

No. 21-617

---

---

In the  
**Supreme Court of the United States**

CHRISTOPHER N. PAYNE,  
*Petitioner,*

v.

JAHAL TASLIMI; MS. SMITH, LPN,  
*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Fourth  
Circuit

BRIEF OF UPTOWN PEOPLE'S LAW CENTER  
AS *AMICUS CURIAE* IN SUPPORT OF  
PETITIONER

ALAN MILLS  
UPTOWN PEOPLE'S  
LAW CENTER  
4413 N. Sheridan  
Chicago, IL 60640  
773-769-1411  
alan@uplchicago.org

CHARLES B. KLEIN  
*Counsel of Record*  
WINSTON & STRAWN LLP  
1901 L Street, N.W.  
Washington, DC 20036  
202-282-5000  
cklein@winston.com

---

---

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
INTEREST OF AMICUS CURIAE .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	3
I. The Fourth Circuit Ignored The Well-Recognized Right To Privacy Of Medical Information, Particularly HIV-Related Information—Creating A Circuit Split. ....	3
A. The Second, Third, And Sixth Circuits Recognize That Gratuitous Disclosure Of HIV Status Violates A Prisoner’s Privacy Rights.....	3
B. The Fourth Circuit Erroneously Relied on <i>Hudson</i> And Erred By Applying Search-And-Seizure Privacy Rights Afforded By The Fourth Amendment Instead Of The Confidentiality Rights Afforded By The Fourteenth Amendment. ....	8
II. Review Is Particularly Warranted To Prevent Unconstitutional Disclosure Of A Prisoner’s HIV Status, Causing Unnecessary Harassment And Harm. ....	12

III. There Is No Adverse Effect To Penological  
Interests In Requiring Modest Measures To  
Maintain Privacy As To HIV Status. ....17

CONCLUSION ..... 21

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Anderson v. Romero</i> , 72 F.3d 518 (7th Cir. 1995) .....	15
<i>Doe v. City and Cnty. of S.F.</i> , 2017 WL 1508982 (N.D. Cal. Apr. 27, 2017) .....	14
<i>Doe v. City of N.Y.</i> , 15 F.3d 264 (2d Cir. 1994) .....	13
<i>Doe v. Delie</i> , 257 F.3d 309 (3d Cir. 2001) .....	<i>passim</i>
<i>Doe v. Lincoln Nat'l Life Ins. Co.</i> , 2017 U.S. Dist. LEXIS 117110 (N.D. Cal. July 26, 2017) .....	14
<i>Doe v. Metro. Life Ins. Co.</i> , 2016 U.S LEXIS 64387 (N.D. Cal. May 13, 2016) .....	14
<i>Elliott v. Lynn</i> , 38 F.3d 188 (5th Cir. 1994) .....	10
<i>Harris v. Thigpen</i> , 941 F.2d 1495 (11th Cir. 1991) .....	15, 16
<i>Henry v. Hulett</i> , 969 F.3d 769 (7th Cir. 2020) (en banc) .....	9
<i>Hudson v. Palmer</i> , 468 U.S. 517 (1984) .....	<i>passim</i>

<i>Lambert v. Hartman</i> , 517 F.3d 433 (6th Cir. 2008).....	11
<i>Moore v. Prevo</i> , 379 F. App'x 425 (6th Cir. 2010) .....	7, 11
<i>Nasa v. Nelson</i> , 562 U.S. 134 (2011).....	10, 11
<i>Nixon v. Adm'r of Gen. Servs.</i> , 433 U.S. 425 (1977).....	10
<i>Patient v. Corbin</i> , 37 F. Supp. 2d 433 (E.D. Va. 1998) .....	14
<i>Payne v. Taslimi</i> , 998 F.3d 648 (4th Cir. 2021).....	<i>passim</i>
<i>Pell v. Procnier</i> , 417 U.S. 817 (1974).....	3, 18
<i>Powell v. Schriver</i> , 175 F.3d 107 (2d Cir. 1999).....	<i>passim</i>
<i>Roe v. City of Milwaukee</i> , 37 F. Supp. 2d 1127 (E.D. Wisc. 1999) .....	14
<i>Roe v. City of N.Y.</i> , 151 F. Supp. 2d 495 (S.D.N.Y. 2001) .....	14
<i>Turner v. Safley</i> , 482 U.S. 78 (1987).....	3
<i>W.G.A. v. Priority Pharm., Inc.</i> , 184 F.R.D. 616 (E.D. Mo. 1999) .....	14
<i>Walls v. City of Petersburg</i> , 895 F.2d 188 (4th Cir. 1990).....	8, 18

<i>Whalen v. Roe</i> , 429 U.S. 589 (1977).....	10, 11
--	--------

### **Statutes**

5 U.S.C. § 552 .....	19, 20
5 U.S.C. § 552(a) .....	19
42 U.S.C. § 1983 .....	4

### **Other Authorities**

28 C.F.R. § 549.14(a)–(b) (2021).....	18
Bureau of Prisons, Freedom of Information Act Response (Nov. 3, 2021) .....	19
BUREAU OF PRISONS, INFECTIOUS DISEASE MANAGEMENT 15 (2014). .....	19
CENTERS FOR DISEASE CONTROL AND PREVENTION, EVIDENCE OF HIV TREATMENT AND VIRAL SUPPRESSION IN PREVENTING THE SEXUAL TRANSMISSION OF HIV 1 (Dec. 2020).....	16
GLAAD, 2021 STATE OF HIV STIGMA 4 (2021) .....	16
Hannah R. Fishman, <i>HIV Confidentiality and Stigma: A Way Forward</i> , 16 U. PA. J. CONST. L. 199, 201 (2013) .....	12
Lance S. Rintamaki et al., <i>Social Stigma Concerns and HIV Medication Adherence</i> , 20 AIDS PATIENT CARE & STDs 359 (2006) .....	12, 13

Susan Reif et al., *Perceptions and Impact of HIV Stigma Among High Risk Populations in the US Deep South*, 4 J. HIV & AIDS 1, 1–3 (2018) ..... 12, 13

U.S. Const., amend. IV ..... *passim*

U.S. Const., amend. XIV ..... *passim*

UNITED NATIONS OFFICE ON DRUGS AND CRIME, HIV/AIDS PREVENTION, CARE, TREATMENT, AND SUPPORT IN PRISON SETTINGS 12 (Oct. 2006) ..... 15, 16

## INTEREST OF AMICUS CURIAE<sup>1</sup>

The Uptown People’s Law Center (“UPLC”) is a non-profit entity that advocates for prisoners, tenants, and disabled people denied benefits. UPLC works to improve people’s quality of life through sound, community-oriented lawyering and by leveraging the law to affect social change. UPLC does not view individual cases in isolation, but rather tries to address the root of the underlying issues. Instead of taking on a specific legal case, UPLC looks at the person as a member of the community that needs help. UPLC has represented several prisoners whose HIV status has been disclosed to other prisoners and civilians by prison staff.

## INTRODUCTION AND SUMMARY OF ARGUMENT

A prison doctor approached petitioner, within earshot of other prisoners, and told him “he had ‘not take[n] [his] *HIV* medications’ that day.” *Payne v. Taslimi*, 998 F.3d 648, 653 (4th Cir. 2021) (alteration in original; emphasis added). Petitioner alleges that respondents violated his civil rights by gratuitously disclosing his HIV status to other prisoners and civilians. The trial court dismissed the complaint and the Fourth Circuit affirmed in a published opinion, holding that prisoners lack a reasonable expectation of privacy as to their HIV status. In doing so, the Fourth Circuit departed from holdings by the Second, Third

---

<sup>1</sup> Pursuant to S. Ct. Rule 37.6, counsel for all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person or entity other than *amicus*, its members, or counsel made a monetary contribution to its preparation or submission.



and Sixth Circuits—all of which have recognized privacy interests of prisoners as to HIV status under the Fourteenth Amendment. This Court’s review is necessary to resolve that circuit split and confirm a prisoner’s constitutional privacy rights.

Amicus submits this brief to emphasize that review is particularly warranted here given the stigma associated with HIV, which remains one of the most stigmatized medical conditions in the world. Disclosure of a prisoner’s HIV status while imprisoned often results in threats and harassment, including possible bodily harm. It is well documented that incarcerated persons living with HIV face social isolation, intolerance, and violence. This HIV stigma persists despite medical advances having greatly reduced the lethality and communicability of the disease.

Only modest steps were needed here to preserve petitioner’s constitutional rights. The doctor merely needed to say “take your medication” instead of “take your *HIV* medication” to avoid drawing undue attention to petitioner’s HIV status. Respondents can point to no credible penological interests in allowing prison doctors to disclose a prisoner’s HIV status to fellow prisoners.

Gratuitous disclosure of a prisoner’s HIV status is a recurring problem, addressed by numerous courts over the years. This case provides the right vehicle for this Court to resolve the circuit split created by the Fourth Circuit and confirm that incarcerated people have a constitutional privacy right in their HIV status. Certiorari should be granted.

## ARGUMENT

### I. **The Fourth Circuit Ignored The Well-Recognized Right To Privacy Of Medical Information, Particularly HIV-Related Information—Creating A Circuit Split.**

This Court “ha[s] repeatedly held that prisons are not beyond the reach of the Constitution. No ‘iron curtain’ separates one from the other.” *Hudson v. Palmer*, 468 U.S. 517, 523 (1984). While “lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights,” this Court has insisted that “a prison inmate retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.” *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *see also Hudson*, 468 U.S. at 523. In other words, a prisoner’s rights may be curtailed only where “[t]he curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of ‘institutional needs and objectives’ of prison facilities[.]” *Hudson*, 468 U.S. at 524; *Turner v. Safley*, 482 U.S. 78, 89 (1987) (“[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”).

#### A. **The Second, Third, And Sixth Circuits Recognize That Gratuitous Disclosure Of HIV Status Violates A Prisoner’s Privacy Rights.**

Over twenty years ago, the Second Circuit was the first to find a prisoner’s right to privacy as to HIV status. *See Powell v. Schriver*, 175 F.3d 107, 111–12

(2d Cir. 1999). In *Powell*, a prisoner sued under § 1983 alleging a corrections officer violated her constitutional right to privacy by telling other prisoners she was HIV positive. *Id.* at 109. The Second Circuit recognized the prisoner’s Fourteenth Amendment right to privacy in her HIV status. *Id.* at 112–13.

Under Second Circuit precedent, “[i]ndividuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition.” *Id.* at 110 (citation omitted). After all, “[a]n individual revealing that she is HIV seropositive potentially exposes herself not to understanding or compassion but to discrimination and intolerance, further necessitating the extension of the right to confidentiality over such information.” *Id.* at 111 (citation omitted). The *Powell* court extended the constitutional privacy right as to HIV status to transsexuals and addressed, among other things, whether prisoners lose these constitutional rights by virtue of their incarceration.

Relying in part on this Court’s precedent, the Second Circuit held that “[p]rison inmates do not shed all fundamental protections of the Constitution at the prison gates” unless they are “inconsistent with [their] status as . . . prisoner[s] or with the legitimate penological objectives of the corrections system.” *Id.* at 112 (citing, among other cases, *Turner*, 482 U.S. at 95, and *Pell*, 417 U.S. at 822) (alterations in original). While leaving open the possibility “of circumstances under which disclosure of an inmate’s HIV-positive status would further legitimate penological interests,” such as an anti-contagion measure, the court concluded “that the gratuitous disclosure of an inmate’s confidential medical information . . . violates

the inmate's constitutional right to privacy." *Powell*, 175 F.3d at 112.

In reaching this conclusion, the court distinguished privacy rights under the Fourth Amendment: "The right to maintain the confidentiality of medical information is sufficiently distinct from the right to privacy protected by the Fourth Amendment[.]" *Id.* at 112 n.3. The court thus distinguished its case from *Hudson v. Palmer*, where this Court held that prisoners lack a privacy right against unreasonable searches of their prison cells. *See* 468 U.S. at 525–26. Considering the differences in the privacy right at issue, the Second Circuit reasoned that "the Supreme Court's holding in *Hudson v. Palmer* has no bearing on this case." *Powell*, 175 F.3d at 112 n.3 (citing 468 U.S. at 526).<sup>2</sup>

Two years later, the Third Circuit "join[ed] the Second Circuit in recognizing that the constitutional right to privacy in one's medical information exists in prison." *Doe v. Delie*, 257 F.3d 309, 317 (3d Cir. 2001). The court emphasized "that the privacy interest in information regarding one's HIV status is particularly strong because of the stigma, potential for harassment, and 'risk of much harm from non-consensual dissemination of the information.'" *Id.* at

---

<sup>2</sup> The *Powell* court ultimately affirmed entry of judgment against the prisoner as to her right-to-privacy claim based on qualified immunity, finding "that the right of a prisoner to maintain the privacy of medical information was not clearly established on December 31, 1991[.]" 175 F.3d at 113-14; *see also id.* at 110 ("As the Supreme Court recommends, we consider [a] qualified immunity defense only after first deciding whether [the plaintiff] 'has alleged a deprivation of a constitutional right at all.'" (quoting *Cnty of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998))).

315 (citation omitted). Indeed, “[i]t is beyond question that information about one’s HIV positive status is information of the most personal kind and that an individual has an interest in protecting against the dissemination of such information.” *Id.* at 316.

Like the Second Circuit, the Third Circuit distinguished the Fourth Amendment privacy right in *Hudson* from the privacy right in one’s medical information. *Ibid.* (citing *Hudson*, 468 U.S. at 525). Indeed, the Third Circuit held that a prisoner’s “right to privacy in his medical information is completely different than the right extinguished in *Hudson*. . . . The right to nondisclosure of one’s medical information emanates from a different source and protects different interests than the right to be free from unreasonable searches and seizures.” *Id.* at 316 (citing, among other cases, *Hudson*, 468 U.S. at 525 and *Whalen v. Roe*, 429 U.S. 589, 598–99 (1977)).

Also like the Second Circuit, the Third Circuit acknowledged the exception stated in *Hudson* limiting a prisoner’s rights to those “not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration[.]” *Hudson*, 468 U.S. at 523; *Delie*, 257 F.3d at 317. In other words, “an inmate’s constitutional right may be curtailed by a policy or regulation that is shown to be ‘reasonably related to legitimate penological interests.’” *Delie*, 257 F.3d at 317. But “a prisoner’s right to privacy in this medical information is not fundamentally inconsistent with incarceration.” *Ibid.* Thus, while a prisoner may not have “a right to conceal this diagnosed medical condition from *everyone* in the corrections system,” unnecessary disclosure to *some* may be violative. *Ibid.* (emphasis added).

The facts in *Delie* are strikingly like petitioner's experience. In *Delie*, a prisoner with HIV alleged that the door to the clinic room was left open, allowing other incarcerated people to see and hear the content of his doctor appointments, and that nurses announced his HIV medication loudly enough for other incarcerated people to hear. *Id.* at 311–12. While the Third Circuit ultimately ruled against the prisoner on qualified immunity grounds, the court left open the possibility that the prisoner's privacy right would have been found to be violated if the government could not show some legitimate penological interest. *Id.* at 317–22 (finding no clearly established right because, by 1995, “no court of appeals had held that prisoners retained a constitutional right to the privacy of their medical information”).

The Sixth Circuit joined the Second and Third Circuits “in finding that, as a matter of law, inmates have a Fourteenth Amendment privacy interest in guarding against disclosure of sensitive medical information from other inmates subject to legitimate penological interests.” *Moore v. Prevo*, 379 F. App'x 425, 428 (6th Cir. 2010). In *Moore*, the plaintiff alleged that corrections officers and a nurse violated his constitutional right to privacy when they informed another prisoner that the plaintiff was living with HIV. *Id.* at 425–26. In response to a dissent, the majority observed that “[w]e are aware of no other circuit to have categorically barred a prisoner from bringing a claim against prison officials over the unnecessary dissemination of his sensitive medical information to other inmates.” *Id.* at 427 n.4. The Sixth Circuit thus declined to “create a circuit split.” *Ibid.*

**B. The Fourth Circuit Erroneously Relied on *Hudson* And Erred By Applying Search-And-Seizure Privacy Rights Afforded By The Fourth Amendment Instead Of The Confidentiality Rights Afforded By The Fourteenth Amendment.**

The Fourth Circuit created a circuit split by holding that petitioner “lacked a reasonable expectation of privacy in his HIV status and his compliance with his treatment plan”—and thus lacked a right to privacy in his HIV diagnosis and treatment—while in prison. *Payne v. Taslimi*, 998 F.3d 648, 658 (4th Cir. 2021). This Court should resolve the circuit split and confirm prisoners’ Fourteenth Amendment right to privacy as to HIV status.

The Fourth Circuit has acknowledged the Fourteenth Amendment right “in avoiding disclosure of personal matters.” *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990). Outside of the context of prisons, this right presumably extends to privacy in one’s medical information—such as HIV status. *See id.* (“The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny.”) But in this case, the court decided that any such right is extinguished once a prisoner enters the prison gates. *See Payne*, 998 F.3d at 655–57.

Unlike other circuits, the Fourth Circuit invoked a “reasonable expectation of privacy” test and thus considers the right to medical privacy under an analysis used to consider claims for Fourth (as opposed to Fourteenth) Amendment violations. *Id.* at 655–58. Applying this test, the court broadly concluded that prisoners lack a reasonable expectation of privacy as

to HIV status “for all purposes.” *Id.* at 659.

In denying petitioner a right to privacy in his HIV status, the court compared disclosing petitioner’s medical information to the physical search of a prisoner’s cell in *Hudson*, and subjected petitioner’s claims to the same “reasonable expectation of privacy” analysis used in Fourth Amendment challenges to searches and seizures. *Id.* at 657–58. The court thus considered “(1) whether a reasonable expectation of privacy in the information exists as to entitle it to privacy protection and, if so, (2) whether a compelling governmental interest in disclosure outweighs the individual’s privacy interest.” *Id.* at 657 (quoting *Walls*, 895 F.2d at 192) (cleaned up).

By invoking this Fourth Amendment analysis, the Fourth Circuit significantly diverged from other circuits. As discussed, the Second and Third Circuits expressly declined to view the right to privacy as to an prisoner’s HIV status through a Fourth Amendment lens, finding that the “asserted right to privacy in [a prisoner’s] medical information is completely different than the right extinguished in *Hudson*.” *Delie*, 257 F.3d at 316 (citations omitted); *see also Powell*, 175 F.3d at 112 n.3 (“The right to maintain the confidentiality of medical information is sufficiently distinct from the right to privacy protected by the Fourth Amendment such that the Supreme Court’s holding in *Hudson v. Palmer* has no bearing on this case.”).

Likewise, the Fifth and Seventh Circuits have viewed *Hudson* as limited to the specific context of searching prison cells for contraband—refusing to extend *Hudson* to other privacy interests. *Henry v. Hulett*, 969 F.3d 769, 777 (7th Cir. 2020) (en banc) (“the Supreme Court has never extended the scope of



*Hudson* to exclude any aspect of a prisoner's life beyond her cell from the reaches of the Fourth Amendment"); *Elliott v. Lynn*, 38 F.3d 188, 191 n.3 (5th Cir. 1994) ("*Hudson* held only that prisoners have no justified expectation of privacy in their prison cells").

The Fourth Circuit stands alone in extending *Hudson's* Fourth Amendment analysis to the context of medical-information privacy, and its position conflicts with holdings by the Second, Third, Fifth, and Seventh circuits. This circuit split has not been lost on the court, which acknowledged "the merits" of the "position" taken by other circuits, but held "we are constrained to apply our holding in *Walls* to the contrary." *Payne*, 998 F.3d at 660 n.10 (citing *Walls*, 895 F.2d at 188).

This Court, of course, is not so constrained. Indeed, the Court's own precedent upholding privacy rights is consistent with confirming a prisoner's right to privacy as to HIV status. See *Whalen*, 429 U.S. at 600–02 (upholding a government program to gather prescription medicine information against a privacy challenge because it provided meaningful safeguards against public disclosure of the private medical information); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457–59 (1977) (upholding the government sorting of millions of pages of presidential documents against a privacy challenge in part because the government would protect against "undue dissemination of private materials"); See *Nasa v. Nelson*, 562 U.S. 134, 155–56 (2011) (upholding a questionnaire for NASA workers that was "subject to substantial protections against disclosure to the public").

Given the caution with which this Court approaches pronouncements regarding constitutional

right of informational privacy, it bears noting that the Sixth Circuit's decision in *Moore* comports with that circuit's demanding standard for privacy protection, limited to private information that "relates to one of those personal rights that can be deemed fundamental or implicit in the concept of ordered liberty." 379 F. App'x at 429 (quotation marks omitted). It has been held specifically that this standard is met "where the release of personal information could lead to bodily harm[.]" *Lambert v. Hartman*, 517 F.3d 433, 440 (6th Cir. 2008) (citing *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998)). An almost ubiquitous concern in the case law regarding a prisoner's HIV status, along with transmission risk, is the risk of violence or other harm to incarcerated people living with HIV at the hands of other incarcerated people learning that fact.

Since the Court has thus far declined to weigh in on the constitutional right of privacy, the circuit courts have taken up the mantle. *See Nelson*, 562 U.S. at 138 ("We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*[.]"). Through that process, there has emerged a rationale for holding in favor of petitioner's privacy right in a minimalist manner. This Court should, at a minimum, agree with the Sixth Circuit and hold that a privacy right exists when it "relates to one of those personal rights that can be deemed fundamental or implicit in the concept of ordered liberty." *See Moore*, 379 F. App'x at 429 (quotation marks omitted). The "at a minimum" qualification would make clear that the Court is not foreclosing the possibility of privacy claims under less onerous standards and thus does not pretermitt percolation of more complex questions. Even such a

minimalist ruling could do much to rein in extreme decisions like the Fourth Circuit's here.

## **II. Review Is Particularly Warranted To Prevent Unconstitutional Disclosure Of A Prisoner's HIV Status, Causing Unnecessary Harassment And Harm.**

The stigma attached to one's HIV-positive status—and the prejudice that those infected face—is deep-rooted and well-known in the United States. Since the onset of the HIV epidemic in the 1980s, individuals with HIV have been subjected to pervasive discrimination. Hannah R. Fishman, *HIV Confidentiality and Stigma: A Way Forward*, 16 U. PA. J. CONST. L. 199, 201 (2013).

In addition to the physical elements of their medical condition, those living with HIV often “have been forced to keep their illness secret to avoid losing jobs and being socially alienated.” *Ibid.* The stigma surrounding HIV “has been labeled as the most important social and psychological issue of the HIV experience” and can have dire consequences on an HIV-positive person's mental and physical health. Lance S. Rintamaki et al., *Social Stigma Concerns and HIV Medication Adherence*, 20 AIDS PATIENT CARE & STDs 359, 360 (2006); *see also* Susan Reif et al., *Perceptions and Impact of HIV Stigma Among High Risk Populations in the US Deep South*, 4 J. HIV & AIDS 1, 1–3 (2018). Indeed, “[k]nowing that bias and stigmatization are often consequences of infection, people with high concerns for stigma may be less likely to disclose their HIV status to others either out of shame or fear of persecution.” Rintamaki et al., *supra*, at 360.

This desire to conceal one's HIV status often

extends to concealment from medical professionals and results in “less use of health and social services, anxiety, negative body-image, and poorer medication adherence among individuals living with HIV and with avoiding or delaying HIV testing among those at high risk for HIV.” *Ibid.*; Reif et al. *supra*, at 1–3. As a 2006 study among HIV patients revealed, a strong link exists between a patient’s concern for the social stigma surrounding HIV and the patient’s adherence to his HIV medication regimen. See Rintamaki et al., *supra*, at 364–66.

Situations such as a doctor’s visit, which risks revealing a person’s HIV status, “create dilemmas for people living with HIV in which they must weigh the costs of taking their medications against others learning about their diagnosis.” *Id.* at 361. Often, a patient with HIV will forgo treatment in favor of nondisclosure. *Ibid.* Due to these concerns, “many experts believe that ensuring patients’ confidentiality in their HIV-related information will encourage testing and reduce the spread of HIV.” Fishman, *supra*, at 201.

Indeed, various circuits and district courts across the country have recognized a privacy interest in one’s HIV-positive status given the stigma and risks associated with public disclosure. See, e.g., *Delie*, 257 F.3d at 315 (“[T]he privacy interest in information regarding one’s HIV status is particularly strong because of the stigma, potential for harassment, and ‘risk of much harm from non-consensual dissemination of the information.’”) (quoting *Doe v. Se. Pa. Transp. Auth.*, 72 F.3d 1133, 1140 (3d Cir. 1995); *Powell*, 175 F.3d at 111 (“HIV . . . is the unusual condition that is likely to provoke both an intense desire to preserve one’s medical confidentiality, as well as hostility and

intolerance from others.”); *Doe v. City of N.Y.*, 15 F.3d 264, 267 (2d Cir. 1994) (“An individual revealing that she is HIV seropositive potentially exposes herself not to understanding or compassion but to discrimination and intolerance, further necessitating the extension of the right to confidentiality over such information.”); *Doe v. City and Cnty. of S.F.*, 2017 WL 1508982, at \*2 (N.D. Cal. Apr. 27, 2017) (permitting the plaintiff to proceed anonymously “to protect Plaintiff from injury or personal embarrassment, based on Plaintiff’s HIV-positive status”); *Doe v. Lincoln Nat’l Life Ins. Co.*, 2017 U.S. Dist. LEXIS 117110, at \*2 (N.D. Cal. July 26, 2017) (“Although public discourse, understanding, and acceptance of such issues has improved in recent years, the Court recognizes that society continues to place at least some stigma on those diagnosed with HIV, and fear of negative treatment due to HIV remains reasonable and understandable.”); *Doe v. Metro. Life Ins. Co.*, 2016 U.S. LEXIS 64387, at \*2 (N.D. Cal. May 13, 2016) (finding the plaintiff’s HIV-positive status to be “of a sufficiently sensitive and personal nature such that the use of a pseudonym is appropriate ‘to protect a person from harassment, injury, ridicule or personal embarrassment.’” (citation omitted)); *Roe v. City of N.Y.*, 151 F. Supp. 2d 495, 510 (S.D.N.Y. 2001) (finding that “HIV-positive plaintiffs are in a highly sensitive position and therefore should be allowed to proceed anonymously.”); *Roe v. City of Milwaukee*, 37 F. Supp. 2d 1127, 1129 (E.D. Wisc. 1999) (“I believe that in modern society one’s HIV-positive status, unlike most other medical conditions, is still considered a stigma. The plaintiff’s HIV-positive status cannot be viewed as a ‘common disorder,’ such that disclosure can be viewed as inconsequential.”); *Patient v. Corbin*, 37 F. Supp. 2d 433, 433 (E.D. Va. 1998) (“Being HIV positive carries

a significant stigma in many parts of today's society."); *W.G.A. v. Priority Pharm., Inc.*, 184 F.R.D. 616, 617 (E.D. Mo. 1999) ("It is understandable that plaintiff does not wish to be publicly identified as a[n] individual with AIDS, which is a personal matter of the utmost intimacy. Persons with AIDS may be subjected to discrimination in the workplace, schools, social settings and public accommodations.").

This stigma persists in prison settings, where the risks of violence and isolation against those living with HIV are especially high. "Inside of prisons, people living with HIV/AIDS are often the most vulnerable and stigmatized segment of the prison population. Fear of HIV/AIDS often places HIV-positive prisoners at increased risk of social isolation, violence, and human rights abuses from both prisoners and prison staff." UNITED NATIONS OFFICE ON DRUGS AND CRIME, HIV/AIDS PREVENTION, CARE, TREATMENT, AND SUPPORT IN PRISON SETTINGS 12 (Oct. 2006) [hereinafter UNODC].

Various circuits have recognized these prison-specific risks as well. *See, e.g., Powell*, 175 F.3d at 115 ("[D]isclosure [of an inmates HIV-positive status] . . . could constitute deliberate indifference to a substantial risk that such inmate would suffer serious harm at the hands of other inmates."); *Anderson v. Romero*, 72 F.3d 518, 523 (7th Cir. 1995) (assuming disclosure of a prisoner's HIV-positive status would make him "a likely target of violence by other inmates"); *Harris v. Thigpen*, 941 F.2d 1495, 1520 n.36 (11th Cir. 1991) ("The close quarters and heightened occurrences of high-risk activity in prisons undoubtedly accentuate 'AIDS phobia' for those who must continually deal with the presence of HIV in the correctional context; 'when patients with AIDS or HIV

are discovered in the prison system, there is a crescendo of concern leading to panic on the part of prisoners, correctional staff, as well as the medical staff.”) (citation omitted and alterations incorporated).

The prejudice that individuals with HIV face is due, in large part, to a lack of understanding and myriad misinformation concerning the disease. UNODC, *supra*, at 12; GLAAD, 2021 STATE OF HIV STIGMA 4 (2021). Indeed, as the Eleventh Circuit has explained, “widespread” “[i]gnorance and prejudice concerning the disease” greatly exacerbates the risks of disclosing a positive HIV diagnosis. *Thigpen*, 941 F.2d at 1514. Chief among misunderstandings are those concerning the transmissibility of HIV. UNODC, *supra*, at 12; GLAAD, *supra*, at 4. Through modern advancements, HIV medicine can now suppress the virus to an undetectable level, preventing infected individuals from transmitting the virus to others. CENTERS FOR DISEASE CONTROL AND PREVENTION, EVIDENCE OF HIV TREATMENT AND VIRAL SUPPRESSION IN PREVENTING THE SEXUAL TRANSMISSION OF HIV 1 (Dec. 2020). Nonetheless, most of the United States population does not believe that medication can prevent transmission. GLAAD, *supra*, at 5. Even further, a common—yet mistaken—belief is that HIV may be transmitted through casual contact. UNODC, *supra*, at 12.

The Fourth Circuit’s opinion dangerously reflects that mistaken belief. In finding that “Payne lacked a reasonable expectation of privacy in his HIV status,” the Fourth Circuit noted that “[t]he limits on an inmate’s expectations of privacy are particularly strong where the information he seeks to protect relates to the institutional safety of the prison.”

*Payne*, 998 F.3d at 658–59. Indeed, while recognizing “HIV and its spread can be controlled by medicine,” the court—in the same breath—compared HIV to the COVID-19 virus, suggesting that HIV “can spread rapidly” within a prison. *Id.* at 659. Thus, the court found it “hard to see how Payne would have a reasonable expectation of privacy in his communicable-disease status within a medical unit.” *Ibid.*

Resting on beliefs unsupported by modern scientific understanding of the transmissibility of HIV, the Fourth Circuit’s decision serves only to perpetuate the harmful misconceptions surrounding HIV and the pervasive stigma that accompanies a positive diagnosis. This decision not only strips prisoners of their privacy rights based on misinformation, but opens the door for the widely known and significant risks that will accompany the disclosures that the decision permits.

### **III. There Is No Adverse Effect To Penological Interests In Requiring Modest Measures To Maintain Privacy As To HIV Status.**

By refusing to recognize any privacy right in HIV status, the decision below preempted any consideration of legitimate penological interests. Under the Fourth Circuit’s view, no protection exists for an incarcerated person’s HIV status, no matter why a prison guard or doctor may choose to disclose it, or to whom. This is contrary to what the constitution demands.

The facts of this case are straightforward. Dr. Taslimi said loudly to petitioner: “You did not take your HIV meds today.” App. 28. Dr. Taslimi did not have to specify what *type* of medication petitioner



needed to take to convey the necessary information to petitioner. Requiring prison officials, whether guards or doctors, to refrain from disclosing a prisoner's HIV status to other incarcerated people or civilians would not adversely affect penological interests because non-disclosure would keep the person living with HIV safer and the Fourth Circuit's understanding of communicability is not supported by science.

Though Respondents “ha[ve] the burden to prove that a compelling governmental interest in disclosure outweighs the individual's privacy interest,” the absence of any legitimate penological interest in this case is notable. *Walls*, 895 F.2d at 192. Further, the unnecessary disclosure of a prisoner's HIV status would not only fail to serve penological interests but would be contrary to them. As this Court has recognized, “central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves.” *Pell*, 417 U.S. at 823. And as discussed *supra*, disclosure of one's HIV status can lead to violence, isolation, mental and physical health issues, and nonadherence to medical regimens. These risks are directly at odds with the interests in a facility's security.

Current Bureau of Prisons (“BOP”) regulations and policy show that prisons already recognize the serious security concerns regarding disclosing a prisoner's HIV status. BOP regulations require that “[a]ny disclosure of test results or medical information is made in accordance with . . . The Privacy Act of 1974 . . . [and] The Correction Officers Health and Safety Act of 1998[.]” Confidentiality of Information, 28 C.F.R. § 549.14(a)–(b) (2021). And as the BOP has decided in implementing this regulation, “[a]ll parties, with whom confidential medical information regarding

another individual is communicated, will be advised not to share this information, by any means, with any other person. Medical information may be communicated among medical staff directly concerned with an inmate's case in the course of their professional duties." BUREAU OF PRISONS, INFECTIOUS DISEASE MANAGEMENT 15 (2014).

Further, Freedom of Information Act ("FOIA") responses from the BOP confirms there is no penological interest in disclosing a prisoner's HIV status:

"The Federal Bureau of Prisons has an obligation to maintain the safe, secure, and orderly operation of an institution, and an inmate's possession of any document discussing HIV status, regardless of whether it is positive or negative, could raise substantial security concerns. Therefore, we request as long as the subject inmate is in the custody of the Federal Bureau of Prisons that the subject not be provided with any document containing information regarding HIV status."<sup>3</sup>

In making this request, the BOP invokes certain exemptions to the information that the FOIA mandates agencies to make publicly available. *Ibid.*; see 5 U.S.C. § 552(a). Specifically, the BOP invokes exceptions that permit it to refused public disclosure of:

"[P]ersonnel and medical files and

---

<sup>3</sup> U.S. Department of Justice Federal Bureau of Prisons, Freedom of Information Act Response (Nov. 3, 2021).

similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” § 552(b)(6).

“[R]ecords or information compiled for law enforcement purposes” that “could reasonably be expected to constitute an unwarranted invasion of personal privacy[.]” § 552(b)(7)(C).

“[R]ecords or information compiled for law enforcement purposes” that “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law[.]” § 552(b)(7)(E).

“[R]ecords or information compiled for law enforcement purposes” that “could reasonably be expected to endanger the life or physical safety of any individual[.]” § 552(b)(7)(F).

Neither of these current regulations allow the needless disclosure of a prisoner’s HIV status to other prisoners. Since *current* BOP regulations already recognize the importance of keeping a prisoner’s HIV status confidential, there can be no adverse effect to penological interests by requiring prison officials and doctors to do the same.

**CONCLUSION**

For these reasons, the Court should grant the petitioner's request for a writ of certiorari.

November 23, 2021

Respectfully submitted,

CHARLES B. KLEIN  
*Counsel of Record*  
**WINSTON & STRAWN LLP**  
1901 L STREET, N.W.  
WASHINGTON, DC 20006  
TELEPHONE: 202-282-5000  
FAX: 202-282-5100  
cklein@winston.com  
*COUNSEL FOR AMICUS CURIAE*