IN THE SUPREME COURT OF OHIO

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

BRIEF OF *AMICI CURIAE* ACLU OF OHIO FOUNDATION, INC. AND CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF APPELLANT ORLANDO BATISTA

ELIZABETH BONHAM (0093733)
JOSEPH MEAD (0091903)
ACLU of Ohio
4506 Chester Ave.
Cleveland, OH 44102
Phone: (216) 472-2220
Fax: (216) 472-2210
ebonham@acluohio.org
attyjmead@gmail.com

and

JEFFREY M. GAMSO (0043869)*
*Counsel of Record
310 Lakeside Ave. Suite 200
Cleveland, OH 44113
Phone: (216) 443-7583
Fax: (216) 443-4362
jeff.gamso@gmail.com
COUNSEL FOR AMICI CURIAE

RAYMOND T. FALLER (0013328)
Hamilton County Public Defender
JOSHUA A. THOMPSON (0089539)
DEMETRA STAMATAKOS (0093803)*
*Counsel of Record
Assistant Public Defenders
230 E. Ninth St. 2d Floor
Cincinnati, OH 45202
Phone: (513) 946-3713
Fax: (513) 946-3840
jathompson@cms.hamilton-co.org
dstamatakos@cms.hamilton-co.org
COUNSEL FOR APPELLANT

JOSEPH T. DETERS (0012084)
Hamilton County Prosecutor
PAULA ADAMS (0069036)
Counsel of Record
Assistant Prosecutor
230 East 9th Street, Suite 4000
Cincinnati, Ohio 45202
Phone: (513) 946-3000
Fax: (513) 946-3017
paula.adams@hcpros.org
COUNSEL FOR APPELLEE
STATE OF OHIO

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STATEMENT OF *AMICI* INTERESTS

The American Civil Liberties Union of Ohio Foundation, Inc. (ACLU) is the Ohio affiliate of the American Civil Liberties Union, one of the oldest and largest organizations in the nation dedicated to the preservation and defense of the Bill of Rights. With some seven hundred thousand members across the country, and with over thirty thousand members and supporters in Ohio, the ACLU appears routinely in state and federal courts, both as amicus and as direct counsel, without bias or political partisanship, to hold the government accountable to the public and to protect the rights of individuals.

The ACLU has a particular concern for the dual protections of the Free Speech Clauses of the federal and Ohio Constitutions: protection of the right to speak and, as relevant here, protection against forced speech. That concern is heightened where, as in this case, speech is compelled for a particularly vulnerable class of persons, those who are aware of their HIV positive status.

The Center for Constitutional Rights ("CCR") is a national legal 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 landmark cases challenging arbitrary and discriminatory criminal justice policies, including *Ashker et al. v. Governor of the State of California*, et al., No. C 09-5796 CW (N.D. Ca.) (ending indefinite solitary confinement in the California prison system), *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (finding the NYPD's "stop and frisk" program unconstitutional), and *Doe v. Jindal*, 851 F. Supp. 2d 995 (E.D. La. 2012) (prohibiting sex offender registration requirements for individuals convicted of Crime Against Nature by Solicitation in Louisiana). As such, CCR has an interest in ensuring that criminal justice policies

and practices across the United States are not implemented in arbitrary, discriminatory, and irrational ways that target marginalized individuals and communities.

STATEMENT OF THE CASE AND FACTS

Amici adopt the statement of facts set forth in the merit brief of Appellant Orlando Batista.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

R.C. 2903.11(B)(1) brings government-mandated disclosures into the bedroom while doing little to effectively limit the incidence of HIV/AIDS in Ohio. Through this law, the State of Ohio makes itself a partner in sexual intimacy, commanding individuals who are HIV positive to disclose deeply private medical information under threat of a lengthy prison sentence. The law compels disclosure of HIV-positive status even when the risk of transmitting the virus is negligible or non-existent. And it compels disclosure despite the absence of *any* evidence that mandatory disclosure is an effective means to prevent the transmission of HIV. On the contrary, empirical studies consistently indicate the opposite. Compelled disclosure laws such as R.C. 2903.11(B)(1) reinforce the long-held stigma surrounding HIV/AIDS, which in turn discourages people from disclosing their status and even seeking treatment. Less restrictive and more effective alternatives to controlling HIV abound.

The Ohio legislature first criminalized failure to disclose HIV status to one's partner prior to sexual conduct as felonious assault in 2000. *See* 2000 Am.H.B. 100. Whatever the understanding of HIV-positive status may have been then, as detailed below and as shown at trial in Batista's case, the evidence is now absolutely clear that living with HIV is not medically significantly different from living with other infectious diseases. Transmission of the virus can be largely obviated by safe sex practices and pharmacological intervention. And most

importantly, the criminalization of non-disclosure of HIV status before sex fails to reduce, and indeed has been demonstrated to increase, the transmission of HIV/AIDS. Thus, the leading authorities on prevention and treatment of this virus - including the Presidential Advisory Council on HIV/AIDS, the American Medical Association, and the Centers for Disease Control - have repeatedly opposed the criminalization of non-disclosure in favor of education and treatment initiatives that actually work. *See* Center for HIV Law and Policy, *Collection of Statements from Leading Organizations Urging and End to the Criminalization of HIV and Other Diseases* (Dec. 2014) http://www.hivlawandpolicy.org/resources/collection-statements-leading-organizations-urging-end-criminalization-hiv-and-other.

Amplifying this ineffective law's constitutional infirmity is the fact that it targets a historically stigmatized community, making individuals living with HIV—and *only* those individuals—disclose sensitive personal information in a deeply private setting. Courts have found compelled speech to be constitutionally unsound even with disclosure of the mundane, e.g., financial and political information. But with this law, Ohio singles out a discrete, vulnerable group to demand disclosure of the most private medical information, without having established that such disclosure is a useful or necessary means of reducing the spread of HIV.

Because R.C. 2903.11(B)(1) compels speech in violation of the First Amendment, it is presumptively unconstitutional unless the State proves that the law is the least restrictive way to further a compelling government interest. No party disputes that controlling infectious diseases like HIV is a compelling interest. But the State has failed even to announce a basic rationale—let alone proffer a single piece of evidence—to support its position that criminalization of non-disclosure to a sex partner achieves this purpose in the least restrictive manner. The State's

evidentiary omission is particularly dramatic when measured against the consistent findings of scientific research. The State has the authority to pursue the worthy goal of combating the spread of HIV, but it may not choose the unconstitutional and ineffective approach of R.C. 2903.11(B)(1).

Proposition of law: R.C. 2903.11(B)(1) compels speech in violation of the Free Speech clauses of the U.S. and Ohio Constitutions.

A. The statute violates the freedom of speech facially and as applied to Mr. Batista.

The Constitutional guarantee of freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); *see also Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 797, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) (noting the "constitutional equivalence of compelled speech and compelled silence"). This Constitutional freedom "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (citations omitted). The freedom of speech is so cherished, it is protected by both the federal and Ohio Constitutions. *See, e.g., Arnold v. Cleveland*, 67 Ohio St. 3d 35, 42, 616 N.E.2d 163 (1993).

Some seventy years ago, the U.S. Supreme Court described the right to decide whether to speak or remain silent as a "fixed star in our constitutional constellation." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (striking down law requiring students to stand for pledge of allegiance). Throughout the ensuing decades, the Supreme Court repeatedly rejected governmental efforts to compel various types of speech, including methods of compulsion much less severe than a felony charge. *See, e.g., Harris v. Quinn*, __U.S.__, 134 S. Ct. 2618, 189 L.Ed.2d 620 (2014) (striking down state law

requiring home health care assistants to pay fees to support union's bargaining with employer); *Agency for Intern. Development v. Alliance for Open Society Intern., Inc.*, __U.S.__, 133 S.Ct. 2321, 2327, 186 L.Ed.2d. 398 (2013) (striking down law requiring recipients of government funding to have a policy opposing prostitution); *United States v. United Foods, Inc.*, 533 U.S. 405, 410, 121 S.Ct. 2334, 150 L.Ed.2d 148 (2001) (striking down law requiring mushroom growers to contribute to an industry-wide marketing campaign); *Riley*, 487 U.S. at 798 (striking down state law requiring professional fundraisers to disclose percentage of raised funds that go to charity); *Wooley*, 430 U.S. at 717 (striking down law requiring motorists to display license plate containing state motto).

R.C. 2903.11(B)(1) runs directly into the full force of these cases. The statute requires that an individual "disclos[e]" specific information (one's HIV status), or be guilty of a felony. By making government-mandated disclosures part of sex for a historically stigmatized population, those living with HIV, this law is an affront to the right not to speak enshrined in generations of Supreme Court precedent. Indeed, as the court below correctly concluded, R.C. 2903.11(B)(1) "requires transmission of specific information," and therefore implicates the "First Amendment protection against government overreaching [which] extends to statements that a speaker would rather avoid making." *State v. Batista*, 1st Dist. Hamilton No. 2016-Ohio-2848 ¶ 8.

Without actually refuting that R.C. 2903.11(B)(1)'s "disclos[ure]" mandate compels speech, the State's briefing in this case has expressed uncertainty about this premise. Without doubt, compelled disclosure laws implicate the freedom of speech. "[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category." *Bartnicki v. Vopper*, 532 U.S. 514, 527, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001) (quotation omitted); *see also Riley*, 487 U.S. at 795 (striking down law that required

"professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity"). The First Amendment harm "takes on an added dimension" where, as here, the restriction takes place in the most private of contexts, "[f]or also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). The appellate court correctly concluded that R.C. 2903.11(B)(1) compels speech, and the State has never refuted that finding. Thus, the statute unmistakably and impermissibly abridges Mr. Batista's constitutional guarantees of free speech and privacy.

B. The First District selected the appropriate standard of review—strict scrutiny—but failed to correctly apply that standard.

As the First District held, R.C. 2903.11(B)(1) compels speech with a particular content, and therefore is a content-based law that must pass strict scrutiny review if it is to survive. *State v. Batista*, 1st Dist. Hamilton No. 2016-Ohio-2848 ¶ 9; *see Riley*, 487 U.S. at 800 (compelled disclosure subject to strict scrutiny). "Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004). As a result, "'[C]ontent-based restrictions on speech [are] presumed invalid' and 'the Government bear[s] the burden of showing their constitutionality.'" *In re Judicial Campaign Complaint Against O'Toole*, 141 Ohio St.3d 355, 2014-Ohio-4046, 24 N.E.3d 1114, ¶ 19 (citing *Ashcroft* with approval). The court below recognized this presumption, and appropriately held that the statute is subject to "most exacting standard of review." *State v. Batista*, 1st Dist. Hamilton No. 2016-Ohio-2848 ¶ 8, quoting *Reed v. Town of Gilbert, Ariz.*, __U.S.__, 135 S.Ct. 2218, 2237, 192 L.Ed.2d 236 (2015) (Alito, J. concurring).

But though the First District nominally adopted strict scrutiny review, it failed to appropriately apply the standard. Strict scrutiny requires the government to *prove* that it chose the "least restrictive means" to advance its "compelling Government interest." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000); *see also State v. Batista*, 1st Dist. Hamilton No. 2016-Ohio-2848 ¶ 9. This is "the most demanding test known to constitutional law," *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1050 (6th Cir. 2015) (quotation omitted), and "[i]t is the 'rare case in which a speech restriction withstands strict scrutiny.'" *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016), quoting *Reed*, 135 S.Ct. at 2236 (Kagan, J., concurring). [1]

At every stage, the burden rests on the State to establish—with evidence—that the demands of strict scrutiny are met. *Amici* agree that controlling transmission of HIV is a compelling interest. But the State in this case has not even suggested a basic rationale, much less proffered even a scintilla of evidence, to support its position that the criminalization of non-disclosure to a sex partner achieves this purpose in the least restrictive manner possible. Despite the lack of evidence, and without engaging any analysis of its own, the First District concluded that "[w]e can think of no less restrictive alternative." *Batista* at ¶ 12. This conclusion falls far short of the analytical rigor the state and federal Free Speech clauses require.

Ohio attempts to defend the statue's constitutionality by citing several cases from other jurisdictions, each at least a decade old. These cases either apply an incorrect standard for First Amendment review or fail to apply any standard whatsoever.

For example, in *People v. Russell*, 158 Ill.2d 23, 26, 603 N.E.2d 794 (1994), the Illinois Supreme Court considered a statute that, unlike Ohio's, did not force individuals to disclose facts

[1] In its Memorandum in Response to Jurisdiction ("State's Response"), the State asserted that the

against their will, but made voluntary disclosure an affirmative defense to knowingly infecting someone with HIV. As a result, the court found that the statute did not implicate free speech, and ceased its analysis—a conclusion which, though incorrect, makes that case inapplicable here. In *People v. Jensen*, 231 Mich.App.439, 465, 586 N.W.2d 748 (1998), a Michigan appellate court found that a statute similar to Ohio's did compel speech. But instead of applying the required strict scrutiny analysis, the court invented a balancing test which neither this Court, nor the U.S. Supreme Court, has ever endorsed or applied. And in *State v. Musser*, 721 N.W.2d 734, 744 (Iowa 2006), Iowa's high court erred in the same way as the First District here: it appropriately held that the challenged mandatory disclosure law was "compelled content-based speech," but failed to perform the analysis that strict scrutiny demands, instead reaching a conclusion bereft of any evidence.[2] Even if these cases were correct when they were decided, a decade of Supreme Court precedent and scientific research render them irrelevant to the case before this Court today.

As more fully expressed in Section C below, Ohio may not simply convey its impressions about HIV/AIDS to this Court to prop up its mandatory disclosure statute. To the contrary, it bears the burden of demonstrating that a law that compels HIV-positive individuals to either disclose their HIV-positive status or face a significant prison sentence is the least restrictive means of preventing transmission of the disease. It has not come close to meeting its burden.

[2] *State v. S.F.,* 483 S.W.3d 385 (Missouri 2016) is another distinguishable case that touches upon, but ultimately sidesteps, the issue in this case. The Missouri court concluded that the challenged statute did not compel speech, thus negating the need for constitutional analysis. Unlike the Missouri statute, Ohio's law explicitly requires disclosure, making the reasoning of the Missouri court inapplicable here.

C. R.C. 2903.11(B)(1) is not the least restrictive means of preventing HIV transmission, and therefore the law fails strict scrutiny review.

Preventing the spread of HIV is a compelling state interest. But simply identifying a governmental interest is the beginning, not the end, of the Constitutional inquiry. *U.S. v. Alvarez*, __U.S.__, 132 S.Ct. 2537, 2549, 183 L.Ed.2d 574, (2012). Rather, the First Amendment requires that the government prove its method of furthering a compelling objective is (1) effective, (2), the least restrictive means of achieving the desired end, and (3) be neither over- nor under-inclusive. The State falls far short of meeting its burden at each of these stages.

First, the State has pointed to no evidence that the statute materially advances the State's compelling interest. The State, like the court below, seems to believe that it is enough to presume (rather than prove) that the law will further its stated interest. This is incorrect. When strict scrutiny is invoked, the State's "burden is much higher." *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799–800, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (rejecting, as insufficient, the legislature's "predictive judgment" and "completing psychological studies" that video games could lead to violence); *see also, e.g., U.S. v. Alvarez*, 132 S.Ct. at 2549 ("The Government points to no *evidence* to support its claim that the public's general perception of military awards is diluted by false claims such as those made by Alvarez" (emphasis added)).

Contrary to the State's assumption that the law prevents HIV transmission, a consistent, ever-growing body of empirical research demonstrates that laws like R.C. 2903.11(B)(1) lead neither to safer sex practices nor lower transmission rates.[3] In fact, research indicates that laws

[3] *See, e.g.* KJ Horvath, C Meyer, and BR Rosser, *Men Who have Sex with Men Who Believe that Their State has a HIV Criminal Law Report Higher Condomless Anal Sex than Those Who are Unsure of the Law in Their State*, Aids Care (2016) (forthcoming) ("Findings suggest that HIV criminal laws have little or counter-productive effects on [men who have sex with men's] risk behavior."), https://www.ncbi.nlm.nih.gov/pubmed/26780329; Horvath, Weinmeyer, and Rosser, *Should it be illegal for HIV-positive persons to have unprotected sex without*

criminalizing transmission of HIV actually have a counterproductive effect, making transmission *more* likely. *See* Patrick O'Byrne, *et al., Nondisclosure Prosecutions and HIV Prevention: Results from an Ottawa-Based Gay Men's Sex Survey,* 24 J. Nurses Assn. AIDS Care 81, 85 (2013) (finding that 10-20 per cent of those surveyed reported nondisclosure penalties resulted in higher risk behaviors). Much of this research has found that criminalizing HIV, rather than combating its spread using education and treatment initiatives, tends to reinforce the stigma that has surrounded the disease since its discovery. The shame and fear still surrounding the illness—although technological advances have made it possible to live normally with HIV—act as "a potent disincentive to seeking HIV testing." *See* Ronald O. Valdiserri, MD, *HIV/AIDS Stigma: An Impediment to Public Health*, 92 Am J Public Health 3, p.341-42 (2002). By adding to this stigma, the State amplifies the harm that R.C. 2903.11(B)(1) purports to reverse. Against the consistent findings of peer-reviewed medical research, the State cannot meet its heavy burden of demonstrating that this statute is the least restrictive way means of limiting HIV transmission.

Second, there are other methods of furthering the State's valid objective that do not compel speech or intrude on the individual, intimate decisions of sexually active adults. "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. at 815. "The least-restrictive-

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disclosure?: An examination of attitudes among US men who have sex with men and the impact of state law, 22 AIDS Care 1221 (2010) ("we found no evidence that states with and without such laws differed in HIV risk behavior reported by HIV-positive MSM [men who have sex with men] or MSM in general."), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3423319/; Carol L. Galletly, Laura R. Glasman, Steven D. Pinkerton, and Wayne DiFranceisco, *New Jersey's HIV Exposure Law and the HIV-Related Attitudes, Beliefs, and Sexual and Seropositive Status Disclosure Behaviors of Persons Living With HIV*, 102 Am J. Public Health 11, p. 2135-40 (Nov. 2012) ("Criminalizing nondisclosure of HIV serostatus does not reduce sexual risk behavior"), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3477954/.

means standard is exceptionally demanding." *Burwell v. Hobby Lobby Stores, Inc*., __U.S.__, 134 S.Ct. 2751, 2780, 189 L.Ed.2d 675 (2014). "When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *U.S. v. Playboy Entertainment Group, Inc*., 529 U.S. at 816. Again, this burden can only be met with evidence. *See Id.* at 821 (rejecting the government's argument that proposed alternatives are less effective because the government had not conducted a survey to prove that point, relying instead on argument and anecdotes); s*ee also Burwell*, 134 S.Ct. at 2780 (pointing to possibility of government-provided contraception as less restrictive means); *Ashcroft*, 542 U.S. at 667 (holding that government should encourage use of software filters as a less restrictive alternative to criminalizing transmission of pornography).

Moreover, whether a less restrictive alternative exists must be assessed in light of the current state of technology, science, and medicine. *See U.S. v. Playboy Entertainment Group, Inc*., 529 U.S. at 821; *Ashcroft*, 542 U.S. at 671. Whatever the status of AIDS research was when R.C. 2903.11(B)(1) was enacted in 2000, this Court must determine whether this law is narrowly tailored to effectively limit HIV transmission *now*. It is not.

Though the State has apparently failed to explore them, there are numerous less restrictive alternatives available to prevent the spread of HIV rather than conscripting individuals to disclose intimate medical information. The State could, for example, increase efforts to educate the public on testing and prevention, personal responsibility for protecting one's sexual health and the widely-available mechanisms to do so, and to make HIV and STI treatment more widely available —methods of limiting incidences of HIV that, unlike criminal laws, have been proven to be effective.

At minimum the State could account for the many measures available to both individuals living with HIV and their sexual partners that reduce or eliminate the risk of transmission, including condom use, antiviral therapy (and PrEP, or pre-exposure prophylaxis, for individuals who are not HIV positive) as relevant to both the risk posed, the intent of the person living with HIV (PLHIV) to cause harm, and the intent of the partner to avoid infection or transmission of disease to the PLHIV. *See, e.g.,* W. Thomas Minahan, *Disclosure Before Exposure: A Review of Ohio's HIV Criminalization Statutes,* 35 Ohio N.U.L. Rev. 83, 106 (2009). But the State did not make such measures defenses to charges under the statute.[4] These less restrictive methods need not be 100% effective; they need only be as effective the compelled disclosure of private information demanded by R.C. 2903.11(B)(1), which, as noted above, is not particularly effective. *See Ashcroft,* 542 U.S. at 668 ("Whatever the deficiencies of filters, however, the Government failed to introduce specific evidence proving that existing technologies are less effective than the restrictions in COPA."). Even under the more forgiving intermediate scrutiny standard, the Supreme Court has made clear that the government must show that it actually *tried* other methods and failed. *See McCullen,* 134 S.Ct. at 2539 ("the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective."); *Reynolds v. Middleton,* 779 F.3d 222, 231 (4th Cir. 2015) ("As the Court explained in *McCullen*, however, the burden of proving narrow tailoring requires the County to *prove* that

[4] This is not to say that all of these less restrictive alternatives would necessarily pass Constitutional muster; the mere existence of these untried, less restrictive alternatives underscores the Constitutional defect in this clumsy, untailored law. *See McCullen v. Coakley,* __U.S.__, 134 S.Ct. 2518, 2538, 189 L.Ed.2d 502 (2014) fn.8 ("We do not "give [our] approval" to this or any of the other alternatives we discuss. *Post,* at 4. We merely suggest that a law like the New York City ordinance could in principle constitute a permissible alternative. Whether such a law would pass constitutional muster would depend on a number of other factors.").

it actually *tried* other methods to address the problem.") (emphasis in original). Under the strict scrutiny standard applicable here, the State's evidentiary omission becomes even more dramatic. Indeed, as noted above, research shows that alternatives to criminalization are not simply *as* effective—they are actually *more* effective than compelled disclosure in preventing the spread of HIV.

Rather than meeting its burden of showing that no less restrictive alternatives to compelled disclosure exist, the State's briefing and the First District decision relied on the observation that the law does not require public disclosure, but only disclosure to private partners. State's Response at 8; *State v. Batista*, 1st Dist. Hamilton No. 2016-Ohio-2848 ¶ 11. But compelled disclosure is compelled disclosure, and it is unconstitutional regardless of whether the State demands that the disclosure be made in a private or public setting. That the State can imagine even *less* tailored statutes demanding public disclosure does nothing to establish that R.C. 2903.11(B)(1) is the least restrictive option. The court below erred in adopting this analysis as sufficient to carry the State's burden.

Third, R.C. 2903.11(B)(1) fails strict scrutiny analysis because it is both under-inclusive—it fails to regulate large classes of behavior which have a high likelihood of passing HIV—while also being sloppily overbroad—it regulates conduct that has almost no chance of passing HIV. *See Brown*, 564 U.S. at 802 ("The consequence is that its regulation is wildly under-inclusive when judged against its asserted justification, which in our view is alone enough to defeat it."); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (over-inclusiveness "indicates that the statute is, to say the least, not narrowly tailored to achieve the State's objective.")

Of the ways in which HIV is most commonly transmitted, many are higher-risk than the behavior that 2903.11(B)(1) criminalizes. *See* Centers for Disease Control and Prevention, "HIV Risk Behaviors," (Dec. 4, 2015), https://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html. For instance, the risk of contracting HIV through a contaminated blood transfusion and the risk of infection because of needle sharing during drug use, are both significantly higher than sexual transmission. *Id.* Rather than choosing to fund education, treatment, and prevention that, based on empirical evidence, *would* mitigate these causes—needle exchange programs, for example, are proven to be effective but the five that exist in Ohio receive *no* state funding—the State continues to employ the highly ineffective and counterproductive 2903.11(B)(1). *See* Tara Britton, Center for Community Solutions, *Syringe Exchange Programs in Ohio* (2016) https://ccs.memberclicks.net/assets/docs/Major_Reports/Other_Publications/syringe%20exchange%20programs%20in%20ohio.pdf.

While failing to regulate behaviors that are likely to increase incidence of HIV, the statute does regulate significant conduct that has a miniscule likelihood of transmitting HIV. The statute criminalizes nondisclosure of HIV status prior to a variety of "sexual conduct" including vaginal and anal intercourse, fellatio, cunnilingus, and even the use of non-biological objects if they have made contact with bodily fluids. "Penetration, however slight, is sufficient" to qualify as sexual conduct. R.C. 2907.01(A), 2903.11(E)(4). According to the Centers for Disease Control and Prevention, however, risk of HIV transmission based on sharing sex toys is statistically negligible; risk from any kind of oral intercourse is less than 1 in 1,000; and even risk from vaginal intercourse is less than 10 in 1,000. Even these miniscule risks drop to virtually nothing when risk reduction practices are followed. Centers for Disease Control and Prevention, "HIV Risk Behaviors," (Dec. 4, 2015)

https://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html. The State here has decided to limit HIV transmission by compelling disclosure even when there is almost no risk of transmitting HIV. This could not pass even a lesser standard of review, but certainly cannot survive strict scrutiny.

CONCLUSION

The State has failed to carry its burden of proving that the law meets the First Amendment's stringent dictates. Indeed, the State's argument is not only unsupported by evidence, it is refuted by a consistent and growing body of empirical research, and by the expert judgments of medical and public health professionals who have devoted their professional lives to combating the virus.

The State should work to combat HIV just as it combats other diseases. But the particular method that the State chose in this case—compelling individuals living with a long-stigmatized illness to disclose private information in the most private of settings—infringes on the freedoms of speech and privacy without being necessary or effective to achieve the State's goal. Decades of free speech jurisprudence require that the State do better.

Amici urge this Court to overturn Mr. Batista's conviction and declare R.C. 2903.11(B)(1) unconstitutional.

/s/ Jeffrey M. Gamso
JEFFREY M. GAMSO (0043869)*
*Counsel of Record
310 Lakeside Ave. Suite 200
Cleveland, OH 44113
Phone: (216) 443-7583
Fax: (216) 443-4362
jeff.gamso@gmail.com

and

ELIZABETH BONHAM (0093733)
JOSEPH MEAD (0091903)
ACLU of Ohio
4506 Chester Ave.
Cleveland, OH 44102
Phone: (216) 472-2220
Fax: (216) 472-2210
ebonham@acluohio.org
attyjmead@gmail.com
COUNSEL FOR AMICI CURIAE

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by e-mail to Demetra Stamatakos, Counsel of Record for Appellant, at dstamatakos@cms.hamilton-co.org, and to Paula Adams, Assistant Hamilton County Prosecutor, at paula.adams@hcpros.org, this 27 day of December, 2016.

/s/Jeffrey Gamso
JEFFREY M. GAMSO
Counsel for Amici Curiae