

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC 11616

COMMONWEALTH

v.

AMANDA KELLY, CHRISTOPHER BRATLIE & KEVIN SHDEED

ON APPEAL FROM JUDGMENT OF THE
SUPERIOR COURT PLYMOUTH COUNTY
CIVIL ACTION NO. 2013-P-0047

AMICUS BRIEF FOR AMICI CURIAE ANTI-DEFAMATION LEAGUE
AND SIX ADDITIONAL AMICI IN SUPPORT OF THE
COMMONWEALTH OF MASSACHUSETTS AND AFFIRMANCE

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September 22, 2014

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STATEMENT OF INTEREST

The Anti-Defamation League ("ADL") and six other *amici* represent a broad cross-section of organizations committed to the just application of the Massachusetts hate crimes statute, G. L. c. 265, § 39.¹ ADL formed in 1913 "to stop the defamation of the Jewish people and to secure justice and fair treatment to all." (ADL Mission Statement, at <http://www.adl.org/about-adl/>.) A premier civil rights organization combating anti-Semitism and all forms of bigotry, ADL educates and informs the public about prejudice and discrimination, and has appeared as *amicus curiae* in a broad range of cases.

ADL is uniquely qualified to serve as *amicus* in this matter. Thirty-three years ago, ADL drafted a model hate crimes law ("ADL Model Hate Crimes Law"), and the organization has been immersed in the issues

¹ No party to this proceeding and no counsel for a party authored this brief in whole or in part, and no party or counsel for a party to this proceeding made a monetary contribution intended to fund the preparation or submission of this brief. No person other than proposed *amicus curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

surrounding hate crimes legislation ever since.² Forty-five states -- including Massachusetts -- and the District of Columbia have since enacted hate crimes laws, many of which are based on the ADL Model Law.³ On the federal level, ADL led a broad coalition of civil rights, religious, educational, professional, law enforcement, and civic organizations in support of expanded federal hate crime legislation for more than a decade, which culminated in the enactment of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249 (2009) ("HCPA").

Through strategic litigation, public policy advocacy, and education, **Gay & Lesbian Advocates & Defenders ("GLAD")** works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians,

² The complete text of the ADL Model Law is available on ADL's website at <http://www.adl.org/combating-hate/hate-crimes-law/>.

³ Only Arkansas, Georgia, Indiana, South Carolina, and Wyoming have not enacted a hate crime law.

gay men, bisexuals, transgender individuals (the LGBT community) and people living with HIV and AIDS. GLAD's history includes litigating before this Court, e.g., *Goodridge v. Dept. of Pub. Health*, 440 Mass. 309 (2003), and providing *amicus* support in a wide range of matters addressing how the LGBT community and HIV community are fully protected under the law in cases such as *Commonwealth v. Healy*, 393 Mass. 367 (1984), and *John Doe, Sex Offender Registry Board No. 10800 v. Sex Offender Registry Board*, 459 Mass. 603 (2011). Through litigation, GLAD seeks to ensure that justice is available to all citizens regardless of their membership in any defined class.

The Lawyers' Committee for Civil Rights and Economic Justice ("LCCR") was founded in 1968 and is a non-profit civil rights law office that specializes in law reform, litigation, and advocacy to redress race and national origin discrimination. LCCR's mission is to provide a "safeguard for the civil, social, and economic rights of residents in the Greater Boston area and throughout Massachusetts." LCCR handles cases involving housing and employment discrimination, voting rights, education, and racial violence.

This nation's history bears witness to the use of violence as a means of oppression, exploitation and disenfranchisement of racial and ethnic minorities. LCCR has worked for many years to advocate on behalf of victims of racial and ethnic violence as well as other hate crimes in the Commonwealth. Its efforts have included collaborations with police and prosecutors to ensure appropriate charges were initiated and prosecuted on behalf of hate crime victims. LCCR has also pursued civil litigation on behalf of these victims in their effort to seek justice. The matter currently before the court is one that will have a significant impact on the victims of racial and ethnic violence that LCCR serves.

Founded in 2001 to promote and protect marriage equality in the first state to end marriage discrimination, **MassEquality** is today the leading statewide grassroots advocacy organization in Massachusetts working to ensure that everyone across Massachusetts can thrive from cradle to grave without discrimination and oppression based on sexual orientation, gender identity, or gender expression. Central to MassEquality's work to achieve full

equality for lesbian, gay, bisexual, transgender and queer people in all spheres of society is ensuring an end to violence, harassment and bias through passage and appropriate implementation of hate crimes protections.

The **Massachusetts Black Lawyers Association** ("MBLA") was founded in 1973 and has provided a valuable network and visible presence for attorneys of color in the Massachusetts legal community. The MBLA focuses its efforts primarily on the recruitment, retention, and advancement of attorneys of color in Massachusetts and on issues that impact Massachusetts communities of color.

Founded in 1985, the **Massachusetts LGBTQ Bar Association** (Mass LGBTQ Bar) is a voluntary state-wide professional association of lesbian, gay, bisexual, transgender and queer lawyers and its allies, providing a visible LGBTQ presence within the Massachusetts legal community. Its work focuses around Leadership, Education, Support, and the promotion of the administration of Justice throughout Massachusetts for all persons without regard to their

sexual orientation or gender identity or expression. The Mass LGBTQ Bar has a substantial interest in the robust enforcement of civil rights statutes under state law and aggressive prosecution of alleged offenders for hate crimes. Jury instructions that reflect the clear and unambiguous will of the legislature to hold offenders accountable for their actions taken "with the specific intent" to intimidate a victim because of his or her membership in a protected group should not be diluted with confusing causative language such as "predominant" or "substantial."

The South Asian Bar Association of Greater Boston ("SABA GB") is a local chapter of the South Asian Bar Association of North America, which represents the interests of over 6,000 attorneys nationwide. SABA GB is the principal voice for attorneys of South Asian descent in the Boston area, who illustrate the same broad and diverse range of religious backgrounds as the pluralistic heritage of the United States. SABA GB also supports the provision of legal services to the South Asian community and takes an active interest in

issues that affect the constitutional rights of ethnic, racial, and religious minorities.

QUESTION PRESENTED

In a prosecution under the Massachusetts Hate Crimes Penalties Act, G. L. c. 265, §39, were jury instructions sufficient when they required jurors to determine whether defendants acted "with the specific intent to intimidate a person because of such person's race, color, religion, national origin, sexual orientation, gender identity or disability," without adding that defendants' discriminatory intent must be a "predominant" or "substantial" reason for the assault?

SUMMARY OF ARGUMENT

As author of the original Model Hate Crimes Law, ADL has a unique interest in ensuring the viability and just application of the Massachusetts hate crimes statute, G. L. c. 265, § 39. Accordingly, ADL welcomed the Supreme Judicial Court's ("SJC") solicitation of interested parties to file *amicus* briefs following the SJC's *sua sponte* transfer of this case from the Massachusetts Appeals Court. The question presented is important, with broad

implications for potentially thousands of defendants and victims. But the question -- apparently inspired by Defendant-Appellants arguments -- is also misleading. The hate crimes statute and the jury instructions given below *already* ensure that jurors will not convict defendants where a victim's identity played a scant role in the attack, because they require that defendants *intentionally selected* their victim *because of* his protected status.

This case is not only about the mob that attacked Tizaya Robinson, stabbed him, hit him with a bottle, kicked him, beat him with a stick, repeatedly called him a "nigger," spit on his body, and left him bloody in the street. This case also presents a fork in the road for the Massachusetts hate crimes statute. By upholding the instructions below, the Court will preserve Massachusetts' alignment with the United States Supreme Court, which has held that hate crimes statutes are constitutional where jurors determine that an assailant "intentionally selected his victim because of the [victim's] race." *Wisconsin v. Mitchell*, 508 U.S. 476, 480 (1993). By contrast, injecting into the hate crimes statute a "predominant" or "substantial" factor test would weaken protections

for victims -- and vulnerable communities -- across the Commonwealth.

The Court should affirm Defendants' convictions for at least the following three reasons: (1) the Massachusetts hate crimes statute provides essential protection against conduct that harms not only individuals but also entire communities and society as a whole; (2) the Judge's instructions requiring "specific intent" align with the statutory text, legislative purpose, and regulatory scheme; and (3) adding a court-constructed "predominant" or "substantial" motive test that the Legislature did not include would be unfaithful to the statute's language and purpose. To ensure the just and proper ongoing application of the Massachusetts hate crimes statute, the Court should uphold the instructions below.

ARGUMENT

I. THE HATE CRIMES STATUTE CRIMINALIZES CONDUCT THAT HARMS THE VICTIM, THE VICTIM'S COMMUNITY, AND SOCIETY AS A WHOLE.

Hate crimes statutes impose enhanced penalties for violent, bigoted crimes because such crimes "inflict greater individual and societal harm and . . . are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and

incite community unrest." *Mitchell*, 508 U.S. at 487-88. Though hate crimes statutes have endured many challenges, the United States Supreme Court unanimously upheld their validity in *Mitchell*, concluding that "among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness." *Id.* at 488 (quoting 4 W. Blackstone, Commentaries).

Hate crimes (or "bias crimes") intimidate not only the victim but also the victim's entire community. Members of the target community recognize the crime as a direct attack on their own identity, resulting in communities living in the shadow of anxiety, fear and intimidation. Hate crimes damage the fabric of our society and fragment communities, causing division in the society as a whole and threatening core American values.

Such crimes occur all too frequently. The most recent statistics show that there are hundreds of new victims of hate crimes every year in the Commonwealth and thousands more across the country. (See, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012-addendum> (reporting approximately 300 hate crimes per year in Massachusetts)). These statistics reflect the

urgent need to provide a strong response to bias-motivated crimes that the Massachusetts Hate Crimes Penalties Act was intended to address.

In order to deter and punish such crimes, the Massachusetts Hate Crimes Penalties Act, like the statute upheld in *Mitchell*, operates when a defendant "intentionally" targets his victim "because of" his race. Compare G.L. c. 265, § 39 (prohibiting assaults and batteries committed "**with the intent** to intimidate [a] person **because of** such person's race, color, religion, national origin, sexual orientation, gender identity, or disability" [emphases added]) with *Mitchell*, 508 U.S. at 480 (upholding enhanced penalties where the defendant "**[i]ntentionally selects** the person against whom the crime... is committed . . . **because of** the race, religion, color, disability, sexual orientation, national origin or ancestry of that person." [emphases added]). (quoting Wis. Stat. § 939.645(1)(b) (2013).)

Whether or not a defendant's bias motive is substantial or predominant is not an element of the underlying offense under the statute. See "A Special Report Regarding the Constitutionality of Massachusetts Civil and Criminal Civil Rights Laws,"

Massachusetts Attorney General's Office, March 16, 1993, at 6, available at <https://www.ncjrs.gov/pdffiles1/Digitization/149794NCJRS.pdf> ("[Section 39] provides prohibitions against criminal conduct that occurs for the specific purpose of intimidating an individual because of his or her racial, ethnic or religious status.")

Evidence of bias is relevant to proving that the victim was intentionally selected because of his or her status. But by focusing on intentional conduct, the Massachusetts hate crimes statute meets the challenges that defendants often raise: the charge that hate crimes laws are either too vague, or somehow punish offensive but lawful *thoughts*. Selecting a victim to attack because he belongs to a certain race, nationality, color, religion, or sexual orientation is a specific unlawful act, not a mere thought or the expression of a bigoted opinion. See *Mitchell*, 508 U.S. at 484 ("[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment."); see also *State v. Talley*, 858 P.2d 217, 231 (Wash. 1993) (upholding "intentional selection" statute because "[n]o one

pretends that actions should be as free as opinions.")

(quoting J. Mill, *On Liberty*, 119 (1st ed. 1859)).

II. THE "SPECIFIC INTENT" INSTRUCTION IS APPROPRIATE
BECAUSE IT IS TRUE TO THE STATUTE'S TEXT,
PURPOSE, AND SCHEME.

The trial judge's instructions made clear that jurors had to determine whether Defendants intentionally selected Tizaya Robinson as their victim because of his membership in a protected class. Before deliberations, the judge instructed the jury that "to prove the defendants are guilty . . . the Commonwealth must prove . . . that the defendants did this act *with the specific intent* to intimidate the alleged victim *because of* the alleged victim's race, color, religion, national origin, sexual orientation, or disability . . ." (emphasis added) (TXVI, 175-76.) The judge further explained that intent "refers to a person's objective or purpose," and indicated that specific intent "is a conscious act with the determination of the mind to do an act." (*Id.* 179-81.)

During deliberations, jurors asked the court whether the assault and battery that Defendants perpetrated had to be "solely" because of race. (TXVII, 18.) Recognizing that nearly every act arises

from multiple motivations, the judge correctly responded that race did not have to be the "sole" reason for the assault and battery, but reiterated that a conviction could attach only if defendants committed the attack "*with the specific intent to intimidate the alleged victim because of the victim's race, color, religion, national origin, sexual orientation or disability. . .*" (emphases added) (TXVII, 38-39.) The judge's instructions were proper for at least the following three reasons: First, the instructions followed the statutory text almost to the letter. Second, the "specific intent" instructions followed the legislative intent in drafting the hate crimes statute. Third, the jury instructions make sense within the larger statutory scheme because other statutes relating to criminal civil rights violations do not require that race be the "substantial" or "motivating" factor for the conduct to constitute a crime.

A. The Instructions Were True to the Statutory Text.

"The words of a statute are the main source from which we ascertain legislative purpose." *Foss v. Commonwealth*, 437 Mass. 584, 586 (2002); see also

Simon v. State Examiners of Electricians, 395 Mass. 238, 242 (1985) ("The starting point of our analysis is the language of the statute, the principal source of insight into Legislative purpose." [internal quotation marks omitted].)

Here, the Massachusetts hate crimes statute prohibits assaults and batteries committed "**with the intent** to intimidate [a] person **because of** such person's race, color, religion, national origin, sexual orientation, gender identity, or disability" (emphasis added) (G. L. c. 265, § 39.)

Accordingly, the judge instructed jurors that Defendants could only be convicted if they acted "**with the specific intent** to intimidate the alleged victim **because of** the victim's race" (TXVII, 38-39.) The instructions could hardly have been more faithful to the statutory text.

B. The "Specific Intent" Instructions Effectuate the Legislature's Intent in Drafting the Hate Crimes Statute.

In construing statutes, this Court also considers "the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated," *Champigny v. Commonwealth*, 422 Mass 249, 251 (1996). Statutes

should further be construed "in a way which avoids constitutional issues." *Kramer v. Zoning Bd. of Appeals of Somerville*, 65 Mass. App. Ct. 186, 191-92 (2005).

The Massachusetts hate crimes statute aimed to prevent a particular type of unlawful conduct: the intentional selection of a victim based on his membership in a protected group. This precise definition allows the statute to remedy a major societal problem without intruding on individuals' private thoughts or otherwise falling prey to constitutional infirmity.

Requiring specific intent strikes the balance the Legislature aimed to accomplish, and cures any potential vagueness issues in the statute. See, e.g., *Commonwealth v. Stephens*, 25 Mass. App. Ct. 117, 121-23 (1987) (affirming conviction because "[t]he construction of the [Civil Rights] statute as creating a specific intent crime cured any problem of vagueness"); *Commonwealth v. Barnette*, 45 Mass. App. Ct. 486, 491 (1998) (affirming conviction and rejecting argument that the hate crimes statute's intent element was "redundant" of the intent element for the underlying assault, because the hate crimes

charge required "specific intent"); see also *In re Joshua H.*, 13 Cal. App. 4th 1734, 1741-42 (1993) (holding California hate crimes statute was "saved by a narrowing construction requiring a specific intent to deprive a person of a defined constitutional or statutory right based on account of the person's status as a member of a protected class").

Defendants argue that the judge's "specific intent" instruction was somehow deficient, on the grounds that it posed a "grave risk of applying a hate crime label and hate crime punishment to individuals . . . whom the legislature and society at large never intended to include within the scope of hate crimes legislation." (Br. for Def. Shdeed at 39.) In fact, the "specific intent" instruction *precludes* any such overbroad application. As the United States Supreme Court has recognized, "[o]ne who does act with such specific intent is aware that what he does is precisely that which the statute forbids." *Screws v. United States*, 325 U.S. 91, 101-03 (1945) (holding that the "specific intent" standard provided a "narrower construction" that avoided negative "consequences to the accused," and saved the federal criminal civil rights statute from any charge of

vagueness); see *Stephens*, 25 Mass. App. Ct. at 122-23 (adopting *Screws*' reasoning, because "[b]y construing [the Massachusetts criminal civil rights statute] as defining a specific intent crime . . . the statute does not become a 'catchall.'"); see also *United States v. Goodspeed*, No. 91-2189, 1992 WL 302242, slip op. at *1 (1st Cir. Oct. 23, 1992) (affirming conviction where "specific intent" jury instruction properly ensured "that no one will be convicted for an act done because of mistake, or accident, or other innocent reason.").⁴

As these ample precedents demonstrate, requiring specific intent to select a victim because of his membership in a protected group fulfills the legislative purpose, balancing the need to address a major societal ill without running afoul of constitutional limits.

⁴ The United States Supreme Court has further held that requiring "specific intent" can preclude the risk that innocent conduct may be wrongly punished, because actions "predominantly motivated" by legitimate purposes "cannot bear out the specific intent essential" to proving a statutory violation. *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 627 (1953).

C. Canons of Statutory Construction Support Upholding the "Specific Intent" Instructions as Consistent With the Larger Statutory Scheme Governing Bias-Related Crimes.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012); see also *Polaroid Corp. v. Comm'r of Revenue*, 393 Mass 490, 497 (1984) ("[W]ords of a statute must be construed in association with other statutory language and the general statutory plan.").

1. The Instructions Below Fit The Overarching Scheme to Prohibit Criminal Civil Rights Violations.

"[W]here two or more statutes relate to the same subject matter, they should be construed together so as to constitute a harmonious whole consistent with the legislative purpose." *Board of Ed. v. Assessor of Worcester*, 368 Mass. 511, 513-14 (1975) (quoted in *Fed. Nat. Mortgage Ass'n v. Hendricks*, 463 Mass. 635, 641 (2012)); *Habeeb v. Ret. Bd. of Quincy*, 389 Mass. 634, 640, (1983) ("[I]ndividual statutory provisions related to the same general area must be read as a whole ... to the end that, as far as possible, the

[entire legislative program] will constitute a consistent and harmonious whole." [internal citation and quotation marks omitted]).

Hate crimes statutes and civil rights laws are part and parcel of the same scheme, and courts frequently interpret them together. See, e.g., *Mitchell*, 508 U.S. at 487 (rejecting a challenge to hate crimes law because "motive plays the same role under the [state hate crimes] statute as it does under federal and state antidiscrimination laws"); *In re Joshua*, 13 Cal. App. 4th at 1749 (recognizing that the hate crimes statute "is indistinguishable from other antidiscrimination laws [because] both make it an offense...to...act 'because of' the victim's race or other status"); *State v. Talley*, 858 P.2d at 225 ("it is pure sophistry" to distinguish civil rights laws and hate crimes statutes).

Massachusetts is no exception to this rule. Here, the hate crimes statute bars assaults and batteries intended "to intimidate" intentionally-selected members of a protected class (G. L. c. 265, § 39); the criminal civil rights statute similarly prohibits the use or threat of force "to intimidate" individuals exercising constitutional rights. (G. L. c. 265, §

37.) Indeed, the nexus is so close that the Massachusetts Court of Appeals has held that "violence of the kind prohibited by the hate crime statute . . . violates [the criminal civil rights statute] G. L. c. 265, § 37." *Commonwealth v. Oliveira*, No. 2001-P-0373, WL31758664, slip op. at *2 (Mass. App. Ct. 2002) (affirming civil rights convictions). See also "A Special Report Regarding the Constitutionality of Massachusetts Civil and Criminal Civil Rights Laws," *supra* at 16 (analyzing Massachusetts civil and criminal civil rights laws together and concluding that "Massachusetts civil rights statutes manifest the Legislature's judgment that it is of paramount public importance to protect all individuals from being singled out for violence or threats on the basis of racial, religious or other forms of discrimination.")

Recognizing that the hate crimes statute is part of the legislative scheme to address criminal civil rights violations further supports the propriety of the judge's instructions below. Put simply, throughout the regime governing criminal civil rights violations, courts have held that a "specific intent" instruction is sufficient. For example, the Massachusetts Court of Appeals has held that "[t]he

deprivation of civil rights . . . does **not** have to be the predominant purpose of the defendant's acts."

(emphasis added) *Stephens*, 25 Mass. App. Ct. at 124;

see also *Barnette*, 45 Mass. App. Ct. at 489-91

(affirming conviction for criminal civil rights violation because "specific intent" instruction sufficiently ensured that crime occurred "because of the victim's membership in a protected class").

Myriad federal cases have reached the same conclusion in addressing criminal civil rights violations. For example, the Third Circuit recently construed a criminal civil rights statute that, like the statute here, allowed for conviction where a defendant "intimidate[d]" the victim "because of" his race. *United States v. Piekarsky*, 687 F.3d 134, 140-45 (3d Cir. 2012). The Third Circuit affirmed the conviction and upheld "mixed motive" jury instructions like those issued here stating that "the government need not prove that race and occupancy were the only reasons for [the defendant's] actions. *The presence of other motives, such as personal dislike, anger or revenge does not make the conduct any less a violation of the statute.*" (emphasis in opinion) *Id.* at 141. The Third Circuit recognized that "[t]he word

'because' is defined to mean 'for the reason that,' 'on account of,' and 'by reason of.' . . . Those meanings do not, necessarily, connote exclusivity or predominance." (emphasis added) *Id.* at 142-45. As the Third Circuit ruled, adding a "predominant purpose" instruction would defeat "the general purpose of such statutes -- those designed to deter and punish acts taken with the specific intent of depriving a victim of a federally recognized right." *Id.* at 144 (holding that "race need only be a motivating factor, and not the predominant purpose," because to hold otherwise would allow the legislature's purpose to be "undermined by the ease with which a defendant can argue that he had some additional motive or purpose in acting as he did.")

The United States Supreme Court and several other circuits have similarly relied on "specific intent" and have not inserted into criminal civil rights statutes a "predominant" or "substantial" motive test. *Anderson v. United States*, 417 U.S.211, 226 (1974) (affirming convictions in light of "specific intent" finding, because where acts have "several purposes," the unlawful purpose may be either "primary or secondary"); *United States v. Nelson*, 277 F.3d

164,187-98 (2d Cir. 2002) (holding constitutional civil rights statute that prohibited attacks that were intended or motivated "because of" the victim's protected status without requiring that the victim's status be a "primary" or "substantial" motive) (cited in *United States v. Woodard*, 149 F.3d 46, 73 (1st Cir. 1998) (holding that "criminal law may punish conduct even if its illegal purpose is incidental to other, legal purposes."); *United States v. Ellis*, 595 F.2d 154, 162 (3d Cir. 1979) (affirming civil rights convictions because the "charge [requiring specific intent] was proper and the requested charge [seeking a "predominant purpose" instruction was] improper."); *United States v. Barker*, 546 F.2d 940, 942 (D.C. Cir. 1976) (unanimously rejecting "predominant purpose" requirement, and holding either "a predominant or incidental objective" sufficient).

These cases echo what the trial judge determined here. Where specific intent to violate a victim's civil rights has been demonstrated, "the presence of other motives . . . does not make [a defendant's] conduct any less of a violation." *United States v. Johns*, 615 F.2d 672, 675 (5th Cir. 1980) (affirming convictions). Criminal civil rights cases have thus

followed the broader, "well-established [rule] that a defendant accused of [a specific intent] crime may properly be convicted if his intent to commit the crime was any of his objectives". *United States v. Technodyne LLC*, 753 F.3d 368, 385 (2d Cir. 2014).

2. The "Specific Intent" Instructions Fit the Hate Crimes Statute's Regulatory Scheme.

"[S]tatutes are to be interpreted in a common sense way which is consistent with the statutory scheme." *Kramer*, 65 Mass. App. Ct. at 192-92. The instructions given below were fully consistent with the regulatory scheme governing hate crime prosecutions.

The Massachusetts Hate Crimes Reporting Act, G. L. c. 22C, § 32 -- enacted specifically to track violations committed under the hate crimes statute -- flatly states that "[b]ias indicators need **not** establish that the predominant purpose of a perpetrator's actions was motivated by hatred or bias." (emphasis added) 501 Code Mass. Regs. § 4.04 (2014). Indeed, in the reporting law and its implementing regulations, the Legislature repeatedly recognized that assailants could have "mixed motives," and never once indicated in any way that hate crimes

occurred only where their unlawful motives were "predominant" or "substantial." See G. L. c. 22, §32 (defining a hate crime as "any criminal act . . . motivated at least in part by racial . . . prejudice"); 501 Code Mass. Regs. § 4.02 (2014) (defining a hate crime as "any criminal act to which a bias motive is evident as a contributing factor"); 501 Code Mass. Regs. § 4.04 (2014) ("[I]t is sufficient for classification of an incident as a hate crime that a perpetrator was acting out of hatred or bias, together with other motives; or that a bias motive was a contributing factor, in whole or in part, in the commission of a criminal act.")

These reporting provisions provide further support for construing the hate crimes statute as the lower court did, because they highlight the Legislature's view that hate crimes arise where bias is "a contributing factor," without further requiring that the factor be "predominant" or "substantial." The trial court's instructions, unlike the instructions Defendants seek here, "give a rational and workable effect to the whole [legislative scheme]." *McCarthy v. Rogers*, 295 Mass. 245, 248-49 (1936).

The trial judge's "specific intent" instructions match Section 39's text, advance the legislative purpose, and fit the statutory scheme. Injecting a "predominant" or "substantial" purpose requirement into the hate crimes statute would accomplish none of the above.

III. REQUIRING A "PREDOMINANT" OR "SUBSTANTIAL" MOTIVE WOULD BE INCONSISTENT WITH SECTION 39, THE STATUTORY SCHEME, AND SOUND POLICY.

The Defendants' proposed instructions fail in large part for the same reasons that the judge's instructions succeed. First, as a threshold matter, Section 39 offers no textual support whatsoever for imposing a "predominant" or "substantial" motive requirement. The "primary responsibility for [setting] criminal penalties lies with the legislature." *Mitchell*, 508 U.S. at 486, (upholding statute that barred "[i]ntentionally select[ing]" the victim "because of" his membership in a protected group without imposing any requirement regarding the defendants' "predominant" or "substantial" motive). Where the legislature has required "specific intent" to target a victim "because of" his group identity -- no more and no less -- there is no cause to re-shape the statute's demands.

Second, requiring a "predominant" or substantial motive would not work within the statutory scheme. Caselaw demonstrates that for the closely-related criminal civil rights statutes, the unlawful aim "does not have to be the predominant purpose of the defendant's acts." (emphasis added) *Stephens*, 25 Mass. App. Ct. at 124. Similarly, Massachusetts statutes and regulations require reporting of hate crimes motivated "in whole or in part" by discriminatory intent (G. L. c. 22, § 32), regardless of whether that part is "predominant" or "substantial." (See 501 Code Mass. Regs. § 4.04 (2014) ("[I]ndicators need not establish that the predominant purpose of a perpetrator's actions was motivated by hatred or bias." [emphasis added])). Adopting the "predominant" or "substantial" test for the hate crimes provision would leave Section 39 out of step with the accompanying civil rights statute, and at odds with the hate crimes reporting regime. Such juxtapositions are hardly in keeping with proper statutory construction.

Third, a "predominant" or "substantial" motive test would undermine the statute's purpose by inserting precisely the uncertainty that Defendants

claim they hope to avoid. Defendants admit that in this very case, jurors could have found Defendants' attack "90% motivated by race," but Defendants also claim (wrongly) that jurors might have found the attack "only 10% motivated by race." (Def. Br. of K. Shdeed at 41-42.) If such uncertainty did persist after a 19-day trial, Defendants offer no explanation for how an amorphous "predominant" or "substantial" motive standard would give jurors the "clear guidance" Defendants claim to seek. (*Id.*)

Indeed, a recent 2-1 decision by the Sixth Circuit overturned convictions obtained under an instruction requiring that the victim's group status had to be a "significant factor" in a hate crime pursuant to the federal HCPA, because the standard created excessive "uncertainty." *United States v. Miller*, No. 13-3177, 2014 WL 4211198, at * 4 (6th Cir. Aug. 27, 2014).⁵

Given the vagaries of a "predominant" or "substantial" factor test and the criminal law's need


⁵ For other reasons, ADL views *Miller* as wrongly decided, but that case is readily distinguishable from this case in any event, because *inter alia*, *Miller* did not address a "specific intent" instruction or a statutory scheme like Massachusetts' that had rejected a "predominant" purpose test.

for certainty, it is not surprising that Defendants can find "no Massachusetts cases" applying the standard they would have this Court impose. (Br. for Def. Shdeed at 33.) This case should not be the first.

CONCLUSION

The trial judge's instructions comport with the Massachusetts hate crimes statute's text, purpose, and regulatory scheme, and avoid constitutional issues. By contrast, injecting a "predominant" or "substantial" requirement has no support in the statute's text, purpose, or scheme. The Court should uphold the trial court's instructions, affirm Defendants' convictions, and ensure proper application of the Massachusetts hate crimes statute.

Respectfully submitted,


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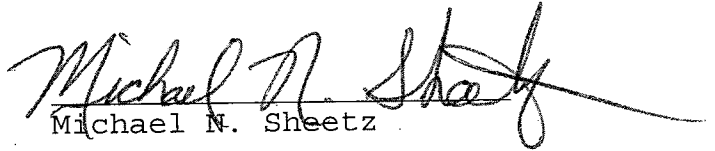
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MASS. R. A. P. 16(k) CERTIFICATE OF COMPLIANCE

I, Michael N. Sheetz hereby certify that the foregoing brief complies with the rules of Court that pertain to the filing of briefs.


Michael N. Sheetz

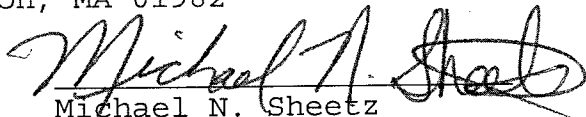
CERTIFICATE OF SERVICE

I, Michael N. Sheetz, hereby certify that on September 22, 2014, I caused two copies of the foregoing *Amicus* Brief for *Amici Curiae* Anti-Defamation League and Six Additional *Amici* In Support of the Commonwealth of Massachusetts and Affirmance to be delivered via first-class mail on each of the following counsel:

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ADDENDUM

MASSACHUSETTS GENERAL LAWS
PART I. ADMINISTRATION OF THE GOVERNMENT
TITLE II. EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE
COMMONWEALTH
CHAPTER 22C

Section 32. Definitions applicable to Secs. 33 to 35

For the purposes of sections thirty-three to thirty-five, inclusive, the following words shall have the following meanings:-

"Crime reporting unit", a joint project of the department of state police and the department of criminal justice information services charged with the responsibility of collecting incident reports submitted by state, local and campus police departments and other law enforcement authorities and disseminating periodic reports analyzing and interpreting crime rates and trends in the commonwealth.

"Hate crime", any criminal act coupled with overt actions motivated by bigotry and bias including, but not limited to, a threatened, attempted or completed overt act motivated at least in part by racial, religious, ethnic, handicap, gender, gender identity or sexual orientation prejudice, or which otherwise deprives another person of his constitutional rights by threats, intimidation or coercion, or which seek to interfere with or disrupt a person's exercise of constitutional rights through harassment or intimidation. Hate crime shall also include, but not be limited to, acts that constitute violations of sections thirty-seven and thirty-nine of chapter two hundred and sixty-five, section one hundred and twenty-seven A of chapter two hundred and sixty-six and chapter two hundred and seventy-two.

"Hate crime data", information, incident reports, records and statistics relating to hate crimes, collected by the crime reporting unit.

"Incident report", an account of occurrence of a hate crime received or collected by the crime reporting unit.

MASSACHUSETTS GENERAL LAWS
PART IV. CRIMES, PUNISHMENTS AND PROCEEDINGS IN
CRIMINAL CASES
TITLE I. CRIMES AND PUNISHMENTS
CHAPTER 265

**Section 37. Violations of Constitutional Rights;
punishment**

No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the commonwealth or by the constitution or laws of the United States. Any person convicted of violating this provision shall be fined not more than one thousand dollars or imprisoned not more than one year or both; and if bodily injury results, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than ten years, or both.

MASSACHUSETTS GENERAL LAWS
PART IV. CRIMES, PUNISHMENTS AND PROCEEDINGS IN
CRIMINAL CASES
TITLE I. CRIMES AND PUNISHMENTS
CHAPTER 265

**Section 39. Assault or battery for purpose of
intimidation; weapons; punishment**

(a) Whoever commits an assault or a battery upon a person or damages the real or personal property of a person with the intent to intimidate such person because of such person's race, color, religion, national origin, sexual orientation, gender identity, or disability shall be punished by a fine of not more than five thousand dollars or by imprisonment in a house of correction for not more than two and one-half years, or by both such fine and imprisonment. The court may also order restitution to the victim in any amount up to three times the value of property damage sustained by the owners of such property. For the purposes of this section, the term "disability" shall have the same meaning as "handicap" as defined in subsection 17 of section one of chapter one hundred and fifty-one B; provided, however, that for purposes of this section, the term "disability" shall not include any condition primarily resulting from the use of alcohol or a controlled substance as defined in section one of chapter ninety-four C.

(b) Whoever commits a battery in violation of this section and which results in bodily injury shall be punished by a fine of not more than ten thousand dollars or by imprisonment in the state prison for not more than five years, or by both such fine and imprisonment. Whoever commits any offense described in this subsection while armed with a firearm, rifle, shotgun, machine gun or assault weapon shall be punished by imprisonment in the state prison for not more than ten years or in the house of correction for not more than two and one-half years. For purposes of this section, "bodily injury" shall mean substantial impairment of the physical condition, including, but not limited to, any burn, fracture of any bone, subdural hematoma, injury to any internal organ, or

any injury which occurs as the result of repeated harm to any bodily function or organ, including human skin.

There shall be a surcharge of one hundred dollars on a fine assessed against a defendant convicted of a violation of this section; provided, however, that moneys from such surcharge shall be delivered forthwith to the treasurer of the commonwealth and deposited in the Diversity Awareness Education Trust Fund established under the provisions of section thirty-nine Q of chapter ten. In the case of convictions for multiple offenses, said surcharge shall be assessed for each such conviction.

A person convicted under the provisions of this section shall complete a diversity awareness program designed by the secretary of the executive office of public safety in consultation with the Massachusetts commission against discrimination and approved by the chief justice of the trial court. A person so convicted shall complete such program prior to release from incarceration or prior to completion of the terms of probation, whichever is applicable.

501 CODE OF MASSACHUSETTS REGULATIONS

501 CMR 4.00: HATE CRIMES

4.02: Definitions

The following phrases shall have the following meanings:

Advocacy Organization: Any non-profit or not-for-profit group which represents or serves constituencies targeted in hate crimes motivated by the forms of bias enumerated at 501 CMR 4.02(3); or gathers information relating to the incidence, circumstances, patterns, causes, or nature of hate crimes or incidents or any specific type(s) of hate crimes or incidents.

Bias Indicators: Objective facts, circumstances, or patterns attending a criminal act(s) which, standing alone or in conjunction with other facts or circumstances, suggest that the offender's actions were motivated, in whole or in part, by any form of bias enumerated at 501 CMR 4.02.

Bias Motive: Hatred, hostility, or negative attitudes towards, or prejudice against, any group or individual on account of race, religion, ethnicity, handicap, gender, or sexual orientation, which is a contributing factor, in whole or in part, in the commission of a criminal act. A bias motive can be inferred from the presence of one or more bias indicators. The specific forms of bias covered by the Hate Crimes Reporting Act are:

Racial Ethnic/National Bias

Anti-Black
Anti-White
Anti-Asian
Anti-Hispanic
Anti-Arab
Anti-Other
Racial/Ethnic/National Group

Religious Bias

Anti-Jewish
Anti-Catholic
Anti-Protestant
Anti-Islamic (Moslem)

Anti-Other Religion

Sexual Orientation Bias

Anti-Gay (Male)

Anti-Lesbian

Anti-Other Sexual Orientation

Handicap Bias

Anti-Persons with AIDS

Anti-Physically Disabled

Anti-Mentally Disabled (i.e. Mental illness, mental retardation)

Gender Bias

Anti-Female

Anti-Male

Anti-Transgender Bias (as further defined by the Governor's Task Force on Hate Crimes).

Anti-Transgender Bias is hatred, hostility, or prejudice towards a person who, in dress, speech, and general appearance, visibly:

(a) "identifies" with the gender opposite to his or her biological or birth gender; or

(b) does not conform to conventional gender role expectations for his or her biological or birth gender. Bias is usually attributed to the circumstance of traditional gender role conventions being openly violated. This bias constitutes gender bias because a "transgender person" is regarded differently and less favorably than would a person of the opposite biological sex, for engaging in similar conduct.

A bias motive may also consist of an intent to interfere with, disrupt, or deprive another person(s) of his/her constitutional rights by threats, intimidation, harassment, or coercion.

Hate Crime:

(a) Any criminal act to which a bias motive is evident as a contributing factor, or

(b) Any act which constitutes a violation of:

1. M.G. L. c. 265, § 37 or 39;
2. M.G. L. c. 266, § 127A;
3. M.G. L. c. 272, § 92A.

Hate Crime Report: An account of a hate crime from a law enforcement source received or collected by the Crime Reporting Unit.

Hate Group: An organization, formal or informal, which promotes bias, animosity, hostility, or malice against persons belonging to a racial, religious, ethnic/national origin, sexual orientation, handicap, or gender group (e.g. the Ku Klux Klan, American Nazi Party, etc.).

Hate Incident: Any act, whether consisting of conduct, speech, or expression, to which a bias motive is evident as a contributing factor, without regard for whether the act constitutes a crime.

Hate Incident Report: An account of a hate incident from a civil rights agency or advocacy organization received or collected by the Crime Reporting Unit.

501 CODE OF MASSACHUSETTS REGULATIONS

501 CMR 4.00: HATE CRIMES

4.04: Bias Indicators

(1) The following criteria can assist law enforcement officers in determining whether a particular crime should be classified as a hate crime. These criteria are not all inclusive, and each case must be examined on its own facts and circumstances. Common sense judgment should also be applied in making the determination whether a crime should be classified as a hate crime.

(a) The offender and the victim were of different racial, religious, ethnic/national origin, handicap, gender or sexual orientation groups. For example, the victim was black and the offenders were white.

(b) Bias-related oral comments, written statements, or gestures were made by the offender which indicate his/her bias. For example, the offender shouted a racial or anti-gay epithet at the victim or made an abusive or pejorative reference based on gender.

(c) Bias-related drawings, markings, symbols, or graffiti were left at the crime scene. For example, a swastika was painted on the door of a synagogue.

(d) Certain objects, items, or things which indicate bias were used (e.g., the offenders wore white sheets and white hoods) or left behind by the offenders(s) (e.g., a burning cross was left in front of the victim's residence).

(e) The victim is a member of a racial, religious, ethnic/national origin, handicap, gender or sexual orientation group which is overwhelmingly outnumbered by members of another group in the area where the victim lives or works and the incident took place.

(f) The victim was visiting a location where previous hate crimes had been committed against other members of his/her racial, religious, ethnic/national origin, handicap, gender or sexual orientation group and where tensions remain high against his/her group.

(g) Several incidents have occurred in the same locality, at or about the same time, and the victims are all of the same racial, religious, ethnic/national origin, handicap, gender or sexual orientation group.

(h) Victims or witnesses perceive that the incident was motivated by bias.

(i) The victim was engaged in activities promoting a racial, religious, ethnic/national origin, handicap, gender or sexual orientation group. For example, the victim is a member of the NAACP, participated in gay rights demonstrations, etc.

(j) The incident coincided with a holiday relating to or a date of particular significance to, a racial, religious, ethnic/national origin, handicap, gender or sexual orientation group (e.g., Martin Luther King Day, Rosh Hashanah, Gay/Lesbian Pride Day, etc.).

(k) The offender was previously involved in a similar hate crime or is a member of, or associates with, a hate group.

(l) There were indications that a hate group was involved. For example, a hate group claimed responsibility for the crime or was active in the neighborhood.

(m) A historically established animosity exists between the victim's ethnic/national/religious group and the offender's ethnic/national/religious group.

(n) The victim, although not a member of the targeted racial, religious, ethnic/national origin, handicap, gender or sexual orientation group, is a member of an advocacy group supporting the precepts of the victim group, or is friendly with members of a victim group.

(o) The victim was in or near an area or place commonly associated with or frequented by a particular racial, religious, ethnic/national origin, handicap, gender or sexual orientation group (e.g., a gay bar).

(p) There was no clear economic motive for an assault and battery.

(q) The victim was in the company of, or married to, a member of a targeted group.

(r) The victim has received harassing mail or phone calls or has been victim of verbal abuse based on his/her affiliation with a targeted group.

(s) The victim was perceivable by the offender as violating or breaking from role conventions or stereotypes, or working in non-traditional employment.

(t) The crime involved extreme mutilation, cruelty, or brutality.

(u) The offender has been subject to M.G. L. c. 209A restraining orders against two or more different women.

(v) The offender has a history of previous crimes with a similar modus operandi, and there have been multiple victims of the same racial, religious, ethnic/national origin, handicap, gender or sexual orientation group.

(2) Bias indicators need not establish that the predominant purpose of a perpetrator's actions was motivated by hatred or bias. It is sufficient for classification of an incident as a hate crime that a perpetrator was acting out of hatred or bias, together with other motives; or that a bias motive was a contributing factor, in whole or in part, in the commission of a criminal act.

(3) For a crime to be classifiable as a hate crime, it is sufficient that bias indicator(s) would, in the exercise of professional law enforcement judgment, directly or circumstantially support a finding of a bias motive. Bias indicators need not conclusively

demonstrate that a criminal act was motivated by bias or bigotry. In some instances, one bias indicator may be sufficient to support an inference that a crime was motivated by bias or bigotry (e.g., bias-related epithets or markings). In other cases, more than one bias indicator may be necessary to warrant such an inference. In each instance, a law enforcement judgment is necessary to assess whether a given crime was hate motivated.

(4) Facts or circumstances deemed sufficient to support an arrest or criminal charge under M.G. L. c. 265, §§ 37 and 39; c. 266, § 127A, and c. 272, § 92A are automatically sufficient for classification and reporting of an incident as a hate crime.

(5) Even if the offender was mistaken in his/her belief that the victim was a member of a racial, religious, ethnic/national origin, handicap, or sexual orientation group, the offense is still a hate crime as long as the offender was motivated by bias against that group. For example, a non-gay man walking by a bar frequented by gays was attacked by six teenagers mistakenly believing the victim to be gay. Although the offenders were mistaken, the offense is a hate crime because it was motivated by the offenders' anti-gay bias.

2013 Wisconsin Statutes & Annotations

939. Crimes - general provisions.

Section 939.645: Penalty; crimes committed against certain people or property.

(1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):

(a) Commits a crime under chs. 939 to 948.

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct.

(2)

(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is \$10,000 and the revised maximum term of imprisonment is one year in the county jail.

(b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is \$10,000 and the revised maximum term of imprisonment is 2 years.

(c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than \$5,000 and the maximum term of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a

special verdict as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry or proof of any person's perception or belief regarding another's race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC 11616

COMMONWEALTH
v.

AMANDA KELLY, CHRISTOPHER BRATTLE & KEVIN SHDEED

ON APPEAL FROM JUDGMENT OF THE
SUPERIOR COURT PLYMOUTH COUNTY
CIVIL ACTION NO. 2013-P-0047

AMICUS BRIEF FOR AMICI CURIAE ANTI-DEFAMATION LEAGUE AND SIX
ADDITIONAL AMICI IN SUPPORT OF THE
COMMONWEALTH OF MASSACHUSETTS AND AFFIRMANCE