National Center for TRANSGENDER EQUALITY ACTION FUND

C.P. Hoffman (They/She)
Senior Policy Counsel
cphoffman@transequality.org

February 1, 2023

The Honorable William C. Smith, Jr.
Senate Judicial Proceedings Committee
2 East
Miller Senate Office Building
Annapolis, Maryland 21401

Testimony of the National Center for Transgender Equality Action Fund

IN SUPPORT OF

SB54: Criminal Law – Unnatural or Perverted Sexual Practice – Repeal

To the Honorable Chair William C. Smith, Jr., Vice Chair Jeff Waldstreicher, and esteemed members of the Judicial Proceedings Committee:

The National Center for Transgender Equality Action Fund ("NCTE Action Fund") is a 501(c)(4) non-profit political advocacy organization affiliated with the National Center for Transgender Equality ("NCTE"). Founded in 2003, the NCTE works to improve the lives of the nearly two million transgender people in the United States and their families through sound public policy, public education, and groundbreaking research. NCTE has worked with countless health and human service providers as well as local, state, and federal agencies on policies to ensure equal access to vital health and human services. The NCTE Action Fund, launched in 2017, builds power for transgender people, our families, and our allies – to make our collective voice heard – so that together, we can change the landscape in this country to fully support transgender equality.

The NCTE Action Fund writes today in support of Senate Bill 54, which would repeal Criminal Law § 3-322, Maryland's outdated, dehumanizing, and largely unconstitutional law prohibiting largely-undefined "unnatural or perverted sexual practices."

While the language of § 3-322 does not expressly target the LGBTQIA+ community, the law was built on a foundation of animus against the queer community, and was historically used predominantly to target LGBTQIA+ people. Indeed, its history is closely tied to the Maryland's now-repealed sodomy law, which the General Assembly repealed in 2020. Given the lack of specificity in that provision, which read en toto "A person who is convicted of sodomy is guilty of a felony and is subject to imprisonment not exceeding 10 years," Section 3-322 – which immediately followed the former sodomy law in the code – could reasonably be read as clarifying that Maryland's sodomy laws covered more than simply anal sex.

What precisely § 3-322 does cover, however, is incredibly unclear. Under § 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.

Violation is punishable by up to 10 years imprisonment and a fine of up to $1,000.

On its face, § 3-322 is primarily concerned with individuals performing or receiving oral sex, which the section implicitly refers to as an "unnatural or perverted sexual practice." Yet, according to multiple public surveys, more than 80% of adults in the United States have performed or received oral sex, with even over 70% of older generations reporting partaking in oral sex.[1] It is hard to believe that something practiced by upwards of 72% of people of retirement age is an "unnatural or perverted sexual practice."

Indeed, court decisions since the 1990s at both the state[2] and federal level[3] have made it clear that § 3-322 is largely unconstitutional and unenforceable because it infringes upon the privacy and bodily autonomy of Marylanders. While Maryland's law and policies have shifted dramatically over the decades, § 3-322 remains a vestige of an earlier time when institutionalized homophobia and the policing of the marital bedroom was written into the state's criminal code.

In 2020, the Maryland General Assembly considered repealing § 3-322 in tandem with the repeal of the state's sodomy law, then encoded at § 3-321. Unfortunately on a number of fronts, the 2020 legislative session was unexpectedly cut short by the COVID-19 pandemic, leaving the General Assembly unable to fully consider the full ramifications of repealing § 3-322 along with § 3-321. Without time to consider the matter fully, and without a recent history of § 3-322 being used against consenting adults, the General Assembly decided to move forward with repeal of the § 3-321's prohibition on sodomy, but to leave the question of § 3-322's prohibition on unnatural or perverted sexual practice to the future.

Unfortunately, the past three years have demonstrated time and again why it is crucial that § 3-322 be repealed. During the summer of 2021, criminal charges under § 3-322 were brought against four men in Hartford County who had been engaged in consensual sex acts.[4] While the charges under § 3-322 were ultimately dropped, the men were still forced to undergo the trauma and publicity of arrest, the threat of having to serve up to ten years in prison, and the feeling of helplessness as a defendant in our criminal justice system.[5] Even with judicial oversight, an overzealous prosecutor can do massive personal damage through simply filing charges that they know will later be dismissed.

More critically, the past year has demonstrated decisively that leaving old unconstitutional laws on the books is simply no longer an option. As you are all aware, on June 24, 2022, the United States Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, in which the Court overturned five decades of precedent guaranteeing the right to have an abortion.[6] In the wake of *Dobbs*, there has been widespread concern over what precedent the Court will come for next, with particular concern focused on *Griswold v.*

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[1] See, e.g., C.E. Copen et al, "Sexual Behavior, Sexual Attraction, and Sexual Orientation Among Adults Aged 18-44 in the United States: Data From the 2011-2013 National Survey of Family Growth," 88 Natl Health Stat Report 1 (Jan. 7, 2016) (reporting that 83% of men and 82% of women between the ages of 15 and 44 had had oral sex with an opposite sex partner during their life); Gypsyamber D'Souza et al, "Differences in Oral Sexual Behaviors by Gender, Age, and Race Explain Observed Differences in Prevalence of Oral Human Papillomavirus Infection," 9 PLoS One e86023 (2014) (reporting that in study of adults between 20 and 69 years old, 85.4% of men and 83.2% women had performed oral sex, with 72.7% of adults 60-69 years old reporting they had performed oral sex), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3901667/.

[2] *Schochet v. State*, 320 Md. 714 (Md. 1990) (finding § 3-322 unconstitutional under Maryland constitution when applied to heterosexual adults engaging in consensual, non-commercial sex acts in private); *Williams v. Glendenning*, No. 98036031/CL-1059 (Baltimore City Cir. Ct. Oct. 15, 1998, Jan. 19, 1999) (expanding *Schochet v. State* to include consensual, non-commercial sex acts engaged in in private by same-sex individuals).

[3] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[4] *See* Lou Chibbaro, Jr., "Gay Men Arrested under Md. Sodomy Law in Adult Bookstore Raid," *The Washington Blade* (July 21, 2021), *available at* https://www.washingtonblade.com/2021/07/21/gay-men-arrested-under-md-sodomy-law-in-adult-bookstore-raid/.

[5] *See* Bradley S. Clark, "Commentary: Why Does Maryland Law Still Prohibit Sexual Contact Between Same-Sex Couples?" *Baltimore Sun* (Jan. 28, 2022), *available at* https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0130-perverted-practice-20220128-envbyoffivagfnsywra7yvipzy-story.html.

[6] 597 U.S. __ (2022), *available at* https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.

National Center for Transgender Equality Action Fund ▪ 1032 15th Street NW, Suite 199, Washington, DC 20005
(202) 642-4542 ▪ ActionFund@TransEquality.org ▪ www.NCTEActionFund.org

Connecticut (right to access contraception),[7] *Lawrence v. Texas* (right to engage in private, consensual sexual acts),[8] *Obergefell v. Hodges* (right to marry a person of the same sex),[9] or even the recent *Bostock v. Clayton County* (interpreting prohibition of employment discrimination "because of sex" to include discrimination on the basis of sexual orientation or transgender status).[10] Indeed, in his concurrence in *Dobbs*, Justice Clarence Thomas expressly called for the court to reconsider *Griswold, Lawrence,* and *Obergefell*.[11]

Unsurprisingly, in the wake of *Dobbs* we have seen a wave of legislative efforts to restrict access to abortion, as well as the going into effect of previously-passed "trigger" laws. But, more directly applicable to the discussion of § 3-322, we have also seen a number of states attempt to enforce pre-*Roe* abortion bans, some of which are more than a century old and had been enjoined from use for nearly half a century. Should *Lawrence v. Texas* be the next precedent to fall, we are likely to see prosecutors across the country seek to enforce sodomy and sodomy-like laws that remain on the books. That could easily include overzealous prosecutors in Maryland, especially since the Supreme Court of Maryland has not specifically ruled that enforcement of § 3-322 against consenting individuals in same-sex relationships is unconstitutional under the state's constitution.

Finally, NCTE Action Fund is also particularly concerned with the vagueness of § 3-322, especially subsection (a)(3), which prohibits "commit[ing] another unnatural or perverted sexual practice with another or with an animal." Nowhere, either in § 3-322 or elsewhere in the Maryland code, is "another unnatural or perverted sexual practice" defined. While this may be a scenario like obscenity where legislators and judges "know it when we see it," that standard provides little protection for LGBTQIA+ individuals who are concerned in an increasingly hostile political environment.

Over the past year, we have seen the rise of a slanderous moral panic focused on LGBTQIA+ (and especially transgender) people as "groomers," who are intent on corrupting (and sexually abusing) the youth of America. Regardless of the role in which we exist in the world – whether as parents, teachers, doctors, advocates, or even just friends – our motivations have been called into question. More frighteningly, we have seen multiple legislative and administrative attacks against us, all of which are justified by this libel. Across the country, for instance, state legislatures are considering bills to prohibit public drag performances under the theory that they both corrupt youth and are inherently sexual.

While thankfully we have not yet seen this level of moral panic reach Maryland, I fear for the future. What is to stop a Maryland prosecutor from bringing charges under § 3-322 against drag performers or against transgender people gathering together in public, under the false theory that wearing clothing inconsistent with societal expectations for our sexes assigned at birth is somehow an "unnatural or perverted sexual practice"?

[7] 381 U.S. 479 (1965).
[8] 539 U.S. 558 (2003).
[9] 576 U.S. 644 (2015).
[10] 590 U.S. __ (2020), *available at* https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf.
[11] 597 U.S. __, at __ (2022) (concurrence of Thomas, J.) ("For that reason, in future cases, we should reconsider all of this Court's substantive due process precdents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents."). *See also* 597 U.S. __, at __ (2022) (dissent of Breyer, Sotomayor, and Kagan, JJ.) ("The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does 'cast[s] doubt on precedents that do not concern abortion. But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not 'deeply rooted in history': Not until *Roe*, the majority argues, did people think abortion fell within the Constitution's guarantee of liberty. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, 'there was no support in American law for a constitutional right to obtain [contraceptives].' So one of two things must be true. Either the majority does not really believe in its own reasoning. Or, if it does, all rights that have no history stretching back to the mid-19th century are insecure.") (internal citations omitted).

Again, I have little doubt that Maryland courts – at least as they stand now – would allow a conviction to stand, but what about what happens in the meantime?

In the past, we may have had the luxury of keeping old, patently unconstitutional laws on the book, knowing they would never be enforced. Unfortunately, we no longer have the luxury, as it is increasingly clear "never" has come far sooner than any of us could have ever expected.

I thank you for your time and urge a favorable report of Senate Bill 54.

Sincerely,

C.P. Hoffman
Senior Policy Counsel
National Center for Transgender Equality Action Fund
cphoffman@transequality.org