IN THE

SUPREME COURT OF OHIO

STATE OF OHIO	:	**NO. 2016-0903**
Plaintiff-Appellee	:	On Appeal from the Hamilton County Court of Appeals, First Appellate
vs.	:	District
ORLANDO BATISTA	:	Court of Appeals Case Number C-1500341
Defendant-Appellant	:	

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STATEMENT OF THE FACTS

The defendant-appellant Orlando Batista and his girlfriend R.S. had known each other for approximately seventeen years before they began to have an intimate physical relationship in November of 2013. They first engaged in sexual intercourse on or about November 21, 2013. Batista did not tell R.S. that he had tested positive for human immunodeficiency virus ("HIV") even though he had known since at least 2001 when he was tested and informed by the Ohio Department of Rehabilitation and Corrections. R.S. eventually confronted Batista, and he told her that he had been infected when he was a teenager. Batista also admitted to the police that he had sexual intercourse with R.S. without telling her that he was HIV positive. (T.p. 108-109)

Batista was indicted for one count of felonious assault in violation of R.C. 2903.11(B)(1), a second-degree felony. He moved for a pre-trial dismissal based upon state and federal constitutional grounds mounting facial equal protection and freedom of speech challenges. Prior to the hearing on Batista's motion to dismiss, he appeared before the trial court on two separate occasions where he was ordered to stop contacting R.S. (T.p. 2-6; T.p. 17-20) In addition to professing his love for R.S, Batista explained that he has lived with HIV for 24 years without ever taking meditations. (T.p. 18-19)

At the motion to dismiss hearing, the trial court heard testimony from Dr. Judith Feinberg, an expert in infectious diseases who has been involved in HIV care and research for 33 years. (T.p. 28) Dr. Feinberg provided a detailed explanation of the tremendous medical advancements toward the treatment of HIV and acquired immunodeficiency syndrome ("AIDS') since 1981, as well as the associated increases in life expectancy for those infected individuals who undergo treatment. (T.p. 38-50) She also explained that as with all microbes, HIV can eventually become resistant to the drugs used to treat it. (T.p. 64) Currently, the wholesale price of the medications used to treat HIV is approximately $1,000 per month. (T.p. 65) Some

patients experience no side effects from the medications, but some patients do experience side-effects which they do not tolerate well. (T.p. 67) Additionally, Dr. Feinberg testified about Hepatitis C. Although Hepatitis C is very serious if left untreated, it can actually be cured with medications. (T.p. 83) Hepatitis C is considered a blood-related disease and has only recently been looked at as possibly being transmitted sexually. (T.p. 86) Most importantly, Dr. Feinberg further verified that despite the tremendous advancements in the treatment of HIV/AIDS, there is still no cure. (T.p. 83)

The trial court determined that Batista did not show that R.C. 2903.11(B)(1) is unconstitutional and denied his motion to dismiss. Batista entered a no contest plea and was found guilty as charged in the indictment. The trial court ordered a Pre-Sentence Investigation Report as well as a Victim Impact Statement.

Counsel for Batista filed a sentencing memorandum requesting community control. The victim, R.S., appeared at the sentencing hearing and informed the court that subsequent to engaging in sexual conduct with Batista, she was diagnosed as HIV positive. She described her immune system as "crashing." She must continue to work through the illness in order to afford the treatment. R.S. credited Batista's ex-sister-in-law with saving her life because it was from her that R.S. learned that Batista was HIV positive. She further shared her belief that Batista had no intention of ever telling her that he was HIV positive. At the beginning of their physical relationship, R.C. directly asked Batista if he had any sexually transmitted diseases and he denied having any. R.S. expressed her opinion that Batista was selfish with no remorse because he had also infected his wife, a previous lover during his marriage, and his youngest daughter. When she confronted Batista, he simply told her to "get over it." (T.p. 126-128)

Batista was sentenced to incarceration for eight years and credited 310 days. On appeal to the First District Court of Appeals, he made the same constitutional arguments that he raised in his motion to dismiss. In overruling the equal protection challenge, the court of appeals determined that there is rational relation between the goal of R.C. 2903.11(B)(1) and requiring HIV disclosure prior to sexual conduct. With regard to the freedom of speech claim, the court of appeals found that although R.C. 2903.11(B)(1) is a "content-based law," it is narrowly tailored to serve a compelling state interest.

This Court accepted jurisdiction to decide Batista's facial constitutional challenges as to whether R.C. 2903.11(B)(1) violates equal protection and freedom of speech as set forth in the Ohio and United States Constitutions.

ARGUMENT

Proposition of Law No. I: Ohio's felonious assault provision requiring a known carrier of a virus that causes AIDS to disclose such status to any person prior to sexual conduct with that person (R.C. 2903.11(B)) does not violate the Equal Protection Clauses of the Ohio or the United States Constitutions because it is narrowly tailored to Ohio's compelling interest in preventing the exposure to and the spread of an incurable and communicable disease.

R.C. 2903.11(B)(1) requires a known carrier of a virus that causes AIDS to disclose that information to his or her partner before engaging in sexual conduct. Batista claims that R.C. 2903.11(B)(1) on its face violates the Equal Protection Clauses of both the Ohio and United States Constitutions because the statute does not include other sexually transmitted diseases and it does not cover non-sexual ways of contracting a virus that causes AIDS.

Constitutionality

The analysis of a statute's constitutionality "begin[s] with the premise that statutes are presumed constitutional." *State v. Noling*, ___ Ohio St.3d ___, 2016-Ohio-8252, ___ N.E.3d

___, ¶9, citing R.C. 1.47. Legislative enactments are entitled to a strong presumption of constitutionality. *See State v. Williams*, 126 Ohio St.3d 65, 2010-Ohio-2453, 930 N.E.2d 770; *State v. Collier*, 62 Ohio St.3d 267, 581 N.E.2d 552 (1991); *State v. Young*, 37 Ohio St.3d 249, 525 N.E.2d 1363 (1988). This strong presumption of constitutionality is rebuttable only by proving the existence of a constitutional infirmity "beyond a reasonable doubt." *State v. Gill*, 63 Ohio St.3d 53, 584 N.E.2d 1200 (1992). When challenged as unconstitutional, a court must apply all presumptions and rules of construction so as to uphold the statute if at all possible. *State v. Dorso*, 4 Ohio St.3d 60, 446 N.E.2d 449 (1983).

Furthermore, "[a] party seeking constitutional review of a statute may proceed in one of two ways: present a facial challenge to the statute as a whole or challenge the statute as applied to a specific set of facts." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶26; *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165. Here, Batista's challenge is clearly a facial one in that he has not claimed that R.C. 2903.11(B)(1) is unconstitutional as applied to the facts of his case. Since a facial constitutional challenge requires that the statute be "unconstitutional in all applications," it is quite difficult to establish and is actually disfavored. *Oliver v. Cleveland Indians Baseball Co. Ltd. Partnership*, 123 Ohio St.3d 278, 2009-Ohio-5030, 915 N.E.2d 1205, ¶13; *Harrold* at ¶37; *see also State v. Mole*, ___ Ohio St.3d ___, 2016-Ohio-5124, ___ N.E.3d ___, ¶96-97 (Kennedy, J., dissenting).

Equal Protection

The basic goal of equal protection as set forth in the state and federal constitutions is that similarly situated persons should be treated in a similar manner. *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶6; *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct.3249 (1985). The Ohio Constitution, Article I, Section 2 provides

that "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit * * *." The Fourteenth Amendment to the United States Constitution provides that "[n]o State * * * shall deny to any person within its jurisdiction equal protection of the laws." Historically, the "limitations placed upon governmental action by the Equal Protection Clauses of the Ohio and United States constitutions" have been treated as "essentially identical." *Kinney v. Kaiser-Aluminum & Chemical Corp.,* 41 Ohio St.2d 120, 123, 322 N.E.2d 880 (1975). Additionally, the standard for determining if a statute violates equal protection has been "essentially the same under state and federal law." *State v. Thompkins,* 75 Ohio St.3d 558, 561, 1996-Ohio-264, 664 N.E.2d 926. Subsequent to the First District Court of Appeals' opinion in the present case, this Court analyzed R.C. 2907.03(A)(13) (sexual battery by a peace officer) and determined that it violated equal protection under both the Ohio and United States Constitutions. In doing so, this Court found that the equal protection guarantees afforded by the Ohio Constitution "independently forbid the disparate treatment" set forth in R.C. 2907.03(A)(13). *State v. Mole,* ___ Ohio St.3d ___, 2016-Ohio-5124, ___ N.E.3d ___, ¶23. Most recently, *Mole* was cited by this Court for the proposition that "the Equal Protection Clause of the Ohio Constitution is coextensive with, or stronger than, that of the federal Constitution." *State v. Noling,* ___ Ohio St.3d ___, 2016-Ohio-8252, ___ N.E.3d ___, ¶11.

Standards of Review

There is no doubt that in identifying those persons "with knowledge that the person has tested positive as a carrier of a virus that causes [AIDS]," R.C. 2903.11(B)(1) provides for a classification of persons. Neither the state nor the federal Equal Protection Clauses completely prohibit the enactment of statutes that treat one group of individuals different from another group of individuals but such "classification must be reasonable, not arbitrary, and must rest upon some

ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560 (1920); *Mole* at ¶25.

Although "the Ohio Constitution is a document of independent force" with even stronger equal protection, the traditional standards of review still apply. *Mole* at ¶14, ¶27; *Noling* at ¶14. The type of classification involved in the particular legislation alleged to violate equal protection determines the level of scrutiny used in state and federal constitutional analysis. *State v. Williams*, 88 Ohio St.3d 513, 530, 2000-Ohio-428, 728 N.E.2d 342; *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910 (1988). "[A]ll statutes are subject to at least rational-basis review, which requires that a statutory classification be rationally related to a legitimate government purpose." *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251, ¶13, citing *Clark* at 461; *Williams* at 530. If the statute's classification is based on sex or illegitimacy then intermediate scrutiny is applied whereby the classification must be "substantially related to an important governmental objective." *Thompson* at ¶13, citing *Clark* at 461. Strict scrutiny, where the classification must be "narrowly tailored to serve a compelling state interest," applies to those statutes with a suspect classification (based on race or national origin) or those jeopardizing the exercise of a fundamental constitutional right. *Thompson* at ¶13, citing *Williams* at 530; *see also City of Painesville Bldg. Dept. v. Dworken & Bernstein Co., L.P.A.*, 89 Ohio St.3d 564, 2000-Ohio-488, 733 N.E.2d 1152; *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878 (2000).

In the present case, before the trial court and the court of appeals, Batista submitted that rational basis was the proper standard of review for his equal protection challenge because the classification set forth in R.C. 2903.11(B)(1) does not involve a suspect class or a fundamental

right. Batista now claims that strict scrutiny should apply because the classification involved in R.C. 2903.11(B)(1) affects the fundamental constitutional right of freedom of speech. In support of this claim, Batista relies exclusively on the First District Court of Appeals' opinion in his case that R.C. 2903.11(B)(1) is a "content-based law." *State v. Batista,* 2016-Ohio-284, 64 N.E.3d 498, ¶9. Although Batista claims that he is entitled to have his equal protection challenge analyzed under strict scrutiny, he argues that R.C. 2903.11(B)(1) cannot even survive under the rational basis standard of review.

As is set forth in the second proposition of law, the State of Ohio certainly does not agree that R.C. 2903.11(B)(1) is per se a "content-based law" as First Amendment constitutional jurisprudence provides. Nevertheless, the state recognizes the novel interplay of the constitutional issues set forth here and submits that R.C. 2903.11(B)(1) is indeed narrowly tailored to serve a compelling state interest.

Strict Scrutiny

"If the challenged legislation impinges upon a fundamental constitutional right, courts must review the statutes under the strict-scrutiny standard." *Harrold v. Collier,* 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶39. "The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." *Police Dept. of City of Chicago v. Mosley,* 408 U.S. 92, 101, 92 S.Ct. 2286 (1972).

Compelling State Interest

Generally, in order to withstand strict scrutiny, the state must have a compelling interest that justifies the law. *Ritchey Produce Co., Inc. v. Ohio Dept. of Adm. Serv.,* 85 Ohio St.3d 194, 1999-Ohio-262, 707 N.E.2d 871. Although there is not a definitive definition for "compelling state interest" in the context of equal protection, it has been described as "one which has more

than a rational relationship to some colorable state interest" in the context of the free exercise of religion. *State v. Bontrager*, 114 Ohio App.3d 367, 375, 683 N.E.2d 126 (3rd Dist.1996), citing *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S.Ct. 1790 (1963).

Compelling Interest in Public Health

"It has long been settled that individual rights must be subordinated to the compelling state interest of protecting society against the spread of disease." *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 (W.D.Ark.2002), citing *Jacobson v. Massachusetts*, 197 U.S. 11, 27-29, 25 S.Ct. 358 (1905); *see also Ex parte Company*, 106 Ohio St. 50, 139 N.E. 204 (1922). "Stopping the spread of the deadly AIDS epidemic is a compelling governmental interest." *Anonymous Fireman v. City of Willoughby*, 779 F.Supp. 402, 416 (N.D.Ohio 1991).

Batista and his amici rely upon a plethora of legal and non-legal commentary to conclude that in enacting R.C. 2903.11(B)(1), the Ohio General Assembly must have been motivated by some nefarious intent to reinforce or perpetuate negative social stigmas that have come to be associated with HIV/AIDS. A review of the actual legislative process reveals otherwise. In 1999, the Ohio General Assembly went through the process to amend the felonious assault statute to specifically require a known carrier of a virus that causes AIDS to disclose that information to his or her partner before engaging in sexual conduct. Am.Sub.H.B. No. 100, 148 Ohio Laws, Part I, 1999-2000. During this legislative process specific reference was made to three cases, one in Ohio, one in New York, and one in Missouri, where known carriers of HIV had engaged in sexual conduct with a multitude of victims and on many occasions passed the incurable fatal disease on to those victims. Ohio House Session, April 28, 1999, available at *http://www.ohiochannel.org/video/house-session-april-28-1999*, at 00:31:00 to 00:36:00 (accessed Feb. 2, 2017). As the amendment was debated, it was further explained that

HIV/AIDS was the only sexually transmitted disease specifically set forth because of its incurability and fatalness. There was also reference to studies conducted by Boston City Hospital and Brown University and the importance of "personal responsibility" concerning infected individuals. Ohio Senate Session, November 9, 1999, available at *http://www.ohio.channel.org/video/senate-session-november-9-1999*, at 02:09:24 to 02:25:42 (accessed Feb. 2, 2017). The timing of the Ohio General Assembly's enactment of R.C. 2903.11(B)(1) shows that there was no rush to legislate before the state had a clear and compelling interest in attempting to stop the exposure to and spread of HIV/AIDS by means of sexual conduct. The concept of personal responsibility in stopping the spread of an incurable disease was clearly the key motivating factor in the enactment of R.C. 2903.11(B)(1).

In the context of civil liability, this Court previously held: "A person who knows, or should know, that he or she is infected with a venereal disease has the duty to abstain from sexual conduct or, at a minimum, to warn those persons with whom he or she expects to have sexual relations of his or her condition." *Mussivand v. David*, 45 Ohio St.3d 314, 544 N.E.2d 265 (1989), paragraph one of the syllabus. This Court looked to other jurisdictions and found "[t]here is a strong public policy behind imposition of this duty" for the reason that "'[t]he health of the people is an economic asset'" and "'[t]o the individual nothing is more valuable than health.'" *Id.* at 319, quoting *Skillings v. Allen*, 143 Minn. 323, 325-326, 173 N.W. 663 (1919). Obviously, when confronted with real situations involving the exposure to and spread of HIV/AIDS, the Ohio General Assembly's compelling interest in the health of Ohioans required a statute such as R.C. 2903.11(B)(1) rather than relying on civil liability in such matters.

"There is voluminous medical evidence about HIV disease available. Although it affects everyone differently, the one common factor of HIV disease is lack of a cure. Asymptomatic

individuals are still experiencing, on a cellular level, significant changes because of the virus." Palmer & Mickelson, *Falling Through the Cracks: The Unique Circumstances of HIV Disease Under Recent Americans with Disabilities Act Caselaw and Emerging Privacy Policies*, 21 Law & Ineq. 219, 240 (2003). Batista and his amici suggest that today the state simply has no interest in the spread of HIV/AIDS via a statute like R.C. 2903.11(B)(1). Due to the medical advances in treating those illnesses, they argue that the state's interest is not even legitimate. According to them, if a person does happen to get infected with HIV today then that person only has to take a daily pill. They further minimize the level of the state's interest because an infected person's life expectancy **may** only be a year or so less than someone who is not infected. The most recent data available from the Ohio Department of Health HIV/AIDS Surveillance Program reveals 902 "persons newly diagnosed and reported with an HIV infection" in 2015 and a total of 22,355 "persons living with an HIV infection" in 2015. Ohio HIV Surveillance Statistical Tables 2015, available at *http://www.odh.ohio.gov/-/media/ODH/ASSETS/Files/health-statistics---disease---hiv-aids/2015-Data-Tables.pdf?la=en* (accessed Jan. 31, 2017). The "History of Ohio's HIV/AIDS Epidemic, 1981-2010" summarizes data compiled and provided by the Ohio Department of Health. It shows the various trends in people living with HIV/AIDS, the number of new diagnoses of HIV/AIDS, and the deaths among persons with HIV/AIDS. Most importantly, it clearly shows that despite the remarkable medical advances in treating HIV/AIDS, there is still a continuous upward trend in the number of persons living with HIV/AIDS. Chart of Ohio HIV/AIDS Epidemic, available at *http://www.odh.ohio.gov/-/media/ODH/ASSETS/Files/health-statistics---disease---hiv-aids/12OhioChart.pdf?la=en* (accessed Jan. 31, 2017). Such an upward trend is most likely due to the fact that there is still no cure for these illnesses. This trend is a strong indicator of the state's compelling interest given

the fact that "[a]ll microbes can become resistant to the drugs aimed at them." (Dr. Feinberg, T.p.64)

Therefore, even with the advances in HIV/AIDS treatment and life expectancy, the State of Ohio's compelling state interest in a statute such as R.C. 2903.11(B)(1) aimed at preventing the exposure to and spread of an incurable and communicable disease cannot be ignored.

Compelling Interest in Consent to Sexual Conduct

R.C. 2903.11(B)(1) also ensures actual consent to sexual conduct when one of the parties has been diagnosed with HIV/AIDS. Many of Ohio's sexual offense statutes set forth restrictions and enhancements when the victim cannot actually consent to sexual conduct or contact due age, limited mental capacity, or impairment. See R.C. 2907.02(A)(1)(b) and (c); R.C. 2907.03(A)(2) and (3); R.C. 2907.04(A); R.C. 2907.05(A)(2), (3), (4), and (5). Likewise, if one party is knowingly left uninformed about the possible exposure to HIV/AIDS from his or her partner then consent does not exist. R.C. 2903.11(B)(1) satisfies this compelling interest.

Narrowly Tailored

Next, under strict-scrutiny analysis, it must be determined whether "the means chosen by the state to effectuate its interests are sufficiently narrowly tailored." *Ritchey Produce Co.,Inc. v. Ohio Dept. of Adm. Serv.,* 85 Ohio St.3d 194, 263, 1999-Ohio-262, 707 N.E.2d 871. The law must be narrowly tailored to the extent that "the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant v. Jackson Bd. Of Educ.,* 476 U.S. 267, 280, 106 S.Ct. 1842 (1986).

Certainly, the state's compelling interest in stopping the spread of and exposure to an incurable and communicable disease cannot be, nor does it have to be, accomplished all in a single legislative enactment. R.C. 2903.11(B)(1) is aimed at one of the possible ways HIV/AIDS

can be transmitted and, as Batista and his amici set forth in their briefs, an easily preventable way of transmission. The Ohio Department of Health reported as follows:

> Ohio's estimated leading mode of transmission for new diagnoses of HIV infection in 2014 was male-to-male sexual contact followed by heterosexual contact. Among males, an estimated 87 percent of cases were attributed to male-to-male sexual contact, six percent to heterosexual contact and four percent to injection drug use. Among females, an estimated 82 percent of cases were attributed to heterosexual contact and 18 percent to injection drug use.
>
> HIV/AIDS Integrated Epidemiologic Profile for Ohio 2016 Edition, page 3, available at *https://www.odh.ohio.gov/-/media/ODH/ASSETS/Files/health-statistics---disease---hiv-aids/hivepiprofile/Epi-Profile-2016.pdf?la=en* (accessed Jan. 31, 2107).

R.C. 2903.11(B)(1) merely requires a known carrier of HIV/AIDS to inform potential sexual partners of the diagnosis before engaging in sexual conduct. After that information is provided, these consenting adults can make their own decisions as to how, what, when, where, and why. The statute does not require abstinence or limit sexual conduct to certain types. It does not dictate the use of protective devices or require a particular viral load level to engage in sexual conduct. The information sharing provided for in R.C. 2903.11(B)(1) simply ensures that sexual conduct under these circumstances is truly consensual and hopefully from there, common human decency will prevail and those consenting adults will make prevention decisions as they see fit.

Batista also claims that without requiring actual transmission of HIV/AIDS to the victim, R.C. 2903.11(B)(1) is no different from the risk of serious physical harm proscribed in subsection (A). The fact that R.C. 2903.11(B)(1) does not require actual transmission of HIV does not negate its being narrowly tailored. Obviously, limiting exposure to HIV/AIDS via abstinence or other forms of protection is the most effective way of stopping transmission. The Ohio Department of Health provides the following information regarding the period of communicability as well as the incubation period:

> Current evidence indicates that once a person is infected with HIV, infection and communicability persists for life. Communicability may vary as the body's viral load fluctuates with the stage of disease. Higher levels of circulating virus in the body are associated with increased likelihood of virus transmission from infected persons to non-infected persons, however; asymptomatic infected persons can transmit infection to others. Persons in any stage of HIV infection must be presumed infectious.
>
> Information from transfusion-associated cases of AIDS suggests an incubation period from infection to symptomatic AIDS ranging from six months to eight years or longer without HIV related treatment. With available treatments, onset of disease may be delayed beyond 10 years.
>
> Human Immunodeficiency Virus (HIV) Infection and Acquired Immunodeficiency Syndrome (AIDS) Infection Among Persons [over] 18 Months of Age, Infection Among Children [less than] 18 months of age, HIV Exposure Among Children [less than] 18 Months of Age, page 13, available at *http://www.odh.ohio.gov/pdf/idcm/hiv.pdf* (accessed Feb. 1, 2017).

These specific factors related to the irreversible communicability as well as the longevity of the incubation period related to HIV/AIDS clearly reveal that R.C. 2903.11(B)(1) is sufficiently narrowly tailored in not requiring actual transmission.

Batista also claims that subsection (B) to R.C. 2903.11 is unnecessary because the same conduct could be prosecuted under subsection (A) which prohibits knowingly causing serious physical harm. "Section 1, Article II of the Ohio Constitution, which vests all legislative power of the state in the General Assembly, empowers that body to enact any law that does not conflict with the Ohio or United States Constitution." *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶60, citing *State ex. rel Jackman v. Cuyahoga Cty. Court of Common Pleas*, 9 Ohio St.2d 159, 162, 224 N.E.2d 906 (1967). "[T]he legislative branch of government is 'the ultimate arbiter of public policy,'" and "the legislature is entrusted with the power to continually refine Ohio's laws to meet the needs of our citizens." *Kaminski* at ¶59, citing *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶21. In providing subsection (B) to R.C. 2903.11, it was clearly the Ohio General Assembly's intent to reduce the exposure to and the possible spread of HIV/AIDS via sexual conduct. The

Ohio General Assembly focused on the risk of exposure to and the spread of HIV/AIDS by sexual conduct in response to actual situations in Ohio and other states where known carriers seemed to be on individual missions to infect as many people as humanly possible and the need for "personal responsibility" in this regard. Ohio Senate Session, November 9, 1999, available at *http://www.ohio.channel.org/video/senate-session-november-9-1999*, at 02:09:24 to 02:25:42 (accessed Feb. 2, 2017).

Furthermore, the various sources of commentary relied upon by Batista and his amici in support of their claims that a statute such as R.C. 2903.11(B)(1) is counterproductive and that it undermines Ohio's public health policy, do not take into consideration the actual data the Ohio Department of Health accumulates and analyzes each year. In fact, deterring unsafe behavior out of fear of punishment, promoting a societal norm against nondisclosure, and incapacitation through imprisonment are three areas related to "nondisclosure" laws for which empirical data has not been established regarding their impact on sexual behavior. Lazzarini, Bray, & Burris, *Fields of Law: Evaluating the Impact of Criminal Laws on HIV Risk Behavior,* 30 J.L. Med. Ethics 239-240 (2002). Although Ohio's data reveals some fluctuations, it is at least notable that since R.C. 2903.11(B)(1) was enacted there have been categories related to "newly diagnosed" that have leveled off. Chart History of Ohio HIV/AIDS Epidemic, available at *http://www.odh.ohio.gov/-/media/ODH/ASSETS/Files/health-statistics---disease---hiv-aids/12OhioChart.pdf?la=en* (accessed Jan. 31, 2017). Despite the commendable and remarkable efforts of the medical community in treating HIV/AIDS and expanding the life expectancy of those patients, without an actual cure, a reversal of communicability, or a vaccine, the number of persons living with HIV/AIDS goes up each year, thereby increasing the risk of exposure and infection of others especially by means of sexual conduct. A statute such as R.C.

2903.11(B)(1), in the most narrowly tailored form possible, simply requires personal responsibility from carriers of HIV/AIDS when it comes to engaging sexual conduct. In fact, it is an attitude contra to personal responsibility such as that demonstrated by Batista in this case that undermines and is counterproductive to Ohio's public health policy.

R.C. 2903.11(B)(1) satisfies the goal of equal protection because all carriers of HIV/AIDS are treated similarly under R.C. 2903.11(B)(1) in that they all must inform potential sexual partners of their HIV/AIDS status before engaging in sexual conduct. Such a classification does not violate the Equal Protection Clauses of the Ohio and United States Constitutions because it is narrowly tailored to Ohio's compelling interest in preventing the exposure to and the spread of an incurable and communicable disease.

<u>Proposition of Law No. II</u>: If speech is indeed involved in Ohio's felonious assault provision requiring a known carrier of a virus that causes AIDS to disclose such status to any person prior to sexual conduct with that person (R.C. 2903.11(B)(1)), it does not violate the freedom of speech protections of the Ohio or the United States Constitutions because it is narrowly tailored to Ohio's compelling interest in preventing the exposure to and the spread of an incurable and communicable disease.

Since R.C. 2903.11(B)(1) requires a known carrier of a virus that causes AIDS to disclose that information to potential sexual partners before engaging in sexual conduct, it is Batista's contention that the statute compels content-based speech in violation the constitutional protections of freedom of speech.

<u>Free Speech</u>

The Ohio Constitution, Article I, Section 11 provides "[e]very citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press." The First

Amendment to the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech * * *" and it applies to all states via the Fourteenth Amendment. *Schneider v. State,* 308 U.S. 147, 60 S.Ct. 146 (1939).

Compelled Speech

The first case to interpret the First Amendment to the United States Constitution as protecting an individual from "compelled speech" was *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178 (1943). The compelled speech involved in *Barnette* was the mandatory recitation of the "Pledge of Allegiance" and the salute to the American flag for all school children. In a concurring opinion, Justice Murphy penned the oft quoted simplified explanation of the majority opinion:

> The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except in so far as essential operations of government may require it for the preservation of an orderly society, --as in the case of compulsion to give evidence in court.

Id. at 645. Since *Barnette,* the United States Supreme Court has gone on to identify instances of compelled speech in a variety contexts. *See Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 94 S.Ct. 2831 (1974) (right-of-reply in newspaper); *Wooley v. Maynard,* 430 U.S. 705, 97 S.Ct. 1428 (1977) (state motto "Live Free or Die" on license plates); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 106 S.Ct. 903 (1986) (a third-party newsletter in billing envelope); *Riley v. National Federation of the Blind of North Carolina, Inc.* 487 U.S. 781, 108 S.Ct. 2667 (1988) (professional fundraiser disclosure of gross receipts); *Turner Broadcasting System, Inc. v. F.C.C.,* 512 U.S. 622, 114 S.Ct. 2445 (1994) (must-carry provision for cable television systems); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 115 S.Ct.338 (1995) (inclusion of a group in parade).

Content-Based v. Content-Neutral Speech

Typically, when a statute or regulation is alleged to violate the freedom of speech, the analysis turns to whether the burden on speech is content-based or content-neutral. *City of Painesville Building Department v. Dworken & Bernstein Co., L.P.A.*, 89 Ohio St.3d 564, 567, 2000-Ohio-488, 733 N.E.2d 1152, citing *City of Ladue v. Gilleo*, 512 U.S. 43, 59 114 S.Ct. 2038 (1994) (O'Connor, J., concurring). The United States Supreme Court has seemingly determined that all compelled speech is content-based speech because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795, 108 S.Ct. 2667 (1988). In *Riley*, the court further refused to recognize any distinction between compelled statements whether they be of opinion or of fact because "either form of compulsion burdens protected speech." *Id.* at 797-798. Courts must apply "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642, 114 S. Ct. 2445 (1994), citing *Simon & Schuster*, 502 U.S. 105, 115, 112 S.Ct. 501; *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S.Ct. 948 (1983). Still, "not every law that turns on the content of speech is invalid." *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S.Ct. 2038 (1994), fn. 10.

It does not appear that the concept of content-based compelled speech is one which has ever been specifically analyzed under federal or state constitutional grounds in the State of Ohio. This Court has, however, analyzed in the context of equal protection, a former subsection of Ohio's importuning statute (R. C. 2907.07(B)) which prohibited solicitation of a person of the same sex to engage in sexual activity knowing that such solicitation would be offensive. *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251. This Court determined that

the statute prohibited speech "because of the **content** expressed in that communication" and therefore applied the strict-scrutiny standard of review. *Id.* at ¶20. Furthermore, this Court found it significant that former R.C. 2907.07(B) did not criminalize **activity** (conduct) but rather **solicitation** (speech). *Id.* at ¶23. None of the statutes or regulations in the above cited cases are strikingly similar to that in the present case. Here, R.C. 2903.11(B)(1) is especially unique in that it arguably involves both compelled speech (inform of HIV positive status) and non-speech (engage in sexual conduct). Simply put, it is not the mere failure to share one's HIV positive status that is proscribed in R.C. 2903.11(B)(1), it is engaging in uninformed sexual conduct.

Intermediate Scrutiny

"When speech and nonspeech elements are part of the same course of conduct, 'a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations of First Amendment freedoms.'" *Bellecourt v. Cleveland,* 104 Ohio St.3d 439, 2004-Ohio-6551, 820 N.E.2d 309, ¶6, quoting *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673 (1968). Additionally, "[i]f combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 66, 126 S.Ct. 1297 (2006). Although the standard of review set forth in *O'Brien* is a less stringent standard than strict scrutiny, it rightly takes into account the significance of the nonspeech conduct that a statute actually intends to limit. "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First

Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien* at 377.

In the present case, the intermediate scrutiny criteria set forth in *O'Brien* is satisfied. The Ohio General Assembly definitely has the constitutional power to provide a statute such as R.C. 2903.11(B)(1) that specifically sets forth what truly makes sexual conduct consensual when one of the parties is a carrier of HIV/AIDS. R.C. 2903.11(B)(1) furthers the important and substantial governmental interest in preventing or limiting exposure to an incurable and communicable disease such as HIV/AIDS. The government interest in R.C. 2903.11(B)(1) is indeed unrelated to the suppression of free expression because it is sexual conduct when one of the parties withholds knowledge of his or her HIV/AIDS status that the statute actually proscribes. The incidental restriction is no greater than is essential in that a person only has to share his or her HIV/AIDS status with those whom he or she engages in sexual conduct.

Furthermore, "[e]ven within the area of protected speech, a difference in content may require a different governmental response." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66, 96 S.Ct. 2440 (1976). Since the manner in which R.C. 2903.11(B)(1) arguably compels "speech" is so limited in that it only requires sharing HIV/AIDS status with those individuals with whom the carrier engages in sexual conduct, the statute is akin to those that regulate time, place, and manner of speech or expression. A similar rationale has routinely been applied in the context of sexually explicit material where some such material is deemed only "marginally protected." *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456 (1991) (nude dancing); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925 (1986) (adult movie theatre); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440 (1976) (adult movie theatre). Although regulation of sexually explicit materials aimed primarily at

suppression of First Amendment rights appears to be content-based, the regulation is deemed content-neutral if the predominate purpose is the amelioration of socially adverse secondary effects of speech-related activity. *See Barnes* at 566; *Renton* at 46–48; *Young* at 70–72. Likewise, R.C. 2903.11(B)(1) only seeks to prohibit uninformed sexual conduct; any effect this prohibition has on "speech" is secondary or incidental. Realistically, R.C. 2903.11(B)(1) only relates to a time restriction in that the information pertaining to HIV status be shared "prior to" sexual conduct.

For these reasons, if indeed R.C. 2903.11(B)(1) compels "speech" at all, it is only incidental and as already set forth above, it satisfies the intermediate scrutiny provided in *O'Brien.*

Strict Scrutiny

As was presented in the first proposition of law related to equal protection, R.C. 2903.11(B)(1) also withstands strict scrutiny analysis even if it does involve compelled content-based speech. The state has a compelling interest in ensuring informed consent as well as limiting the exposure to and the spread of HIV/AIDS by means of sexual conduct. The statute's simple requirement that a person with HIV/AIDS inform potential sexual partners of that status before engaging in sexual conduct is narrowly tailored to that state interest. In this regard, the First District Court of Appeals aptly found, "We can think of no less restrictive alternative to serve this interest." *State v. Batista,* 2016-Ohio-284, 64 N.E.3d 498, ¶12.

Other Jurisdictions

While this matter appears to be one of first impression in Ohio, courts in Illinois, Michigan, Iowa, and most recently Missouri have addressed it. *See People v. Russell,* 158 Ill.2d 23, 630 N.E.2d 794 (1994); *People v. Jensen,* 231 Mich.App.439, 586 N.W.2d 748 (1998); *State*

v. Musser, 721 N.W.2d 734 (Iowa 2006); *State v. S.F.*, 483 S.W.3d 385 (Mo. 2016). Each of these states took different legal routes in determining that their respective statutes did not violate the First Amendment. In *Russell,* the Illinois Supreme Court simply determined, "[n]either the statute nor the cases before us have even the slightest connection with free speech." *Russell* at 25-26. In *Jenson,* a Michigan Court of Appeals first addressed the defendant's right of privacy claim and held: "Michigan has an undeniable compelling interest in discouraging the spread of HIV. Requiring an infected person to so inform sexual partners so they can make an informed decision before engaging in sexual penetration is narrowly tailored to further this compelling state interest." *Jenson* at 458. With regard to the free speech claim, the Michigan Court of Appeals determined that compelled speech effectively asserts a "negative First Amendment right" in which strict scrutiny does not apply. *Id.* at 461-462. The court then held: "in weighing the infringement of defendant's negative First Amendment right against compelled speech by requiring private disclosure that she is HIV infected against the magnitude of the state's interests in controlling the spread of this currently incurable disease, the state's interests outweigh defendant's right against compelled speech." *Id.* at 464-465. In *Musser,* the Iowa Supreme Court found "compelled content-based speech" was involved and applied strict scrutiny to determine that the Iowa statute "promotes a compelling state interest, and the legislature narrowly tailored the statute to promote this compelling interest." *Musser* at 744. In *S.F.*, the Supreme Court of Missouri held that "the burden on speech is incidental to the conduct the statute seeks to prohibit and does not violate constitutional provisions protecting the freedom of speech." *S.F.* at 386.

The Illinois, Michigan, Iowa, and Missouri statutes prohibiting an HIV-positive individual from engaging in sexual conduct without informing the other person of the HIV status

are similar to Ohio's R.C. 2903.11(B)(1). Although the Illinois and Iowa statutes make the "informing the other person of the HIV status" an affirmative defense, the essence of the statutes is similar. The Iowa Supreme Court's analysis in *Musser* can similarly be applied to R.C. 2903.11 (B)(1).

The Ohio General Assembly has a compelling interest in discouraging the exposure to and the spread of an incurable and communicable disease. R.C. 2903.11(B)(1) is narrowly tailored to promote that compelling interest. Like the Iowa statute, R.C. 2903.11(B)(1) "does not absolutely prohibit an infected person from having sexual relations with another" and "it does not compel public disclosure of an infected person's HIV status; an infected person may privately inform a potential sexual partner of his or her condition." *Musser* at 744. The Missouri Supreme Court's analysis is the most applicable to Ohio's R.C. 2903.11(B)(1). If indeed R.C. 2903.11(B)(1) compels "speech," it does so only incidentally in setting forth what truly makes sexual conduct consensual when one of the parties is a carrier of HIV/AIDS.

For these reasons, R.C. 2903.11(B)(1) does not violate the freedom of speech provided by the Ohio or United States Constitutions.

CONCLUSION

Since R.C. 2903.11(B)(1) satisfies the highest level of scrutiny applicable to equal protection and freedom of speech analysis under both the Ohio and United States Constitutions, the defendant-appellant Orlando Batista's claims are without merit. When it comes to HIV/AIDS, the State of Ohio has a compelling interest in ensuring informed consent to sexual conduct as well as limiting exposure to it. The classification identified in R.C. 2903.11 is narrowly tailored to those interests. And, even if R.C. 2903.11 (B)(1) does affect some level of protected speech, it is only incidental. The statute is narrowly tailored to the State of Ohio's interest in ensuring informed consent to sexual conduct when one of the parties is HIV/AIDS

positive as well as limiting the exposure to and spread of an incurable and communicable disease.

For these reasons, this Court should reject Batista's facial claims that R.C. 2903.11 (B)(1) violates equal protection and freedom of speech under the state and federal constitutions.

Respectfully,

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O Const I Sec. 2 Equal protection and benefit

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

Ohio Const. Article I, Section 2

O Const I Sec. 11 Freedom of speech

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

Ohio Const. Article I, Section 11

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.
Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.
Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV

2903.11 Felonious assault

(A) No person shall knowingly do either of the following:
(1) Cause serious physical harm to another or to another's unborn;
(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.
(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:
(1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;
(2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;
(3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.
(C) The prosecution of a person under this section does not preclude prosecution of that person under section 2907.02 of the Revised Code.
(D)(1)(a) Whoever violates this section is guilty of felonious assault. Except as otherwise provided in this division or division (D)(1)(b) of this section, felonious assault is a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree.
(b) Regardless of whether the felonious assault is a felony of the first or second degree under division (D)(1)(a) of this section, if the offender also is convicted of or pleads guilty to a specification as described in section 2941.1423 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, except as otherwise provided in this division or unless a longer prison term is required under any other provision of law, the court shall sentence the offender to a mandatory prison term as provided in division (B)(8) of section 2929.14 of the Revised Code. If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.
(2) In addition to any other sanctions imposed pursuant to division (D)(1) of this section for felonious assault committed in violation of division (A)(2) of this section, if the deadly weapon used in the commission of the violation is a motor vehicle, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.
(E) As used in this section:
(1) “Deadly weapon” and “dangerous ordnance” have the same meanings as in section 2923.11 of the Revised Code.
(2) “Motor vehicle” has the same meaning as in section 4501.01 of the Revised Code.

(3) “Peace officer” has the same meaning as in section 2935.01 of the Revised Code.
(4) “Sexual conduct” has the same meaning as in section 2907.01 of the Revised Code, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.
(5) “Investigator of the bureau of criminal identification and investigation” means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or providing emergency assistance to peace officers pursuant to authority granted under section 109.541 of the Revised Code.
(6) “Investigator” has the same meaning as in section 109.541 of the Revised Code.

Ohio Rev. Code Ann. § 2903.11 (West)