COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
No. SJC-11182

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MARC FLAGG,

Plaintiff/Appellant,

v.

ALI-MED, INC.,

Defendant/Appellee.

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On Appeal From A Judgment Of The Superior Court For Norfolk County, Civil Action No. NOCV2010-00236

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# BRIEF OF *AMICI CURIAE*

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## BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE, GAY & LESBIAN ADVOCATES & DEFENDERS, AND THE JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION


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## STATEMENTS OF INTEREST OF THE *AMICI CURIAE*

### THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS

The American Civil Liberties Union of Massachusetts (ACLUM) is a nonprofit, non-partisan membership organization dedicated to the principles of liberty and equality embodied in the state and federal constitutions and civil rights laws. ACLUM has long participated in cases aimed at eradicating invidious discrimination in employment. See, e.g., *Massachusetts Electric Company* v. *Massachusetts Comm'n Against Discrimination*, 375 Mass. 160 (1978); *Smith College* v. *Massachusetts Comm'n Against Discrimination*, 376 Mass. 221 (1978); *College-Town, Div. of Interco, Inc.* v. *Massachusetts Comm'n Against Discrimination*, 400 Mass. 156 (1987); *Trustees of Health and Hospitals of City of Boston, Inc.* v. *Massachusetts Comm'n Against Discrimination*, 449 Mass. 675 (2007).

ACLUM believes that directing discriminatory animus against individuals because of their association with members of a protected class is as corrosive to our society as other forms of discrimination, and that where such acts of discrimination create barriers to equal opportunity in

the workplace, those who are the target of discrimination have a legal remedy under Massachusetts law.

## THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School (CHHIRJ) was launched in September 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law. The Institute honors and continues the unfinished work of Charles Hamilton Houston, one of the 20th century's most important legal scholars and litigators. Houston engineered the multi-year legal strategy that led to the unanimous 1954 Supreme Court decision, *Brown* v. *Board of Education*, repudiating the doctrine of "separate but equal" schools for black and white children. By facilitating a continuous dialogue between practitioners and scholars, he ensured that legal scholarship would resonate outside the academy, and that new legal strategies would be immediately incorporated into the training of lawyers.

CHHIRJ uses this model to address contemporary civil rights challenges in our increasingly multi-racial society. Its long-term goal is to ensure that

every member of our society enjoys equal access to the opportunities, responsibilities and privileges of membership in the United States. One of the most critical mechanisms to fulfill this mission is the ability to prevent the exclusion of individuals from the workplace because of their membership in a protected class or their association with an individual member of such a class.

GAY & LESBIAN ADVOCATES & DEFENDERS

Founded in 1978, Gay & Lesbian Advocates & Defenders (GLAD) is New England's leading public interest legal organization dedicated to ending discrimination based on sexual orientation, HIV status and gender identity and expression. GLAD has litigated widely in New England in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals and people living with HIV and AIDS.

GLAD's history includes litigating and providing *amicus* support in a wide range of anti-discrimination and employment matters. See, e.g., *Muzzy* v. *Cahillane Motors*, 434 Mass. 409 (2001) (*amicus* brief addressing appropriate level of specificity of jury

instruction on "reasonable person" standard in same-sex sexual harassment case); *Melnychenko* v. *84 Lumber Co.*, 424 Mass. 285 (1997) (*amicus* brief arguing that same-sex sexual harassment is prohibited by Chapter 151B regardless of the sexual orientation of the parties); *Bragdon* v. *Abbott*, 524 U.S. 624 (1998) (establishing that people with HIV are protected under the Americans with Disabilities Act); *Rosa* v. *Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (holding that transgender person denied opportunity to apply for loan may state sex discrimination claim under Equal Credit Opportunity Act). GLAD has an enduring interest in ensuring that employees receive full and complete redress for the violation of their civil rights in the workplace.

JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION

The Jewish Alliance for Law and Social Action ("JALSA") is a membership civil rights organization which draws upon an institutional history reaching back to 1918. JALSA members have worked for many years in the struggle for civil rights for all Americans drafting and encouraging passage of anti-discrimination laws for all members of the community and participating as *amici* in federal and state cases

where essential civil rights protections are at risk. Our members, working earlier as New England Region of American Jewish Congress, were significantly involved in the establishment of the Massachusetts Commission Against Discrimination ("MCAD") and have worked to support the full breadth of the duties and responsibilities assigned to that agency. JALSA sees protection of the right of association as an essential component of the protection of civil rights.

## INTRODUCTION AND STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The Justices have solicited *amicus* briefs on the issue of whether a claim of "associational handicap discrimination" is actionable under G.L. c. 151B. *Amici* respectfully suggest, for the reasons discussed herein, that the text and legislative history of G.L. c. 151B compel the conclusion that "associational discrimination" is actionable. A contrary ruling would prevent the statute from fully achieving its core purpose of eradicating workplace discrimination.

"Associational discrimination" claims, by definition, are claims made by individuals who have been subjected to the same type of unfounded stereotypes, prejudices, and fears as those applied to

members of a protected class, even though they are not themselves members of that protected class. *Barrett* v. *Whirlpool Corp.*, 556 F.3d 502, 512 (6th Cir. 2009).

This type of discrimination is "associational" in two respects. First, it arises where the affected individual is somehow "associated" with a member or members of a protected class, by marriage or otherwise, see, e.g., *Barrett*, 556 F.3d at 513 (and cases cited). Second, and more importantly, it arises because the employer has somehow "associated" the employee with the protected class, and, as a result, has subjected that employee to the same types of unfounded negative assumptions that the employer harbors against members of the protected class. See, e.g., *Tetro* v. *Elliott Popham Pontiac, Oldsmobile, Buick and GMC Trucks, Inc.*, 173 F. 3d 988, 994 (6th Cir. 1999) (concluding that a white male's claim was actionable under Title VII "even though the root animus for the discrimination [was] a prejudice against [his] biracial child"); *Romano* v. *Lowell Paper Box Co.*, 4 Mass. Discrimination Law Rep. 1087 (1982)(finding a violation of G.L. c. 151B where supervisors who harbored anti-Semitic animus fired an employee because his wife was Jewish).

The discriminatory animus that drives "associational discrimination," whether directed at race, religion, national origin, disability, or otherwise, targets individuals associated with members of protected classes as though they themselves are members of such classes, and in this way, creates unwarranted barriers to equal opportunity in the workplace. It is precisely the kind of divisive, discriminatory conduct that G.L. c. 151B was enacted to eliminate.

This Court has never before addressed the question whether the anti-discrimination protections of G.L. c. 151B apply to individuals who suffer "associational discrimination" in their workplaces, whether on the basis of "handicap" or otherwise.[1] *Amici*

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[1] The Massachusetts Commission Against Discrimination ("the MCAD") has consistently held that "associational discrimination" claims fall within the protective scope of G.L. c. 151B. See *Romano* v. *Lowell Paper Box Co.*, 4 Mass. Discrimination Law Rep. 1087 (1982); *Dittbenner* v. *Hapco Auto Parts, Inc.*, 11 Mass. Discrimination Law Rep. 1139 (1989); *Hamer* v. *Cambridge School Department*, 21 Mass. Discrimination Law Rep. 154 (1999). See also *Gryzych v. American Reclamation Corp.*, 32 Mass. Discrimination Law Rep. 238 (2010)(finding liability under G.L. c. 151B §§ 1 and 4 (4A) where a white employee had been subjected to repeated, virulent racist attacks on account of the fact that his fiancé was black).

maintain that it is only by recognizing such a claim that this Court will fully permit the statute to achieve its core purpose of eradicating workplace discrimination.

There is nothing in the statutory text that precludes such a claim, or that limits the scope of G.L. c. 151B to acts of discrimination directed against those who are themselves members of the targeted protected class. In the case of "handicap" discrimination, G.L. c. 151B § 4 (16) makes it unlawful to take adverse employment action

> "or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person capable of performing the essential functions of the position involved with reasonable accommodation."

By definition, however, these protections extend not just to those who are themselves handicapped, but also

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Lower courts are divided on the issue. See *Brelin-Penney* v. *Encore Images, Inc.*, 27 Mass. L. Rep. 254 (Mass. Super. Ct. June 1, 2010)(concluding that "associational handicap discrimination" claims are not cognizable under G.L. c. 151B), *aff'd on other grounds sub nom, Scott* v. *Encore Images, Inc.*, 80 Mass. App. Ct. 661 (2011)(declining to reach the issue); Curley v. Sentry Ins., Mass. Super. Ct. Civil Action No. 03-2825 (Feb. 23, 2005)(denying employer's motion to dismiss plaintiff's "associational handicap discrimination" claim). See also, *Ayanna* v. *Dechert LLP*, 840 F.Supp.2d 453 (D. Mass. 2012) (following *Brelin-Penney*).

to those who are treated as if they were. See G.L. c. 151B, § 1 (17).

Moreover, under G.L. c. 151B, it is a separate and independent unlawful act for anyone, including an employer, to "interfere with another person in the exercise or enjoyment of any right granted or protected" by the statute - regardless of whether the employee is a member of a targeted protected class. G.L. c. 151B § 4 (4A). A core "right" protected by the statute is the right to a workplace free from unwarranted barriers created by discriminatory animus against protected classes. See *Lopez* v. *Commonwealth*, 463 Mass. 696, 707 (2012); *Woodason* v. *Town of Norton School Committee*, 25 Mass. Discrimination Law Rep. 62, 63-64 (2003).

While the text of G.L. c. 151B does not expressly mention "associational discrimination," it need not do so in order for the claim to be recognized. This Court has made clear that, particularly in the area of civil rights, "[t]he rule for construction of remedial statutes is that cases within the reason, though not within the letter, of a statute shall be embraced by its provisions." *Batchelder* v. *Allied Stores Corp.*, 393 Mass. 819, 822 (1985) (*quoting* 2A Sands,

Sutherland Statutory Construction § 54.04 at 570 (4th ed. 1974)). See, e.g., *DeRoche* v. *Massachusetts Commission Against Discrimination*, 447 Mass. 1, 16-18 (2006)(concluding that attorneys' fees are available to prevailing complainants in Superior Court, even though the statute does not explicitly so provide); *Gomez-Perez* v. *Potter*, 553 U.S. 474, 481 (2008) (holding that federal-sector age discrimination statute protects against retaliation, even though the statute does not explicitly so provide).[2] Indeed, adhering to the legislature's explicit directive that the statute be construed to effectuate its purpose, see G.L. c. 151B, § 9, the MCAD has consistently interpreted G.L. c. 151B to reach acts of "associational discrimination" in the workplace.[3]

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[2] This is quite different from asking this Court to apply G.L. c. 151B to an entirely new protected class, as this Court declined to do in *Macauley* v. *Massachusetts Comm'n Against Discrimination*, 379 Mass. 279 (1979). Because "associational discrimination" arises from adverse employment actions motivated by prejudice against classes that are already protected by the statute, it is a form of conduct that the statute already makes unlawful.

[3] See note 1, *supra*. Indeed, for decades, federal agencies that contract with the MCAD to enforce federal anti-discrimination laws have done so with the understanding that G.L. c. 151B provides at least the same protections as are available under federal anti-discrimination laws, including the Fair Housing Act,

Finally, the statute's enforcement provisions, G.L. c. 151B, §§ 5 and 9, make clear that "*[a]ny* person claiming to be aggrieved by an alleged unlawful practice" may bring a claim of discrimination to the MCAD and to the courts. (Emphasis supplied). These sections, by their terms, permit employees targeted with discriminatory animus to seek redress under G.L. c. 151B.

To exclude "associational discrimination" from the protective scope of G.L. c. 151B is thus contrary to the statutory scheme as well as its manifest intent. Such a result would prevent the statute from fully achieving its core purpose.

## STATEMENT OF THE CASE

The plaintiff Marc Flagg ("Mr. Flagg") brought an action against his former employer, Ali-Med, Inc. ("Ali-Med") arising from the termination of his employment. (Record Appendix (hereinafter, "R.A.") at

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42 U.S.C. §§ 3601 *et seq.* and the Americans With Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* *See* Addendum at A-49 through 53, A-57. Both of these statutes expressly permit claims of "associational handicap discrimination." See 42 U.S.C. § 3604 (f)(1); 42 U.S.C. § 12112 (b)(4). A decision holding that "associational handicap discrimination" is not actionable under G.L. c. 151B will thus affect the MCAD's ability to fully perform its obligations under its contracts with its federal partners. See, e.g., A-57 at ¶ 3.

162-164). According to his Complaint, Mr. Flagg had been an employee in good standing at Ali-Med for eighteen years. (R.A. at 161 ¶ 3).

Mr. Flagg alleges that, on December 7, 2007, approximately two months before his termination, his wife underwent surgery for recurrence of a brain tumor - a condition that had rendered her totally disabled. (R.A. at 161-162 ¶¶ 3, 6, 8(a)). According to the Complaint, Mr. Flagg's manager told him to take the time he needed to care for his family after his wife's surgery. (R.A. at 162 ¶ 8(c)).

Thereafter, with his manager's knowledge, Mr. Flagg left work from time to time, "usually briefly," to pick up his daughter from school. (R.A. at 161-162 ¶¶ 5, 7, 8(d), 8(f)). Although Mr. Flynn admits that he did not punch out during the times he was absent from shift, he alleges that the practice was condoned by his manager and was generally tolerated when other employees temporarily left their shifts. (R.A. at 162 ¶¶ 7, 8(d)-(f)).

Nevertheless, on or about February 4, 2008, Ali-Med abruptly terminated Mr. Flagg's employment for the alleged "misconduct" of failing to punch out when leaving his shift. (R.A. at 161 ¶ 5). Among other

things, Mr. Flagg claims that Ali-Med's reason for terminating his employment was a pretext, and that its real reason was to rid the workplace of an employee whose family member was disabled, and who was likely to cause the employer to incur unwanted expense. (R.A. at 161-163 ¶¶ 5, 6, 9).[4]

After filing a timely Charge of Discrimination with the MCAD, Mr. Flagg exercised his right under G.L. c. 151B, § 9 to bring a civil action in the Superior Court. (R.A. at 7, 163 ¶ 11). After making an unsuccessful attempt to remove the case to federal court on grounds of ERISA pre-emption, Ali-Med ultimately moved to dismiss Mr. Flagg's "associational discrimination" claim, asserting that G.L. c. 151B protects only those employees who are themselves disabled. (R.A. at 7-9, 100, 114-115). The Superior Court agreed with the defendant and entered a judgment of dismissal. (R.A. at 1-2). This appeal followed. On April 9, 2012, this Court transferred the case *sua sponte* from the Appeals Court.

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[4] Mr. Flagg also claims that he was defamed. R.A. at 163 ¶¶ 14-15. *Amici* do not address that claim herein.

## ARGUMENT

### G.L. c. 151B PROTECTS AGAINST "ASSOCIATIONAL DISCRIMINATION" IN THE WORKPLACE.

The argument against extending G.L. c. 151B's protections to instances of "associational discrimination" rests primarily upon the incorrect premise that certain of the statute's enumerated "unlawful practices," namely those set forth in G.L. c. 151B §§ 4 (1) and 4 (16), apply only to individuals who are *themselves* members of the protected class against whom the employer's discriminatory animus is directed. The defendant and supporting *amici* argue that, as a result, G.L. c. 151B must be read to preclude a remedy to those who have been subjected to adverse employment action on account of discriminatory animus directed against a protected class, where the individual is not actually a member of the targeted protected class.

The defendant's premise is incorrect because it ignores key provisions of G.L. c. 151B and contradicts the statute's clear purpose. It is a well-settled canon of statutory construction that a statute's individual provisions may not be read in isolation, as the defendant and supporting *amici* have done here.

Instead, they must be interpreted in light of the enactment as whole, and in a manner that "effectuates the statute's manifest purpose." *Selectmen of Topsfield* v. *State Racing Commission*, 324 Mass. 309, 312-13 (1949). Such a reading compels the conclusion that G.L. c. 151B provides a remedy for "associational" discrimination in the workplace.

## I. THE PURPOSE OF G.L. c. 151B IS TO ELIMINATE INVIDIOUS DISCRIMINATION AS A BARRIER TO EQUAL EMPLOYMENT OPPORTUNITY. EXCLUDING ACTS OF "ASSOCIATIONAL DISCRIMINATION" FROM THE SCOPE OF G.L. c. 151B WOULD UNDERMINE THAT PURPOSE.

Enacted in 1946, G.L. c. 151B, represents the Commonwealth's first and most comprehensive effort to eliminate invidious discrimination as a barrier to equal opportunity in the workplace. The drafters saw G.L. c. 151B as a necessary tool to combat a problem viewed as a most "harmful influence to our democratic institutions," Report of the Special Commission Relative to the Matter of Discrimination Against Persons In Employment Because Of Their Race, Color, Religion, Or Nationality, 1944 House Doc. No. 337 at 2, (hereinafter,"1944 House Doc. No. 337"). According to the drafters, exclusion from employment opportunity on the basis of discriminatory animus was nothing less than "a hideous evil which must be extirpated from our

soil forever." Report of the Governor's Committee to Recommend Fair Employment Practice Legislation, 1946 House Doc. No. 400 at 7 (hereinafter, "1946 House Doc. No. 400").

Committed to crafting a statutory scheme that would effectively eliminate discriminatory barriers to equal opportunity in the workplace, the original drafters of G.L. c. 151B proclaimed that "[t]he right to work without discrimination because of race, color, religious creed, national origin or ancestry is hereby declared to be a right and privilege of the inhabitants of the commonwealth." 1946 House Doc. No. 400 at 9. The legislature only broadened the reach of this policy when, in 1983, it amended G.L. c. 151B to include "handicap" as a protected classification.

From the outset, the drafters of G.L. c. 151B recognized that, while the problem of workplace discrimination was easily acknowledged, there were unique difficulties inherent in combating it:

> Often in the companies where we find evidence of such practice their officers claim that there is no official sanction of such conduct, but it is obvious that individuals who are responsible for the employment and promotion of employees sometimes subtly, and sometimes rather crudely, engage in this practice, without any restraint or admonition from the executive powers. ***The object is accomplished***

***by so many devious and various means that no single corrective rule can be applied to prevent the injustices committed.***

(emphasis supplied). 1944 House Doc. No. 337 at 2.

Given the "devious and various" ways that discriminatory animus could express itself in the workplace, the legislature enacted a broadly worded statute, *Rock* v. *Massachusetts Comm'n Against Discrimination*, 384 Mass. 198, 204 (1981), and created a specialized agency, the MCAD, to enforce it. The legislature also gave an explicit directive that the provisions of the statute were to be "construed liberally for the accomplishment of the purposes thereof." 1946 House Doc. No. 400 at 22; G.L. c. 151B, § 9.

In the years since the statute's enactment, this Court has recognized that "the clear purpose of G.L. c. 151B is to implement the right to equal treatment guaranteed to all citizens by the constitutions of the United States and this Commonwealth." *Katz* v. *Massachusetts Comm'n Against Discrimination*, 365 Mass. 357, 366 (1974). And, according to the United States Supreme Court, that constitutional right to equal treatment includes the right to be free from acts of "associational discrimination." *Adickes* v. *Kress*, 398

U.S. 144 (1970)(allowing a claim by a white teacher to proceed, where she had been subjected to cruel mistreatment on account of defendants' explicit racial animus against her African American students). Indeed, in *Adickes* v. *Kress*, the Supreme Court explained: "Few principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person ***because of his race or the race of his companions….***" (emphasis supplied). *Id.* at 151-52.

"Associational discrimination" - taking adverse action against an individual because of animus held against protected groups with whom the person associates - is precisely the type of harmful, divisive conduct that the legislature sought to eliminate when it enacted G.L. c. 151B. The behavior creates precisely the same barriers to equal opportunity in the workplace, for precisely the same illegitimate reasons.

Interpreting G.L. c. 151B to include "associational discrimination" claims allows the statute to work as intended - as a tool to eliminate invidious workplace discrimination no matter what form it may take, and to secure the promise of equal

treatment that is "stitched into our constitutional fabric." *Adickes*, 398 U.S. at 152. Excluding "associational discrimination" from the scope of G.L. c. 151B would have precisely the opposite effect.[5] It would exempt from liability the very conduct that the statute was enacted to address.

## II. G.L. c. 151B'S PROTECTIONS EXTEND TO INDIVIDUALS WHO HAVE BEEN SUBJECTED TO ACTS OF DISCRIMINATION BASED UPON ANIMUS AGAINST A PROTECTED CLASS, EVEN IF THEY ARE NOT THEMSELVES MEMBERS OF THE PROTECTED CLASS.

As defendant and supporting *amici* point out, G.L. c. 151B, § 4 lists the type of employment practices that the statute makes unlawful. Among such unlawful practices are those prohibiting discrimination against employees on account of disability, G.L. c. 151B §4 (16), and those prohibiting discrimination against

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[5] In the area of handicap discrimination alone, the issue of "associational discrimination" is pertinent to a surprisingly large segment of the workforce. The EEOC's Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities states:

> "According to the most recent U.S. census, nearly a third of families have at least one family member with a disability, and about one in ten families with children under 18 years of age include a child with a disability. Most men and women who provide care to relatives or other individuals with disabilities are employed." www.eeoc.gov/policy/docs/caregiving.html *2 (as of Dec. 18, 2012). A-44.

employees on account of other characteristics such as race, religion, national origin, gender, or sexual orientation. G.L. c. 151B, § 4 (1).

G.L. c. 151B § 4 (16) provides, in pertinent part, that it is unlawful for an employer to:

> Dismiss from employment or refuse to hire, rehire, or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation. . . .

Similarly, G.L. c. 151B § 4 (1) makes it unlawful:

> For an employer...because of the race, color, religious creed, national origin, sex, sexual orientation...genetic information, or ancestry of any individual to refuse to hire or employ or to bar or discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment....

In urging this Court to hold that G.L. c. 151B protects only those who are themselves members of protected classes, the defendant and supporting *amici* ask the Court to read these provisions without reference to any other part of G.L. c. 151B or to the statute's manifest purpose. This is simply improper. *Selectmen of Topsfield* v. *State Racing Commission*, 324 Mass. 309, 312-13 (1949). Moreover, even if there were only one literal meaning of these provisions, the

Court need not and should not adopt "a strictly literal reading of the statute . . . if the result of adopting it would be to thwart or hamper the accomplishment of the obvious purpose of the act and if another interpretation which will not have that effect is possible." *Frye* v. *School Committee of Leicester*, 300 Mass. 537, 538 (1938). Accord *Commmonwealth* v. *Rahim*, 441 Mass. 273, 278 (2004)(noting that the Court "need not adhere strictly to the statutory words if to do so would lead to an absurd result or contravene the clear intent of the Legislature"); *Industrial Technical Schools Inc.* v. *Commissioner of Education*, 330 Mass. 622, 627 ((1953)(and cases cited).

Notably, Title VII, the "federal analogue to G.L. c. 151B," *Lopez* v. *Commonwealth*, 463 Mass. 696, 703 n. 8 (2012), describes "unlawful practices" in substantially the same way as G.L. c. 151B, §§ 4 (1) and 4 (16). The federal statute prohibits

> discrimination against any individual with respect to his compensation, terms, conditions, or privileges of employment because of *such individual's* race, color, religion, sex, or national origin.

(emphasis supplied). 42 U.S.C. § 2000e-2.

By the defendant's logic, "associational

discrimination" would not be actionable under Title VII at all, because 42 U.S.C. § 2000(e)-2, read literally, appears to prohibit only those practices that discriminate against an individual because of his or her *own* membership in a protected class. For decades, however, just the opposite has been true. Nearly every federal court considering the question has held that Title VII authorizes claims of "associational discrimination."[6] While the federal

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[6] Most of the Title VII "associational discrimination" cases arise in the context of race and/or national origin. Among the reasons why federal courts have recognized claims of "associational discrimination" in Title VII cases, used alone or in combination, are:

(1) the discrimination at issue arises from the differences in race or national origin between the employee and the third party, making the employee's *own* race an issue. See, e.g., *Barrett* v. *Whirlpool Corp.*, 556 F.3d 502, 512 (6th Cir. 2009); *Holcomb* v. *Iona College*, 521 F.3d 130, 139 (2nd Cir. 2008); *Deffenbaugh-Williams* v. *Wal-Mart Stores, Inc.*, 156 F.3d 581, 588-89 (5th Cir. 1998);

(2) the claim is based upon decision-making tainted by considerations of race, which Title VII makes impermissible. See, e.g., *Johnson* v. *Univ. of Cincinnati*, 215 F. 3d 561, 574-75 (6th Cir. 2000); *Parr* v. *Woodmen of the World Life Ins. Co.*, 791 F. 2d 888, 892 (11th Cir. 1986)(noting that "Title VII proscribes race-conscious discriminatory practices");

(3) the agency charged with the interpretation of Title VII, the EEOC, has consistently recognized such claims, see *Parr*, 791 F. 2d at 892 (and cases cited);

courts have employed a variety of rationales to reach this conclusion, they have invariably recognized that, at bottom, there is simply no other way to effectuate Title VII's clear purpose than to permit claims of "associational discrimination."

Given the virtual identity of statutory language and legislative purpose, this Court may choose simply to follow federal precedent and conclude that G.L. c. 151B, §§ 4 (16) and 4 (1), like the cognate provision of Title VII, protects against "associational" discrimination. See, e.g., *Howard* v. *Burlington*, 399

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(4) although Title VII is silent on the matter, it must be read to cover both "direct" and "indirect" discrimination. See, e.g., *Tetro* v. *Elliott Popham Pontiac, Oldsmobile, Buick and GMC Trucks, Inc.*, 173 F. 3d 988, 995 (6th Cir. 1999); and

(4) because Title VII provides the right to a workplace free from discrimination on the basis of race and/or national origin, a plaintiff injured by a discriminatory employment decision has standing to assert a Title VII claim, even though the plaintiff is not a member of the targeted protected class. See *Clayton* v. *White Hall School District*, 875 F.2d. 676 (8th Cir. 1989); Zielonka *v.* Temple University, U.S. Dist. Ct. No. 99-5693 (E.D.Pa 2001).

Although several of these rationales provide a basis to conclude that "associational discrimination" is actionable under both G.L. c. 151B, §§ 4 (1) and 4 (16), the first rationale provides a separate and independent basis for concluding that "associational discrimination" is cognizable with respect to some of the protected classes listed in G.L. c. 151B, § 4 (1), such as race.

Mass. 585, 589 (1987) (noting that, when construing Massachusetts statutes, "we are ordinarily guided by the construction given by the parallel Federal statute by the Federal courts"); *Batchelder* v. *Allied Stores Corp.*, 393 Mass. 819, 821-22 (1985).[7]

Yet this Court need not rest its decision on the language of G.L. c. 151B §§ 4 (1) and 4 (16) alone. Other provisions of G.L. c. 151B make it clear that the statute not only protects members of protected classes, but that it also provides a remedy to individuals who have suffered adverse employment

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[7] Historically, when determining the scope of G.L. c. 151B, the instances in which the Supreme Judicial Court has departed from federal Title VII precedent have been those where this Court has determined that similar language in G.L. c. 151B supports a *broader*, more expansive interpretation than that offered by the Federal courts, resulting in greater protections against workplace discrimination for the residents of this Commonwealth. See, e.g., *Massachusetts Electric Co.* v. *Massachusetts Commission Against Discrimination*, 375 Mass. 160, 167 (1978)(departing from Federal precedent when concluding that G.L. c. 151B's protection against sex discrimination includes discrimination on the basis of pregnancy); *College-Town* v. *Massachusetts Commission Against Discrimination*, 400 Mass. 156, 162 (1987)(departing from Federal precedent when concluding that, under G.L. c. 151B, employers are vicariously liable for the sexual harassment of their supervisory personnel). *Amici* have found no cases in which this Court has interpreted G.L. c. 151B in a manner that is *more* restrictive than Title VII where, as here, the statutory language is substantially the same. There is no reason to do so here.

action on account of discriminatory animus held against a protected class, even where the individuals are not themselves members of that class. These other provisions - including those found in G.L. c. §§ 1 (17), 4 (4A), 5, and 9 - further support the conclusion that "associational discrimination" is actionable.

1. **G.L. c. 151B, § 1 (17)**. In the case of handicap discrimination, G.L. c. 151B, § 1 (17) defines the term "handicap" to cover not just individuals who themselves have "a physical or mental impairment which substantially limits one or more major life activities," but to cover those who have "a record of . . . such impairment," or who are "regarded as having such impairment." By definition, G.L. c. 151B thus makes it an unlawful practice to discriminate not just against those who are themselves "handicapped," but against those who are treated as "handicapped," even if they are not.[8]

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[8] To the extent that the language of G.L. c. 151B, § 4 (16) conflicts with the definitional provision of G.L. c. 151B, § 1 (17), this Court may treat the discrepancy as an ambiguity in the statutory text. In such an instance, the Court must seek "to discern the intent of the Legislature by turning to the 'cause of [the statute's] enactment, the mischief or imperfection to be remedied and the main object to be

This is no accident. When the General Court amended G.L. c. 151B in 1983 to include protections against discrimination on the basis of disability, it chose to model the amendments on the Rehabilitation Act, 29 U.S.C. §§ 701 et seq., which prohibits disability discrimination by federal agencies, federal contractors, and recipients of federal funds. *Dahill* v. *Police Department of Boston,* 434 Mass. 233, 238 (2001); Note, "Employment Discrimination Against the Handicapped: An Analysis of Statutory and Constitutional Protections in Massachusetts," 21 New Eng. L. Rev. 305, 306-07 (1986).

In order to combat the effects of "erroneous but nevertheless prevalent perceptions about the handicapped," Congress had expanded the Rehabilitation Act's definition of the term "handicap" in 1974, so as to protect not only people who were themselves disabled, but also those who had a record of disability, or were regarded as disabled - even if

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accomplished, to the end that the purpose of its framers may be effectuated.'" *Adams* v. *City of Boston,* 461 Mass. 602, 611 (2012) (quoting *Industrial Fin. Corp. v. State Tax Comm'n,* 367 Mass. 360, 364 (1975)). As discussed above, it is only by reading the statute to cover acts of "associational handicap discrimination" that the purpose of G.L. c. 151B's framers may be effectuated.

they themselves had no disability at all. 29 U.S.C. § 705 (9); *School Board of Nassau County* v. *Arline*, 480 U.S. 273, 279 (1987); *Cook* v. *State of Rhode Island Department of Mental Health, Retardation, and Hospitals*, 10 F.3d 17, 22 (1st Cir. 1993).

In doing so, Congress acknowledged that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Arline*, 480 U.S. at 283. Thus, written into the very definition of the word "handicap" was the concept that, in order to effectively address the problem of handicap discrimination, the statute had to protect not just those who were themselves disabled, but also those who were treated as if they were disabled, and who were subjected to the same prejudices as a result.

These principles were specifically incorporated into G.L. c. 151B in 1983 when the statute was amended to add protections against handicap discrimination in employment. 21 New Eng. L. Rev. at 309. Accord *Dahill*, 434 Mass. at 240. By adopting the definition of "handicap" used by the Rehabilitation Act, the legislature made clear that, in order to effectively

eliminate employment discrimination on the basis of handicap, G.L. c. 151B had to protect individuals from the attitudinal barriers associated with having a handicap, whether the individual was actually handicapped or not.

Notably, the Americans With Disabilities Act ("the ADA"), enacted in 1990, adopted precisely the same definition of "disability" as is used in the Rehabilitation Act and in G.L. c. 151B, for precisely the same reasons. See 42 U.S.C. § 12102 (1); 29 C.F.R. Part 1630, App. at 369-74; H.R. Conf. Rep. No. 485, 101st Cong., 2d Sess., Part 3 (May 15, 1990) (Committee on the Judiciary). Congress's purpose in enacting the ADA was "to provide a 'clear and comprehensive national mandate,' with 'clear, strong, consistent, enforceable standards,' for eliminating disability-based discrimination." H.R. Rep. 730, 110th Cong., 2d Sess. (June 23, 2008) (Committee on the Judiciary).[9] The types of stereotypes, prejudices, and fears that the ADA sought to eliminate in the workplace included concerns that the employee would be

[9] The statute itself states the purpose slightly differently: "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b) (1).

costly; that the employee would be unreliable and/or absent; and/or that the employee would spread disease. *Id.* In order to accomplish that purpose, the ADA, like the Rehabilitation Act and G.L. c. 151B, defined the term "disability" to include those who were disabled and those who were regarded as such, even if they were not. 42 U.S.C. § 12102 (1).

Given that the ADA adopted substantially the same definition of "disability" as that used by G.L. c. 151B, it is instructive that Congress directed that the statute be construed in a manner that covered "associational discrimination." 42 U.S.C. § 12112 (b) (4). Congress did so not to create a new protected class, but to ensure that the ADA would be interpreted in a manner that most completely effectuated the statute's purpose. It reflected the common-sense recognition that those who are associated with disabled persons may be subjected to the same "attitudinal barriers," and the very same discriminatory conduct, that the statute was designed to eliminate from the workplace. See 29 C.F.R. 1630.8; 29 C.F.R. Part 1630 App. at 382; *Larimer* v. *International Business Machines, Inc.*, 370 F. 3d 598, 701 (7th Cir. 2004); *Oliveras-Sifre* v. *Puerto Rico*

*Department of Health*, 214 F. 3d 23, 26 (1st Cir. 2000)(and cases cited).

As noted above, the fact that "associational discrimination" is not explicitly mentioned in G.L. c. 151B does not mean that it is not covered. See *Batchelder* v. *Allied Stores Corp.*, 393 Mass. 819, 822 (1985). See also *DeRoche* v. *Massachusetts Comm'n Against Discrimination*, 447 Mass. 1, 16-18 (2006); *Gomez-Perez* v. *Potter*, 553 U.S. 474, 481 (2008). The conduct that constitutes "associational handicap discrimination" - subjecting an individual to attitudinal barriers in the workplace on account of disability - is functionally and materially the same as conduct that the statute makes unlawful. Protecting employees against this form of discrimination is well "within the reason, though not within the letter of the statute," and as such, is "embraced by its provisions." *Batchelder*, 393 Mass. at 822 (quoting 2A Sands, Sutherland Statutory Construction § 54.04 at 570 (4th ed.1974)).

2. **G.L. c. 151B, § 4 (4A).** In addition, G.L. c. 151B makes it an unlawful practice

> [f]or any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted ***or protected*** by

> this chapter…. G.L. c. 151B, § 4 (4A)(emphasis supplied).

This section was drafted to encompass more than just those rights specifically "granted" by the other sub-parts of G.L. c. 151B, § 4, including those granted by G.L. c. 151B, §§ 4 (16) and 4 (1). See, e.g., *Thomas O'Connor Constructors, Inc.* v. *Massachusetts Comm'n Against Discrimination*, 72 Mass. App. Ct. 555-56 (2008) (holding that G.L. c. 151B, § 4 (4A) imposes liability for discriminatory acts perpetrated against non-employees, even though G.L. c. 151b, § 4 (1) does not). By its very terms, G.L. c. 151B, § 4 (4A) was drafted more broadly, to encompass rights "protected" by the statute.

It is well-recognized that the rights "protected" by the statute include the right to a workplace free from invidious discrimination. See 1946 House Doc. No. 400 at 9 (declaring, as a matter of policy, that "[t]he right to work without discrimination because of race, color, religious creed, national origin or ancestry is . . . a right and privilege of the inhabitants of the commonwealth." *Lopez* v. *Commonwealth*, 463 Mass. 696, 707 (2012) (holding that G.L. c. 151B, 4 (4A) provides a right of action where

a defendant "knowingly interferes with the plaintiff's right to be free from discrimination in the terms, conditions, and privileges of employment on the basis of a protected class. . . ."); *Woodason* v. *Norton School Committee*, 25 Mass. Discrimination Law Rep. 62, 63-64 (2003)(concluding that liability under G.L. c. 151B, § 4 (4A) is triggered by interference with the "exercise or enjoyment of the right to a non-discriminatory, harassment free workplace.")

As noted above, this is precisely the right at stake in cases of "associational" discrimination, where those targeted with adverse employment action because of animus held against members of a protected class have been "deprived of a workplace free from discrimination in the terms, conditions, and privileges of employment on the basis of a protected category." *Lopez*, 463 Mass at 707. G.L. c. 151B, § 4 (4A) thus provides an ample statutory basis for this Court to conclude that those subjected to "associational" discrimination are protected by G.L. c. 151B.

3. **G.L. c. 151B, §§ 5 and 9**. Finally, like Title VII, G.L. c. 151B's administrative and judicial enforcement provisions extend to "any person claiming

to be aggrieved" by acts made unlawful by the statute. See 42 U.S.C. § 2000e-5 (b); G.L. c. 151B, §§ 5, 9. In *Thompson* v. *North American Stainless LP*, 131 S.Ct. 863 (2011), the Supreme Court explained that the standing provision of Title VII enables any individual "with an interest arguably [sought] to be protected by the statutes", to bring a claim. *Thompson*, 131 S.Ct. at 870 (quoting *National Credit Union Admin.* v. *First Nat. Bank & Trust Co.*, 522 U.S. 479, 495 (1998)).

Federal courts, for decades, have recognized that plaintiffs who have suffered adverse employment action based upon discrimination against a protected class have standing to bring a Title VII claim, even where that plaintiff is not a member of the protected class against whom the discriminatory animus is directed. See, e.g., *Clayton* v. *White Hall School District*, 875 F.2d 676, 679-80 (8th Cir. 1989) (concluding that, because the "dominant purpose of Title VII. . . is to root out discrimination in employment," an employee's interest in a work environment free of race discrimination is "clearly within the zone of interest protected by the statute," even where that employee was not a member of the targeted protected class). Cf. *Thompson* 131 S.Ct. at 870 (holding that a plaintiff

subject to reprisal in retaliation for his fiancé's exercise of her protected rights had standing to bring a claim under Title VII, even though he himself had not been targeted for exercising his protected rights).

The same principles should apply to the virtually identical "standing" provisions of G.L. c. 151B. Employees who have been subjected to acts of "associational" discrimination amply meet the statute's standing requirements. They have suffered an employment related injury - whether in the form of a refusal to hire, a termination, or otherwise. The injury they allege - exclusion from employment opportunities due to discriminatory animus against members of a protected class - is exactly the type of conduct that the statute makes unlawful, either under a broad reading of G.L. c. 151B § 4 (1) and § 4 (16) or under the more expansive language of G.L. c. § 4 (4A). The enforcement provisions of G.L. c. 151B thus provide an additional basis upon which to conclude that victims of "associational discrimination" have

standing to seek the protections of G.L. c. 151B, even if they themselves are not members of a protected class.[10]

## CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the decision of the Superior Court and to hold that "associational handicap discrimination" is actionable under G.L. c. 151B.

Respectfully submitted,

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GAY & LESBIAN ADVOCATES & DEFENDERS

JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION

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[10] A ruling that "associational handicap discrimination" is not actionable under G.L. c. 151B would not foreclose such claims altogether, although it would deprive complainants of the administrative procedures provided by the MCAD. This Court has made clear that the Massachusetts Equal Rights Act, G.L. c. 93, §§ 102-03 provides a remedy to plaintiffs who have suffered on-the-job discrimination in cases where G.L. c. 151B does not apply. *Thurdin v. SEI Boston,* 452 Mass. 436, 454-55 (2008).

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Dated: December 21, 2012

I hereby certify, pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, that this brief complies with the rules of court that pertain to the filing of amicus briefs, including Rules 16(a)(6), 16(e), 16(f), 16(h), 17, 18, and 20.

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