IN THE DISTRICT COURT OF OKLAHOMA COUNTY,

STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. **CM-2006-0140**
	)	
LONNIE WAYNE LATHAM,	)	
a/k/a LUKE LATHAM,	)	
	)	
Defendant.	)	
	)	

AMICUS BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA AND AMERICAN CIVIL LIBERTIES UNION

Amici Curiae American Civil Liberties Union of Oklahoma and American Civil Liberties Union respectfully submit their amicus brief in support of the motion to dismiss.

FACTUAL BACKGROUND

On January 3, 2006, Defendant, a male, allegedly invited an undercover police officer, also a male, to engage in oral sex in a hotel room. Information; Probable Cause Aff. For purposes of the motion to dismiss only, and taking the factual allegations before the Court as represented by the Information and Probable Cause Affidavit in the light most favorable to the non-moving party, as is appropriate on a motion to dismiss, it is undisputed that (1) Defendant and the undercover police officer are adults; (2) Defendant did not seek to coerce the undercover police to engage in oral sex; (3) Defendant did not seek to engage in oral sex in a public place; and (4) Defendant did not offer money to or accept money from the undercover police officer in exchange for oral sex. See id.

Defendant was arrested and, on January 12, 2006, was charged with soliciting an act of lewdness under Okla. Stat. tit. 21, § 1029(A)(2). Id. On February 1, 2006, Defendant filed a motion to dismiss. Mot. to Dismiss.

ARGUMENT

Adult, consensual, private, non-commercial sex with a person of the same gender is constitutionally protected activity which may not be criminalized. Because it is constitutionally protected activity, its solicitation is constitutionally protected speech.

I. ADULT, CONSENSUAL, PRIVATE, NON-COMMERCIAL SEX WITH A PERSON OF THE SAME GENDER IS CONSTITUTIONALLY PROTECTED ACTIVITY

The right to privacy has long been recognized as a constitutionally guaranteed fundamental right. See Griswold v. Connecticut, 381 U.S. 479 (1965); see also U.S. Const. amend. IV (due process clause); Okla. Const. art. 2, § 7. Its importance and breadth have been described in extraordinarily expansive terms: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct." Lawrence v. Texas, 539 U.S. 558, 562 (2003). At the core of the right to privacy are personal decisions about such matters as intimate association, marriage, child-bearing, child-rearing, and, of particular relevance to this case, sexual intimacy. See, e.g., Lawrence v. Texas, 539 U.S. 558 (2003) (sexual intimacy); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (intimate association); Roe v. Wade, 410 U.S. 113 (1973) (child-bearing); Stanley v. Illinois, 405 U.S. 645 (1972) (child-rearing); Eisenstadt v. Baird, 405 U.S. 438 (1972) (sexual intimacy); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (sexual intimacy). Where personal decisions about sexual intimacy concern adult,

consensual, private, non-commercial sex, the right to privacy protects those decisions from governmental interference – especially criminal prosecution – regardless of whether the sexual partners are married or unmarried, or of the same gender or of the opposite gender.

It has long been established that the right to privacy protects decisions about sexual intimacy regardless of the marital status of the sexual partners. The United States Supreme Court first recognized the right to privacy in the context of decisions about sexual intimacy made by married partners: "We deal with a right of privacy older than the Bill of Rights." Griswold, 381 U.S. at 486 (striking down a criminal prohibition on the use of contraceptives by married couples). Just seven years later, the Court made express that the right to privacy equally protects decisions about sexual intimacy made by unmarried partners: "[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the married and the unmarried alike." Eisenstadt, 405 U.S. at 453 (striking down a criminal prohibition on the distribution of contraceptives to unmarried couples).

More recently, it has been established that the right to privacy also protects decisions about sexual intimacy regardless of the gender of the sexual partners. Although at one time Bowers v. Hardwick, 478 U.S. 186 (1986) suggested otherwise, Lawrence v. Texas, 539 U.S. 558 (2003), wholly repudiated Bowers, not only overruling it, but indeed holding that "[it] was not correct when it was decided." Lawrence, 539 U.S. at 578 (striking down a criminal prohibition on engaging in sex with a person of the same gender). Placing itself squarely in the line of privacy cases following from Griswold v. Connecticut, 381 U.S. 479 (1965), Lawrence confirms that people who seek to enter into a sexual relationship with a person of the same gender "may seek autonomy for [purposes such as sexual intimacy], just as heterosexual persons do." Lawrence, 539 U.S. at 574; see also id. at 578 ("[I]ndividual

decisions . . . concerning the intimacies of [a] physical relationship . . . are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."). Thus, those who seek to enter into a sexual relationship with a person of the same-gender "are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime." Id. at 578.

Like all other constitutional safeguards, the right to privacy necessarily informs the construction of all statutory provisions: "When a statute . . . may be susceptible of more than one meaning, the court's duty is to give its text that construction which would . . . make it impervious to constitutional attack." State ex rel. Macy v. Board of County Comm'rs, 1999 OK 53, ¶ 16, 986 P.2d 1130, 1139 (footnote omitted). The statutory provisions concerning acts of lewdness are no exception.

It is a crime to engage in an act of lewdness. Okla. Stat. tit. 21, § 1029(A)(1). Lewdness is defined as "(a) any lascivious, lustful or licentious conduct, (b) the giving or receiving of the body for indiscriminate sexual intercourse, fellatio, cunnilingus, masturbation, anal intercourse, or lascivious, lustful or licentious conduct with any person not his or her spouse, or (c) any act in furtherance of such conduct or any appointment or engagement for prostitution." Okla. Stat. tit. 21, § 1030(6). Although the definition is susceptible to an expansive reading, it must be construed in accord with the fundamental canon of statutory construction that insists that a statutory provision must be interpreted in a way that avoids constitutional deficiency. Thus, the definition must be construed not to encompass adult, consensual, private, non-commercial sex, regardless of whether the sexual partners are married or unmarried, or of the same gender or of the opposite gender.

Accordingly, the act that was allegedly solicited in this case – adult, consensual,

private, non-commercial sex with a person of the same gender – is a form of constitutionally protected activity which may not be criminalized.

II. THE SOLICITATION OF ADULT, CONSENSUAL, PRIVATE, NON-COMMERCIAL SEX WITH A PERSON OF THE SAME GENDER IS CONSTITUTIONALLY PROTECTED SPEECH

The government may censor – indeed, criminalize – speech that solicits unlawful activity. The speech at issue in this case, however, solicited lawful activity – indeed, constitutionally protected activity. See § I supra. The censorship at issue in this case – this criminal prosecution – cannot be shown to be narrowly tailored to further a compelling governmental interest, and is therefore unconstitutional under both federal and state constitutional law. See U.S. Const. amend. I (free speech clause); Okla. Const. art. 2, § 22; see also In re Initiative Pet. No. 366, 2002 OK 21, ¶ 7, 46 P.3d 123, 126 ("[T]he Oklahoma Constitution is more protective of speech than is the United States Constitution.") (footnote omitted).

The speech at issue in this case was targeted solely for its content – a solicitation of sexual activity. See Information; Probable Cause Aff. The undisputed facts confirm that this is so. The speech was not harassing; in fact, Defendant had reason to believe that it was welcome. See id. Moreover, the speech was not disorderly; in fact, the only listener was the undercover police officer. See id. Such content-based censorship is subject to strict scrutiny. See Police Dep't v. Mosley, 408 U.S. 92 (1972); Conchito v. City of Tulsa, 1974 OK CR 84, 521 P.2d 1384.

Given the absence of extenuating circumstances (e.g., harassment or disorder), the only explanation for the censorship at issue in this case is the notion that such speech might

be offensive to a listener. It has long been established that such a notion does not state even a legitimate governmental interest, let alone a compelling governmental interest: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989) (citations omitted) (striking down a criminal prohibition on flag burning); see also Cohen v. California, 403 U.S. 15, 25 (1971) ("[S]o long as the means are peaceful, the communication need not meet standards of acceptability.") (quotation omitted) (overturning a conviction for wearing a jacket bearing the message "fuck the draft"). This is true even with respect to speech that is sexual in nature: "In evaluating the free speech rights of adults, we have made it perfectly clear that sexual expression which is indecent but not obscene is protected by the First Amendment." Reno v. American Civil Liberties Union, 521 U.S. 844, 874 (1997) (quotation and citation omitted); see also Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975) ("[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.").

Accordingly, "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." Cohen, 403 U.S. at 21; see also, e.g., Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245 (2002).

The fact that the censorship at issue in this case penalizes speech that seeks to facilitate constitutionally protected activity is especially troublesome. If the government

were permitted to indiscriminately censor speech that seeks to facilitate constitutionally protected activity, it would be empowered to do indirectly what it could not do directly – suppress the constitutionally protected activity. For example, the government would be empowered to suppress the right to vote if it were permitted to censor indiscriminately the speech of voters seeking information about how to exercise their right to vote.

Past rulings of Oklahoma courts addressing this issue must be considered in light of intervening – and binding – case law of the United States Supreme Court. See Sawatzky v. City of Oklahoma City, 1995 OK CR 69, 906 P.2d 785, cert. denied, 517 U.S. 1156 (1996) (solicitation of sexual activity with person of same sex); see also Allen v. City of Oklahoma City, 1998 OK CR 42, 965 P.2d 387 (solicitation of sexual activity with person of opposite gender). In particular, such rulings must be considered in light of the evolving articulation of the overbreadth doctrine. See Virginia v. Hicks, 539 U.S. 113 (2003); Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); Los Angeles Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32 (1999).

In Virginia v. Hicks, 539 U.S. 113 (2003), the United States Supreme Court explained that "[t]he showing that a law punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep, suffices to invalidate all enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech – especially when the overbroad statute imposes criminal sanctions." Id. at 118-19 (quotations, citations, and emphasis omitted). The restriction at issue in Hicks – a trespass policy – did not target speech alone.

Indeed, it primarily targeted conduct – the conduct of those who trespass for reasons other than expression. In contrast, not only does the criminal prohibition at issue in this case target speech alone but indeed, if the criminal prohibition is to be construed so broadly as to apply in this case, an overwhelming proportion of the targeted speech is constitutionally protected speech – solicitations of adult, consensual, private, non-commercial sex, without more (e.g., harassment or disorder), including the indisputably commonplace occurrence of a bar patron inviting another bar patron to his or her home to engage in some sort of sexual activity.

Only a small proportion of the targeted speech solicits unlawful activity. The criminal prohibition at issue in this case does not target, for example, the solicitation of an act of prostitution, which is a crime separate from the solicitation of an act of lewdness. See Okla. Stat. tit. 21, §§ 1029(A)(2), 1030(1), (6) (criminalizing solicitation of acts of lewdness and prostitution, and defining "lewdness" and "prostitution" as separate terms); see also, e.g., Okla. Stat. tit. 21, § 1114 (criminalizing non-consensual sexual activity); Okla. Stat. tit. 21, § 1123 (criminalizing solicitation of non-adult sexual activity). As the United States Supreme Court has held, "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." Free Speech Coalition, 535 U.S. at 255 (quotation omitted); see also id. at 245 ("The prospect of a crime . . . by itself does not justify laws suppressing protected speech.") (citation omitted).

Moreover, in light of Lawrence, which rendered unenforceable all criminal prohibitions on adult, consensual, private, non-commercial sex with a person of the same

gender, the proportion of the targeted speech that solicits unlawful activity is now that much smaller. It is inescapable that the criminal prohibition at issue in this case, if it is to be construed so broadly as to apply in this case, is impermissibly overbroad. See Sawatzky, at ¶ __ n.7, 906 P.2d at 787 n.7 ("[P]ernicious are those laws which go too far in trying to regulate our private activities . . . . [T]he ordinances in question . . . may very well go too far in attempting to regulate private activities.") (citation omitted).

For the foregoing reasons, the solicitation of adult, consensual, private, non-commercial sex with a person of the same gender is constitutionally protected speech. Accordingly, to avoid an overbreadth deficiency, the statutory provisions concerning solicitations of acts of lewdness must be construed not to encompass the solicitations of adult, consensual, private, non-commercial sex.

III. THE PROSECUTION OF THE SOLICITATION OF ADULT, CONSENSUAL, PRIVATE, NON-COMMERCIAL SEX WITH A PERSON OF THE SAME GENDER BUT NOT THE SOLICITATION OF ADULT, CONSENSUAL, PRIVATE, NON-COMMERCIAL SEX WITH A PERSON OF THE OPPOSITE GENDER IS CONSTITUTIONALLY IMPERMISSIBLE

Discriminatory enforcement of the law has long been recognized as a constitutional concern. See Yick Wo v. Hopkins, 118 U.S. 356 (1886); see also U.S. Const. amend. IV (equal protection clause); Okla. Const. art. 2, § 7. Here, the disparate exercise of prosecutorial discretion to censor the speech of those who seek to enter into a sexual relationship with a person of the same gender but not those who seek to enter into a sexual relationship with a person of the opposite gender is constitutionally impermissible.

It is indisputably commonplace for an adult, while in a public place (e.g., in a bar or on the street), to invite an adult of the opposite gender to his or her home (or another private place) to engage in some sort of sexual activity, yet such a person is virtually never

prosecuted for soliciting an act of lewdness. This prosecution stands in marked contrast. The only explanation for this stark disparity appears to be disapproval of those who seek to enter into a sexual relationship with a person of the same gender.

"[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); see also City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) (even under rational basis review, the proper level of scrutiny for classifications based on mental retardation, "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like"). This fundamental principle of constitutional law has been expressly extended to governmental action reflecting animus against those who seek to enter into a sexual relationship with a person of the same gender. See Romer v. Evans, 517 U.S. 620, 634 (1996) (striking down a constitutional amendment that discriminated on the basis of sexual orientation in view of "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected"); see also Lawrence, 539 U.S. at 583 ("Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law.") (O'Connor, J., concurring) (quotation omitted). Thus, such disapproval may not be proffered as the justification for the prosecution of the solicitation of sexual activity with a person of the same gender but not the solicitation of sexual activity with a person of the opposite gender.

Finally, separate and apart from the disparate treatment of those who seek to enter into a sexual relationship with a person of the same gender and those who seek to enter into a sexual relationship with a person of the opposite gender, an equal protection violation lies because, of all of the people who solicit adult, consensual, private, non-commercial sex, Defendant was singled out for prosecution. The equal protection guarantee prohibits not only discrimination against a class of people but also discrimination against a single person. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam) ("Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.") (citations omitted); see also City of Houston v. Hill, 482 U.S. 451, 466-67 (1987) (an overbreadth deficiency arises where an "ordinance's plain language is admittedly violated scores of times daily, yet only some individuals – those chose by the police in their unguided discretion – are arrested") (citation omitted).

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request that the Court grant the motion to dismiss.

Dated: February 1, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this _____ day of February, 2006, true and correct copies of the foregoing Amicus Brief of American Civil Liberties Union of Oklahoma and American Civil Liberties Union were delivered or mailed first-class, postage-prepaid, to the following:

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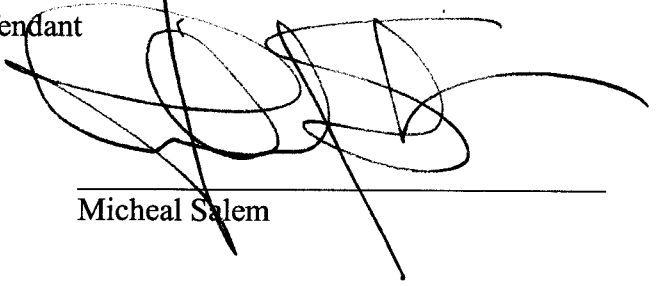

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