terms as to render the statute impermissibly vague and invite arbitrary and discriminatory enforcement in violation of the Due Process Clause.

In Part II, *amici* will address why the unintentional transmission of HIV should, as a general matter, be addressed as a public health issue rather than a criminal issue. Criminalization of consensual sex by people living with HIV leads to stigma and discrimination, which in turn deter testing, voluntary disclosure, and accessing medical treatment. Criminalization, therefore, undermines public health. The unintentional transmission of HIV, as occurred here, is most appropriately addressed through public health education, de-stigmatization, and connecting people living with HIV/AIDS to health care.

BRIEF FACTUAL BACKGROUND

The virus that would come to be known as HIV, or human immunodeficiency virus, was first recognized in the United States in 1981. Sarah J. Newman, *Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform*, 107 Nw. U. L. Rev. 1403, 1406 n.16 (2013). From that time on, misinformation and unjustified fear—for example the idea that the virus could spread through sharing a drinking glass or a simple handshake—were widespread, and along with them stigma and discrimination against those who were living with HIV/AIDS. *See, e.g.*, Stephen V. Kenney, *Criminalizing HIV Transmission: Lessons from History and A Model for the Future*, 8 J. Contemp.

Health L. & Pol'y 245, 258 (1992) (describing the "hysteria" that attended early reports of the epidemic and surveying examples of how "fears of AIDS contagion through casual contact abounded").

The fact that HIV/AIDS was particularly prevalent in the gay community exacerbated that discrimination, linking a group that was already marginalized and vilified with the frightening and poorly-understood new diagnosis. *See id.* (noting the widespread sentiment that HIV was "a 'just' punishment for the practice of 'immoral behavior'") (citing Allan M. Brandt, *AIDS: From Social History to Social Policy*, 14 J. L. Med. & Ethics 231, 235 (1986)). People with HIV/AIDS lost their jobs, their homes, and their friends. *See* Caroline Palmer & Lynn Mickelson, *Falling Through the Cracks: The Unique Circumstances of HIV Disease Under Recent Americans With Disabilities Act Caselaw and Emerging Privacy Policies*, 21 Law & Ineq. 219, 221 (2003) (surveying cases that evidenced the "everyday reality of discrimination occurring in venues ranging from the workplace to schools, treatment centers, nursing homes, medical clinics, housing, airlines, and government service providers").

As of 2014, at least 132,000 people in New York are living with diagnosed HIV infections, and over 10,000 more are undiagnosed. Nirav R. Shah, New York State Commissioner of Health, Dear Colleague Letter (May 2, 2014).[1] Significant

[1] https://www.health.ny.gov/diseases/aids/providers/testing/law/letter_2014.htm.

progress has been made since 1981 in learning about HIV/AIDS and in effectively treating it. The Centers for Disease Control and Prevention now recognize (1) that the risk of transmission of the disease through sexual activity is very low, with a per-act probability of acquiring HIV at 11 per 10,000 exposures for insertive anal intercourse, the type of activity at issue in this case; (2) that antiretroviral therapy can further reduce the risk of transmission as much as 96%; and (3) that, "[w]ith testing and treatment, HIV can be a manageable chronic disease" for which the life expectancy of a 20-year-old with HIV "approaches that of an HIV-negative 20-year-old in the general population." U.S. Dep't of Just. ("DOJ"), *Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors* (July 15, 2014) (hereinafter "*DOJ Best Practices*").[2] At the same time, the discriminatory treatment of people living with HIV/AIDS remains pervasive—in employment, housing, health care, and in the criminal justice

[2] http://aids.gov/federal-resources/national-hiv-aids-strategy/doj-hiv-criminal-law-best-practices-guide.pdf. This guide cites data from Centers for Disease Control and Prevention ("CDC"), *HIV Transmission Risk: Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, http://www.cdc.gov/hiv/policies/law/risk.html, and Hasina Samji et al., *Closing the Gap: Increases in Life Expectancy among Treated Individuals in the United States and Canada* at 16, http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0081355. These scientific and medical developments are also described in greater detail in the brief of *amici curiae* The Center for HIV Law and Policy et al.

system. *See* Lambda Legal, *HIV Stigma and Discrimination in the U.S.: An Evidence-Based Report* (Nov. 2010) at 2-4.[3]

ARGUMENT

I. THE FELONY RECKLESS ENDANGERMENT STATUTE CANNOT BE USED TO CRIMINALIZE CONSENSUAL SEX BY PEOPLE LIVING WITH HIV.

The felony reckless endangerment statute under which the defendant was charged requires the prosecution to show that the defendant recklessly engaged in conduct creating a "grave risk of death to another person" under circumstances evincing a "depraved indifference to human life." Penal Law § 120.25; *People v. Chrysler*, 85 N.Y.2d 413, 415 (1995); *People v. Davis*, 72 N.Y.2d 32, 35 (1988). As the defendant explains in his brief, the lower courts correctly found, based on expert medical evidence, that consensual sexual encounters by people living with HIV cannot rise to the level of a "grave risk of death to another person" or "depraved indifference to human life" because of the low risk of transmission and the exceptionally low and attenuated risk of death as a result of transmission. Resp't's Br. at 11-39;[4] *People v. Williams*, 111 A.D.3d 1435, 1436-37 (App. Div. 4th Dep't 2013); R. at 9. The application of the felony reckless endangerment statute to consensual sex by people living with HIV would be a dramatic and

[3] http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_hiv-stigma-and-discrimination-in-the-us_1.pdf.

[4] "Resp't's Br." refers to Brief for Respondent, dated May 19, 2014, filed before this Court.

unprecedented expansion of the scope of this law, and it would render the statute unconstitutionally vague.

a. Consensual Sex by People Living With HIV Is Fundamentally Different From the Facts That Have Served as Bases for the Felony Reckless Endangerment Statute.

The application of the felony reckless endangerment law to consensual sex by people living with HIV would expand the interpretation of this law in an unprecedented way. Courts have properly interpreted "depraved indifference to human life" and "grave risk of death" to apply to only those heinous acts of wanton violence that create a serious risk of imminent death—*i.e.*, "extremely dangerous and fatal conduct performed without specific homicidal intent but with a depraved kind of wantonness." *People v. Payne,* 3 N.Y.3d 266, 272 (2004). The quintessential examples of conduct creating a "grave risk of death" and evincing "depraved indifference to human life" are those aimed at the public at large, such as "shooting into a crowd, placing a time bomb in a public place, or opening the door of the lions' cage in the zoo." *Id.*

Where a defendant's conduct relates to only one person rather than to the public, a finding of "depraved indifference" is appropriate only in those "rare and extraordinary circumstances" when there is proof of "wanton cruelty, brutality or callousness directed against a particularly vulnerable victim, combined with utter indifference to the life or safety of the helpless target of the perpetrator's

inexcusable acts." *People v. Jones*, 100 A.D.3d 1362, 1363-64 (App. Div. 4th Dep't 2012) (quoting *People v. Suarez*, 6 N.Y.3d 202, 213 (2005)).[5] A recurring variation on the classic example of single-victim "depraved indifference" occurs when the defendant has assaulted a helpless and particularly vulnerable victim and abandoned him or her in circumstances likely to cause death. *See Suarez*, 6 N.Y.3d at 212.[6] "Grave risk of death" and "depraved indifference to human life" have also been found in a variation of "Russian Roulette" in which the defendant chose from among three live shells and two dummy shells and then shot the victim at close range, creating a probability of 60% that a live shotgun round would be fired directly into the victim's chest. *People v. Roe,* 74 N.Y.2d 20, 26 (1989) (the victim died).

In each of the cases cited above, the risk of death was also imminent. Indeed, proof of "depraved indifference" and "grave risk of death" requires a showing that the defendant's acts were "imminently dangerous" and "presented a very high risk

---

[5] *See also People v. Lynch,* 95 N.Y.2d 243, 246 (2000) (defendant perpetuated a brutal and sustained attack upon the victim, including stabbing the back of his neck with a sharp metal object, while witnesses begged him to relent, then he fled).

[6] The Court in *Suarez* cites *People v. Mills,* 1 N.Y.3d 269, 275 (2003) (the defendant pushed a 12-year-old boy off a pier, the boy struck his head on the concrete, and the defendant indicated to the other boys that the victim did not need help and left him to drown); *People v. Kibbe,* 35 N.Y.2d 407, 410-11 (1974) (defendants pushed intoxicated victim out of a car onto the side of the road on a very cold night, without his glasses and with his pants pulled down); *see also People v. Rolston,* 190 A.D.2d 1000 (App. Div. 4th Dep't 1993) (defendant offered money to a mentally disabled person to do push-ups and sit-ups on a well-traveled street and the victim was struck by a car).

of death to others." *People v. Hafeez*, 100 N.Y.2d 253, 259 (2003);[7] *see also People v. Lynch,* 95 N.Y.2d 243, 247 (2000) ("Depraved indifference requires proof that the actor's reckless conduct is imminently dangerous."). While the District Attorney attempts to brush this requirement off by citing to a dictionary definition of "imminent" that "includes something 'hanging over one's head,'" Appellant's Reply Br. at 8-9 (citing "Merriam-Webster Dictionary [on line]"), he blithely ignores the primary and well-understood definition of the word: "happening very soon." *Merriam-Webster Dictionary* (2014).[8] No case cited above, and no case cited by either party, has ever found "grave risk of death" to encompass temporally remote risks of death-at-some-point-multiple-years-in-the-future.

Consensual sex by people living with HIV is nothing like shooting into a crowd, placing a bomb in a public place, or viciously assaulting a person and leaving that person to die. The defendant's behavior here carried with it a low risk of transmission and an exceedingly low risk of a temporally-distant death. It is better understood, and much better addressed, through the lens of public health education and prevention strategies that can account for the long history of misinformation, sensationalized fear, and discrimination against those living with

[7] The Court in *Hafeez* is quoting *People v. Register*, 60 N.Y.2d 270, 274 (1983), *overruled on other grounds by People v. Feingold*, 7 N.Y.3d 288, 294 (2006).

[8] http://www.merriam-webster.com/dictionary/imminent.

HIV. *See* Part II, *infra*. This Court should not equate consensual sex by people living with HIV to those acts of depraved indifference that put people at grave risk of death.

b. An Expansive Application of Felony Reckless Endangerment to Consensual Sex by People Living With HIV Would Render the Law Vague and Violate the Due Process Clause.

If the felony reckless endangerment law were read so expansively as to encompass consensual sex by people living with HIV, that application would render the law impermissibly vague and violate the Due Process Clauses of the federal and state Constitutions. U.S. Const. amend. V, XIV; N.Y. Const. art. I § 6. The Due Process Clause requires that laws, particularly penal laws, be crafted with sufficient clarity so that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed" and to prevent "arbitrary and discriminatory enforcement" and caution against "furnish[ing] a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *People v. Bright*, 71 N.Y.2d 376, 382-83 (1988) (internal quotations omitted); *see also City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (recognizing the same underlying reasons for invalidating vague laws).

Courts have recognized that New York's felony reckless endangerment law is susceptible to vague applications and to the attendant risks of arbitrary and

discriminatory enforcement. In *Jones v. Keane*, for example, the court found that the confusion around the term "depraved indifference" raised a "strong possibility of prosecutorial discrimination against minorities or unpopular defendants." *Jones v. Keane*, 2002 WL 33985141, at *5 (S.D.N.Y. May 22, 2002), *rev'd on other grounds,* 329 F.3d 290 (2d Cir. 2003); *see also St. Helen v. Senkowski*, 2003 WL 25719647, at *6 (S.D.N.Y. Sept. 22, 2003) ("[I]t is the failure of the statute—as it is presently interpreted by the New York Court of Appeals—to define the more serious *mens rea* so that prosecutors and juries may not determine arbitrarily and erratically which crime to prosecute or to apply."), *rev'd on other grounds,* 374 F.3d 181 (2d Cir. 2004). The United States Supreme Court has also recognized that the term "great risk of death," similar to the term "grave risk of death" in the felony reckless endangerment law, "might be susceptible of an overly broad interpretation." *Gregg v. Georgia*, 428 U.S. 153, 202-03 (1976) (holding that it was *not* vague as construed by the highest court of the state because "[t]he only case in which the court upheld a conviction in reliance on this aggravating circumstance involved a man who stood up in a church and fired a gun indiscriminately into the audience" and the state court had reversed a finding of "great risk" when the victim was simply kidnapped). This Court has reviewed a case previously to ensure proper, narrow limitations on the felony reckless endangerment law, *see People v. Feingold*, 7 N.Y.3d 288, 295 (2006) (clarifying

the *mens rea* definition of "depraved indifference" and noting that "we cannot conceive that a person may be guilty of a depraved indifference crime without being depravedly indifferent"), and it must continue to be vigilant to ensure that overzealous law enforcement and prosecuting officials are not overstepping the narrow permissible scope of the law.

Application of the felony reckless endangerment statute in this case would purge the law of any limiting principles and arbitrarily target a particularly unpopular and stigmatized group of New Yorkers—those living with HIV. Consensual sexual acts with an 11-in-10,000 (0.11%) chance of transmission and no immediate risk of death simply cannot constitutionally rise to the levels of "depraved indifference" or "grave risk of death." If they did, so could exposure to syphilis, which would eventually cause death in a hypothetical world without medications—which is the world envisioned by the District Attorney. *See* Resp't's Br. at 20. Would the introduction of an impressionable person to an addictive substance be considered the creation of a "grave risk of death" since, if left to spiral out of control, it could develop into debilitating addiction and could lead to that person's death? These scenarios may seem far-fetched, but if the statute applies to consensual sexual acts that carry low risks of harm and exceedingly low and attenuated risks of future death, it could also apply to these situations and countless others.