IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

OUTMEMPHIS; MICHELLE ANDERSON; JANE DOE 2; JANE DOE 3; and JANE DOE 4,	)	
Plaintiffs,	)	**Case No. 2:23-CV-2670**
v.	)	**Chief Judge Lipman**
BILL LEE, in his official capacity as Governor of Tennessee; JONATHAN SKRMETTI, in his official capacity as Attorney General and Reporter of Tennessee; DAVID RAUSCH, in his official capcity as Director of the Tennessee Bereau of Investigation; and FRANK STRADA, in his offical capacity as Commissioner of the Tennessee Department of Correction,	)	**Magistrate Judge Claxton**
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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INTRODUCTION

HIV is a deadly disease that "cannot currently be cured." (Dkt. 62 at 10, ¶ 32.) Left untreated, HIV causes AIDS, which causes death within one to three years on average. (*Id*. at 9, ¶ 29.) Particularly relevant, the Centers for Disease Control states that current "risk of HIV" is "high among persons who exchange sex for money or nonmonetary items."[1]

For over thirty years, Tennessee has guarded against that heightened risk by enhancing the criminal punishment for those who engage in prostitution while knowingly infected with HIV and by subjecting those offenders to the requirements of the Sexual Offender and Violent Sexual Offender Registration, Verification and Tracking Act (TN-SORA). (Dkt. 62 at 9–10, 18, ¶¶ 31, 78.)

Plaintiffs—four HIV-positive persons and an LGBTQ+ advocacy group—now bring this novel challenge to Tennessee's longstanding laws under the U.S. Constitution and the Americans with Disabilities Act of 1990 (ADA). (*See* Dkt. 62.) Plaintiffs do not dispute that sexual intercourse transmits HIV, nor that lawmakers enacted the challenged prohibition at a time when HIV was "invariably fatal." (*Id*. at 9–10, ¶¶ 31, 33.) Instead, the Amended Complaint, like the original, insists that Tennessee's approach to stemming the spread of HIV no longer reflects "best practices" in light of "[c]ontemporary [s]cience," (*see id.* at 8–18, 45, ¶¶ 24–63, 185), and recent medical advances. Citing these putative changes in HIV science, the Amended Complaint contends that Tennessee's laws irrationally and unlawfully discriminate against HIV-positive persons.

[1] CDC, *HIV Risk Among Persons Who Exchange Sex for Money or Nonmonetary Items*, http://tinyurl.com/yh7mfwkm (last visited Jan. 10, 2024); *see also Bradley v. Jefferson Cnty. Pub. Sch.*, 598 F. Supp. 3d 552 (W.D. Ky. 2022) (allowing "judicial notice of information posted on official public websites of government agencies").

The Amended Complaint still fails to cure the shortcomings of the original and should be dismissed in its entirety. At the outset, standing and sovereign immunity bar many claims and require wholesale dismissal of Governor Lee, Attorney General Skrmetti, and Commissioner Strada as defendants. And on the merits, Plaintiffs fail to state a claim under the ADA (Counts I, IV), and holding otherwise would raise significant doubts about the ADA's constitutionality. Plaintiffs' equal-protection and substantive-due-process claims (Counts II-III, V-VI) also fail because Plaintiffs have not identified any similarly situated individuals the laws favor, and lawmakers rationally enacted the challenged statutes to stem the spread of HIV. Plaintiffs' Eighth Amendment claim (Count VII) fails because the provisions of the TN-SORA enforced by Director Rausch—the only defendant with authority under that statute—are not punitive. Plaintiffs' Ex Post Facto claim (Count VIII) fails for that same reason, and for the additional reason that those provisions are not retroactive to Plaintiffs. And Plaintiffs' claims under the Rehabilitation Act (Counts IX, X)—the statutory precursor to the ADA—also fail to state a claim. Thus, the Amended Complaint presents no actionable legal claims and should be dismissed in its entirety.

BACKGROUND

I. Tennessee's Longstanding Law Against Engaging in Prostitution While Knowingly HIV-Positive

Tennessee's aggravated prostitution statute dates back to 1991. 1991 Tenn. Pub. Acts, c. 281, § 2. At that time, HIV was "invariably fatal," (Dkt. 62 at 10, ¶ 31–32), with the HIV/AIDS epidemic ranking as the *ninth* leading cause of death in the United States.[2] In 1991, as now, sexual contact was among the most common ways HIV is transmitted.[3] Thus, it is unsurprising that the

[2] *See* CDC, *Update: Mortality Attribute to HIV Infection Among Persons Aged 25-44 Years—United States, 1991 and 1992* (Nov. 19, 1993), http://tinyurl.com/3mjktwmf (last visited February 8, 2024).

[3] CDC, *Ways HIV Can Be Transmitted*, http://tinyurl.com/2wmsxvym (last visited February 8, 2024).

risk of HIV is "high" among sex workers.[4] Against this backdrop and higher-than-ever HIV death rates, Tennessee lawmakers took up the question of how to combat "the growing problem of HIV" in the State's communities. (Dkt. 62 at 21, ¶ 77.)

Like other States, Tennessee opted for an approach that elevated the penalties for engaging in prostitution while knowingly infected with HIV. *See* Tenn. Code Ann. § 39-13-516; *see also, e.g.*, Ky. Rev. Stat. § 529.090(2). Prostitution generally is a Class B misdemeanor in Tennessee. Tenn. Code Ann. § 39-13-513(b)(1); *see id.* § 40-35-111(e)(2) ("The authorized terms of imprisonment and fines" for a Class B misdemeanor are "not greater than six (6) months or a fine not to exceed five hundred dollars ($500), or both, unless otherwise provided by statute. . . ."). Aggravated prostitution, however, is a Class C felony. *Id.* § 39-13-516. Thus, any person who commits prostitution "knowing" that they are "infected with HIV" faces a term of imprisonment "not less than" three years and a fine of up to $10,000. *Id.*; *id.* § 40-35-111(3). Persons convicted of aggravated prostitution must also register under, and comply with, the TN-SORA. *See id.* § 40-39-202(20)(A)(iii), (31)(X).

Fortunately—as the Amended Complaint details—HIV treatment has advanced in the thirty years since the enactment of the aggravated prostitution statute. (*See generally* Dkt. 62 at 8–18, 44–57, ¶¶ 24–63, 179–236.) Yet as Plaintiffs also acknowledge, HIV remains a deadly disease that "cannot currently be cured." (*Id.* at 10, ¶ 32.) Left untreated, HIV causes AIDS, which causes death within one to three years on average. (*Id.* at 9, ¶ 29.) And the risk of HIV infection remains high among sex workers.[5]

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[4] CDC, *HIV Risk Among Persons Who Exchange Sex for Money or Nonmonetary Items*, http://tinyurl.com/yh7mfwkm (last visited February 8, 2024).

[5] *See id.*

Recognizing those public-health risks, Tennessee included aggravated prostitution as a registerable offense when adopting its sex offender registry in 1995. (*Id.* at 21, ¶ 78.) Individuals convicted of aggravated prostitution therefore must register with their incarcerating facility within 48 hours prior to their release, and they are required to update their information with their registering agency regularly. *See, e.g.*, Tenn. Code Ann. § 40-39-203(a)(1), (b), (i). The TBI maintains a database of registered sex offenders in Tennessee and publishes that database to the public. *See id.* §§ 40-39-204(a), -206(a). The TN-SORA also creates restrictions on registered offenders, including limits on where they may live and work. *Id*. § 40-39-211. Local district attorneys general have exclusive power to prosecute criminal violations of those restrictions. *See id.* § 8-7-103(1).

II. Plaintiffs' Unprecedented Constitutional, ADA, and Rehabilitation Act Challenges

Plaintiffs are four HIV-positive individuals (together, "Individual Plaintiffs") and OUTMemphis, an advocacy group that describes its mission as supporting LGBTQ+ individuals in the Memphis area against Tennessee's so-called "hate agenda."[6] The Individual Plaintiffs were convicted of aggravated prostitution and are therefore subject to the TN-SORA's registry-related obligations. (*Id*. at 5, ¶ 17.) Three of the Individual Plaintiffs reside in the community; the final one, Jane Doe 4, is currently incarcerated for a registry violation. (*Id*. at 64-76, ¶ 263–317.)

The Amended Complaint mirrors the original in its challenges Tennessee's aggravated prostitution statute as well as the associated obligations and prohibitions imposed on offenders by the TN-SORA. The Amended Complaint adds claims under the Rehabilitation Act. Together, the Individual Plaintiffs and OUTMemphis assert ten claims, broken down as follows:

[6] OUTMemphis, *Tennessee Boasts One of the Broadest Scopes of New Anti-LGBTQ+ Laws*, http://tinyurl.com/mrynb6f (last visited Jan. 10, 2024).

OUTMemphis's Aggravated Prostitution Claims (Counts I-III, IX). OUTMemphis presses three claims (Counts I-III, IX) exclusively against Governor Lee and Attorney General Skrmetti. Each claim facially challenges the aggravated prostitution statute, asserting that the statute discriminates against people "living with HIV" in violation of the ADA (Count I), the Equal Protection Clause (Count II), substantive due process (Count III), and the Rehabilitation Act (Count IX). (*Id*. at 85–89, ¶¶ 368–385, 422, 428.)

All Plaintiffs' Registry Claims (Counts IV-VII, X). All Plaintiffs bring six claims challenging the registry-related obligations under the TN-SORA for those convicted of aggravated prostitution. Five claims—numbered Counts IV through VII and X—are each brought by all Plaintiffs against all Defendants. These claims allege that the TN-SORA's reporting requirements and "exclusion zones" violate the ADA (Count IV), the Equal Protection Clause (Count V), substantive due process (Count VI), the Eighth Amendment (Count VII), and the Rehabilitation Act (Count X). (*Id*. at 89–94, ¶¶ 386–414, 429, 436.)

Individual Plaintiffs' Registry Claim (Count VIII). The sole remaining claim is brought by the Individual Plaintiffs against all Defendants. It alleges that the TN-SORA retroactively increased the Individual Plaintiffs' punishment for their aggravated prostitution convictions in violation of the Ex Post Facto Clause. (*Id*. at 94–95, ¶¶ 415–421.)

The cross-cutting theory of the Amended Complaint tracks that of the original: that the challenged statutes unlawfully "single[] out people with HIV" for worse punishment vis-à-vis other HIV-negative offenders. (*E.g.*, *id*. at 87, ¶ 376.) That is so, the Amended Complaint principally contends, because the rationale for Tennessee's aggravated prostitution statute conflicts with "contemporary" understandings of "How HIV Operates," the "Risk of HIV Transmission" through various types of sex, empirical studies on public health, and the absence of comparable laws aimed at other "Infectious Diseases that Are Comparable to HIV." (*Id*. at 8–18, 44–57, 76–

85.) The Individual Plaintiffs allege that this disparate treatment has caused them "significant harm," (*see e.g.*, *id.* at 66, ¶ 271), while OUTMemphis alleges that the challenged laws have "frustrated" its mission to serve "constituents who are living with HIV," (*id*. at 5, ¶¶ 15–16).

The Amended Complaint presses claims against four official-capacity defendants. First, Plaintiffs sue Defendant Lee, alleging he generally maintains responsibility to enforce "applicable federal and state laws" and administer state departments. (*Id.* at 6, ¶ 18.) Second, Plaintiffs sue Defendant Skrmetti, alleging he has a duty to "defend the constitutionality and validity" of all statewide legislation. (*Id.*, ¶ 19.) Third, Plaintiffs sue Commissioner Strada, citing his authority under a separate, unchallenged statute—Tennessee's Serious and Violent Sex Offender Monitoring Pilot Project Act, Tenn. Code. Ann. § 40-39-301, et seq.—to establish a program to monitor certain sex offenders while they are on probation. (*Id.* at 7, ¶ 21.) The Amended Complaint otherwise alleges no connection between the challenged statutes and Defendants Lee, Skrmetti, or Strada. Fourth, Plaintiffs sue Defendant Rausch, who as TBI Director helps administer aspects of the TN-SORA. (*Id.* at 6–7, ¶ 20.)

LEGAL STANDARD

Under Federal Rules of Civil Procedure 12(b)(1) and (h)(3), a court "must dismiss" any claim over which it lacks subject matter jurisdiction. A court lacks jurisdiction if a plaintiff has no standing, or if a defendant is immune from suit. *Lyshe v. Levy*, 854 F.3d 855, 857 (6th Cir. 2017); *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1046 (6th Cir. 2015).

Courts assessing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) must "construe the Amended Complaint in the light most favorable to the plaintiff, accept [the plaintiff's] allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir.2007). "However, 'a legal conclusion couched as a factual allegation' need not be accepted as true on a motion to dismiss, nor are recitations of the

elements of a cause of action sufficient." *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) (quotation omitted). A complaint must plead claims that are facially plausible—*i.e.*, supported by "factual content that allows the court to draw the reasonable inference that the defendant is liable." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The mere "possibility that a defendant has acted unlawfully" is insufficient. *Id.*

ARGUMENT

Plaintiffs' Amended Complaint should be dismissed in its entirety because its claims are jurisdictionally barred under the doctrines of sovereign immunity or standing, or else fail on the merits. At a minimum, this Court cannot enjoin the challenged laws statewide.

I. Sovereign Immunity Requires Dismissing Several Claims and Defendants.

Sovereign immunity generally bars courts from hearing claims against the State without the State's consent. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). And a claim against "a state official in his or her official capacity" is generally treated as a claim against "the State itself." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). The Supreme Court, in *Ex parte Young*, 209 U.S. 123 (1908), created an "exception" to that rule, allowing suit to enjoin a state official "from enforcing state laws" in ways that run "contrary to federal law." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 39 (2021). But that exception to sovereign immunity is "narrow," *id.*, reaching only officials with "the right and power to enforce" the "act alleged to be unconstitutional," *Ex parte Young*, 209 U.S. at 157, 161. And there must be "a realistic possibility the official will take legal or administrative actions against the plaintiff's interests." *Russell*, 784 F.3d at 1048.

Many of Plaintiffs' claims fall outside of *Ex parte Young*'s narrow exception. None of the Defendants enforce Tennessee's aggravated prostitution statute, and Defendants Lee, Skrmetti, and Strada do not enforce the TN-SORA's registry-related obligations and prohibitions. Thus,

sovereign immunity bars all claims (Counts I-X) against Defendants Lee and Skrmetti, as well as all claims (Counts IV-VIII, X) against Defendant Strada. And *Ex parte Young* permits claims against Defendant Rausch only to the extent Plaintiffs allege harms flowing from his limited authority to maintain and publish Tennessee's sex offender registry. Sovereign immunity otherwise bars Plaintiffs' claims against Defendant Rausch in Counts IV-VIII and X "connect[ed] with" the TN-SORA's registry-related obligations that he does not "enforce[]." *See Ex parte Young*, 209 U.S. at 157.

A. Sovereign immunity bars all claims against Defendants Lee and Skrmetti.

Ex parte Young does not permit Plaintiffs' official-capacity claims against Defendants Lee and Skrmetti because neither has the requisite enforcement authority. *See Mich. Dep't of State Police*, 491 U.S. at 71. Under Tennessee law, the Governor and Attorney General generally do not play a role in criminal enforcement; the law reserves that authority to locally elected district attorneys general. *See Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1032 (6th Cir. 2022) (citing Tenn. Code Ann. § 8-7-103(1)). The Governor and "[t]he Attorney General never step[] in" to "initiate criminal prosecutions." *See id.* at 1032.

That general rule applies to the aggravated prostitution statute and violations of the TN-SORA. Defendants Lee and Skrmetti are not empowered to initiate or prosecute alleged violations of the aggravated prostitution statute. They lack authority to require sex offenders to register with local registering agencies. *See* Tenn. Code Ann. § 40-39-203. They do not require sex offenders to disclose any personal information, *see id.*, nor do they collect, compile, or publish that information, *see id.* §§ -203(m), 206(d), 214(a). And they do not keep sex offenders away from any schools, parks, or playgrounds, *see id.* § -211. Instead, all the criminal prohibitions Plaintiffs cite are enforced by local district attorneys via local prosecutions, *see* Tenn. Code Ann. § 40-39-208(a); *Nabors*, 35 F.4th at 1032, with limited TN-SORA administration otherwise falling to the

TBI. Because Defendants Lee and Skrmetti have no "right [or] power to enforce" the "act[s] alleged to be unconstitutional," sovereign immunity bars all claims against them. *Ex parte Young*, 209 U.S. at 157, 161; *Nabors*, 35 F.4th at 1032.

Plaintiffs cannot sidestep *Ex parte Young*'s limits by pointing to Defendant Lee's general duty to "take care that" Tennessee's "laws [are] faithfully executed." (*See* Dkt. 62 at 6, ¶ 18 (citing Tenn. Const. art. III, § 10).) Any "[g]eneral authority" Defendant Lee may have "to enforce the laws of the state is not sufficient to make" the Governor a "proper part[y] to [this] litigation." *Russell*, 784 F.3d at 1048 (citation omitted); *see also Nabors*, 35 F.4th at 1031; *R. K. by and through J. K. v. Lee*, 53 F.4th 995, 999 (6th Cir. 2022).[7] Nor is Defendant Skrmetti's duty to "defend the constitutionality and validity of all legislation of statewide applicability" sufficient to defeat sovereign immunity. (Dkt. 62 at 6, ¶ 19 (citing Tenn. Code Ann. § 8-6-109(b)(9).) A duty to *defend* Tennessee's laws in litigation is different than a grant of authority to *enforce* those laws against the public. "*Young*" thus "does not apply" to Defendant Lee or Skrmetti, as they have "neither enforced nor threatened to enforce the allegedly unconstitutional state statute[s]." *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1415 (6th Cir. 1996).

B. Sovereign immunity bars all claims against Defendant Strada.

In Counts IV-VIII and X, Plaintiffs raise statutory and constitutional challenges to offenders' obligations under the TN-SORA against Defendant Strada, among others. But as with

[7] The Sixth Circuit has sometimes allowed suits against governors. *See, e.g.*, *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 475 n.16 (6th Cir. 2008); *Lawson v. Shelby County*, 211 F.3d 331, 335 (6th Cir. 2000). These two cases permitted suits against the Governor concerning elections and the right to vote, matters over which the Governor had specific authority to control. But those cases did not—and cannot, consistent with earlier Sixth Circuit precedent—create the rule that generalized executive power is always enough to render the Governor a proper defendant under *Ex Parte Young*. *See Children's Healthcare*, 92 F.3d at 1416. Though such a "general" theory "would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law," the Supreme Court has rejected this approach as an affront to sovereign immunity. *Ex Parte Young*, 209 U.S. at 157 (citation omitted).

Defendants Lee and Skrmetti, the Amended Complaint fails to allege that Defendant Strada enforces the challenged TN-SORA requirements or prohibitions, because he does not. Sovereign immunity likewise bars Counts IV-VII against him. *Ex parte Young*, 209 U.S. at 157, 161; *Nabors*, 35 F.4th at 1032.

It makes no difference that Commissioner Strada administers Tennessee's program for monitoring certain violent sexual offenders who have been paroled or granted probation. (*See* Dkt. 62 at 6, ¶ 21(citing Tenn. Code. Ann. § 40-39-302(a)). For one thing, that program is authorized by an entirely separate, unchallenged statute. *See* Tenn. Code. Ann. § 40-39-301, et seq. Defendant Strada's power to "develop[] [and] implement guidelines for the continuous satellite-based monitoring of serious offenders and violent sexual offenders," Tenn. Code. Ann. § 40-39-302(b)(1), thus does not provide him enforcement authority over separate TN-SORA reporting requirements and restrictions. Moreover, the Amended Complaint nowhere alleges that any plaintiff is currently paroled or otherwise subject to the monitoring program that Defendant Strada administers. Sovereign immunity thus prohibits Plaintiffs' claims against Defendant Strada.

C. Sovereign immunity bars certain claims against Defendant Rausch.

Defendant Rausch's official actions also enjoy sovereign immunity, meaning they cannot be subject to suit unless covered by *Ex parte Young*'s exception. *See Mich. Dep't of State Police*, 491 U.S. at 71. Unlike the other named defendants, Defendant Rausch does administer limited parts of the TN-SORA. *See, e.g.*, Tenn. Code Ann. §§ 40-39-206(d), 214(a). Most relevant here, Defendant Rausch maintains the sex-offender registry database and makes it available to the public and law enforcement. *See id.* § 40-39-206(a), (b). Thus, while claims against those limited provisions would fail on the merits, *see infra* (V), *Ex parte Young* would permit them to advance.

But sovereign immunity bars Plaintiffs' remaining TN-SORA claims against Defendant Rausch. Again, to advance under *Ex parte Young*, such official-capacity claims "must be 'based

on a theory that the officer['s] . . . *statutory authority* . . . is unconstitutional'" and therefore cannot be employed consistent with federal law. *Children's Healthcare*, 92 F.3d at 1415 (emphasis added) (citation omitted). But Defendant Rausch has no statutory authority to enforce the TN-SORA's reporting requirements or "exclusion zones" at the core of Plaintiffs' registry claims. Again, local district attorneys enforce those obligations by prosecuting their violation as a separate criminal offense. *See* Tenn. Code Ann. § 40-39-208(a); *Nabors*, 35 F.4th at 1032. Thus, to the extent Plaintiffs' TN-SORA claims (Counts IV-VIII) rest on provisions that Defendant Rausch has no "right [or] power to enforce"—namely, "exclusion zones" and reporting requirements—those claims are barred by sovereign immunity. *See Ex parte Young*, 209 U.S. at 157.

II. The Doctrine of Standing Requires Dismissing Several Claims and Defendants.

Article III to the U.S. Constitution "limited the jurisdiction of federal courts to 'Cases' and 'Controversies'" brought by parties with standing. *Safety Specialty Ins. Co. v. Genesee Cnty. Bd. Of Comm'rs*, 53 F.4th 1014, 1020 (6th Cir. 2022) (citation omitted). To establish standing, the plaintiff must show "(1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, (3) that is likely to be redressed by the requested relief." *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 296 (2022). And standing is not "dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Rather, "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester, N.Y. v. Lareo Estates, Inc.*, 581 U.S. 433, 439 (2017) (citation omitted). As discussed below, several plaintiffs and claims fail to carry this standing burden.

A. OUTMemphis does not have standing.

OUTMemphis lacks standing to sue, whether on a theory of associational or third-party standing, or based on its own asserted injuries. OUTMemphis's lack of standing bars its ability to

bring any claim and requires outright dismissal of those claims for which it is the sole plaintiff (Counts I, II, III, and IX).

1. OUTMemphis lacks standing to bring any claim.

a. No associational standing

OUTMemphis only asserts claims on behalf of "its constituents who are living with HIV." (*See* Dkt. 62 at 5, ¶ 16.) Although the Supreme Court has recognized "associational standing" in certain cases, *see Ass'n of Am. Physicians & Surgeons v. FDA*, 13 F.4th 531, 542 (6th Cir. 2021), the doctrine imposes stringent requirements. An organization must show that (1) "its members would otherwise have standing to sue in their own right"; (2) the "interests" that the suit "seeks to protect are germane to the organization's purpose"; and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

OUTMemphis's associational-standing argument fails because it has not identified a single member with individual standing to sue. To satisfy this prong of the test, OUTMemphis must specifically "identify members who have [or will] suffer[] the requisite harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) (internal citations omitted). The mere "possib[ility] . . . that one individual will meet all of th[e] criteria," or a "likelihood" that harm will befall an "unknown member," does not suffice. *Id.* Yet here, the Amended Complaint eschews any mention of OUTMemphis's members, instead noting only that OUTMemphis has a "mission" to "serve[] lesbian, gay, bisexual, transgender, and queer (LGBTQ+) people in the Mid-South." (Dkt. 62 at 4–5, ¶¶ 14, 16.)[8] If anything, these allegations suggest that OUTMemphis lacks *any* members; at

[8] While the Amended Complaint contains information about the Individual Plaintiffs, it does not state or even suggest that they are "members" of OUTMemphis. (Dkt. 62 at 64–65, ¶¶ 263–317.) Rather, the Amended Complaint only alleges the Doe Plaintiffs are among the individuals in the community that OUTMemphis "serves." (*Id.* at 5, ¶ 15.)

a minimum, the Amended Complaint's failure to point to even "one specifically-identified member [who will] suffer[] an injury-in-fact," *Am. Chem. Council v. Dep't of Transp.*, 468 F.3d 810, 820 (D.C. Cir. 2006), means OUTMemphis has not plausibly pled associational standing.

Nor could OUTMemphis merely name an "at risk" member to support its standing. (*See* Dkt. 62 at 61, ¶ 249.) Any such member would have standing to bring "a pre-enforcement challenge" only if "the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citation omitted). In other words, OUTMemphis must allege that its member "intend[s] to engage" in aggravated prostitution or a TN-SORA violation "and there exists a credible threat of prosecution thereunder." *Id.* at 159. It has not.

OUTMemphis's allegations of "the stigma and harassment experienced by its constituents" do not excuse the Amended Complaint's deficiencies. (Dkt. 62 at 5, ¶ 16.) OUTMemphis has not alleged that these "constituents" are members as associational standing requires. Regardless, even accepting that individuals with HIV "may wish not to publicize their identities," OUTMemphis must still "bear[] [its] burden of establishing the Court's Article III power to adjudicate its case." *Do No Harm v. Pfizer Inc.*, No. 1:22-cv-07908, 2022 WL 17740157, at *9 (S.D.N.Y. Dec. 16, 2022), *appeal docketed*, No. 23-15 (2d Cir. Jan. 4, 2023). To the extent OUTMemphis had concerns about satisfying that burden while "keeping information confidential," it could have "request[ed] to proceed anonymously when warranted and the requisite showing is made." *Id.* OUTMemphis's stigma argument is no substitute for satisfying a jurisdictional requirement. *See Ass'n of Am. Physicians*, 13 F.4th at 542.

b. No third-party standing

Nor does OUTMemphis fit into the narrow class of plaintiffs that can obtain prudential standing to assert the rights of third parties. Generally, plaintiffs cannot establish standing based

on the legal rights or interest of others. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). There are "limited" exceptions to this rule, such as where a "close relationship" exists between the party asserting the right and the party possessing it or where a "hindrance" exists to the possessor's ability to protect the right. *Id*. at 129–30. But OUTMemphis's services to "constituents" do not resemble the close bond embodied by the lawyer-client or doctor-patient relationships recognized by the Supreme Court in *Kowalski*. (*See* Dkt. 62 at 6, ¶ 16.) Allegations that an organization has developed a "close relationship" based on its "missions and outreach efforts in various communities" is an "unavailing distinction" that does not confer prudential standing. *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 808 (E.D. Mich. 2020). OUTMemphis has not identified a reason why individuals could not pursue their own legal challenges either affirmatively or as a defense to a prosecution—and indeed, individual challenges to the TN-SORA are routine. *See e.g.*, *Does #1–9 v. Lee*, 574 F. Supp. 3d 558 (M.D. Tenn. 2021), *appeal docketed*, No. 23-5248 (6th Cir. Mar. 28, 2023).

c. No injury-in-fact

An organization may also claim standing when it has suffered its own palpable injury that is traceable to a defendant's challenged conduct and redressable by the requested relief. *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 555 (6th Cir. 2021). Notably, OUTMemphis—a corporate entity—does not allege an intent to commit aggravated prostitution or a violation of the TN-SORA, let alone that it fears "prospective prosecution" under those statutes. *See Block v. Canepa*, 74 F.4th 400, 409 (6th Cir. 2023) (detailing when "reasonable fear of prosecution" satisfies the injury-in-fact requirement) (citation omitted). Rather, OUTMemphis alleges that it has standing "in its own right" because advising its "constituents" on complying with the aggravated prostitution statute and the TN-SORA's registry-related obligations "frustrate[s]" its "mission" and "diverts resources." (Dkt. 62 at 5, 61, ¶¶ 15, 248–49.)

OUTMemphis's argument ignores this Circuit's standing precedents, which distinguish between not-yet-enacted and existing laws for purposes of assessing an entity's injury-in-fact. An organization facing proposed legislation might have standing to challenge that legislation, should its enactment require the organization's "plans to redirect" money and resources. *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016).

But existing laws are a different story. Specifically, an organizational plaintiff does not have standing "merely by virtue of its efforts and expense to advise others how to comport with the law, or by virtue of its efforts and expense to change the law." *Fair Elections Ohio v. Husted*, 770 F.3d 456, 460 (6th Cir. 2014). This rule denies standing based on OUTMemphis's asserted injuries, which rest on past expenses and efforts that it simply would like to *discontinue* by prevailing in a challenge to existing laws. *Cf. id.* (no standing where plaintiff "decides that the government is violating the law, and decides to stop it by suing").

2. OUTMemphis, at a minimum, lacks standing to bring Claims I, II, III, IV, and IX.

a. No standing for aggravated prostitution claims

The same lack of enforcement authority that renders *Ex parte Young* inapplicable to Defendants Lee and Skrmetti also means that OUTMemphis lacks standing to bring Counts I-III against those same officials. *See WCI, Inc. v. Ohio Dep't of Pub. Safety*, 18 F.4th 509, 514 (6th Cir. 2021) (equating the *Ex parte Young* inquiry with the requirements for Article III standing). Even had OUTMemphis properly alleged an Article III injury-in-fact based on harm to its resources and expenditures, such injuries are not fairly traceable to enforcement of the aggravated prostitution statute by either Defendant Lee or Defendant Skrmetti. And because neither defendant has authority to enforce the statute, an order enjoining them from doing so would not redress OUTMemphis's alleged injuries. *See Cruz*, 596 U.S. at 296. Local prosecutors would remain free to prosecute violations of the laws challenged in the Amended Complaint. Because

OUTMemphis's alleged injuries "result [from] the independent action of some third party not before the court," its aggravated prostitution claims are neither traceable to, nor redressable by an order against, Defendant Lee or Defendant Skrmetti. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

b. No standing for ADA or Rehabilitation Act claims

Separately, OUTMemphis lacks statutory standing to sue under the ADA or Rehabilitation Act (Counts I, IV, and IX). Title II of the ADA allows "any person alleging discrimination on the basis of disability in violation of section 12132" to bring an action. 42 U.S.C. § 12133. Title II does not expressly allow an organization to bring an action against a public entity on the theory that it has suffered an injury, and the Sixth Circuit has permitted organizations to bring claims under Title II of the ADA only where there was some discrimination *against the organization itself*. *MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 335 (6th Cir. 2002) (requiring an organization to allege that "it has been discriminated against on the basis of its association with a disabled person").

OUTMemphis does not allege that it has faced discrimination or been denied a benefit under the ADA or Rehabilitation Act because of its association with HIV-positive constituents. Rather, the organization claims that its HIV-positive constituents face discrimination under the aggravated prostitution statue, and the organization "diverts resources" to help them understand and comply with the law. (Dkt. 62 at 5, ¶ 15.) But the "diversion of resources and advocacy efforts" are insufficient to confer organizational standing for an ADA and Rehabilitation Act claims. *Velzen v. Grand Valley State Univ.*, 902 F. Supp. 2d 1038, 1044 (W.D. Mich. 2012); *see MX Grp.*, 293 F.3d at 326. OUTMemphis lacks standing to pursue ADA claims (Counts I, IV) for this additional reason. And OUTMemphis lacks standing to bring a Rehabilitation Act for the same reasons it lacks standing to bring an ADA claim. *See Andrews v. State of Ohio*, 104 F.3d

803, 807 (6th Cir.1997) (because "standards under both of the acts are largely the same, cases construing one statute are instructive in construing the other").

B. All claims against Defendants Lee, Skrmetti, and Strada fail for lack of standing.

The doctrine of standing independently requires dismissing Defendants Lee, Skrmetti, and Strada as defendants, because any alleged injury cannot be traced to, or redressed by, these parties.

Plaintiffs must "separately" demonstrate standing to sue each defendant on each claim for each form of relief. *Nabors*, 35 F.4th at 1031. Standing's "traceab[ility]" prong requires Plaintiffs to prove that their alleged injury "can be traced to [the] 'allegedly unlawful conduct of' the [defendants], not to the provision of law that is challenged." *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021) (internal citations omitted). And the "redressability" prong requires Plaintiffs to show "how the requested relief against" each defendant "could redress [its] alleged injuries-in-fact." *Nabors*, 35 F.4th at 1031.

In short, when it comes to challenging enforcement of a statute, standing requires a connection between that enforcement and the particular defendant who has been sued. Yet here, as mentioned, neither Defendant Lee, Defendant Skrmetti, nor Defendant Strada has any authority to enforce the challenged statutes. *See supra* p. (I)(A)-(B). Under Sixth Circuit precedent, Plaintiffs thus lack standing to sue—and the Court lacks jurisdiction to enjoin—Defendant Lee, Defendant Skrmetti, and Defendant Strada. *See Nabors*, 35 F.4th 1031–32; *R. K.*, 53 F.4th at 999–1000.

C. Certain claims against Defendant Rausch fail for lack of standing.

For similar reasons, Plaintiffs have only limited standing to bring their claims against Defendant Rausch. Because Article III's "traceab[ility]" prong requires Plaintiffs to prove that their alleged injury "can be traced to [the] 'allegedly unlawful conduct of'" each defendant, they have standing to bring Counts IV-VIII only to the extent that they allege harms from the aspects

of the TN-SORA that Defendant Rausch oversees. *See Collins*, 141 S. Ct. at 1779. And Defendant Rausch does not enforce the obligations that cause the harms at the core of Plaintiffs' challenges to the TN-SORA—like reporting requirements and "exclusion zones." *See supra* (I)(C). Thus, Plaintiffs lack standing to bring such claims against Defendant Rausch, and they have standing under Counts IV-VIII and X only stemming from his maintaining and publishing the TN-SORA registry, which Plaintiffs have not alleged here.

III. The Amended Complaint Fails to State Any Valid ADA or Rehabilitation Act Claims (Count I, IV, IX, and X).

Both the ADA and the Rehabilitation Act proscribe discrimination against individuals with disabilities. Title II of the ADA states that "no qualified individual with a disability shall, *by reason of such disability*, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (emphasis added). Similarly, under the Rehabilitation Act of 1973, "No otherwise qualified individual with a disability in the United States, . . . shall, *solely by reason of her or his disability*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (emphasis added). "It is well-established that the two statutes are quite similar in purpose and scope." *McPherson v. Mich. High Sch. Ath. Ass'n*, 119 F.3d 453 (6th Cir. 1997).

A. OUTMemphis does not have a cause of action under the ADA and Rehabilitation Act.

"To sue someone, you must have a cause of action. And you only have a cause of action under a federal statute if the statute's text provides you one." *Keen v. Helson*, 940 F.3d 799, 800 (6th Cir. 2019). Here, the text of the ADA and Rehabilitation Act do not provide OUTMemphis a cause of action because the Amended Complaint does not allege that the organization itself has suffered "exclusion, [a] denial of benefits, or discrimination." *McCullum v. Orlando Reg'l*

Healthcare Sys., Inc., 768 F.3d 1135, 1143 (11th Cir. 2014). Nor can OUTMemphis permissibly reroute an ADA claim under § 1983.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. And Congress granted "any person alleging discrimination on the basis of disability" a cause of action to enforce Title II's protections. 42 U.S.C. § 12132. "It is widely accepted" that Title II's enforcement provision grants organizations a private right of action "when *they are injured*" under the ADA—meaning, discriminated against—"because of their association with a disabled person." *McCullum*, 768 F.3d at 1142 (emphasis added). Courts have for instance permitted Title II suits by drug rehabilitation centers denied zoning permits because of their clientele. *MX Grp.*, 293 F.3d at 335.

By contrast, courts consistently dismiss claims brought by non-disabled individuals seeking relief "for injuries other than exclusion, denial of benefits, or discrimination that they themselves suffer." *McCullum*, 768 F.3d at 1143–44; *Popovich v. Cuyahoga Cnty. Court of Common Pleas, Domestic Rels. Div.*, 150 F. App'x 426–27 (6th Cir. Sept. 27, 2005). Here, the Amended Complaint does not allege that OUTMemphis has been excluded, denied benefits, or discriminated against. Instead, OUTMemphis alleges that it has taken steps to mitigate the effects of discrimination *its constituents* have suffered. The ADA does not confer OUTMemphis with a right to proceed in this context. *See McCullum*, 768 F.3d at 1143–44. As the Eleventh Circuit noted, to hold otherwise "would mean that Congress granted non-disabled persons more rights under the ADA . . . than it granted to disabled persons, who can recover only if they are personally excluded, denied benefits, or discriminated against on the basis of their disability"—a reading that "cannot be right." *Id.* Because OUTMemphis has no cause of action for ADA-based relief, Count

I should be dismissed outright. *See id.* at 1145 (affirming dismissal of ADA claim on similar grounds); *see also MX Grp.*, 293 F.3d at 225.

OUTMemphis cannot pursue its failed ADA and Rehabilitation Act claims under Section 1983. While that statute generally permits claims to enforce federal rights "elsewhere conferred," *Albright v. Oliver*, 510 U.S. 266, 271 (1994), Congress may carve off certain statutes from enforcement via § 1983 by "creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983," *Blessing v. Freestone*, 520 U.S. 329, 341 (1997); *accord Williams v. Pennsylvania Human Relations Comm'n*, 870 F.3d 294, 298–99 (3d Cir. 2017). And at least four circuits have held the comprehensive remedial scheme Congress established in Title II means "that a plaintiff cannot bring an action under [Section] 1983 against a State official in her individual capacity to vindicate rights created by Title II of the ADA." *Vinson v. Thomas*, 288 F.3d 1145, 1156 (9th Cir. 2002) (joining "the Fifth, Eighth, and Eleventh Circuits"). Indeed, while the Sixth Circuit has not "squarely decided" the issue, the Court recognized in *Bullington v. Bedford Cnty., Tn.*, 905 F.3d 467, 471 (6th Cir. 2018), that "[o]ther circuits . . . have held that the ADA does preclude § 1983 claims for violations of the statute."

Plaintiffs purport to bring both their ADA and Rehabilitation Act claims under Section 1983. (Dkt. 62, at 4, ¶ 11.) But as multiple courts in this circuit and others have concluded, Section 1983 is an inappropriate vehicle for either. *See Lollar v. Baker*, 196 F.3d 603, 610 (5th Cir. 1999) (concluding that Congress intended to foreclose resort to § 1983 due to the specific comprehensive internal enforcement mechanism contained within the Rehabilitation Act); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1011 (8th Cir. 1999) (en banc) (applying the same reasoning to Title II of the ADA); *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1531 (11th Cir. 1997) (holding a plaintiff could not "maintain a section 1983 action in lieu of – or in addition to – a Rehabilitation Act or ADA cause of action" against the state when the only alleged deprivation was of rights

created by those acts); *Cole v. Taber*, 587 F.Supp.2d 856, 863 (W.D. Tenn. 2008); *Burnette v. University of Akron*, No. 05:11-CV-02361, 2012 WL 3587568, at *5 (N.D. Ohio August 20, 2012); *Porter v. Ellis*, 117 F.Supp.2d 651, 652 (W.D.Mich.2000); *Westermeyer v. Ky. Dep't of Pub. Advocacy*, No. 2:10–131–DCR, 2011 WL 830342, at *7 n. 1 (E.D.Ky. Mar. 3, 2011); *see also Vinson v. Thomas*, 288 F.3d 1145, 1156 (9th Cir. 2002) (citing *Lollar*, *Alsbrook*, and *Holbrook* before joining in their conclusions). Because Plaintiff cannot sustain a claim under § 1983 for violations of the ADA and Rehabilitation Act, Counts I, IV, IX, and X could be dismissed for that reason alone.

Defendants Lee, Skrmetti, and Strada are particularly inappropriate defendants for § 1983 enforcement. "Because vicarious liability is inapplicable to Section 1983 suits," Plaintiffs "must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676. They must also show "a causal connection between the defendant's unconstitutional action and the plaintiff's injury." *Pineda v. Hamilton Cnty.*, 977 F.3d 483, 490 (6th Cir. 2020); *R. K.*, 53 F.4th at 1001 (6th Cir. 2022). Plaintiffs have not made—and cannot make—that necessary showing, because Defendants Lee, Skrmetti, Strada, and Rausch play no role in enforcing the aggravated prostitution statute.

B. The ADA claims fail on their own terms.

A claim under Title II requires proof that the plaintiff (1) had a disability, (2) was otherwise qualified to participate in the public program, service, or activity at issue, and (3) was excluded from participation in the public program or was discriminated against by the public entity—including a state or local government—because of his or her disability. *See Anderson v. City of Blue Ash*, 798 F.3d 338, 357 n.1 (6th Cir. 2015). Here, the Amended Complaint falls short of alleging a prima facie case under Title II.

1. OUTMemphis is not a "qualified individual with a disability."

A "qualified individual with a disability" covered by Title II's protections is "an individual with a disability who . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). That does not describe OUTMemphis. Aside from not being an "individual" and failing to allege a qualifying disability of its own, OUTMemphis cannot advance Counts I or IV because it has not alleged that it is otherwise eligible for any (unnamed) service or benefit it allegedly has been denied. *See Doe v. Univ. of Maryland Med. Sys. Corp.*, 50 F.3d 1261, 1265, 1267 (4th Cir. 1995) (holding that "a hospital does not violate . . . Title II of the ADA when it terminates an HIV-positive" worker because "he poses a significant risk to the health or safety of its patients that cannot be eliminated by reasonable accommodation and therefore is not an otherwise qualified individual with a disability.").

2. The Amended Complaint does not allege discrimination in the provision of public services, programs, or benefits.

Best read, Title II of the ADA serves to guarantee equal access to the programming, services, and benefits States provide—not to block the enforcement of criminal laws aimed at individuals' knowing conduct and nonpunitive portions of the SORA. All Plaintiffs' claims under Counts I and IV thus fall outside of Title II's scope.

The proper "starting point" is the text of Title II itself. *Thompson v. Greenwood*, 507 F.3d 416, 419 (6th Cir. 2007). That provision specifies that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Title II's text thus focuses on public entities' affirmatively providing equal access to public services, programs, and activities. *See Tennessee v. Lane*, 541 U.S. 509, 516–17 (2004) (ADA prohibits "discrimination against persons with disabilities in three

major areas of public life: employment, which is covered by Title I of the statute; *public services, programs, and activities, which are the subject of Title II*; and public accommodations, which are covered by Title III" (emphasis added)).

Title II's structure and history reinforce this reading. As mentioned, Title II covers only "qualified individual[s]." 42 U.S.C. § 12132. The definition of "qualified individual" in turn requires showing that a plaintiff meets "the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 225 (Thomson/West 2012) ("[I]nterpretation clauses are to be carefully followed."). The "title of" Plaintiffs' cited section—"Public Services," Pub. L. No. 101-336, § 1—is yet another "cue[] that Congress did not intend" Title II to "sweep within its reach" Plaintiffs' novel criminal-statute and SORA challenges. *Yates v. United States*, 574 U.S. 528, 540 (2015). Title II's history is likewise telling. "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state *services and programs*, including systemic deprivations of fundamental rights." *Lane*, 541 U.S. at 524 (emphasis added). Absent from this historical record is discrimination based on individuals' knowingly engaging in unlawful conduct that risks transmitting deadly diseases to others. *See infra* (III)(B)(3).

The Amended Complaint does not allege that any plaintiff has been denied *any* public service or benefit. Instead, they argue that Congress intended Title II to generally invalidate all State laws that draw any distinctions based on disability, including laws regulating the knowing exposure of deadly communicable diseases. (*See* Dkt. 62 at 86, 89 ¶¶ 371, 389.)

This position flouts the "limits to the obligations" Title II imposes on public entities. *Tucker v. Tennessee*, 539 F.3d 526, 530 (6th Cir. 2008), *abrogated on other grounds in Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 317 (6th Cir. 2012) (en banc). As the Sixth Circuit

has put it, the requirements of Title II are "subject to the bounds of reasonableness." *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998). Courts have accordingly held that certain criminal enforcement activities—like arrests—are not "service[s], program[s], or activit[ies]" covered by Title II because they are not "voluntarily provided by the police" and do not provide a benefit. *Tucker*, 539 U.S. at 534 (citing *Rosen v. Montgomery County, Maryland*, 121 F.3d 154 (4th Cir.1997)). Thus, general enforcement of a State's criminal code is not reasonably considered a covered "service, program, or activity." *See Johnson*, 151 F.3d at 569.

Title II's residual clause—prohibiting "discrimination by any [public] entity"—does not license striking down all state statutes that distinguish based on disability. *See Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1175 (9th Cir. 1999). "Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001) (quoting 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47.17 (1991)). This *ejusdem generis* principle requires reading Title II's residual phrase "to give independent effect" to the preceding terms. *Id*. at 114–15; *see CSX Transp., Inc. v. Alabama Dept. of Revenue*, 562 U.S. 277, 295 (2011) ("We typically use *ejusdem generis* to ensure that a general word will not render specific words meaningless."). Read in context, Title II's residual clause, "like the first, prohibits discrimination only in a public entity's 'outputs.'" *Zimmerman*, 170 F.3d at 1176. A contrary, broader reading would cause the residual clause to swallow the remainder of Title II—contrary to the general rule that "no clause, sentence, or word of a statute should be read as superfluous, void, or insignificant." *In re City of Detroit*, 841 F.3d 684, 696–97 (6th Cir. 2016) (internal quotation marks and citation omitted). It also would conflict with Title II's limited definition of "qualified individual with a disability" by offering a

remedy regardless of whether the disabled individual is otherwise eligible for some public program or service. *See* 42 U.S.C. 12131(2).

Plaintiffs' expansive reading of Title II's residual clause also cannot be squared with binding precedent interpreting Title I of the ADA, which prohibits employment discrimination. In *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), the Supreme Court held that Congress lacked authority to abrogate the States' sovereign immunity for failing to comply with Title I's provisions. *Id.* at 374. Yet under Plaintiffs reading, Title II's residual clause would permit suit for the same employment discrimination that Title I could not constitutionally reach.

This Court should reject reading Title II's residual clause to make a hash of myriad other ADA provisions. *See Menuskin v. Williams*, 145 F.3d 755, 768 (6th Cir. 1998) ("[Courts] must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.") (citation omitted). Instead, it should adopt the sounder reading that squares with the ADA's text, structure, history and precedent. Under that view, Title II's residual clause "prohibit[s] *intentional* discrimination" against disabled persons in the provision of public programs and benefits, whereas the first clause "prohibit[s] *disparate treatment* of the disabled"—regardless of whether such treatment reflects discriminatory intent. *Zimmerman,* 170 F.3d at 1176 (emphasis in original). That reading gives full independent effect to each term in Title II and makes sense of Title II's definitional sections. It also corresponds to the elements courts regularly use to analyze ADA claims. *See Thompson v. Williamson County, Tenn.*, 965 F. Supp. 1026, 1036 (M.D. Tenn. 1997) ("To show a violation of the ADA, Plaintiff[s] must show disability, denial of public benefit, and that such denial or discrimination was by reason of the disability."); *Kornblau v. Dade County*, 86 F.3d 193, 194 (11th Cir. 1996); *see Green v. Corrections Corp. of America*, 198 F.3d 245 (Table), 1999 WL 1045087, at *1 (6th Cir. 1999).

Ultimately, because Plaintiffs have not alleged that they have been denied public services or benefits that they otherwise would qualify for, they have failed to state a claim under Title II. 42 U.S.C. §§ 12131(2), 12132.

3. Applying Title II as Plaintiffs suggest would create serious constitutional problems.[9]

Federal courts are obliged to avoid constitutional questions if an alternative interpretation of the statute is possible. *See Bevan & Assocs., LPA, Inc. v. Yost*, 929 F.3d 366, 376–77 (6th Cir. 2019) (citing *Arizona v. Inter Tribal Council of Ariz., Inc*., 570 U.S. 1, 18 (2013)). For reasons just given, the best reading of Title II is that it does not cover Plaintiffs' claims. At a minimum, this reading is "reasonable," and thus "must be resorted to in order to save" Title II from the constitutional defects that would attend application to Plaintiffs' claims in this case. *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trustees*, 411 F.3d 777, 785–86 (6th Cir. 2005) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

Congress enacted the ADA pursuant to Section 5 of the Fourteenth Amendment and the Commerce Clause. 42 U.S.C.A. § 12101(b)(4). Applying Title II in the manner Plaintiffs seek would not be a valid exercise of either power.

Section 5 empowers "Congress . . . to enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment. U.S. Const. amend. XIV, § 5. This grant of authority, the Supreme Court has held, permits Congress to "enact so-called prophylactic legislation that proscribes

[9] There can be no doubt about Plaintiffs' desired application of Title II: their construction would subject *all* statutes to facial challenges under Title II. Plaintiffs have already argued that all statutes must, in their enacted language, "provide for such an individualized assessment" that complies with the federal regulations implementing Title II. (Dkt. 47, PageID#: 233.) Plaintiffs' absurd construction would require the "individualized assessment" to include "a reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk." 28 CFR § 35.139.

facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 727–28 (2003); *contra Lane*, 541 U.S. at 560 (Scalia, J., dissenting). But such prophylactic legislation may not work a "substantive redefinition of the Fourteenth Amendment right at issue." *Hibbs*, 538 U.S at 728 (quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000)).

Under *City of Boerne v. Flores*, 521 U.S. 507, 529–36 (1997), courts consider three factors to determine whether legislation is a valid exercise of Congress's Section 5 authority: (1) the nature of the constitutional right at issue; (2) the extent to which Congress passed the remedial statute in response to a documented history of relevant constitutional violations; and (3) whether the statute is "congruent and proportional" to the specific class of violations at issue, given the nature of the relevant constitutional right and the identified history of violations. *See also Lane*, 541 U.S. at 522, 529–30. Under that rubric, applying Title II as Plaintiffs suggest exceeds Congress's Section 5 authority.

Nature of Constitutional Right. To determine the appropriateness of applying the ADA to a State, it is necessary to identify "with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Here, Plaintiffs' core contention is that Title II enforces the Equal Protection Clause of the Fourteenth Amendment by prohibiting the State from "singl[ing] out people with HIV for different treatment." (*See* Dkt. 62 at 86, 88, ¶¶ 372, 379–80.) But as the Amended Complaint implicitly concedes, (*see e.g.*, *id.* at 87–88, ¶¶ 376–77, 382), legislative classifications based on disability status are subject to only rational-basis review. *Garrett*, 531 U.S. at 366. Ultimately, Plaintiffs must "negative any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 367. That is, the Amended Complaint must allege that the State is irrationally discriminating against persons who knowingly commit prostitution with HIV. And they cannot do so here. *See infra* (IV).

No Congressional Record of Discrimination. Having "determined the metes and bounds of the constitutional right in question," the next step is determining whether Title II was "responsive to, or designed to prevent unconstitutional behavior." *City of Boerne*, 521 U.S. at 532. Doing so requires examining the "legislative record of the ADA" to understand what specific evils Title II was meant to address. *Garrett*, 531 U.S. at 368. On this score, it is not enough for Congress to have generally considered and debated historical discrimination against the disabled. Rather, Congress's historical findings "[w]ith respect to the particular services at issue" must prove Title II was meant to remedy a pattern of the types of wrongs asserted by the plaintiff. *City of Boerne*, 521 U.S. at 527 (emphasis added).

Thus, here, the question is whether Congress identified a "history and pattern" of state criminal laws which irrationally discriminated against the disabled. *Garrett*, 531 U.S. at 368. The answer is a resounding "no." While Congress considered what the ADA meant for people with HIV, that review was limited to the employment context covered by Title I. *See, e.g.*, Senate Committee on Labor and Human Resources, Rep. 101-116 (Aug. 30, 1989), p. 37 (citing *School Board of Nassau Cnty. v. Arline*, 480 U.S. 273, 287 n.16 (1987)). The path Congress chose is telling: Title I prohibits employment discrimination against people with HIV, but Congress recognized that an employer may "deny employment to an applicant or . . . fire an employee" with HIV if the individual "poses a direct threat to the health or safety of others." *Id.* at 25. Thus, the only consideration Congress gave to States' treatment of individuals with HIV shows Congress intended to preserve States' ability to mitigate harm of transmission to others.

And Congress's silence about past irrationally discriminatory prosecutions is particularly notable because States were criminalizing the spread of communicable diseases—including HIV—well before Congress enacted the ADA. *See* Sun Lee, *Criminal Law and HIV Testing: Empirical Analysis of How At-Risk Individuals Respond to the Law*, 14 Yale J. Health Pol'y. L. &

Ethics 194, 202 (2014) (collecting state statutes criminalizing HIV-prostitution).[10] Yet the congressional record does not identify a history or pattern of the States enforcing these laws to irrationally discriminate against people with HIV or other communicable diseases.

Lack of Congruence and Proportionality. Even if Plaintiffs could proffer some scattered examples of prior unconstitutional discrimination by the States—something they have not and cannot do—"the rights and remedies created by the ADA against the States would raise . . . concerns as to congruence and proportionality" if applied in the manner sought by Plaintiffs. *Garrett*, 531 U.S. at 372. Whether Title II is an appropriate response to a purported class of constitutional violations depends on whether its remedy is well-tailored to the nature of the right and the history of violations. "Difficult and intractable problems often require powerful remedies," but "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Lane*, 541 U.S. at 523. Thus, while Congress has a wider berth to craft remedies vindicating fundamental rights that are subject to heightened scrutiny, *see id.* at 533–34, when non-fundamental rights are at stake, Congress must draft focused statutes grounded in a comprehensive legislative record. *See Garrett*, 531 U.S. at 369–70.

Here, no fundamental right is at stake because no Plaintiff has any right to engage in prostitution or to be free from the TN-SORA obligations resulting from their prior criminal conduct. Thus, it would be "out of proportion to a supposed remedial or preventive object" if Title II imposed liability against Tennessee for enforcing its aggravated prostitution statute and the TN-SORA. *City of Boerne*, 521 U.S. at 536. Indeed, those statutes advance Tennessee's fundamental interests in public health and safety. *See Kentucky v. Biden*, 23 F.4th 585, 609 (6th Cir. 2022) ("Since the Framing, the power to regulate the public health has been 'part and parcel' of states

[10] *See, e.g.*, W. Va. Code Ann. § 16-4-20 (1921); La. Rev. Stat. § 14:43.5 (1987); Ky. Rev. Stat. § 529.090.

'traditional police power.'"). And the Supreme Court has suggested that the congruence and proportionality of a remedial statute also depends, to a degree, on whether the statute "curtail[s] [States'] traditional regulatory power" or imposes heavy costs. *City of Boerne*, 521 U.S. at 536. Applying Title II to invalidate the statutes challenged here not only infringes on Tennessee's traditional authority over moral and public-health issues, *see Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 560 (1991), but it also imposes significant costs on the State's public health system by removing a tool for limiting the spread of HIV. That result would be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532. In such a case, Title II is not a valid exercise of Congress's Section 5 authority.

The Commerce Clause likewise offers no constitutional ground to extend Title II to Plaintiffs' claims. As a threshold matter, Congress cannot use Article I powers to abrogate States' sovereign immunity, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73 (1996), nor can Plaintiffs defend their proposed application of Title II as a valid exercise of the Commerce Clause power based on their seeking only injunctive and declaratory relief.

Plaintiffs allege they are "subjected to discrimination by a public entity" via the State's "maintenance, administration, and enforcement" of the aggravated prostitution statute and TN-SORA, and that these state actions are themselves regulated by Title II.[11] (Dkt. 62 at 86, 89 ¶¶ 371, 389.) Because the aggravated prostitution statute simply makes a felony out of engaging in prostitution while knowing one is infected with HIV, Plaintiffs tacitly argue that the

[11] Plaintiffs' allegations demand a reading of the final phrase of 42 U.S.C. § 12132 that treats the enactment of legislation as a commercial activity in and of itself, which only further demonstrates why Plaintiffs' nonsensical construction of Title II should be rejected on the grounds of constitutional avoidance.

criminalization of prostitution, or increasing punishments for certain types of prostitution, are activities that substantially affect interstate commerce.

But it strains credulity to suggest that a State's enforcement of its criminal statutes is an "economic endeavor." *United States v. Morrison*, 529 U.S. 598, 609 (2000) (rejecting generalized "costs of crime" and "national productivity" arguments as evidence of criminal law enforcement's substantial effect on interstate commerce); *see United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that federal law prohibiting possession of firearm in school zone did not "regulate a commercial activity"). The relevant question is not whether the regulated activity affects commerce; it is whether the regulated activity *is* commerce. *See Lopez*, 514 U.S. at 560–61. Enforcement of duly enacted legislation prohibiting conduct known to spread a deadly disease is a far cry from the type of commercial activity contemplated by *Lopez* and *Morrison*. Even in *Wickard v. Filburn*, 317 U.S. 111 (1942), which the Supreme Court has described as "perhaps the most far-reaching example of Commerce Clause," the statute at issue strictly pertained to commercial conduct. *Lopez*, 514 U.S. at 560.

Title II cannot be applied as proposed by Plaintiffs because to do so would push the Commerce Clause power of Congress beyond the outermost limits recognized by *Wickard*. Criminal prosecutions are not an economic activity. To impose Title II on state enforcement of its criminal laws under the precept of regulating commerce would blatantly usurp traditional police powers explicitly reserved to the States and upset fundamental principles of federalism.

Some federal courts have recognized that certain applications of Title II are not legitimate exercises of Commerce Clause power. *See McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 433 (5th Cir. 2004) (Garza, J., concurring in part and dissenting in part) ("Title II of the ADA is not permissible Commerce Clause legislation to the extent that it regulates states' decisions regarding who will participate in or receive the benefits of state entitlement programs."); *Klingler v. Director,*

Mo. Dept. of Revenue, 366 F.3d 614, 620 (8th Cir. 2004)[12]; *see also Castells v. Fisher*, No. 05 CV 4866 (SJ), 2007 WL 1100850, at *3 (E.D.N.Y. Mar. 24, 2007) ("What *Garrett* made quite clear…was that Congress could not assert its power under the Commerce Clause in order to remedy past discrimination.").

For these reasons, application of Title II to invalidate Tennessee's aggravated prostitution statute and the TN-SORA would exceed Congress's constitutional authority and should be avoided by adopting Defendants' reasonable interpretation instead. *See supra* (III)(B)(2).

C. The Rehabilitation Act claims fail on their own terms.

A claim under section 504 of the Rehabilitation Act requires proof that plaintiff: (1) is an individual with a disability; (2) is otherwise qualified for participation in a program or activity; (3) but is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program or activity solely by reason of their disability; and, (4) the relevant program or activity is receiving federal financial assistance. *Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1180 (6th Cir. 1993). Here, the Amended Complaint falls short of alleging a prima facie case under these elements of the Rehabilitation Act.

1. The Amended Complaint names no proper defendant.

Plaintiffs' claims under the Rehabilitation Act should be dismissed because the Amended Complaint does not identify Defendants' responsibility over any federally funded program or activity that has discriminated against Plaintiffs.

The Rehabilitation Act (the "Act") prohibits discrimination by "any program or activity" receiving "federal financial assistance." 29 U.S.C. § 794(a), (b). "Program or activity" means "all of the operations of" any "department, agency, special purpose district, or other instrumentality of

[12] *Klingler* was vacated and remanded by the Supreme Court in light of *Tennessee v. Lane*. Once the Supreme Court decided *Lane*, Missouri dropped its constitutional challenge altogether.

a State . . . government." 29 U.S.C. § 794(b)(1)(A). But courts considering the scope of a state entity's sovereign-immunity waiver under the Rehabilitation Act acknowledge that the definition of "program or activity" was "not intended to sweep in the whole state or local government" whenever one "little crann[y]" allegedly discriminates. *Schroeder v. City of Chicago*, 927 F.2d 957, 962 (7th Cir. 1991). The "program or activity" language limits section 504's reach so that it "does not encompass *all the activities* of the State," thus ensuring Congress acted within its Spending Clause power "when it conditioned the receipt of [section 504] funds on a waiver of sovereign immunity." *Lovell v. Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002) (emphasis added). For these reasons, courts interpret the phrase "program or activity" to "only cover[ ] all the activities of the department or the agency receiving federal funds." *Id*. at 1051. "The acceptance of funds by one state agency therefore leaves unaffected both other state agencies and the State as a whole." *Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir. 2000).

Liability under the Act only extends to entities who provide the "program" or "activity" that receives the related federal funds. *Id*. And Defendants' lack of responsibility over the enforcement or administration of the challenged statutes dooms Plaintiffs' claims under the Rehabilitation Act. *See Fritz v. Michigan*, 747 F. App'x 402, 404 (6th Cir. 2018) ("The proper defendant in an action under . . . the Rehabilitation Act is the public entity responsible for the relevant program.") Local district attorneys enforce the aggravated prostitution statute, not Defendants Lee and Skrmetti. *See supra* at (I)(A). And Defendant Strada oversees a separate unchallenged statute. *Id*. at (I)(C). No Defendants administer the sex offender registry statute, except for Defendant Rausch's administration of the sex offender registry website.[13] Funding is therefore irrelevant because Defendants cannot possibly accept federal funding—potentially incurring liability—for a "program" or "activity" they do not provide or administer.

[13] Defendant Rausch should be dismissed for separate and independent reasons. *See supra* at (I)(C).

2. OUTMemphis is not a "qualified individual with a disability."

OUTMemphis is the sole plaintiff in Count IX challenging the aggravated prostitution statute. But, for the same reasons explained above, *supra* at (III)(B)(1), OUTMemphis is not an "qualified individual with a disability" covered by the Act's protections. Aside from not being an "individual" and failing to allege a qualifying disability of its own, *see supra* (III)(B)(1), OUTMemphis cannot advance Count IX because it has not alleged that it is otherwise eligible for any (unnamed) service or benefit it allegedly has been denied. *See Zibbell v. Mich. Dep't of Human Servs.*, 313 F. App'x 843, 849 (6th Cir. 2009) (defining "qualified individual" under the Rehabilitation Act as the same as claims brought under the ADA).

3. Plaintiffs have not been discriminated against "solely" based on their HIV-status.

While the ADA requires Plaintiffs to show that discrimination occurred "because of" a disability, the Rehabilitation Act requires them to show that discrimination occurred "s*olely* by reason of" a disability. *Douglas v. Muzzin*, No. 21-2801, 2022 WL 3088240, at *5 (6th Cir. Aug. 3, 2022) (emphasis added); *see also Gohl v. Livonia Pub. Sch. Sch. Dist.*, 836 F.3d 672, 682 (6th Cir. 2016). This is an impossible burden for Plaintiffs.

The plain text of the challenged statutes does not single out HIV-positive individuals solely because of their diagnosis. Rather, the aggravated prostitution statute enhances punishment for criminal conduct when the actor *engages in that criminal conduct while knowing they are HIV-positive*. *See infra* (IV)(B). So, beyond someone's HIV status, the aggravated prostitution statute requires at least two additional criteria before any enhanced penalties are imposed on them: the person (1) must *know* that they are HIV-positive and (2) choose to engage in prostitution. And a person is not subject to the registry requirements without a conviction under the statute. Therefore, neither statute discriminates "solely by reason of" HIV status.

4. Plaintiffs are not "otherwise qualified."

To establish liability under the Rehabilitation Act, Plaintiffs must show they are "otherwise qualified" to participate in a covered "program." *Knox Cnty., Tennessee v. M.Q.*, 62 F.4th 978, 1000 (6th Cir. 2023) (quotation omitted). An "individual with a disability" does not include "an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals." 29 U.S.C. § 705(20)(D).

Courts have routinely recognized that certain individuals with HIV are not "otherwise qualified" under this section when their actions pose a health or safety risk. *Onishea v. Hopper*, 171 F.3d 1289, 1295 (11th Cir. 1999) (finding HIV-positive inmates were not "otherwise qualified" for prison programs); *Est. of Mauro By & Through Mauro v. Borgess Med. Ctr.*, 137 F.3d 398, 407 (6th Cir. 1998); (individuals with HIV were not "otherwise qualified" under Section 504); *Doe v. Univ. of Maryland Med. Sys. Corp.*, 50 F.3d 1261, 1266 (4th Cir. 1995) (the plaintiff with HIV "is not an otherwise qualified individual with a disability under § 504 of the Rehabilitation Act…"); *Bradley v. Univ. of Texas M.D. Anderson Cancer Ctr.*, 3 F.3d 922, 924 (5th Cir. 1993) (same). Congress was clear that nothing about the Act should be construed to prevent states from taking "normal good faith public health precautions to prevent the spread of contagious diseases." 134 Cong. Rec. E1004-02, 1988 WL 1086622 (discussing Civil Rights Restoration Act as it applies to section 504 of the Rehab Act).

In Count X, the Individual Plaintiffs have not specifically alleged how they are "otherwise qualified" under the Act. This shortcoming warrants dismissal.

5. Tennessee has not consented to Rehabilitation Act challenges to its criminal offense and sex offender registry statutes.

The Rehabilitation Act is Spending Clause legislation that prohibits certain recipients of federal financial assistance from engaging in disability-based discrimination. 29 U.S.C. § 794.

Unlike ordinary legislation, which "imposes congressional policy" on regulated parties "involuntarily," Spending Clause legislation operates based on consent: "in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 219 (2022). In this way, grants under the Spending Clause function "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Kentucky v. Yellen*, 54 F.4th 325, 347-48 (6th Cir. 2022) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). For that reason, the "legitimacy of Congress' power" to enact Spending Clause legislation turns on "whether the [recipient] voluntarily and knowingly accepts the terms of th[at] 'contract.'" *Id.* (quoting *Pennhurst*, 451 U.S. at 17).

For Spending Clause legislation to be constitutional, "Congress itself" must speak "with a 'clear voice'" when conditioning funding. *Kentucky v. Yellen*, 54 F.4th 325, 354 (6th Cir. 2022) (citation omitted). And because States cannot "knowingly accept conditions of which they are 'unaware'" or which they are "unable to ascertain," *id.* (citation omitted), Congress "must provide 'clear notice of the obligations a spending law entails,'" *id.* (quoting *Pennhurst*, 451 U.S. at 25). Under this "clear-statement rule," *id.*, conditions on federal grants must come from Congress, through provisions that set out the conditions "'unambiguously' and with a 'clear voice,'" *id.* at 348 (citation omitted), and in such a manner "ensuring that the receiving entity of federal funds [had] notice that it will be liable." *Cummings*, 596 U.S. at 219.

There are two insurmountable problems with Plaintiffs' interpretation of the Rehabilitation Act.

First, no reasonable interpretation of the Rehabilitation Act supports Plaintiffs' suggestion that it "unambiguously" required Tennessee—by virtue of accepting federal funding—to

knowingly waive all sovereign immunity from suits alleging discrimination in its criminal code and sex offender registry laws. *Yellen*, 54 F.4th at 348, 354.

The purpose of the Rehabilitation Act is clear. Congress focused on several substantive areas—employment,[14] education,[15] and the elimination of physical barriers to access.[16] *See* 29 U.S.C.A. § 701 (listing "increased employment," "empower[ing] individuals with disabilities," and "promoting the employment of individuals with disabilities" as the purposes of the legislation). None of these aims suggest that Congress sought to make major inroads on states' longstanding discretion to enact and enforce criminal or public health and safety laws. On the contrary, the Act was explicitly not intended limit a state's ability "to take normal good faith public health precautions to prevent the spread of contagious diseases." 134 Cong. Rec. E1004-02, 1988 WL 1086622 (discussing Civil Rights Restoration Act as it applies to section 504 of the Rehab Act).

Tennessee's enforcement of its criminal statutes and maintenance of a sex offender registry are not "reasonably related" to the Rehabilitation Act's express purposes. *See Gordon v. Holder*, 826 F. Supp. 2d 279, 294 (D.D.C. 2011), *aff'd*, 721 F.3d 638 (D.C. Cir. 2013) (Spending Clause conditions must be "reasonably related to the purpose of the funding."). The Court should reject Plaintiffs' attempt to implant new and illegitimate conditions in the Act that are plainly "unrelated to the federal interest in particular national projects or programs." *S. Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (citing *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

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[14] "The primary goal of the Act is to increase employment." *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 632–633, n. 13 (1984); *see also* 29 U.S.C. § 701(11) (1976 ed.).

[15] *See, e.g.*, 117 Cong.Rec. 45974 (1971) (statement of Rep. Vanik); 118 Cong.Rec. 525–526 (1972) (statement of Sen. Humphrey); 119 Cong.Rec. 5882–5883 (1973) (statement of Sen. Cranston); 118 Cong.Rec. 3320–3322 (1972) (statement of Sen. Williams).

[16] *See, e.g.*, 29 U.S.C. § 701(11) (1976 ed.); S.Rep. No. 93–318, p. 4 (1973); S.Rep. No. 93–1297, p. 50 (1974), U.S.Code Cong. & Admin.News 1974, pp. 6373, 6400.

Waiver of sovereign immunity must be unequivocally expressed and strictly construed. *Lane*, 518 U.S., at 192. It requires an "intentional relinquishment or abandonment of a known right or privilege." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd*., 527 U.S. 666, 682 (1999). Suits like Plaintiffs' are not a foreseeable "consequence[]" of Tennessee's acceptance of federal funding. *Pennhurst*, 451 U.S. at 17. Plaintiffs' claims under the Rehabilitation Act fail for this reason alone.

Second, by its own terms, the Act does not apply to programs or activities not receiving federal funds. Plaintiffs interpret the Act to mean that any arm of the state can be liable under the Act simply because one of its departments or agencies receives or distributes federal funds. But courts have squarely rejected the theory that the entire state can waive sovereign immunity for Rehabilitation Act claims simply by one of its "little crannies" accepting federal funds. *McMullen v. Wakulla Cnty. Bd. of Cnty. Commissioners*, 650 F. App'x 703, 706 (11th Cir. 2016) (citing *Schroeder v. City of Chicago*, 927 F.2d 957 (7th Cir. 1991)). As the Third Circuit opined, "if the entire state government were subject to [the Act] whenever one of its components received federal funds," then the following section of the Act, which provides that both the government entity that distributes federal funds and the entity that receives them are covered by the Rehabilitation Act, "would be redundant." *Koslow v. Pennsylvania*, 302 F.3d 161, 171 (3d Cir.2002); *accord Arbogast v. Kan., Dep't of Labor*, 789 F.3d 1174, 1184 (10th Cir.2015) (holding that "program or activity" only covers "the activities of the department or the agency receiving federal funds"); *Thomlison v. City of Omaha*, 63 F.3d 786, 789 (8th Cir.1995).

Though Plaintiffs state in a conclusory fashion that the Defendants "receive federal funds" (Dkt. 62 at 95, 97 ¶¶ 424, 431), that alone is not what incurs Rehabilitation Act liability. Rather, receipt of federal money, whether direct or indirect, incurs Rehabilitation Act liability only if the funding is "intended" as a "subsidy." *Shotz v. Am. Airlines, Inc*., 420 F.3d 1332, 1335 (11th Cir.

2005). Plaintiffs do not explain how Defendants are subsidized by funding under the Rehabilitation Act *for the purpose of* enforcing the challenged statutes. *See supra* at p. 33 (conditions on funding must be "reasonably related" to the purpose of the funding). Their claims under the Rehabilitation Act also fail for this reason.

IV. The Amended Complaint Fails to State a Valid Equal-Protection (Counts II, V) or Substantive- Due-Process Claim (Counts III, VI)

The Fourteenth Amendment to the U.S. Constitution prohibits States from "depriv[ing] any person of life, liberty, or property, without due process of law" or "deny[ing] any person within its jurisdiction the equal protection of the laws." The Due Process Clause "provides substantive, as well as procedural, protection for 'liberty[,]'" but only for "two categories of substantive rights—those rights guaranteed by the first eight Amendments to the Constitution and those rights deemed fundamental that are not mentioned anywhere in the Constitution." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 237 (2022). "In deciding whether a right falls into either of these categories," courts must carefully consider the "history of the right at issue." *Id.* at 238.

A. Rational-basis review applies, and the challenged statutes are rational.

To their credit, Plaintiffs do not allege that the U.S. Constitution guarantees a fundamental right to knowingly engage in prostitution while HIV-positive without facing heightened criminal consequences. *Cf. Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 459 (9th Cir. 2018), *amended*, 881 F.3d 792 (9th Cir. 2018). (no right to engage in prostitution); *Barnes*, 501 U.S. at 560 (States maintain traditional police power "to provide for the public health, safety, and morals"). Nor do Plaintiffs contest precedent holding that disability status is not a suspect classification. *Garrett*, 531 U.S. at 367.

This leaves Plaintiffs to argue that the challenged statutes fail rational-basis review—and thus violate equal protection and substantive due process—because they arbitrarily discriminate against HIV-positive persons. Showing that a statute fails rational-basis review is an "uphill

climb" for Plaintiffs, "given that under the rational basis standard, government action is afforded a strong presumption of validity, and [courts] will uphold it so long as there is a rational relationship between the disparity of treatment and some legitimate government purpose." *Andrews, Trustee of Gloria M. Andrews Trust Dated April 23, 1998 v. City of Mentor, Ohio*, 11 F.4th 462, 477 (6th Cir. 2021) (citation omitted). This "highly deferential" standard places the "burden … on plaintiffs to negate every conceivable basis which might support the government's disparate treatment." *Id*. (citation omitted).

The challenged statutes' approaches to stemming the spread of a dangerous, communicable disease more than pass rational-basis muster. Plaintiffs admit that HIV is an incurable disease. (Dkt. 62 at 10, ¶ 32.) If left untreated, HIV will almost always lead to the final stage of the infection or AIDS, followed by death in one to three years. (*Id*. at 9, ¶ 29.) As of 2022, HIV/AIDS has killed over 608,000 people in the United States, and despite recent advances in HIV therapies, more than 32,000 new cases of the deadly disease were recorded in 2021.[17]

And when Tennessee adopted its aggravated prostitution statute and made offenders register under the TN-SORA, things were worse. When HIV/AIDS first entered the public consciousness in the 1980s, the medical community was particularly concerned about the disease's devastating impact on "previously healthy persons."[18] HIV was declared an epidemic in the United States in 1981.[19] That year saw only 318 new cases of HIV reported, but by 1992, new cases

[17] CDC, *HIV by the Numbers – 2021*, http://tinyurl.com/yzpsw9ej (last visited Feb. 12, 2024).

[18] CDC, *HIV Surveillance --- United States, 1981 – 2008*, http://tinyurl.com/2t5j2unj (last visited Feb. 12, 2024).

[19] *Id.*

peaked at 75,457.[20] That period also saw "sharp increases" in the number of HIV-related deaths.[21] There were only 451 HIV-related deaths in 1981, but by 1992, HIV/AIDS was the number one cause of death for men ages 25 to 44.[22] Two years later, HIV/AIDS became the leading cause of death for *all* people ages 25 to 44.[23] In 1995, HIV/AIDS killed 50,628 people in the United States.[24]

To help stop the spread of this deadly disease, Tennessee's legislature created a separate offense for individuals who commit prostitution knowing that they are HIV-positive. The legislature recognized that "[t]he risk of HIV . . . is high among persons who exchange sex for money or nonmonetary items."[25] Thus, the legislature rationally concluded that it was possible to stem the spread of HIV by deterring individuals in this high-risk category—particularly individuals who *know* that they risk exposing others—from continuing to engage in behavior that could spread the disease. Such a decision is in the heartland of the State's traditional interests. *See Barnes*, 501 U.S. at 560.

To be sure, Plaintiffs contest "the wisdom of the challenged action." *In re Flint Water Cases*, 384 F. Supp. 3d 802, 844 (E.D. Mich. 2019). But "[a]s long as the classificatory scheme chosen by [the legislature] rationally advances a reasonable and identifiable governmental objective," courts should "disregard the existence of other" means it might "have preferred." *See*

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[20] *Id.*

[21] *Id.*

[22] *Id.*; https://www.hiv.gov/hiv-basics/overview/history/hiv-and-aids-timeline/#year-1992

[23] https://www.hiv.gov/hiv-basics/overview/history/hiv-and-aids-timeline/#year-1994

[24] CDC, *HIV Surveillance --- United States, 1981 – 2008*, http://tinyurl.com/2t5j2unj (last visited Feb. 12, 2024)

[25] CDC, *HIV Risk Among Persons Who Exchange Sex for Money or Nonmonetary Items*, http://tinyurl.com/yh7mfwkm (last visited Feb. 12, 2024).

Schweiker v. Wilson, 450 U.S. 221, 235 (1981). Discouraging HIV-positive individuals from engaging in prostitution rationally advances the legislature's goal to stop the spread of HIV. *See, e.g.*, *State v. Whitfield*, 134 P.3d 1203, 1212 (Wash. Ct. App. 2006) (recognizing "a reasonable relationship" between a statute criminalizing knowingly exposing others to HIV and Washington's "legitimate state objective—to stop the transmission of a deadly disease . . . .").

For similar reasons, lawmakers' decision to require those convicted of aggravated prostitution to register and comply with the TN-SORA is rationally related to the State's interests in protecting public health and safety. The TN-SORA "assist[s] law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts"—i.e., prostitution—with the added benefit of helping to identify and deter individuals who continue committing prostitution while knowingly HIV-positive. *See Michigan Dep't of State Police*, 490 F.3d at 500–01. And even if Tennessee's justifications arguably "sweep[] too broadly," *id.*, the "strong presumption of validity" accorded to states laws means that "any reasonably conceivable state of facts . . . [can] provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 319 (1993).

Plaintiffs dispute the efficacy of the statutes in achieving Tennessee's goals, citing new methods for treating HIV and stopping its spread. But the rationality of a law is judged at the time of passage; that an approach is arguably "unfair, outdated, and in need of improvement" thus "does not mean that the statute when enacted was wholly irrational or, for purposes of rational basis review, unconstitutional." *Smart v. Ashcroft*, 401 F.3d 119, 123 (2d Cir. 2005). Nor, under rational-basis review, may courts subject a "legislative choice … to courtroom fact-finding." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Instead, lawmakers' approach may be based on rational speculation unsupported by evidence or empirical data." *Id.* That rule governs here, where the General Assembly, faced with the high-risk of HIV associated with prostitution,

rationally concluded that public health would be aided by discouraging knowingly HIV-positive individuals from committing prostitution.

In sum, the Amended Complaint concedes that rational basis-review applies. And the challenged statutes satisfy rational-basis review. The Amended Complaint accordingly fails to state a valid equal-protection or substantive due process claim, requiring dismissal of Counts II, III, V, and VI.

B. The Amended Complaint identifies no similarly situated comparator to show discrimination.

Plaintiffs' equal-protection claims fail also because the Amended Complaint does not identify any "similarly situated" individuals who are treated more favorably under the challenged laws.

To prevail on a discrimination-based claim, Plaintiffs "have the burden of demonstrating that they were treated differently than" others who were "similarly situated in *all material respects*." *Loesel v. City of Frankenmuth*, 692 F.3d 452, 462 (6th Cir. 2012) (emphasis in original). Though this standard does "not demand exact correlation," *id.* (citation omitted), it requires at least "relevant similarity" among those allegedly within and outside the classes at issue. *Id.* at 462–63 (citations omitted). Plaintiffs' claims fail this comparator requirement.

First, it is the knowing *conduct* Tennessee criminalizes, not *being* HIV positive. This reality forecloses Plaintiffs' differential-treatment theory. Contrary to the Amended Complaint's contentions, the aggravated-prostitution statute does not discriminate based on HIV-positive status. (*See, e.g.*, Dkt. 62 at 90–91, ¶ 395.) Rather, to trigger heightened penalties, a person must know that they are HIV-positive and nonetheless choose to engage in prostitution, which can entail high-risk sexual encounters. Non-infected individuals who commit prostitution are materially different, as they do not pose the same public health risks that HIV-positive offenders pose. Tennessee likewise "would be justified" in treating HIV-positive individuals who knowingly

expose others to a deadly, highly infectious disease more harshly than those HIV-positive individuals who lack knowledge of their condition, and thus do not consciously place others at risk. *EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 865 (6th Cir. 2012).

Second, Plaintiffs cannot properly compare HIV-positive offenders to individuals "who are convicted of misdemeanor Prositution" and have "other infectious diseases with similar transmissibility and symptoms." (Dkt. 62 at 90–91, ¶ 395.) As discussed above, HIV/AIDS has been a particularly dangerous disease with unique public health challenges. Certainly, Tennessee "would be justified" in treating HIV differently than other types of infectious diseases. *EJS Properties, LLC*, 698 F.3d at 865.

Third, individuals "who are convicted of Patronizing Prostitution, including those with HIV or other infectious diseases with similar transmissibility and symptoms," (Dkt. 62 at 87, 90–91, ¶¶ 376, 395), are also poor comparators. One material difference is that individuals who patronize prostitution commit a different crime than individuals who commit prostitution. Indeed, while the crimes are complementary, Tennessee already punishes prostitution and patronizing prostitution differently. *Compare* Tenn. Code Ann. § 39-13-513(b)(1) (Class B misdemeanor) *with* § 39-13-513(b)(1) (Class A misdemeanor). Tennessee is justified in treating different crimes differently.

V. The Amended Complaint Fails to State an Eighth Amendment (Count VII) or Ex Post Facto (Count VIII) Claim.

For reasons given, Defendant Rausch is the only permissible defendant under Counts VII and VIII. *See supra* (I)(C). Thus, Plaintiffs' claims can survive only to the extent that Defendant Rausch's duties under the TN-SORA violate the Eighth Amendment and the Ex Post Facto Clause. *See Children's Healthcare*, 92 F.3d at 1415–16 (requiring claims under *Ex parte Young* be "based on a theory that the officer['s] . . . *statutory authority* . . . is unconstitutional") (citation and quotation marks omitted); *Lujan*, 504 U.S. at 560–61 (requiring "a causal connection" between a

plaintiff's alleged injuries and "the challenged action of the defendant" to satisfy Article III standing). But, as explained above, *supra* (I)(C), Defendant Rausch's responsibilities under the TN-SORA are limited to maintaining and publishing the sex offender registry. Because those duties are neither punitive nor retroactive to Plaintiffs, Counts VII and VIII must fail.

Eighth Amendment Claim. To establish their Eighth Amendment claim, Plaintiffs must show that Defendant Rausch's limited responsibilities of maintaining and publishing the TN-SORA's sex offender registry "impose[s] punishment." *See Cutshall v. Sundquist*, 193 F.3d 466, 477 (6th Cir. 1999). But the Supreme Court rejected an identical argument in *Smith v. Doe*, 538 U.S. 84 (2003), which considered the constitutionality of Alaska's Sex Offender Registration Act. Like Tennessee, Alaska's law contained "a registration requirement and a notification system." *Id.* Alaska required sex offenders to report their "name, aliases, identifying features, address, place of employment, date of birth, conviction information, driver's license number, information about vehicles to which he has access, and postconviction treatment history" and permitting law enforcement "to photograph and fingerprint him." *Id*. And the offender's name, aliases, address, photograph, physical description, license number, vehicle identification numbers, place of employment, date of birth, crime of conviction, date of conviction, place and court of conviction, length and conditions of sentence were made available to the public online. *Id*. at 91. These obligations, the Court held, were part of a "nonpunitive regime." *Id.* at 96; *see also id.* at 102–03.

Indeed, the Sixth Circuit relied on *Smith* to conclude that the TN-SORA's specific "registration, reporting, and surveillance components are not of a type that we have traditionally considered as a punishment." *Doe v. Bredesen*, 507 F.3d 998, 1005 (6th Cir. 2007). Those requirements "do not increase the length of incarceration for covered sex offenders, nor do they prevent them from changing jobs or residences or traveling to the extent otherwise permitted by their conditions of parole or probation." *Id.* Thus, "the challenged provisions . . . create a civil,

nonpunitive regime." *Id.* at 1004. And because the provisions of the TN-SORA administered by Defendant Rausch "do[] not impose punishment . . . [they] do[] not violate the Eighth Amendment's prohibition on cruel and unusual punishment." *Cutshall*, 193 F.3d at 477.

Ex Post Facto Claim. That the TN-SORA's registration and publication requirements are nonpunitive also requires dismissal of Plaintiffs' ex post facto claim. *See Bredesen*, 507 F.3d at 1004–05. "[T]he focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of disadvantage,' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *California Dep't of Corrections v. Morales*, 514 U.S. 499, 506 n.3 (1995). As just explained, the TN-SORA's registration, reporting, and publication requirements are not punitive or unduly burdensome, and so Plaintiffs "claim under the federal Ex Post Factor Clause fails." *See Bredesen*, 507 F.3d at 1004–07, 1008. Other circuits have "consistently and repeatedly rejected ex post facto challenges to state statutes that retroactively require sex offenders convicted before their effective date to comply with similar registration, surveillance, or reporting requirements." *Id.* at 1007.

Plaintiffs' ex post facto claim fails for an even more fundamental reason: The provisions of the TN-SORA that Defendant Rausch administers are not retroactive to Plaintiffs. According to the Amended Complaint, Plaintiff Anderson committed aggravated prostitution as recently as 2012, Jane Doe #2 committed aggravated prostitution as recently as 2010, Jane Doe #3 committed aggravated prostitution as recently as 2008, and Jane Doe #4 committed aggravated prostitution as recently as 2009. (Dkt. 62 at 64, 69, 71, 73, ¶¶ 265, 285, 295, 306.) But aggravated prostitution has been a registerable offense since 1995. (*Id.* at 21−22, ¶ 78.) The lifetime registration requirements for offenders convicted of one or more prior sexual offenses and for violent sexual offenders were in place before 2008. *See* Tenn. Code Ann. § 40-39-207(f) (2007). And even then, Director Rausch was required to maintain a centralized record system of information submitted by

offenders and publish information about registered offenders online. Tenn. Code Ann. §§ 40-39-204(a), -206(a), (e) (2007). The Ex Post Facto Clause is implicated only if a law "changes the legal consequences of acts committed before its effective date." *Miller v. Florida*, 482 U.S. 423, 430 (1987). And here, Plaintiffs fail to identify a provision of the TN-SORA that (1) is properly before the Court in light of Director Rausch's limited administration authority and (2) applies against them retroactively. These failures preclude their ex post facto claim.

VI. The Court Lacks Jurisdiction to Grant Plaintiffs' Requested Relief.

Plaintiffs seek sweeping declaratory and injunctive relief that is untethered to their claims and beyond the jurisdiction of this Court. For example, Plaintiffs ask the Court to enjoin *all* enforcement of the aggravated prostitution statute and to bar Defendants "from placing *any* individual convicted under the Aggravated Prostitution Statute" on the sex offender registry. (Dkt. 62 at 99, ¶ H.) They also ask that this Court order expungements of all records of sex offender registration for any person registered due to an aggravated prostitution conviction. (*Id.* at ¶ F.) They further request relief ordering Defendants to "alert all agencies" that have received information about any person who registered due to an aggravated prostitution conviction "that this information is no longer valid." (*Id.* at ¶ G.) And, finally, Plaintiffs ask to monitor Defendants' compliance with their sweeping demands. (*Id.* at ¶ I.) The Court lacks jurisdiction to grant these requests.

First, this Court cannot grant sweeping relief to non-parties. A valid remedy "ordinarily operate[s] with respect to specific parties,'" not on "legal rules in the abstract." *California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (cleaned up). And any remedy "must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). "District courts 'should not issue relief that extends further than necessary to remedy the plaintiff's injury.'" *L. W. by and through Williams v. Skrmetti*, 83 F.4th 460, 490 (6th Cir. 2023) (citation omitted).

"A court order that goes beyond the injuries of a particular plaintiff to enjoin government action against nonparties exceeds the norms of judicial power." *Id.* "[N]o court may 'lawfully enjoin the world at large,' or purport to enjoin challenged 'laws themselves.'" *Whole Woman's Health*, 595 U.S. at 44 (citation omitted). "[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs[;] the State is free to prosecute others who may violate the statute." *Doran v. Salem Inn*, 422 U.S. 922, 931 (1975). Any relief must be limited to the Plaintiffs before this Court.

Second, the narrow jurisdiction of federal courts does not permit the extensive remedial relief Plaintiffs seek—such as expungements of state records and alerts to non-parties—much less ongoing "monitor[ing]" by Plaintiffs themselves. (Dkt. 62 at 96, ¶ I.) The *Ex Parte Young* doctrine permits "a federal court [to command] a state official to do nothing more than refrain from violating federal law . . . The doctrine is limited to that precise situation." *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). Plaintiffs cannot micromanage the administration of state statutes beyond the narrow prospective injunctive relief *Ex Parte Young* authorizes. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984). The Court should dismiss or otherwise strike Plaintiffs' requests for relief that exceed its jurisdiction.

CONCLUSION

The Amended Complaint should be dismissed in its entirety. For the Court's convenience, Defendants have appended to this Memorandum a chart summarizing Plaintiffs' claims and the various bases for their dismissal. *See* Exhibit A.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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