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Model Legislative Testimony Regarding HIV Criminalization and Disability Discrimination

State laws that criminalize, or enhance the criminal penalties for, acts by people who are HIV-positive violate the nondiscrimination principles of the Americans with Disabilities Act.

The Americans with Disabilities Act of 1990¹ or ADA was enacted to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”² Title II of the ADA protects against disability discrimination by state and local government entities. Title II states that “no qualified individual with a disability shall, by reason of such disability, [...] be subjected to discrimination by any [public] entity.”³ That means state governments may not discriminate against people with disabilities, including people living with HIV. The ADA has an expansive reach and prohibits rules that purposely treat people differently on the basis of their disability, as well as rules that have a disparate impact on people with disabilities such as HIV.⁴

The ADA was passed in 1990 during the height of the HIV/AIDS crisis, when fear and misinformation about HIV was widespread. In fact, the National Restaurant Association and other business groups tried to include language in the ADA⁵ that would have permitted restaurants and other food service employers to remove workers with HIV from their jobs. Congress rejected this proposal, which was not based on science. Instead, Congress required that science and medical experts determine any risks that infectious diseases pose in the context of food handling. Congress also codified the “direct threat” analysis, which the U.S. Supreme Court endorsed in 1987 in the *Arline* case.⁶ The “direct threat” analysis requires an individualized assessment, based on current medical knowledge or on the best available objective evidence, of the nature, duration, and severity of the risk, the probability that the potential injury will actually occur, and whether reasonable modifications would mitigate the risk.⁷ Thus, from the very beginning, the ADA has required persuasive objective evidence before treating someone more harshly on the basis of any disability including HIV.

The U.S. Supreme Court has recognized that people who are HIV positive are protected under the ADA. In 1998, in *Bragdon v. Abbott*,⁸ the Supreme Court upheld a ruling that a woman with asymptomatic HIV infection who was refused dental care had a “disability” under the ADA.

¹ 42 U.S.C. § 12131 et seq.

² 42 U.S.C. § 12131(b)(1).

³ 42 U.S.C. § 12132.

⁴ See 28 C.F.R. § 35.130; *A.H. v. Ill. High Sch. Ass’n*, 881 F.3d 587 (7th Cir. 2018).

⁵ To learn more about the Chapman amendment, see <http://www.adalawproject.org/chapman-amendment>.

⁶ *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

⁷ See 28 C.F.R. § 35.139.

⁸ 524 U.S. 624 (1998).

Congress made the inclusion of people living with HIV within the scope of the ADA even more explicit with the 2008 ADA Amendments Act (ADAAA). The ADAAA expanded and clarified the definition of disability.⁹ Under the ADAAA, disability – “a physical or mental impairment that substantially limits one or more major life activities” – is considered in its “active” phase, and without regard to mitigating measures such as medications.¹⁰ Further, “major life activities” is defined to include “major bodily functions,” such as “functions of the immune system.” This language easily encompasses HIV, including asymptomatic HIV.

In amending the ADA in 2008, Congress intended to include disabilities such as HIV. The legislative history repeatedly references HIV as disability that would be covered by the Act.¹¹ The U.S. Department of Justice regulations implementing the ADAAA state that that it is a “predictable assessment” that “Human Immunodeficiency Virus (HIV) infection substantially limits immune function.”¹² It is abundantly clear, therefore, that people living with HIV are people with disabilities protected by the ADA.

The ADA does permit different treatment in response to a legitimate direct threat to the safety of others.¹³ The direct threat exception only applies where there is a significant risk of substantial harm that cannot be mitigated sufficiently with reasonable accommodations.¹⁴ Moreover, the defense prohibits consideration of prejudice, stereotypes, or unsubstantiated fears, and instead requires an objectively reasonable assessment “based on medical or other objective evidence.”¹⁵ Subjecting people living with HIV to harsher criminal punishment without an objective medical or scientific basis is the exact kind of irrational prejudice against people with disabilities that the ADA prohibits.

State laws that criminalize HIV violate Title II of the ADA when they are not based on the current objective medical and scientific knowledge regarding HIV transmission.¹⁶ For example, HIV cannot be transmitted via

⁹ See 42 U.S.C. § 12102.

¹⁰ 42 U.S.C. § 12102.

¹¹ See, e.g., ADA AMENDMENTS ACT OF 2008 House Committee Report (as amended), H.R. Rep. No. 110-730, pt. 2, at 16-17 and n. 44 (2008) (listing a person with HIV as an example of someone who could make use of the ADAAA’s illustrative list of major life activities to demonstrate that they qualify for protection under the ADA.); 154 Cong. Rec. H8297-98 (daily ed. Sept. 17, 2008) (Statement of Rep. Tammy Baldwin) (“The ADA was meant to prohibit discrimination against people with disabilities. Yet, many people with HIV have been denied coverage under the ADA and therefore left without any legal recourse against discrimination. Under the ADA Amendments Act, these men and women will all be assured legal protection for discrimination based on their HIV status, irrespective of their child-bearing intentions or lack of expert testimony about HIV’s impact on child-bearing.”); 154 Cong. Rec. H6064-65 (daily ed. June 25, 2008) (Statement of Rep. Jerrold Nadler) (“I have seen scores of cases where the ADA was construed not to cover individuals with cancer, epilepsy, diabetes, severe intellectual impairment, *HIV*, muscular dystrophy, and multiple sclerosis. These people have too often been excluded because their impairment, however serious or debilitating, was mis-characterized by the courts as temporary, or its impact considered too short-lived and not permanent enough-although it was serious enough to cost them the job.”) (emphasis added); 154 Cong. Rec. H6072-73 (daily ed. June 25, 2008) (Statement of Rep. Mazie Hirono) (“Congress never intended for the courts to seize on the definition of ‘disability’ as a means of excluding individuals with serious health conditions like [...]HIV [...] from protection under the law. [...] By passing H.R. 3195, the Congress will be able to correct these decisions made by the courts.”).

¹² See 28 C.F.R. § 35.108.

¹³ 28 C.F.R. §§ 35.130(h), 35.139(a).

¹⁴ 28 C.F.R. §§ 35.130(h), 35.139; 29 C.F.R. § 1630.2(r); *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998).

¹⁵ 28 C.F.R. § 35.139(b).

¹⁶ These laws often criminalize a variety of types of conduct and cover other kinds of pathogens, such as Hepatitis B or C. Unless otherwise noted, other types of conduct or pathogens are outside the scope of these comments.

saliva,¹⁷ and thus there is no scientific basis for treating people more harshly for spitting because of their HIV status. Nevertheless, several states criminalize or impose harsher criminal penalties for spitting as a person living with HIV. In Mississippi, for example, the simple fact that someone is living with HIV can result in sentences and fines that are ten times higher for the exact same conduct as someone who is HIV-negative.¹⁸ Similar laws exist in many states, including Indiana¹⁹ Missouri,²⁰ Ohio,²¹ Pennsylvania,²² and Utah.²³ These laws are not based on science, and violate the non-discrimination mandate of the ADA.

Other laws that criminalize sexual contact similarly violate the ADA. There is no scientific basis for the proposition that digital penetration poses a quantifiable risk of HIV transmission.²⁴ Similarly, oral sex carries little or no risk of HIV transmission.²⁵ Nevertheless, several states criminalize these sexual acts if the person does not disclose their HIV positive status.²⁶ In Arkansas, engaging in these sexual acts without disclosing one's HIV positive status is a Class A felony punishable for a minimum of six years and up to thirty years in prison.²⁷

Further, the use of condoms, PrEP (pre-exposure prophylaxis), and antiviral medication, by themselves or in combination, can dramatically reduce the risk of HIV transmission, in some cases to zero.²⁸ The

¹⁷ Centers for Disease Control and Prevention, Ways HIV is Not Transmitted, (April 21, 2021) available at <https://www.cdc.gov/hiv/basics/hiv-transmission/not-transmitted.html> (“[HIV] is not transmitted [...] Through saliva, tears, or sweat”).

¹⁸ MISS. CODE ANN. § 97-27-14(2) (misdemeanor punishable with up to a year in county jail and a \$1,000 fine to knowingly expose someone to your saliva inside a correctional facility, but felony punishable with a minimum three year prison sentence, and up to ten years in prison, and a \$10,000 fine, if person knows they are living with HIV).

¹⁹ See Ind. Code §§ 35-42-2-1, 35-45-16-2(c), 35-50-3-3.

²⁰ See MO. REV. STAT. § 575.155; MO. REV. STAT. § 575.157.

²¹ See OHIO REV. CODE ANN. §§ 2921.38, 2929.14.

²² See 18 PA. CONS. STAT. ANN. § 2703.

²³ See UTAH. CODE. ANN. §§ 76-3-204, 76-3-301, 76-5-102.6.

²⁴ Centers for Disease Control and Prevention, Ways HIV is Not Transmitted, (April 21, 2021) available at <https://www.cdc.gov/hiv/basics/hiv-transmission/not-transmitted.html> (“[HIV] is not transmitted [...] “[t]hrough [...] sexual activities that don’t involve the exchange of body fluids (for example, touching)”).

²⁵ Centers for Disease Control and Prevention, Ways HIV Can Be Transmitted, (April 21, 2021) available at <https://www.cdc.gov/hiv/basics/hiv-transmission/ways-people-get-hiv.html> (“[t]here is little to no risk of getting HIV” from oral sex); Julie Fox, Peter J. White, Jonathan Weber, et al., Quantifying sexual exposure to HIV within an HIV-serodiscordant relationship: development

of an algorithm, *AIDS* 2011, 25:1065–1082 at 1077 (2011) (person receiving oral sex has 0-0.04% chance of transmitting HIV while a person performing oral sex has 0% risk of transmitting HIV).

²⁶ See ALA. CODE § 22-11A-21; ARK. CODE ANN. § 5-14-123 (engaging in penetrative sex, broadly defined to include oral, vaginal, and anal sex, as well as digital penetration, without disclosing HIV positive status is a Class A felony punishable for a minimum of six years and up to thirty years).

²⁷ ARK. CODE ANN. § 5-14-123.

²⁸ Robert W. Eisinger, Carl W. Dieffenbach, Anthony S. Fauci, HIV Viral Load and Transmissibility of HIV Infection: Undetectable Equals Untransmittable, *Journal of the American Medical Association* (2019), available at <https://jamanetwork.com/journals/jama/article-abstract/2720997>; National Institute of Allergy and Infectious Disease, The Science Is Clear—With HIV, Undetectable Equals Untransmittable: NIH Officials Discuss Scientific Evidence and Principles Underlying the U=U Concept, (Jan. 10 2019), available at <https://www.niaid.nih.gov/news-events/science-clear-hiv-undetectable-equals-untransmittable> (“In recent years, an overwhelming body of clinical evidence has firmly established the HIV Undetectable = Untransmittable (U=U) concept as scientifically sound, say officials from the National Institutes of Health.

criminalization of sex acts without regard to the actual risk of transmission in the individual case also discriminates against people living with HIV by failing to consider the mitigation of any risk.

The harms caused by these forms of disability discrimination are nothing new. In its foundational *Arline* decision, the Supreme Court noted that in the past, “[e]ven those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious.”²⁹ The direct threat exception which requires an assessment of risks and harms based on the best available objective evidence strikes a fair balance between public safety and the freedom of people with disabilities to live full and equal lives within American society.

Laws that penalize people living with HIV without regard to scientific or medical evidence, do not reflect the fair balance that the ADA requires. Instead, such laws discriminate against people with disabilities in violation of the ADA. We urge you to [vote yes / vote no] on this legislation, and to bring [state] into compliance with the minimum standards of the ADA.

U=U means that people living with HIV who achieve and maintain an undetectable viral load—the amount of HIV in the blood—by taking and adhering to antiretroviral therapy (ART) as prescribed cannot sexually transmit the virus to others.”); Alison J. Rodger, Valentina Cambiano, Tina Bruun, et al., Sexual Activity Without Condoms and Risk of HIV Transmission in Serodifferent Couples When the HIV-Positive Partner Is Using Suppressive Antiretroviral Therapy, *JAMA*. 2016;316(2):171-181. doi:10.1001/jama.2016.5148 (2016), available at <https://jamanetwork.com/journals/jama/fullarticle/2533066>; Roger Chou, Christopher Evans, Adam Hoverman, et al., Preexposure Prophylaxis for the Prevention of HIV Infection: Evidence Report and Systematic Review for the US Preventive Services Task Force, *JAMA* (2019), available at <https://jamanetwork.com/journals/jama/fullarticle/2735508>; Centers for Disease Control and Prevention, PrEP Effectiveness (May 13, 2021), available at <https://www.cdc.gov/hiv/basics/prep/prep-effectiveness.html> (“PrEP reduces the risk of getting HIV from sex by about 99% when taken as prescribed.”).

²⁹ *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 284 (1987).