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IN THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

ED103217

STATE OF MISSOURI,
Respondent,

v.

MICHAEL L. JOHNSON,
Appellant.

Appeal from the Circuit Court of St. Charles County

Brief of AIDS Law Project of Pennsylvania, American Academy of HIV Medicine, American Civil Liberties Union of Missouri Foundation, Athlete Ally, Black AIDS Institute, Center for Constitutional Rights, Center for HIV Law and Policy, Counter Narrative Project, Dr. Jeffrey Birnbaum, Empower Missouri, GLBTQ Legal Advocates & Defenders, GLMA: Health Professionals Advancing LGBT Equality, Grace, Human Rights Campaign, Missouri AIDS Task Force, National Alliance of State and Territorial AIDS Directors, National Black Justice Coalition, National Center for Lesbian Rights, National LGBTQ Task Force, One Struggle KC, Treatment Action Group, William Way LGBT Community Center, and Women With A Vision as *Amici Curiae* in Support of Appellant

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Jurisdictional Statement

Amici adopt the jurisdictional statement as set forth in the Appellant's brief.

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Authority to File

Amici file this brief with the consent of all parties, and seek leave for permission to file with the Court in the motion filed contemporaneously with this proposed brief.

Interest of *Amici Curiae*

Amici Curiae are 22 organizations and one individual with a variety of institutional backgrounds, interests, and practices — their statements of interest are attached to this brief as Appendix A. What *amici* have in common, and what unites them in filing in this matter, is a belief that HIV-specific criminal laws are discriminatory and violate constitutional rights, protections against disability-based bias and human dignity, and that Michael Johnson has received a horribly unjust criminal sentence. *Amici* have, from a variety of different perspectives, provided medical, mental health, social, and advocacy services for those who suffer discrimination; each believes that an approach rooted in research, science, and objective facts is the best way to counter prejudice and end the HIV epidemic. HIV-specific criminal laws like the one used to punish Mr. Johnson take the opposite approach — they are based in an outdated understanding of HIV and reflect invidious discrimination against people living with HIV. *Amici* thus join here to respectfully ask this Court to apply reason, objective fact, and established constitutional and statutory law to overturn Mr. Johnson's unjust sentence.

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Statement of Facts

Amici adopt the statement of facts as set forth in Appellant's brief.

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Argument

Michael Johnson was convicted of violating section 191.677 of the Missouri criminal code ("the Act" or "the Statute"), V.A.M.S. § 191.677, enacted in 1988 when HIV and AIDS was "growing relentlessly," Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 Ohio St. L. J. 1017, 1018 (1989), and was a "deadly disease for which there [was] no known cure[,]" Hilda Chaski, *et al.*, *The Missouri AIDS Law: A Public Health Perspective*, 53 Mo. L. Rev. 645, 646 (1988). In the ensuing public health crisis, some policy-makers went so far as to call for quarantine. *See* Gregg Gonsalves, *et al.*, *Panic, Paranoia, and Public Health — The AIDS Epidemic's Lessons for Ebola*, 371 New England J. Med. 2348, 2348 (2014) ("Various politicians called for quarantining of anyone who tested positive for HIV . . . . There was an AIDS-quarantine ballot initiative in California, and various states threatened or passed conditional quarantine measures.").

In this environment, a time of "near hysteria about the disease in certain quarters," Gene P. Schultz & Meg Reuter, *AIDS Legislation in Missouri: An Analysis and a Proposal*, 53 Mo. L. Rev. 599, 624 (1988), Missouri passed multi-part legislation "to prevent further spread of HIV," Chaski, *The Missouri AIDS Law*, 53 Mo. L. Rev. at 646. Among the enacted policy provisions was the Act, an HIV-specific criminal measure that requires, under penalty of prosecution, that anyone who is knowingly HIV-positive disclose that fact prior to, among other things, sexual activity. V.A.M.S. § 191.677. Seventeen years later, Appellant Michael Johnson was sentenced under V.A.M.S. § 191.677 to 30 1/2 years in prison.

By the time of Mr. Johnson's conviction, the treatment and prevention of HIV had been transformed; it can be managed with antiretroviral therapy ("ART") in the form of a single, once-daily pill. For most who take their pill consistently, the HIV virus becomes undetectable, reducing transmission risk and preventing the suffering and death that were the frequent results of HIV in the past. *See* Alison Rodger, *et al.*, *HIV Transmission Risk Through Condomless Sex If the HIV Positive Partner Is on Suppressive ART: PARTNER Study*, Presentation, 21st Conference on Retroviruses and Opportunistic Infections (2014), *presentation slides available at* http://www.chip.dk/portals/0/files/CROI_2014_PARTNER_slides.pdf. In stark contrast to the time when Missouri's criminal HIV law was enacted, people living with HIV and AIDS can now expect to live a nearly normal lifespan with a high quality of life. U.S. Dep't of Health & Human Servs., *Newly Diagnosed: What You Need to Know* (2015), *available at* https://www.aids.gov/hiv-aids-basics/just-diagnosed-with-hiv-aids/overview/newly-diagnosed/. Thus, 20-year-olds diagnosed with HIV in the United States today have a life expectancy approaching that of their same-aged counterparts without HIV. *See generally* Hasina Samji, *et al.*, *Closing the Gap: Increases in Life Expectancy Among Treated Individuals in the United States and Canada*, 8 PLoS One 1 (2013), *available at* http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0081355.

The timing of the Act's passage is also significant because, while the routes of HIV transmission were scientifically established even then, *see, e.g., Chalk v. U.S. Dist. Ct. Cent. Dist. of California*, 840 F.2d 701, 706 (9th Cir. 1988) (referencing the numerous

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medical and public health experts who concurred on limited routes of HIV transmission), the larger public was ignorant of this science and was instead motivated by fear. Nat'l Inst. On Drug Abuse, *HIV/AIDS and Drug Abuse: Intertwined Epidemics* (2012), *available at* https:/www.drugabuse.gov/publications/drugfacts/hivaids-drug-abuse-intertwined-epidemics. In contrast, the United States Center for Disease Control ("CDC") now publicizes statistical studies showing that many fears related to transmission are unjustified; for example, some sexual activities, like oral sex, carry a risk of HIV transmission from statistically negligible to zero,[1] *see* CDC, *HIV Risk Reduction Tool*, (2016) *available* at http://wwwn.cdc.gov/hivrisk/transmit/activities/, and condom use is highly effective at stopping HIV transmission, *see* Karen R. Davis and Susan C. Weller, *The Effectiveness of Condoms in Reducing Heterosexual Transmission of HIV*, 31 Family Planning Perspectives 272 (1999) (empirical study in heterosexual couples found condoms between 87-96% effective at reducing risk of HIV transmission). Yet the Act ignores varying transmission risks and the transformative evolution of HIV treatment while

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[1] Public ignorance about HIV transmission remains rampant. According to a study in 2012, approximately 34% of Americans held a misconception that, or did not know if, HIV could be transmitted from a drinking glass, a toilet seat, or by swimming in a pool with a person living with HIV. The Washington Post/Kaiser Family Foundation, *2012 Survey of Americans on HIV/AIDS* at 3 (2012), *available at* https://kaiserfamilyfoundation.files.wordpress.com/2013/01/8334-t.pdf.

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specifically disallowing condom use as a defense to prosecution. V.A.M.S. § 191.677.4 ("The use of condoms is not a defense to a violation of . . . this section.").

The Act is also a failure. Nearly two decades of experience have established that laws like the Act simply fail at their essential purpose because they do nothing to slow the spread of HIV. *See* Kim Buchanan, *When Is HIV a Crime? Sexuality, Gender, and Consent*, 99 Minn. L. Rev. 1231, 1247 (2015) ("[E]mpirical studies have found that criminal laws are unlikely to increase disclosure, reduce risky behaviors, or reduce HIV transmission[.]"). Indeed, the evidence discussed in further detail below shows that statutes like the Act likely exacerbate rather than remedy the problem, at least in part because they reinforce the stigma of being HIV positive, making HIV testing and disclosure less rather than more likely. *See* Angelo A. Alonzo & Nancy R. Reynolds, *Stigma, HIV and AIDS: An Exploration and Elaboration of a Stigma Trajectory*, in Medical Sociology, Vol. 3: Coping with Chronic Illness and Disease 216, 224-27 (Graham Scrambler ed. 2005). Such laws also threaten publicity of deeply personal medical information, which also discourages testing and undermines trust in medical and public health services. *See* Scott Burris, *Surveillance, Social Risk, and Symbolism: Framing the Analysis for Research and Policy*, 25 J. AIDS (Supp.) 120, 132 (2000) ("Any use of public health data for law enforcement purposes represents a profound threat to public health, because it compromises the principle that public health data are sacrosanct for any purpose other than public health.").

As time has thus eroded the logic of HIV-specific criminal laws, while also proving them ineffective and counterproductive, it has become apparent that these laws have always

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served a different purpose: expressing animus towards those associated with infection. Gostin, *The Politics of AIDS*, 49 Ohio St. L. J. at 1018-19 ("[HIV is] spread predominantly through volitional behavior such as sodomy, prostitution, and the use of intravenous drugs, which are regarded as immoral, even criminal."); Schultz & Reuter, *AIDS Legislation in Missouri*, 53 Mo. L. Rev. 599, 624 (1988) (scholar who participated in drafting the Act noting that "many of those infected are or are believed to be members of very unpopular minorities"); *see* Burris, *Surveillance, Social Risk, and Symbolism*, 25 J. AIDS (Supp.) at 130 (discussing HIV-specific criminal laws as, at bottom, condemnation of unpopular social elements). Moreover, as the demographic most affected by HIV has shifted, HIV remains associated with historically oppressed populations: new infections among gay black men spiked 22% between 2005 and 2014, and among gay black men under 24 years of age, the increase was 87%. CDC, *HIV Among African American Gay and Bisexual Men* (2016), *available at* http://www.cdc.gov/hiv/group/msm/bmsm/index.html. And emerging data suggest that laws like the Act are disproportionately enforced against black men. *See* Brad Barber & Bronwen Lichtenstein, *Support for HIV Testing and HIV Criminalization Among Offenders Under Community Supervision*, 33 Research in the Sociology of Health Care 253, 257 (2015).

Accordingly, numerous political, medical, and public health organizations have called for repeal of HIV-specific criminal laws — noteworthy opponents include the President's Advisory Council on AIDS ("HIV-specific criminal laws . . . are based on outdated and erroneous beliefs about the routes, risks, and consequences of HIV

transmission" and "reinforce the fear and stigma associated with HIV");[2] the United States Department of Justice;[3] the American Medical Association (denouncing HIV-specific criminal laws in light of "stigma created by HIV criminalization statutes and subsequent negative clinical and public health consequences");[4] the Infectious Diseases Society of America;[5] the National Alliance of State and Territorial AIDS Directors ("HIV criminalization undercuts our most basic HIV prevention and sexual health messages, and

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[2] President's Advisory Council on AIDS, *Resolution on Ending Federal and State HIV-Specific Criminal Laws, Prosecutions, and Civil Commitments* (2013), *available at* http://hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/PACHA_Criminalization_Resolution%20Final%20012513.pdf.

[3] U.S. Dep't of Justice, *Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors* (2014), *available at* https://www.aids.gov/federal-resources/national-hiv-aids-strategy/doj-hiv-criminal-law-best-practices-guide.pdf.

[4] Am. Med. Assoc., *H-20.914 Discrimination and Criminalization Based on HIV Seropositivity* (2014), *available at* http://hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/AMA%20Resolution.pdf

[5] Infectious Diseases Soc. of Am. & HIV Med. Assoc., *Position on the Criminalization of HIV, Sexually Transmitted Infections and Other Communicable Diseases* (2015), *available at* http://www.hivma.org/uploadedFiles/HIVMA/Policy_and_Advocacy/HIVMA-IDSA-Communicable%20Disease%20Criminalization%20Statement%20Final.pdf.

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breeds ignorance, fear, and discrimination against people living with HIV.");[6] the American Academy of HIV Medicine;[7] the National Association of County and City Health Officials;[8] the United States Conference of Mayors ("[R]esearch demonstrates that HIV-specific criminal laws do not reduce transmission or increase disclosure and may discourage HIV testing[.]");[9] the American Psychological Association (criticizing HIV-specific criminal laws because "many HIV disclosure laws were enacted in the 1980s during a climate of fear and uncertainty" and because the penalties they impose "are unjust

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[6] Nat'l Alliance of State and Terr. AIDS Dirs., *National HIV Strategy Imperative: Fighting Stigma and Discrimination by Repealing HIV-Specific Criminal Statutes* (2011), *available at* https://www.nastad.org/sites/default/files/114641_2011311_NASTAD-Statement-on-Criminalization-Final.pdf.

[7] Am. Acad. of HIV Med., *Policy Position Statement on HIV Criminalization* (2015), *available at* http://www.aahivm.org/Upload_Module/upload/Advocacy/AAHIVM%20-%20PolicyPlatform%20-%20Final%202015.pdf.

[8] Nat'l. Assoc. of Cty. & City Health Officials, *State of Policy: Opposing Stigma and Discrimination against Persons with Communicable Diseases* (2013), *available at* http://www.naccho.org/uploads/downloadable-resources/Policy-and-Advocacy/13-11-Opposing-Stigma-and-Discrimination-against-Persons-with-Communicable-Diseases-2.pdf.

[9] U.S. Conf. of Mayors, *HIV Discrimination and Criminalization* (2013), *available at* http://www.usmayors.org/resolutions/81st_Conference/csj11.asp.

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. . . [and] run counter to public health efforts to reduce HIV transmission");[10] and the Association of Nurses in AIDS Care ("These laws are based on outdated and erroneous information about HIV risk and transmission and further promote misinformation that contributes to stigma and discrimination.").[11]

In the final analysis, the Act is so offensive as to run afoul of the Constitution and laws of the United States. It violates equal protection and the right to privacy in one's medical information and cannot survive even the most deferential constitutional analysis, rational basis review. It also violates prohibitions against discrimination on the basis of a disability under the Americans with Disabilities Act[12] and Section 504 of the Rehabilitation Act.[13] Further, Mr. Johnson's sentence is unconstitutional under the Eighth Amendment because it is grossly disproportionate to Mr. Johnson's conduct and any resulting harm. Ultimately, undersigned *amici* respectfully urge this Court to right a grave injustice and

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[10] Amer. Psych. Assoc., *Resolution Opposing HIV Criminalization* (2016), *available at* http://www.apa.org/ab
out/policy/hiv-criminalization.aspx.

[11] Assoc. of Nurses in AIDS Care, *Position Statement: HIV Criminalization Laws and Policies Promote Discrimination and Must Be Reformed* (2014), *available at* http://www.nursesinaidscare.org/files/public/ANAC_PS_Criminalization_December1201
4.pdf.

[12] 42 U.S.C. §§12131,12132; 28 C.F.R. 35.130 (2016).

[13] 29 U.S.C. § 701 *et seq.* (2014).

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overturn Mr. Johnson's sentence. The law under which he was sentenced bears no relation to objective facts and serves no purpose but to discriminate against persons with HIV.

I. The Act Violates the Constitutional Guarantee of Equal Protection.

Missouri Revised Statutes section 191.677 violates the constitutional right to equal protection. U.S. CONST. amend. XIV, § 2.[14] This is because it imposes burdens on people living with HIV, singling them out among people living with other communicable diseases, without rational justification. Ultimately, the Act is discriminatory and motivated by an animus toward disfavored groups. For these reasons, the Act is unconstitutional and Mr. Johnson's conviction and sentence are void.

(1) <u>Equal Protection Forbids Arbitrary, Irrational Classifications.</u>

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-440 (1985) (quoting U.S. CONST. amend. XIV, § 2). Under the Equal Protection Clause, claims receive varying levels of scrutiny depending on the particular classification and individual interests burdened. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993); *Cleburne*, 473 U.S. at 439-440; *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1978); *Batek v. Curators of the Univ.*

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[14] This issue has not been determined by the Missouri Supreme Court. The recent opinion on the constitutionality of Section 191.677 in *State v. S.F.*, __ S.W.3d __, 2016 WL 1019211 (Mo. banc Mar. 15, 2016), did not consider an equal protection claim.

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of Mo., 9.20 S.W.2d 895, 898 (Mo. banc 1996). State action that distinguishes between similarly situated persons on the basis of suspect classifications, *see*, *e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (race); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (alienage), or which burdens the exercise of fundamental rights, *see*, *e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (right to travel); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (right to vote), violates the Constitution "unless necessary to further a compelling governmental interest," *Grutter*, 539 U.S. at 327; *Etling v. Westport Heating and Cooling Servs., Inc.*, 92 S.W.3d 771, 774 (Mo. banc 2003).

State action "neither involving fundamental rights nor proceeding along suspect lines" is subject to rational basis review. *Heller*, 509 U.S. at 320; *accord Nordlinger v. Harn*, 505 U.S. 1, 10 (1993). Under this standard, the contested State action must "bear some rational relationship to legitimate state purposes" to pass constitutional muster. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973); *accord Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 366-67 (2001); *Amick v. Dir. of Revenue*, 428 S.W.3d 638, 640 (Mo. banc 2014). Rational basis review is thus a more deferential standard than strict scrutiny; nonetheless, "[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." *Cleburne*, 473 U.S. at 445 (striking down denial of zoning variance to create group home for intellectually impaired under rational basis review); *see also Romer v. Evans*, 517 U.S. 620 (1996) (striking down Colorado constitutional amendment denying civil rights protection to homosexuals under rational basis review); *Dep't. of Agric. v.*

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Moreno, 413 U.S. 528, 534 (1973) (striking down amendment to Federal Food Stamp Act that denied provision to unrelated persons cohabitating under rational basis review).

Because prejudice towards a politically disfavored group is invariably arbitrary, State action motivated by this purpose fails even rational basis review. *Cleburne*, 473 U.S. at 448 (action motivated by "mere negative attitudes, or fear, unsubstantiated by factors that are properly cognizable" is forbidden); *Moreno*, 413 U.S. at 534 ("[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 in original) (internal citation omitted). Under rational basis review, a State classification may be shown to be prejudicial because the burdens imposed on the classified group are so unrelated to the purpose of the law as to betray a true purpose of irrational fear or unlawful prejudice. *Romer*, 517 U.S. at 632 (contested State action's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus towards the class it affects; it lacks a rational relationship to legitimate state interests."); *Cleburne*, 473 U.S. at 450 (inferring motivation of "irrational prejudice" where proffered justifications did not withstand analysis); *Moreno*, 413 U.S. at 537 ("[I]n practical effect, the challenged classification simply does not operate so as rationally to further [the asserted State interest.]"). That is, a classification manifests prejudice because it "singles out" a particular group among others that are similarly situated, without justification. *Romer*, 517 U.S. at 633. In sum, even under the more lenient standard described by rational basis review, equal protection requires that State action be founded in 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 (1979) (A claimant will prevail by showing that the "legislative facts on which the classification is based could not reasonably be considered to be true by the governmental decisionmaker."); *accord Romer*, 517 U.S. at 635.

(2) The Act Fails under Any Level of Constitutional Scrutiny.

Section 191.677 violates equal protection because it unjustifiably discriminates against persons living with HIV. As discussed in the next section, the Statute impinges on the fundamental right to privacy in one's confidential medical information, *Whalen v. Roe*, 429 U.S. 589 (1977), and accordingly must be subjected to strict scrutiny review. But because the Act applies burdens to people living with HIV that bear no reasonable relationship to any legitimate purpose, and in so doing, irrationally singles them out for special burdens, the Act fails even the lower standard of rational basis review. Under any standard of equal protection scrutiny, therefore, the Statute is unconstitutional.

The Act imposes special burdens on people with HIV because it makes it criminal to "[a]ct in a reckless manner by exposing another person to HIV without the knowledge and consent of that person." V.A.M.S. § 191.677.1(2). "Recklessness" under the Act is not given its ordinary meaning in Missouri's criminal code, to "consciously disregard a substantial and unjustifiable risk . . . [which] disregard constitutes a gross deviation from the standard of care[.]" *Id.* § 562.016.4. Instead, to prove "recklessness" under the Act, the State need only prove "(1) [defendant] knew of his infection before he had sexual activity with [victim]; and (2) [victim] was unaware that [defendant] was HIV positive. . .

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[.]" *State v. Wilson*, 256 S.W.3d 58 (Mo. banc 2008) (emphasis in original) (citing V.A.M.S. § 191.677.1.(2).(a)). The Act's definition of "reckless" thus permits no distinction on the basis of actual risk of transmission, and in particular, the use of condoms is no defense. *Id.* § 191.677.4. As a result, where a person is aware that his HIV status is positive, he must disclose this prior to any sexual activity under threat of prosecution for a class B felony, unless actual transmission of HIV occurs, in which case the offense is class A. *Id.* § 191.677.2. These convictions carry sentences of between 5-15 years and 10 years to life, respectively. *Id.* § 558.011.1. Thus, the Act uniquely burdens people living with HIV with the obligation to disclose private medical information with others prior to sex under penalty of felony prosecution and extremely serious punishment.

For purpose of equal protection, invoking simple rational basis review, the question is whether the burden thus imposed by the Act on people living with HIV is "reasonably related to a legitimate State interest." *See*, *e.g.*, *Glossip v. Mo. Dep't. of Transp. & Highway Patrol Emps.' Ret. Syst.*, 411 S.W.3d 796, 806 (Mo. banc 2013). Here, the purpose of the Act is to prevent the spread of HIV and AIDS**.** *See State v. S.F.*, __ S.W.3d __ , 2016 WL 1019211, at *3 (Mo. banc Mar. 15, 2016) ("The purpose of section 191.677 is . . . to prevent certain conduct that could spread HIV to unknowing or nonconsenting individuals."). *Amici* do not contend that preventing HIV transmission is not a strong State interest — certainly, it is. Nonetheless, section 191.677 fails even rational basis review because it seeks to further this State interest through irrational, arbitrary, and ultimately discriminatory means.

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To begin, for many years now, the medical and public health communities have been in agreement as to how best to stop the spread of HIV: "diagnosing all HIV-infected persons, linking them to appropriate high-quality care and prevention services, helping them adhere to treatment regimens, and supporting them in adopting and sustaining HIV risk reduction behavior." CDC, *Prevention Strategies for Individuals with HIV*, The Serostatus Approach (2001), *available at* http://www.cdc.gov/hiv/research/seroststatusapproach/strategies.html. Because Section 191.677 does not regulate testing or treatment but rather criminalizes nondisclosure prior to sexual activity (and other behaviors), theoretically, it could only be linked to the last of the objectives, above — sustaining HIV risk reduction behavior.

It is not, however. Instead, the Act is an unreasonable and arbitrary means of preventing HIV transmission for at least three reasons: first, because legislation of this kind is empirically proven to have no effect on the rate of HIV infection in the population at large; second, because it is arbitrary, in the sense that it is both overinclusive, criminalizing behavior that carries no risk of infection, and underinclusive, singling out HIV among all other communicable diseases; and third, because it is counterproductive, in that it provides powerful reasons for people living with HIV *not* to get tested and *not* to disclose their status to prospective sexual partners. At the end of the day, the absence of any reasonable relationship between the Act and the goal of preventing new HIV infections compels, as a matter of law, the inference that the Act reflects animus, an unconstitutional State purpose under any circumstances. Each of these points is discussed in turn, below.

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(A) *HIV-Specific Criminal Laws Are Empirically Proven to Have No Effect on the Spread of HIV.*

Research has demonstrated that criminal laws like the Act simply do not work. *See* Buchanan, *When Is HIV a Crime?*, 99 Minn. L. Rev. at 1247 (discussing empirical studies showing failure of HIV-specific criminal laws to reduce rate of HIV transmission); President's Advisory Council on AIDS, *Resolution on Ending Federal and State HIV-Specific Criminal Laws* ("[A]n evidence-based approach to disease control and research demonstrates that HIV-specific laws do not reduce transmission or increase disclosure[.]"). 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) (concluding "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); 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 Act 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 the Act, "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* at 255 (noting new infection rate constant from 2010-2015 at approximately 50,000 cases per year). 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, *Do Criminal Laws Influence HIV Risk Behavior?*, 39 Ariz. St. L. J. at 467.

(B) *The Act's Classification Is Arbitrary Because It Is Both Over- and Underinclusive.*

Section 191.677 requires disclosure of infection prior to any sexual activity, but only with regard to HIV — no other communicable disease, no matter how deadly or easily transmitted, is implicated by the Act. This classification is arbitrary because it is both over- and underinclusive. It is overinclusive because it disregards significant differences in the risks of transmission through sexual activity. *See*, *e.g.*, J. Lerhman, *et al.*, *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, 18 AIDS and Behav. 997, 1003 (2014) ("The risk of acquiring HIV varies

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widely by route of exposure."). In particular, the law is explicit that condom use is no defense, V.A.M.S. § 191.677.4 ("The use of condoms is not a defense to a violation of . . . this section."), notwithstanding that condoms are proven to lower the risk of transmission considerably. CDC, *Effectiveness of Prevention Strategies to Reduce the Risk of Acquiring or Transmitting HIV* (2016), *available at* http://www.cdc.gov/hiv/risk/estimates/preventionstrategies.html (self-reported regular condom use proven to reduce risk of transmission markedly). The Act thus refuses to distinguish between those who take affirmative measures to prevent transmission and those who do not, a patently irrational policy that disincentivizes conduct that ought to be encouraged.

Likewise, there is significant variance in the risk of transmission between types of sexual activity. 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. Nonetheless, the Act makes no distinction between types of sexual activity, even in the face of these established facts.

The statute also does not distinguish among defendants based on factors that measurably affect individual infectiousness and the ability to transmit HIV.[15] This, too, is irrational. For example, appropriate treatment through antiretroviral therapy "reduces both plasma and genital fluid viral load," meaning there is less virus present in the bodily fluids of a potential defendant and correspondingly, less possibility of infection through exposure. R.S. Jansen, *et al.*, *The Serostatus Approach*, 91 Am. J. Pub. Health 1019, 1020 (2001); Galletly & Pinkerton, *Toward Rational Criminal HIV Exposure Laws*, 32 J. L. Med. &

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[15] The Act ignores all factors going to the risk of transmission, and there are many more such factors than *amici* highlight, above. For example, additional, relevant factors include circumcision, the presence or absence of other sexually transmitted diseases, stage of infection of the person who is HIV-positive, immune-system strength of uninfected partner, preventative treatment via ART by the uninfected partner (known as "PReP", which when taken consistently reduces transmission of high-risk individuals by up to 92%), and whether the infected partner is someone whose HIV viral load remains relatively low and stable even in the absence of treatment over a period of years (such individuals are medically termed "nonprogressors"). Florencia Pereya, *et al., Genetic And Immunologic Heterogeneity Among Persons Who Control HIV Infection In The Absence Of Therapy*, 197 J. Infect. Dis. 563 (2008); CDC, *HIV Risk and Prevention* (2016), *available at* http://www.cdc.gov/hiv/risk/index.html; *see* Burris, *Do Criminal Laws Influence HIV Risk Behavior?*, 39 Ariz. St. L. J. at 477; Galletly & Pinkerton, *Toward Rational HIV Exposure Laws*, 32 J. L. Med. & Ethics at 328.

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Ethics at 328 (calling viral load the most significant factor in probability of HIV transmission). Regular 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).

In other words, the risk of infection through sexual activity 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 activity where the HIV-positive individual has a low viral load. *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 acts] and negligible for the remainder.") (emphasis in original). The Act is therefore overinclusive to the point of irrationality because it prohibits a significant amount of conduct that carries no actual risk of infection and therefore threatens no harm whatsoever to the public. *Id.* at 335 ("The lack of consideration given to risk-reduction measures . . . is a striking omission"); Buchanan, *When Is HIV a Crime?*, 99 Minn. L. Rev. at 1239-40 (criticizing convictions in cases where sexual activity bore "no realistic possibility of transmission"). 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 Romer*, 517 U.S. 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"); *Zobel*, 457 U.S. at 61 (Alaska law which apportioned revenue surplus to

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citizens commensurate with length of State residency could not be sustained by purported State interests that did not justify breadth of windfall provided to residents of long standing).

But the Act is also arbitrary because it is irrationally underinclusive. *See Romer*, 517 U.S. at 633 (calling Colorado Amendment 2 "at once too narrow and too broad" because [i]t identifies persons by a single trait and then denies them protection across the board"); *Cleburne*, 473 U.S. at 449-50 (striking down State action where justifications applied equally to groups not similarly burdened). That is, section 191.677, and the corresponding burden it imposes, is unique in Missouri law. Missouri does not explicitly require, under penalty of criminal prosecution and imprisonment, prior disclosure and consent for knowing exposure relative to any other communicable disease.[16] For example,

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[16] Missouri law includes two provisions that criminalize *intentional* exposure to HIV and hepatitis to protect State employees: sections 565.085.1 and 565.086.1 make it a felony for one in state custody who is knowingly infected with HIV or hepatitis to endanger the health of a correctional officer, department of mental health employee, or other person at a security facility by attempting or actually causing contact with infected bodily fluids. *See* L. 2005 H.B. 700; L. 2010 S.B. 774. These laws are also underinclusive in their isolation of HIV and hepatitis, but neither imposes as severe a burden on the classified group as section 191.677. On that score, neither criminalizes nondisclosure for otherwise legal activity. And the penalty for violation of these laws is a Class C felony, as opposed to the Class A and B felonies of the Act.

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individuals knowingly infected with human papillomavirus (HPV), herpes, tuberculosis, and hepatitis cannot be prosecuted for the nondisclosure of their status 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."). Nor is it an answer that actual or attempted infection of another with a communicable disease could theoretically be punishable under the general criminal law,[17] since general criminal law provisions could be applied to HIV infection as well. *See*, *e.g.*, *State v. Stewart*, 18 S.W.3d 75 (Mo. App. E.D. 2000) (upholding conviction for assault in the first degree for defendant's intentional infection of another with HIV via injection). What makes HIV stand alone in Missouri's code is that it is the only disease singled out for particularized criminal regulation, without regard to actual risk of harm. Moreover, it does so by applying a lower *mens rea* requirement than is applicable to general criminal law provisions; thus, Missouri defines criminal negligence, the lowest *mens rea* requirement in the general criminal law, as "fail[ing] to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, [where] such failure constitutes a gross deviation from the standard of care," V.A.M.S. § 562.016. As

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[17] For example, reckless or intentional exposure of another to a communicable disease would seemingly satisfy the elements of, at a minimum, third degree assault. V.A.M.S. § 565.070 (defining assault in the third degree as, among other definitions, "attempt[] to cause or recklessly caus[ing] physical injury to another person").

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previously discussed, however, the Act prohibits much conduct that has *no* appreciable risk of harm to others, let alone risk that is "substantial and unjustifiable." For people living with HIV, and only such people, the law thus authorizes severe penalties — a class B felony where transmission does not actually occur — for mental states below even negligence.

This singling out of HIV and of those living with that disease is medically unfounded. HIV is now treatable through ART via a once-daily pill that both prevents the onset of AIDS and allows infected persons to live virtually symptom-free. *See* Jansen, *et al.*, *The Serostatus Approach*, 91 Am. J. Pub. Health at 1020. With appropriate treatment, people living with HIV can now live a normal life-span with a quality of life that is minimally encumbered by illness. *See* Buchanan, *When Is HIV a Crime? Sexuality, Gender, and Consent*, 99 Minn. L. Rev. at 1244 ("[ART] has transformed HIV from a lethal disease to a chronic, though life-changing, illness that is manageable with medication."). And while it is true that, untreated, HIV almost always leads to AIDS, which in turn can be fatal, this fact does not distinguish HIV. Tuberculosis, for example, may be fatal if untreated, CDC, *Basic TB Facts* (2016), *available at* http://www.cdc.gov/tb/topic/basics/default.html, and HPV, which is untreatable and accounts for 71% of all new sexually transmitted infections each year, can cause cervical and other fatal cancers, CDC, *Genital HPV Infection - Fact Sheet* (2016), *available at* http://www.cdc.gov/std/hpv/stdfact-hpv.htm. New cases of HIV also occur at vastly lower rates than almost every other sexually transmitted disease, most of which have severe health consequences if untreated. C.L. Satterwhite, *et al., Sexually Transmitted Infections Among U.S Women And Men: Prevalence And Incidence Estimates, 2008,* 40 Sex. Trans.

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Dis. 187 (2013); K. Owusu-Edusei, *et al., The Estimated Direct Medical Cost Of Selected Sexually Transmitted Infections In The United States, 2008,* 40 Sex. Trans. Dis. 197 (2013). According to the CDC, "[a]bout 79 million Americans are currently infected with HPV" and "[a]bout 14 million people become newly infected each year." CDC, *Genital HPV Infection - Fact Sheet*. Hepatitis A, B, and C are "about as common as HIV, but [] easier to transmit." Buchanan, *When Is HIV a Crime?*, 99 Minn. L. Rev. at 1279, 1279 n.218 (citing CDC statistics). By contrast, just over 1.2 million Americans are infected with HIV, with annual new cases estimated at between 40,000 and 50,000. CDC, *HIV in the United States: At a Glance* (2016), *available at* http://www.cdc.gov/hiv/statistics/overview/ataglance.html. By no means, then, is the uniquely punitive treatment of HIV justified; instead, the Act unjustifiably represents a vestige of the "widespread fear and moral outrage" that attended "the HIV epidemic in the 1980s." Barber & Lichtenstein, *Support for HIV Testing* at 270. This is exactly the kind of "status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests" that, under *Romer*, violates equal protection. 517 U.S. at 635.

Significantly, other States have begun to recognize that there is no longer a rational basis for differential treatment of HIV/AIDS in the criminal law. For example, several years ago Illinois modernized its HIV-specific criminal law.[18] While maintaining a statute

[18] Other jurisdictions have also enacted, and some are considering, reforms that are both more rational and less punitive than section 191.677. For example, in California, a

that irrationally singles out HIV/AIDS for criminal regulation, the new code at least addresses the former law's overinclusiveness by limiting coverage to anal and vaginal intercourse "without the use of a condom," while also requiring proof of "specific intent" to infect. 720 Ill. Comp. Stat. Ann. 5/12-5.01 (2014); *see* Buchanan, *When Is HIV a Crime?*, 99 Minn. L. Rev. at 1234 n.15 (discussing legislative history of Illinois amendment). More recently, prosecutors from across the country convened to form an ongoing national roundtable to review the value and fairness of state HIV criminal laws in

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violation of the applicable law requires a showing of "specific intent to infect," and provides punishment ranging from three to eight years, Cal. Health & Saf. Code § 120291 (2016); in Maryland, a violation provides misdemeanor punishment of up to three years Maryland Health-General Code § 18-601.1; in Michigan, a violation is punishable by up to four years in prison, MCLS § 333.5210; and in New Jersey, a violation is punishable by a felony between three and five years, NJ Stat Ann §2C: 34-5. Additionally, the Colorado legislature is currently considering a bill that would repeal its HIV-specific criminal law, "conform with current medical knowledge by applying provisions previously applied to HIV to all [sexually transmitted infections]," and eliminate felony punishments for all violations of the law, substituting misdemeanor offenses in their place. *See* Colorado SB 146 (3/15/16), *available at* http://www.leg.state.co.us/CLICS/CLICS2016A/csl.nsf/fsbillcont3/11 60859E5A43CEAB87257F2400640ED8?Open&file=146_01.pdf.

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view of current knowledge about HIV transmission and treatment.[19] The fact that the Association of Prosecuting Attorneys and its members — professionals charged with enforcing laws such as Missouri's HIV criminal law — have joined forces to re-examine laws such as the Act is further evidence of the growing consensus that they irrationally single out people living with HIV without serving the public's interests.[20]

These modernization efforts signal a move towards a more rational approach to legitimate public health concerns; they reflect a shift in focus towards objectively reasonable facts about HIV and away from assumptions and stereotypes. Because the Missouri Statute, by contrast, "imposes a special disability upon [the classified] persons alone" without basis in objectively reasonable facts, it fails even rational basis review, and must be invalidated. *Romer*, 517 U.S. at 631.

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[19] Norman L. Reimer, *Inside NACDL: A Lamentable Example of Overcriminalization: HIV Criminalization*, 37 Champion 7, 7 (December 2013) ("The express purpose of the meeting was to consider the relevance, viability, and fairness of HIV criminalization laws and policies in light of the current science about HIV transmission and treatment. Much of the convening was devoted to review of that science in an effort to separate facts from myths — myths that have resulted in the enactment of laws that bear no relationship to reality and that have stigmatized HIV-positive individuals for more than a quarter of a century.").

[20] *Id.* at 7 n.4 ("[T]he APA will endeavor to develop consensus positions with respect to reform of HIV-related laws.").

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(C) *Criminalization of Nondisclosure Is Counterproductive.*

Finally, not only does the Act proscribe conduct with no rational relation to its goal, but it 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 conduct only by individuals "knowingly infected" — those who avoid testing and remain ignorant of their status can thus not be prosecuted. V.A.M.S. § 191.677.1; *see Burris*, *Do Criminal Laws Influence HIV Risk Behavior?*, 39 Ariz. St. L. J. at 514 ("The logical arguments for the effect [of criminalization on testing] are hard to fault: criminal law's create a good reason not to know one's status[.]"); *see also* President's Advisory Council on AIDS, *Resolution on Ending Federal and State HIV-Specific Criminal Laws* (calling for repeal of HIV-specific criminal laws because they "may discourage HIV testing").

Testing is obviously central to any rational public health response to HIV; not only does testing facilitate treatment of people with HIV and secure better health outcomes for those already infected, it also reduces the risk of further transmission. Jansen, *The Serostatus Approach*, 91 Am. J. Pub. Health at 1020. That is because testing prompts people living with HIV to enter into treatment, resulting, as previously noted, in a reduction of their viral load and thus making further transmission less probable. *Id.* at 1020-21. But testing also thwarts the spread of HIV because, as research demonstrates, people generally adopt lower risk behavior upon learning they are HIV positive. *Id.*; Buchanan, *When Is HIV a Crime?*, 99 Minn. L. Rev. at 1245 ("People who know they have HIV are more likely to disclose, take precautions, and receive treatment than those who have not been

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tested, and are much less likely than their untested counterparts to transmit HIV."); Assn. of Nurses in AIDS Care, *HIV Criminalization Laws and Policies Promote Discrimination and Must Be Reformed* (2014) ("[S]tudies have shown that HIV+ individuals who know their status are significantly less likely to engage in sexual behaviors that may increase risk of transmission to a partner than HIV+ individuals who remain unaware they are infected."). In sum, by discouraging HIV testing, recognized by the Missouri legislature itself as the number one priority in the State's HIV initiative,[21] the Act undermines rather than furthers the important State goal of reducing HIV transmission. This, of course, is the height of irrationality. *See Moreno*, 413 U.S. at 537-38 (holding that where "the challenged classification simply does not operate so as rationally to further [its purpose in]," "the classification is not only 'imprecise,' it is wholly without any rational basis").

The Act also discourages testing for those who know they are infected because of the way it reinforces stigma. Stigma may be defined as "a powerful discrediting and tainting social label that radically changes the way individuals view themselves and are viewed as persons." Alonzo & Reynolds, *Stigma, HIV and AIDS* at 217. HIV and the people it affects are stigmatized to an "extraordinary" degree because the disease is:

1. associated with deviant behavior, both as a product and as a producer of deviant behavior;

2. viewed as the responsibility of the individual;

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[21] *See Preventing HIV Disease*, Mo. Dep't of Health & Senior Servs., *available at* http://health.mo.gov/living/healthcondiseases/communicable/hivaids/prevention.php.

3. tainted by a religious belief as to its immorality and/or thought to be contracted via a morally sanctionable behavior . . . ;

4. perceived as contagious and threatening to the community

5. associated with an undesirable and an unaesthetic form of death; and

6. not well understood by the law community and viewed negatively by health care providers.

Id. at 219-20. That is, public attitudes about HIV embody the Supreme Court's warning that, "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 284 (1987).

Laws like section 191.677, of course, not only reflect but actively bolster stigma. By singling out HIV for unique criminal regulation without regard to actual risk of transmission, the Act inaccurately signals that HIV is uniquely fearsome and dangerous to society. *See* Buchanan, *When Is HIV a Crime?*, 99 Minn. L. Rev. at 1273 (concluding that regulation that criminalizes nondisclosure of HIV, without regard to risk of transmission, uniquely stigmatizes HIV). The Act also promotes stigma because its minimal *mens rea* requirement disregards the "substantial and qualitative difference between failing to disclose one's HIV positive serostatus to a prospective partner and intentionally trying to infect that partner;" in this manner, the Act paints people living with HIV and AIDS who decline to disclose their status as maliciously trying to infect the public, "a gross

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mischaracterization of the motives of the vast majority of sexually-active HIV-infected persons[.]" Galletly & Pinkerton, *Toward Rational Criminal HIV Exposure Laws*, 32 J. L. Med. & Ethics at 335. Finally, the Act reinforces stigma because it penalizes exposure without regard to actual infection, further inflating a false sense that HIV is uniquely deadly.

As reinforced by the Act, stigma associated with HIV provides a powerful disincentive for infected individuals both to get tested and to learn their status, as well as, obviously, to disclose that status to others. It discourages testing because "the knowledge it provides may be regarded as too . . . threatening in terms of a potential for rejection by family, partners, friends and co-workers. In addition, at risk individuals may believe that testing will jeopardize civil liberties and encourage many forms of discrimination." Alonzo & Reynolds, *Stigma, HIV and AIDS*, at 223; *accord* Scott Burris, *Law and the Social Risk of Health Care: Lessons from HIV Testing*, 61 Alb. L. Rev. 831, 889 (1998) ("Given the complexity of the decision to be tested, it seems likely that for many people fears of social risk may tip the balance[.]"); Assn. of Nurses in AIDS Care, *HIV Criminalization Laws* ("One concern is that these outdated laws will inhibit HIV testing, either directly or by promoting stigma and discrimination[.]"). Such stigma likewise discourages the kind of open communication with sexual partners that permits shared understanding of the risks of sexually transmitted diseases and available means for intimacy without risk of infection. Barber & Lichtenstein, *Support for HIV Testing* at 254 ("[People living with HIV] have little incentive to be frank with sexual partners if they face increased HIV stigma and fear of arrest after being legally framed as medically dangerous[.]"). The social science also

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suggests that stigma encourages nondisclosure as a form of denial, leading to "activities that dismiss and deny the diagnosis, such as unprotected sex with unknowing partners[.]" Alonzo & Reynolds, *Stigma, HIV and AIDS*, at 227. In this manner, the Act significantly undermines the public health goal of preventing the spread of HIV, and for this reason, too, is irrational.

(D) *The Absence of Any Rational Basis for the Act Suggests 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*, 517 U.S. at 634. Such an inference is certainly warranted here. HIV and AIDS first emerged in the United States among "gay men and intravenous drug users," groups historically subjected to "a persistently negative societal response[.]" Alonzo & Reynolds, *Stigma, HIV and AIDS*, at 216; *accord* Burris, *Surveillance, Social Risk, and Symbolism*, 25 J. AIDS at 125 ("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."); Buchanan, *When Is HIV a Crime?*, 99 Minn. L. Rev. at 1294-95 ("Since the beginning of the epidemic, HIV has been associated with stigmatized groups of people. . . . HIV was often described in popular discourse as a 'gay plague.'").[22] Resort

[22] These prejudices were on display in Michael Johnson's trial. The prosecutor told the jury that he had intentionally included in the venire jurors who consider homosexuality a sin, (Trial Tr. vol. 4, 707 (May. 14, 2015) ("Some of you believe gay sex is a sin, some of

to the criminal law, then, in response to the HIV crisis is appropriately viewed as a moral judgment about those deemed at fault for its emergence:

> [Criminal laws] represent an assertion of social control over those at risk of HIV, and their passage in a legislative or administrative struggle often represents a victory for social factions who not only believe that homosexuality and drug use are wrong, but also that the toleration of these behaviors undermines their own values and social status.

Burris, *Surveillance, Social Risk, and Symbolism*, 25 J. AIDS at 130. An observer of Missouri's legislative process in drafting and enacting section 191.677 expressed concern that because it was produced in an environment of "near hysteria," with "very unpopular minorities" the assumed culprits of the epidemic and targets of the Act, "[n]egative reactions [ran] so high in some instances that careful attempts to apply the prescribed legal

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you don't. I kept people with both views.")), and that he personally endorsed this view, (*id.* at 711 ("[T]hey have a lifestyle that I don't understand, that many of us don't understand.")). More egregiously still, the prosecutor urged the jury to sentence Mr. Johnson harshly because HIV could ultimately spread to heterosexuals. (*Id.* at 773 ("And if you think you can take consolation by the fact that someone isn't gay, think again. One of the men he had sex with didn't want to come forward because he didn't want to tell his wife. We're all in this together. That's why this is a crime. That's why our legislature decided to make it a crime.")).

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standard [gave] way to irrational fears and personal prejudices." Schultz & Reuter, *AIDS Legislation in Missouri*, 53 Mo. L. Rev. at 624.

The discrimination at the core of laws like the Act is only confirmed by the ways in which these statutes disregard varying levels of risk and allow for convictions upon minimal showings of *mens rea*, thereby prohibiting a wide swath of conduct for a distinctly narrow group. *See* President's Advisory Council on AIDS, *Resolution on Ending Federal and State HIV-Specific Criminal Laws, Prosecutions, and Civil Commitments* ("Legal standards applied in HIV criminalization cases regarding intent, harm, and proportionality deviate from generally accepted criminal law principles and reflect stigma toward HIV and HIV-positive individuals.").

Moreover, the passage of time has only exacerbated the discriminatory nature of the Act. As treatment through ART has rendered the negative reaction to people living with HIV and AIDS less justifiable, that reaction nonetheless persists, even as HIV and AIDS has become a disease that increasingly and disproportionately affects black communities within the United States. Brook Kelly, *The Modern HIV/AIDS Epidemic*, 41 U. Balt. L. Rev. 355, 355-56 (2012). Indeed, the CDC reports that "[b]lacks/African Americans have the most severe burden of HIV and all racial/ethnic groups in the United States. Compared with other races and ethnicities, African Americans account for a higher proportion of new HIV diagnoses, those living with HIV, and those ever diagnosed with AIDS." CDC, *HIV Among African Americans* (2016), *available at* http://www.cdc.gov/hiv/group/racialethnic/africanamericans/index.html. HIV also disproportionately affects the poor: a CDC study found that "HIV prevalence rates in urban

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poverty areas were inversely related to socioeconomic status;" indeed, more than one out of 50 poor urban residents is HIV positive. CDC, *Communities in Crisis: Is There a Generalized HIV Epidemic in Impoverished Urban Areas of the United States?* (2016), *available at* http://www.cdc.gov/hiv/group/poverty.html. Further, HIV is disproportionately linked to morbidity for poor, black, southern women. Amie L. Meditz, *et al.*, *Sex, Race, and Geographic Region Influence Clinical Outcomes Following Primary HIV-1 Infection*, 203 J. Infectious Diseases 442, 449-50 (2011) ("socioeconomic circumstances of nonwhite women in the South are a major determinant of elevated morbidity in this group"); Wendy S. Armstrong & Carlos del Rio, *Gender, Race, and Geography: Do They Matter in Primary Human Immunodeficiency Virus Infection?*, 203 J. Infectious Diseases 437, 437 (2011) ("Women, nonwhites, and those living in the Southern United States were significantly less likely to start antiretroviral therapy and were more likely to have AIDS related complications."). In other words, HIV today disproportionately burdens persons who have borne the greatest historical discrimination, and who are consequently among society's most marginalized members. *See* Kelly, *The Modern HIV/AIDS Epidemic*, 41 U. Balt. L. Rev. at 355 ("The HIV epidemic is driven by the same social and structural factors that perpetuate current inequalities found in the United States[.]"). The Act, of course, does likewise, especially given available data suggesting that, nationwide, HIV-specific criminal laws are disproportionately enforced against black men. *See* Barber & Lichtenstein, *Support for HIV Testing* at 257; Buchanan, *When Is HIV a Crime? Sexuality, Gender, and Consent*, 99 Minn. L. Rev. at 1294-1304

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(discussing prosecution of HIV-specific criminal laws as disproportionately targeted at black men for nondisclosure in cases of sexual activity with white women).

These considerations support the inference that inevitably arises from the Act's lack of rational grounding, promotion of stigma, and counterproductive effect on public health: that the Act's continued existence reflects discrimination not only against people living with HIV and AIDS, but also against those most affected by HIV and AIDS today, poor blacks. In sum, section 191.677 is an arbitrary law that serves no purpose but to further harm a group that is already subject to societal discrimination on grounds of little more than fear and animus. For these reasons, the Act is unconstitutional, and Mr. Johnson's sentence cannot stand.

II. The Act Violates the Right to Privacy in Personal Medical Information.

Section 191.677 also violates the right to privacy in confidential medical information, derived from the constitutionally protected interest in "avoiding disclosure of personal matters" in the face of government compulsion.[23] *Whalen v. Roe*, 429 U.S. 589,

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[23] This remains an issue of first impression. Although the courts of this State have determined that the Act does not violate a statutory right to privacy, *see State v. Mahan*, 971 S.W.2d 307 (Mo. banc 1998) (holding that V.A.M.S. § 191.656, concerning the confidentiality of HIV-positive status, contains a statutory exception broad enough to encompass the law enforcement purpose of the Act), as well as a constitutional right to privacy "in making certain kinds of important decisions," *see State v. S.F.*, __ S.W.3d __ , 2016 WL 1019211 (Mo. banc Mar. 15, 2016) (rejecting a challenge to the Act alleging

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599 (1977) (recognizing privacy interest of patients against New York statute mandating reporting and storage of identifying information for patients, physicians, and pharmacies in the prescription of certain drugs); *State ex rel. Daly v. Info. Tech. Servs. Agency of City of St. Louis*, 417 S.W.3d 804, 812 (Mo. App. E.D. 2013) ("A Constitutional right to privacy has been recognized and extended to protect an individual's interest in preventing the disclosure of personal matters."); *State ex rel. Callahan v. Kinder*, 879 S.W.2d 677, 681 (Mo. App. W.D. 1994) ("[T]he Supreme Court of the United States has proclaimed a constitutionally protected privacy interest of an individual in avoiding the disclosure of personal matters.") (citing *Whalen*, 429 U.S. 589). As the United States Supreme Court has analyzed it, private medical information is the prototypical "personal matter" protected by this doctrine. *Whalen*, 429 U.S. at 605 (upholding New York "statutory scheme, and its implementing administrative procedures, [because they] evidence a proper concern with, and protection of, the individual's interest in privacy").

When medical information pertains to one's HIV-positive status, the right to privacy is at its zenith, given the unique and persistent stigma attached to HIV. The Missouri Court of Appeals has explicitly held that medical information confirming one's HIV-positive status invokes a heightened interest in privacy:

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violation of the right to privacy in personal decision-making under *Lawrence v. Texas*, 539 U.S. 558 (2003)), no Missouri court has yet considered, or decided, the challenge raised here, alleging a violation of the constitutional right to privacy in one's personal medical information.

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> The public's perception of HIV–AIDS is that it is contracted by homosexual activity and intravenous drug use. The disclosure of an individual's HIV status is a greater intrusion than disclosure of most other medical information because "the public considers the virus to be highly communicable . . . and is associated with lifestyles of homosexuality, sexual promiscuity and drug use."
>
> . . . .
>
> [T]he privacy interest in one's exposure to the AIDS virus is even greater than one's privacy interest in ordinary medical records because of the stigma that attaches with the disease.

Kinder, 879 S.W.2d at 679-80 (internal citations omitted) (striking down on statutory and constitutional privacy grounds a local court rule requiring publication of inmate medical records showing HIV infection for *in camera* review for purpose of court officer safety).

Nor is Missouri alone in this respect — the courts of other jurisdictions have shown similar sensitivity to the special privacy concerns implicated by one's HIV-positive status. *See*, *e.g.*, *Doe v. Delie*, 257 F.3d 309, 315 (3d Cir. 2001) ("[T]he privacy interest in information regarding one's HIV status is particularly strong because of the stigma, potential for harassment, and 'risk of much harm from non-consensual dissemination of the information.'") (internal citation omitted); *Doe v. SEPTA*, 72 F.3d 1133, 1140 (3d Cir. 1995) (discussing the "social stigma, harassment, and discrimination that can result from public knowledge of one's affliction with AIDS" and upholding a right to privacy for information concerning HIV status because "there still exists a risk of much harm from

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non-consensual dissemination of the information that an individual is inflicted with AIDS"); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) ("[A constitutional right to privacy in one's medical information] would be true for any serious medical condition, but is especially true with regard to those infected with HIV or living with AIDS, considering the unfortunately unfeeling attitude among many in this society toward those coping with the disease. An individual revealing that she is HIV seropositive potentially exposes herself . . . to discrimination and intolerance, further necessitating the extension of the right to confidentiality over such information."); *Syring v. Tucker*, 498 N.W.2d 787, 814 (Wis. 1993) ("Unjustified fears about transmission of AIDS have caused our society to discriminate against persons who have, or are suspected of having, AIDS.").[24]

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[24] The Missouri legislature expressed an appreciation of the uniquely confidential nature of one's HIV status. Thus, section 191.656 of Missouri's public health code holds:

> All information . . . and records . . . held . . . by any department . . . concerning an individual's HIV infection status or the results of any individual's HIV testing shall be strictly confidential and shall not be disclosed except to: (a) Public employees within the . . . department . . . who need to know to perform their public duties; (b) Public employees from other . . . departments . . . who need to know to perform their public duties[.]

V.A.M.S. § 191.656(1). Unfortunately, despite this legislative protection of the privacy of people living with HIV relative to their status, a challenge to the Act under § 191.656 failed because the Act was held to fall within the statutory exception for "[p]ublic employees . .

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There is no question that the Act infringes upon the right to privacy in one's medical information — this intrusion is codified in the Act itself. Section 191.677 provides that to build a case for "reckless" exposure to HIV:

> The department of health and senior services shall assist the prosecutor or circuit attorney in preparing such case, and upon request, turn over to peace officers, police officers, the prosecuting attorney or circuit attorney, or the attorney general records concerning that person's HIV-infected status, testing information, counseling received, and the identity and available contact information for individuals with whom that person had sexual intercourse or deviate sexual intercourse and those individuals' test results.

V.A.M.S. § 191.677.3. But not only does the Act authorize release of an individual's HIV status and list of sexual partners to law enforcement personnel; as the Missouri Supreme Court has recognized, "[b]ecause infection with HIV is an element of the crime of risking infection with HIV . . . the judges and jurors involved in the litigation of such cases need to know the HIV status of the accused in order to administer justice." *State v. Mahan*, 971 S.W.2d 307, 313 (Mo. banc 1998).

Nor does disclosure end there. Missouri protects the public's access to criminal trials even more forcefully than does the First Amendment:

. who need to know to perform their duties." *State v. Mahan*, 971 S.W.2d 307, 313 (Mo. banc 1998).

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> The Supreme Court has not unanimously decided that the First Amendment of the United States Constitution provides for the public's right of access to the courtroom. However, Missouri's constitution expressly provides in Article 1, Section 14 that "[t]he courts of justice shall be open to every person." Additionally, there is support for such a right in Missouri's statutes. Section 476.170 RSMo (1994) states that "[t]he sitting of every court shall be public and every person may freely attend same." Section 510.200, RSMo (1994) also states "[a]ll trials upon the merits shall be conducted in open court and insofar as convenient in the regular courtroom." Thus, the existence of a right of public access to criminal proceedings in Missouri is certain.

State ex rel. Pulitzer, Inc. v. Autrey, 19 S.W.3d 710, 713 (Mo. App. E.D. 2000). Records of arrest, investigation, and conviction are open to the public under Missouri law. *See* V.A.M.S. § 610.100, *et seq.* No provision of the Act creates an exception to these general rules of public access to trial and related criminal records.

The broad scope of disclosure under the Act is apparent from Mr. Johnson's particular case. Mr. Johnson's prosecution and conviction — and accordingly, his HIV-positive status — was detailed in national publications that included The Nation,[25] the New

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[25] Rod McCullom, "*The Reckless Prosecution of 'Tiger Mandingo,'*" The Nation (May 29, 2015), *available at* http://www.thenation.com/article/reckless-prosecution-tiger-mandingo/.

York Daily News,[26] BuzzFeed,[27] and Gawker,[28] and video footage detailing his case is available on YouTube[29] and Amazon[30] websites, among others. A simple Google search for "Michael Johnson Missouri" immediately yields numerous links revealing Mr. Johnson's HIV-positive status. *See* https://www.google.com/webhp?sourceid=chrome-instant&rlz=1C1CAFB_enUS653US658&ion=1&espv=2&ie=UTF-

[26] Errol Louis, *Michael Johnson Conviction Shows Fear Spreads Faster Than HIV*, Daily News (May 19, 2015), *available at* http://www.nydailynews.com/opinion/errol-louis-michael-johnson-trial-fear-faster-hiv-article-1.2227075.

[27] Steven Thrasher, *"'Tiger Mandingo' Found Guilty in HIV Case, Faces Life in Prison*, BuzzFeed News (May 14, 2015), *available at* http://www.buzzfeed.com/steventhrasher/tiger-mandingo-found-guilty-in-hiv-case-faces-life-in-prison#.ndKnb4mgJ.

[28] Rich Juzwiak, *The Infuriating Ignorant Trial of HIV-positive Wrestler 'Tiger Mandingo,'"* Gawker (May 18, 2015), *available at* http://gawker.com/the-infuriating-ignorant-trial-of-hiv-positive-wrestler-1705294930.

[29] *Available at* https://www.youtube.com/watch?v=2uyg_yD2v1g.

[30] *Available at* http://www.amazon.com/Tiger-Mandingo-Found-Guilty-Case/dp/B00Y1LOV1I.

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8#safe=active&q=michael+johnson+missouri.[31] It is thus no exaggeration to say that Mr. Johnson's HIV-positive status has been disseminated to millions nationwide and is literally available at the click of a button, and that Mr. Johnson's name and identity are now synonymous with HIV.

Furthermore, disclosure of Mr. Johnson's private medical information via his criminal trial went well beyond the fact of his HIV-positive status. Not only did the State necessarily present evidence of Mr. Johnson's sexual partners and practices, but the State also adduced extensive proof of Mr. Johnson's infection and symptoms relative to other sexually transmitted diseases. *See* (Trial Tr. vol. 2, 206, 209, 222, 226, 229 (May 12, 2015)). In this manner, the most private and embarrassing details of Mr. Johnson's personal and medical information have been subjected to not only public but national display.

There can, then, be no doubt that the Act infringes generally, and infringed in this case, on the right to privacy of confidential information; where that is so, it must be subjected to heightened constitutional scrutiny. *See Zablocki v. Redhail,* 434 U.S. 374, 388 (1978) ("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."); *Doe v. City of New*

[31] That others may have publicized Mr. Johnson's case in effort to draw attention to the injustice of HIV-specific criminal laws and Mr. Johnson's sentence, in particular, does not remove ultimate responsibility for invasion of Mr. Johnson's privacy from the State.

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York, 15 F.3d 264, 269 (2d Cir. 1994) (holding that government interest must be "'substantial and must be balanced against [petitioner's] right to confidentiality") (internal citation omitted). Missouri similarly adopts a standard of heightened constitutional review in cases of this type, holding that "[f]or the government . . . to acquire such information, it must show a compelling interest, and the government must safeguard the confidentiality of such information." *Kinder*, 879 S.W.2d at 679-80 (Mo. App. W.D. 1994); *see also State v. Russo*, 790 A.2d 1132, 1149 (Conn. 2002) (surveying the standard applied to claims of violation of the right to privacy of one's medical information across State and federal jurisdictions and concluding that most apply a heightened "intermediate balancing approach" that entails balancing the extent of the State's invasion of privacy with its reason for doing so).

The failure of the Act to adequately further a legitimate state interest under even rational basis review has already been established in the discussion above. But constitutional privacy law also requires that this Court consider the degree to which Missouri safeguards the private information disclosed through prosecution; the State must limit publication of private medical information narrowly for the particular purpose at issue. *Whalen*, 429 U.S. at 605 (upholding "New York's statutory scheme, and its implementing administrative procedures" because the laws "evidence a proper concern with, and protection of, the individual's interest in privacy"); *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999) ("Relevant factors to be considered" in right to informational privacy claim include "the adequacy of safeguards to prevent unauthorized disclosure"); *Barry v. City of New York*, 712 F.2d 1554, 1561 (2d Cir. 1983) (considering whether

"statute's privacy mechanism adequately protects plaintiffs' constitutional privacy interests" as an element of intermediate scrutiny afforded in claims alleging intrusion on right to privacy in personal information). As written and applied, the Act does not require that Missouri make any effort to limit the dissemination of the information at issue to the purposes of the Statute. As a result, criminal defendants under the Act, like Mr. Johnson, are exposed to an incomprehensible and ultimately unconstitutional invasion of their privacy. Accordingly, the Act must be invalidated and Mr. Johnson's conviction and sentence under it must be reversed and vacated.

III. The Act Violates Prohibitions Against Discrimination on the Basis of Disability.

Section 191.677 also violates the clear prohibitions against disability-based discrimination under the Americans with Disabilities Act ("ADA")[32] and Section 504 of the Rehabilitation Act ("Section 504").[33] This is because the Act 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.

Title II of the ADA ("Title II") and Section 504 both prohibit discrimination on the basis of disability: Title II applies to the activities of public entities, while Section 504 governs recipients of federal funding, including state agencies. 42 U.S.C. §§ 12131, 12132,

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[32] 42 U.S.C. §§ 12131, 12132; 28 C.F.R. 35.130 (2016).

[33] 29 U.S.C. § 701 *et seq.* (2014).

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28 C.F.R. 35.130 (2016); 29 U.S.C. § 794(a). To succeed on a claim that State action violates Title II, a litigant must establish that (1) he has a "disability" as defined by the ADA; (2) he is "otherwise qualified" to be free of the contested State action; and (3) the contested State action was taken against the litigant because of his protected disability. *See, e.g., Randolph v. Rogers*, 170 F.3d 850, 858 (8th Cir. 1999); *Bechtel ex rel. Bechtel v. State Dep't. of Soc. Servs., Fam. Support Div.*, 274 S.W.3d 464, 467 (Mo. banc 2009). A claim under Section 504 requires proof of these same three elements, plus an additional one: that the contested State action was performed by an agency that receives federal funding. *See, e.g., Harris v. Thigpen*, 941 F.2d 1495, 1522 (11th Cir. 1991); *City of St. Joseph v. Preferred Fam. Healthcare, Inc.*, 859 S.W.2d 723, 725 (Mo. App. W.D. 1993) (citing *Brown v. Sibley*, 650 F.2d 760, 769 (5th Cir. 1981)).

As a preliminary matter, Title II of the ADA is sufficiently broad to cover State criminal regulations and their enforcement. Title II's protections include activities of the legislative and judicial branches of State and local governments, 28 C.F.R. § 35.102 (a) (2016); 28 C.F.R. § 35.104, and while it does not expressly identify state legislative activity as within its scope, "[t]he fact that the statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth'." *Gorman v. Bartch*, 152 F.3d 907, 912 (8th 1998) (quoting *Pa. Dep't. of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998)). Thus, the U.S. Department of Justice, whose interpretation of

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Titles I and II of the ADA receives deference,[34] 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." U.S. Dep't of Justice, "Title II Highlights" (emphasis added), *available at* http://www.ada.gov/t2hlt95.htm. In addition, the Eighth Circuit Court of Appeals has explicitly held it "plain" that actions of the Missouri legislature are covered by Title II. *See Klingler v. Director, Dep't of Revenue, Mo.*, 433 F.3d 1078, 1080 (8th Cir. 2006). Other United States Courts of Appeals have similarly held State legislatures to be public entities subject to Title II's requirements. *See*, *e.g.*, *Hargrave v. Vermont*, 340 F.3d 27 (2d Cir. 2003); *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999); *Peck v. Clayton Cty.,* 47 F.3d 430 (11th Cir. 1995). Furthermore, Title II and Section 504 apply equally when the contested State activity pertains to criminal law enforcement. *See*, *e.g.*, *Davis v. Thompson*, 295 F.3d 890, 897 (9th Cir. 2002) ("A state's substantive decision-making processes in the criminal law context are not immune

[34] 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 citations 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)(b)(6).

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from the anti-discrimination guarantees of federal statutory law"); *Gohier v. Enright*, 186 F. 3d 1216, 1221 (10th Cir. 1999) (under ADA regulations, "law enforcement is obligated to modify 'policies that result in discriminatory arrests or abuse of individuals with disabilities.'") (internal citations omitted).

The ADA defines "disability," the first element of a claim under Title II and Section 504 as:

> (a) a physical or mental impairment that substantially limits one or more major life activities . . . ;
>
> (b) a record of such an impairment; or
>
> (c) being regarded as having such an impairment[.]

42 U.S.C. § 12102(1)(A).[35] 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 affected life activities relevant to disability definition);[36] and the U.S. Department of Justice, Civil Rights Division has likewise

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[35] *See also* 42 U.S.C. § 12102(2)(B) (including functions of the immune system in illustrative list of life activities the impairment of which is relevant to determining that an individual's disability is covered under the ADA).

[36] Pub. L. No. 110-325, 122 Stat. 3553; H.R. Rep. No. 110-730.

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confirmed that HIV is a protected disability under federal antidiscrimination law.[37] Moreover, as the United States Supreme Court made clear in its decision in *School Board of Nassau County v. Arline*, the "regarded as" language of the statute is designed to incorporate individuals who have a condition that triggers the prejudice and discriminatory reactions and perceptions of others:

> By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, 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.

480 U.S. at 284. *Arline* thus acknowledged both that the "regarded as" prong of the ADA definition of disability includes those whose conditions result in public prejudice and that contagious diseases are subject to prejudice of exactly this type. *Id.* Numerous cases have since confirmed that because of the continuing scourge of HIV discrimination in all aspects of private and public settings and institutions, Section 504 and Title II of the ADA protect people living with HIV and AIDS. *See, e.g.*, *Holiday v. City of Chattanooga*, 206 F.3d 637 (6th Cir. 2000); *Chalk v. U.S. Dist. Ct. of Cent. Dist. of Calif.,* 840 F.2d 701 (9th Cir. 1988) *Henderson v. Thomas*, 913 F. Supp. 2d 1267 (M.D. Ala. 2012).

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[37] *See* http://www.ada.gov/aids/index.htm; 28 C.F.R. §35.104(i)(ii); 42 U.S.C. §12134; 28 C.F.R. §35.190(b)(6).

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The second element of a claim under Section 504 and Title II concerns whether the claimant is "otherwise qualified" to be free of the State activity that is the focus of the discriminatory treatment. *Thigpen,* 941 F.2d. at 1522. The question here is whether individuals living with HIV are "otherwise qualified" to have intimate sexual relationships and engage in other conduct proscribed under the Act on the same terms as all other individuals without the disability of HIV. In *Arline*, the Supreme Court held that in the context of a communicable disease, the "otherwise qualified" inquiry must consider:

> (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long the carrier is infected), the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

480 U.S. at 288.

Application of these factors ultimately turns on the principle that "the significance of a risk is a product of the odds that transmission will occur and the severity of the consequences." *Id.* The Supreme Court emphasized in *Arline* that if a policy doesn't provide for application of these factors on an individualized, case-by-case basis, it contravenes the goal of Section 504 "of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear [.]" *Id.* at 287.[38]

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[38] In rejecting an earlier Eleventh Circuit decision that upheld segregation of inmates with HIV on the basis that they posed a threat to others' safety and therefore fell outside the ADA's protections, the district court in *Henderson* found it dispositive that, while the

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As discussed at length above, there can be no question that people living with HIV are otherwise qualified to engage in sexual activity without being subject to criminal prosecution for the nondisclosure of their HIV status.[39] The Act criminalizes much conduct

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Eleventh Circuit had based its conclusion on "'the state of medical knowledge and art at the time of trial,'" *Henderson*, 913 F.Supp.2d at 1290 (internal citation omitted), "[t]oday, however, HIV does not invariably cause death [and] [t]he vast majority of infected individuals can expect to live a near-normal lifespan." *Id.*

[39] As *amici* establish above, even without treatment, HIV is not easily transmitted, and many couples have remained, even before the advent of PrEP, in sero-discordant relationships for years without the HIV-negative partner becoming infected. In addition to PrEP, post-exposure prophylaxis, or PEP, is available to reduce transmission risks following contact where a prevention measure may have failed or been neglected. Roland M.E., *et al.*, *Seroconversion Following Nonoccupational Postexposure Prophylaxis Against HIV*, 41 Clin. Infect. Dis. 1507 (2005). Not surprisingly, people living with HIV are encouraged to have healthy, loving relationships, even to have children if that is their choice, *see* CDC, *HIV Among Pregnant Women, Infants, and Children*, *available at* http://www.cdc.gov/hiv/group/gender/pregnantwomen/index.html; U.S. Dep't. of Health & Human Servs. Panel on Treatment of HIV-Infected Pregnant Women & Prevention of Perinatal Transmission, *Recommendations for Use of Antiretroviral Drugs in Pregnant HIV-1 Infected Women for Maternal Health and Interventions to Reduce Perinatal HIV Transmission in the United States*, *available*

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that has little or no risk of HIV transmission, including oral sex, sex with condoms, and sex with an individual whose viral load is undetectable. The Act thus concerns individuals with a protected disability who are "otherwise qualified" within the meaning of Title II, as interpreted by *Arline*.

The third element to a claim under Title II and Section 504 is whether the claimant's disability, and discriminatory attitudes about that disability, are the reason for the contested State action. In analyzing under this element, courts often look to whether the State activity is based on unfounded stereotypes. This, too, has been discussed at length, above: HIV-specific criminal laws are the product of historical and ongoing animus. 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.

Finally, to succeed under Section 504, a claimant must establish that the challenged State body receives federal funding. In 1990, the United States Congress enacted the Ryan White Comprehensive AIDS Resource Emergency (CARE) Act, Public Law 101-381,

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at https://aidsinfo.nih.gov/contentfiles/lvguidelines/perinatalgl.pdf (last updated Aug. 6, 2015); U.S. Dep't of Health & Human Servs., *Pregnancy and Childbirth*, *available at* https://www.aids.gov/hiv-aids-basics/prevention/reduce-your-risk/pregnancy-and-childbirth/ (last updated Sept. 28, 2015); and interventions to prevent mother-to-child transmission have, since their discovery more than 20 years ago, practically eliminated pediatric HIV transmission in this country.

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codified at 42 U.S.C. § 300ff *et seq.*, which required States to certify that their criminal laws are sufficient to prosecute HIV-infected persons who knowingly expose others to HIV infection in order to receive funding for HIV/AIDS treatment and care, *id.* § 300ff-47 (2000). Missouri has, of course, so certified. *See* Univ. of California San Francisco Center for AIDS Prevention Studies, *is there a role for criminal law in HIV prevention?* (2005), *available at* http://caps.ucsf.edu/uploads/pubs/FS/pdf/criminalizationFS.pdf (by 2000, all 50 States had certified compliance to the federal government). Accordingly, the fourth and final element of a claim under Section 504 is established.

In sum, the Act applies a special requirement for individuals with HIV that is precisely the kind prohibited under ADA regulations. *See* 28 C.F.R. § 35.130(b)(8). When people with a protected disability are subjected to illogical requirements under threat of criminal prosecution for the simple reason of widespread prejudice, the authorizing criminal statute is in violation of Title II and, as here, Section 504.

IV. Mr. Johnson's Sentence Violates His Eighth Amendment Right Against Cruel and Unusual, Disproportionate Sentencing.

Michael Johnson's sentence — 30 1/2 years (with an additional concurrent term of 30 years) — violates the proscription against cruel and unusual punishment contained within the Eighth Amendment to the United States Constitution. In particular, that proscription extends to "extreme sentences that are 'grossly disproportionate'" to the offense, like this one. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (internal citation omitted).

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Claims of unconstitutionally disproportionate sentences are reviewed in a two-step process. First, courts compare "the gravity of the offense and the severity of the sentence." *Graham v. Florida*, 560 U.S. 48, 60 (2010). In this regard, "judgment should be informed by objective factors to the maximum possible extent." *Rummel v. Estelle*, 445 U.S. 263, 274 (1980). These include the type and extent of punishment imposed, the magnitude of the harm resulting from the offense, and the intent and culpability of the defendant. *Solem v. Helm*, 463 U.S. 277, 293-94 (1983). If consideration of these factors gives rise to an inference of "'gross disproportionality[,] the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Graham*, 560 U.S. at 60 (internal citation omitted). Where these comparisons support the initial inference of a disproportionate sentence, "the sentence is unconstitutional." *Id.*

First, Mr. Johnson's sentence gives rise to an inference of gross disproportionality because of its extreme harshness relative to Mr. Johnson's conduct. The starting point, as always, is the "absolute magnitude of the crime" – *i.e.*, the harm that the crime inflicts on its victim or society. *Solem v. Helm*, 463 U.S. 277, 293 (1983). Mr. Johnson was convicted of four counts of exposure or attempted exposure to HIV, and one count of exposure resulting in infection. With regard to the four counts of exposure, the magnitude of the harm cannot justify the sentence imposed: though exposure to HIV may certainly result in anxiety and a sense of violation for unknowing sexual partners, these psychological harms are not the type punished harshly under Missouri criminal law. *See*, *e.g.* V.A.M.S. § 565.070 (offense of "purposely placing another person in apprehension of immediate

physical injury" is a class C misdemeanor, punishable by a term of incarceration "not to exceed 15 days," *id.* § 558.011.1(7)); *see also* Schultz & Reuter, *AIDS Legislation in Missouri*, 53 Mo. L. Rev. at 623-24 ("This offense [of assault in the third degree] provides misdemeanor penalties for essentially the same type of conduct covered by the provision now considered [in section 191.677]."). And, with regard to the count of reckless exposure resulting in actual transmission of HIV, the law must, as set forth above, reflect that medical advances since the Act's passage have dramatically reduced the harm caused by HIV infection. Because the Act was passed at a time when HIV infection meant untimely death, it equated HIV transmission and exposure with acts of murder and attempted murder, respectively. *See* Michael L. Closen, *et al.*, *Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws*, 46 Ark. L. Rev. 921 (1994) (explaining that legislatures regarded AIDS as a death sentence and enacted HIV-specific laws in part because convictions using murder statutes were difficult to secure). But as already noted, the development of treatment, notably ART, has significantly altered the landscape. U.S. Dep't of Justice, *Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors* (2014), *available at* http://aids.gov/federal-resources/national-hiv-aids-strategy/doj-hiv-criminal-law-best-practices-guide.pdf (citing DHHS, *Chronic Manageable Disease*, *available at* www.aids.gov/hiv-aids-basics/just-diagnosed-with-hiv-aids/overview/chronic-manageable-disease/) ("HIV can be manageable as a chronic disease. People living with HIV can enjoy healthy lives.").

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In Mr. Johnson's case, the prosecutor acknowledged that the passage of time had reduced the magnitude of harm wrought by HIV infection, but urged the jury in summation that the law nonetheless remained unchanged:

> We're not required to prove this is a death sentence. It is a life-changing event. That's all we're required to prove, the transmission of the exposure to the virus, not that it's going to kill somebody. We didn't charge him with attempted murder.

(Trial Tr. vol. 4, 713 (May 14, 2015)). The comparison to attempted murder is telling: while the prosecutor essentially admitted that the State could not attain a conviction for attempted murder, that offense is a Class B felony in Missouri, *see* V.A.M.S. § 564.011.3(1) (attempt of a Class A felony is itself a Class B felony); *id.* at §§ 565.020, 565.021 (first- and second-degree murder are Class A felonies), the same level offense as mere exposure to HIV, without transmission, under the Act, *see* § 191.677.2. In other words, the State admitted in Mr. Johnson's case that the failure of the law to keep pace with objective facts entitled it to a windfall — clear evidence of gross disproportionality.

Also relevant to the threshold proportionality question addressing the magnitude of the crime is the intent and culpability of the offender. *Solem*, 463 U.S. at 293-94 (1983). As discussed, above, the Act requires no proof of specific intent to infect, and indeed, no related allegation was presented in Mr. Johnson's case. Further, as has also been discussed above, the decision whether to disclose one's status is complicated by the HIV-related stigma which will follow, as the courts of this State have recognized, *see Kinder*, 879 S.W.2d at 682 ("'[T]he privacy interest in one's exposure to the AIDS virus is even greater

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than one's privacy interest in ordinary medical records because of the stigma that attaches with the disease.'") (internal citation omitted), resulting in not only the loss of privacy, but also discrimination with regard to employment, housing, social relationships, and other areas. Burris, *Law and the Social Risk of Health Care*, 61 Alb. L. Rev. at 866-69. Where nondisclosure may thus represent a rational calculation of overall harm reduction, the decision not to disclose must be considered less culpable than would ordinary "recklessness," defined in Missouri's code as "consciously disregard[ing] a substantial and unjustifiable risk, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation," V.A.M.S. § 562.016.4; *see* Buchanan, *When Is HIV a Crime?*, 99 Minn. L. Rev. at 1253 ("HIV nondisclosure is not always blameworthy. The stigma and discrimination faced by people with HIV make disclosure risky as well as difficult . . . and partners could protect themselves by using condoms or engaging in safer sexual behaviors."). The lengthy sentence imposed, however, one which will take away from Mr. Johnson a good part of the rest of his life, fails to account for any of these facts, making his sentence unconstitutionally severe. Accordingly, an inference of gross disproportionately is unavoidable.

Thus, the Court must move to the second step of proportionality review, which requires intra- and inter-State comparisons of the penalties proscribed under the Act with those of criminal statutes within Missouri. The Act categorizes reckless exposure to HIV as a class B felony, with exposure resulting in infection elevated to class A. V.A.M.S. § 191.677.2. Intra-state comparison reveals that in Missouri, class A felonies, like the one for which Mr. Johnson is here punished, include murder in the first degree, V.A.M.S. §

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565.020; molestation with serious injury of a child under 12 years old, *id.* at § 566.067; robbery in the first degree, *id*. at § 569.020; child abandonment resulting in death, *id.* at § 568.030; infanticide, *id.* § 565.300; and child-kidnapping, *id.* § 565.115. There is a clear pattern here: class A felonies punish crimes resulting in death, which risk death during the course of another serious felony, or which cause irreparable harm to children. By contrast, infection with HIV is none of the above. *See* Part II(2)(B) *supra*. Likewise, class B felonies in Missouri include, for example, attempted murder, *id.* § 565.050, robbery in the second degree, *id.* § 569.030, and arson, *id.* § 569.040. Again, a pattern is readily apparent: these offenses threaten death or serious bodily injury to others through use of violence. And again, exposure to HIV no longer belongs in this category. In sum, without minimizing the seriousness of HIV exposure and infection, Mr. Johnson's conduct was plainly of a different order of magnitude than conduct receiving similarly harsh punishment under Missouri criminal law.

Disproportionality is also clear from other Missouri statutes that criminalize intentional exposure to HIV and hepatitis. Sections 565.085.1 and 565.086.1 make it a felony for someone in state custody who is knowingly infected with HIV or hepatitis to endanger the health of a correctional officer, department of mental health employee, or other person at a secure facility by attempting or actually causing contact with infected bodily fluids. *See* L. 2005 H.B. 700; L. 2010 S.B. 774. Tellingly, these laws – passed in 2005 and 2010, when the benefits of ART were understood and HIV was increasingly regarded as a chronic, but not a fatal condition – label *intentional* exposure as *Class C* felonies (with a sentencing range of 0-7 years imprisonment, V.A.M.S. § 558.011.1(2)).

In contrast to § 191.677, which carries far more severe penalties notwithstanding a less culpable mental state, these laws reflect an understanding that the magnitude of the harm of HIV infection is significantly less than it once was. This comparison of Mr. Johnson's sentence with others available in Missouri for like offenses, enacted at later times in history, supports the inference of gross disproportionality. *See State v. Dillard*, 158 S.W.3d 291, 303 (Mo. App. S.D. 2005) (courts may consider sentencing exposure for other offenses in the same jurisdiction when assessing proportionality of a sentence).

Finally, proportionality review calls for an inter-State comparison of penalties, which here entails comparing Mr. Johnson's sentence with sentences imposed for the same offense in other States. To a certain extent, that comparison should be given limited weight, given that HIV-specific criminal laws, regardless of jurisdiction, are overwhelmingly irrational and, as set forth above, *see* Part II(2)(D), reflect and reinforce an unconstitutional animus toward people with HIV and AIDS. *See*, *e.g.*, Nat'l Alliance of State & Terr. AIDS Dir's., *National HIV/AIDS Strategy Imperative: Fighting Stigma and Discrimination by Repealing HIV-Specific Criminal Statutes*, Exec. Comm. Res. (Feb. 2011) ("HIV criminalization undercuts our most basic HIV prevention and sexual health messages, and breeds ignorance, fear and discrimination against people living with HIV."). Nonetheless, States that have at least begun to reform their HIV-specific criminal laws have sentencing schemes that reinforce the inference of disproportionately in Mr. Johnson's case. In Illinois, Mr. Johnson could not have been convicted at all on the basis of the evidence presented at his trial, as Illinois's statute requires proof of specific intent to transmit HIV. Ill. Comp. Stat. § 5/12-5.01(a). But even so, Illinois classifies the more culpable offense

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of intentional exposure as a Class 2 felony, *id.* at § 5/12-5.01(e), with a sentencing range of between three and seven years, *id.* § 5/5-4.5-35 (2012). And under the statutes in Maryland, Michigan, California, and New Jersey, Mr. Johnson's conduct could have resulted in a sentence of, at most, eight years' incarceration. *See supra* n.19. These sentences are all markedly less than the range mandated by the Missouri law at issue here, and which Mr. Johnson himself received.

In sum, a comparison of Mr. Johnson's sentence with sentences provided for similar offenses in neighboring States supports an inference of gross disproportionality in violation of the Eighth Amendment. For this reason, too, his sentence violates the Eighth Amendment and must be invalidated.

V. Conclusion

For all of the foregoing reasons, undersigned *amici* respectfully request that this Court vacate Mr. Johnson's convictions and sentence. Nearly 20 years after passage of section 191.677, and more than 30 since the outbreak of HIV and AIDS in this country, there is no longer any rational justification for HIV-specific criminal laws. Because these laws now serve only to ostracize politically unpopular groups, and destroy lives, as has occurred here, this Court should invalidate the Act, reverse Mr. Johnson's convictions, and vacate his Draconian sentence.

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Respectfully submitted,

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Certificate of Service and Compliance

The undersigned hereby certifies that on April 14, 2016, the foregoing *amicus* brief was filed electronically and served automatically on the counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06 and Local Rule XLI; (3) contains 15,298 words. Finally, the undersigned certifies that electronically filed brief was scanned and found to be virus-free.

/s/ Anthony E. Rothert

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APPENDIX A
Statements of Interest of *Amici Curiae*

AIDS Law Project of Pennsylvania

The AIDS Law Project of Pennsylvania (ALPP) is a non-profit, public interest law firm providing legal services to persons in Pennsylvania affected by the HIV/AIDS epidemic. ALPP's interest in this case is consistent with its goal of ending the discrimination and stigma that fuel the HIV/AIDS epidemic. ALPP believes that criminalizing sexual behavior based on HIV status exacerbates discrimination and stigma and therefore is inconsistent with the public health goals of HIV prevention.

American Academy of HIV Medicine

The American Academy of HIV Medicine (AAHIVM) is an independent national organization of HIV Specialists and HIV care providers dedicated to promoting excellence in HIV/AIDS care and to ensuring better care for those living with AIDS and HIV disease. AAHIVM's interest in this case is as health care providers and certified medical professionals who seek policies that promote sound health practices and science-based public health policies for the care and well-being of people living with HIV and those most vulnerable to the disease. AAHIVM supports public policy based on current scientific understanding, best medical practices, and evidence-based research. Consequently, AAHIVM supports policies that respond to HIV disease exposure, transmission, and infection in the same way as other communicable diseases, and opposes public policies and

laws that distinguish HIV disease from other comparable diseases such as tuberculosis, hepatitis, herpes, or syphilis or that create disproportionate penalties for disclosure, exposure, or transmission of HIV disease. AAHIVM is also opposed to statutes that criminalize HIV infection in individuals which are flawed in their presuppositions, motives, and utility, and fail to take into account the major advances in HIV care and treatment that are now available to those who do become infected.

American Civil Liberties Union of Missouri

The American Civil Liberties Union (ACLU) of Missouri Foundation is an affiliate of the national ACLU, a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 500,000 members nationwide. The ACLU of Missouri has more than 4,500 members in the state. In furtherance of their mission, the ACLU and its affiliates engage in litigation, by direct representation and as *amici curiae*, to encourage the protection of rights guaranteed by the federal and state constitutions.

Athlete Ally

Athlete Ally is dedicated to eliminating homophobia and transphobia in sport, and to educating and activating athletic communities to champion lesbian, gay, bisexual, transgender, and queer (LGBTQ) equality. Athlete Ally's interest in this case is consistent with its mission to ensure that all members of athletic communities, including athletes, coaches, and fans, are treated fairly and equally, in the stadium and under the law. As allies

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to people living with HIV, Athlete Ally believes that inconsistent and unbalanced interpretation and application of criminal and civil laws to people living with HIV, including LGBTQ people of color — who are disproportionately impacted by HIV — reinforces prejudice and undermines the critical work of HIV prevention.

Black AIDS Institute

Founded in May of 1999, the Black AIDS Institute is the only national HIV/AIDS think tank focused exclusively on Black people. The Institute's Mission is to stop the AIDS pandemic in Black communities by engaging and mobilizing Black institutions and individuals in efforts to confront HIV. The Institute interprets public and private sector HIV policies, conducts trainings, offers technical assistance, disseminates information, and provides advocacy mobilization from a uniquely Black point of view. The Institute's interest in this case is consistent with its commitment to confront HIV by challenging public and private policies that reinforce HIV stigma and that are out of step with the latest HIV science, treatment, and prevention tools.

Center for Constitutional Rights

The Center for Constitutional Rights (CCR) is a national, not-for-profit legal, educational and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution and international law. Founded in 1966 to represent civil rights activists in the South, CCR has since litigated numerous cases on behalf of individuals impacted by arbitrary and discriminatory criminal justice policies, including under statutes

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that unconstitutionally target sex offenses in ways that disproportionately impact LGBTQ communities of color. For example, in *Doe v. Jindal*, 851 F. Supp. 2d 995 (E.D. La. 2012), CCR brought a successful equal protection challenge to a Louisiana law that required individuals convicted of Crimes Against Nature by Solicitation as sex offenders. In other contexts, CCR has brought substantive due process challenges to the use of harsh statutory schemes to target unpopular but non-violent conduct. *See United States v. Buddenberg*, No. 09-CR-00263, 2009 WL 3485937 (N.D. Cal. Oct. 28, 2009); *Blum v. Holder*, 744 F.3d 790 (1st Cir. 2014), *cert denied*, 2014 U.S. App. LEXIS 7475 (Nov. 10, 2014); *United States v. Johnson*, No. 14-CR-390, 2015 U.S. Dist. LEXIS 26843 (N.D. Ill. Mar. 25, 2015). CCR has also challenged irrational and disproportionate punishment schemes in the context of the prison system. *See Ashker et al. v. Governor of the State of California*, et al., No. C 09-5796 CW (N.D. Cal.).

<u>Center for HIV Law and Policy</u>

The Center for HIV Law and Policy (CHLP) is a national legal and policy resource and strategy center for people living with HIV and their advocates. 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 and unbalanced interpretation and application of criminal and civil laws to people living with HIV reinforces prejudice and undermines government-funded HIV prevention and treatment campaigns.

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Counter Narrative Project

The Counter Narrative Project (CNP) is a national advocacy organization committed to building power among black gay men in the United States through education, organizing and advocacy. CNP's interest in this case is consistent with its advocacy against systems and institutions that perpetuate structural violence against black gay communities. CNP achieves its advocacy goals through educational seminars, national webinars that identify and propose solutions to systemic bias and discrimination, policy reform advocacy, and community mobilization.

Dr. Jeffrey Birnbaum

Dr. Jeffrey Birnbaum is a physician and the Executive Director of the Health and Education Alternatives for Teens (HEAT) Program caring for HIV positive and high-risk LGBTQ youth, ages 13-24 years, in Brooklyn, New York. Established in 1991, HEAT is the only comprehensive care program of its kind in Brooklyn that provides age and developmentally appropriate, culturally competent care for heterosexual, lesbian, gay, bisexual, and transgender youth who are living with or are at very high risk for HIV/AIDS. The New York State-funded program, operating out of SUNY Downstate Medical Center, provides education, support, and referral opportunities for youth at risk for HIV infection.

Empower Missouri

Empower Missouri advocates for the well-being of all Missourians through civic leadership, education, and research. Empower Missouri was founded in 1901 and has had

four names over its century-plus history, but only one mission: to promote social justice. Its interest in this case is grounded in the priorities adopted by its Human Rights Task Force and its Health and Mental Health Task Force at its October 2014 annual business meeting. Those goals included improving the quality of life and health outcomes for persons living with HIV in Missouri by replacing policies grounded in misinformation and fear with those supported by peer-reviewed medical research.

<u>GLBTQ Legal Advocates and Defenders</u>

GLBTQ Legal Advocates & Defenders (GLAD) is a public interest legal organization dedicated to ending discrimination based upon sexual orientation, HIV status, and gender identity and expression. For over three decades, GLAD's AIDS Law Project has litigated cases establishing privacy rights, access to health care, equal employment opportunity, and sound public health policies for people with HIV. GLAD was counsel in *Bragdon v. Abbott*, 524 U.S. 624 (1998), which involved a dentist who refused to provide dental care to people with HIV, and established nationwide antidiscrimination protections for people with HIV under the Americans with Disabilities Act.

<u>GLMA: Health Professionals Advancing LGBT Equality</u>

GLMA: Health Professionals Advancing LGBT Equality (GLMA) is the largest and oldest association of LGBT and allied healthcare professionals of all disciplines. GLMA's mission is to ensure equality in healthcare for LGBT individuals and healthcare professionals, by using the medical and health expertise of GLMA members in public

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policy and advocacy, professional education, patient education and referrals, and the promotion of research. Formerly known as the Gay & Lesbian Medical Association, GLMA was founded in 1981 as a response to the call to advocate for policy and services to address the growing health crisis that would become the HIV/AIDS epidemic. Since then, GLMA's mission has been broadened to address the full range of health issues affecting LGBT people, including ensuring that all healthcare providers offer a welcoming environment to LGBT individuals and their families and are competent to address specific health disparities affecting LGBT people, including HIV and AIDS.

Grace

Grace is a women's group that offers confidential meetings to bring help, hope, and healing for a lifetime to those who are affected and infected with HIV. Grace was founded in 2008 and its mission is to provide spiritual, educational and personal health success to empower women of faith. Its interest in this case is that according to the CDC (Centers for Disease Control), approximately one in four people living with HIV infection in the United States are women. Women made up 20% (9,500) of the estimated 47,500 new HIV infections in the United States in 2010. Grace, as women of the faith community, is in this fight against HIV disease together with its brothers and sisters.

Human Rights Campaign

Human Rights Campaign (HRC), the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where LGBT people are ensured

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of their basic equal rights, and can be open, honest and safe at home, at work and in the community. Among those basic rights is the right to be free from discrimination based on HIV status.

Missouri AIDS Taskforce

The Missouri AIDS Task Force is a coalition of advocacy groups, AIDS service organizations, and citizen activists fighting to reduce stigma and discrimination against people living with HIV. The mission of the Missouri AIDS Task Force is to empower the citizens of Missouri by providing them with the tools to advocate for the rights and well-being of people living with HIV.

National Alliance of State and Territorial AIDS Directors

The National Alliance of State and Territorial AIDS Directors (NASTAD), representing the nation's chief state health agency staff, has programmatic responsibility for administering HIV/AIDS and viral hepatitis healthcare, prevention, education, and support service programs funded by state and federal governments. NASTAD is dedicated to reducing the incidence of HIV/AIDS and viral hepatitis infections in the U.S. and its territories, providing comprehensive, compassionate, and high-quality care to all persons living with HIV/AIDS and viral hepatitis, and ensuring public policies are in line with current medical and public health knowledge about HIV/AIDS and viral hepatitis.

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National Black Justice Coalition

The National Black Justice Coalition (NBJC) is a civil rights organization dedicated to the empowerment of Black LGBT people. Since 2003, NBJC has provided leadership at the intersection of national civil rights groups and LGBT organizations, advocating for the unique challenges and needs of the African American LGBT community that are often relegated to the sidelines. NBJC envisions a world where all people are fully-empowered to participate safely, openly, and honestly in family, faith and community, regardless of race, class, gender identity or sexual orientation.

National Center for Lesbian Rights

The National Center for Lesbian Rights (NCLR) is a national organization committed to protecting and advancing the rights of LGBT people, including LGBT individuals in prison, through impact litigation, public policy advocacy, public education, direct legal services, and collaboration with other social justice organizations and activists.

National LGBTQ Task Force

Since 1973, the National LGBTQ Task Force has worked to build power, take action, and create change to achieve freedom and justice for LGBTQ people and their families. As a progressive social justice organization, the Task Force works toward a society that values and respects the diversity of human expression and identity and achieves equity for all.

One Struggle KC

One Struggle KC is a coalition of Kansas City activists seeking to connect the struggles of oppressed Black communities, locally and globally. Its interest in this case is centered on the over-criminalization of Black people, especially those living with HIV. One Struggle KC believes that misinformation about HIV transmission risks, anti-Black racism, fear mongering, and heterosexism created an environment that caused the overly aggressive and unfair treatment and sentencing of Michael Johnson.

Treatment Action Group

Treatment Action Group (TAG) is an independent AIDS research and policy think tank fighting for better treatment, a vaccine, and a cure for AIDS. TAG's interest in this case is consistent with its mission to ensure that all people with HIV receive lifesaving treatment, care, and information. TAG believes that criminal prosecutions of people with HIV for exposing others to HIV or transmitting the virus undermine thirty-five years of scientific advances in treatment and care, and challenge efforts by public health officials and medical providers to remove the stigma of having an HIV diagnosis so more people are comfortable getting tested and receiving the appropriate care.

William Way LGBT Community Center

The William Way LGBT Community Center is a 501(c)(3) community center in Philadelphia, Pennsylvania serving the LGBT and allied communities. The Center's interest in the case relates to its forty years of work in the LGBT and allied communities

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to end discrimination and stigma against LGBT people, people living with HIV, and people of color.

Women With A Vision

Women With A Vision, Inc. (WWAV) is a community-based non-profit, founded in 1989 by a grassroots collective of African-American women in response to the spread of HIV/AIDS in communities of color. Created by and for women of color, WWAV is a social justice non-profit that addresses issues faced by women within its community and region. Major areas of focus include sex worker rights, drug policy reform, HIV positive women's advocacy, and reproductive justice outreach.

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