No. 16-8903

IN THE

Supreme Court of the United States

NUSHAWN W., aka SHYTEEK JOHNSON,

Petitioner,

—v.—

STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION,
FOURTH JUDICIAL DEPARTMENT

BRIEF OF *AMICI CURIAE* THE CENTER FOR HIV LAW & POLICY, ET AL. IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Is a State's reliance on an individual's HIV status to determine that he is a dangerous sex offender in need of civil confinement in conflict with this Court's rulings on the fundamental requirements for depriving a person of liberty?

Does indefinite civil confinement based on HIV status reflect disability-based discrimination in conflict with this Court's rulings on Title II of the Americans With Disabilities Act and Section 504 of the Rehabilitation Act of 1973?

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The **Center for HIV Law and Policy** ("CHLP") is a national legal and policy resource and strategy center for people living with HIV ("PLHIV") and their advocates. CHLP's interest in this case is consistent with its mission to secure fair treatment under the law for all individuals living with HIV and similar disabilities. CHLP believes that inconsistent, scientifically-unsupported application of criminal and civil laws to PLHIV reflects and reinforces bias and stigma, and is in opposition to federally funded HIV prevention and treatment campaigns.

The **American Academy of HIV Medicine** (AAHIVM) is an independent national organization of HIV specialists dedicated to promoting excellence in HIV/AIDS care. AAHIVM's interest in this case is as healthcare providers who seek policies that promote science-based health practices affecting the care of people living with/at risk for HIV. Laws criminalizing otherwise-legal behavior based on HIV status also fail to account for major advances in HIV care and treatment now available.

Dr. Jeffrey Birnbaum is a physician and the Executive Director of the Health and Education Alternatives for Teens ("HEAT") Program, operating

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no person other than amici, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.2.

out of State University of New York Downstate Medical Center. HEAT provides education, support, and referrals for youth at risk for HIV infection, and works against the stigma and misinformation about HIV that discourages engagement in care. Dr. Birnbaum has an interest in this case because treatment of HIV as a marker of deviant criminal sexual conduct, and the characterization of consensual sex as a sex offense because an individual has HIV, undermines the state-funded HIV treatment and prevention programs he provides, reinforces the stigma that is an obstacle to program prevention, and is at odds with medical facts.

Harlem United Community AIDS Center, Inc. provides access to health care, housing, and social services for individuals experiencing multiple issues, including HIV and AIDS. Harlem United's interest in this case stems from its belief that ending the AIDS epidemic requires addressing HIV stigma and shame. Laws criminalizing HIV status are a barrier to successful HIV testing and linkage to care, and contribute to the concentration of the epidemic among low-income communities of color most likely to be prosecuted.

Harm Reduction Coalition is a national organization addressing substance use through advocacy, training and capacity-building. Harm Reduction Coalition advances evidence-based policies and public health strategies to combat the HIV/AIDS epidemic, including challenging HIV criminalization and stigmatization. Harm Reduction Coalition believes appropriate responses to HIV transmission should reduce reliance on law enforcement and criminal justice and promote strategies grounded in science.

Housing Works, Inc. is a community-based organization serving people living with HIV/AIDS ("PLWHAs"). For decades, Housing Works has been at the forefront of fighting the HIV/AIDS epidemic in New York, formulating strategies, laws, and policies to combat the illness along with the stigma, discrimination, and misperceptions that fuel the epidemic. Housing Works has an interest in ensuring that legal and public health policies are guided by science, fact, and reason.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit professional bar association working on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL opposes laws that base criminal liability and/or penalty enhancements on HIV status—rather than on the intent to harm—because they constitute flawed criminal justice and public health policy. NACDL's interest in this case stems from its opposition to using HIV status as a basis for indefinite confinement as a sex offender.

Dan O'Connell worked at the New York State Department of Health AIDS Institute for 29 years until his retirement in June 2016, serving as its director for his final three years, and was responsible for state efforts to prevent, control and treat HIV infection. He oversaw extensive reviews and modernization of New York State's Sanitary Code provisions on control of sexually transmitted and infectious diseases. Mr. O'Connell has an interest in this case because treatment of HIV as a marker of deviant criminal sexual conduct undermines New York State investments in preventing and treating HIV and other sexually transmitted diseases, and is at odds with medical and public health facts and

initiatives he advanced with the AIDS Institute. His interest also stems from the state's use of Article 10 in this case to bypass legislative delegation of authority to local and state officials for the control of infectious diseases posing a threat to citizens.

Neal Rzepkowski, M.D., is an HIV specialist in Chautauqua County, New York. For the past 20 years he cared for five individuals living with HIV who were part of Shyteek Johnson's social network at the time of incidents leading to his conviction. Dr. Rzepkowski's interest in this case relates to his decades of experience as an HIV care provider, his familiarity with the facts of the case, his own status as an individual living with HIV for 32 years, and the potential negative impact treating HIV as a marker of "dangerousness" has on individuals' willingness to get tested and be in care.

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

William M. Valenti, M.D., is a licensed physician practicing in Rochester, NY. Having worked in HIV medicine, research and health policy since 1981, Dr. Valenti's interest in this case rises from a clinical care perspective. Decisions regarding appropriate treatment of Mr. Williams should consider the social

justice issues central to the case, and his access to medical care. Engagement in a medical care plan addresses any post-release risk or transmission to others.

Voices of Community Activists & Leaders, Inc. (VOCAL New York) is a grassroots membership organization representing low-income people living with HIV/AIDS (PLWHA) and people affected by the war on drugs, homelessness, and mass incarceration. Since 1998 they have fought for the rights, health, and safety of PLWHA, objectives dependent on addressing stigma and discrimination based on HIV serostatus. This case is of special concern because it raises basic questions about state use of medical and public health evidence to determine criminal liability.

INTRODUCTION

Amici support Petitioner's petition for a writ of certiorari in this case. Amici respectfully submit this brief to describe how reliance on an individual's HIV diagnosis, to any extent, in a civil commitment proceeding establishes a dangerous precedent that allows an individual to be confined, possibly for life, based on a health status unrelated to a finding of mental abnormality or recidivism. The State's reliance on HIV as an indispensable factor in determining Petitioner's predisposition to commit sex offenses is an unprecedented use of *any* state's civil commitment law that goes significantly beyond what this Court has defined as constitutionally acceptable bases for civil confinement. *See Kansas v. Hendricks*, 521 U.S. 346, 358 (1997).

Even if the evidence supported a finding that as a young man Petitioner intentionally transmitted HIV to his sexual partners, such a finding would be insufficient to establish the presence of a mental abnormality and volitional impairment required for confinement as a dangerous sex offender. It is essential to maintain the distinction between conduct that may be socially reprehensible, even possibly criminal, and conduct that makes a person eligible for potentially indefinite civil confinement as a dangerous sex offender.

Allowing this precedent to stand dramatically expands the scope of those who may be civilly committed as a dangerous sex offender. It subjects people living with HIV (PLHIV), or any other incurable infectious disease, to legally enshrined stigma and discrimination. It also operates at odds with the considerable investment in state and national public health campaigns to normalize HIV testing and treatment.

Review by this Court is necessary to address and resolve the extraordinary issues implicit in this case, *i.e.*, whether sex offender civil commitment proceedings can be based at least in part on an individual's HIV status; and whether this use of the law impermissibly endangers the fundamental liberty interests of the more than 1.2 million PLHIV in the United States. *See* Centers for Disease Control and Prevention ("CDC") (2016), *HIV/AIDS Basic Statistics* (2016), https://www.cdc.gov/hiv/basics/statistics.html.

Current treatment modalities have transformed the morbidity and mortality of HIV, which now is a manageable, if life-long, disease that becomes nearly impossible to transmit with

appropriate therapy. New York has a comprehensive public health regime to address sexually transmitted infections (STIs) and other communicable diseases, *see, e.g.,* New York Public Health Law §§ 2, 12 and 2100, that, like other states, balances public health concerns and constitutional protections, *see, e.g., Hickox v. Christie*, 205 F.Supp. 3d 579, 590-94 (D.N.J. 2016) (quarantine of nurse exposed to ebola constitutional). Yet PLHIV and their families still confront the burden of persistent HIV stigma, manifested in this case by imposition of indefinite civil commitment of Nushawn W. as a dangerous sex offender.

Finally, the State's decision ignores considerable federal court precedent on the applicability of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act ("Section 504") to HIV, and these laws' prohibitions against singling out a particular disability for exceptionally harsh treatment under the law.[2] The Court should take this opportunity to provide essential clarification on the scope and application of the ADA and Section 504 to civil commitment proceedings.

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[2] HIV is a disability under Title II of the ADA. *See* 28 C.F.R. §35.108(a)(1)(i), (b)(2), (c)(1)(ii) (defining disability as a physical or mental impairment substantially limiting a major life activity, listing HIV as a physical or mental impairment, and listing immune system function as a major life activity).

ARGUMENT

I. Involuntary Commitment Based on an Individual's Positive HIV Status is in Conflict With This Court's and Courts of Appeals' Rulings and with the Minimum Due Process Standards for Civil Commitment as a Dangerous Sex Offender.

A. Only a Mental Abnormality Creating an Inability to Control Sexual Predation Can Warrant Indefinite Civil Confinement, and HIV is Not a Mental Abnormality.

This case is of national importance as it allows for civil commitment, based on unconstitutional standards, of the many individuals living with HIV in this country. "[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979) (citing *Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972) and *Specht v. Patterson*, 386 U.S. 605 (1967)). "Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed." *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (citing *Jones v. United States*, 463 U.S. 354, 368 (1983) and *Jackson v. Indiana,* 406 U.S. 715, 738 (1972)). Consistent with substantive due process, only a narrow class of persons, "those who suffer from a volitional impairment rendering them dangerous beyond their

control," are eligible for confinement. *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997).

Article 10 of the New York Mental Hygiene Law ("MHL"), is consistent with the constitutional due process standard requiring a "volitional impairment," as it only applies to "a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such *an inability to control behavior*, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility." MHL §10.03(e) (emphasis supplied).[3] This "volitional impairment" is uniformly demonstrated in Article 10 cases by other detainees' histories documenting numerous sexual offense convictions resulting in repeated imprisonments over a period of many years. *See, e.g.*, *Matter of State of New York v. Dennis K.*, 27 N.Y.3d 718, 729 (2016), *cert. denied* 137 S. Ct. 579, 196 L. Ed. 2d 452, 85 U.S.L.W. 3274 (U.S. Dec. 5, 2016) (in this consolidated case, all three respondents with extensive, long-term criminal records or histories were imprisoned on three or more separate occasions for multiple sexual offense convictions, ranging over periods of eight to twenty years); *Matter of State of New York v. Shannon S.*, 20 N.Y.3d 99, 102 (2012) ("extensive criminal record involving nonconsenting or underage victims"). Such cases are precisely the type of "recidivistic sex offenders," MHL §10.01(a), from which Article 10 is "designed to protect the public," MHL §10.01(b).

By contrast, the instant case is tellingly devoid of these indicia of "volitional impairment," the

[3] It also requires that civil commitment be based on "the most accurate scientific understanding available." MHL §10.01(e).

"inability to control behavior." Nushawn W. has been imprisoned once to serve sentences for reckless endangerment and rape in the second degree, stemming from conduct occurring in late 1996 to early 1997, for which he pled guilty. His record does not involve repeated imprisonment for sexual offenses over an extended timeframe. Moreover, the conduct for which he was convicted, non-forcible sex with three young women, occurred during a fairly brief period of time when Nushawn W. was nineteen to twenty years old. His conduct, in contrast with the facts in the small subset of the "most extreme cases," MHL §10.01(a), targeted for civil commitment, is of an entirely different magnitude.[4]

The record below unquestionably demonstrates that the State relied to an extraordinary degree, in both the initiation and subsequent execution of the Article 10 proceedings, on Nushawn W.'s HIV status in arguing that he warranted confinement under Article 10. Those findings include a report by one of

[4] Typical of such conduct is that described in *Dennis K.*, 27 N.Y.3d at 729 and 745; that of Dennis K., who, over seventeen years in separate incidents, gang-raped a 19-year-old woman, raped and robbed a 25-year-old woman, was incarcerated for several years, and upon release, raped, robbed and assaulted a different woman. After serving another twenty-two years, he raped and robbed a pregnant 17-year-old. Or that of Richard TT, who "has a long history of committing sex offenses," including anally sodomizing a 5-year-old girl and attempting to anally sodomize an 8-year-old boy, was ultimately sent to a juvenile detention facility, where he confessed to sexually victimizing six girls, including his sister, two of her friends, his stepsister, and two of his cousins. After serving a nine-month jail sentence for criminal contempt, he then raped a 15-year-old girl and threatened to kill her if she told, and then had intercourse with a different fourteen-year-old girl. After pleading guilty to both charges, he was sentenced to one to three years' imprisonment.

the State's experts, Dr. Jacob Hadden, who diagnosed Nushawn W. with antisocial personality disorder (ASPD), polysubstance dependence, and "Highly Infectious Disease." Petition for Writ of Certiorari, *Nushawn W. v. The State of New York* (No. 16-8903) (hereinafter "Petitioner's brief") at 6. Dr. Roger Harris, a mental health expert who testified for the State at Nushawn W.'s trial, also diagnosed Nushawn W. with ASPD (and psychopathy), as well as polysubstance dependence and HIV, Petitioner's brief at 15. Dr. Hadden admitted that his assessment of Nushawn W. was heavily dependent on his HIV status, as "it's so intertwined with this case." Dispositional Hearing, *State of New York v. Nushawn Williams*, Index No. K1-2010-1659 (hereinafter "DT") at 90 (Nov. 19, 2013). In fact, at trial there were more than a thousand separate references to HIV; at least 450 of these references directly linked Nushawn W.'s HIV status with some form of wrongdoing. Article 10 Trial, *State of New York v. Nushawn Williams*, Index No. K1-2010-1659 (hereinafter "T") (2013).

The State argued that Nushawn W.'s HIV status did not form part of the "condition, disease, or disorder" that established his mental abnormality, yet it simultaneously relies nearly exclusively on his HIV status to ascertain his "disregard for others" and "impulsivity," which constitute the basis of his diagnosis with a mental abnormality. Memorandum in Opposition to Motion Filed by Amici Curiae, *State of New York v. Nushawn Williams*, Index No. K1-2010-1659 at 4. The "detailed psychological portrait" that the State depends upon is wholly contingent on Nushawn W.'s HIV status rather than the existence of any *per se* mental abnormality that is a legally

sufficient basis for confinement under the U.S. Constitution or Article 10 of the MHL.

In doing so, the State failed to satisfy the requirements of the MHL and the Fourteenth Amendment's due process clause. An individual's physical disability has nothing to do with whether that individual can control his behavior toward others. Having sex as a person living with HIV is not a sex offense—nor does it make a person inherently dangerous. Using Nushawn W.'s HIV status as a proxy for his future dangerousness violated his substantive due process rights.

B. Civil Confinement Based to Any Extent on HIV Status is Impermissible Punishment at Direct Odds with this Court's Central Principles for Finding Civil Commitment Constitutional.

The Constitution's due process clause requires that "the nature of commitment bear some reasonable relation to the purpose for which the individual is committed." *Foucha,* 504 U.S. at 79. This Court has emphasized the "constitutional importance of distinguishing a dangerous sex offender subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.' " *Kansas v. Crane,* 534 U.S. 407, 412 (citing *Hendricks*, 521 U.S. at 360). The State never met its burden of showing that Nushawn W. has a mental abnormality that makes him a danger to others if released. Instead, it banked on fear- and stigma-based characterizations of Nushawn W.'s conduct as a young man living with HIV in order

to confine him for the purpose of "retribution or general deterrence," which are functions that belong more properly to the criminal law, not civil commitment. *Id.* (citing *Hendricks*, 521 U.S. at 372-73 (Kennedy, J., concurring)).

Hinging sex offender civil commitment to any degree on Nushawn W.'s HIV status is no more appropriate than considering any serious, sexually-transmitted infection ("STI") as a factor in support of preventive detention. *See*, *e.g.*, *Robinson v. California*, 370 U.S. 660, 667 (1962)(holding "status crimes" unconstitutional). The only significant differences between HIV and STIs such as treatment-resistant gonorrhea (which can cause death) or HPV (the cause of most deaths from cervical or throat cancer) are the extreme level of fear and ignorance that still attaches to HIV, and HIV's status as a protected disability under federal disability antidiscrimination law. By the State's standard, many thousands of sexually active PLHIV could be classified as dangerous sex offenders eligible for civil commitment under Article 10.

II. Any Reliance on an Individual's HIV Status as a Basis for Civil Commitment as a Dangerous Sex Offender Runs Counter to Federal Court Precedent Interpreting the Rehabilitation Act of 1973 and Title II of the Americans With Disabilities Act.

A. Involuntary Civil Commitment Proceedings are not Exempt from Title II of the Americans with Disabilities Act or Section 504 of the Rehabilitation Act.

This case presents an important opportunity for the Court to clarify the scope of Title II of the ADA ("Title II") and the Rehabilitation Act of 1973 in order to ensure that individuals with a disability are protected from impermissible discrimination in the context of civil commitment.

Title II applies to public entities, while Section 504 covers recipients of federal funding, including state agencies. *See* 42 U.S.C. §§ 12131, 12132; 28 C.F.R. § 35.130 (2016); 29 U.S.C. § 794(a). While the Second Circuit Court of Appeals has ruled that involuntary commitment can fall within the scope of Title II, *see Bolmer v. Oliveira*, 594 F.3d 134 (2d Cir. 2010), other courts have not addressed this specific question. [5] The *Bolmer* decision reflects Congress'

[5] However, several Courts of Appeal have issued decisions confirming Title II's applicability to State activity regarding institutionalization, criminal law enforcement, and other executive decision-making. *See*, *e.g.*, *Hargrave v. Vermont*, 340 F.3d 27, 38 (2d Cir. 2003) (the ability of persons who are civilly committed to participate in a program that allows the

intent, through the ADA, to combat the historical reality that, "society has tended to isolate and segregate individuals with disabilities," and that "discrimination against individuals with disabilities persist[s] in such critical areas as . . . institutionalization." 42 U.S.C. §§ 12101(a)(2), 12101(a)(3).

Title II's protections encompass activities of the legislative and judicial branches of State and local governments. The U.S. Department of Justice ("DOJ"), whose interpretation of Title II of the ADA is entitled to deference,[6] has stated unequivocally that "*[a]ll activities, services, and programs of public entities are covered, including activities of State legislatures and courts,* town meetings, police and fire departments, motor vehicle licensing, and

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appointment of a durable power of attorney); *Thompson v. Davis*, 295 F.3d 890, 897 (9th Cir. 2002) (per curiam), *cert. denied*, 538 U.S. 921 (2003) (drug addiction may not operate as a *per se* bar on eligibility for parole); *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999) (a city's obstruction of a methadone clinic's relocation, despite consistency with zoning laws, is impermissible under the ADA); *Gohier v. Enright*, 186 F.3d 1216, 1221 (10th Cir. 1999) (concluding ADA may apply to arrest); *Gorman v. Bartch,* 152 F.3d 907, 913-14 (8th Cir. 1998) (reversing the conclusion that the ADA and Rehabilitation Act do not cover police transportation of arrested persons).

[6] The ADA grants DOJ the authority to issue rules and interpretive guidance on its implementation; and "[w]here Congress expressly delegates authority to an agency to promulgate regulations, the regulations 'are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'" *Tatum v. NCAA*, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998) (internal citations omitted); s*ee also Bragdon v. Abbott*, 524 U.S. 624, 646 (1998) (holding that the DOJ receives deference); 28 C.F.R. §§ 35.190(a) and (b)(6).

employment." U.S. Dep't of Justice, *Title II Highlights* (emphasis added) (2002), http://www.ada.gov/t2hlt95.htm. In view of the risk, evidenced in this case, that disability-based fear rather than fact could be the basis for adjudicating an individual as "dangerous," the Court's clarification of Title II's application in this context has particular urgency and importance.

B. Courts Have Rejected Reliance on Unfounded Fears and Stereotypes About HIV As A Basis For Singling Out Individuals Living with HIV For Uniquely Negative Treatment.

This Court, in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), described the need for statutory protections of those "regarded as" disabled, particularly conditions perceived as contagious, since society's fear and misunderstanding of such conditions is as "handicapping as are the physical limitations that flow from actual impairment." 480 U.S at 284. *Arline* underscores the importance of the ADA's protection for those whose conditions trigger prejudice and discrimination in our society, such as HIV.

In HIV discrimination cases brought under the ADA and the Rehabilitation Act, courts have relied on *Arline's* finding that the ADA does not sanction "deprivations based on prejudice, stereotypes, or unfounded fear." 480 U.S. at 287. For example, in *Bragdon v. Abbott*, 524 U.S. 624, 651 (1998), this Court noted that a dentist who refused to treat an HIV positive patient outside of a hospital failed to provide a scientific basis for his assertions that measures such as air filtration, ultraviolet lights, and

respirators reduce the risk of HIV infection. *See also Doe v. Deer Mountain Day Camp, et al.*, 682 F.Supp.2d 324, 347-48 (S.D.N.Y. 2010) (the court, in denying defendant's motion for summary judgment where defendant refused full summer camp access to a family with an HIV positive child, found no support for the contention that HIV is transmitted through exposure in a swimming pool, through contact sports, or from a toilet); *Chalk v. United States District Court Cent. Dist. Of Cal.*, 840 F.2d 701, 707-709 (9th Cir. 1988) (school prohibited by preliminary injunction from removing HIV positive teacher because theoretical possibility of HIV transmission to students did not present significant risk, despite defendant's characterization of the potential harm as "catastrophic").

These and more recent cases demonstrate the need for court intervention to address persistent HIV-related exclusions and government policies that burden those with HIV in defiance of solid scientific knowledge and practice. *See also, e.g., Rodriguez-Alvarez v. Municipality of Juana Diaz*, 2017 U.S. District LEXIS 23342 (D.P.R. Feb. 17, 2017) (municipal employer blocked employee's access to bathroom, kitchenette, and work-related social gatherings, and relieved her of her duties after discovering she is HIV positive).

C. Nushawn W. is an Otherwise Qualified Individual with a Protected Disability Whose Civil Commitment Relied Upon Grossly Inaccurate, Fear-Based Beliefs about HIV and Related Stigma in Violation of Federal Disabilities Discrimination Law.

Claims under Title II and Section 504 must show: a) that the claimant has a disability; b) that the claimant is otherwise qualified to participate in or receive a public benefit; c) that the claimant was subjected to discrimination on the basis of the disability. 42 U.S.C. § 12132; *See Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002).

Nushawn W.'s HIV status constitutes a disability under Title II and Section 504. 42 U.S.C. § 12102(1)(A). [7] The ADA Amendments Act of 2008 removed any doubt that HIV is a protected disability[8] and DOJ's Civil Rights Division has subsequently

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

[8] Congress expressed that the newly enacted definition should be broadly construed and added physical functions directly related to HIV as examples of affected life activities relevant to the definition of disability, such as the functioning of a person's immune system. Equal Employment Opportunity (EEOC) regulations promulgated pursuant to the ADA have likewise stressed that the definition of "substantially limits" is to be interpreted broadly, 29 C.F.R. § 1630.2(j)(1)(i), and that applying these rules of construction should "easily" enable a finding that HIV "substantially limits immune function," 29 C.F.R. § 1630.2(j)(3)(iii)

confirmed that HIV is a protected disability under federal antidiscrimination law. [9] *See also e.g.*, *Bragdon v. Abbott,* 524 U.S. 624 (1998) (patient with asymptomatic HIV was protected under both the ADA and the Rehabilitation Act)*; Holiday v. City of Chattanooga*, 206 F.3d 637 (6th Cir. 2000) (police department not entitled to summary judgment under the ADA or Rehabilitation Act when it withdrew employment offer based on department doctor's opinion that was contradicted by objective medical evidence).

Because Nushawn W. is an "otherwise qualified" individual, he must be free from the discriminatory use of his HIV status as a factor in the decision to indefinitely civilly commit him as a dangerous sex offender. In the context of involuntary civil commitment, the question is whether a person living with HIV is "otherwise qualified" to be evaluated as a "dangerous sex offender" without discriminatory reliance on their physical health status. It is evident from the record in this case that but for Nushawn W.'s HIV status, he would not have been committed as a dangerous sex offender for the indefinite future. Yet HIV has absolutely no bearing on the determination in question because it is irrelevant to whether or not Nushawn W. has a mental abnormality that renders him unable to fully control his behavior and predisposed to commit sex offenses. MHL § 10.03(e).

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[9] Dep't of Justice, *Questions and Answers: The Americans with Disabilities Act and Persons with HIV/AIDS* (June 2012), https://www.ada.gov/hiv/ada_q&a_aids.pdf; 28 C.F.R. § 35.108(a)(1)(i), (d)(2)(iii)(J) (defining disability as a physical or mental impairment substantially limiting a major life activity and listing HIV as a substantial limitation on immune function, a major life activity); 42 U.S.C. § 12134; 28 C.F.R. § 35.190(b)(6).

The State's experts in this case doggedly focused on Nushawn W.'s HIV status and perpetuated precisely the kinds of persistent, intractable stereotypes—misinformation about risk of HIV transmission and unfounded assumptions about future dangerousness—that have triggered court intervention under the ADA. In relying on that part of Nushawn W.'s conduct that is arguably legal—consensual sex as a person living with HIV—to support his characterization as a dangerous sex offender requiring confinement, the State has engaged in discrimination prohibited under the ADA. *See* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(8).

The court allowed repeated references to HIV proffered to support the contention that Nushawn W. suffered from a mental abnormality making him predisposed to commit sexual offenses, and the characterizations of HIV on which the State relied were riddled with inflammatory inaccuracies. These included repeated descriptions of HIV as a "highly infectious disease," DT at 59; T at 417, 453-55, 460, and testimony that "[Mr. Johnson] engaged in unprotected sexual activity which put . . . [his sexual partners] at great risk to get HIV and potentially get AIDS," T at 1309. *See also* Petitioner's brief at 7 – 19.[10]

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[10] Current scientific data demonstrates beyond debate that HIV is *not* a "highly infectious disease." Indeed, expert opinion is uniform that HIV is not an easy disease to transmit. Penile-vaginal intercourse, the type of sexual intercourse discussed most frequently in this case, carries a very low rate of average transmission risk per individual exposure, *i.e.*, about 8 in every 10,000 acts of intercourse. *See* Pragna Patel et al, *Estimating Per-Act HIV Transmission Risk: A Systematic Review*, 28 AIDS 1509-1519 (2014). For individuals on effective antiretroviral treatment, the risk is reduced to near-zero. By any measure,

It is unlikely that Article 10 would ever be used to indefinitely confine a person with another serious STI, such as HPV or syphilis, on the basis that the person was sexually active as a young man and therefore that the person likely would continue to have multiple sex partners and spread life-threatening STIs in the future. Other STIs have much higher transmission rates, and potentially serious consequences that can include cancer and even death.[11] For example, human papilloma virus ("HPV") is easily transmitted and certain strains of HPV cause 99% of all cervical, anal and other genital cancers. *See* CDC, EPIDEMIOLOGY AND PREVENTION OF VACCINE-PREVENTABLE DISEASES 175-178 (2015). Using Nushawn W.'s HIV status as the basis for a finding of mental abnormality and future dangerousness constitutes irrational and uniquely negative targeting of a disability by the State.

Contrary to the State's repeated assertions, HIV is neither highly infectious nor abnormally dangerous. HIV is an incurable disease, but the risk involved relates to a chronic, manageable disease with an exceedingly low probability of transmission

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these transmission rates are unquestionably low, demonstrating that the claim repeated at trial, that HIV is a "highly infectious disease," is utterly fallacious.

[11] The New York State Department of Health warns that "without treatment, these diseases [syphilis, gonorrhea, herpes, HIV, genital warts and viral hepatitis] can lead to major health problems such as sterility (not being able to get pregnant), permanent brain damage, heart disease, cancer, and even death." "Diseases that Can Be Spread During Sex," State of New York (3/12), https://www.health.ny.gov/publications/3805.pdf.

via any kind of sexual conduct.[12] Reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services can reduce the risk even further. 28 C.F.R. § 35.139(b). Nushawn W. could receive education about the nature of HIV and his diagnosis, and effective treatment will reduce the already low risk of transmission to virtually zero.

III. This Case Raises Unique and Important Public Policy Questions, in that Reliance on HIV as a Factor in a Sex Offender Commitment Proceeding Reflects a Major Departure from the Purpose of Indefinite Civil Commitment and Impermissible State Reinforcement of the Continuing Stigma Associated with HIV.

The purpose of civil commitment statutes in other states, ranging from Alaska to California to

[12] "In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the *nature, duration, and severity of the risk; the probability that the potential injury will actually occur*." 28 C.F.R. § 35.139(b) (emphasis added). Receptive anal intercourse poses the highest risk of HIV transmission of all sexual activities, yet the average risk is about 138 transmissions in every 10,000 incidents. *See* Pragna Patel et al, *Estimating Per-Act HIV Transmission Risk: A Systematic Review*, 28 AIDS 1509-1519 (2014), http://www.hivlawandpolicy .org /resources/estimating-act-hiv-transmission-risk-a-systematic-review-patel-et-al-lippincott-Johnson.

Wisconsin and similar to that in New York, is to prevent civilly confined individuals with dangerous *mental impairments* from committing future acts of sexual violence. *See, e.g., Wetherhorn v. Alaska Psychiatric Inst.*, 167 P.3d 701, 703 (Alaska 2007); *Hubbart v. Super. Ct.*, 19 Cal 4th 1138, 1144 (1999); *State v. Post*, 197 Wis. 2d 279, 302-303 (1995). Dislike or fear of a stigmatized disease such as HIV does not fit within this framework. Rather, it is indicative of intractable forms of stigma and discrimination against PLHIV. In view of the life-limiting consequences of being classified as an unusually dangerous sex offender, the State has an obligation to be particularly vigilant against allowing identity-based or status-based stereotypes and prejudices to inform a determination that an individual should be subject to the extraordinary measure of indefinite civil confinement.

The State's use of an individual's HIV status as a factor in a civil commitment hearing puts a judicial imprimatur on misconceptions about HIV transmission and serves to entrench stigma[13] and discrimination against PLHIV. In this case, the record makes plain that, were it not for Nushawn W.'s HIV status, he never would have been the

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[13] "[S]tigma exists when the following four interrelated components converge: 1) individuals distinguish and label human differences, 2) dominant cultural beliefs link labeled persons to undesirable characteristics (or negative stereotypes), 3) labeled persons are placed in distinct categories to accomplish some degree of separation of 'us' from 'them,' and 4) labeled persons experience status loss and discrimination that lead to unequal outcomes." Anish P. Mahajan et al., *Stigma in the HIV/AIDS Epidemic: A Review of the Literature & Recommendations for the Way Forward*, 22 (Suppl. 2) AIDS S67 (2008).

subject of commitment proceedings. The State not only made the determination that non-forcible sex while HIV positive constitutes a sex offense, but that it is a sex offense so dangerous and so predictive of future sex crimes that it merited classification and confinement as one of New York's most dangerous sex offenders.

The State's highly-publicized treatment of Nushawn W. is a blatant contradiction of state and national campaigns to end the HIV epidemic by encouraging those at risk of HIV to get tested,[14] or those living with HIV to access medical care and treatment that keeps them and their communities healthy. *See* Center for American Progress, *HIV/AIDS Inequality: Structural Barriers to Prevention, Treatment, and Care in Communities of Color,* at 14 (July 12, 2012), http://www.americanprogress.org/wp-content/uploads /issues/2012/07/pdf/hiv_community_of_color.pdf. Stigma is one of the most significant barriers to public health efforts to prevent HIV transmission. *See, e.g.,* V. Earnshaw et al., *Stigma and Racial/Ethnic HIV Disparities, Moving Toward Resilience,* 68 AMERICAN PSYCHOLOGIST 225-236 (May-June 2013). If left unreviewed, continued use of HIV status as a factor to be considered in civil commitment proceedings will further harm public health efforts to effectively combat the HIV epidemic.

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[14] Indeed, it undercuts New York State's longstanding campaign to encourage testing for individual and public health reasons. *See, e.g.,* New York State Department of Health, *Reasons to Get An HIV Test* (Feb. 2009), https://www.health.ny.gov/publications/0232.pdf.

CONCLUSION

For the foregoing reasons, amici curiae support Petitioner's petition for certiorari and respectfully request that the petition be granted.

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Respectfully submitted,

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