all sexual conduct involving the transfer of sperm, regardless of disclosure of one's health status, cannot survive constitutional review. The state "seeks to achieve its goals by means having a maximum destructive impact" on constitutionally protected interests and relationships. *Griswold*, 381 U.S. at 487. The state's application of Minn. Stat. § 649.2241 subd. 2(2) to sexual conduct prevents HIV-

positive individuals from engaging in any sexual act in which the transfer of sperm occurs, even after disclosing their HIV status to their partner. This application of the law severely burdens the rights of individuals with HIV to have children and engage in intimate relationships. The state attempts to justify this significant intrusion on the ground that it is protecting the public health against the transfer of communicable diseases. While that is certainly an important state interest, the state does not meaningfully connect that interest to the significant burdens imposed. Under the test used by the Supreme Court in *Lawrence*, the state has failed to meet its burden. Because the state's interpretation of the law does not survive such heightened scrutiny, it follows, *a fortiori*, that it fails review under the more exacting strict scrutiny standard.

In *Lawrence*, the Court balanced the government's interests against the "intrusion into the personal and private life of the individual." *Lawrence*, 539 U.S. at 578. There can be no disagreement that the intrusion at issue in this case is severe. The Supreme Court has characterized government intrusion into the sexual behavior of adults in the privacy of the home as "repulsive" to the right of privacy. *See Griswold*, 381 U.S. at 486-87 (finding the idea of permitting "the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives...repulsive to the notions of privacy surrounding the marriage relationship"); *Lawrence*, 539 U.S. at 567 (cautioning that criminal sodomy statutes have "penalties and purposes [and] far-reaching consequences,

touching upon the most private human conduct, sexual behavior, and in the most private of places, the home").

Beyond the significant burden on the decision to engage in consensual sexual activity, the state's interpretation of the law effectively bars HIV-positive individuals from having biological children. Though the statute would permit couples to have children through assisted reproduction procedures where the HIV-status of the sperm provider is disclosed "on donor screening forms," the cost of these procedures is prohibitive for many couples.[4] Additionally, for many couples, assisted reproduction conflicts with deeply held moral and religious beliefs and would not be considered an option for creating a family.[5] Thus, for many people living with HIV, this law prevents them from ever having biological children. It is hard to imagine a more extreme invasion of personal liberty. The Supreme Court has long recognized that having and raising children is of paramount importance to many people. "[T]he rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious . . . than property rights." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (internal citations omitted).

The state cannot justify its far-reaching intrusion into the intimate and personal decisions of consenting adults to engage in sexual activity, particularly given the medical knowledge regarding the risk of transmission and the available

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4 Hansenss et al., at 17 (noting that intra-uterine insemination procedures are expensive and often not covered by insurance).

5 Carol Glatz, IVF opened 'wrong door' to treating infertility, says Vatican official (Oct. 5, 2010), http://www.catholicnews.com/data/stories/cns/1004064.htm.

medical treatment for HIV. Even without the use of a latex or other barrier, the risk of transmitting HIV through sexual conduct is extremely low. The probability that an HIV-positive man will transmit the virus to an HIV-negative woman during a single act of unprotected vaginal intercourse is estimated to be 0.08%, or 1 in 1250.[6] For unprotected anal sex the risk is estimated as a 1 to 2% chance of transmission per act.[7] This general risk varies significantly based on several factors, including the health of the HIV-negative partner, whether the partner has any sexually transmitted infections, the timing of the sexual activity in relation to an individual's HIV diagnosis, as well as other genetic factors. [8] Thus, the risk of transmission is even lower under many circumstances. Nevertheless, the state's interpretation of subdivision 2(2) criminalizes all conduct involving the transfer of sperm.

Furthermore, under current treatment regimens for HIV, reproduction of the virus can be suppressed and, as a result, the presence of the virus in the human body can be greatly reduced. Because lower viral loads correspond with lower risks of transmission, treatment with antiretroviral drugs can reduce the likelihood of HIV transference through sexual conduct to a *de minimis* risk. Early initiation of treatment can lead to a 96% decrease in the already low rate of transmission

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[6] Boily et al., Heterosexual risk of HIV-1 infection per sexual act: systematic review and meta-analysis of observational studies, 9 The Lancet 118, 118 (2009).

[7] *Id.* (estimating the probability of HIV transmission from one act of anal intercourse to be 1.7%); *see also* Vittinghoff et al., Per-Contact Risk of Human Immunodeficiency Virus Transmission between Male Sexual Partners, 150 Am. J. Epidemiology 306, 306 (1999).

[8] Julie Fox et al., Quantifying sexual exposure to HIV within an HIV-serodiscordant relationship: development of an algorithm, 25:1065–1082, 1066 AIDS (2011), http://hivlawandpolicy.org/resources/view/621.

through sexual activity where the HIV-positive individual is the insertive partner.[9] A 96% reduction in transmission rates means that the risk that an HIV-positive man will transfer the virus to his HIV-negative partner drops from approximately 1 in 1,250 (0.08%) to around 1 in 31,250 (0.0032%) for vaginal sex, and from between 1 in 100 (1.0%) and 1 in 50 (2.0%) to between 1 in 2,500 (0.04%) and 1 in 1,250 (0.08%) for anal sex.[10]

Moreover, the state's position appears to be premised on the notion that the consequences of contracting HIV are so severe as to warrant a profound intrusion into the private sexual lives of individuals with HIV, even where the known risk of transmitting HIV through the prohibited conduct is close to zero. This notion is based on a lack of awareness of current medical science. Since effective antiretroviral treatment became available in the mid-1990s, it is possible for people with HIV to lead normal, healthy and long lives. A disease that, at one time, many considered a "death sentence" has been transformed—for those with access to care—into a chronic manageable condition, much like diabetes.[11] Indeed, with prompt diagnosis and appropriate care and treatment, an individual

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[9] Cohen et al., Prevention of HIV-1 Infection with Early Antiretroviral Therapy, 365 NEW ENG. J. MED. 493, 503 (2011).

[10] Brief for *Amici Curiae* The Association of Nurses in AIDS Care et al. 11.

[11] Samuel Broder, MD, The development of antiretroviral therapy and its impact on the HIV-1/AIDS pandemic, ANTIVIRAL RESEARCH (2010), http://hivlawandpolicy.org/resources/view/590; D. McLay, E. et al., HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario (2010), http://hivlawandpolicy.org/resources/view/535.

diagnosed with HIV at the age of 25 has a life expectancy comparable to a 25-year-old without HIV.[12]

Given the low risk of transmission, particularly under certain circumstances, and the fact that HIV is not the catastrophic condition it once was, the government's interest in protecting the public health does not warrant this extraordinary intrusion into the bedroom and does not permit the government to interfere with couples' intimate and personal decisions concerning sex and procreation. When an individual is fully informed by a partner that he or she is HIV-positive, there is no basis for the government to override that individual's judgment about whether or how to be sexually intimate or attempt to conceive a child.

Contrary to the state's position, the availability of the affirmative defense under subdivision 3(1) does not prevent the application of subdivision 2(2) to sexual activity from unconstitutionally burdening the protected liberty interests of HIV-positive individuals. State Br. 38. An individual prosecuted under Minn. Stat. § 609.2241 can defend prosecution by demonstrating that s/he took "practical means to prevent transmission as advised by a physician or other health professional." Minn. Stat. § 609.2241 subd. 3(1). As the state explains, "'practical means to prevent transmission' is ... a broader and more flexible statement than is 'use of a latex or other effective barrier,' absence of which the

[12] Gus Cairns, Many patients diagnosed with HIV today will have normal life expectancies (Feb. 22, 2010), http://www.aidsmap.com/Many-patients-diagnosed-with-HIV-today-will-have-normal-life-expectancies-European-studies-find/page/1437877/.

state must prove in connection with the prosecution of an offense under subpart (1)." State Br. 9 n. 5. Playing the state's argument out to its logical conclusion, an HIV-positive individual who is under the care of a physician and is taking a course of antiretroviral therapy to reduce his viral load and consequently, his risk of transferring HIV through sexual conduct, has taken the "practical means to prevent transmission" necessary to successfully raise this affirmative defense. And to the extent the defense is interpreted this way, it would allow some individuals to avoid criminal conviction. But without clarity in the law, there is a profound chilling effect on individuals who are being treated with antiretroviral drugs or who are otherwise taking the appropriate steps as advised by a doctor to minimize the likelihood of transmitting HIV, because they have no certainty that they are safe from conviction if they engage in sexual relations. Further, because this is an affirmative defense, it would not insulate someone from prosecution and defendants would have the burden of raising the defense at trial and presenting expert testimony to avoid conviction. Even where a defendant could successfully show that he was engaging in safe sexual activity as advised by a physician, he would have to do so in the context of a criminal trial, which is a significant burden on one's otherwise lawful engagement in consensual sexual activity.

Finally, even if the affirmative defense in subdivision 3(1) were written more clearly, it would not rescue subdivision 2(2) from constitutional infirmity. It would be unjust to hold that only a person with access to a physician who can advise them of the "practical means to prevent transmission" and resources to

access antiretroviral drugs is permitted to engage in consensual sexual activity and choose to have children biologically. The state cannot override the informed decision of the consenting partner of an HIV-positive individual when it comes to such intimate and personal decisions as whether and how to bear a child and whether to engage in sexual activity. Again, given the low risks of transmission from sexual activity, particularly under certain circumstances, and the manageable nature of HIV under current treatment regimens, the state's interest in protecting the public health cannot justify this severe intrusion into the personal and intimate decision-making of consenting adults.

II. THE DISTRICT COURT'S INTERPRETATION OF MINN. STAT. § 649.2241 SUBD. 2(2) RENDERS THE STATUTE UNCONSTITUTIONALLY VAGUE.

The Due Process Clause of the Fourteenth Amendment protects against the arbitrary enforcement of criminal laws that are impermissibly vague. A statute is unconstitutionally vague when it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *U.S. v. Lanier,* 550 U.S. 259, 266 (1997). If a statute does not provide an individual with "fair notice that his contemplated conduct is forbidden by the statute" and affords the police "unfettered discretion" which "encourages arbitrary and erratic arrests and convictions," the statute is void for vagueness. *Papachristou v. Jacksonville,* 405 U.S. 156, 162, 168 (1972). Statutes "imposing criminal penalties and those infringing on constitutionally protected rights" – like the statute at issue in the

instant case – are subject to a higher standard of specificity in a vagueness analysis. *Garner v. White,* 726 F.2d 1274, 1278 (8th Cir. 1984).

If interpreted to apply to sexual conduct, Minn. Stat. § 649. 2241 subd. 2(2) is unconstitutionally vague. The statute's reference to "transfer of...sperm" is insufficient to put a reasonable person of common intelligence on notice that subdivision 2(2) applies to sexual conduct. Such an interpretation of the statute makes it a crime for two consenting adults to engage in sexual activity involving the transfer of sperm even where the HIV-positive individual has disclosed his/her HIV status to a sexual partner. When one reads the entire statute, placing the phrase "transfer of . . . sperm" in context, any reasonable person would understand this provision to be addressing the transfer of sperm through medical procedures and not to sexual conduct. First, the word "sperm" must be read and interpreted in conjunction with the other words in the list of prohibited transfers under the doctrine of *noscitur a sociis*. *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486-87 (2006) ("'[A] word is known by the company it keeps' - a rule that 'is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth... .'" (citations omitted)); *Dole v. Steelworkers*, 494 U.S. 26, 36 (1990)("[W]ords grouped in a list should be given related meaning."). Subdivision 2(2) prohibits the transfer of "blood, sperm, organs and tissue"—all things that one medically donates. Second, the word "sperm" is more commonly used in the context of medical procedures, such as Intrauterine Insemination (IUI) and In Vitro Fertilization (IVF), whereas "semen" is generally used to refer to the

bodily fluid containing sperm that is emitted through ejaculation during sexual activity. Finally, subdivision 2(2) references "medical research" and "donor screening forms," terms which apply to medical procedures and not sexual conduct.

A consideration of the statute as a whole further supports the conclusion that subdivision 2(2) would be impermissibly vague if interpreted to apply to sexual conduct. It is a maxim of statutory interpretation that a statute must be read its entirety, keeping in context how the subdivisions relate to one another in addressing the prohibited conduct. *Dolan*, 546 U.S. at 486-87 ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute…."); *State v. Randolph*, 800 N.W.2d 150, 154 (Minn. 2011) ("A statute is read as a whole and each section is interpreted 'in light of the surrounding sections to avoid conflicting interpretations.'" (citations omitted)). In this case, sexual activity is addressed fully and explicitly in subdivision 2(1). This explicit reference to sexual conduct in the preceding subsection, and subdivision 2(2)'s lack of any such reference, would prompt a person of reasonable intelligence to conclude that the statute prohibits three distinct types of conduct under each of the three subsections: sexual conduct in the first subsection, medical conduct in the second subsection, and drug-related conduct in the third subsection. Further, the state's interpretation of subdivision 2(2) directly conflicts with subdivision 2(1). In subdivision 2(1), the statute reflects an intent to attach criminal liability only if the HIV-positive individual

fails to use a latex or other effective barrier and fails to disclose his or her HIV status—an intent undermined by the state's interpretation of subdivision 2(2), which would attach criminal liability regardless of disclosure.

The state's interpretation of subdivision 2(2) as applying to sexual activity creates additional ambiguity by not specifying whether criminal liability would attach where a person is the receptive partner in sexual acts "involving the transfer of sperm." Because subdivision 2(2) only requires that the crime "involve" a transfer of sperm, there is no clarity as to whether the defendant must be the party that produces the sperm or whether either party involved in the sexual activity could be liable. On the one hand, a reading of the plain language of subdivision 2(2) suggests that an HIV-positive receptive partner in sexual intercourse *could* be liable if his or her partner ejaculates, because the "crime" would have "involved" a transfer of sperm. On the other hand, such a result would be absurd because the risk posed by an HIV-positive person who is the receptive partner in sexual intercourse has nothing to do with "sperm," but instead involves the risk that HIV might be spread through another infectious bodily fluid, such as vaginal secretions or blood. Because applying subdivision 2(2) to sexual acts creates unconstitutional vagueness about its applicability to the receptive participants in sexual intercourse involving the transfer of sperm, such an interpretation of the statute must be rejected.

In summary, by isolating certain terms and ignoring other portions of the statute altogether, the state navigates its way to a reading of the remaining terms

that appears to suggest that subdivision 2(2) applies to sexual activities in which there is a "transfer of...sperm." It is clear, however, that a reasonably intelligent person would certainly not reach that conclusion through a straightforward reading of the statute as a whole. Thus, the state's interpretation creates a constitutional vagueness problem that can be avoided if the Court rejects the state's interpretation and affirms the decision of the Court of Appeals.

III. THE STATE'S INTERPRETATION OF MINN. STAT. § 649.2241 SUBD. 2 (2) DISCRIMINATES ON THE BASIS OF SEX IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

The state argues that Minn. Stat. § 649.2241 subd. 2(2) only criminalizes the transfer of sperm and not other sexual fluids because men and women are not similarly situated when it comes to the risk of transferring HIV, and therefore, there is no constitutional violation caused by the sex-based classification. As discussed above, there is ambiguity as to whether the receptive partners in sexual intercourse, regardless of gender, could be held criminally liable if subdivision 2(2) is interpreted to apply to sexual acts. However, the Court of Appeals suggested, and the state seems to agree, that receptive partners could not be held liable and that subdivision 2(2) does treat men and women differently under the state's interpretation. *State v. Rick*, 821 N.W.2d 610, 617 (Minn. App. 2012); State Br. 19-21. The Court of Appeals correctly concluded that such an interpretation of the statute might give rise to a violation of the Equal Protection Clause of the federal and Minnesota constitutions. Under the state's

interpretation, the Court of Appeals noted that subdivision 2(2) would impose criminal liability on men, but not on women, for engaging in the same conduct. In other words, an HIV-positive man can be convicted for transferring sperm through sexual activity, but an HIV-positive woman could not be convicted for transferring vaginal secretions through sexual activity. This interpretation creates a sex-based classification that must be subjected to equal protection review.

Statutes that discriminate based on sex are subject to heightened scrutiny. Such classifications are only valid if the government can show an "exceedingly persuasive justification" for treating the sexes differently. *U.S. v. Virginia*, 518 U.S. 515, 531 (1996). The burden is on the state to "show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 533. *See also In re Custody of J.J.S.*, 707 N.W.2d 706, 709 (Minn. 2006) (holding that sex-based classifications receive intermediate scrutiny under the Minnesota Constitution).

In an equal protection case involving sex-based classifications, the state's burden is "demanding," and the justification for the classification must be "genuine, not hypothesized or invented post hoc in response to litigation." *Virginia*, 518 U.S. at 533 (1996); *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) (mere identification of a benign purpose, such as public health, is not sufficient if it is not the "actual purpose underlying a statutory scheme"). Here, the state is unable to cite to anything in the legislative history

that would indicate any intention underlying the statutory scheme to treat men differently than women with respect to sexual conduct capable of transmitting a communicable disease. *See generally* State Br.; Brief of *Amicus Curiae* Minnesota AIDS Project (legislative history clearly establishes that subdivision 2(2) was not intended to apply to sexual conduct or treat men and women differently in the context of sexual activity). Because the state's proposed interpretation of the statute is a novel one—unrelated to anything in fact contemplated by the legislature—the state's proffered justification for differentiating between sperm and other infectious bodily fluids exchanged during sexual contact is necessarily a *post hoc* rationalization. For this reason alone, the state's interpretation and application of subdivision 2(2) to sexual conduct does not survive an equal protection analysis.

Even if the state could produce evidence of legislative intent in support of the distinction drawn between men and women by its interpretation of the statute, such a distinction would not ultimately survive an equal protection analysis. The state argues that its interpretation of subdivision 2(2)'s differential treatment of men and women can be justified because HIV-positive men and HIV-positive women are not similarly situated when it comes to the risk of transferring HIV through sexual conduct. This argument is premised on two assumptions – one factual and one legal: first, that the transfer of sperm always presents a higher risk of HIV infection to a sexual partner than the transfer of vaginal secretions, and second, that when there are biological differences between men and women, such

differences permit differential treatment under the law. Both of these assumptions are incorrect.

Under heightened scrutiny, the government faces a heavy burden to show why a problem faced by both men and women—in this case, the transmission of HIV—should be addressed by a statute that differentiates based on sex. Both men and women can and do transmit HIV through sexual conduct. The state's argument justifying the differential treatment of men and women in this case is based on an inaccurate and overly simplified assessment of the risk of transmitting HIV and other communicable diseases. Although an HIV-positive man is statistically somewhat more likely to infect a female partner during vaginal intercourse than an HIV-positive woman would be to infect a male partner during the same act,[13] many other non-gender based factors affect the likelihood of transmission including: a person's overall health; the presence of other sexually transmitted illnesses; the timing of the sexual conduct in relation to when the HIV-positive individual was infected; and the use of antiretroviral drugs, which can reduce the likelihood of transmission to almost zero.[14]

Given the many factors that affect one's risk of transmitting HIV through sexual conduct, the differential treatment of men and women under the statute

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[13] The risk of transmission in a single act of unprotected receptive vaginal intercourse with an HIV-positive male is approximately .08% (a risk level that would result in 8 transmissions per 10,000 contacts) and in a single act of unprotected insertive vaginal intercourse with an HIV-positive female, the risk is approximately .04% (or 4 transmissions per 10,000 contacts). *See* Boily, et al. Such a small difference in the relative risks of transmission between men and women would not justify the categorically different treatment imposed by the State's interpretation of subdivision 2(2). *Craig v. Boren*, 429 U.S. 190, 201-02 (1976) (the difference in arrest rates for women and men under the drunk driving laws (0.18% vs. 2.00%) did not justify the gender-based distinction being drawn by the law in question).

[14] *See* Cohen et al. at 503.

does not substantially relate to the stated goal of minimizing the transmission of HIV. It is incorrect to categorically conclude that sperm presents a higher risk of transmitting communicable disease than vaginal secretions. Indeed, HIV-positive men whose viral loads are undetectable as a result of the use of antiretroviral drugs may present virtually no risk of infection, while untreated, recently infected, HIV-positive women likely present discernibly higher risks. If subdivision 2(2) is interpreted to apply to sexual conduct as the state suggests, then both men and women present risks of transmitting communicable diseases, including HIV, based on a number of factors and there is no reason to criminalize men but not women for the same conduct.

The United States Supreme Court has made clear that even where there exist real differences between men and women, such differences may not substantially relate to a state's interest and a sex-based classification based on such differences may not withstand constitutional review. In *Craig v. Boren*, 429 U.S. 190, 199-200 (1976), the Court struck down an Oklahoma law prohibiting the sale of certain classes of beer to males under the age of 21 and females under the age of 18. The state presented statistics showing higher rates of drunk driving arrests for men than women but the Court held that this could not "support the conclusion that the gender-based distinction closely serves to achieve [the government's] objective" of regulating driving while under the influence of alcohol. *Id.* at 199-200, 203. Similarly in *U.S. v. Virginia*, the Court struck down the Virginia Military Institute's (VMI) policy of admitting only men despite recognizing that

there were biological differences between the sexes that may affect the ability of most women to complete the physical requirements of the VMI training program. *Virginia*, 518 U.S. at 533, 540-41. The Court held that even if many women would not be able to complete the physical requirements because of these "inherent differences," that "some women" would be "capable of all of the individual activities required of VMI cadets," and that the existence of biological sex differences did not warrant the differential treatment of men and women under the school's admission policy. *Id.* at 540-41.

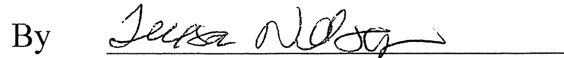
The existence of biological differences between men and women with regard to the rate of transmission of HIV similarly does not warrant the differential treatment in this case. Criminalizing sexual conduct based on gender does not "closely serve" the state's interest in preventing the transmission of HIV given that both men and women present risk of transmission through sexual intercourse and gender is not determinative of an individual's risk. Because the state's application of subdivision 2(2) would violate equal protection, its interpretation should be rejected and this Court should instead affirm the decision of the Court of Appeals and hold that subdivision 2(2) applies in the context of medical donations and procedures, but not sexual activity.

CONCLUSION

Amici respectfully submit that the Court should uphold the Court of Appeals decision and reverse the Defendant's conviction.

February 4, 2013

Respectfully Submitted,

By 

Teresa Nelson #269736
AMERICAN CIVIL LIBERTIES
UNION OF MINNESOTA
2300 Myrtle Ave., Suite 180
St. Paul, Minnesota 55114
651.645.4097 Ext. 122

Leslie Cooper #2759835 (New York)
Chase Strangio #4879466 (New York)
AMERICAN CIVIL
LIBERTIES UNION
125 Broad St., 18th Floor
New York, NY 10004

Scott A. Schoettes #6282105 (Illinois)
Christopher R. Clark #6236859 (Illinois)
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND
105 W. Adams, Suite 2600
Chicago, IL 60603

Attorneys for *Amici Curiae*
American Civil Liberties Union, et al.

CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 6,983 words. This brief was prepared using Microsoft Word 2010.

Dated: February 4, 2013

By ______________________

Teresa Nelson #269736
AMERICAN CIVIL LIBERTIES
UNION OF MINNESOTA
2300 Myrtle Ave., Suite 180
St. Paul, Minnesota 55114
651.645.4097 Ext. 122

Leslie Cooper #2759835 (New York)
Chase Strangio #4879466 (New York)
AMERICAN CIVIL
LIBERTIES UNION
125 Broad St.
New York, NY 10004

Scott A. Schoettes #6282105 (Illinois)
Christopher R. Clark #6236859 (Illinois)
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND
105 W. Adams, Suite 2600
Chicago, IL 60603

Attorneys for *Amici Curiae*
American Civil Liberties Union, et al.

State of Minnesota	)	
	) SS.SS.	
County of Hennepin	)	

Affidavit

Stephen M. West, being first duly sworn, states that he is an employee of Bachman Legal Printing, located at 510 Marquette Building, Suite 222 On the Skyway, Minneapolis, MN 55402. That on **February 4, 2013**, he prepared the **Brief of Amici Curiae, American Civil Liberties Union, American Civil Liberties Union of Minnesota, Center for HIV Law and Policy, Lambda Legal Defense and Education Fund and OutFront Minnesota,** case number **A12-0058**, and served **2** copies of same upon the following attorney(s) or responsible person(s) by **First Class Mail postage prepaid.**

Lori Swanson
MINNESOTA ATTORNEY GENERAL
1800 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101-2134

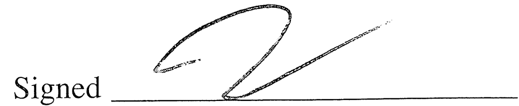
Michael O. Freeman
Elizabeth R. Johnston
HENNEPIN COUNTY ATTORNEY'S OFFICE
C-2000 Government Center
300 South Sixth Street
Minneapolis, MN 55487

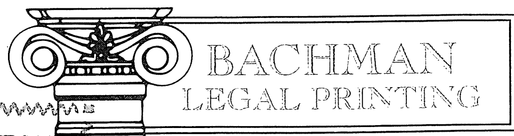
Landon J. Ascheman
Grant Smith
ASCHEMAN & SMITH, LLC
500 Laurel Avenue
St. Paul, MN 55102

COPY

Subscribed and sworn to before me on
February 4, 2013

Signed ____________





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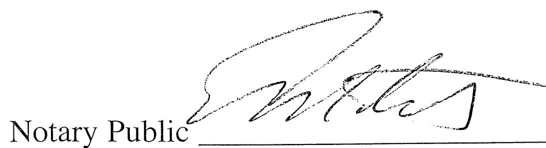

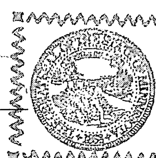

EDWIN R. MOTCH
NOTARY PUBLIC-MINNESOTA
My Commission Expires Jan. 31, 2015

Phone (612) 339-9518 ■ (800) 715-3582
Fax (612) 337-8053 ■ www.bachmanprint.com
510 Marquette Avenue
222 On The Skyway
Minneapolis, MN 55402

State of Minnesota)
) SS.SS.
County of Hennepin)

Affidavit

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Benjamin Feist
GRELL & FEIST LLC
825 Nicollet Mall, Suite 1648
Minneapolis, MN 55402

Alan E. Schoenfeld
WILMERHALE
7 World Trade Center
250 Greenwich Street
New York, NY 10007

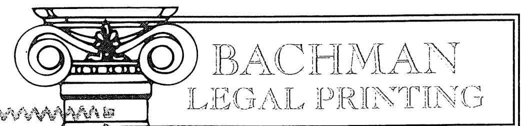
Susan Friedman
Christopher Babbitt
Gerard Sinzdak
WILMERHALE
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006

Lynn Mickelson
MINNESOTA AIDS PROJECT
1400 Park Avenue
Minneapolis, MN 55404

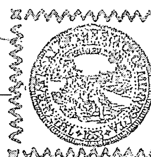
Jerry A. Burg
The Uptown Business Center
3009 Holmes Avenue South
Minneapolis, MN 55408

Subscribed and sworn to before me on
February 4, 2013

Signed ______________________



Notary Public ______________________



EDWIN R. MOTCH
NOTARY PUBLIC-MINNESOTA
My Commission Expires Jan. 31, 2015

Phone (612) 339-9518 ■ (800) 715-3582
Fax (612) 337-8053 ■ www.bachmanprint.com
510 Marquette Avenue
222 On The Skyway
Minneapolis, MN 55402