IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
	)	
Appellee,	)	BRIEF OF *AMICUS CURIAE*
	)	IN SUPPORT OF APPELLANT
v.	)	
	)	
AMA Second Class (E-5)	)	
Lamar FORBES,	)	
U.S. Navy,	)	USCA Dkt. No. 18-0304/NA
	)	Crim.App. Dkt. No. 201600357
Appellant.	)	

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Amicus curiae OutServe-SLDN, Inc., respectfully submits this brief in support of Appellant. The interests of OutServe-SLDN are described in the Motion for Leave to File Brief of Amicus Curiae, filed on October 5, 2018.

INTRODUCTION

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

Olmstead v. United States, 277 U.S. 438, 479, 48 S. Ct. 564 (1928) (Brandeis, J., dissenting). Justice Brandeis's observation should be centered here, where "well-meaning" people—courts, commanders, prosecutors, and judges—crafted and

developed a legal rule to protect victims and promote public health. "Without understanding" either the medical science or the practical effects, these well-meaning people achieved neither goal. Now, only the Rule is left—one that imposes severe punishment for a victimless crime without public-health consequences based on having a chronic, manageable medical condition. It is time to re-evaluate the Rule and end it.

The Rule is this: *engaging in sex while failing to disclose one's HIV status to a sex partner causes that partner "bodily harm."* As applied here, the Rule bears no relationship to reality: the sexual conduct underlying the charged offenses was incapable of transmitting HIV. (JA 0198-0199, 0238, 0378.) Consequently, Appellant was convicted solely for not saying the words, "I have HIV." In effect, "bodily harm" was found in the absence of expression despite no possibility of actual, physical injury.

This result has no support—not in science, not in law, not in public policy, not in equity. OutServe-SLDN submits this brief to assist the Court in understanding that the Rule has nothing to redeem it, and much to condemn it—not just here, but in all instances. The Court should therefore rule that HIV nondisclosure is not relevant to proving "bodily harm" in assault charges under the Uniform Code of Criminal Justice ("UCMJ").

BACKGROUND

OutServe-SLDN adopts the Statement of the Case and Statement of Facts set forth in the Brief of Appellant and offers the following additional facts to assist the Court.

A. Criminalization of HIV has a long history.

The criminalization of HIV[1] dates back decades, to the beginning of the AIDS epidemic in the 1980s. When AIDS came into the national consciousness mid-decade, the unknowns created an "epidemic of fear."[2] In response, legislators and courts sought to use legal tools to address the epidemic.[3] One such tool was to criminalize behavior that was believed to spread the virus.[4] States "enacted coercive measures aimed at controlling the HIV infection rate, despite public health experts' disavowal of the effectiveness of these compulsory measures."[5]

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[1] "'HIV criminalization' refers to the use of criminal law to penalize alleged, perceived or potential HIV exposure; alleged nondisclosure of a known HIV-positive status prior to sexual contract (including acts that do not risk HIV transmission); or non-intentional HIV transmission." AIDSWatch, *HIV Criminalization: A Challenge to Public Health and Ending AIDS*, https://www.aidsunited.org/data/files/Site_18/AW2015-Criminalization_Web.pdf.

[2] Victoria A. Harden, AIDS AT 30, 77-78 (2012).

[3] Sun Goo Lee, *Criminal Law and HIV Testing: Empirical Analysis of How At-Risk Individuals Respond to the Law*, 14 YALE J. HEALTH POL'Y, L. & ETHICS 194, 198 (2014).

[4] *See id.*

[5] Stephen V. Kenney, *Criminalizing HIV Transmission: Lessons from History and a Model for the Future*, 8(1) J. CONTEMP. HEALTH L. & POL'Y 245, 246 (1992).

One of the first efforts came in 1988, with the final report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic.[6] Among its strategy recommendations, the report advocated for "the enactment of AIDS-specific statutes that prosecute individuals who 'knowingly conduct themselves in ways that pose a significant risk of transmission to others.'"[7] The Report suggested that such statutes be limited in scope:

> [C]riminal sanctions for HIV transmission must be carefully drawn, must be directed only towards behavior which is scientifically established as a mode of transmission, and should be employed only when all other public health and civil actions fail to produce responsible behavior.[8]

Congress provided additional incentive with The Ryan White CARE Act in 1990,[9] which made federal grants contingent on enacting laws to prosecute people with HIV who engage in sexual activity, donate blood, tissue, or breast milk, or share needles, and who "intend" to "expose" another person to HIV.[10]

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[6] The Presidential Commission on the Human Immunodeficiency Virus: The Report of Human Immunodeficiency Virus Epidemic (1988) ("Presidential Report").

[7] Kenney, *supra* note 5, at 260 n.91 (quoting Presidential Report at 130).

[8] *Id.* (quoting Presidential Report at 130).

[9] The Ryan White Comprehensive AIDS Resources Emergency (CARE) Act of 1990, Pub. L. No. 101-381, 104 Stat. 576.

[10] *Id.* § 2647, 42 U.S.C. § 300ff-47 (1999) (repealed); *see also* Kenney, *supra* note 5, at 247 & n.11.

Whether in response to these federal recommendations and incentives or otherwise, HIV-specific criminal laws have proliferated: Today, 34 states, two territories, and the federal government have HIV-specific criminal statutes.[11] The military is among them: Among the strategies developed purportedly to mitigate the spread of HIV are so-called "safe-sex" orders, which counsel Service members with HIV on the risk of sexual activity, require them to disclose their HIV status to potential sex partners, and require them to use barriers to prevent the exchange of bodily fluids during sex;[12] as well as criminal prosecutions for failing to follow those orders and for various offenses under the UCMJ.[13]

Despite the Presidential Commission's recommendation that these laws be carefully drawn, scientifically valid, and a last resort, many of them impose harsh criminal penalties—felony convictions, extended jail sentences, and even sex-

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[11] *See generally* Center for HIV Law & Policy ("CHLP"), *HIV Criminalization in the United States: A Sourcebook on State and Federal HIV Criminal Law and Practice* (2017), http://www.hivlawandpolicy.org/sourcebook ("CHLP *Sourcebook*"); *see also* CHLP, *Chart: State-by-State Criminal Laws Used to Prosecuted People with HIV* (2017), http://www.hivlawandpolicy.org/resources/chart-state-state-criminal-laws-used-prosecute-people-hiv-center-hiv-law-and-policy-2012 ("CHLP *Chart*").

[12] *E.g.*, NAVMC 2904, Commander's Guide to the Human Immunodeficiency Virus (HIV), Appx. E & F; *Military to Help Civilians on AIDS Warnings*, N.Y. Times (Apr. 23, 1987), http://www.nytimes.com/1987/04/23/us/military-to-help-civilians-on-aids-warnings.html.

[13] *See generally United States v. Womack*, 29 M.J. 88 (C.M.A. 1989); *United States v. Bygrave*, 40 M.J. 839 (N.M.C.M.R. 1994); *United States v. Morris*, 30 M.J. 1221 (A.C.M.R. 1990).

offender registration—for the mere nondisclosure of HIV, without regard to whether the alleged victim acquired the virus or was even exposed to it, or even whether there was any risk to the sexual activity.[14] According to the CDC, 25 states "criminalize one or more behaviors that pose a low or negligible risk for HIV transmission."[15]

Even in states without HIV-specific criminal laws, and sometimes in states with them, prosecutors use public-health statutes, sentencing-enhancement statutes, and general felony laws such as assault, reckless endangerment, or even attempted murder to further subject people living with HIV ("PLWHIV") to criminal penalty.[16] The military is in this latter category: there are no HIV-specific criminal provisions in the UCMJ. Instead, HIV "offenses" are typically charged under Article 92 (failure to follow an order or regulation); Article 120 (sexual assault), Article 128 (assault), Article 133 (conduct unbecoming), and Article 134 (acts against good order and discipline).[17] As in some states, the military charges HIV

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[14] *See generally* CHLP *Sourcebook*, *supra* note 11; *see also infra* note 79 (setting forth examples of lengthy sentences).

[15] CDC, *HIV-Specific Criminal Laws*, https://www.cdc.gov/hiv/policies/law/states/exposure.html.

[16] *See generally* CHLP *Sourcebook*, *supra* note 11.

[17] *E.g.*, J. Brostek, *Prosecuting an HIV-Related Crime in a Military Court-Martial: A Primer*, Army Law. (Sept. 2009) at 29.

nondisclosure as an offense even without evidence of transmission, exposure, or risk to the alleged victim.[18]

B. Scientific knowledge of HIV has improved dramatically.

Even while this legal crack-down was taking place, scientists made great strides in understanding HIV. The virus operates by gaining a foothold in the blood, hijacking the body's immune system, and using it to create copies of itself.[19] These copies then target CD4 T-cells, which the body needs to fight infection.[20] If untreated, the virus multiplies to levels that allow it to reduce the overall quantity of CD4 cells until the body becomes more prone to "opportunistic infections."[21]

Until the mid-1990s, HIV was always terminal.[22] But in 1996 that changed. New antiretroviral medications that attack the virus and prevent it from replicating revolutionized HIV treatment and radically shifted health outcomes for PLWHIV.[23] Antiretroviral treatment ("ART") reduces the number of copies of

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[18] *E.g.*, *United States v. Gutierrez*, 74 M.J. 61 (2015).

[19] *See* HIV.gov, *What Are HIV and AIDS?*, https://www.hiv.gov/hiv-basics/overview/about-hiv-and-aids/what-are-hiv-and-aids (last visited Sept. 28, 2018).

[20] *See id.*

[21] *See* CDC, *About HIV/AIDS*, https://www.cdc.gov/hiv/basics/whatishiv.html (last visited Sept. 28, 2018).

[22] *See What Are HIV and AIDS?*, *supra* note 19; *see also* CDC, *HIV and AIDS Timeline*, https://npin.cdc.gov/pages/hiv-and-aids-timeline (last visited Sept. 28, 2018).

[23] *See What Are HIV and AIDS?*, *supra* note 19.

virus in a person's blood—measured as copies/ml, known as the "viral load."[24] A viral load under the detectable limit of lab machines—typically 50 copies/ml—is known as "undetectable."[25] People who adhere to ART will become undetectable.[26]

As viral load drops, CD4 cells rebound and the immune system recovers, reversing the effects of untreated HIV and restoring good health.[27] So for anyone with access to treatment, HIV is no longer terminal.[28] In fact, someone who is timely diagnosed with HIV and who adheres to ART has about the same life expectancy as a person who does not have HIV.[29]

1. The risks of transmitting HIV are extremely low.

The past two decades have also seen great strides in understanding HIV transmission.[30] There is a clear consensus among medical, scientific, and public-

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[24] *See About HIV/AIDS*, *supra* note 21.

[25] CDC, *Dear Colleague*, https://www.cdc.gov/hiv/library/dcl/dcl/092717.html (last visited Oct. 5, 2018); *see also* Greta Hughson, *Factsheet: Viral Load*, AIDSMAP (May 2017), http://www.aidsmap.com/Viral-load/page/1044622/.

[26] *See* National Institute of Allergy and Infectious Diseases, *10 Things to Know About HIV Suppression* (Nov. 14, 2017), https://www.niaid.nih.gov/news-events/10-things-know-about-hiv-suppression.

[27] *See* Selina Corkery, *Factsheet: Diagnosed with HIV at a Low CD4 Count*, NAM AIDSMap (Mar. 2016), http://www.aidsmap.com/Diagnosed-with-HIV-at-a-low-CD4-count/page/2182215/.

[28] *See What Are HIV and AIDS?*, *supra* note 19.

[29] *See* Julia L. Marcus et al., *Narrowing the Gap in Life Expectancy Between HIV-Infected and HIV-Uninfected Individuals With Access to Care*, 73 J. AIDS 39, 42 (2016); *see also What Are HIV and AIDS?*, *supra* note 19.

[30] *See* CDC, *Effectiveness of Prevention Strategies to Reduce the Risk of Acquiring or Transmitting HIV*,

health professionals that HIV is not easily transmitted. The likelihood of transmission depends on several biological factors, such as a person's overall health, use of protective barriers such as condoms, and viral load.[31] Only certain bodily fluids, almost always blood or semen, carry enough viral load to result in transmission.[32] During sexual activity, HIV cannot be transmitted if there is no exposure to a bodily fluid containing enough HIV.[33]

Even without barrier protection or biomedical interventions, studies on the HIV transmission risks associated with sexual acts show that they are very small. The riskiest sexual activity has only a 1.38% per-act chance of transmitting HIV, and per-act risk for other sexual activities is between zero and .08%.[34] For example, the risk of HIV transmission through unprotected oral sex is extremely low—approaching zero or actually zero—absent a combination of extenuating

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https://www.cdc.gov/hiv/risk/estimates/preventionstrategies.html (last visited Sept. 28, 2018).

[31] *See* CDC, *HIV Risk Behaviors*, https://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html (last visited Oct. 3, 2018) (describing factors that increase risk of HIV transmission); *see also* Julia Fox et al., *Quantifying Sexual Exposure to HIV Within an HIV-Serodiscordant Relationship: Development of an Algorithm*, 25(8) AIDS 1065 (2011) (describing factors that affect risk of HIV transmission).

[32] *See* CDC, *HIV Transmission*, https://www.cdc.gov/hiv/basics/transmission.html (last visited Oct. 3, 2018).

[33] *See id.*

[34] *See HIV Risk Behaviors*, *supra* note 31.

circumstances.[35] If someone with HIV is performing oral sex, and no HIV-transmitting bodily fluid is present in the oral cavity, then transmission does not occur because saliva does not transmit HIV.[36] Even if the person with HIV is receiving oral sex and ejaculates into his partner's mouth, the transmission risk remains near zero.[37] It is so low, the CDC declines to provide a numerical estimate of the per-act probability of transmitting HIV this way, even though it does for other sexual activity. The CDC states that accurate estimates of the risk are not available; it describes the risk as "low."[38]

The risk of HIV transmission—for any particular sexual activity—can be reduced even further with the use of condoms,[39] biomedical interventions like

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[35] *See* Fox et al., *supra* note 31, at 1075, 1077 (finding the risk of HIV transmission per sexual exposure for insertive oral sex to be zero); *HIV Risk Behaviors*, *supra* note 31.

[36] *See HIV Transmission*, *supra* note 32, (stating that saliva is not a bodily fluid that transmits HIV); *see also* Jeffrey D. Klausner, MD, *Risk of HIV Infection Through Receptive Oral Sex at Univ. of Cal. S.F.* (Mar. 14, 2003), http://hivinsite.ucsf.edu/insite?page=pr-rr-05 ("[T]here has to be exposure to infectious substance. … If there is no infectious [substance], there should be no transmission, there should be no exposure to virus.").

[37] *See* Fox et al., *supra* note 31, at 1076-77.

[38] *See HIV Risk Behaviors*, *supra* note 31.

[39] "Latex condoms, when used consistently and correctly, are highly effective in preventing the … transmission of HIV." CDC, *Fact Sheet for Public Health Personnel*, https://www.cdc.gov/condomeffectiveness/latex.html (last visited Oct. 3, 2018). In fact, "[c]ondom effectiveness for STD and HIV prevention has been demonstrated by both laboratory and epidemiologic studies." CDC, *Condom Fact Sheet in Brief*, https://www.cdc.gov/condomeffectiveness/brief.html (last visited Oct. 3, 2018).

PEP[40] and PrEP,[41] and effective medical care for people with HIV. Alone or in combination, these practices will reduce transmission risk to effectively zero.

2. The U.S. recognizes that effective treatment prevents transmission of HIV.

Scientific study of HIV has led to another understanding: if a person with HIV is in consistent treatment and becomes undetectable, the risk of transmission is *essentially zero* for any sexual activity.[42]

As science advanced, and based on overwhelming evidence, in 2016 the Prevention Access Campaign—a health-equity initiative to end the dual epidemics of HIV and HIV-related stigma by empowering people with and vulnerable to HIV with accurate and meaningful information about their social, sexual, and reproductive health—launched *Undetectable = Untransmittable*, or U=U.[43] The Campaign issued a Consensus Statement signed by prominent HIV scientists and

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[40] PEP—post-exposure prophylaxis—is a prevention measure that involves taking ART after a possible exposure to HIV. *See* CDC, *PEP* https://www.cdc.gov/hiv/basics/pep.html (updated May 23, 2018).

[41] PrEP—pre-exposure prohylaxis—is a prevention measure that involves taking ART before HIV exposure to reduce the chance of infection. *See* CDC, *PrEP*, https://www.cdc.gov/hiv/basics/prep.html (last visited Oct. 3, 2018).

[42] *See* HIV.gov, *HIV Treatment as Prevention*, https://www.hiv.gov/hiv-basics/hiv-prevention/using-hiv-medication-to-reduce-risk/hiv-treatment-as-prevention (last visited Sept. 28, 2018); *10 Things to Know About HIV Suppression*, *supra* note 26 (people who maintain undetectable viral load have effectively no risk of sexually transmitting HIV).

[43] *See* Prevention Access Campaign, https://www.preventionaccess.org/ (last visited Oct. 5, 2018).

medical doctors, setting forth that treatment prevents transmission: "People living with HIV on ART with an undetectable viral load in their blood have a negligible risk of sexual transmission of HIV."[44] (Scientifically, "negligible" means "so small or unimportant as to be not worth considering; insignificant."[45]) Over 700 organizations from nearly 100 countries endorsed the Consensus Statement.[46]

The United States itself—the same government prosecuting Appellant in this action—recently recognized these scientific principles. In late September 2017, after hundreds of other medical experts and organizations had already signed on, the Centers for Disease Control officially acknowledged that people with HIV who achieve undetectable status are non-infectious:

> Across three different studies, including thousands of couples and many thousand acts of sex without a condom or pre-exposure prophylaxis (PrEP), no HIV transmissions to an HIV-negative partner were observed when the HIV-positive person was virally suppressed. This means that people who take [ART] daily as prescribed and achieve and maintain an undetectable viral load have effectively no risk of sexually transmitting the virus to an HIV-negative partner.[47]

One of the signers of the CDC's acknowledgement was Assistant Surgeon General of the U.S. Public Health Service, Rear Admiral Jonathan H. Mermin, MD, MPH.

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[44] Prevention Access Campaign, *Consensus Statement*, https://www.preventionaccess.org/consensus (updated Aug. 23, 2018).

[45] *Id.*

[46] *Id.*

[47] CDC, *Dear Colleague*, *supra* note 25.

ARGUMENT

I. Finding "bodily harm" through HIV nondisclosure is legally and scientifically unsupported.

Equating nondisclosure to "bodily harm" has no legal or scientific basis, particularly when involving sexual activity in which the risk of HIV transmission is non-existent.

A. Disclosure as a proxy for the "bodily harm" element of an assault charge is inconsistent with plain language.

To start, disclosure of HIV status is irrelevant to the "bodily harm" analysis. The Court should reject efforts to replace an inquiry that is meant to be about *harm* with an inquiry about knowledge or information.

It is a "fundamental canon of statutory construction" that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227, 134 S. Ct. 870 (2014). "[E]specially in the interpretation of a criminal statute subject to the rule of lenity, we cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant." *United States v. Burrage*, 571 U.S. 204, 216, 134 S. Ct. 881 (2014).

Under these principles, the "bodily harm" element of sexual assault and assault cannot be satisfied with evidence of nondisclosure. For sexual assault and

assault charges, "bodily harm"[48] is defined as "any offensive touching of another, however slight."[49] In plain English, the inquiry is about harm or injury, while disclosure is about sharing information. But disclosing the information "I have HIV" will not prevent injury from the exposure to or transmission of HIV any more than not hearing the words will cause such injury. Words are not prophylactic; a person can make a disclosure and still cause bodily harm. Similarly, HIV exposure *may* cause bodily harm, but disclosing HIV status will not interfere with that exposure (if it is possible).

In addition, this Court has held that "in cases involving HIV exposure, the government will be held to its burden of proving every element of the charged offense *in the same manner* that is required in other cases invoking the same statute." *United States v. Gutierrez*, 74 M.J. 61, 67 (C.A.A.F. 2015) (emphasis added). This means that bodily harm "must mean the same thing in [a] prosecution … involving HIV transmission as it does in any other prosecution under the statute." *Id.* at 66. Allowing "bodily harm" to be proved by HIV nondisclosure would depart from this rule, as no other sexual assault or assault prosecution examines what words came out of an accused's mouth in determining bodily harm.

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[48] Manual for Courts-Martial ("MCM") (2016 ed.) pt. IV, ¶45.a.(b)(1)(B); *see also id.* ¶54.b(2)(a).

[49] MCM, pt. IV, ¶45.a.(g)(3); *id.* ¶54.c.(1)(a).

Analyzing HIV disclosure for the "bodily harm" element of any charge under the UCMJ is logically and legally unsound. The Court should therefore disapprove the use of HIV nondisclosure as a proxy for the "body harm" element of assault charges.[50]

B. "Bodily harm" is impossible when the risk of HIV transmission is essentially zero.

The correct analysis of "bodily harm" is not whether disclosure occurred, but whether there is a likelihood of HIV transmission. That analysis *must* include scientific evidence and an assessment of the risk under the circumstances of the sexual activity of each case. And when there is no risk of transmission, the "bodily harm" element of assault cannot be established.

This Court has previously considered the "bodily harm" element of assault in the context of HIV. *See United States v. Gutierrez*, 74 M.J. 61 (C.A.A.F. 2015). Though the opinion purported to be about the accused's failure to disclose HIV status, the analysis properly focused on the likelihood of HIV transmission. *See id.* at 66-67. The question flowed from the elements of the charged offense: "was grievous bodily harm the likely consequence of Appellant's sexual activity" for purposes of an aggravated assault charge. *Id.* at 66. There, for each of three kinds

[50] Information, such as disclosure of HIV status, may be relevant to the consent element of an assault charge. But when the risk of HIV transmission is non-existent, disclosure should not be required before consent is effective. That is, nondisclosure should not vitiate consent when there is no risk.

of sexual activity that Appellant engaged in, the Court concluded that grievous bodily harm was *not* likely because "HIV transmission [was] not the likely consequence" of that activity. *Id.* at 66-67; *see also id.* at 67 ("an event is not 'likely' to occur when there is a 1-in-500 chance of occurrence").

Following *Gutierrez*, the correct analysis here tracks the elements of the charge: for sexual assault and assault, the question is: *did the sexual activity result in bodily harm by causing an offensive touching, however slight*. And taking it further, when there is no possibility of transmitting HIV, then there can be no offensive touching, however slight. When there is no transmissibility, "the evidence is legally insufficient to support a conviction … , because the government has failed to prove an essential element of the offense, that the [accused] had the ability to assault the victim by transmitting transmit [sic] the HIV virus." *United States v. Perez*, 33 M.J. 1050, 1053 (A.C.M.R. 1991).

As the discussion above on HIV science makes clear, a large swath of sexual activity would fail to meet this standard because there is no risk of HIV transmission, including:

- Kissing, frottage, mutual masturbation, digital stimulation, and use of toys;
- Sexual activity involving a protective barrier, such as a condom;
- Oral sex, particularly when performed by a person with HIV;
- Sexual activity in which the person with HIV has an undetectable viral load;
- Sexual activity in which the person without HIV is on PrEP.

This list is not exhaustive. The analysis should be case-by-case, based on the circumstances.

Any rule in which "bodily harm" is determined without examining the underlying risk of HIV transmission is scientifically indefensible. The Court should recognize that "bodily harm" cannot be proved when the risk of transmission is essentially zero.[51]

II. Criminalizing HIV does not protect public health.

Finding "bodily harm" through HIV nondisclosure has no support in public policy either. Though purporting to be public-health measures, laws criminalizing HIV do not live up to that goal and thus cannot be justified on that basis.

A. Criminalizing HIV reflects and increases stigma and discrimination.

HIV-related stigma is a significant barrier to governmental efforts to control the epidemic:

> One of the biggest barriers to health equity surrounding HIV/AIDS is the stigma and relative silence associated with the disease. … [T]he stereotype of HIV/AIDS as the consequence of an individual's deviant behavior has perpetuated shame and discouraged people from knowing their status and treating it.[52]

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[51] Arguably, the relevant facts would include whether HIV was actually transmitted; examining risk in the abstract is unnecessary when the sexual encounter has already occurred and the results are known.

[52] Center for American Progress, *HIV/AIDS Inequality: Structural Barriers to Prevention, Treatment, and Care in Communities of Color* (July 12, 2012) at 14,

Stigma disrupts the public-health response by discouraging testing and interfering with access to care and treatment—particularly when the judgmental attitudes come from health-care providers.[53]

HIV and the people it affects are stigmatized to an "extraordinary" degree because the disease is: (1) associated with deviant behavior; (2) viewed as the responsibility of the individual; (3) viewed through a morality lens, whether religious belief or otherwise, or associated with morally sanctionable behavior; (4) perceived as contagious and threatening to the community; (5) associated with an undesirable form of death; and (6) not well understood by the law community and viewed negatively by health-care providers.[54] HIV criminalization both reflects these attitudes and fosters them. As discussed above, the laws were born out of panic and fear about HIV, as well as moral judgment. Their existence also makes those matters worse: By singling out HIV for criminal sanction without regard to actual risk of transmission, the government sends the inaccurate signal that HIV is

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http://www.americanprogress.org/wp-content/uploads/issues/2012/07/pdf/hiv_community_of_color.pdf/.

[53] Ronald O. Valdiserri, *HIV/AIDS Stigma: An Impediment to Public Health*, 92 AM. J. PUB. HEALTH 341 (2002).

[54] Angelo A. Alonzo & Nancy R. Reynolds, *Stigma, HIV and AIDS: An Exploration and Elaboration of a Stigma Trajectory*, 41 SOC. SCI. & MED. 303 (1995).

uniquely fearsome and dangerous.[55] It is particularly harmful when the stigmatizing efforts come from the government. It provides a visible and powerful disincentive for those at risk for HIV to ever get tested, let alone access medical care and treatment that keeps them and their communities healthy. Accordingly, the President's Advisory Council on AIDS has recognized that the criminalization of people with HIV fuels HIV stigma and on that basis has recommended that HIV-specific criminal laws be repealed.[56]

The military's interpretation of the UCMJ is part of this cycle. For example, even though herpes and viral hepatitis are easier to transmit and have worse health outcomes, failure to disclose these infections is not prosecuted as sexual assault or assault. Subjecting Service members to criminal prosecution based on HIV thus institutionalizes and promotes HIV stigma. By accepting that HIV nondisclosure is enough to establish bodily harm, then, this Court would codify bias and stigma against PLWHIV into the law, distorting it to the point where irrational fear of the impossible is satisfactory proof. By equating nondisclosure to assault, the result would essentially disregard the "substantial and qualitative difference between

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[55] Kim Shayo Buchanan, *When Is HIV a Crime? Sexuality, Gender & Consent*, 99 MINN. L. REV. 1231, 1273 (2015).

[56] President's Advisory Council on AIDS, *Resolution on Ending Federal and State HIV-specific Criminal Law, Prosecutions, and Civil Commitments* (2013), http://hivlawandpolicy.org/resources/view/824.

failing to disclose one's HIV positive serostatus … and intentionally trying to infect [someone]."[57]

B. Laws criminalizing HIV are empirically proven to have no effect on the spread of HIV.

Empirical data backs up the conclusion that criminalizing HIV creates a stigmatizing environment that interferes with public-health goals. Research has demonstrated that HIV criminalization simply does not work as a public-health measure:

> In this ecologic analysis, we found no association between diagnosis rates and state criminal exposure laws. … Finding no association between HIV or AIDS diagnosis rates and laws that criminalize HIV exposure supports the hypothesis that these laws have not affected HIV behaviors or transmission.[58]

In study after study, medical and public-health experts have concluded that HIV-specific criminal laws do not promote disclosure of HIV status before sex.[59]

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[57] Carol L. Galletly & Steve D. Pinkerton, *Toward Rational Criminal HIV Exposure Laws*, 32 J. L. MED. & ETHICS 327, 355 (2004).

[58] Patricia Sweeney et al., *Association of HIV diagnosis rates and laws criminalizing HIV exposure in the United States*, 31(10) AIDS 1483 (June 19, 2017); *see also* Buchanan, *supra* note 55, at 1247 (discussing empirical studies showing failure of HIV-specific criminal laws to reduce rate of HIV transmission); President's Advisory Council on AIDS, *supra* note 56 ("[A]n evidence-based approach to disease control and research demonstrates that HIV-specific laws do not reduce transmission or increase disclosure[.]").

[59] *See* Carol L. Galletly et al, *New Jersey's HIV Exposure Law and the HIV-Related Attitudes, Beliefs, and Sexual Seropositive Status Disclosure Behaviors of Persons Living with HIV*, 102 AM. J. PUB. HEALTH 2135, 2139 (2012) ("awareness that New Jersey has an HIV exposure law had little if any effect on the disclosure

Nor do such laws foster behavior that mitigates the risk of transmission; rather, they are shown to have no effect (or a negative effect) on abstinence, number of sex partners, or condom use.[60] As a result, despite the widespread proliferation of such laws, "new HIV cases have remained steady" and in some subpopulations "have risen sharply."[61]

That HIV-specific criminal laws are counterproductive has been known for decades, even when they started to be proposed and enacted when the AIDS crisis began. As early as 1989, public-health experts knew that "legislation for compulsory screening, isolation, and criminalization has proceeded despite the absence of evidence that it is efficacious and the fact that it often contradicts explicit public health advice."[62] No evidence has developed to fill this gap; HIV-specific criminal laws *still* aren't effective and still contradict public-health advice.

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behavior of [PLWHIV]"); Carol Galletly et al., *A Quantitative Study of Michigan's Criminal HIV Exposure Law*, 24 AIDS CARE 174, 178 (2012) (same, in Michigan).

[60] Galletly, *Michigan's HIV Exposure Law*, *supra* note 59, at 178; Scott Burris et al., *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 ARIZ. ST. L.J. 467 (2007); Patrick O'Byrne et al., *Nondisclosure Prosecutions and HIV Prevention: Results from an Ottawa-Based Gay Men's Sex Survey*, 24 J. NURSES ASS'N AIDS CARE 81, 85 (2013) (between 10-20% of men surveyed reported that awareness of prosecutions for nondisclosure led to higher risk behavior).

[61] Brad Barber & Bronwen Lichtenstein, *Support for HIV Testing and HIV Criminalization Among Offenders Under Community Supervision*, 33 RESEARCH IN SOC. HEALTH CARE 253, 255 (2015).

[62] Lawrence O. Gostin, *Public Health Strategies for Confronting AIDS*, 261 JAMA 1621, 1629 (1989).

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."[63]

C. HIV-specific criminal laws encourage behavior that is contrary to public health.

These laws aren't just ineffective; they're also counterproductive. "The logical arguments for the effect [of criminalization] are hard to fault: criminal laws create a good reason not to know one's status."[64] Because criminal liability attaches only if a person knows he has HIV, and because it reinforces stigma of a condition that is already extremely disfavored, HIV-specific criminal laws actually discourage people from being tested.

Testing is central to any sensible public-health response to HIV: not only does testing facilitate treatment and secure better health outcomes for those who already have HIV, it also reduces the risk of further transmission: people who are diagnosed begin treatment, which ultimately suppresses viral load and prevents transmission.[65] Testing also helps reduce the spread of HIV because people adopt lower risk behavior after learning they have HIV;[66] "People who know they have

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[63] Burris, *supra* note 60, at 467.

[64] *Id.* at 514.

[65] Robert S. Jansen et al., *The Serostatus Approach to Fighting the HIV Epidemic: Prevent Strategies for Infected Individuals*, 91 AM. J. PUB. HEALTH 1019, 1020-21 (2001).

[66] *Id.*

HIV … are much less likely than their untested counterparts to transmit HIV."[67] By discouraging testing, then, HIV criminalization undermines rather than furthers the important governmental goal of reducing HIV transmission.

This is not just a theoretical problem. Survey evidence reveals that HIV criminalization is a deterrent to testing and treatment:

> One quarter of respondents (25.1%) indicated they knew one or more people who told them they did not want to get tested for HIV because of fear of prosecution if they tested positive; more than 5% indicated that "*many people*" have told them this.
>
> Almost half of respondents (49.6%) felt it could be reasonable for someone to avoid testing for HIV, and 41.6% felt it could be reasonable to avoid HIV treatment for fear of prosecution.[68]

In sum, them, HIV criminalization laws—including the use of the UCMJ to charge HIV nondisclosure—have failed as a public-health measure. The government's goal of controlling the spread of HIV is not served by these laws, and their existence cannot be justified on those grounds.[69]

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[67] Buchanan, *supra* note 55, at 1245.

[68] SERO Project, Press Release, *HIV Criminalization Discourages HIV Testing, Creates Disabling and Uncertain Legal Environment for People With HIV in U.S.* (July 25, 2012), http://toolkit.hivjusticeworldwide.org/wp-content/uploads/2017/02/Sero-Survey-Complete.pdf.pdf.

[69] Because these laws fail to advance a legitimate government interest, they are constitutionally suspect. They would fail scrutiny under the First Amendment (free speech), Fifth Amendment (due process/equal protection), and the right to privacy.

III. Criminalizing HIV nondisclosure unfairly burdens PLWHIV.

Finally, equity disfavors the result below. Unless this Court corrects it, using the UCMJ to criminalize HIV nondisclosure burdens PLWHIV in several ways, even beyond the direct legal consequences of noncompliance. These burdens are unique and unfair.

A. PLWHIV face a hostile and uncertain legal environment.

Under these laws, PLWHIV are very vulnerable legally. The evidence is stark:

> [Survey r]esponses … paint a picture of a *disabling* legal environment, one where PLHIV receive vague information—if any—about how to protect themselves from prosecution and results in a fear of false accusations and little trust in the judicial system to give them a fair hearing in the event of a prosecution.[70]

The law punishes nondisclosure; thus, a false accusation is as simple as an unhappy ex or spurned romantic interest declaring: "He never told me he had HIV."[71] These "he said–he said" accusations are notoriously difficult to defend.

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[70] SERO Project: National Criminalization Survey (July 25, 2012), http://toolkit.hivjusticeworldwide.org/wp-content/uploads/2017/02/Sero-Survey-Complete.pdf.pdf; *see also* Carol L. Galletly & Julia Dickson-Gomez, *HIV Sero-positive Status Disclosure to Prospective Sex Partners and Criminal Laws That Require it: Perspectives of Persons Living with HIV*, 20(9) INT'L J. STD & AIDS 613 (Jul. 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4097389/.

[71] Galletly & Dickson-Gomez, *supra* note 70 ("Participants also feared being exploited by persons who discover their positive-serostatus … and might try to capitalize on their vulnerable position by falsely accusing them of violating the law.").

Because of the possible consequences, OutServe-SLDN recommends that Service members with HIV maintain written or electronic evidence of HIV disclosure.[72] It is likely not the only to do so.

This legal jeopardy is not just theoretical. A Georgia woman was convicted for not disclosing her HIV status based on the testimony of her male partner over the statements of multiple witnesses who stated that the "victim" already knew the HIV status.[73] An Ohio man received a 40-year sentence after his jealous ex-lover accused him of not disclosing his HIV status.[74] The identical situation landed a man behind bars in Illinois.[75]

When they do find themselves in the criminal justice system, PLWHIV worry that they will not be treated fairly. There might be something to their fears: *One*, as recounted above, much of the legacy of HIV criminalization arises from—and continues to be maintained by—misinformation, unfounded fears, and moral judgment rather than up-to-date scientific data. *Two*, HIV is singled out: laws

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[72] OutServe-SLDN, Inc., *Freedom to Serve: The Definitive Guide to LGBTQ Military Service* (forthcoming, 2018) (advising Service members with HIV to disclose by text or app message and take a screen shot of the disclosure).

[73] Ari Ezra Waldman, BetaBlog, *Ask a Lawyer: The Injustice of HIV Criminalization* (May 3, 2013), https://betablog.org/ask-a-lawyer-the-injustice-of-hiv-criminalization/.

[74] *Id.*

[75] Chad Zawitz, MD, *He Said, She Said—And What the Law Says*, https://www.positivelyaware.com/articles/he-said-she-said%E2%80%94and-what-law-says (last visited Oct. 4, 2018).

rarely punish exposure to other diseases, including other sexually transmitted diseases. When they do, HIV is almost always treated as a felony and punished more severely.[76] *Three*, examples abound of prosecutorial overreach involving serious charges, such as attempted murder and bioterrorism, for spitting and biting even though saliva does not transmit HIV.[77] *Four*, when they are convicted, PLWHIV are often sentenced to comically large sentences, often for offenses that harmed no one.[78] And *five*, comments made during proceedings often send the message that PLWHIV are viewed with fear and bias. In sentencing a defendant who had worn a condom and maintained an undetectable status, one judge was both dramatic and incorrect:

> "Often times for the court it is easy to tell when someone is dangerous. They pull the gun. They have done an armed robbery. But you created a situation that was just as dangerous as anyone who did that."[79]

Similarly, in closing argument in a court martial in which the undersigned served

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[76] *See generally* CHLP *Sourcebook*, *supra* note 11.

[77] Deonna Anderson, The Marshall Project, *Is It Time to Roll Back the Laws on Spreading HIV?* (July 24, 2016), https://www.themarshallproject.org/2016/07/24/is-it-time-to-roll-back-the-laws-on-spreading-hiv.

[78] *See Rhoades v. Iowa*, 840 N.W.2d 726 (Iowa Ct. App. 2013) (25 years); *State v. Thomas*, 297 P.3d 268, 271 (Idaho Ct. App. 2013) (30 years); *Missouri v. Johnson*, No. ED 103217 (Mo. Ct. App. 2016) (30 years).; *Ex parte Campbell*, 2013 Tex. Crim. App. Unpub. LEXIS 131 (Tex. Crim. App. 2013) (35 years for spitting).

[79] Sergio Hernandez, *Sex, Lies and HIV: When What You Don't Tell Your Partner Is A Crime*, Propublica (Dec. 1, 2013), https://www.propublica.org/article/hiv-criminal-transmission. The sentence was for 25 years.

as defense counsel, Trial Counsel argued that an Airman, accused of assault for failing to disclose HIV, placed others at risk even though the only evidence was that the risk of transmission was zero. There is no equity for PLWHIV in the justice system.

B. PLWHIV face adverse consequences from compelled HIV disclosure.

By mandating disclosure subject to criminal punishment, these laws force PLWHIV to confront the possibility of harassment and rejection, potential anger and violence, loss of control over private and potentially damaging information, and other adverse outcomes.[80] These burdens are unjustified and untenable.

Scientific research and anecdotal evidence show that harassment and rejection are common reactions to HIV disclosure.[81] Hostile and demeaning language is common. Violence is a possibility:[82] in 2013, a man "used a kitchen knife to stab and kill Cicely Bolden … after she told him about her HIV status."[83]

Legally mandated disclosure also makes PLWHIV vulnerable to "unwanted secondary disclosure"[84]—sex partners passing on the information to third parties.

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[80] Galletly & Dickson-Gomez, *supra* note 70.

[81] *See*, *e.g.*, *id.*

[82] *See* CHLP, *Ignorance, Domestic Violence, and HIV Disclosure: A Fatal Combination*, , https://www.hivlawandpolicy.org/fine-print-blog/ignorance-domestic-violence-and-hiv-disclosure-fatal-combination.

[83] Hernandez, *supra* note 79.

[84] Galletly & Dickson-Gomez, *supra* note 70.

Though the law requires PLWHIV to disclose, it typically places no restrictions on what the receiving party can do with that information.[85] The fear—and reality—is that sex partners will spread these private, personal details. The consequences can be merely devastating—loss of family and relationships, ostracization from friends and community, difficulty finding romantic interests—to catastrophic, such as the loss of jobs, housing, and financial independence.[86] This is on top of the already imposing mental, physical, and financial burdens of merely having HIV.[87]

C. PLWHIV shoulder the entire public-health burden.

HIV disclosure laws also place the burden of prevention solely on PLWHIV. Instead of encouraging *all* people to make responsible choices to protect themselves, these laws hold PLWHIV responsible for the behavior of other people.

Preventing the transmission of HIV and other sexually transmitted diseases is the option of each individual engaging in sexual activity. By ignoring, even up-ending, the decision-making role that two consenting adults share with respect to maintaining their sexual health and placing it squarely and solely on the person with HIV, the laws do multi-layered damage: *first*, to PLWHIV, by holding them "responsible for protecting the health of the at-risk partner who is required to do

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[85] Some states do have confidentiality laws that deal with unauthorized disclosures by social contacts. *E.g.*, Mich. Comp. Laws § 333.5131.

[86] Galletly & Dickson-Gomez, *supra* note 70.

[87] *Id.*

nothing";[88] and *second* to their partners, who are lulled into a false sense of security about the health consequences of their actions when in fact they should be vigilant: "[f]or an uninfected person, every sexual encounter presents a risk of acquiring HIV."[89]

The law creates this dichotomy even though, currently, about one-third of new HIV infections are coming from people who believe they are virus-free—that is, people who do not know they have HIV, who would be considered negative and therefore not subject to HIV-disclosure laws.[90] So while HIV-"negative" people are continuing the epidemic, the law irrationally asks PLWHIV to shoulder the public-health burden.

Laws criminalizing HIV unjustifiably create additional burdens on PLWHIV. Equity favors a result here that does not criminally target people for HIV nondisclosure.

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[88] *Id*.

[89] Beena Varghese et al., *Reducing the Risk of Sexual HIV Transmission: Quantifying the Per-Act Risk for HIV on the Basis of Choice of Partner, Sex Act, and Condom Use*, 29 SEXUALLY TRANSMITTED DISEASES 38 (2002).

[90] Jacek Skarbinski et al., *Human Immunodeficiency Virus Transmission at Each Step of the Care Continuum in the United States*, 175(4) JAMA INT'L MED. 588 (2015) (people who are unaware of their positive status are responsible for 30.2% of new infections in the U.S.).

CONCLUSION

"[T]he law should not adopt a sui generis standard in cases involving HIV exposure"[91] should govern here:

> "[W]hen the Government comes before a court of law and tries to fit a round peg of conduct into a square hole of a punitive statutory provision, it is not the proper function of the court to reshape the hole so that it will accept the peg and, in the process, distort the hole's character. Rather, it is the proper limit of the court's function to consider whether the hole—politically determined—already is large enough so that the peg fits within it."[92]

Amici respectfully ask this Court to hold that nondisclosure of HIV status is not sufficient to sustain the "bodily harm" element of assault under the UCMJ.

Respectfully submitted,

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[91] *Gutierrez*, 74 M.J. at 67.

[92] *Id.* (quoting *United States v. Joseph*, 37 M.J. 392, 402 (C.M.A. 1993) (Wiss, J., concurring in the result)).

CERTIFICATE OF FILING AND SERVICE

I certify that, in accordance with C.A.A.F.R. 39, the foregoing was delivered electronically to this Court, and that copies were transmitted by electronic means to the following on October 5, 2018:

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because it contains 6,975 words, excluding the index; table of cases, statutes, and other authorities; and the certificates of counsel.

This brief complies with the typeface and type style requirements of Rule 37 because it was prepared in Microsoft Word 2016 using proportional typeface (Times New Roman), 14 point.

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