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Statement in Support of HB 81:
Criminal Law – Sodomy and Unnatural or Perverted Sexual Practice – Repeal

Dear Chair, Vice-Chair, and Honorable Delegates:

I write today in my capacity as a staff attorney with FreeState Justice to encourage this committee to support HB 81 and repeal Maryland's outdated, unenforceable, and dehumanizing sodomy law. FreeState Justice is a legal advocacy organization that seeks to improve the lives of low-income lesbian, gay, bisexual, transgender, and queer ("LGBTQ") Marylanders.

Maryland's sodomy law, presently encoded in sections 3-321 and 3-322 of the Criminal Law article, remains on the books despite a series of court decisions questioning its enforceability and despite a dramatic shift in the state's policies in regards to LGBTQ+ rights. It remains a homophobic stain on this great state that it is well past time to toss into the dust bins of history.

As currently codified, Maryland's sodomy law provides:

> 3–321.
>
> > A person who is convicted of sodomy is guilty of a felony and is subject to imprisonment not exceeding 10 years.
>
> 3–322.
>
> > (a) A person may not:
> >
> > > (1) take the sexual organ of another or of an animal in the person's mouth;
> > >
> > > (2) place the person's sexual organ in the mouth of another or of an animal; or
> > >
> > > (3) commit another unnatural or perverted sexual practice with another or with an animal.

(b) A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 10 years or a fine not exceeding $1,000 or both.

(c) A person who violates this section is subject to § 5–106(b) of the Courts Article.

(d) An indictment for a violation of this section:

(1) is sufficient if it states that the defendant committed an unnatural and perverted sexual practice with a person or animal as applicable; but

(2) need not state the particular:

(i) unnatural or perverted sexual practice with which the defendant is charged; or

(ii) manner in which the defendant committed the unnatural or perverted sexual practice.

On first blush, these terms apply to all, regardless of consent, the age or gender of one's partner, or where the sex acts occur. However, in *Schochet v. State*, 320 Md. 714, 731 (1990), the Court of Appeals as a matter of statutory interpretation ruled that the law "does not encompass consensual, noncommercial, heterosexual activity between adults in the privacy of the home." While the Court reached this decision in part to avoid constitutional issues, the effect was to create a statutory regime that criminalized the sex lives of LGBTQ+ Marylanders, while leaving the sex lives of their heterosexual peers untouched.

The Court of Appeals' decision also perpetuated a dark history of portraying LGBTQ+ individuals as sexual deviants. The Court's exemption of "consensual, noncommercial, heterosexual activity between adults in the privacy of the home" has the effect of lumping queer Marylanders in with rapists, sex workers, pedophiles, and exhibitionists. Every one of these is a pejorative stereotype that has been (and in far too many cases, still is) used against LGBTQ+ individuals.

After *Schochet*, enforcement of the sodomy law dropped precipitously. During this period, however, the sodomy law remained as a sword of Damocles hanging over the heads of many in Maryland's LGBTQ+ community. Even if largely unenforced, it was a threat to the ability of queer Marylanders to live their lives as themselves and to advocate for their rights more broadly. Indeed, the sodomy law was repeatedly used during this period as a cudgel by opponents of LGBTQ+ rights. *See, e.g.,* ACLU, "In Historic Settlement with ACLU, Maryland Clears Last of its Sodomy Laws From the Books" (Jan. 19, 1999) (noting that opponents of LGBTQ+ rights cited the sodomy law during school board hearings regarding the adoption of non-discrimination policies), *available at* https://www.aclu.org/press-releases/historic-settlement-aclu-maryland-clears-last-its-sodomy-laws-books.

In this uncertain status quo, a group of six queer Marylanders, represented by the ACLU, petitioned the Circuit Court of Baltimore City for a declaratory judgment to bar the enforcement of the sodomy statute. In *Williams v. Glendenning*, No. 98036031/CL-1059 (Baltimore City Cir. Ct. Oct. 15, 1998, Jan. 19, 1999), the circuit court, building off of the Court of Appeals' decision in *Schochet*, found that it violated equal protection principles to apply the state's sodomy law to homosexuals when the same conduct under the same circumstances was not criminalized for heterosexuals. After a settlement, the state opted not to appeal the circuit court's decisions.

Lest there was any doubt of the bindingness of the court's decision in *Williams*, matters were soon settled with the United States Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down sodomy laws across the country. Post-*Lawrence*, Maryland's sodomy law is clearly unenforceable.

And yet it remains a part of the Maryland Code.

In the years since, Maryland has fully embraced LGBTQ+ rights. In 2005, Maryland expanded the definition of hate crimes to include sexual orientation and gender identity. In 2012, the Marriage Protection Act granted Marylanders in same-sex couples equal access to the institution of marriage. The Fairness for All Marylanders Act in 2014 expanded state non-discrimination laws to include gender identity. In 2018, Maryland banned conversion therapy. Just last year, Maryland began offering a third gender marker on driver's licenses and state IDs. And these are just a few of the many laws and policies adopted by the state of Maryland in the two decades since *Williams*.

And yet, Maryland's sodomy law still remains on the books.

The time has come for the state of Maryland to remedy this injustice, to remove this badge of criminality and dehumanization from LGBTQ+ Marylanders. The time has come to repeal Maryland's sodomy law.

Sincerely,

C.P. Hoffman, Esq.

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