IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	Supreme Court Case No.: 2016-0903
	*	
Appellee,	*	On Appeal from the
	*	Hamilton County Court of
vs.	*	Appeals, First Appellate
	*	District
ORLANDO BATISTA,	*	
	*	Court of Appeals
Appellant.	*	Case No. 150341

MEMORANDUM IN SUPPORT OF JURISDICTION OF ACLU OF OHIO FOUNDATION, INC., CENTER FOR HIV LAW AND POLICY, OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, OHIO PUBLIC DEFENDER, CUYAHOGA COUNTY PUBLIC DEFENDER, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, CENTER FOR CONSTITUTIONAL RIGHTS, NATIONAL CENTER FOR LESBIAN RIGHTS, HUMAN RIGHTS CAMPAIGN, GLBTQ LEGAL ADVOCATES AND DEFENDERS (GLAD), NATIONAL LGBTQ TASK FORCE, GAY AND LESBIAN MEDICAL ASSOCIATION, AMERICAN ACADEMY OF HIV MEDICINE, TREATMENT ACTION GROUP, NUEVA LUZ URBAN RESOURCE CENTER as *AMICI CURIAE* in SUPPORT OF APPELLANT

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND WHY LEAVE TO APPEAL SHOULD BE GRANTED

It is time to move away from animus and fear and ignorance.

Under R.C. 2903.11(B)(1), a person who knows him or herself to be HIV positive and engages in sexual conduct without first informing the other person of his or her HIV status is guilty of felonious assault, a felony of the second degree punishable by up to eight years in prison.

When it was believed that being HIV positive led inexorably to having AIDS and that persons with AIDS were doomed to die within just a few years, there were calls for something to be done. Scientific understanding of the details of HIV transmission was developing, but the knowledge did not readily filter its way to lay people who too readily accepted that AIDS, and therefore HIV positive status was a disease spawned by homosexual men, intravenous drug users, and Haitian immigrants - people whose circumstance elicited little sympathy. But it was clear that something had to be done.

And so, in fear and ignorance and too-often animus, states enacted laws which had little effect on reducing HIV transmission rates but disadvantaged those of whom we disapproved. R.C. 2903.11(B)(1), is such a law. It neither mandates nor encourages safe sex practices. It actually provides a disincentive to getting tested - and thereby, and if necessary, treated - for HIV. It does little to achieve its nominal purpose. Studies show that similar laws actually increased the rates of HIV transmission.

As we now know, the law bears no rational relationship to its purpose. Yet it impinges on the rights and interests of persons who fall under its umbrella. It violates the right to equal protection of the laws of people who know themselves to be HIV positive. It compels their speech in violation of the First Amendment. It violates the Americans With Disabilities Act and Section 504 of the Rehabilitation Act.

R.C. 2903.11(B)(1) does this while serving no meaningful goal. It uses government resources to

prosecute and then house in prison people who in some instances may have done absolutely nothing that could - even in theory - have transmitted the virus.

This case matters, presenting an issue of great public interest. Reducing Ohio's HIV transmission rates is a universally desired goal. Ohio is one of the leading states in the country for the number of HIV diagnoses, ranking 12 of 50 in 2013. Centers for Disease Control, 2015 Ohio Health Profile, https://www.cdc.gov/nchhstp/stateprofiles/pdf/ohio_profile.pdf. R.C. 2903.11(B)(1), enacted in 2000, has not reduced these rates. It may even be causing them to increase. Since it was enacted, HIV infections have increased from approximately 620 in 2000 to approximately 925 in 2010. See History of Ohio's Aids Epidemic, https://www.odh.ohio.gov/~/media/ODH/ASSETS/Files/health%20statistics%20-%20disease%20-%20hiv-aids/12OhioChart.pdf. Each year from 2010 to 2014, has brought approximately 1000 new HIV infections. Ohio HIV/AIDS Surveillance Data, https://www.odh.ohio.gov/~/media/ODH/ASSETS/Files/health%20statistics%20-%20disease%20-%20hiv-aids/WebTables12.pdf. The law simply has no apparent effect in reducing transmission of HIV, and may in fact have contributed to the increase in the rate of transmission.

It is time for this Court to say, "Enough." As Justice Brandeis noted, even the best of intentions can be problematic in execution:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479, 48 S.Ct. 564, 72 L.Ed. 944 (1928)(Brandeis, J., dissenting)

The Court should accept jurisdiction, adopt Appellant's or *Amici's* propositions of law, and declare R.C. 2903.11(B)(1) unconstitutional.

STATEMENT OF *AMICI* INTERESTS

Amici Curiae are organizations both Ohio-based and national with varied interests, perspectives, and constituencies. Their institutional foci range from civil liberties and civil rights broadly construed,[1] to criminal justice,[2] to social and advocacy services for those facing discrimination due to sexual and gender identity and status,[3] and HIV status.[4] They come together to urge the Court to hear this case because they all share a belief that R.C. 2903.11(B)(1) is both unconstitutional and unjust.

The statute targets a particularly vulnerable class, persons who know themselves to be HIV positive, singling out the members of that class for punishment based on outmoded, outdated understandings of HIV - its course, treatment, and transmission. Invidiously discriminating against that class of persons, R.C. 2903.01(B)(1) effectively subjects their private, consensual sexual behavior to invasive government scrutiny and criminalization. By its terms, it violates the Ohio and United States Constitutions by denying those persons the equal protection of the laws and compelling them to engage in particular speech. And it violates both the Americans with Disabilities Act and the Rehabilitation Act and Ohio's statutory prohibition of discrimination against persons with disabilities.

STATEMENT OF THE CASE AND FACTS

Amici accept and adopt the "Statement of the Case and Procedural Posture" as set forth in appellant Batista's Memorandum in Support of Jurisdiction.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

When Orlando Batista engaged in sexual conduct with his girlfriend, he did not first "disclos[e] his HIV-positive status to her." *State v. Batista*, 1st Dist. Hamilton No. C-150341, 2016-Ohio-2848, ¶

[1] ACLU of Ohio Foundation, Center for Constitutional Rights.
[2] National Association of Criminal Defense Lawyers; Ohio Association of Criminal Defense Lawyers; Ohio Public Defender; Cuyahoga County Public Defender.
[3] National Center for Lesbian Rights; Human Rights Campaign; Legal Advocates and Defenders for the LGBTQ Community (GLAD); National LGBTQ Task Force; Gay and Lesbian Medical Association.
[4] American Academy of HIV Medicine; Center for HIV Law and Policy; Treatment Action Group; Nueva Luz Urban Resource Center.

1. Under R.C. 2903.11(B)(1), Batista's failure to disclose his status before sex was felonious assault, a second degree felony for which he received the maximum penalty of eight years in prison.

Failing to disclose HIV status to one's partner prior to sexual conduct first became a felony in 2000. See Am.H.B. 100, 123rd General Assembly. Whatever the understanding of HIV-positive status may have been then, as detailed below and as was shown at a hearing in the trial court in Batista's case, the evidence is now absolutely clear that being HIV positive is no longer a death sentence. And transmission of the virus can be largely obviated by both safe-sex practices and pharmacological intervention.

Simply, and regardless of whether there was once a seemingly rational basis for R.C. 2903.11(B)(1) criminalization of failure to notify, the law now is irrational. Because it is irrational, its targeting of a single, discrete, category of persons with communicable diseases -- those who have been tested and informed of their status as HIV-positive -- violates their rights to equal protection of the law. Because it compels particular communication and is not the least restrictive means to its end, R.C. 2903.11(B)(1) is a content-based regulation of speech that fails strict scrutiny under the federal and Ohio constitutions. Finally because it imposes special burdens on persons because of their HIV-positive status it constitutes discrimination in violation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

> **Proposition of Law No. 1**: R.C. 2903.11(B)(1) violates the Equal Protection Clauses of the United States and Ohio Constitutions.

No state may deny a "person within its jurisdiction the equal protection of the laws." Fourteenth Amendment to the U.S. Constitution, Section 1. The very purpose of government is to provide people "equal protection." Article I, Section 2, Ohio Constitution. At base, the Equal Protection Clauses require that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

R.C. 2903.11(B)(1) violates that stricture.

Amici recognize that the courts have never held that *every* difference in treatment violates equal protection principles. Whether any particular difference in treatment is a violation depends on the nature of the classification and the interests at issue. Where the disparate treatment is based on suspect classifications or burdens fundamental rights, courts apply strict scrutiny, finding a violation unless the difference in treatment is "narrowly tailored . . . [and] necessary to further a compelling governmental interest." *Grutter v. Bollinger*, 539 U.S. 306, 326-327, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). In other cases, the measure may require that the classification "serve important governmental objectives and be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). Even where the classification is of no constitutional moment in itself, there must be at least a rational relationship between the differential treatment and a "legitimate government interest." *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257; *State v. Williams*, 136 Ohio St.3d 65, 2010-Ohio-2453, 930 N.E.2d 770, ¶ 39 (citing cases).

R.C. 2903.11(B)(1) provides

> (B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:
>
> (1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct.

Violation is felonious assault, a felony of the second degree allowing a sentence of up to eight years in prison.

The statute treats HIV positive persons differently than all other people, including those with other communicable diseases even those with sexually transmitted diseases. Persons who are HIV positive, and they alone, are required under pain of criminal sanction to inform their

partner of their HIV status prior to engaging in sexual conduct. The requirement is without qualification. It does not matter whether the HIV-positive person takes precautions to reduce or eliminate the threat of transmission. Wearing a condom, for instance, is not a defense. It does not even matter if the sexual conduct does not include touching with a body part.[5]

I. Levels of Scrutiny

State action that distinguishes between similarly situated persons on the basis of suspect classifications, *see, e.g., Grutter, supra*, at 326 (race); *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) (alienage), or which burdens the exercise of fundamental rights, *see, e.g., Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (right to travel); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969) (right to vote), is subject to strict scrutiny. Under strict scrutiny, a law will violate the Constitution unless it is both "necessary to further a compelling governmental interest," and "narrowly tailored" to further that interest. *Grutter* at 327, 326.

A somewhat less rigorous analysis is applied to state action that significantly interferes with a fundamental right. In *Zablocki v. Redhail*, 434 U.S. 374, 388, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), the Court held, "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." And in *Doe v. City of New York*, 15 F.3d 264, 269 (2d Cir. 1994), applying heightened scrutiny to disclosure of HIV status, the court explained that the relevant government interest must be "'substantial and

[5] "'Sexual conduct' means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body *or any instrument, apparatus, or other object* into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." R.C. 2907.01(A) (emphasis added).

must be balanced against [petitioner's] right to confidentiality'" (internal citation omitted).

Where neither strict nor heightened scrutiny applies, state action is reviewed to determine whether the action "bear[s] some rational relationship to legitimate state purposes." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). Although deferential, even under rational basis review "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, *supra*, at 445. At a bare minimum, equal protection requires that State action be founded on objectively reasonable facts which support both the burdens imposed on the classified group and its distinction from other, similarly situated groups. *Vance v. Bradley*, 440 U.S. 93, 111, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979).

Because prejudice towards a politically disfavored group is invariably arbitrary, State action motivated by this purpose fails even rational basis review. As the Court held in *Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973), "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest" (emphasis *sic*) (internal citation omitted). The "desire to harm" need not be explicit. Thus, in *Moreno* the Court looked to the classification's "practical effect," which it found "simply does not operate so as rationally to further [the asserted State interest.]" A classification, then, will manifest prejudice when it "singles out" a particular group among others that are similarly situated, without justification. *Romer v. Evans*, 517 U.S. 620, 633, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

II. Rational Basis Review

R.C. 2903.11(B)(1) violates equal protection even under this most forgiving of standards

because the statute is not reasonably related to any legitimate state interest. *Amici* do not dispute that preventing HIV transmission is a legitimate interest. Rather, they assert that the statute does not reasonably advance that interest. There are at least three reasons.

First, studies demonstrate that criminalization of failure to notify does not, in fact, reduce the rate of HIV infection. See, *e.g.*, Kim Buchanan, *When Is HIV a Crime?Sexuality, Gender, and Consent*, 99 Minn. L. Rev. at 1247 (2015)(discussing empirical studies showing failure of HIV-specific criminal laws to reduce rate of HIV transmission). And insofar as the laws aim to change behavior they simply fail. In study after study, medical and public health experts unfailingly conclude that HIV- specific criminal laws do not actually promote disclosure of status prior to sex. See Carol L. Galletly, *et al.*, *New Jersey's HIV Exposure Law and the HIV-Related Attitudes, Beliefs, and Sexual Seropositive Status Disclosure Behaviors of Persons Living with HIV*, 102 Am. J. Pub. Health 2135, 2139 (2012) ("awareness that New Jersey has an HIV exposure law had little if any effect on the disclosure behavior of [people living with HIV and AIDS]"); Carol Galletly, *et al.*, *A Quantitative Study of Michigan's Criminal HIV Exposure Law*, 24 AIDS Care 174, 178 (2012) (same, in Michigan).

Indeed, there is evidence that laws like R.C. 2903.11(B)(1) are counterproductive. See Patrick O'Byrne, *et al.*, *Nondisclosure Prosecutions and HIV Prevention: Results from an Ottawa-Based Gay Men's Sex Survey*, 24 J. Nurses Assn. AIDS Care 81, 85 (2013) (in survey of 441 men who have sex with men, finding that between 10-20% reported that awareness of prosecutions for nondisclosure led to *higher* risk behavior).

Nor do laws like the R.C. 2903.11(B)(1) foster behavior that mitigates the risk of transmission. See Scott Burris, *et al.*, *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 Ariz. St. L. J. 467 (2007) (comparing self-reported behavior of people living

with HIV and AIDS and those at risk of infection in Illinois and New York, states with and without HIV-specific criminal laws, respectively, and finding no difference in condom use); Galletly, *Michigan's HIV Exposure Law*, 24 AIDS Care at 178 (Michigan study showed no correlation between awareness of HIV-specific criminal law and either abstinence, number of sexual partners, or condom use). As a result, despite nationwide proliferation of laws like R.C. 2903.11(B)(1), "new HIV cases have remained steady" and, in fact, among young black men who have sex with men, rates "have risen sharply in recent years." Barber & Lichtenstein, *Support for HIV Testing and HIV Criminalization among Offenders under Community Supervision*, 33 Research in the Sociology of Health Care 253, 255 (2015). By any reasonable metric, "[t]he criminalization of HIV has been a strange, pointless exercise in the long fight to control HIV. It has done no good." Burris, *supra*, at 467.

Second, R.C. 2903.11(B)(1) is arbitrary. Its prohibitions are both overinclusive and underinclusive.

It is overinclusive because it fails to distinguish among forms of sexual conduct that have widely differing risks of transmission. Unprotected, receptive anal sex is estimated to transmit infection at the rate of 138 times per 10,000 instances (1.38%), insertive vaginal intercourse is estimated to transmit in only 4 instances out of 10,000 (0.04%), and oral sex, both fellatio and cunnilingus, carry a rate of transmission deemed negligible at beneath 1/10,000 (less than 0.01%). CDC, *Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act* (2016), *available at* http://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html. Other forms of "sexual conduct" (*e.g.*, mutual masturbation, insertion of objects) carry no risk of transmission at all. But R.C. 2903.11(B)(1) makes no distinction among types of sexual conduct, even in the face of these established facts. Failure to inform of HIV status is felonious assault

regardless of what act may be performed or what the risk of transmission may be.

Nor does R.C. 2903.11(B)(1) distinguish among defendants based on factors that measurably affect individual infectiousness and the ability to transmit HIV.[6] This, too, is irrational. For example, treatment through ART can decrease viral load to undetectable levels, reducing an already-low risk of infection by 96%. Cohen M. *et al.*, *Prevention of HIV-1 Infection with Early Antiretroviral Therapy*, 365 New England J. Med. 493 (2011).

The risk of infection through sexual conduct varies from 1.4% per encounter for unprotected anal sex (insertive partner HIV positive person and not in treatment) *at the high end* to a probability that is statistically insignificant for a variety of conduct, including oral sex, sex with a condom, or any sexual conduct where the HIV- positive individual has a low viral load, to zero for some forms of sexual conduct. *See* Galletly & Pinkerton, *Toward Rational Criminal HIV Exposure Laws*, 32 J. L. Med. & Ethics at 328 ("[T]he likelihood of infection — *even if exposure does occur* — is very small for most [sexual conduct] and negligible for the remainder.") (emphasis in original).

The law is therefore irrationally overinclusive because it prohibits a significant amount of conduct that carries no risk of infection. Overinclusiveness of precisely this kind is just the sort of irrationality the Supreme Court has cited in striking down State laws under rational basis review. See, *e.g.*, *Romer*, *supra*, at 635 (striking down Colorado Amendment 2 in part because "[t]he breadth of the amendment is so far removed from [the State's] justifications that we find it impossible to credit them").

[6] Simply, R.C. 2903.11(B)(1) does not distinguish at all. Sexual conduct without prior notification is a felony of the second degree. The circumstances do not matter.

R.C. 2903.11(B)(1) is also arbitrary because it is irrationally underinclusive. See *Romer* at 633 (Colorado Amendment 2 is both "too narrow and too broad" because "[i]t identifies persons by a single trait and then denies them protection across the board"); *Cleburne*, *supra*, at 449-50 (striking down state action where justifications applied equally to groups not similarly burdened). *Amici* are not aware of any Ohio statute requiring , on pain of prosecution, disclosure before conduct of any other communicable disease.

Persons knowingly infected with human papillomavirus (HPV), herpes, tuberculosis, or hepatitis cannot be prosecuted for nondisclosure prior to sexual activity. See Buchanan, *When Is HIV a Crime?*, 99 Minn. L. Rev. at 1279 ("Other potentially deadly communicable diseases, such as hepatitis, human papillomavirus (HPV), or tuberculosis, are not subject to the fear and stigma associated with HIV, and are not in practice treated as crimes").

Third, R.C. 2903.11(B)(1)'s criminalization of non-disclosure is directly at odds with the legitimate government interest of protecting public health and encouraging those at risk of HIV infection to get tested and, as appropriate, obtain treatment. The disincentive to be tested flows directly from the Statute, which criminalizes nondisclosure only from a person "with knowledge that the person has tested positive." One who avoids testing and thus remains ignorant cannot be prosecuted but, also, cannot be treated. "[C]riminal laws create a good reason not to know one's status." *Burris*, *Do Criminal Laws Influence HIV Risk Behavior? supra*, at 514. For that reason, the President's Advisory Council on AIDS called for repeal of HIV-specific criminal laws

which "may discourage HIV testing." *Resolution on Ending Federal and State HIV-Specific Criminal Laws* (calling for repeal of HIV-specific criminal laws because they "may discourage HIV testing").

Finally, that there is no rational basis for R.C. 2903.11(B)(1) suggests that it is based, certainly that it survives, based largely on unlawful animus.

Where State action imposes special burdens on a unique class with no rational basis, "an inevitable inference [arises] that the disadvantage imposed is born of animosity towards the class of persons affected." *Romer* at 634. Such an inference is certainly warranted here. HIV and AIDS first emerged in the United States among gay men and IV drug users. "The stigma and hostility [associated with HIV] are magnified by the fact that HIV is spread by behavior that is itself socially problematic: both drug use and homosexuality are independently subject to stigma and social hostility." Burris, *Surveillance, Social Risk, and Symbolism: Framing the Analysis for Research and Policy*, 25 J. AIDS (Supp.) 120. 125 (2000). "HIV was often described in popular discourse as a 'gay plague.'" Buchanon, *When Is HIV a Crime?*, *supra*, at 1295.

III. Heightened Scrutiny

Although it fails even rational basis analysis, R.C. 2903.11(B)(1) should properly be analyzed under the less deferential standard of heightened scrutiny.

The right to privacy in confidential medical information is recognized by statutes both federal, *e.g.*, the Health Insurance Portability and Accountability Act, and state, *e.g.*, R.C. 2317.02(B) and 2701.243. And the right is derived from the constitutionally protected interest in "avoiding disclosure of personal matters" in the face of government compulsion. *Whalen v. Roe*,

429 US 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977). R.C. 2903.11(B)(1) violates that right. Not only does it mandate disclosure, by prosecution of non-disclosure it makes the disclosure public.

The statute also burdens the fundamental right to consensual sexual privacy. As Justice Kennedy explained, the "right to liberty under the Due Process Clause gives [consenting adults] the full right to engage in their conduct without intervention of the government." *Lawrence v. Texas*, 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). R.C. 2903.11(B)(1) is the very model of government intervention in that conduct.

Proposition of Law No. 2: R.C. 2903.11(B)(1) violates the Free Speech Clauses of the First Amendment and of Section 11, Article I of the Ohio Constitution.

The First Amendment protects not only the right to speak freely but also the right not to speak at all. *Wooley v. Maynard*, 430 U.S. 705, 706, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). The two rights are complementary and when content-based are equally subject to "the most exacting scrutiny." *Turner Broadcasting Sys., Inc. v. Fed. Communications Comm.*, 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (citing cases).

The First District Court of Appeals in reviewing this case rightly recognized that the particular speech compelled by R.C. 2903.11(B)(1) is content-based and therefore "presumptively unconstitutional." And the court recognized that to overcome the presumption, the government must prove that the particular compelled speech is "narrowly tailored to serve compelling state interests." *State v. Batista*, 1st Dist. Hamilton No. 2016-Ohio-2848, ¶ 9 (quoting *Reed v. Town of Gilbert*, 576 U.S. ___, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015)). Although the court of appeals held that the government met its burden, the court was wrong.

Amici do not dispute that preventing the transmission of HIV is a compelling interest. But the compelled speech of R.C. 2903.11(B)(1) is not narrowly tailored to advance that interest.

First, as detailed in the discussion of the first proposition of law, the statute simply does

not materially advance the goal of preventing the transmission of HIV. Indeed, by discouraging people who may be HIV positive from seeking testing so that they will not risk felony sanctions for not telling a partner, it *increases* the likelihood of HIV transmission. And the statute does nothing to ensure safe-sex practices which might actually reduce the likelihood of transmission in the context of sexual conduct.

Second, the statute is overbroad, obligating compelled speech even when the intended sexual conduct *cannot* be a conduit of transmission. One who knows herself to be HIV positive, for instance, must so inform a prospective partner before engaging in mutual masturbation or the insertion of an "instrument, apparatus, or other object into the vaginal or anal opening of another." R.C. 2907.01(A). The state may argue that it would not bring charges in such a case. "But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010).

Proposition of Law No. 3: R.C. 2903.11(B)(1) violates prohibitions against discrimination on the basis of disability.

The Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504) prohibit discrimination based on disability. R.C. 2903.11(B)(1), because it singles out people living with HIV for unique – and uniquely onerous – punishment for otherwise legal conduct based entirely on their HIV status and scientifically unsupportable beliefs about HIV, violates those prohibitions.

As an initial matter, it is clear that the ADA and Section 504 apply to persons who are HIV positive and with AIDS. See, *e.g., Holiday v. City of Chattanooga*, 206 F.3d 637 (6th Cir. 2000). As the court said in that case, "The thesis of the [ADA] is simply this: That people with

disabilities ought to be judged on the basis of their abilities; they should not be judged nor discriminated against based on unfounded fear, prejudice, ignorance, or mythologies; people ought to be judged on the relevant medical evidence and the abilities they have.'" *Id.* at 643 (quoting *Smith v. Chrysler Corp.*, 155 F.3d 799, 805 (6th Cir. 1998)).

To determine whether there has been a violation, the court first asks whether the person with the disability or handicap is "otherwise qualified" to do the task at issue, in this case engage in sexual conduct without criminal sanction. In *School Board of Nassau Cty. v. Arline*, 480 US 273, 288, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987), the Court held that in the context of a contagious disease, the question of qualification should be determined "based on reasonable medical judgments given the state of medical knowledge." As set forth in the discussion of the first proposition of law, persons who are HIV positive are indeed "otherwise qualified."

The disability itself, in this case HIV-positive status, is the basis for the discriminatory obligation. And regardless of the Act's original intent, its terms reflect precisely the types of persistent, intractable stereotypes —misinformation about transmission, assumptions about dangerousness and irreparable outcomes — that trigger Court intervention under the ADA.

CONCLUSION

For the reasons set forth above, this Court should accept jurisdiction, grant the propositions of law, and hold that R.C. 2903.11(B)(1) is unconstitutional.

Respectfully submitted,

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This is to certify that a copy of the foregoing was served by e-mail to Demetra Stamatakos, Counsel of Record for Appellant, at dstamatakos@cms.hamilton-co.org, and to Paula Adams, Assistant Hamilton County Prosecutor, at paula.adams@hcpros.org, this 20th day of June, 2016.

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