Arizona Attorneys for Criminal Justice
Keith J. Hilzendeger (Ariz. Bar No. 023685)
Randal McDonald (Ariz. Bar No. 032008)
1641 East Osborn Road, Suite 8
Phoenix, Arizona 85016
(602) 382-2700 voice
khilzend@gmail.com

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In re PETITION TO AMEND RULE 13 OF THE ARIZONA RULES OF CRIMINAL PROCEDURE	No. R-22-0042 **Comment Opposing Adoption of New Rule 13.6 of the Arizona Rules of Criminal Procedure Relating to HIV Testing**

Arizona Attorneys for Criminal Justice, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature; promoting excellence in the practice of criminal law through education, training, and mutual assistance; and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ opposes the proposal to add a new Rule 13.6 to provide for mandatory HIV testing of persons accused—not convicted—of certain forcible sex offenses for two reasons. First, the proposed rule conflicts with a duly enacted

statute. Second, the proposed rule will disproportionately impact LGBT persons of color, and it perpetuates outmoded beliefs surrounding HIV and AIDS and overlooks modern scientific advances that make HIV infection a manageable, chronic illness.

Background

As part of the Violence Against Women Act (VAWA) of 1994, Congress established a grant program, to be administered by the Department of Justice, aimed at "encourag[ing] States, Indian tribal governments, and units of local government to treat domestic violence as a serious violation of criminal law." Pub. L. No. 103-322, § 40231(a)(3), 108 Stat. 1796, 1932 (codified as amended at 34 U.S.C. § 10461(a)). In 2006, the program was expanded to include "HIV testing programs for sexual assault perpetrators and notification and counseling protocols." Pub. L. No. 109-162, § 102(b)(2)(G), (b)(4), 119 Stat. 2960, 2977 (codified as amended at 34 U.S.C. § 10461(b)(13), (d)). The Department of Justice has established the Office on Violence Against Women (OVW) to administer the grants, and OVW subdivides the grant monies into programs enumerated specifically in 34 U.S.C. § 10461(b)(1)–(24). *See* 28 C.F.R. § 90.62(a).

A recipient of VAWA grant funds that is a State or a unit of local government loses 5% of the funds awarded if it does not certify three things:

- the State or unit of local government at the request of a victim to administer to a defendant, against whom an information or indictment is presented for a crime in which by force or threat of force the perpetrator compels the victim to engage in sexual activity, testing for the immunodeficiency virus (HIV) not later than 48 hours after the

> date on which the information or indictment is presented and the defendant is in custody or has been served with the information or indictment;

- as soon as practicable notification to the victim, or parent and guardian of the victim, and defendant of the testing results; and
- follow-up tests for HIV as may be medically appropriate, and that as soon as practicable after each such test the results be made available.

34 U.S.C. § 10461(d)(1)(A)–(C); 28 C.F.R. § 90.64.

Alternately, the grantee can avoid being docked this 5% of the award if it instead "gives the Attorney General assurances that its laws and regulations will be in compliance with" these requirements within two years or by the end of the next session of the state legislature. *Id.* § 10461(d)(2).

According to OVW, during fiscal year 2022 (ending September 30, 2022) 39 eligible entities were awarded a total of $29,416,428 under the Improving Criminal Justice Responses to Domestic Violence, Dating Violence, Sexual Assault, and Stalking Grant Program. *See* FY 2022 OVW Grant Awards By Program, https://www.justice.gov/ovw/awards/fy-2022-ovw-grant-awards-program#ICJR. None of the 39 entities were located in Arizona. In fiscal year 2022, OVW awarded a total of $9,991,463 to 13 grantees (a total of 15 grants) in Arizona. These grantees include the City of Tucson, the State of Arizona, and other nonprofit partner agencies working in the domestic violence space.

In 1990, the Arizona legislature enacted a statutory provision allowing for HIV testing, at the request of a victim, of a person "arrested" for a "sexual offense or other crime which involved significant exposure" to bodily fluids that can result

in exposure to HIV. H.B. 2173, 39th Leg., 2d Reg. Sess., § 1 (Ariz. 1990) (codified at A.R.S. § 13-1415(A), (E)). Five years later, the statute was amended to clarify that the sexual offenses covered are "oral sexual contact, sexual contact or sexual intercourse" as defined in A.R.S. § 13-1401. S.B. 1149, 42d Leg., 1st Reg. Sess. § 2 (Ariz. 1995) (codified as amended at A.R.S. § 13-1415(G)(3)). The statute was last amended in 2021, but not in any way germane to the OWV grant programs.

Reasons for Rejecting the Proposal

1. This Court cannot enact a substantive rule that amends a statute that has been duly enacted by the legislature.

"In Arizona, the legislature is endowed with the legislative power of the State, and has plenary power to consider any subject within the scope of government unless the provisions of the Constitution restrain it." *State ex rel. Brown v. Napolitano*, 194 Ariz. 340, 342 ¶ 5, 982 P.2d 815, 817 ¶ 5 (1999) (citing *Giss v. Jordan*, 82 Ariz. 152, 159, 309 P.2d 779, 783–84 (1957)). The Arizona Constitution "vests the power to make procedural rules exclusively in" this Court. *Id.* ¶ 6, 982 P.2d at 817 ¶ 6 (citing Ariz. Const. art. VI, § 5; *Slayton v. Shumway*, 166 Ariz. 87, 91, 800 P.2d 590, 594 (1990); *State v. Fowler*, 156 Ariz. 408, 411, 752 P.2d 497, 500 (App. 1987)). But "when a constitutionally enacted substantive statute conflicts with a procedural rule, the statute prevails." *Albano v. Shea Homes Ltd. P'ship*, 227 Ariz. 121, 127 ¶ 26, 254 P.3d 360, 366 ¶ 26 (2011) (citing *Seisinger v. Siebel*, 220 Ariz. 85, 91 ¶ 24, 203 P.3d 483, 489 (2009)).

There is an irreconcilable conflict between the substance of § 13-1415 and the proposed new Rule 13.6. Under the statute, HIV testing is not authorized unless a court finds that “sufficient evidence exists to indicate that significant exposure occurred.” A.R.S. § 13-1415(B). “Significant exposure” means contact of the victim’s ruptured or broken skin or mucous membranes with a person’s blood or bodily fluids, other than tears, saliva, or perspiration, of a magnitude that the centers for disease control have epidemiologically demonstrated can result in transmission of” HIV. A.R.S. § 13-1415(G)(3). But the proposed rule dispenses with this significant-exposure requirement. All that is required is that the accused person commit an “offense” “by force or threat of force” involving “oral sexual contact, sexual contact, or sexual intercourse,” and that the victim demand that the accused be tested for HIV. Prop. Ariz. R. Crim. P. 13.6(a). Once the victim demands a test, the state “must obtain” a court order authorizing the test, whether or not a court finds significant exposure. *Id.* 13.6(b).

So the proposed rule overrides a substantive protection that the legislature afforded to those suspected—not convicted—of committing forcible sex offenses. In § 13-1415, the legislature determined that only those cases of sexual assault involving a real possibility of HIV transmission should involve HIV testing. The proposed rule expands the possibility of HIV testing to every case where the victim demands it. This irreconcilable conflict on a substantive matter means that this Court has no power to enact the proposed rule. The petitioner should ask the legislature to amend the statute instead.

2. **The burdens of the proposed rule change will fall disproportionately on people of color and will result in these populations facing more discrimination than they already do in our criminal justice system.**

In 2019, the CDC estimated that African Americans made up 40.3% of the U.S. Population living with HIV, and Hispanic/Latino people made up 24.7%—despite the fact that these groups made up only 13.4% and 18.5% of the overall population, respectively. HIV Surveilance Report: Supplemental Report, Vol. 26, Number 1 (https://www.cdc.gov/hiv/pdf/library/reports/surveillance/cdc-hiv-surveillance-supplemental-report-vol-26-1.pdf). Additionally, in 2020, almost three quarters of new HIV infections were attributed to members of the LGBT community. Should this Court change its rules to more easily allow the State to subject individuals to forced HIV-testing, the negative results will fall disproportionately on those populations.

A recent study by Lambda Legal reveals that living with HIV can drastically increase the likelihood of negative outcomes in the criminal justice system. For instance, LGBT people and those living with HIV reported higher rates of physical and sexual abuse, verbal harassment, and accusations of criminal conduct in U.S. prisons than those who do not belong to those populations. Protected & Served? 2022 Community Survey of LGBTQ+ People and People Living with HIV's Experiences with the Criminal Legal System, https://www.protectedandserved.org. The report also found that 25% of people living with HIV had their status inappropriately and unwillingly revealed during courtroom proceedings.

Furthermore, making it easier to forcibly impose HIV-testing on people is not necessary to protect victims. Anyone in Arizona can access free HIV testing at

over 100 locations within the state through partnerships with Aunt Rita's Foundation in Phoenix. (https://gettestedaz.org). Other organizations, such as the Southwest Center for HIV/AIDS, offer free and confidential testing in the metro Phoenix area. (https://www.swcenter.org/testing). The Southern Arizona AIDS Foundation offers free testing in Tucson. (https://saaf.org/services/hiv-testing/). And the Arizona Department of Health Services maintains a list of free testing locations statewide. (https://hivaz.org/locate-services/?services=47). Victims can easily connect with these services at no cost to themselves.

Finally, testing those who are merely accused of forcible sex crimes, regardless of whether "significant exposure" occurred within the meaning of A.R.S. § 13-1415, needlessly perpetuates the stigma associated with HIV. With the advent of antiretroviral therapy in 1996, HIV has gone from being "invariably fatal within eight to ten years" to a "chronic, treatable condition." *Roe v. Dep't of Defense*, 947 F.3d 207, 214 (4th Cir. 2020). "Today, there is an effective treatment regimen for virtually every person living with HIV"—a "one-tablet antiretroviral regimen, which combines the required medications into a single pill taken daily." *Id.* at 213. "And with adherence to treatment, an HIV-positive person's viral load becomes 'suppressed' within several months and the virus reaches 'undetectable' levels shortly thereafter, meaning there are less than 50 virus copies per milliliter of blood." *Id.* Today, nearly 40 years after the first cases of a "gay cancer" first emerged, *see Roe*, 947 F.3d at 212, HIV infection is hardly a "death sentence" that the public widely believed it to be in the 1980s. *See Hedgepeth v. Whitman Walker*

Clinic, 22 A.3d 789, 820 (D.C. 2011) (pointing out that a clinic assures its patients that "in 2010, the presence of HIV is not tantamount to a death sentence").

Moreover, people with HIV suffer a tremendous stigma, even in today's society. "Many Americans regard the first victims of the disease—gay men, intravenous drug users, and prostitutes—as evidence that AIDS is a curse, and that it is proper to shun and even punish those who contract the virus." Keith J. Hilzendeger, Note, *Unreasonable Publicity: How Well Does Tort Law Protect the Unwarranted Disclosure of a Person's HIV-Positive Status?*, 35 Ariz. St. L.J. 187, 187–88 (2003). "Stigma, fear, and misinformation about HIV persist today." *Roe*, 947 F.3d at 212. This stigma can color the accused person's experience of the criminal justice system—even when the accused person engages in consensual conduct with informed consent. *E.g. State v. Rick*, 835 N.W.2d 478 (Minn. 2013) (reversing a conviction for transferring a communicable disease when the defendant informed his partner of his HIV status), *overruled on other grounds by State v. Thonesavanh*, 904 N.W.2d 432, 440 (Minn. 2017).

Respectfully submitted: May 1, 2023.

s/Keith J. Hilzendeger
KEITH J. HILZENDEGER
RANDAL MCDONALD
Arizona Attorneys for Criminal Justice

Comment electronically mailed to:
Hon. Wendy A. Million
Tucson City Court