

March 27, 2023

William C. Smith, Jr., Chair
Jeff Waldstreicher, Vice-Chair
Senate Judicial Proceedings Committee
Maryland General Assembly
2 East
Miller Senate Office Building
Annapolis, Maryland 21401

Re: House Bill 287 concerning HIV decriminalization – SUPPORT

Chair Smith, Vice-Chair Waldstreicher, and Members of the Senate Judicial Proceedings Committee:

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) respectfully submits the following written comments in support of H.B. 287, concerning HIV decriminalization. Founded fifty years ago in 1973, Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender people and people living with HIV through impact litigation, education, and public policy work. Lambda Legal has experience representing the interests of people living with HIV and has advanced policy and litigated to ensure access to treatment, and helped combat discrimination, bias, and stigma. Our HIV Project has lead cases across the nation concerning HIV discrimination in all areas of law including health care, employment discrimination, privacy, and criminalization.

We write to express our firm support for H.B. 287, which would repeal a statute that criminalizes health status, not intentional wrongdoing.

Laws that criminalize HIV are outdated given medical advance in HIV treatment and prevention. In the 1980s and 1990s, at a time when very little was known about HIV or its treatment, legislators across the nation introduced and passed laws to address the growing issues presented by the HIV epidemic. Most of the legislation had stated public health purposes or intentions, namely, to reduce risk of HIV transmission. HIV-criminalization laws enacted around the time—although with the stated intent “to discourage actions that might lead to transmission”¹—have the effect of decreasing measures shown to enhance the public health goal of reducing transmission. Not only are HIV criminalization laws harmful to public health goals,

¹ *HIV and STD Criminalization Laws*, <https://www.cdc.gov/hiv/policies/law/states/exposure.html> (last reviewed Oct. 24, 2022)

their direct and indirect impacts are disparately felt by historically marginalized populations, and they result in prosecutions grounded in stigma rather than scientific fact.

HIV criminalization laws are contrary to efforts to increase public health.

Today, at a time when medical advances provide for people living with HIV to live long, healthy, and fulfilling lives,² the condition remains criminalized in many states. HIV criminalization laws, like Maryland’s Health Code §18-601.1, are statutes that make specific acts uniquely a crime if an individual is living with HIV.³ Maryland’s law does not require transmission, account for affirmative defenses, or a risk assessment for transmission to prove criminal liability, and thus does not recognize actual risk of transmission for varying acts⁴ as estimated by the Centers for Disease Control. Instead, the elements of this laws may trigger prosecution even in the absence of substantial risk of transmission or intent to transmit.⁵

Primary public health strategies related to ending the HIV epidemic include people knowing their HIV status, people with HIV being in the care of a medical professional, and people living with HIV being on a medical treatment regimen for HIV.⁶ However, HIV criminalization statutes by their very existence and enforcement put negative pressures on reaching those goals.

Advocates explain that criminalization schemes disincentivize HIV testing—the foundation to any HIV-related public health strategy—because, as under §18-601.1 *knowing* one’s status is an essential element to the crime of “knowingly transfer[ring] or attempt[ing] to transfer [HIV].” Thus, if a person does not know that they were living with HIV, they cannot knowingly transmit or attempt to transmit HIV. Where criminalization creates such disincentives to learning one’s status, they indirectly alienate people living with HIV from health care because one will not seek out care for a condition they are unaware they have.

But even when people living with HIV do access care, they may face interference because of criminalization schemes in the provision of their care. Doctors often internalize HIV-related stigma (that is reinforced by HIV-criminalization schemes) and reflect it back upon their patients when providing care in making negative statements and inferences about people living

² Rosalie Hayes, *Life Expectancy for People Living with HIV*, AIDS MAP, (Nov. 2021) <http://bit.ly/3RuY7L0>

³ MD. Code. Ann., Health-Gen. § 18-601.1 (2023)

⁴ *HIV Risk Behaviors*, <https://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html> (last reviewed Nov. 13, 2019)

⁵ Kate Boulton, et. al., *Maryland, in HIV CRIMINALIZATION IN THE UNITED STATES: A SOURCEBOOK ON STATE AND FEDERAL HIV CRIMINAL LAW AND PRACTICE 206, 206-12* (Center for HIV Law and Policy 3rd ed., 2022), <https://bit.ly/3JAfAzT>

⁶ Collectively, these strategies are also known as the 90-90-90 strategy. See UNAIDS, *90-90-90: Treatment for All*, <https://www.unaids.org/en/resources/909090> (last visited Jan. 3, 2023)

with HIV.⁷ Further, medical records are often utilized by law enforcement in prosecutions.⁸ Finally, with ample scientific evidence to the contrary, leading experts agree,⁹ there is also no scientific support for the efficacy of HIV criminalization statutes as utilitarian. Instead, they function as a form of retributive justice, and—according to the Director of the White House’s Office of National AIDS Policy—“get in the way of us achieving our goals to end the HIV epidemic.”¹⁰

HIV disproportionately impacts historically marginalized communities.

HIV disproportionately impacts historically marginalized communities including Black communities, Latinx communities, gay and bisexual men, transgender women, and Black women.¹¹ And, although HIV can affect anyone, today, in the U.S., Black women are currently experiencing the highest HIV transmission rates¹² of any demographic group. And, as with any criminalization scheme, those most impacted by HIV-criminalization policing, prosecutions, and sentencing are low-income people, people of color, and LGBTQ+ people. Data show that Black and Latinx people are arrested, prosecuted, and convicted at disproportionately higher rates than their White counterparts for HIV-criminal offenses.¹³ Compounding biased-driven overpolicing, charges, and prosecutions; juries’ and courts’ implicit biases¹⁴—against LGBTQ+ people, people living with HIV, sex between people of the same sex, sex workers, racial minorities, etc.—and often an incomplete understanding of the risk of transmission can result in convictions and sentencing based on assumptions of HIV transmission risk where none existed. This disparate

⁷ Angelica Geter, et. al., *HIV-Related Stigma by Healthcare Providers in the United States: A Systematic Review*, 32 AIDS Patient Care and STDs 418 (2018), <https://doi.org/10.1089/apc.2018.0114>

⁸ Sergio Hernandez, *Sex, Lies and HIV: When What You Don’t Tell Your Partner Is a Crime*, (Dec. 1, 2013, 10:58 PM) <https://www.propublica.org/article/hiv-criminal-transmission>

⁹ Cameron Gorman, *20 Global Experts Agree: Science Doesn’t Back HIV Crime Laws*, (Jul. 25, 2018), <https://www.poz.com/article/20-global-experts-agree-science-back-hiv-crime-laws-video>

¹⁰ *HIV Criminalization: ONAP’s Harold Phillips Discusses Repealing Outdated Laws*, (Apr. 27, 2022), <https://www.hiv.gov/blog/hiv-criminalization-onap-s-harold-phillips-discusses-repealing-outdated-laws>

¹¹ *Impact on Racial and Ethnic Minorities*, HIV.gov, <http://bit.ly/3jruJJ2> (last updated Jan. 20, 2023)

¹² Shamard Charles, M.D., *HIV Hits black Women Hardest, CDC Report Says*, (May 9, 2019, 10:17 AM), <https://www.nbcnews.com/health/womens-health/hiv-hits-black-women-hardest-cdc-report-says-n1003891>

¹³ Amira Haenbush, et. al, *HIV Criminalization in California* (The Williams Institute, 2015) <https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-CA-Dec-2015.pdf>; Brad Sears, et. al, *The Criminalization of HIV and Hepatitis B and C in Missouri*. (The Williams Institute, 2020) <http://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-MO-Feb-2020.pdf>

¹⁴ *Anti-LGBT and HIV Bias in the Courtroom*, subsection of *Protected and Served*, <https://www.lambdalegal.org/node/30526#1a> (last visited Jan. 3, 2023)

impact is a vital consideration for your attention as elected leaders in Maryland, a state in which HIV rates are ten-times higher among Black people than White people.¹⁵

Science, not stigma, should inform public policy.

Again, despite their original statutory intent, HIV criminalization laws face broad criticism from independent medical professional associations,¹⁶ the Centers for Disease Control,¹⁷ civil rights advocates,¹⁸ elected officials,¹⁹ and even the U.S. Department of Justice²⁰ for the laws' outdated foundations, effect stigmatizing an illness, and impairing public health efforts to end the epidemic.

Since 2014, the Centers for Disease Control and Prevention (CDC) and the Department of Justice have encouraged states with HIV criminal statutes to re-assess these laws based on the current state of the evidence regarding HIV transmission risk and the public's health, given that behavior such as biting, spitting, and throwing bodily fluids, which pose a negligible risk of HIV transmission has, in some cases, resulted in overly harsh sentencing.²¹ It was more than five years ago that the CDC affirmed that a person who is on HIV antiretrovirals, regularly takes them (one-pill, once a day), and thus has an undetectable viral load presents "effectively no risk"²² of HIV transmission through sex. Yet, Maryland's §18-601.1 does not account for actual risk of the

¹⁵ *HIV by Race/Ethnicity in Maryland, 2021*, Maryland Department of Health (Jun. 30, 2022), <https://health.maryland.gov/phpa/OIDEOR/CHSE/SiteAssets/Pages/statistics/Race-and-HIV-Fact-Sheet-2021.pdf>

¹⁶ *HIV Criminalization*, American Academy of HIV Medicine, <https://aahivm.org/hiv-criminalization/> (last visited Jan. 3, 2023)

¹⁷ *HIV Criminalization and Ending the HIV epidemic in the U.S.*, <https://www.cdc.gov/hiv/policies/law/criminalization-ehe.html> (last updated Jan. 19, 2023)

¹⁸ *HIV Criminalization*, <https://www.lambdalegal.org/know-your-rights/article/hiv-criminalization> (last visited Jan. 23, 2023)

¹⁹ John Riley, *Congressional HIV/AIDS Caucus Introduces Bill to Stop Criminalizing People with HIV*, (Mar. 2, 2021), <https://www.metroweekly.com/2021/03/co-chairs-of-congressional-hiv-aids-caucus-introduce-bill-to-stop-criminalizing-people-with-hiv/>

²⁰ Office of Public Affairs, *Justice Department Releases Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors*, DOJ (Jul. 15, 2014), <https://www.justice.gov/opa/pr/justice-department-releases-best-practices-guide-reform-hiv-specific-criminal-laws-align>

²¹ J. Stan Lehman, et. al., *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, 18 AIDS Behavior 997 (Mar. 15, 2014), <https://www.justice.gov/sites/default/files/crt/legacy/2014/10/02/hivcrimarticle.pdf>

²² *National Gay Men's HIV/AIDS Awareness Day*, (Sep. 27, 2017), https://www.cdc.gov/nchhstp/dear_colleague/2017/dcl-092717-National-Gay-Mens-HIV-AIDS-Awareness-Day.html

underlying act or mitigating factors to address risk of transmission like the risk posed by underlying factual act,²³ an individual being in treatment,²⁴ or barriers like condom use.²⁵

Threats of criminal prosecution create stigma and harm. Rather than compliment the work of public health experts and health care providers, HIV criminalization laws undermine those efforts to end the HIV epidemic. In the ways described above, HIV criminalization laws perpetuate the public health crisis of systemic racism and bias within the criminal legal system.

We strongly support H.B. 287 as a critical and necessary step in our fight to end HIV stigma and discrimination.

Please do not hesitate to contact me via kingelhart@lambdalegal.org should you have questions or if additional information would be helpful.

Sincerely,

Kara N. Ingelhart
Senior Attorney

²³ *HIV Risk Behaviors*, CDC, <http://bit.ly/3HUHVIX> (last reviewed Nov. 13, 2019)

²⁴ *Effectiveness of Prevention Strategies to Reduue the Risk of Acquiring or Transmitting HIV*, <https://www.cdc.gov/hiv/risk/estimates/preventionstrategies.html> (last reviewed Jun. 17, 2022)

²⁵ *Condoms*, <https://www.cdc.gov/hiv/risk/condoms.html> (last reviewed Feb. 15, 2022)