Court of Appeals

State of New York

ROBERT SUTTLE, Defendant-Appellant,	:	
	:	Appellate Division
Against	:	
	:	Mo. No. 2022-7705 (Pin No. 80030)
THE PEOPLE OF THE STATE OF NEW YORK, Respondent.	:	:

PROPOSED BRIEF OF AMICUS CURIAE CENTER FOR HIV LAW AND POLICY

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DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

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PRELIMINARY STATEMENT

Amicus respectfully request that the Court of Appeals accepts Robert Suttle's (Appellant-Respondent's) appeal. The case of Robert Suttle offers the Court of Appeals the chance to review a novel question of law regarding the application of Title II of the Americans with Disabilities Act, and well as reaffirm New York's commitment to their own public policies. The Court should grant Appellant's motion for leave to appeal so that this court can consider the full range of legal and policy considerations raised by this case, particularly the impact of an inflexible sex offender registration requirement based on a health condition that is a protected disability under New York state and federal law and the subject of a massive state campaign to end HIV stigma and the HIV epidemic in New York. The decision below has a profound impact for many New Yorkers living with HIV and other protected disabilities besides Mr. Suttle. To refuse Certiorari and allow the lower courts judgment against Mr. Suttle to stand is to announce to the world that New York values comity over justice, and is not willing to stand as a bulwark against the draconian laws being passed in other states[1].

[1] This Court has jurisdiction to consider this appeal as of right under CPLR 5601(b)(1), because it is from an order of the Appellate Division constituting a final determination of an action originating in Supreme Court and directly involving a fully preserved, substantial constitutional question. Alternatively, because this appeal raises issues of statewide importance, this Court has jurisdiction to consider it pursuant to CPLR 5602(a)(1)(i).

INTEREST OF AMICUS CURAE

The Center for HIV Law and Policy ("CHLP") is a national legal resource and support hub that challenges barriers to the sexual health and rights of people on the basis of stigmatized health status or identity. We do this through legal advocacy, high-impact policy initiatives, and creation of cross-issue partnerships, networks and resources that amplify the power of communities to mobilize for change that is rooted in racial, gender and economic justice. No party or person authored this brief in whole or in part, and no party or person other than amicus contributed funds for the preparation or submission of this brief.

CHLP's interest in this case is consistent with its mission to secure fair treatment under the law for all individuals living with HIV and similar disabilities. CHLP believes that inconsistent, scientifically-unsupported application of criminal and civil laws to people living with HIV (PLHIV) reflects and reinforces bias and stigma, and is in opposition to state and federal programs and commitments to end the HIV epidemic.

ARGUMENT

THE COURT OF APPEALS SHOULD GRANT THE MOTION FOR LEAVE TO APPEAL AS THE DECISION BELOW IS CONTRARY TO NEW YORK STATE AND FEDERAL LAW AND POLICY ON THE RIGHTS AND HEALTH OF PEOPLE LIVING WITH HIV

I. Both as applied to Mr. Suttle, and as written, NY Corrections Law 168 (more commonly known as SORA) violates the ADA by requiring all people who have to register as sex offenders in another state do so in New York without providing for an individualized assessment that is compliant with the ADA and by causing NY courts to enforce other state's discriminatory laws that violate the rights of persons living with disabilities such as HIV.

A. Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act prohibit discrimination by state actors against people living with HIV

The Federal Government crafted the Americans with Disabilities Act (ADA) to enshrine protections for people with disabilities into federal law. The goal was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" that did not leave the decision up to the vagaries of the states. 42 U.S.C. § 12101(b)(1). Section 504 of the Rehabilitation act prohibits discrimination on the basis of disability as well; Title II applies to the activities of public entities, while Section 504 governs recipients of federal funding, including state agencies. *See* 42 U.S.C. §§ 12131, 12132, 28 C.F.R. § 35.130 (2016); 29 USCS § 794(a). However, the courts have traditionally analyzed claims under both statutes identically. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003)

(citing Weixel v. Bd. of Educ., 287 F.3d 138, 146 n. 6 (2d Cir.2002)); *Rodriguez v. City of New York*, 197 F.3d 611, 618 (2d Cir. 1999) ("Because Section 504 of the Rehabilitation Act and the ADA impose identical requirements, we consider these claims in tandem.")

The protections of the ADA pre-empt any state law that is in conflict with them, as written, or as applied. See *Hindel v. Husted*, 875 F.3d 344, 349 (6th Cir. 2017) (A" state procedural requirement may not excuse a substantive ADA violation," and "[r]equiring public entities to make changes to rules, policies, practices, or services is exactly what the ADA does") (internal citations omitted)). The U.S. Department of Justice, whose interpretation of Titles I and II of the ADA receives deference,[2] has made it clear that "*[a]ll activities, services, and programs of public entities are covered, including activities of State legislatures and courts*, town meetings, police and fire departments, motor vehicle licensing, and employment."[3]. Other courts have analyzed challenged sections of their State laws through the lens of the ADA and found the sections unenforceable due to ADA violations. *See, e.g.*, *Hargrave v. Vermont*, 340 F.3d 27, 38–39 (2d Cir. 2003) (enjoined implementation and enforcement of several provisions of state law allowing the override of power of attorneys for people with mental health diagnoses based on ADA and 504 violations) (the provisions of the law in question "violate[] the ADA by distinguishing between "qualified individuals" on the basis of mental illness").

The ADA prohibits government entities from engaging in discriminatory practices, either

[2] The ADA grants DOJ the authority to issue rules and interpretive guidance on its implementation; and "[w]here Congress expressly delegates authority to an agency to promulgate regulations, the regulations 'are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'" *Tatum v. NCAA*, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998) (internal citaions omitted); s*ee also Bragdon v. Abbott*, 524 U.S. 624, 646 (1998) (holding that DOJ gets deference); 28 C.F.R. §§ 35.190(a) and (b)(6).
[3]U.S. Dep't of Justice, Title II Highlights (emphasis added), http://www.ada.gov/t2hlt95.htm (last accessed December 13, 2022)

explicitly, through excluding or denying their access to programs, or through failure to prevent or ameliorate such discrimination. 42 U.S.C. § 12132. To determine whether Section II of the ADA applies in a situation there are two interlocking tests. The overarching test is drawn from the statutory text of the ADA itself, § 12132:

> Subject to the provisions of this subchapter, no [1] qualified individual with a [2] disability shall, [3] by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity (numbers added)

42 U.S.C. § 12132. Addressing prong one, the ADA directs the court to determine whether a person is "otherwise qualified" to access the service.[4] This determination requires application of the test found in *School Board of Nassau County v. Arline*, where the United States Supreme Court directs the lower courts to examine the: (1) nature of the risk; (2) duration of risk (3) severity of risk, and (4) probability of transmission. *School Board of Nassau County v. Arline,* 481 U.S. 1024, 1024 (1987). Essentially, the ADA instructs officials to do an assessment to determine if someone with a communicable disease is actually a direct threat and if such threat could be ameliorated through reasonable modifications to policies, practices, or procedures. 28 C.F.R. § 35.139(b) (2020).

Under Prong 2, to be covered by the ADA an individual must have a qualifying disability. Living with HIV, at "every stage of the disease" regardless of whether an individual is "asymptomatic" is considered a covered disability. *See Bragdon v. Abbot*, 524 U.S. 624 (1998). Congress dispensed with any doubts as to whether HIV is a protected disability when it passed the ADA Amendments Act of 2008 (ADAAA) (noting that the newly enacted definition should be broadly construed and adding physical functions directly related to HIV as examples of

[4] Joshua Blecher-Cohen, *Disability Law and HIV Criminalization*, 130 Yale L.J.1560, 1580 (Apr 2021)

affected life activities relevant to disability definition); and the U.S. Department of Justice, Civil Rights Division has likewise confirmed that HIV is a protected disability under federal antidiscrimination law. In fact, the passage of the ADAAA underscored Congress's continued concern with the persistence of pernicious, subtle, and inadvertent discrimination against individuals with disabilities. Congress's express purpose in passing the ADAAA was to reverse a judicial trend of narrowing the concept of "disability" and constraining the ADA's reach. *See* ADAAA § 2(b), Pub. L. 110-325, 122 Stat. 3553 (2008).

Prong Three directs the court to determine whether the person with a disability has either been subject to denials of access to programs OR subject to discrimination by a state entity. Again, it is well established by the ADA that the actions of the courts fall under its purview as a "state entity." 28 C.F.R. pt. 35, app. B (2021)("Title II coverage, however, is not limited to "Executive" agencies, but includes activities of the legislative and *judicial* branches of State and local governments." [emphasis added]).[5] A showing of discrimination does not require a showing of animus by the state entity. *See, e.g., Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 275 (2d Cir. 2009).

It is important to note two requirements that are the touchstones of the above analysis. First, the analysis must rely on current medical evidence and avoid the use of stereotypes or generalizations about the effect of a disability. *See* 28 C.F.R. § 35.139(b) (2020). *See also* 28 C.F.R. § 35.104 (2020). The Court in *Arline* directly addressed why this reliance on science is essential to counter the prejudice and discriminatory reactions of others to persons with contagious diseases:

> [b]y amending the definition of "handicapped individual" to include not only those who are actually physically impaired,

[5] *See also supra* note 4.

> but also those who are regarded as impaired . . . 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. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness.

Arline, 480 U.S. at 284. Secondly, in order for a law to comply with the ADA it *must* provide for an individualized assessment of the *Arline* factors. 28 C.F.R. § 35.139(b) (2020)("In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an *individualized* assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur.")(emphasis added)). Any law that fails to do so, whether as written or as applied, fails to comply with the terms of the ADA and is unenforceable.

B. Section 168a of SORA is overbroad and does not comply with the ADA

NY Corrections law 168, or the Sex Offender Registration Act ("SORA") governs both who must register as a sex offender in the state of NY as well as the consequences of registration. NY CLS Correction § 168 et. Seq (2008). Since its enactment in 1995, the law has been modified to comply with the changing requirements of federal sex offender registration laws, the most recent of which is the Sex Offender Registration and Notification Act (SORNA). *See People v. Diaz*, 32 N.Y.3d 538, 541 (NY 2018). To comply with SORNA, states' laws must include a provision where they agree that when a person who has been required to register in their home state moves into a new state, that new state must require them to register as well *for the crimes listed in SORNA*.[6] 42 USC § 14071[b][7]. In pertinent part, SORA reads, "[upon

[6] Under SORNA alone, Robert Suttle would not be required to register as a sex offender for the crime he pled guilty to in Louisiana. 42 USC § 14071[b][7]. Meaning that in order to comply with SORNA, NY

moving to NY state a person must register if convicted of] (ii) a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred." N.Y. Correct. Law § 168-a[7]. This requirement is not a mere technicality. Although the courts have found registration to be administrative and not additionally punitive, registration not only carries with it a very real stigma, but a host of limitations and requirements, violation of which is punishable as a felony under NY State Criminal law.[8] SORA was amended in 2002 to provide an easy to follow, bright line rule to determine if a person has to register as a NY sex offender without the need to resort to an extensive review of the underlying out-of-state conviction. *Diaz*, 32 N.Y.3d at 547. But, as detailed below, this change by the legislature makes the law overbroad and violative of the ADA. The term "overbroad" refers to the fact that due to its reach and lack of any individualized assessment (beyond assessing whether or not a person was a sex offender in another state) SORA as amended requires people to register in violation of other rights they may have, causing NY to compound rights violations caused by other states rather than ameliorating them. To put it simply, two wrongs don't make a right. The lower courts requirement of Mr. Suttle to register as a sex offender runs contrary to the protections of the

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state would NOT have to require him to register. In fact, only 5 states that criminalize people living with HIV require those who are found guilty of such offenses ("exposure" to HIV) to register as a sex offender, thereby adding insult to injury.

[7] Ironically, if he had remained in Louisiana, Robert Suttle would come off the registry of that state in 2023. Under NY State classifications, he is required to register until 2028.

[8] As a level one registrant, Mr. Suttle will have to disclose his address, he has 10 days to report any change in address, and report all of his email names and internet providers, among other consequences. The Center for HIV Law and Policy, *Moving to New York State?: A Quick Reference Guide for Relocation for Registered Sex* Offenders. https://www.hivlawandpolicy.org/sites/default/files/Moving%20to%20New%20York%20State_%20A%20Reference%20Guide%20for%20Relocation%20for%20Registered%20Sex%20Offenders%20%28CHLP%29.pdf (last visited Dec. 13, 2022). "Failure to perform any of the registration obligations is a felony level crime. A first conviction is punishable as a Class E felony; a second or subsequent conviction is punishable as a Class D felony." NYS Division of Criminal Justice Services, *Frequently Asker Questions: New York State's Sex Offender* Registry. https://www.criminaljustice.ny.gov/nsor/faq.htm (last accessed Dec. 13, 2022).

ADA, even if the preliminary violation was due to the actions of Louisiana rather than NY. There is no meaningful individualized review[9] of each case involving an out of state registrant. And to reiterate, those that are required to register as sex offenders are subject to stigma and there are limitations on their ability to participate as a full member in society, meaning this is not a technical violation but rather one that causes real and actual harm. *Diaz,* 32 N.Y.3d at 548.

Consistent with the first brief filed by the People in this case, appellate courts have been found to have the ability to review the determinations of the Board of Corrections that a person must register as a sex offender after moving to NY State.[10] *See People v. Liden*, 19 N.Y.3d 271 (2012). It could be argued that the issue of compliance with the ADA was not raised in the lower court and therefore was waived. However, the issue of Mr. Suttle being targeted specifically due to his HIV status was raised ad nauseam in his initial filing to dismiss the case requiring him to register. In addition, the Court of Appeals is now on notice that the protections of the ADA are at issue. If the Court of Appeals chose to not address the ADA issue due to finding it was waived, it would therefore be engaging in the very form of discrimination that the ADA was crafted to prevent, failure by the state (in this case, the judiciary) to ameliorate discrimination. At minimum, Cert should be granted so the Court of Appeals can grapple with this issue and thereby comply with the ADA.

[9] It is this entire lack of individualized review, explicitly required by the ADA, which renders the SORA section violative **as applied**, even if the court finds that the statute itself can stand.

[10] The People filed an amended brief claiming that they had been mistaken as to the jurisdiction of the courts to review the findings by the Board. ADA's Am.Resp. to Def. Mot. To Dismiss at 2, *People v. Suttle*, SCID No. 30092/14 (N.Y. Sup. Ct. 2014). However, in this amended brief they mistake the underpinning for the court's holding. The court did not determine whether or not the decision of the board was reviewable due to the existence of a technical mistake of law, but instead in support of judicial economy. *See People v. Linden*, 19 N.Y.3d 271 (2012).

C. **The Louisiana Law "Intentional exposure to HIV" violates the ADA both facially as well as applied by Louisiana Courts.**[11]

The Louisiana law criminalizing "Intentional exposure to HIV" is facially discriminatory and violates the ADA. The Louisiana law now reads: "No person shall intentionally expose another to the human immunodeficiency virus (HIV) through sexual contact without the knowing and lawful consent of the victim, if at the time of the exposure the infected person knew he was HIV positive." LA R.S. § 14:43.5 (2018)[12]The law specifically targets people living with HIV, and as noted above, HIV is a protected disability under the ADA. *See Bragdon v. Abbot*, 524 U.S. 624 (1998). The singling out, and treating differently, of disabled people is unequivocally discriminatory and exactly what the ADA was crafted to combat.[13] And not only does Louisiana take the step of targeting people with HIV for criminalization, it is one of *five* states that include the additional penalty of requiring that people so discriminated against have to register as sex offenders for engaging in sexual activity with another consenting adult.

Even if the Louisiana law did not facially violate the ADA through targeting people living with HIV for additional punishment, there is no provision in the law for any individualized assessment of whether a person's treatment when so charged violates the ADA. LA R.S. § 14:43.5 (2018) Assuming, in arguendo, that the Louisiana law as written passes muster, it still

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11 At the lower appellate level the AG's office had argued that in order to address the issue of registration that Mr. Suttle would have to get his conviction overturned in Louisiana as a violation of equal protection. See Memorandum of Law of New York State Board of Sex Offenders as Amicus Curiae, *People v. Suttle*, SCID No. 30092/14 (N.Y. Sup. Ct. 2014). Although this section addresses the history, and by implication the equal protection issues of the Louisiana statute, we do not adopt the AG's argument. For the purposes of the amicus, any discussion of Louisiana is only to discuss what the basis is for the statute that NY is in fact enforcing. It is the actions of NY courts, and not those of Louisiana, which the court is being asked to review.

[12] At the time of his plea in 2009 the law referred to "intentional exposure to the AIDS virus" in even more grievous contravention of known science at the time. LA Rev Stat § 14:43.5 (1993)

[13]*Supra* note 4 at 1581-1582.

fails the *Arline* test as applied. *See School Board of Nassau County v. Arline,* 481 U.S. 1024 (1987). As detailed above, the *Arline* test, promulgated by the United States Supreme Court, requires government actors, including the judiciary, to look at the risk of transmission of a communicable disease in order to assess whether an individual is "otherwise qualified" and therefore protected by the ADA. *Id.* At 1024. Basically, the government is permitted in highly limited circumstances to impose such limitations on people with communicable diseases as are necessary to protect others from transmission. However, the Louisiana courts eschew any kind of individualized review to determine risk, applying their law under a strict liability standard; the only element required is that one knows that they are living with HIV, not that they have intent to transmit.[14] The Louisiana Courts, in interpreting this law, have included conduct that is almost statistically impossible to cause transmission (which could include such conduct as holding hands). *See State v. Gamberella,* 633 So.2d 595 (La. App. 1 Cir. 1993). Therefore, the Louisiana law by criminalizing behavior with negligible risk of transmission of a communicable disease fails the *Arline* test and therefore as applied violates the ADA.

D. The New York statute violates the ADA by further punishing protected disabled people, even if their conduct was initially criminalized elsewhere.

The Suttle case provides one example of why the "out of state" registrant provision of SORA violates the ADA by being too broad and should be struck down. NY amended SORA to

[14] And this is one reason why laws that criminalize people living with HIV are actually a menace to the public health disguised as a mode of protection. It disincentivizes people from getting tested, as if they do not know they have HIV, they can never be found to be in violation of these laws, in direct contravention of public health policy. The Center for HIV Law and Policy, HIV Criminalization in the United States (2022). https://www.hivlawandpolicy.org/resources/map-hiv-criminalization-united-states-chlp-updated-2022 (last visited December 13, 2022). Even in 1987, when the Louisiana law was initially passed during the height of the AIDS panic, Louisiana health professionals argued against the passing of this law for exactly this reason. Louisiana State Archives, *1987 Legislative Session, Week Four: Louisiana the State We're in.* (May 15, 1987). http://ladigitalmedia.org/video_v2/asset-detail/LSWI-1030

streamline review of out of state registration cases. *People v. Diaz*, 32 N.Y.3d 538, 541 (NY 2018). But now as written, the NY law encourages the NY courts to engage in discriminatory behavior in contravention to the protections of the ADA. The NY Courts cannot just collectively bury their heads in the sand and ignore the fact that the underlying Louisiana conviction for which Mr. Suttle has to now register as a sex offender in New York is clearly due to a discriminatory law.[15] Pursuant to the ADA, the NY courts must engage in an individualized analysis of whether requiring Mr. Suttle to register as a sex offender by NY is due to discrimination on the basis of his disability. NY cannot forgo its obligations under the ADA, whose protections are mandated to be applied broadly, merely because Louisiana did it first. Therefore, due to being overbroad, and thereby complicit in continuing unlawful discrimination, the "out of state registrant" portion of SORA must be struck down. Or, at minimum, it should be found that due to a lack of individualized review in Mr. Suttle's case, that the lower court erred in its review of SORA as applied to Mr. Suttle.

II. The Appellate Division's Ruling on the Level of Discretion Afforded the New York Board of Examiners and the New York City District Attorney Is In Conflict With Critical New York State Law and Policy Governing the Treatment of HIV and Other Disabilities

A. While a number of other states target HIV for exceptional, negative treatment under the criminal law, only five states actually attach mandatory sex offender status to laws that make consensual sex following an HIV diagnosis a crime

[15] Criminal laws that specifically target people living with HIV are currently under challenge through DOJ in two states, Ohio and Tennessee, as violative of the ADA. Complaint by CHLP, *Discrimination by the State of Tennessee on the Basis of the Disability of HIV (Jan 21, 2022); Complaint by CHLP,* Discrimination by the State of Ohio on the Basis of the Disability of HIV (Jan. 21, 2022). *Complaints on file with author.*

In the last five decades criminal law responses to the HIV epidemic have remained rooted in fear, stigma, and ignorance rather than in science and principled application of basic requirements of *mens rea* and proportionality. The general public's profound lack of literacy concerning the actual risks, routes and realities of treatment for HIV transmission, compounded by moral judgment, homophobia and racism, continues to fuel the enactment and enforcement of disease specific punitive criminal laws.[16] Thirty states and several U.S. territories have laws that call for the prosecution and imprisonment of people living with HIV for conduct that is perfectly legal or would be only a minor offense (e.g., spitting on someone) for people who have not tested positive. HIV is criminalized via alleged exposure, non-disclosure, or transmission of HIV.[17] Importantly, NY State does not have a law that directly targets people living with HIV for criminalization or enhanced punishment. These laws, and their penalties, are solely promulgated by the states; there is no parallel federal crime or penalty.[18]

As stigmatizing and unwarranted as these laws are, only *five* states —South Dakota, Louisiana, Arkansas, Tennessee, and Ohio— take the additional, extreme step of requiring persons convicted under their HIV specific criminal law to register as a sex offender.[19] In fact, sex offender registration in these states is mandated not only in the absence of any evidence of

[16] Bebe J. Anderson, JD, *HIV Stigma and Discrimination Persist, Even in Health Care*, JAMA (Dec. 2009), https://journalofethics.ama-assn.org/article/hiv-stigma-and-discrimination-persist-even-health-care/2009-12. Anne L. Stang et. al., *The Health Stigma and Discrimination Framework: a Global, Crosscutting Framework to Inform Research, Intervention Development, and Policy on Health-Related Stigmas*, BMC MEDICINE (2019). https://bmcmedicine.biomedcentral.com/articles/10.1186/s12916-019-1271-3.

[17] The Center for HIV Law and Policy, HIV Criminalization in the United States (2022) https://www.hivlawandpolicy.org/resources/map-hiv-criminalization-united-states-chlp-updated-2022 (last visited December 13, 2022).

[18] "An offense involving consensual sexual conduct is not a sex offense for the purposes of this title if the victim was an adult." 42 U.S.C. 16911(5)(c)

[19] *Supra* note 17.

transmission, but despite the fact that in many cases sexual conduct itself has not even occurred.[20]

B. **Requiring Robert Suttle to register as a sex offender in NY based upon his conviction under a discriminatory Louisiana Law violates NY public policy.**

The *Diaz* court explicitly reserved the issue of whether someone who has to register as a sex offender in another state is required to register as a sex offender in New York if their registration violates NY public policy for "another day." *People v. Diaz*, 32 N.Y.3d 538, 548 (2018) To echo Defendant's brief in support of the granting of Cert, that day is today. To continue to force him to register would be to swim upstream against the current of New York law which has moved progressively away from laws that criminalize people on the basis of historically stigmatized identities and health. [21]

C. Since the Supreme Court ruling in *Dobbs*, the NY Legislature has passed laws specifically to avoid being party to other states' laws that are contrary to public policy.

The concept of Full Faith and Credit was enshrined in Article IV of the US Constitution as a result of the chaos that existed previously under the Articles of Confederation, where states vied against each other for sovereignty, and ignored each other's laws.[22] However, it has long been accepted that Full Faith and Credit is not absolute, that one state does not need to enforce the statute of another within its own borders if to do so would be in opposition to its own public

[20] Centers for Disease Control and Prevention, HIV and STD Criminal Laws. https://www.cdc.gov/hiv/policies/law/states/exposure.html (last visited December 2, 2022).
[21] And continues to evolve away from the criminalization of people with HIV. Trudy Ring, *Jessica González-Rojas's Bill Would Decriminalize the Sexual Activity of People Living with Sexually Transmitted Infections,* ADVOCATE (Dec. 1, 2022). https://www.advocate.com/politics/2022/12/01/new-york-state-lawmaker-file-sti-decriminalization-bill
[22] Cong. Rsch. Serv., *Passage of Orders, Resolutions, or Votes*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIV-S1-2/ALDE_00013016/#:~:text=Article%20IV%2C%20Section%201%3A,proved%2C%20and%20the%20Effect%20thereof (last visited December 13, 2022).

policy. *Pac. Emps. Ins. Co. v. Indus. Accident Comm'n of State of California,* 306 U.S. 493, 502 (1939) ("It has often been recognized by this [Supreme] Court that there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy."). As federal judicial protections for certain rights, especially those found applicable under a 14th Amendment privacy analysis, are unceremoniously stripped away it has become important for states such as New York to clearly establish and enforce protections for their citizens consistent with their internal public policy. To quote Florence Reece, "Which side are you on?"

And that question is likely to be asked over and over again as we make our way through a post-*Dobbs* world. *See Dobbs v. Jackson Women's Health Organization,* 142 S.Ct. 2228 (2022). Prior to the lead up to that decision last spring (including recent judicial appointments), most pundits believed that even while access to abortion was being constricted in a piecemeal fashion across the country[23], that the *Roe* decision itself was unlikely to be overturned. But then, suddenly, it was. Laws all over the country limiting, if not abolishing, the right for a person to have an abortion that *had remained on the books but unenforceable* were suddenly the law of the land in states across the country.[24]

New York State's response to the *Dobbs* decision was to swiftly enact a series of statutes that not only enshrined New Yorker's right to choose, but unequivocally established protections for the members of their medical community who will likely be called upon to perform abortions on people who come to NY for healthcare banned in their home states. 2022 NY Senate-

[23] Center for Reproductive Rights, *After Roe Fell: Abortion Laws by State*, (2022). https://reproductiverights.org/maps/abortion-laws-by-state/new-york (last visited December 13, 2022).

[24] This in direct contrast to NY state, where abortion was legalized prior to the Roe decision and therefore remained so. *Id.*

Assembly Bill S.9039A, A.10094A. 2022 NY Senate-Assembly Bill S.9077A, A.10372A. 2022 NY Senate-Assembly Bill S.9079B, A.9687B. The passage of these protections was not only based on a gestational parent's privacy rights and bodily autonomy, the "right to choose," but also in acknowledgement that:

1. Allowing access[25] to abortions is sound public policy, grounded in a historically and scientifically based public health model whereas banning them has negative repercussions on public health, and
2. Many states were passing abortion bans due to a "moral imperative" instead of scientifically proven fact.

NY Assembly Debate on Assembly Bill A09718-B , June 2, 2022 at 276. The aforementioned laws not only impose a variety of conditions on, or outright ban of abortion in states that are passing them, they also codify criminal penalties due to the medical condition of pregnancy. Many states are considering laws to criminalize people going out of state for abortions, and those that facilitate that travel. *Id.* at 278.[26] It is not a coincidence that a Louisiana statute is the underlying basis for Mr. Suttle's conviction and that Louisiana is also a state that currently criminalizes abortions. What are the broader policy implications that a Louisianan would be able to access a legal abortion in New York but that same Louisianan would not be able to access respite from another similarly draconian law?

When New York passed the six bills to ensure the individual right to abortion access and protect abortion providers in the state, they specifically did so in direct contrast to other states' actions. As Representative Rosenthal stated, "Well, the problem is that in this brave new world

[25] Authors note: Along with comprehensive universal healthcare

[26] See also John Kruzel, *Battle Lines Emerge Over Out-Of-State*, The Hill, July 14, 2022, https://thehill.com/regulation/3558330-battle-lines-emerge-over-out-of-state-abortion/ (last accessed December 7, 2022).

where other states have enacted draconian laws that thankfully we don't have in New York State or we have protections here, one can never be too careful in trying to convey protections to our healthcare providers here, and that's what this bill is doing." NY Assembly Debate on Assembly Bill A09687-B , June 2, 2022 at 255. And the laws are draconian due to the values they embody, values contrary to those that NY wants to codify into law. Representative Glick put it clearly, "[W]e'd rather that other states didn't behave in the way they are behaving in a punitive and irrational fashion based on imposing religious beliefs on everybody else." NY Assembly Debate on Assembly Bill A09718-B, June 2, 2022 at 276.

D. The Louisiana law criminalizing intentional exposure to HIV is a perfect example of a law contrary to well established NY public policy that NY courts should not enforce.

The Louisiana statute criminalizing the intentional exposure of a person to HIV and subjecting that person to registration as a sex offender is a similarly draconian law. The law specifically criminalizes exposure, not transmission, in order to cast the widest net possible. LA R.S. § 14:43.5 (2018). And, to reiterate, although Louisiana is one of 30 states that explicitly criminalize people living with HIV (of which NY is *not* one[27]) it is only one of five states where someone so convicted is required to register as a sex offender. The Louisiana Law is explicitly rooted solely in a purely "moral" or religious grounding, and not anything scientific, as made clear by the Louisiana court in *Gamberella*. The *Gamberella* Court specifically found that the statute is one of strict liability, not requiring any proof of intent to transmit, or even that the "behavior" engaged in could result in transmission (such as holding hands)[28]. *See State v.*

[27] And NY is currently in the process of amending its laws so people living with HIV cannot be prosecuted under the general STI transmission law. Ring, *supra* note 21.

[28]The Center for HIV Law and Policy, *Arrests and Prosecutions for HIV Exposure in the United States*, (2019), https://www.hivlawandpolicy.org/sites/default/files/Chart%20of%20U.S.%20Arrests%20and%20Prosecu

Gamberella, 633 So.2d 595 (La. App. 1 Cir. 1993). If the purported purpose of laws criminalizing people with HIV is to protect "the community," but the law does not require a viable threat to the community (ie, that there is no risk of transmission) then there *must* be an ulterior motive to the law not explicitly stated. And it is that ulterior motive, deeply rooted in a hatred of the "undesirables" who are seen as indiscriminate vectors for disease, that is contrary to NY public policy.

That ulterior motive was clearly on display when the bill, one of the first of its kind, was being debated in the Louisiana legislature. The bill's lead sponsor, Representative Kernan Hand, said during a committee hearing that "the purpose of this bill is to deter those infected with [HIV] from remaining sexually active in the community."[29] Also, the disproportionate punishment levied upon people convicted under this statute shows the vilification of people living with HIV. An individual convicted under this statute in Louisiana faces up to 10 years in prison, whereas one convicted of *negligent homicide* faces only 5 years.[30]

It is not only the history that prompted the codifying of the law that is problematic, it is also the discriminatory way that it has been enforced that mandates New York refuse to uphold its provisions. The Williams Institute found that since 2011, 100% of the people arrested under LA R.S. § 14:43.5 (2018) were Black, making the statute another discriminatory tool used to over police Black communities.[31] Furthermore, aggregating data since 1998, 75% of all

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tions%20for%20HIV%20
Exposure%20in%20the%20United%20States%20%28June%202019%29_0.pdf (last visited December 13, 2022).

[29] Nathan Cisneros and Brad Sears, *Enforcement of HIV Criminalization in Louisiana (2022)* (last accessed December 7, 2022). Citing La S. Comm. on Judiciary C Debate on HB 1728, June 23, 1987.

[30] Rachel Brown, *When the Body is a Weapon: An Intersectional Feminist Analysis of HIV Criminalization in Louisiana*. Berkley Journal of Gender, Law, & Justice (2020)(in depth analysis of the history and impact of the "Intentional Exposure to HIV law in Louisiana).

[31] Cisneros and Sears, *supra* note 29.

registrants on the Louisiana sex offender registry due to an HIV related crime were Black.[32] This blatant discrimination on the basis of race is contrary to New York public policy.[33]

E. **The targeting of people living with HIV by Louisiana, and the levying of additional penalties such as sex offender registration, is in direct contravention to the goals and policies of the State of New York.**

In 2015 NY state compiled a report entitled "Ending the Epidemic: 2015 Blueprint to End AIDS."[34] This document outlines strategies to reduce the stigma of having an HIV diagnosis in order to encourage testing and people knowing their status. Similarly, under NY State Human Rights Law, people living with HIV represent a class of people with a protected disability.[35] On their website, the New York State Division of Human Rights details how to file a complaint if you have been discriminated against on the basis of your HIV status.[36] Laws targeting people living with HIV only increase stigma, and discourage testing, in direct opposition of the goals of NY State. Even though NY does not have a law that specifically targets people with HIV, State Legislators are currently engaged in an effort to close the loophole that has permitted people living with HIV to be prosecuted under general crimes against the person.[37] NY state government has invested millions in their campaign to end the epidemic, and if NY courts

[32] Cisneros and Sears, *supra* note 29.
[33] It also raises concerns under the Due Process and Equal Protection provisions of the US Constitution as well as New York State law, though this Amicus in support of Cert is only tangentially touching on the Constitutional implications.
[34] New York State Department of Health, *2015 Blueprint on Ending the AIDS Epidemic*, (2015), https://www.health.ny.gov/diseases/aids/ending_the_epidemic/docs/blueprint.pdf (last visited December 13, 2022).
[35] New York State Department of Health, *HIV/AIDS Discrimination*, https://dhr.ny.gov/system/files/documents/2022/05/hiv_aids.pdf (last visited December 13, 2022).
[36] *Id.*
[37] Ring, *supra* note 20.

continue to tacitly criminalize those people living with HIV such as Robert Suttle, those millions are just going to waste.[38]

F. **It is likely that New York Courts will continue to be called on to determine whether an out of state law is enforceable when it conflicts with New York State public policy**

Based on the *Dobbs* decision and the flurry of court cases which have followed, it is likely that the Suttle case will not be the last time NY Courts have to examine whether the action they take is tantamount to enforcing laws of other states, contrary to well settled NY public policy against their own residents. As was true in the abortion context, many retrogressive state laws are still on the books, just waiting for the cases that rendered them unconstitutional to be overturned. And some laws that were overturned still continue to negatively impact people who were criminalized under them to this day.

For example: in 1980, the Court in *People v. Onofre* found that laws criminalizing sodomy were contrary to the equal protections of the NY Constitution and struck down the statute. *See People v. Onofre*, 51 N.Y.2d 476 (NY App 1980). By contrast, it was not until 2003 that the statutes criminalizing sodomy were rendered unenforceable across the United States[39] by the US Supreme Court in *Lawrence*. *See Lawrence v. Texas*, 539 U.S. 558 (2003). The Court held the statute facially unconstitutional, as it "further[ed] no legitimate state interest which

[38] For example, the City of New York invested $23 million dollars in 2016, adopting the recommendations of the Statewide Blueprint. New York, *On World Aids Day, Mayor de Blasio, Speaker Mark-Viverito & City Council Announce NYC Commitment to End the Epidemic* (Dec. 1, 2015). https://www.nyc.gov/office-of-the-mayor/news/896-15/on-world-aids-day-mayor-de-blasio-speaker-mark-viverito-city-council-nyc-commitment-to#/0 (last accessed December 14, 2022).

[39] The law for "Crimes Against Nature" is still on the books in Louisiana. *See* Gay and Lesbian Archives of the Pacific Northwest, *Sodomy Laws*, https://www.glapn.org/sodomylaws/usa/louisiana/louisiana.htm (last accessed December 8, 2022). It was only recently, after extensive legislation, that people were able to get themselves removed from the Sex Offender Registration due to a conviction for sodomy. Center for Constitutional Rights, *Louisiana to Remove Hundreds of Individuals Unconstitutionally Placed on Sex Offender Registry*, https://ccrjustice.org/home/press-center/press-releases/louisiana-remove-hundreds-individuals-unconstitutionally-placed-sex (last accessed December 8, 2022).

[could] justify its intrusion into the personal and private life of the individual." *Id.* At 578. The *Onofre* court, 23 years earlier, came to the same conclusions regarding limitations on unmarried couple's consensual sex lives and their lack of ability to harm the public, morally or otherwise. *See Onofre,* 51 N.Y.2d 476. So, it is well established public policy in NY that consensual sodomy is not a crime.

However, there are still people on state sex offender registries due solely to convictions for consensual sodomy. The most recent case to challenge this practice, in Idaho, *Doe v. Wadsen,* just settled November 10, 2022.[40] Under the terms of the settlement, Idaho has to come up with a plan to remove all of the people on their sex offender registry for crimes against nature, or consensual sodomy; in the meantime, it appears that everyone except the three plaintiffs in the suit remain on the registry.[41] If an Idahoan in that situation moved to NY, it would be clearly against NY public policy for them to have to register as a sex offender. Why should Robert Suttle be any different? The *Diaz* case left the door open for such a decision based on public policy.

IV. **Conclusion**

The Court should grant Cert for this appeal not only to cure a substantial injustice against Mr. Suttle, but also to prevent similar injustice moving forward. The provision of SORA requiring out of state registrants to automatically register in NY should be struck down due to sweeping too many people under its umbrella, and making NY courts liable for enforcing other states laws that are discriminatory and against NY state policy. It is clear that Mr. Suttle's conviction in

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[40] Kelsie Rose, *State of Idaho Settles ALU Lawsuit Over Anti-sodomy Law* https://www.kivitv.com/news/state-of-idaho-settles-aclu-lawsuit-over-anti-sodomy-law-use-of-sex-offender-registr, (last visited December 13, 2022). Amicus filed in this 2021 case can be found *Doe & Menges. v. Wasden*. Brief amicus curiae of Lambda Legal 11 November 2022, https://www.lambdalegal.org/in-court/legal-docs/id_20221111_amicus-brief.

[41] Rose, *supra* note 40.

Louisiana was in clear contravention to the important protections of the ADA, and that is only compounded by the actions of NY. Although NY can do nothing about the underlying injustice, the court can choose to end Mr. Suttle's nightmare. Doing so would also provide further proof that New York is not going to sacrifice supporting their public policy on the alter of "Full Faith and Credit," enforcing other states retrogressive policies, may they be about abortion, sodomy, or any other right previously found to be enshrined in the 14th Amendment of the US Constitution. These are important issues in an ever-shifting landscape, and the Court should grant Cert to give them the full consideration and weight they deserve.