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IDENTITY OF *AMICI CURIAE*

Amici Curiae BreakOUT! (a project of the Juvenile Justice Project of Louisiana), Lambda Legal, the National Center for Lesbian Rights, and the Sylvia Rivera Law Project¹ are organizations that represent and work with lesbian, gay, bisexual, and transgender (“LGBT”) youth and adults, many of whom have experienced family rejection, homelessness, and involvement with the juvenile or criminal justice systems. *Amici* submit this amicus brief to demonstrate that the mandatory sex offender registration requirement imposed upon a conviction of Crime Against Nature by Solicitation (“CANS”) originates from a constitutionally impermissible moral disapproval of homosexuality. The statutory provision mandating sex offender registration only for individuals charged with solicitation of oral and anal sex - acts historically associated with homosexuality - but not for individuals charged with the same conduct under the prostitution statute harms all LGBT people because it expresses and perpetuates state-sponsored bias and animus against this community. *Amici* have a special interest in ensuring that courts enforce the requirements of equal protection to strike down statutes with such discriminatory punishment schemes. *Amici* are uniquely situated to present arguments and information that would be useful to the Court based on their experience litigating similar cases in the federal court system and their expertise with how CANS’s disparate, discriminatory, and disproportionate punishment scheme has harmed and continues to harm LGBT people.

SUMMARY OF ARGUMENT

In Louisiana, unlike in any other state, individuals who have allegedly engaged in solicitation of oral or anal sex for compensation are treated differently depending on whether the

¹ Descriptions of *Amici* are included in Appendix A.

government chooses to charge them under the CANS or prostitution statute. While the two laws identically apply to solicitation of oral and anal sex, only the CANS law imposes the uniquely harsh penalty of mandatory sex offender registration, from which flows devastating consequences for all those who must bear the “sex offender” label. As explained in this brief, LGBT young people and transgender women are especially susceptible to the irrational and draconian consequences of Louisiana’s unconstitutional sex offender registration requirement for CANS convictions.

LGBT young people and transgender women experience family rejection, harassment, discrimination, and violence at drastically disproportionate rates. These experiences often result in a cycle of unemployment, poverty, homelessness, and incarceration, from which escape is extremely difficult. Some LGBT people are forced into prostitution for survival. Regardless of whether LGBT youth and transgender women are actually engaging in such conduct, police often profile and arrest them for prostitution-related offenses, and selectively apply and enforce CANS against them. As shown by Plaintiffs, the disparate penalties imposed under CANS, including mandatory sex offender registration, violate equal protection. The history of this legislation indicates that the disparities in punishment are based on moral disapproval of sexual activity associated with homosexuality, and animus and discrimination against those who engage in such activity. In addition, because police and prosecutors have unfettered discretion to decide which statute to use when charging individuals alleged to have offered oral or anal sex for compensation, CANS is susceptible to discriminatory enforcement against LGBT people. Finally, the Registration of Sex Offenders, Sexually Violent Predators, and Child Predators statute (“Registry Law”) as applied to individuals convicted under CANS, amounts to cruel and unusual punishment in violation of the Eighth Amendment. Such requirements are particularly

harmful to LGBT people who face increased harassment, discrimination, and other devastating harms when forced to register as sex offenders based on a CANS conviction. For these reasons, *Amici* respectfully urge this Court to deny Defendants' Motion to Dismiss.

ARGUMENT

I. THE CANS STATUTE SINGLES OUT SOLICITATION OF ORAL OR ANAL SEX FOR HARSHER PUNISHMENT THAN SOLICITATION OF OTHER SEX ACTS AND IS MOTIVATED BY ANIMUS TOWARDS SEX ACTS TRADITIONALLY ASSOCIATED WITH HOMOSEXUALITY IN VIOLATION OF EQUAL PROTECTION.

Louisiana has a long history of criminalizing the commission of oral and anal sex acts, which have been historically associated with homosexuality. Louisiana's Crime Against Nature ("CAN") statute established in 1805 that the commission of such "unnatural carnal copulation" was a crime. Complaint ("Compl.") ¶¶ 1, 33, 34. In 1982, Louisiana expanded its CAN statute to specifically criminalize the solicitation of oral or anal sex. In so doing, Louisiana became the first and only state in the country to adopt a freestanding statute to criminalize solicitation of oral or anal sex for compensation under a separate statute with harsher punishments, despite the fact that it had already been penalized under a general prostitution statute that applies to all sex acts. Compl.¶ 2. Unlike those convicted of prostitution, La. Rev. Stat. Ann. § 14:82, individuals who have been convicted of CANS, La. Rev. Stat. Ann. § 14:89.2 (formerly La. Rev. Stat. Ann. § 14:89(A)(2) (2009)), are required to register as sex offenders.² CANS is the only offense requiring registration as a sex offender that does not involve use of force, coercion, use of a

² Until August 2010, and at all times relevant to Plaintiffs' claims, CANS was a felony offense, carrying a sentence of up to five years as well as mandatory registration as a sex offender under the Registry Act. See La. Rev. Stat. Ann. § 14:89(B) (2009); *id.* § 15:542. The August 2010 amendment made the penalties for a first time CANS conviction the same as for a first time prostitution conviction. Subsequent convictions of CANS still result in mandatory sex offender registration. In addition, the 2010 legislative amendment was not retroactive, and thus individuals with a single CANS conviction prior to August 2010 (which includes several Plaintiffs) are required to continue to register as sex offenders. Compl. ¶ 58.

weapon, lack of consent, or a minor victim. Compl. ¶ 8. The only credible explanation for mandatory sex offender registration for a CANS conviction is to punish more harshly sexual activity traditionally associated with homosexuality – which Louisiana has condemned for over 200 years – solely on the grounds of moral disapproval of the specific sexual acts involved. Much of the outdated statute under which the Plaintiffs in this case were charged –La. Rev. Stat. Ann. § 14.89 (2009) – has been rendered unconstitutional by the U.S. Supreme Court’s decision in Lawrence v. Texas, 539 U.S. 558 (2003).³

In 2003, the Supreme Court ruled that a Texas statute making it a crime for two persons of the same sex to engage in oral or anal sex violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Lawrence, 539 U.S. at 577. While decided on Due Process grounds, Lawrence emphasized the equal protection principles implicated by the challenged criminal prohibition as well, stating, “[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.” Id. at 575-76 (noting that conviction under the Texas sodomy statute would come within Texas’s registration law, “underscor[ing] the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition”). At that time, Louisiana was one of only thirteen states that still had a statute criminalizing sodomy. Id. at 573. The sodomy statutes of those states were invalidated by Lawrence in so far as they applied to private, noncommercial conduct between consenting adults. Today, eight years after that decision, Louisiana is the only

³ Specifically, La. Rev. Stat. Ann. § 14:89(A)(1) (2009), criminalizing sodomy between consenting adults has been described as unlikely to survive scrutiny under Lawrence by the Louisiana Court of Appeal. Louisiana Electorate of Gay and Lesbian, Inc. v. Connick, 902 So. 2d 1090, 1094, 1096 (La. Ct. App. 2005), cert. denied, 916 So. 2d 1062 (La. 2005). Plaintiffs were convicted under La. Rev. Stat. Ann. § 14.89(A)(2) (2009), the section of the statute that prohibits solicitation, which is now severed and codified at La. Rev. Stat. Ann § 14:89.2.

state that singles out solicitation of oral or anal sex for compensation for harsher punishment than solicitation of other sex acts. The disproportionate punishment scheme under the CANS statute is fueled by continued moral disapproval of same-sex sexual acts and is a vestige of the kind of legislation Lawrence condemned.

Under the Equal Protection Clause, “legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’” Lawrence, 539 U.S. at 583 (O’Connor, J., concurring) (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)); see also City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985). The CANS statute does just that by targeting sex acts associated with a politically unpopular group and punishing the same conduct more severely than the prostitution statute does. Accordingly, “careful consideration” is paramount to determine its constitutionality. See Romer, 517 U.S. at 633. Singling out solicitation of oral or anal sex for compensation for harsher punishment is rooted in moral disapproval of the specific sexual act involved and is “so far removed” from any legitimate government interest that it is “impossible to credit” the Defendants’ purported rationales.⁴ Id. at 635. Therefore, the enforcement of the disparate penalties and sex offender registration requirements associated with the CANS statute violates Equal Protection principles. This differential treatment has no rational, much less compelling and narrowly tailored, relationship to a legitimate government interest.

II. LGBT YOUNG PEOPLE AND TRANSGENDER WOMEN ARE AMONG THE POPULATIONS WHO ARE CURRENTLY BEING HARMED BY THE DISCRIMINATORY AND DISPROPORTIONATE PUNISHMENT SCHEME IMPOSED UNDER CANS.

⁴ For a detailed analysis of this point, see section II.B.1.a of Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss, arguing that the Defendants’ stated purposes of public safety and morality do not advance a legitimate governmental interest.

LGBT young people and transgender women experience family rejection, harassment, discrimination, and violence at drastically disproportionate rates. These experiences often lead LGBT people into a cycle of unemployment, poverty, homelessness, and incarceration, from which it is extremely difficult to escape. Without access to housing and employment, LGBT youth⁵ and transgender women are often forced into criminalized economic activities, including prostitution, in order to survive. An even greater number of LGBT young people and transgender women are profiled by police as being engaged in prostitution-related offenses when simply walking down the street, hailing a cab, or talking to friends. For these reasons, LGBT people are one of the populations that have been particularly harmed by the CANS statute's disparate, discriminatory, and disproportionate punishment scheme.

A. LGBT young people and transgender women are pushed into criminalized economies through systemic discrimination, family rejection, unemployment, and homelessness.

Across the United States, including in Louisiana, LGBT youth are over-represented in the foster care system and experience shockingly disproportionate rates of homelessness.⁶ Studies conducted in cities across the country have found that LGBT youth represent between 20 and 40 percent of all youth who are homeless.⁷ Family rejection and abuse are central reasons why LGBT youth flee from or are removed from their homes. In foster care, LGBT youth routinely face the same hostility they did in their families of origin and consequently often run away from

⁵ *Amici* use the term “youth” to include young people under the age of 24.

⁶ See Nicholas Ray, Nat'l Gay & Lesbian Task Force Policy Inst. & Nat'l Coal. for the Homeless, Lesbian, Gay, Bisexual and Transgender Youth: An Epidemic of Homelessness 1, 11-14 (2006); Rob Woronoff et al., Child Welfare League of Am. & Lambda Legal Def. & Educ. Fund, Out of the Margins: A Report on Regional Listening Forums Highlighting the Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth in Care 34-35 (2006).

⁷ Compare Ray, supra note 6, at 1, 11-14, with Laura Kann et.al., Centers for Disease Control and Prevention, Sexual Identity, Sex of Sexual Contacts, and Health-Risk Behaviors Among Students in Grades 9–12 52 (June 10, 2011), <http://www.cdc.gov/mmwr/pdf/ss/ss60e0606.pdf> (fewer than 7 percent of students surveyed identified as gay, lesbian, bisexual, or unsure).

foster or group homes.⁸ According to an advocate at the Juvenile Justice Project of Louisiana, every one of his self-identified LGBT clients over a four year period had previously run away from group homes, foster placements, or other non-secure facilities.⁹ Research shows that being forced out of homes as a result of family rejection is the greatest predictor of future involvement with the juvenile or criminal justice system for LGBT youth.¹⁰ In New Orleans, many LGBT youth who have been rejected by their families end up detained at the Youth Study Center.¹¹

Homeless LGBT youth frequently experience discrimination, as well as assaults by non-LGBT youth, when trying to access the services and programs that support homeless young people.¹² Transgender people of all ages face additional barriers because many shelters and support programs are segregated by gender and either refuse to serve transgender people or are unsafe or discriminatory.¹³ According to a 2011 study completed by the National Center for Transgender Equality and the National Gay and Lesbian Task Force of nearly 6,500 transgender people across the country, 29 percent of those surveyed who had attempted to access homeless

⁸ “[O]ne study found that a staggering 78 percent of LGBT youth were removed from or ran away from foster care placements because such placements were un-welcoming or even hostile toward their sexual orientation or gender identity.” Randi Feinstein et al., Lesbian & Gay Youth Project of the Urban Justice Ctr., Justice for All? A Report on Lesbian, Gay, Bisexual and Transgendered Youth in the New York Juvenile Justice System 16 (2001); see also Heather Berberet, Putting the Pieces Together for Queer Youth: A Model of Integrated Assessment of Need and Program Planning, 85 *Child Welfare J.* 361, 373 (2006) (showing, in one survey, that 39 percent of LGBT youth ages 12-24 living out of home had been forced to leave home due to sexual orientation or gender identity).

⁹ See Jason Cherkis, Obama Administration Seeks to Address Homeless Crisis Among Gay Teens, *Huffington Post* (June 1, 2011), http://www.huffingtonpost.com/2011/06/01/obama-administration-gay-teens-homeless-crisis_n_869901.html.

¹⁰ Katayoon Majd et al., Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts 72 (2009) [hereinafter Hidden Injustice]; Berberet, *supra* note 8, at 373 (finding 45 percent of LGBT homeless youth in San Diego, many of whom had been kicked out of their homes, had involvement with the justice system).

¹¹ Wesley Ware, Juvenile Justice Project of La., Locked Up & Out: Lesbian, Gay, Bisexual, & Transgender Youth in Louisiana’s Juvenile Justice System 14 (2010).

¹² Ray, *supra* note 6, at 83-85.

¹³ Id.

shelters were turned away altogether, 42 percent were forced to stay in facilities designated for a different gender than they identified with, and many others encountered hostile environments.¹⁴ More than half reported being harassed, a quarter were physically assaulted, and almost a quarter were sexually assaulted. Due to this pervasive discrimination and violence, many homeless transgender women choose to remain on the street rather than go to a shelter.¹⁵

LGBT youth have reported similar negative experiences with the only youth shelter in New Orleans, Covenant House, a private Catholic shelter which has historically rejected LGBT youth at many of their locations across the country.¹⁶ Transgender women in New Orleans have also had a particularly difficult time accessing homeless shelters. At this time, there is only one shelter in the city that specifically welcomes transgender women. This is a long-term shelter housing only four single adults at one time, with a substantial waiting list, and to date, it has not actually housed a transgender resident.¹⁷

Without access to housing and other forms of support, unemployment is rampant in LGBT communities.¹⁸ Transgender people in particular experience staggering rates of unemployment due to discrimination and have income levels when employed that are lower than for non-transgender people.¹⁹ One needs-assessment of transgender people conducted in the Washington, DC area showed that only 58 percent of those surveyed were employed in paid positions, 29 percent reported no source of income, and another 31 percent reported annual

¹⁴ Jaime M. Grant et al., Nat'l Ctr. For Transgender Equal. & Nat'l Gay & Lesbian Task Force, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 106 (2011) [hereinafter Injustice at Every Turn].

¹⁵ See id.

¹⁶ Covenant House Houston Watchdogs, <http://covhou.com/> (last visited June 16, 2011).

¹⁷ Hagar's House, <http://hagarshousenola.org/> (last visited June 16, 2011).

¹⁸ Injustice at Every Turn, supra note 14, at 50-71.

¹⁹ See id.

income of less than \$10,000.²⁰ Another assessment of transgender people conducted in San Francisco found that 64 percent of participants reported annual incomes in the range of \$0–\$25,000.²¹ Transgender people of color are especially marginalized, experiencing even higher rates of unemployment and discrimination.²²

As a result of this systemic discrimination and the inability to access housing, legal employment, and other basic needs, LGBT youth and transgender women of all ages are driven into prostitution and other criminalized markets in order to survive.²³ The findings of Injustice at Every Turn illustrate this crisis. Specifically, 16 percent of survey participants had some experience in “sex work, drug sales, and other underground work,” with Black (53 percent) and Latino/a (34 percent) respondents reporting substantially higher rates of underground work, likely related in part to barriers and abuse within educational systems and dramatically higher rates of employment discrimination.²⁴ The study also found that those who had lost a job due to transgender bias were “four times as likely to experience homelessness and [had] more than

²⁰ Jessica M. Xavier et al., Admin. for HIV and AIDS of the D.C. Gov’t, The Washington Transgender Needs Assessment Survey: Executive Summary (2000), <http://www.glaa.org/archive/2000/tgneedsassessment1112.shtml>.

²¹ See generally, Shannon Minter & Christopher Daley, Nat’l Ctr. for Lesbian Rights & Transgender Law Center, Trans Realities: A Legal Needs Assessment of San Francisco’s Transgender Communities (2003).

²² See Injustice at Every Turn, *supra* note 14, at 3 (documenting findings that transgender people experienced unemployment at “twice the rate of the general population . . . [and] transgender people of color up to four times the national unemployment rate”).

²³ Berberet, *supra* note 8, at 374; Hidden Injustice, *supra* note 10, at 71-73; Rebecca Klein, Group Work Practice With Transgendered Male To Female Sex Workers, in *Social Services With Transgendered Youth* 95, 98 (Gerald P. Mallon ed., 1999).

²⁴ Injustice at Every Turn, *supra* note 14, at 64 (finding that “[t]hose at high risk for underground work were those who had lost jobs due to bias (28%) . . . and the unemployed (29%)”).

double the rate of involvement in the underground economy than those who had not lost a job due to bias.”²⁵

B. LGBT youth and transgender women are targeted by the police and profiled as engaging in prostitution-related activity regardless of any actual engagement.

Regardless of whether LGBT youth actually engage in solicitation, many enter the criminal and juvenile justice systems with prostitution-related charges.²⁶ One reason for this is that police often target and arrest LGBT youth for prostitution even when they are not engaging in such activity.²⁷ In focus groups of LGBT youth, many youth reported that police regularly profiled them for prostitution-related offenses. For example, one transgender youth explained, “[There are] popular streets that are for trans [youth] and police recognize that . . . Cops will stop you and ask what you are doing there . . . The cops will keep asking, ‘You’re working, right?’”²⁸ A gay-identified youth reported that he had been stopped by the police and asked for identification while he was wearing a dress, make-up, and a wig. “[The police officer] said that the reason he stopped me was suspicion of soliciting sex . . . I had to show him evidence that I was going to [perform in a] show before they let me go . . . Whenever I would dress up [for a performance], [the police harassment] was horrible.”²⁹

²⁵ *Id.* at 67. Similarly, those who had experienced homelessness were more than four times as likely to have engaged in sex work for income (33 percent) compared to those who had not been homeless (8 percent). *Id.* at 106.

²⁶ One public defender noted that every youth she had represented with a prostitution charge had been LGBT. *Hidden Injustice*, *supra* note 10, at 73.

²⁷ Amnesty Int’l, *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual, and Transgender People in the U.S.* 15 (2005), <http://www.amnesty.org/en/library/info/AMR51/122/2005> [hereinafter *Stonewalled*]; Joey L. Mogul et al., *Queer (In)Justice: The Criminalization of LGBT People in the United States* 61-64 (2011) [hereinafter *Queer (In)Justice*].

²⁸ *Hidden Injustice*, *supra* note 10, at 62.

²⁹ *Id.*

Police also frequently profile and arrest transgender women for engaging, or intending to engage, in prostitution.³⁰ While some transgender women, just like some non-transgender women, actually do engage in prostitution, this stereotype is perpetuated against all transgender women and is legitimized through false arrests.³¹ Amnesty International has found that many transgender women reported being stopped by police and questioned about their purpose for being on the street, often under the pretext of policing prostitution, while they were doing routine daily activities such as walking a dog or going to a neighborhood store.³²

Similar occurrences have been documented in New Orleans, particularly in the French Quarter or known-prostitution areas, such as Tulane Avenue. According to preliminary results from a study of African-American transgender young women in New Orleans conducted by BreakOUT!, 70 percent of those surveyed indicated they felt targeted or profiled by the New Orleans Police Department (“NOPD”) on the basis of their gender expression or perceived sexual orientation and all survey respondents reported being stopped by the police and given no reason for the stop.³³ Many of the Black transgender women surveyed by BreakOUT! said they were stopped by police on Tulane Avenue or in the French Quarter and accused of engaging in prostitution simply because they were transgender and in areas where prostitution occurs. One 19-year-old Black transgender woman explained, “I was walking from a store [when] police roll

³⁰ Queer (In) Justice, *supra* note 27, at 62.

³¹ Stonewalled, *supra* note 27, at 13.

³² Id.; see generally, Andrea Ritchie et al., In the Shadows of the War on Terror: Persistent Police Brutality and Abuse of People of Color in the United States, 1 DePaul J. for Soc. Just. 175 (2007).

³³ At the time of writing, this survey consists of 15 respondents, all young African-American transgender women currently living in New Orleans. The survey asks questions regarding interactions between transgender women and the NOPD. Final survey results are forthcoming, August 2011. Preliminary Results of Survey Study of Transgender Women by BreakOUT! (on file with authors) [hereinafter BreakOUT! Study]. See also BreakOUT!, <http://www.youthbreakout.org> (last visited June 16, 2011).

up and ask me for I.D.” Another surveyed youth, a 20-year-old Black transgender woman, stated she was “walking from a club [and was] stopped, accused of soliciting.” And another stated, “I was walking in the French Quarter and [the police] just stopped me.”³⁴

LGBT youth and transgender women commonly face staggering rates of poverty, violence, unemployment, and discrimination. Some are forced into prostitution to survive while living on the streets, while many others are wrongly profiled and arrested by police. As a result, LGBT people have been particularly harmed by the CANS statute’s disparate and discriminatory mandatory sex offender registration requirement.

III. CANS IS SUSCEPTIBLE TO DISCRIMINATORY ENFORCEMENT AGAINST LGBT YOUTH AND TRANSGENDER WOMEN.

In Louisiana, unlike in any other state, individuals who have allegedly engaged in exactly the same conduct – solicitation of oral or anal sex – are treated differently depending on whether the police or prosecutor chooses to charge them with CANS or with prostitution. Those who are convicted of CANS are required to register as sex offenders, while those convicted of prostitution are not. The mandatory sex offender registration requirement for those convicted of CANS cannot possibly increase public safety or any other goal, since individuals who are convicted of engaging in the exact same conduct but who are charged with prostitution rather than CANS are not required to register. Accordingly, there is no rational reason to treat such people differently, and doing so violates Equal Protection principles.

While this arbitrary and unfair difference affects both LGBT people and non-LGBT people, the government’s power to charge a person under CANS – a statute that originates from animus toward sex acts traditionally associated with homosexuality – is highly susceptible to anti-LGBT bias. Without statutory guidance as to when someone can be charged under CANS

³⁴ See BreakOUT! Study, supra note 33.

(and face mandatory sex offender registration) versus the prostitution statute, police and prosecutors have complete authority to make this life-altering decision on any basis, however arbitrary or animus-driven. This makes CANS ripe for abuse and discriminatory enforcement.

There is a long history of anti-LGBT bias in both prosecutorial and policing practices, including the discriminatory enforcement of laws criminalizing sexual conduct against LGBT people.³⁵ Earlier this year, after an extensive investigation, the Department of Justice (“DOJ”) released a 158-page report documenting the constitutional violations committed by the NOPD. One of the DOJ’s central findings was the NOPD’s discriminatory policing of LGBT people. In describing these findings, Assistant United States Attorney General Thomas Perez noted, “[w]e found regular harassment of LGBT individuals, and the use of the ‘crimes against nature’ statute almost solely against LGBT individuals.”³⁶ The Report states the DOJ has:

[R]easonable cause to believe that NOPD practices lead to discriminatory treatment of LGBT individuals. In particular, transgender women complained that NOPD officers improperly target and arrest them for prostitution, sometimes fabricating evidence of solicitation for compensation. Moreover, transgender residents reported that officers are likelier, because of their gender identity, to charge them under the state’s “crimes against nature” statute—a statute whose history reflects anti-LGBT sentiment. ... Of the registrants convicted of solicitation of a crime against nature, 80 percent are African American, suggesting an element of racial bias as well. Indeed, community members told us they believe some officers equate being African American and transgendered with being a prostitute.³⁷

As the DOJ’s findings show, CANS has been selectively and discriminatorily enforced in New Orleans and likely in other jurisdictions, targeting LGBT people.

³⁵ See, e.g., Queer (In)Justice, *supra* note 27, at 72-79; Hidden Injustice, *supra* note 10, at 26-27, 61-67 (explaining that LGBT youth are regularly profiled as criminals and sex offenders, and there is a selectivity in enforcing “laws relating to public sexual expression or conduct”).

³⁶ Chris Geidner, DOJ’s New Scrutiny: Justice Department’s “Historic Document” About Anti-LGBT Police Discrimination Signals New Approach to Investigations – And to Gender Identity, *MetroWeekly*, Mar. 23, 2011, <http://www.metroweekly.com/news/?ak=6104>.

³⁷ Civ. Rights Div., U.S. Dep’t of Justice, Investigation of the New Orleans Police Department, at x (2011).

The following story is illustrative of how the unique combination of unfettered discretion, LGBT-bias, and police profiling can easily result in discriminatory enforcement of CANS. Several years ago, a 16-year-old African-American transgender woman, after being forced to leave her home by her father, was walking in the French Quarter when an undercover officer approached her and asked if she wanted to come with him.³⁸ Having no place to go and being on the street for the first time in her life, she hesitantly followed the officer. After they turned the corner, several marked police cars surrounded them. She was arrested and charged with CANS. The young woman had not solicited sex for compensation. Although her charges were eventually dropped, she endured several months of court hearings in juvenile court, causing her to miss numerous days of school and affecting her grades. Fortunately, after this nightmare was over, she was able to resume her life, graduate from high school, and start college. Her experience, however, was not typical. Many other transgender young women targeted and charged under CANS must forever bear the “sex offender” brand, severely compromising their education, employment, and housing opportunities.

Although police and prosecutors are ethically obligated not to discriminate against or in favor of a person on the basis of race, religion, sex, sexual orientation, or ethnicity when investigating and prosecuting violations of the law,³⁹ evidence suggests that prosecutions under laws prohibiting sexual conduct between similarly aged peers disproportionately target youth who engage in sexual conduct with youth of the same sex.⁴⁰ As DOJ findings and other evidence confirm, bias against LGBT people leads to disproportionate targeting under the CANS statute.

³⁸ See BreakOUT! Study, *supra* note 33.

³⁹ See ABA Sec. Crim. Justice, Criminal Justice Section Standards: Prosecution Function, Standard 3-3.1(b) (3rd ed. 1993).

⁴⁰ Because statutory rape laws are often not enforced when two similarly aged youth engage in consensual sexual activity, prosecutors may engage in impermissible selective prosecution

IV. MANDATORY SEX OFFENDER REGISTRATION FOR A CANS CONVICTION IS PUNITIVE IN EFFECT, FURTHERS NO LEGITIMATE GOVERNMENTAL INTEREST, AND CAUSES DEVASTATING LONG-TERM HARM FOR LGBT PEOPLE.

Plaintiffs have also alleged that Defendants' maintenance, administration, and enforcement of the Registry Law with respect to Plaintiffs and other individuals convicted of CANS amounts to cruel and unusual punishment in violation of the Eighth Amendment. Compl. ¶ 204. LGBT people who are required to register as sex offenders based on a CANS conviction experience devastating harmful effects due to the added stigma of a sex offender label on a population that already faces animus and bias. As the DOJ noted in its discussion of NOPD's discriminatory treatment of LGBT individuals, "for the already vulnerable transgender community, inclusion on the sex offender registry further stigmatizes and marginalizes them, complicating efforts to secure jobs, housing, and obtain services at places like publicly-run emergency shelters."⁴¹

Louisiana's sex offender Registry Law imposes a myriad of requirements on individuals convicted of CANS, affecting every aspect of their lives. Compl. ¶ 12. Failure to comply with these complex obligations can result in felony-level criminal sanctions, including incarceration. Compl. ¶¶ 101-03. In addition to the humiliation, discrimination, and continued criminalization that many registered sex offenders experience, LGBT people on Louisiana's Sex Offender and Child Predator Registry ("Registry") face unique harms. Specifically, mandatory sex offender registration after a CANS conviction intensifies the already high levels of housing and employment discrimination that LGBT people experience and increases their risk of being

against LGBT youth based on stereotypes, bias, or moral disapproval. See, e.g., Commonwealth v. Washington, 928 N.E.2d 908, 910-11 (Mass. 2010); Hidden Injustice, *supra* note 10, at 62.

⁴¹ Civ. Rights Div., U.S. Dep't of Justice, Investigation of the New Orleans Police Department, at x (2011).

assaulted and targeted for other forms of hate violence. In addition, many transgender women are at an increased risk of violence and discrimination because the Registry's public website includes detailed personal information about them, making it easy for those visiting the website to identify them as transgender.⁴² Finally, LGBT people who are arrested for allegedly violating the registration requirements are at high risk of physical and sexual abuse while incarcerated.

A. The notification and disclosure requirements of Louisiana's Registry Law place LGBT people convicted of CANS at increased risk of housing and employment discrimination as well as assault and hate violence based on their LGBT identity and their sex offender status.

Like individuals on the Registry convicted of sexual offenses involving children, violence, or lack of consent, LGBT people convicted under CANS for allegedly offering to engage in oral or anal sex for compensation are required to disclose their registered sex offender status to neighbors, landlords, employers, schools, churches, and community centers. Compl. ¶ 12. Such far-reaching disclosure requirements intensify the already high levels of housing and employment discrimination LGBT people experience, causing devastating long-term harm that is highly disproportionate to the offense. The additional stigma associated with being a sex offender can push LGBT people already struggling because of anti-LGBT bias and discrimination into a vicious cycle of unemployment, homelessness, and incarceration.

Similarly, the Registry's restriction of access to homeless shelters and other public programs can turn a difficult situation into an impossible one. This harm is not theoretical. For

⁴² Individuals convicted of CANS are included in Louisiana's sex offender database and Registry. The listing for each registrant on the Registry's website includes the registrant's name, aliases, addresses, a description of physical characteristics including such things as sex, race, age, height, and eye color, a recent photograph, the conviction that triggered registration, and descriptions of any vehicles. Compl. ¶¶ 76, 78-82, 113. The Registry website has field-search capabilities which allow the public to search for registered sex offenders based on a range of inputs, including name, zip code, or address. The public can also elect to receive email alerts that inform users whenever a registrant moves within one mile of a particular address. Compl. ¶ 113.

example, when plaintiff Eve Doe found herself in need of substance abuse treatment, she was very fortunate to locate three residential substance abuse programs that would consider taking a transgender woman, only to be denied treatment with these programs because of her status as a registered sex offender. Compl. ¶¶ 13, 160. When she attempted to find temporary housing with a non-profit agency, she was refused placement for the same reason. Compl. ¶ 160.

In addition to having to disclose their registered sex offender status to people in their community and workplace, LGBT people convicted under CANS must regularly disclose this status in person to complete strangers because they are required to have the words “SEX OFFENDER” in orange capitalized letters on the front of state-issued identification, such as driver’s licenses. Compl. ¶¶ 87-88. This means that LGBT people are forced to disclose their status as registered sex offenders every time they are asked to present identification at places such as banks, airports, and establishments serving alcohol, which puts them at risk of harassment, discrimination, physical and sexual assault, and other forms of hate violence. The risk of harassment and violence is even greater for transgender people if the sex listed on their identification does not match their gender expression.⁴³

B. Many transgender women who are convicted of CANS can easily be identified as transgender on the Registry’s public website, putting them at increased risk of harassment and hate violence.

All individuals convicted under CANS are required to have detailed personal information on the state’s sex offender Registry website making them easily identifiable to the public. In addition to home and workplace addresses, registrants’ online entries include their names, any aliases, recent pictures, the sex listed on their identification at the time of arrest, as well as descriptions of other physical characteristics. Compl. ¶¶ 76, 78-82, 113. Such detailed personal

⁴³ Injustice at Every Turn, supra note 12, at 153-54.

information allows those who visit the website to identify someone as transgender if, for example, the registrant's listed sex is male, but the registrant's picture indicates the registrant is a woman or includes an alias and/or a name commonly used by females. This unfettered intrusion is a clear invasion of privacy for transgender women and increases the risk of hate violence against them given the specific personal information the Registry makes available to the public.

C. Failure to comply with obligations imposed by the Registry Law can result in lengthy prison sentences that place LGBT people at high risk of abuse.

A person required to register under the Registry Law who fails to register with the proper authorities, renew and update his or her registration information within stated time frames, provide proof of residence or notification of change of address or other registration information, or complete the required community notification is guilty of a felony and can be sentenced to up to ten years in prison. See La. Rev. Stat. Ann § 15:542.1.4. This is true regardless of the reason for failure to comply, such as an inability to pay registration fees or homelessness. Because LGBT people registered as sex offenders have increased difficulty finding stable housing and employment, they are at risk of violating the Registry's strict requirements and consequently spending time in prison, where they will likely face egregious conditions of confinement in violation of their human and constitutional rights.⁴⁴ In addition, due to discriminatory policing identified by the DOJ, LGBT people are also at-risk of arrest even when they properly register.⁴⁵

⁴⁴ See Just Det. Int'l, A Call for Change: Protecting the Rights of LGBTQ Detainees 2 (2009); Sylvia Rivera Law Project, "It's War in Here," A Report on the Treatment of Transgender and Intersex People in New York State Men's Prisons 20 (2007) [hereinafter It's War].

⁴⁵ For example, Plaintiff Fiona Doe was arrested for allegedly failing to register when she went to her appointment to fill out her change of address paperwork. She was locked up in a men's unit at Orleans Parish Prison until the charges against her were dropped four days later. Compl. ¶ 166.

LGBT people in prisons face a high-risk of verbal, physical, and sexual abuse at the hands of both inmates and prison staff.⁴⁶ Other inmates regularly subject LGBT people to physical attacks, sexual assault, and rape.⁴⁷ Prison staff often fail to respond to this abuse or encourage or engage in verbal, physical, and sexual abuse themselves.⁴⁸ Prison staff also target LGBT people for unnecessary strip searches and other types of forced nudity.⁴⁹ In addition, LGBT inmates are often placed in isolation or segregation for long periods of time, supposedly to protect them from this abuse, although in many cases this puts LGBT inmates at greater risk of abuse by facility staff.⁵⁰

⁴⁶ Nat'l Prison Rape Elimination Comm'n, National Prison Rape Elimination Commission Report 73 (June 2009); Injustice at Every Turn, *supra* note 27, at 167-68; Valerie Jenness et al., Ctr. for Evidence-Based Corr. at Univ. of Cal. Irvine, Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault 30, 32 (2007), http://ucicorrections.seweb.uci.edu/pdf/PREA_Presentation_PREA_Report_UCI_Jenness_et_al.pdf.

⁴⁷ See, e.g., Farmer v. Brennan, 511 U.S. 825, 830 (1994) (transgender inmate beaten and raped by another inmate); Howard v. Waide, 534 F.3d 1227, 1230 (10th Cir. 2008) (gay male inmate forced into prostitution by prison gang); Greene v. Bowles, 361 F.3d 290, 292 (6th Cir. 2004) (transgender inmate attacked by another inmate on multiple occasions, including with a mop handle and fifty-pound fire extinguisher); Johnson v. Johnson, 385 F.3d 503, 512-13 (5th Cir. 2004) (gay male inmate forced to become sex slave).

⁴⁸ See, e.g., Morris v. Trevino, 301 Fed. Appx. 310, 313 (5th Cir. 2008) (gay inmate's arms twisted into painful positions, hands yanked through tray slot opening, arms and face punched by guard); Schwenk v. Hartford, 204 F.3d 1187, 1193-94 (9th Cir. 2000) (transgender inmate suffered repeated sexual harassment and attempted rape by prison guard); Clayton v. Harrington, No. 10-cv-00376, 2010 U.S. Dist. LEXIS 111518, *3-*4 (E.D. Cal. Oct. 13, 2010) (inmate subjected to verbal abuse by guard regarding sexuality).

⁴⁹ See, e.g., Meriwether v. Faulkner, 821 F.2d 408, 417-418 (7th Cir. 1987) (transgender inmate regularly forced to strip in front of guards and other inmates); Wolfe v. Beard, No. 10-2566, 2010 U.S. Dist. LEXIS 136341, *5 (E.D. Pa. Dec. 9, 2010) (transgender inmate subjected to full-body strip searches where guards touched her breasts and nipples).

⁵⁰ See, e.g., DiMarco v. Wy. Dep't of Corr., 473 F.3d 1334, 1336 (10th Cir. 2007) (intersex inmate placed in administrative segregation); Jefferson County, Ky. v. Lindsay, No. 96-5840, 1997 U.S. App. LEXIS 27133 *3 (6th Cir. Ky. Sept. 29, 1997) (gay man placed in solitary confinement); Meriwether, 821 F.2d at 410 (transgender inmate indefinitely confined in administrative segregation); It's War, *supra* note 44, at 18.

Transgender women face additional harms because they are housed in prisons according to their external genitalia rather than their gender identity.⁵¹ In addition, prison staff often do not respect transgender inmates' name and pronoun preferences, forbid transgender inmates to dress in a manner that matches their gender identity, and fail to provide privacy and safety in bathrooms and showers.⁵² Transgender inmates are also denied medically necessary treatments, such as hormone therapy.⁵³ Those denials can have devastating effects on mental and physical health.

LGBT people who are incarcerated in Louisiana are particularly likely to suffer these abuses. The risk of violence and constitutional violations is high for LGBT people detained in the Orleans Parish Prison ("OPP"). OPP was the subject of a DOJ investigation in 2009 finding numerous unconstitutional conditions of confinement.⁵⁴ In addition, OPP has no policies for the housing or treatment of LGBT people, fails to protect LGBT people from physical and sexual abuse, houses transgender women in units with men, where they are at increased danger of assault, and fails to provide LGBT people with adequate medical care. So many LGBT-identified people have reported violence and rape at OPP that in 2009 the Louisiana American Civil Liberties Union sent a letter to Sheriff Gusman highlighting these problems and urging gay

⁵¹ It's War, *supra* note 44, at 17-18.

⁵² See, e.g., Konitzer v. Frank, 711 F. Supp. 2d 874, 883, 896 (E.D. Wis. 2010) (male-to-female transgender inmate disciplined for wearing female undergarments and had clothing confiscated; staff at facility instructed not to use inmate's female name); Wolfe, 2010 U.S. Dist. LEXIS 136341 at *26-*27 (transgender inmate denied gender-appropriate clothing).

⁵³ See, e.g., Cuoco v. Moritsugu, 222 F.3d 99, 103-04 (2d Cir. 2000) (transgender female inmate denied estrogen treatment); Adams v. Fed. Bureau of Prisons, 716 F. Supp. 2d 107, 109 (D. Mass. 2010) (court upheld transgender inmate's claim for denial of treatment for Gender Identity Disorder); De'Lonta v. Angelone, 330 F.3d 630, 632 (4th Cir. 2003) (facility terminated inmate's treatment for GID due to prison policy against hormone treatment).

⁵⁴ Civ. Rights Div., U.S. Dep't of Justice, Orleans Parish Prison System Investigation Report (September 11, 2009), <http://www.aclu.org/files/pdfs/prison/dojletteronopp.pdf>.

and transgender people arrested in Orleans Parish to try to post bond quickly because of the likelihood they will be raped at OPP.⁵⁵

Accordingly, LGBT people who are arrested for allegedly violating a registry requirement will face harsh and dangerous conditions of confinement in violation of their rights. The mandatory sex offender registration requirement for CANS convictions is punitive, purposeless, and grossly disproportionate to the underlying offenses, amounting to cruel and unusual punishment in violation of the Eighth Amendment.

CONCLUSION

For the foregoing reasons, *Amici Curiae* BreakOUT! (a project of the Juvenile Justice Project of Louisiana), *et al.*, respectfully request that this Court deny Defendants' Motion to Dismiss.

Respectfully submitted,

Dated: June 21st, 2011

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⁵⁵ See Margorie Esman, Letter to Sherriff Marlin Gusman (April 28, 2009), https://www.laaclu.org/PDF_documents/Letter_Gusman_042809.pdf.

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Appendix A**Description of *Amici Curiae***

BreakOUT! is a project of the **Juvenile Justice Project of Louisiana** (“JJPL”) that does youth organizing and leadership development with LGBT youth from ages 13-24 who are most impacted by the juvenile or criminal justice system in New Orleans, LA. Youth involved with the group seek to reform New Orleans’ criminal and juvenile justice system and end discriminatory policing on the basis of gender identity or sexual orientation. Many of BreakOut!’s youth leaders have experienced homelessness and some have been arrested and charged with Crime Against Nature by Solicitation. In addition, many transgender women in BreakOut!’s service constituency group have been convicted of CANS and are currently required to register as sex offenders. JJPL has been in existence since 1997 and has challenged unconstitutional conditions of confinement for young people in juvenile detention or long-term secure care facilities, many of whom are LGBT.

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) is a national legal organization committed to advancing the civil rights of LGBT people through litigation, public policy advocacy, and education. Lambda Legal has served as counsel in numerous United States Supreme Court cases securing constitutional rights for LGBT people. Most notably, Lambda Legal was counsel in Lawrence v. Texas, 539 U.S. 558 (2003) and Romer v. Evans, 517 U.S. 620 (1996), cases establishing that moral disapproval of conduct associated with homosexuality is not a constitutionally permissible justification for adverse legal treatment. Over a decade ago, Lambda Legal established its Youth in Out-of-Home Care Project to advance reforms on behalf of LGBT youth in child welfare, juvenile justice, and homeless systems of care. Lambda Legal has served as counsel in a number of cases ensuring constitutional and nondiscriminatory protections for LGBT youth in out-of-home care.

The **National Center for Lesbian Rights** (“NCLR”) is a national legal organization dedicated to achieving full civil and human rights for LGBT people and their families through impact litigation, public policy advocacy, and community and public education. NCLR has served as counsel in numerous federal court cases securing constitutional rights for LGBT people. NCLR each year directly serves more than 5,000 individuals. Since 1993, NCLR’s Youth Project has been committed to advancing the rights of LGBT youth in schools, foster care, and the juvenile justice system. NCLR is recognized nationally as a leader in both juvenile justice and prison issues affecting LGBT individuals.

The **Sylvia Rivera Law Project** (“SRLP”) is a collectively governed, community-based organization that provides free legal services for transgender, gender nonconforming, and intersex people who are low income and/or people of color. SRLP works to guarantee that all people are free to self-determine their gender identity and expression, regardless of income or race, and without facing harassment, discrimination, or violence. SRLP’s legal work seeks to combat the pervasive discrimination that transgender individuals encounter in every realm of society, including with the criminal justice system.

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2011, I electronically filed the foregoing using the court's CM/ECF system which will provide a notice of electronic filing to All Counsel of Record. I further certify that all parties are represented by CM/ECF participants.

/s/Carol Kolinchak
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