NO. 11-7427

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM SCOTT MACDONALD,

Petitioner - Appellant

v.

TIM MOOSE,

Respondent - Appellee

and

KEITH HOLDER,

Respondent

ON APPEAL FROM AN ORDER OF
The Honorable Gerald Bruce Lee
United States District Court for the Eastern District of Virginia

BRIEF OF AMICI DEAN AND PROFESSOR ERWIN CHEMERINSKY, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC., AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF PETITIONER–APPELLANT AND OF REVERSAL

Rebecca K. Glenberg
AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC.
530 E. Main Street
Suite 310
Richmond, Virginia 23219
Telephone: 804-644-8080
Facsimile: 804-649-2733

Susan L. Sommer
Gregory R. Nevins (not admitted in this Court)
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street
19th Floor
New York, New York 10005
Telephone: 212-809-8585
Facsimile: 212-809-0055

Attorneys for Amici

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTERESTS OF AMICI CURIAE 1

INTRODUCTION 3

ARGUMENT 5

I. *Lawrence* Facially Invalidated All Sodomy-Only Statutes, Preventing Their Enforcement Against Anyone 5

A. *Lawrence* Explicitly Stated That It Was Ruling On The Validity Of Sodomy Laws 6

B. *Lawrence* Specifically Invalidated On Liberty Grounds *All* Sodomy-Only Laws, Not Merely Those That Targeted Same-Sex Conduct 8

C. *Lawrence* Expressly Ruled That Bowers, A Facial Challenge, Was Wrongly Decided 10

D. Sodomy-Only Statutes, Invalid Under *Lawrence*, Cannot Be Enforced Against Anyone, And The Prudential Standing Concerns Raised By The Virginia Courts Are Misplaced 12

II. *Lawrence*'s Facial Invalidation Of The Sodomy Statute Is Consistent With Extensive Precedent Striking Down Laws That Broadly Infringe Protected Rights 14

III. The Virginia Courts' Rewriting Of The Sodomy Statute Gives Rise To An Equal Protection Violation, Further Demonstrating Why The Facially Unconstitutional Law Should Have Been Struck Down In Its Entirety 23

CONCLUSION 30

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7) 31

CERTIFICATE OF SERVICE 32

TABLE OF AUTHORITIES

Page

CASES

Aptheker v. Sec'y of State,
378 U.S. 500 (1964)....................15

Ayotte v. Planned Parenthood of N. New England,
546 U.S. 320 (2006)....................*passim*

Barrows v. Jackson,
346 U.S. 249 (1953)....................13

Bd. of Trustees v. Fox,
492 U.S. 469 (1989)....................13

Bowers v. Hardwick,
478 U.S. 186 (1986)....................*passim*

Butts v. Merch. & Miners Transp. Co.,
230 U.S. 126 (1913)....................18

City of Cleburne v. Cleburne Living Center, Inc.,
473 U.S. 432 (1985)....................26

County Court of Ulster County v. Allen,
442 U.S. 140 (1979)....................14

Danforth v. Minnesota,
552 U.S. 264 (2008)....................12

Doe v. Commonwealth's Attorney for the City of Richmond,
403 F. Supp. 1199 (E.D. Va. 1975),
aff'd, 425 U.S. 901 (1976)....................22

Doe v. Jindal,
2012 U.S. Dist. LEXIS 43818 (E.D. La. Mar. 29, 2012)....................28, 29

TABLE OF AUTHORITIES
(cont'd)

Page

Dombrowski v. Pfister,
380 U.S. 479 (1965)....................13

Eubanks v. Wilkinson,
937 F.2d 1118 (6th Cir. 1991)....................17

Fisher v. King,
232 F.3d 391 (4th Cir. 2000)....................13

Gooding v. Wilson,
405 U.S. 518 (1972)....................23

Griswold v. Connecticut,
381 U.S. 479 (1965)....................14

Hayes v. Secretary of Dep't of Pub. Safety,
455 F.2d 798, 801 (4th Cir. 1972)....................13

Helton v. Hunt,
330 F.3d 242 (4th Cir. 2003)....................23

Hill v. Wallace,
259 U.S. 44 (1922)....................17

Kansas v. Limon,
122 P.3d 22 (Kan. 2005)....................27, 28

Lawrence v. Texas,
539 U.S. 558 (2003)....................*passim*

Legend Night Club v. Miller,
637 F.3d 291 (4th Cir. 2011)....................12

Limon v. Kansas,
539 U.S. 955 (2003)....................28

TABLE OF AUTHORITIES
(cont'd)

Page

Marchetti v. United States,
390 U.S. 39 (1968)....................18

McDonald v. Commonwealth,
630 S.E.2d 754 (Va. Ct. App. 2006)....................19, 24

Mohammed v. State,
561 So.2d 384 (Fla. Ct. App. 1990)....................21

Moore v. East Cleveland,
431 U.S. 494 (1977)....................14

Pacesetter Homes, Inc. v. Vill. of S. Holland,
163 N.E.2d 464 (Ill. 1959)....................18

Paris v. Commonwealth,
545 S.E.2d 557 (Va. Ct. App. 2001)....................22

People v. Hofsheier,
129 P.3d 29 (Cal. 2006)....................26, 27

People v. Uplinger,
447 N.E.2d 62 (N.Y. 1983)....................19

Reno v. ACLU,
521 U.S. 844 (1997)....................16

State v. Guice,
541 S.E.2d 474 (N.C. Ct. App. 2000)....................21

State v. Hill,
369 P.2d 365 (Kan. 1962)....................17

State v. Newstrom,
371 N.W.2d 525 (Minn. 1985)....................17

TABLE OF AUTHORITIES
(cont'd)

Page

State v. Richardson,
300 S.E.2d 379 (N.C. 1983)....................19

Torres v. N.Y. State Bd. of Elections,
462 F.3d 161 (2d Cir. 2006)....................15

Torres v. Puerto Rico,
442 U.S. 465 (1979)....................22

United States v. Ju Toy,
198 U.S. 253 (1905)....................18

United States v. L. Cohen Grocery Co.,
255 U.S. 81 (1921)....................17

United States v. Reese,
92 U.S. 214 (1875)....................17

Wieman v. Updegraff,
344 U.S. 183 (1952)....................15

Williams v. Taylor,
429 U.S. 362 (2000)....................13, 14

Virginia v. Am. Booksellers Ass'n, Inc.,
484 U.S. 383 (1988)....................15

Virginia Society for Human Life, Inc. v. Caldwell,
152 F.3d 268 (4th Cir. 1998)....................23

CONSTITUTIONAL AMENDMENTS, STATUTES AND RULES

U.S. Const. amend. I....................13

U.S. Const. amend. V....................14, 15

TABLE OF AUTHORITIES
(cont'd)

Page

U.S. Const. amend. XIV 13, 14

Ala. Code § 13A-6-60(2) 3

Ala. Code § 13A-6-65(a)(3)..........3

Fla. Stat. Ann. § 800.02 3

Ga. Code Ann. § 16-6-2(a)(1) (1984) 10

Idaho Code Ann. § 18-6605..........3

Kan. Stat. Ann. § 21-3505(a)(1) 3

La. Rev. Stat. Ann. § 14:89..........3

Miss. Code Ann. § 97-29-59..........3

Mo. Rev. Stat. § 566.062 3

N.C. Gen. Stat. § 14-177..........3

Okla. Stat. tit. 21, § 886 3

S.C. Code Ann. Regs. § 16-15-120..........3

Tex. Penal Code Ann. § 21.06(a)..........3

Utah Code Ann. § 76-5-403(1) 3

Va. Code Ann. § 9.1-902(B)(2) 25

Va. Code Ann. § 9.1-903(D-G) 25

TABLE OF AUTHORITIES
(cont'd)

Page

Va. Code Ann. § 9.1-913 25

Va. Code Ann. § 18.2-10(e) 24

Va. Code Ann. § 18.2-10(f) 24

Va. Code Ann. § 18.2-11(a) 25

Va. Code Ann. § 18.2-29 24

Va. Code Ann. § 18.2-63 11

Va. Code Ann. § 18.2-64.1 12

Va. Code Ann. § 18.2-67.1 11

Va. Code Ann. § 18.2-346 11

Va. Code Ann. § 18.2-361 ....*passim*

Va. Code Ann. § 18.2-371(ii) 25

Va. Code Ann. § 18.2-387 11

Va. Code Ann. § 24-2.101 25

Va. Code Ann. § 63.2-1205.1 25

Fed. R. App. P. 29(a) 2

TABLE OF AUTHORITIES
(cont'd)

Page

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Charles Lane, *Justices Overturn Texas Sodomy Ban; Ruling Is Landmark Victory for Gay Rights*, Wash. Post, June 27, 2003 9

David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. Rev. 1333 (2005) 7, 10

Elizabeth Neff, *Laws on Consensual Sodomy, Premarital Sex Targets of Suit*, Salt Lake Trib., July 17, 2003 9

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INTERESTS OF AMICI CURIAE

This case presents important questions concerning the respect due the United States Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), the proper role of lower courts in adhering to that precedent, and constraints against judicial revision of laws to yield the unconstitutional results that occurred here. Amici, a professor of constitutional law and two legal organizations dedicated to advancing liberty and equality rights, submit this brief to address the Virginia courts' improper enforcement of Virginia's "crimes against nature" statute, Va. Code Ann. § 18.2-361(A). This brief focuses on the statute's infringement on protected liberty interests and facial unconstitutionality, which could not be corrected by the courts' after-the-fact judicial rewriting of the law. As the brief also argues, the Virginia courts further erred in construing the "crimes against nature" statute in a manner that violates guarantees of equal protection.

Professor Erwin Chemerinsky, founding Dean of the University of California – Irvine School of Law, has published extensively on constitutional issues central to this appeal. He also submitted an Amicus brief and argued in the Virginia Supreme Court on behalf of Appellant

William Scott MacDonald ("Mr. MacDonald") in an earlier proceeding in the Virginia courts addressing questions raised in this appeal.

The American Civil Liberties Union of Virginia, Inc., whose mission is to protect the civil liberties of individuals in Virginia under the federal and state constitutions and statutes, has long been involved in the effort to establish the invalidity of Virginia's sodomy prohibition, which is the subject of this appeal.

Lambda Legal Defense and Education Fund, Inc., the nation's oldest and largest legal organization dedicated to securing recognition of the civil rights of lesbian, gay, bisexual, and transgender individuals and those living with HIV, was lead counsel in *Lawrence* and has served as counsel and Amicus in many other cases challenging the validity of sodomy prohibitions, including the Virginia statute at issue in this case.

All parties have consented to the filing of this Amicus brief. *See* Fed. R. App. P. 29(a).[1]

[1] No party or party's counsel authored the brief in whole or in part, and no party or person other than the Amici and their counsel contributed money intended to fund preparing or submitting the brief.

INTRODUCTION

The U.S. Supreme Court unmistakably held in *Lawrence v. Texas*, 539 U.S. 558 (2003), that a criminal statute whose *only* element is the commission of oral or anal sex (hereinafter "sodomy-only statute") is unconstitutional. The Court in *Lawrence* expressly invalidated Texas's ban on sodomy between same-sex partners on due process rather than equal protection grounds, making clear that *all* state statutes remaining in effect in the nation whose only element is the commission of sodomy, including between different-sex partners, are invalid. Virginia's sodomy-only statute, Va. Code Ann. § 18.2-361(A), suffers this fatal flaw and so is unenforceable under *Lawrence*.[2] The Court overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986), unequivocally stating that that Court should have sustained the facial challenge to the Georgia sodomy statute,

[2] The 13 operative sodomy-only statutes at the time of *Lawrence* included 9 that applied to conduct irrespective of the sex of the participants, *see* Va. Code Ann. § 18.2-361; Ala. Code §§ 13A-6-60(2), 13A-6-65(a)(3); Fla. Stat. Ann. § 800.02; Idaho Code Ann. § 18-6605; La. Rev. Stat. Ann. § 14:89; Miss. Code Ann. § 97-29-59; N.C. Gen. Stat. § 14-177; S.C. Code Ann. Regs. § 16-15-120; Utah Code Ann. § 76-5-403(1), and 4 that applied to only same-sex conduct, *see* Kan. Stat. Ann. § 21-3505(a)(1); Mo. Rev. Stat. § 566.062; Okla. Stat. tit. 21, § 886; Tex. Penal Code Ann. § 21.06(a). Of course, there were dozens of other criminal statutes that criminalized oral or anal sex when committed in public, with those under the age of consent, for money, or without consent. The Court's opinion clarified that legislatures can (within otherwise constitutional bounds) enact measures addressed to these situations. *Lawrence*, 539 U.S. at 578.

which mirrors Virginia's law. Rather than acknowledge the facial invalidity of Virginia's sodomy-only statute in light of *Lawrence*, the Virginia courts took the view in this case that Mr. MacDonald does not have standing to invoke *Lawrence*, even though Mr. MacDonald personally is harmed by prosecution under a facially invalid statute which cannot be enforced against anyone.

Lawrence's facial invalidation of the Texas sodomy-only prohibition comports with a long line of cases holding that courts cannot add words to broadly unconstitutional statutes to salvage them. Instead, courts are obliged to leave to the legislature to determine, within constitutional bounds, which conduct to criminalize. This, of course, is a basic principle of separation of powers and the properly limited role of the judiciary in a democratic society.

Here the Virginia courts compounded their error by giving the facially unconstitutional statute a judge-made construction that itself is unconstitutional. The Virginia courts' construction of the sodomy law levies far harsher penalties on adults who engage with a person 15 to 17 years old in acts of oral or anal sex as opposed to vaginal intercourse. As demonstrated by decisions in other analogous cases, this irrational result and its expression of special condemnation for acts of sodomy violate the

guarantee of equal protection. The Virginia courts had no authority in the first place to rewrite a facially invalid statute in order to salvage it in a pending criminal proceeding, and even less to give an unconstitutional construction to the already facially unconstitutional law.

The position advanced by Mr. MacDonald and Amici does not call into question the legislature's police power to enact narrower statutes, within constitutional bounds, specifically targeting sex that is forcible, commercial, truly public, or with minors. Instead, the sodomy statute is invalid because it contains none of the elements that could make a sodomy prohibition constitutional. There is a crucial difference between acknowledging that the legislature has the police power to criminalize sexual conduct under certain limited circumstances, and the legislature actually having done so through valid means.

ARGUMENT

I. *LAWRENCE* FACIALLY INVALIDATED ALL SODOMY-ONLY STATUTES, PREVENTING THEIR ENFORCMENT AGAINST ANYONE.

The Supreme Court's decision in *Lawrence* invalidated the statute before it in that case, along with all remaining sodomy-only laws in this country. That *Lawrence* facially invalidated sodomy statutes is apparent from (1) the exact language of the *Lawrence* opinion, which

demonstrates that the Court was invalidating a statute, and not considering an as-applied challenge; (2) *Lawrence*'s express determination to strike down Texas's sodomy law, which prohibited acts of sodomy only by same-sex partners, on due process rather than equal protection grounds in order to reach other sodomy laws, like Virginia's, prohibiting acts of sodomy engaged in by different-sex couples as well; and (3) Lawrence's express holding that *Bowers*, a facial challenge to a state's sodomy prohibition, was incorrect when it was decided.

A. *Lawrence* Explicitly Stated That It Was Ruling On The Validity Of Sodomy Laws.

The Texas statute at issue in *Lawrence* was struck down on its face. At the very outset of the majority opinion, Justice Kennedy stated: "The question before the Court is *the validity of a Texas statute* making it a crime for two persons of the same sex to engage in certain intimate sexual conduct." *Lawrence*, 539 U.S. at 562 (emphasis added). Throughout its analysis, the Court addressed the constitutional deficiencies of *laws* targeted at intimate sexual behavior. *See, e.g.*, *id*. at 567 ("*The laws* involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences. . . .") (emphasis added); *id*. at 571 ("The issue is whether the majority may

use the power of the State to enforce these views on the whole society through operation of the criminal law."). The Court recognized that these laws impermissibly reach into the sexual intimacies of adults free to exercise their liberty to engage in such conduct without government interference, and contribute to stigma and discriminatory treatment toward gay people. *See* David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. Rev. 1333, 1379-80 (2005) (explaining that the Court invalidated all sodomy-only laws to eradicate the stigma those laws engendered).

The aim and reach of the Texas statute were unacceptable, and the statute was unsalvageable. Thus, the Court concluded its decision in *Lawrence* in terms that unmistakably held the statute unconstitutional on its face and not just as applied in that case: "The *Texas statute* furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id*. at 578 (emphasis added); *see also id*. at 579 (Justice O'Connor, concurring) ("I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional.").

B. *Lawrence* Specifically Invalidated On Liberty Grounds *All* Sodomy-Only Laws, Not Merely Those That Targeted Same-Sex Conduct.

Lawrence made clear the unconstitutionality of all remaining sodomy laws similarly reaching private intimate conduct. The opinion noted that "[t]he 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13 [including Virginia], of which 4 enforce their laws only against homosexual conduct." 539 U.S. at 573. The Court explicitly chose to decide the case on due process rather than equal protection grounds because otherwise "some might question whether a prohibition would be valid if drawn differently . . . to prohibit the conduct both between same-sex and different-sex participants." 539 U.S. at 575. The Court emphasized that its due process ruling reached not just same-sex sodomy prohibitions, which were vulnerable on equal protection grounds, but sodomy prohibitions generally: "[i]f protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons." *Id.*

The Court's election to decide the case on due process rather than equal protection grounds thus voided all consensual sodomy statutes and

precluded the very real harms of leaving any such laws in force. The Court's opinion in *Lawrence* cannot be read to permit continued enforcement of sodomy-only statutes given the Court's evident aim, set forth in unusually candid and explicit language, to remove these laws from the books and ameliorate their stigma. Thus, the Court issued a broader ruling effectively invalidating all sodomy-only laws.

Indeed, in the wake of *Lawrence*, several state Attorneys General — including Virginia's — publicly acknowledged their states' sodomy statutes to have been invalidated. *See* Charles Lane, *Justices Overturn Texas Sodomy Ban; Ruling Is Landmark Victory for Gay Rights*, Wash. Post, June 27, 2003, at A1 ("Virginia Attorney General Jerry W. Kilgore (R) expressed disappointment with the ruling, which he said invalidates a state statute banning oral and anal sex between consenting gay and heterosexual couples.").[3]

Scholars have also arrived at the same unremarkable conclusion that *Lawrence* facially invalidated sodomy-only laws. *See* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 Calif. L. Rev.

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[3] *See also* Elizabeth Neff, *Laws on Consensual Sodomy, Premarital Sex Targets of Suit*, Salt Lake Trib., July 17, 2003, at C3 ("Utah Attorney General Mark Shurtleff readily admits a U.S. Supreme Court ruling issued last month has already nullified both" sodomy and premarital sex laws.).

915, 938 and n.143, 948 and n.211 (2011); Gans, *Strategic Facial Challenges*, 85 B.U. L. Rev. at 1334 n.8 (describing *Lawrence* as having "invalidat[ed the] sodomy statute on its face"); Scott A. Keller and Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes* In Toto, 98 U. Va. L. Rev. 301, 354 n.198 (2012) (citing *Lawrence* as example of when the Supreme Court "does invalidate statutes *in toto*").

C. *Lawrence* Expressly Ruled That *Bowers*, A Facial Challenge, Was Wrongly Decided.

Lawrence's explicit holding that *Bowers* was wrong "when it was decided," *Lawrence*, 539 U.S. at 578, further demonstrates that the Court dealt a fatal blow to all consensual sodomy statutes. Section 18.2-361(A) is substantively identical to the Georgia law that, as *Lawrence* held, should have been found facially unconstitutional in 1986.[4] *Id*. *Bowers* was a declaratory relief action raising a facial challenge to the constitutionality of Georgia's sodomy statute, which applied to all couples regardless of sex. *Bowers*, 478 U.S. at 188 n.1; *see also id*. at

[4] *Compare* Ga. Code Ann. § 16-6-2(a)(1) (1984) (One commits sodomy who "performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.") with Va. Code Ann. § 18.2-361(A) ("If any person . . . carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge. . . .").

198 n.2 (Powell, J., concurring) ("Moreover, the State has declined to present the criminal charge against Hardwick to a grand jury, and this is a suit for declaratory judgment brought by respondents challenging the validity of the statute."). The *Lawrence* Court recognized *Bowers* as a facial challenge that should have prevailed. 539 U.S. at 566 ("Hardwick was not prosecuted, but he brought an action in federal court to declare the state statute invalid."). The Court emphasized that "*Bowers* was not correct when it was decided, and it is not correct today." *Id.* at 578. The *Lawrence* Court recognized that gay people in particular suffer collateral harms when sodomy statutes remain on the books, even without direct prosecutions for private conduct, and that such laws must be fully invalidated because otherwise their "stigma might remain." *Id.* at 575.

Like Georgia's sodomy prohibition, Virginia's Section 18.2-361(A) prohibits all acts of sodomy, even if committed in private between consenting adults. There is no element in the statute requiring that the sex be forcible, commercial, public, or with a minor. Virginia has criminal prohibitions encompassing each of these elements, but Mr. MacDonald was not charged under any of those statutes.[5] The Virginia

[5] *See* Va. Code Ann. §§ 18.2-67.1 (forcible sodomy), 18.2-346 (prostitution), 18.2-387 (indecent exposure), 18.2-63 (carnal knowledge

courts erred in failing to recognize that, under *Lawrence*, *all* sodomy-only statutes, Section 18.2-361(A) included, are facially invalid.

D. Sodomy-Only Statutes, Invalid Under *Lawrence*, Cannot Be Enforced Against Anyone, And The Prudential Standing Concerns Raised By The Virginia Courts Are Misplaced.

This Court's certificate of appealability did not call for briefing on Mr. MacDonald's standing to pursue his facial challenge to the Virginia sodomy-only statute (Joint Appendix ("JA") 432-33), and, as Mr. MacDonald explained in his brief (Brief of Appellant 13-16), the lower courts were plainly incorrect in ruling that he lacked standing to defend himself with a facial challenge to the statute.

Where "enforcement of [a] statute" has properly been invalidated as unconstitutional, "then so is enforcement of all identical statutes in other States, whether occurring before or after our decision." *Danforth v. Minnesota*, 552 U.S. 264, 286 (2008). Facial invalidation precludes further use of the statute against *anyone*. Where a "statute is facially overbroad, its enforcement is 'totally forbidden.'" *Legend Night Club v. Miller*, 637 F.3d 291 (4th Cir. 2011) (citation omitted). "If a facial challenge is upheld, the sovereign cannot enforce the statute against

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of child between 13 and 15), 18.2-64.1 (carnal knowledge of minor in juvenile custody).

anyone." *Fisher v. King*, 232 F.3d 391, 395 (4th Cir. 2000) *citing Bd. of Trustees v. Fox*, 492 U.S. 469 (1989).[6]

Thus Virginia could not enforce its facially unconstitutional sodomy-only prohibition against Mr. MacDonald, who clearly had standing to challenge his prosecution under an invalid law. *See Barrows v. Jackson*, 346 U.S. 249, 255-56 (1953) (prudential rule that "a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation . . . has no application to the instant case in which . . . a judgment against respondent would constitute a direct . . . injury to her."); *see generally Hayes v. Secretary of Dep't of Pub. Safety*, 455 F.2d 798, 801 (4th Cir. 1972) (plaintiff alleging he "must live from day to day under the constant threat of brutality and misconduct" had standing even though he "has not alleged that brutality or other misconduct has been practiced on him." (citing *Barrows*)).[7]

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[6] It is unclear whether any legitimate judicial mechanism exists to salvage statutes declared facially violative of the Due Process Clause. When a measure is invalidated in a First Amendment overbreadth challenge, the executive branch may bring a pre-enforcement declaratory judgment action to secure a narrower construction of the law. *See Dombrowski v. Pfister*, 380 U.S. 479, 490-491 (1965). Clearly that route was not followed here.

[7] The Virginia courts' determination that Mr. MacDonald lacked standing to challenge the facial constitutionality of the statue was counter to and an unreasonable application of Supreme Court precedent. *See Williams v. Taylor*, 529 U.S. 362 (2000). Contrary to the district court's

II. *LAWRENCE*'S FACIAL INVALIDATION OF THE SODOMY STATUTE IS CONSISTENT WITH EXTENSIVE PRECEDENT STRIKING DOWN LAWS THAT BROADLY INFRINGE PROTECTED RIGHTS.

Lawrence's facial invalidation of sodomy-only statutes is in accord with numerous prior precedents striking down in their entirety laws impinging upon the liberty guarantees of the Fifth and Fourteenth Amendments. *See*, *e.g.*, *Moore v. East Cleveland*, 431 U.S. 494 (1977) (residential restriction precluding cohabitation of certain relatives violated due process interest in family life choices); *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., Warren, J., and Brennan, J., concurring) ("[I]t is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately

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superficial holding (JA 407), the Virginia courts' erroneous ruling on standing was not made suddenly right by a citation to *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979). That case concerned an "inapposite exception" to the fundamental principle that one suffering injury in fact has standing to protest application of a facially invalid statute. *See Williams*, 529 U.S. at 397 (state court's "analysis in this respect was thus not only 'contrary to,' but also, inasmuch as the . . . [court] relied on [an] inapplicable exception . . . an 'unreasonable application of' the clear law as established by this Court."). *Ulster County* criticized the circuit court for facially invalidating presumptions in state criminal law based on "improbable" scenarios that the lower court "hypothesized." *See Ulster County*, 442 U.S. at 156. Just the opposite occurred here. A statute was already facially invalid because it plainly covered conduct protected almost all the time; it was the Virginia courts that tried to salvage this broadly unconstitutional statute so as to apply it to atypical situations — and, as discussed in Point III., in a manner that violates the guarantee of equal protection.

tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples."); *Aptheker v. Sec'y of State*, 378 U.S. 500, 514 (1964) ("In our view, the foregoing considerations compel the conclusion that § 6 of the Control Act is unconstitutional on its face. The section . . . sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment."); *Wieman v. Updegraff*, 344 U.S. 183, 190-92 (1952) (loyalty oath required of state employees violated due process).

Lawrence's facial invalidation of the sodomy statute also comports with the longstanding admonition against judicial tinkering with overly broad statutes to fulfill the legislative duty that branch has abdicated. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006). *Ayotte* cautioned against rewriting a law to conform to constitutional requirements "even as we strive to salvage it." *Id.* at 329, citing *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988). This concern is especially acute when legislative "line-drawing" is more appropriate. *Ayotte*, 546 U.S. at 330; *see also Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161, 206 (2d Cir. 2006) (upholding court's refusal to act as "a one-person legislative superchamber — precisely what is forbidden" —

in declining to salvage election statute where the "constitutionally permissible options are numerous, [and the] 'line-drawing is inherently complex' for a host of policy reasons."). The judiciary's role is to let the legislature define the offenses and punishments, and then weigh in on whether the legislature acted constitutionally — it is not to enact the offenses and punishments in the first place. *See* Sylvia A. Law, *Physician-Assisted Death: An Essay on Constitutional Rights and Remedies*, 55 Md. L. Rev. 292, 336-37 (1996) (holding a statute to be "facially unconstitutional can be viewed as respecting democratic choice by inviting lawmakers to reformulate their policy in narrower terms, free from judicial predetermination of the constitutionality of alternative approaches.").

Notably, *Ayotte* commands that, even if the legislature does intend a particular result, courts should be "wary of legislatures who would rely on [judicial] intervention" to rewrite broad statutes. 546 U.S. at 330. "'It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside' to announce to whom the statute may be applied." *Id.*; *accord Reno v. ACLU*, 521 U.S. 844, 884 n.49 (1997). As *Ayotte* explained, "this would, to some extent, substitute the judicial for the legislative

department of the government." 546 U.S. at 330 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875)).

Many cases prior to *Ayotte* likewise cautioned against judicial rewriting of broadly unconstitutional statutes. For example, the U.S. Supreme Court has held that a statute cannot broadly proscribe an entire category of activity that includes constitutionally protected conduct, and then leave it for the judicial system to decide who can be charged. *See United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) ("[T]o attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."); *see also Eubanks v. Wilkinson*, 937 F.2d 1118, 1125 (6th Cir. 1991) (A court may not "dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court.") (quoting *Hill v. Wallace*, 259 U.S. 44, 70 (1922); *State v. Newstrom*, 371 N.W.2d 525, 529 (Minn. 1985) ("Courts cannot save a penal statute by imposing post facto limitations on official discretion through case by case adjudications where no such restraints appear on the face of the legislation."); *State v. Hill*, 369 P.2d 365, 373

(Kan. 1962); *Pacesetter Homes, Inc. v. Vill. of S. Holland*, 163 N.E.2d 464, 467 (Ill. 1959) ("[T]he relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again.") (quoting *United States v. Ju Toy*, 198 U.S. 253, 262 (1905)).

It is particularly inappropriate for courts to insert words (here, "with minors") into a criminal sodomy statute that has no such language. If, in order to make a statute constitutional, a court "would be required not merely to strike out words, but to insert words that are not now in the statute," the court then is "'mak[ing] a new law, not . . . enforc[ing] an old one. This is no part of our duty.'" *Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968) (citation omitted); *Butts v. Merch. & Miners Transp. Co.*, 230 U.S. 126, 135 (1913) ("To do this would be to introduce a limitation where Congress intended none, and thereby to make a new penal statute, which, of course, we may not do."). In short, "if the legislature wishes to include" certain "sexual acts" within a statute's

reach, "it should do so with specificity since [it] is a criminal statute." *State v. Richardson*, 300 S.E.2d 379, 381 (N.C. 1983).

Amici do not disagree with the Virginia Court of Appeals' statement that *Lawrence* "leav[es] states free to define people under age eighteen as children" and to proscribe sexual activity between adults and children. *McDonald v. Commonwealth*, 630 S.E.2d 754, 757 (Va. Ct. App. 2006). But that is the point — the Virginia legislature must actually define the crime of sodomy involving minors and specify the offense.[8] Since the legislature has not done so with regard to minors of the age involved in this case under these circumstances, Mr. MacDonald cannot be prosecuted under another statute that is unconstitutional on its face because it includes no elements beyond the commission of sodomy itself.

The differing results in *Ayotte* and *Lawrence* illustrate the point and are the simple consequence of applying the same principle to two radically different pieces of legislation. *Ayotte* addressed New

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[8] *People v. Uplinger*, 447 N.E.2d 62 (N.Y. 1983), illustrates the proper balance between the courts and the legislature in this arena. After New York's highest court ruled its sodomy law unconstitutional, that court was asked to save the state's statute against loitering for the purpose of sodomy by adding elements to the language of the statute. *Id.* at 63. The court in *Uplinger* rejected the invitation, noting that the "statute . . . is devoid of a requirement that the conduct proscribed be in any way offensive or annoying to others," and that a "properly drafted" statute addressing offensive conduct would present a different question. *Id.*

Hampshire's statute requiring minors to notify their parents before terminating a pregnancy. The statute did not include an exception if the minor's health is in imminent danger, as is constitutionally required. The Supreme Court held that the state had a legitimate goal in passing the notification statute. *Id.* at 966 ("States unquestionably have the right to require parental involvement" in decisions relating to abortions.) It also determined that, in failing to provide an exception for the health of the minor in a medical emergency, the statute would operate unconstitutionally only in "some very small percentage of cases." *Id.* at 967. The *Ayotte* Court declined to "nullify more of [the New Hampshire statute] than is necessary," *see id.* at 967, because the New Hampshire legislature, as most legislative bodies do, acted with legitimate intent and its overreaching affected only a small number of cases. Thus, the Court asked the lower court to consider carefully whether the entire statute should be invalidated. *Id.* at 331.

These features of the New Hampshire law at issue in *Ayotte* are absent here, where Virginia's sodomy statute on its face has an unconstitutional purpose and operates unconstitutionally in the great majority of the situations it covers. Sodomy statutes are invalid because they "seek to control a personal relationship that . . . is within the liberty

of persons to choose." *Lawrence*, 539 U.S. at 567. In passing a law making *all* acts of sodomy felonies, the Virginia legislature attempted to advance an improper government interest to visit moral condemnation on particular individuals and their consensual sexual conduct. *See Lawrence*, 539 U.S. at 578.

The prohibition on oral sex, at issue in this case, targets conduct fully protected under the Constitution in the vast majority of cases, given that oral sex is widely practiced among consenting adults. *See, e.g.*, *Mohammed v. State*, 561 So.2d 384, 386 n.1 (Fla. Ct. App. 1990) (citing surveys showing between 85% and 87% of adults engage in oral sex); *see also* Centers for Disease Control & Prevention, *Sexual Behavior, Sexual Attraction, and Sexual Identity in the United States: Data From the 2006-2008 National Survey of Family Growth*, 36 Nat'l Vital Health Stat. Rep. 1 (2011), http://www.cdc.gov/nchs/data/nhsr/nhsr036.pdf (estimating based on 2006-08 survey that 89% of women and 90% of men aged 25-44 had engaged in oral sex with a different-sex partner). Sodomy-only statutes differ profoundly from the statute at issue in *Ayotte* by having an unconstitutional purpose and operating unconstitutionally in most of the instances they cover. *See generally State v. Guice*, 541 S.E.2d 474, 487 (N.C. Ct. App. 2000) (a statute that in most cases improperly imposes a

criminal penalty is not saved constitutionally merely because it could be applied validly in some instances).

Indeed, efforts to secure a limiting interpretation of the scope of Section 18.2-361(A) prior to *Lawrence* had been rejected by the courts. *See, e.g.*, *Paris v. Commonwealth*, 545 S.E.2d 557, 561 (Va. Ct. App. 2001) ("The statute does not require proof that the defendant knew the victim did not consent. The intentional commission of the act is the sole element that must be proven."); *see also Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976) (refusing to limit the statute so as not to encompass private, noncommercial acts between consenting adults). The courts plainly recognized that the language and intent of the statute was to punish all sodomy without limitation, and so upheld it in its entirety — wrongly, as *Lawrence* would determine. The suggestion that the legislature intended to reach only specific areas of concern, such as oral sex with minors, is disingenuous. *See generally Torres v. Puerto Rico*, 442 U.S. 465, 473 (1979) (law could not be sustained by analogy to health and safety legislation when the Puerto Rico Supreme Court had held the law to be related to criminal law enforcement, not to health and safety). Such judicial legerdemain should not occur when a statute's

plain intent was to invade protected liberty interests. *See Helton v. Hunt*, 330 F.3d 242, 248-49 (4th Cir. 2003) (The government "argue[s] that we should construe the statute as providing due process protections. . . . Any savings construction here would be at odds with the statute, whose language encourages defiance of, not compliance with, due process guarantees. Although a court will 'often strain to construe legislation so as to save it against constitutional attack,' it will not do so to the point of 'judicially rewriting' the legislation." (citations omitted)).

III. The Virginia Courts' Rewriting Of The Sodomy Statute Gives Rise To An Equal Protection Violation, Further Demonstrating Why The Facially Unconstitutional Law Should Have Been Struck Down In Its Entirety.

The Virginia courts erred not only in their failure to declare Section 18.2-361(A) unconstitutional on its face rather than rewrite it to impose criminal liability on already committed acts, but also in supplying a purported narrowing construction to the statute that is itself unconstitutional. Even if a court could construe such a facially unconstitutional statute to have limited application, it could do so only "if such a construction will tailor the statute to a constitutional fit." *Virginia Society for Human Life, Inc. v. Caldwell*, 152 F.3d 268, 270 (4th Cir. 1998), citing *Gooding v. Wilson*, 405 U.S. 518, 520 (1972). Here the Virginia courts have merely replaced the legislature's facially

unconstitutional statute with a similarly unconstitutional judge-made substitute.

The courts' interpretation of Section 18.2-361(A) is constitutionally infirm because it creates vast and irrational disparities in penalties for different acts of sex, even between the same partners. A person over 18 who engages in sexual activity with a 15 to 17 year old is treated much more harshly for acts of oral or anal sex than for acts of vaginal intercourse. Far from curing Section 18.2-361(A)'s facial due process violation, this judicial fix improperly injects an equal protection violation into Virginia's statutory scheme.

As interpreted by the Virginia courts, Section 18.2-361(A) makes guilty of a Class 6 felony a person over 18 who engages in oral or anal sodomy with a person 15 to 17 years old. *See McDonald*, 630 S.E.2d at 757. A conviction may carry a minimum prison term of one year and a maximum of five. *See* Va. Code Ann. § 18.2-10(f). Pursuant to Va. Code Ann. § 18.2-29, under which Mr. MacDonald was convicted (JA 124), solicitation by a person over 18 of a person under 18 to engage in a felony is a Class 5 felony, raising the maximum potential prison term to 20 years. *See* Va. Code Ann. § 18.2-10(e). Beyond a prison sentence, conviction of a felony in Virginia also strips the individual of the right to

vote. *See* Va. Code Ann. § 24-2.101 "Qualified voter" ("No person who has been convicted of a felony shall be a qualified voter unless his civil rights have been restored by the Governor or other appropriate authority."). A violation or attempted violation of the sodomy law further requires registration as a sex offender, with offender status publicly posted on the internet, ongoing monitoring by the government, a prohibition on adoption, and other stigmatizing disabilities. *See* Va. Code Ann. § 9.1-902(B)(2); Va. Code Ann. § 9.1-903(D-G); Va. Code Ann. § 9.1-913; Va. Code Ann. § 63.2-1205.1; *see also Lawrence*, 539 U.S. at 576 (noting that sex offender registration resulting from conviction under sodomy law "underscores . . . the state-sponsored condemnation attendant to the criminal prohibition").

In contrast, a conviction under Va. Code Ann. § 18.2-371(ii) of a person over 18 who engages in sexual intercourse with a 15 to 17 year old is only a misdemeanor, with no mandatory prison sentence and a one-year *maximum* potential term. *See* Va. Code Ann. § 18.2-11(a). A person convicted of this misdemeanor offense neither loses the right to vote nor is required to register as a sex offender, and suffers far less of the "state-sponsored condemnation" attendant to a conviction under Virginia's sodomy law.

The gross disparities in Virginia's penalties for sodomy as opposed to sexual intercourse are utterly irrational and contrary to the cardinal equal protection principle that "all persons similarly situated shall be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). Indeed, the disparity is especially suspect given its basis in a wholly illegitimate statute that purports to make felons of everyone who engages in acts of sodomy. This harsher treatment simply perpetuates the very state condemnation of nonprocreative sex and of conduct particularly associated with homosexuality held by the Supreme Court in *Lawrence* to be impermissible bases for criminal law. *See Lawrence*, 539 U.S. at 570 (sodomy prohibitions reflect historical "condemnation of nonprocreative sex"); *id.* at 571 ("for centuries there have been powerful voices to condemn homosexual conduct as immoral"). As *Lawrence* held, the state may not "enforce these views on the whole society through operation of the criminal law." *Id.*

Thus in *People v. Hofsheier*, 129 P.3d 29, 41-42 (Cal. 2006), the California Supreme Court ruled that imposition of harsher sex offender registration consequences for conviction of oral rather than vaginal intercourse with a 16 or 17 year old violates the equal protection guarantee. As the California court observed, "[t]he only difference

between the two offenses is the nature of the sexual act." *Id.* at 37. The court concluded that there is no legitimate or rational governmental objective served by imposing more severe burdens on those convicted of oral rather than vaginal sex with a 16 or 17 year old. *Id.* at 41-42. The court noted that the harsher treatment of oral sex is "an historical atavism dating back to [California's sodomy prohibition] repealed over 30 years ago that treated all oral copulation as criminal regardless of age or consent." *Id.* at 41. The Virginia courts in attempting to salvage Section 18.2-361(A), which, like California's long-repealed law, on its face continues to treat all sodomy as criminal "regardless of age or consent," have likewise perpetuated an unconstitutional historical atavism, levying special stigma on sexual acts declared in *Lawrence* to be entitled to constitutional protection, *see* 539 U.S. at 575.

In *Kansas v. Limon*, 122 P.3d 22 (Kan. 2005), the Kansas Supreme Court similarly held that that state's more severe penalties — including a much lengthier prison sentence and sex offender registration, *id.* at 22-23 — for same-sex as opposed to different-sex sexual conduct by a young adult with a minor violates the guarantee of equal protection. Earlier in the litigation, the defendant's equal protection challenge had been rejected and his conviction upheld by the Kansas courts; the day after

ruling in *Lawrence*, the Supreme Court granted *certiorari*, vacated the state court ruling, and remanded the case to the Kansas courts "for further consideration in light of" *Lawrence*. *Limon v. Kansas*, 539 U.S. 955 (2003); *see also Limon*, 122 P.3d at 24-26. The Supreme Court's remand in *Limon* thus intimated that even where a minor is involved, imposing harsher penalties on sexual conduct between same-sex couples than on sexual conduct — vaginal intercourse included — between similarly aged different-sex partners gives rise to significant equal protection concerns. On remand, the Kansas Supreme Court concluded that the differential treatment was unjustified by even a rational government objective, 122 P.3d at 46-55, noting, for example, that the legitimate government interest in deterring teenage pregnancy was actually *ill-served* by a statutory regime imposing less punishment on heterosexual intercourse than on sexual conduct that cannot result in pregnancy, *id.* at 53. The court held that the state's purported justifications expressed only "moral disapproval," an illegitimate basis for the differential sanction. *Id.* at 55.

Most recently, a federal district court held in *Doe v. Jindal*, 2012 U.S. Dist. LEXIS 43818 (E.D. La. Mar. 29, 2012), that Louisiana's designation as sex offenders those convicted of the "crime against nature

by solicitation" (i.e., oral or anal sex for compensation), but not those convicted of prostitution (i.e., vaginal, as well as oral and anal, sex for compensation), violates the federal equal protection guarantee. The court noted that the two groups are similarly or identically situated, and rejected as "an exercise that is without substance" the contention that the differential treatment could be justified by distinctions between acts of sodomy and acts of sexual intercourse. *Id.* at *37 n.27. Finding not "even one unique legitimating governmental interest that can rationally explain" the harsher treatment of convictions under the "crime against nature" statute, the court held that the differential scheme violates the federal guarantee of equal protection. *Id.* at *40.

The Virginia courts are no more authorized to craft an unconstitutional statutory provision than is the Virginia legislature, yet that is precisely the result of the purported narrowing construction the lower courts have imposed on Section 18.2-361(A). The remedy the lower courts employed to address a facially unconstitutional statute is itself unconstitutional and cannot stand.

CONCLUSION

For the foregoing reasons, the district court's grant of the Commonwealth's motion to dismiss and denial of Mr. MacDonald's petition for writ of habeas corpus should be reversed and the writ should be granted.

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Respectfully submitted,

/s/ *Susan L. Sommer*

Susan L. Sommer
Gregory R. Nevins (not admitted in this Court)
Lambda Legal Defense and Education Fund, Inc.
120 Wall Street, 19th Floor
New York, New York 10005
Telephone: 212-809-8585
Facsimile: 212-809-0055

Rebecca K. Glenberg
American Civil Liberties Union of Virginia Foundation, Inc.
530 East Main Street, Suite 310
Richmond, Virginia 23219
Telephone: 804-644-8080
Facsimile: 804-649-2733

Attorneys for Amici

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

I, Rebecca K. Glenberg, counsel for the *Amici*, certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,472 words, excluding parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I further certify that this brief complies with Federal Rules of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

/s/ Susan L. Sommer
Susan L. Sommer

Attorney for Amici

CERTIFICATE OF SERVICE

I certify that on June 5, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Rebecca K. Glenberg
Rebecca K. Glenberg

Attorney for Amici