Case No. 21-____

IN THE
SUPREME COURT OF SUPERIOR

The AMERICAN CIVIL LIBERTIES UNION OF SUPERIOR Petitioner, v. MURPPLE, Attorney General of Superior Respondents, in re: 720 ILCS 5/12-5.01	)	Filed: April __, 2021

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

HurricaneofLies
ACLU OF SUPERIOR

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Attorney for Plaintiff

INTRODUCTION

1. Plaintiff the American Civil Liberties Union of Superior ("ACLU of Superior") is a civil liberties advocacy group headquartered in Chicago, Superior. The ACLU of Superior is a regional affiliate of the American Civil Liberties Union.

2. Defendant Murpple, in his official capacity as Attorney General, is the chief legal officer of the State and supervises the enforcement of the State's criminal statutes through his supervisory role over the State's attorneys.

3. The challenged statute is 720 ILCS 5/12-5.01 ("the HIV transmission statute", "the statute"), which criminalizes intentional engagement in insertive vaginal or anal intercourse without a condom in the knowledge that one is infected with human immunodeficiency virus (HIV).

4. The statute criminalizes consensual adult sexual relationships between partners due to fear of HIV transmission, even when no such transmission is proven or when transmission is medically impossible to a high degree of scientific certainty.

5. The State's enforcement of the statute violates the rights of people living with HIV under the U.S. Constitution's First and Fourteenth Amendments. The statute further engages in facially discriminatory conduct against a group—people living with HIV—based on their disabilities, in violation of title II of the

Americans with Disabilities Act and section 504 of the Rehabilitation Act.

6. Plaintiff presents the following questions of law and fact for the consideration of this Court:

a. Whether the HIV transmission statute discriminates against persons living with HIV;

b. Whether the statute compels persons living with HIV to engage in speech that they find objectionable; and

c. Whether, by reason of the facts alleged in this Complaint, the Defendant's enforcement of the statute violates one or more of the constitutional and statutory rights enumerated herein.

COUNT ONE

EQUAL PROTECTION (U.S. CONST. AMEND. XIV)

7. Plaintiff incorporates by reference all preceding paragraphs.

8. The Fourteenth Amendment to the United States Constitution guarantees that "[n]o State shall [...] deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV.

9. Under clearly established precedent, denial of equal protection on the basis of a suspect classification engenders strict

scrutiny. *Fisher v. University of Texas*, 570 U.S. 297 (2013). To satisfy strict scrutiny, a regulation must further a compelling government interest and the classification must be narrowly tailored to serve that interest.

10. Suspect classification is in turn determined in accordance to a three-pronged test, where the Court must assess whether "(1) there is competent evidence establishing the essentially unchangeable trait; (2) that trait must be ascertainable, meaning it is capable of definition so courts can tell who belongs and who doesn't; and (3) the immutable trait is unrelated to the ability to perform or contribute to (or harm) society." *Assorted Homosexuals v. FDA*, 101 M.S.Ct. 115 (2020), at part II-B. If each prong of this test is satisfied, "it raises the rebuttable presumption that classifications based on that trait are suspect." *Id.*

11. The burden would then shift onto the Defendant to rebut the presumption by showing with clear and convincing evidence that (1) "the trait has not been used to subject a class to historic discrimination," (2) "the relevant class has political power," and (3) "the class is not an insular and discrete minority." *Id.* If this is demonstrated by Defendant, the class is quasi-suspect and intermediate scrutiny applies.

12. In this case, the class is people living with HIV and the trait is HIV status.

13. HIV status is an essentially unchangeable trait since HIV is a "communicable and potentially fatal, incurable disease." *U.S. v. Blas*, 360 F.3d 1268, 1273 (11th Cir. 2004). Because HIV status is not generally "a product of choice," *Assorted Homosexuals*, *supra*, at part II-C, its incurable, lifelong nature and ability to afflict persons regardless of personal choice renders it an essentially unchangeable trait. This satisfies the first prong of the suspect classification test.

14. HIV status is also ascertainable: it is defined by whether or not a person is infected with the HIV virus. Testing for the presence of the HIV virus is accurate, widespread, and readily commercially available upon demand. This satisfies the second prong of the suspect classification test.

15. Finally, HIV status is self-evidently not related to a person's ability to contribute to society. People living with HIV who have no detectable viral load are fully-functional members of society who live long, healthy, and ordinary lives. Indeed, many talented and widely-admired members of society, including Charlie Sheen, Freddie Mercury, Liberace, and Magic Johnson, have tested positive for HIV but nonetheless indelibly contributed to the advancement of this Nation's public and civic life. This satisfies the last prong of the suspect classification test, and raises the presumption that HIV status is a suspect classification.

16. Strict scrutiny thus applies since Defendant cannot overcome this presumption.

17. First, persons living with HIV as a class undeniably face persistent historic discrimination. As the Federal Government has expressly acknowledged, "HIV-related discrimination is impairing this nation's ability to limit the spread of the epidemic." *Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic* 19 (1988).

18. Second, the relevant class is both politically marginalized (*see generally*, Presidency of Ronald Reagan) and a discrete and insular minority, since only 1.2 million people in the United States live with HIV and face social stigma and alienation.

19. Although "achieving an HIV transmission rate [...] as low as reasonably achievable," *Assorted Homosexuals*, *supra*, at part III, is certainly a compelling government interest, the statute in question utterly fails the narrow-tailoring prong of the test because it is both overbroad and underinclusive.

20. The statute is overbroad because HIV-positive people who receive treatment and have undetectable viral loads are medically incapable of transmitting the virus to sexual partners. National Institutes of Health, *The science is clear: with HIV, undetectable equals untransmittable* (Jan. 10, 2019). Yet, people

living with undetectable HIV viral loads still face criminal penalties under this statute.

21. The statute is also underinclusive because it only criminalizes knowing transmission through vaginal and anal sex, but not through oral sex, despite oral sex also being well-documented risk factor for HIV transmission. Centers for Disease Control, *STDs and HIV – CDC Fact Sheet* (Apr. 5, 2021), https://www.cdc.gov/std/hiv/stdfact-std-hiv-detailed.htm.

22. Accordingly, the statute violates the Fourteenth Amendment to the U.S. Constitution and Plaintiff requests the relief outlined below.

COUNT TWO

COMPELLED SPEECH (U.S. CONST. AMEND. I)

23. Plaintiff incorporates by reference all preceding paragraphs.

24. The First Amendment to the United States Constitution, as incorporated against the States by the Due Process Clause, prohibits governments from, among other things, "abridging the freedom of speech, or of the press." U.S. Const., amend. I.

25. A fundamental principle that flows from this guarantee is that the State "may not compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-American Gay,*

Lesbian Bisexual Group, 515 U.S. 557, 573 (1995). This limitation is not only limited to "expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Id.*

26. The statute does precisely what the First Amendment prohibits by compelling the disclosure of facts about HIV status which a HIV-positive speaker would rather avoid during highly intimate romantic or sexual encounters. Because a regulation compelling a specific factual message necessarily targets speech based on "its message, its ideas, its subject matter, or its content," *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002), it thus constitutes a content-based restriction, which is "presumptively invalid" under the First Amendment. *U.S. v. Stevens*, 559 U.S. 460, 468 (2010).

27. Accordingly, the statute violates the First Amendment to the U.S. Constitution and Plaintiff requests the relief outlined below.

COUNT THREE

DISCRIMINATION ON THE BASIS OF DISABILITY

(29 U.S.C. 794; 42 U.S.C. 12132)

28. Plaintiff incorporates by reference all preceding paragraphs.

29. Title II of the Americans with Disabilities Act (ADA) provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S. Code § 12132.

30. Similarly, section 504 of the Rehabilitation Act states that "[n]o otherwise qualified individual with a disability in the United States [...] shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S. Code § 794.

31. Under both Federal statutes, a disability is "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S. Code § 12102. A qualified individual with a disability is, in turn, "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S. Code § 12131.

32. There is little debate that HIV-positive status constitutes a disability under Federal law.

33. First, it is well-established that HIV-positive status "satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease." *Bragdon v. Abbott*, 524 U.S. 624, 637 (1998).

34. It is furthermore established that, due to its centrality to family life and basic physiological nature, "sex easily qualifies as a major life activity." *Adams v. Rice*, 531 F.3d 936, 947 (D.C. Cir. 2008). *Accord*, *McAlindin v. County of San Diego*, 192 F. 3d 1226, 1234 (9th Cir. 1999) ("engaging in sexual relations, just like procreation, is a major life activity"). *See generally*, *Bragdon*, 524 U.S. at 638 ("Reproduction and the sexual dynamics surrounding it are central to the life process itself.").

35. Finally, it is beyond dispute that the Attorney General and the state's attorneys who enforce the statute are both a "public entity" and a "program receiving receiving Federal financial assistance." They are thus fully subject to both the ADA and the Rehabilitation Act.

36. A statute that singles out HIV-positive people for disclosure under pain of criminal prosecution necessarily discriminates against HIV-positive people on the basis of their physical disability: their HIV status. Because a HIV-disclosure

measure expressly "treats some people", i.e., people living with HIV, "less favorably than others because of their [protected characteristic]," *Teamsters v. United States*, 431 U. S. 324, 335, n. 15 (1977), this is a form of intentional disparate treatment.

37. "Liability in a disparate-treatment case depends on whether the protected trait actually motivated the [defendant's] decision." *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003). Because there is clear, unambiguous indication of intentional discrimination, the statute is facially contrary to the nondiscrimination protections of Federal disability legislation.

38. Accordingly, the statute violates the Americans with Disabilities Act and the Rehabilitation Act and Plaintiff requests the relief outlined below.

CONCLUSION

39. For the reasons stated above, 17 ILCS 5/12-5.01 violates the First and Fourteenth Amendments to the United States Constitution, title II of the Americans with Disabilities Act, and section 504 of the Rehabilitation Act.

40. Petitioners pray for the following relief:

a. a declaration that 170 ILCS 5/12-5.01 violates the First and Fourteenth Amendments to the United States Constitution, title II of the Americans with

Disabilities Act, and section 504 of the Rehabilitation Act;

b. a permanent injunction barring enforcement of the statute; and

c. any additional such relief as the Court may deem proper.

Respectfully submitted,

___/s/_____
HurricaneofLies
Attorney for Plaintiff

Dated: April 14, 2021

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