WASHINGTON
LEGISLATIVE OFFICE

June 8, 2010

Jerry A. Holmberg, PhD
Advisory Committee on Blood Safety and Availability
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Dear Dr. Holmberg:

We write regarding the June 11, 2010 Meeting of the Advisory Committee on Blood Safety and Availability, during which time the Committee will hear comments on whether to recommend changes to the FDA policy recommending that men who have had sex with another man even one time since 1977 should be banned from donating blood.

Gay and bisexual men, intravenous drug users, people who have had sex for money, and people who have tested positive for HIV disease are presently the *only* groups of people banned from donating blood. Current policy excludes all gay and bisexual men regardless of their individual sexual histories or HIV risk. Other individuals who are also at increased risk for HIV disease, however, including people who have heterosexual sex with someone who they know to be HIV+, or people who have had sex with a commercial sex worker, are prevented from donating blood for only a year. Because the current policy establishes different standards for behavior that poses similar (or greater) risk of HIV transmission, it has been criticized as stigmatizing and discriminatory to gay and bisexual men.

In considering whether to change this policy, which was enacted in 1985, we urge the Committee to make its decision based on actual evidence, rather than stereotypes or assumptions. To the extent that the available evidence suggests that either a shorter deferral period or an eligibility policy that is based on an assessment of individual risk would not pose a greater risk to the nation's blood supply than the more nuanced eligibility policies already in existence for other demographic groups, treating gay and bisexual men differently would pose serious constitutional concerns.

The guarantee of equal protection codified in the Fifth and Fourteenth Amendments to the United States Constitution "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). While there is no constitutional right to donate blood, government policy regulating the blood donation field must not discriminate on the basis of sexual orientation by

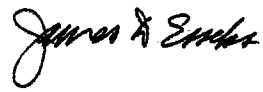
adopting differing standards for conduct that poses similar risks, based solely on the identity of those engaging in such conduct. In other words, gay and bisexual men cannot constitutionally be singled out for differential treatment solely because of their sexual relationships. *See Romer v. Evans*, 517 U.S. 620 (1996) (striking down a state constitutional amendment that deprived gay, lesbian and bisexual people of protection under state nondiscrimination laws); *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas law that criminalized same-sex sexual activity because of the burden it imposed on protected liberty and intimate relationships). Instead, the eligibility standards must reflect current scientific knowledge, and must treat like risks alike.

Further, if the blanket exclusion is not indeed necessary to ensure the safety of the blood supply, important public health reasons support changing the policy. By categorically barring all gay and bisexual men from donating blood, the current policy wrongly signals that – regardless of whether condoms are used consistently, regardless of the number of sexual partners, and regardless of the kind of sexual activity engaged in – the mere fact of sexual activity with another man that poses a risk of HIV transmission. This message is stigmatizing, runs contrary to effective HIV prevention education, and may in fact contribute to an increase in higher risk behavior, as it fails to distinguish between high risk and safer sex practices.

In conclusion, the ACLU urges the Committee to apply these principles in evaluating whether to change the eligibility standards for blood donation. If you have questions, please contact Rose Saxe at (212) 549-2605 or rsaxe@aclu.org.

Sincerely,

Laura W. Murphy
Director, Washington Legislative Office



James Esseks
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