

Case No. 16-15927

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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Erotic Service Provider Legal, *et al.*,

Plaintiffs,

v.

George Gascon; *et al.*

Defendants.

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On Appeal from the United States District Court,  
Northern District of California  
No. CV 4:15-cv-01007-JSW  
(Honorable Jeffrey S. White)

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**BRIEF OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF  
SOUTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF NORTHERN CALIFORNIA, API EQUALITY-LA,  
BIENESTAR, BLACK WOMEN FOR WELLNESS, CALIFORNIA RURAL  
LEGAL ASSISTANCE, INC., CALIFORNIA WOMEN'S LAW CENTER,  
EQUALITY CALIFORNIA, FAMILIA: TRANS QUEER LIBERATION  
MOVEMENT, FREE SPEECH COALITION, GENDERS & SEXUALITIES  
ALLIANCE NETWORK, GENDER JUSTICE LOS ANGELES, JUSTICE  
NOW, LOS ANGELES LGBT CENTER, NATIONAL CENTER FOR  
TRANSGENDER EQUALITY, TRANSGENDER, GENDER-VARIANT,  
INTERSEX JUSTICE PROJECT, TRANSLATIN@ COALITION,  
TRANSGENDER LAW CENTER,  
TRANSGENDER SERVICE PROVIDER NETWORK  
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and 29(c), *Amici Curiae* the ACLU of Southern California, the ACLU of Northern California, API Equality-LA, Bienestar, Black Women for Wellness, California Rural Legal Assistance, Inc., California Women’s Law Center, Equality California, Familia: Trans Queer Liberation Movement, Free Speech Coalition, Genders & Sexualities Alliance Network, Gender Justice LA, Justice Now, Los Angeles LGBT Center, National Center for Transgender Equality, The Transgender, Gender-Variant, Intersex Justice Project, TransLatin@ Coalition, Transgender Law Center, Transgender Service Provider Network (“Amici”) state that they are each non-profit corporations; that none of the *Amici* has any parent corporations; and that no publicly held company owns any stock in any of the *Amici*.

Dated: October 7, 2016

Respectfully submitted,

s/ Melissa Goodman  
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## INTEREST OF *AMICI*<sup>1</sup>

*Amici* are civil rights, legal, and social service organizations that serve people negatively impacted by laws that criminalize sex work.<sup>2</sup> *Amici* are deeply concerned about the discriminatory enforcement of laws that criminalize sex work and sex work-related activity against people because of their gender, gender non-conformity, gender identity, or sexual orientation; namely, lesbian, gay, bisexual, transgender, and queer (LGBTQ) people and women, and particularly LGBTQ people and women of color.<sup>3</sup> *Amici* have a strong interest in the resolution of this case and people's ability to mount challenges to discriminatory prostitution-related statutes and prosecutions.

*Amici* the **American Civil Liberties Union Foundations of Southern California and Northern California** are California-based affiliates of the nationwide American Civil Liberties Union (collectively ACLU). As a matter of long-standing policy, the ACLU opposes the criminalization of sex work because of adults' constitutional right to engage in private, consensual sexual activity

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<sup>1</sup> All parties have consented to this filing. *Amici* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person other than *Amici* contributed money intended to fund preparing or submitting the brief.

<sup>2</sup> Sex work is the provision of sexual services for money or goods.

<sup>3</sup> These groups are overlapping as many women are LGBTQ and many LGBTQ people are women but *amici* highlight them separately because their experience of discriminatory targeting for prostitution-related offenses is sometimes different and rooted in different biases.

without fear of criminal penalty, and also the deep history of discriminatory enforcement of prostitution, loitering, vagrancy, and lewdness offenses by targeting people because of who they are or their appearance.

**API Equality-LA** is an LGBTQ rights and social justice organization building grassroots community power and organizing for change in the Asian American and Pacific Islander community.

**Bienestar** is a non-profit organization dedicated to positively impacting the health and well-being of the Latino LGBT community and other underserved communities in Southern California.

**Black Women for Wellness** is a non-profit committed the empowerment, health and well-being of Black women and girls.

**California Rural Legal Assistance, Inc.** is a nonprofit legal aid organization dedicated to helping California's rural low-income individuals and their families, including vulnerable LGBT communities.

**California Women's Law Center** works to ensure, through systemic change, that life opportunities for women and girls are free from unjust social, economic, and political constraints.

**Equality California** is the nation's largest statewide LGBT civil rights organization dedicated to creating a fair and just society.

**Familia: Trans Queer Liberation Movement** is a national LGBTQ Latinx organization and works at the intersection of immigrant and LGBTQ rights, and racial justice through community organizing, advocacy and education.

**Free Speech Coalition** is a trade association that assists film makers, producers, distributors, wholesalers, retailers, and Internet providers located throughout the United States in the exercise of their First Amendment rights and in defense of those rights against censorship.

**Genders & Sexualities Alliance Network (“GSA Network”)** supports the work of trans and queer youth uniting for racial and gender justice. GSA Network organizes around overcriminalization of LGBTQ youth, many of whom have been profiled as sex workers or prosecuted for alleged sex work-related activity solely based on their identity or appearance.

**Gender Justice Los Angeles** is a member-based, grassroots social justice organization led by and for gender non-conforming, genderfluid, Two Spirit, questioning, and trans People of Color in LA County, centering low income folks.

**Justice Now** is focused on challenging gender oppression and violence, and ending imprisonment. It provides legal services and supports prisoner organizing efforts that promote health and justice.

The **Los Angeles LGBT Center**, providing services and advocating on behalf of the LGBT community since 1969, today is the largest LGBT organization in the world with more than 42,000 client visits a month.

The **National Center for Transgender Equality (NCTE)** is a national social justice organization devoted to advancing justice, opportunity and well-being for transgender people through education and advocacy on national issues.

The **Transgender, Gender-Variant, Intersex Justice Project** is a legal and organizing project made up of a group of transgender, gender variant and intersex people—inside and outside of prisons, jails and detention centers—creating a united family in the struggle for survival and freedom.

**TransLatin@ Coalition** is a coalition of transgender Latina leaders who come together from all across the country to organize and advocate for the issues and needs of the trans latin@ community living in the United States.

**Transgender Law Center**, based in Oakland, is the largest organization in the United States dedicated to advancing the rights of transgender and gender nonconforming people.

**Transgender Service Provider Network** serves to coordinate and plan services for transgender people in LA County through capacity-building, solution-focused community dialogue, service planning and implementation.

## INTRODUCTION

California Penal Code § 647(b) both implicates fundamental constitutional rights and is discriminatorily enforced. *Amici* agree with Plaintiff-Appellants that the statute wrongly criminalizes private, consensual sexual activity amongst adults, and impermissibly encroaches upon constitutionally protected interests. The Supreme Court in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), undoubtedly stopped short of recognizing a right to engage in consensual sexual activity in exchange for something of value, but the Court recognized “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” *Id.* at 572. *Lawrence* stands for the proposition that the “state cannot demean [people’s] existence or control their destiny by making their private sexual conduct a crime.” *Id.* at 587.

Each principle undergirding the *Lawrence* ruling—the right to private sexual intimacy, the right to form and make decisions about intimate relationships that are sexual in nature, and the right to privately engage in intimate conduct in one’s bedroom—applies to an adult’s personal decision to engage in sexual activity with another adult in exchange for money, shelter, food, or necessities.

The *Lawrence* Court, and the district court below, heavily emphasized that many same-sex couples affected by criminal sodomy laws form familial, long-term, committed bonds. *Lawrence*, 539 U.S. at 567; ER 7 (Dkt. No. 48). However,



the constitutionally guaranteed sphere of privacy that protects sexually intimate relationships and personal decision-making about sex and childbearing has never been limited to marriage-like relationships. *See, e.g., Carey v. Population Services, Intern.*, 431 U.S. 678, 685 (1977); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *see also Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (fundamental liberty “extend[s] to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs”). The *Lawrence* Court acknowledged as much when it defined the right at issue “adult consensual sexual intimacy in the home,” 539 U.S. at 564, and derived from contraception and abortion jurisprudence that “the right to make certain decisions regarding sexual conduct extends beyond the marital relationship,” *id.* at 565. Our deeply cherished right to be intimate in our homes and to be “let alone” in that intimacy, *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), persists whether the relationship at issue is built on love, is fleeting, or happens to involve exchange of something of value other than feelings. Moreover, moral disapproval of sex work cannot justify its prohibition. *Lawrence*, 539 U.S. at 577; *id.* at 581 (O’Connor, J., concurring). Like the sodomy laws struck down by the Court prior to *Obergefell*’s extension of marriage rights to same-sex couples, laws criminalizing sex work “seek to control a personal

relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.” *Id.* at 567.<sup>4</sup>

Though the lower court should have applied the heightened scrutiny standard articulated in *Lawrence*, *amici* focus here on another fundamental problem with prostitution-related offenses: how they are unfairly enforced. *Amici* write to inform the Court about how prostitution-related and lewdness offenses historically have been—and continue to be—discriminatorily enforced against women (transgender and cisgender<sup>5</sup>) and people who are LGBTQ and gender non-conforming. Transgender women and LGBTQ youth, particularly those who are homeless, are disproportionately profiled as sex workers and more frequently arrested for prostitution-related offenses. Gay men are targeted disproportionately for lewdness offenses. Women who sell sex are vastly more targeted for arrest and prosecution than men who buy sex.

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<sup>4</sup> Indeed, it is strange that the lower court concluded that “the intimate association between a prostitute and client” does not merit constitutional protection under *Lawrence* because “the relationship has not historically been granted recognition as fundamental,” when *Lawrence* itself was about historically unprotected relationships and conduct. See *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986), *overruled by Lawrence*, 539 U.S. at 558 (stating that it was “obvious” that gay people had no fundamental right “to engage in acts of consensual sodomy” because “[p]roscriptions against that conduct have ancient roots”); see also *Obergefell*, 135 S. Ct. at 2598 (“The nature of injustice is that we may not always see it in our own times.”).

<sup>5</sup> A transgender person is someone whose gender identity does not align with the sex they were assigned at birth. Gender identity is one’s internal, deeply-held sense of belonging to a particular gender. A cisgender person is someone whose gender identity aligns with their sex assigned at birth.

We urge the Court to consider this dark history and current reality as it assesses the constitutional challenge in this case. At a minimum, the Court should leave intact a person's ability to move to dismiss their criminal charge and bring as-applied discrimination challenges to Cal. Penal Code 647(b) and other laws commonly used to prosecute people for prostitution-related activity, when enforcement is discriminatory or unconstitutional.

## **ARGUMENT**

### **I. TRANSGENDER WOMEN ARE DISCRIMINATORILY PROFILED AND TARGETED FOR ARREST FOR PROSTITUTION-RELATED CRIMES.**

Police profiling of and institutional discrimination against transgender women leads to exceedingly high rates of arrest and incarceration for prostitution-related offenses. This biased enforcement activity then leads to heightened rates of violence against transgender women, by law enforcement and others.

Police profiling of women who are transgender for prostitution-related offenses is a systemic and nationwide practice. On top of being impacted by the discriminatory policing of sex work that all women are subjected to, see section IV *infra*, women who are transgender face added profiling based on their transgender status. A study of four cities found that transgender people are routinely profiled as sex workers and are “stopped and searched while doing nothing illegal, including walking home, returning from school, and waiting for the bus.” Human Rights

Watch, *Sex Workers at Risk: Condoms as Evidence of Prostitution in Four U.S. Cities*, 75 (July 2012) (“*Sex Workers at Risk*”). In Los Angeles, 60 percent of transgender Latinas surveyed reported being stopped by police while merely walking to the grocery store or to the bus. Frank H. Galvan & Mohsen Bazargan, *Bienestar, Interactions of Latina Transgender Women with Law Enforcement* 1 (April 2012) (“*Bienestar*”). The U.S. Department of Justice has found systemic biased policing practices discriminate against transgender women suspected of sex work in New Orleans, Puerto Rico, and Baltimore; thus far, settlement agreements implementing reforms have been entered with New Orleans and Puerto Rico.<sup>6</sup> At a 2013 forum in New York, nearly all 200 transgender attendees reported being profiled by police. See Noah Remick, *Activists Say Police Abuse of Transgender People Persists Despite Reforms*, *The New York Times* (Sep. 6, 2015). Profiling of transgender women, particularly transgender women of color, is “so pervasive that queer communities have coined the phrase ‘walking while trans’ to describe the experience of being targeted because of their gender and racial identities.” Joey Mogul et al., *Queer (In)justice: The Criminalization of LGBT People in the United States* 61 (2012) (“*Queer (In)justice*”).

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<sup>6</sup> See U.S. Dept. of Justice, Civil Rights Division, *Investigation of the Baltimore City Police Dept.* 122-23 (Aug. 10, 2016) (“*DOJ Baltimore Investigation*”); U.S. Dept. of Justice, Civil Rights Division, *Investigation of the New Orleans Police Department*, x & 36 (March 17, 2011); Agreement for the Sustainable Reform of the Puerto Rico Police Department, *U.S. v. Commonwealth of Puerto Rico and the Puerto Rico Police Department* (D. P.R. 2012) (No. 3:12-cv-2039).

Some examples include:

- In 2013, Monica Jones, a Black transgender woman, activist, and social work student from Arizona State University was arrested in Phoenix for “manifesting intent to engage in prostitution,” after accepting a ride to a bar from undercover officers. The arresting officer testified that his basis for arresting Ms. Jones was her presence in an area known for prostitution, which happened to be near her residence, and her outfit—a black form-fitting dress. Ms. Jones was convicted but successfully challenged her conviction on appeal. Ms. Jones reported being stopped and questioned by police four separate times on suspicion of engaging in prostitution while merely walking down the sidewalk or having conversation with friends. *See* Brief for Monica Jones as Amici Curiae Supporting Appellant at 4, *Arizona v. Jones*, Municipal Court No. 20139021636 (Super. Ct. Ariz. Aug. 5, 2014); Mitch Kellaway, *Phoenix Drops 'Walking While Trans' Charges Against Monica Jones*, Advocate (Feb. 27, 2015).
- In 2012, a transgender woman in Los Angeles reported: “I work in a restaurant. And I have been stopped on the way home from work. I’ve been accused of being a prostitute because I am walking with two condoms in my pocket.” *Sex Workers at Risk* at 50.
- In 2012, a transgender woman in New York reported: “Eight days ago I wasn’t working because I was sick. I left my house to get a coffee, and had two condoms in my pocket. The police stopped me and said ‘what are you doing?’ I said I was getting coffee. They searched me and found two condoms. They asked ‘what are you doing with two condoms, what are they for?’ I said they were for protection. They took the condoms. I couldn’t get coffee, I was so scared. I felt very bad. I’m not a delinquent, I didn’t steal. When they searched me and found them, I was shaking, I was so scared.” *Id.* at 19.
- In 2000, a transgender woman reported: “I was sitting on the steps of my Tenderloin apartment. An undercover cop tried to get me to solicit him. I am not a sex worker and don’t want to be considered as a prostitute.” Chris Daley et al., Ella Baker Center for Human Rights and TransAction, *Walking While Transgender: Law Enforcement Harassment of San Francisco’s Transgender/Transsexual Community*, ix (April 2000) (“*Walking While Transgender*”).

Transgender individuals who do engage in sex work are more likely to be targeted and stopped by virtue of their actual or perceived transgender status. In a nationwide survey of transgender people, approximately 11 percent reported having done sex work and an additional 2 percent reported that they traded sex for rent or place to stay. See Erin Fitzgerald *et al.*, *Meaningful Work: Transgender Experiences in the Sex Trade* 4 (December 2015) (“*Meaningful Work*”). Police profiling and stings targeted at transgender women sweep up transgender women at disproportionately high rates. See Make the Road New York, *Transgressive Policing: Police Abuse of LGBTQ Communities of Color in Jackson Heights* 15-16 (October 2012) (“*Transgressive Policing*”) (59 percent of transgender respondents indicated that they had been stopped by police, in comparison to only 28 percent of cisgender respondents); *Meaningful Work* at 17 (of those who reported having engaged in sex work, a whopping 79.1 percent had frequent interactions with police).

The discriminatory profiling and targeting of transgender women also expose them to high rates of police violence. Contrary to the government’s assertion that laws like 647(b) protect sex workers from violence, ER 101-102 (Dkt. No. 21), studies have shown that criminalization actually exposes sex workers to more violence. See, e.g., Michael Rekart, M.D., *Sex Work Harm Reduction*, 366 *Lancet* 2124 (2005); Amnesty International, *Stonewalled: Police*

*Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.*, 3, 17-19 (September 2005) (“*Stonewalled*”). Transgender people are nearly 4 times, with transgender people of color 6 times, more likely to experience violence from the police. National Coalition of Anti-Violence Programs, *Hate Violence Against Transgender Communities* (2014). The U.S. Department of Justice recently found that the Baltimore City police “disregard[ ] reports of sexual assault by people involved in the sex trade,” misgendered, harassed, and conducted unconstitutional searches of transgender people, and concluded that its “interactions with transgender individuals reflect underlying unlawful gender bias.” *DOJ Baltimore Investigation* at 123. Transgender sex workers in four U.S. cities described to Human Rights Watch “police behavior ranging from verbal harassment to public humiliation to extortion for sex.” *Sex Workers at Risk* at 2. Of transgender women surveyed in Los Angeles, 24 percent reported sexual, and 21 percent reported physical, assault at the hands of police. *Bienestar* at 1. A transgender woman in San Francisco reported being stopped by the police and then forced to perform oral sex. *Walking While Transgender* at 5. A transgender woman in Los Angeles reported being raped by an officer in an alley while he yelled “[y]ou fucking whore, you fucking faggot!” *Queer (In)justice* at 63. A transgender woman in Sacramento reported being beaten, pepper sprayed and dragged across hot pavement; then, after being raped by another inmate while in custody, was

taunted by jail staff. *Stonewalled* at 1. These anecdotes and statistics likely reflect only a fraction of the abuses police inflict on transgender people given underreporting. *See, e.g.*, Emily Thomas, *Rape is Grossly Underreported in the U.S., Study Finds*, The Huffington Post (Nov. 21, 2013); Zoë Carpenter, *The Police Violence We Aren't Talking About*, The Nation (Aug. 27, 2014).

The profiling and abuse by law enforcement results in increased violence against the transgender community due societal expectations that targeting of transgender people, and particularly those engaged in the sex trades, will go unpunished. One in two transgender individuals will suffer sexual abuse and/or assault during their lifetime. U.S. Dept. of Justice Office of Justice Programs, Office for Victims of Crime, *Responding to Transgender Victims of Sexual Assault* (June 2014). In 2013, transgender women accounted for 72 percent of hate violence homicides targeting LGBTQ people. National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2013*, 22 (2014). But in 2013, only 45 percent of LGBTQ and HIV affected people who experienced hate crimes—many of whom are transgender—reported the crime to the police. *Id.* at 46. Nearly half of respondents to a national survey of transgender people were uncomfortable seeking police assistance. *See* Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National*



*Transgender Discrimination Survey* 6 (2011) (“*NTDS*”).<sup>7</sup> In another survey, 87 percent of the transgender respondents who identified as or had been profiled a sex worker reported fear of the police. Monsello Arrington et al., *Move Along: Policing Sex Work in Washington, D.C.* 43 (2008); see also *DOJ Baltimore Investigation* at 123 (finding that transgender individuals are “afraid to report crime to law enforcement”).

The discriminatory enforcement of prostitution-related offenses against transgender women raises serious constitutional questions. In California, sex discrimination warrants strict scrutiny under the state constitution. *Sail’er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 17-20 (1971), and “sex” is defined explicitly to encompass gender identity and gender expression. See, e.g., Cal. Gov’t Code § 11135. Similarly, federal courts are increasingly recognizing that government actions that target or harm transgender people are subject to heightened constitutional scrutiny as impermissible sex discrimination, see *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011);

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<sup>7</sup> The solicitation statute and heavy enforcement burden transgender people experience ignore the harsh realities that push many transgender people to sex work in the first place: institutional discrimination often leaves many transgender people with no other viable employment opportunity. Of transgender survey respondents who had engaged in sex work, 83 percent experienced discrimination in schools and 69 percent in employment. *Meaningful Work* at 4-5. Forty-seven percent of transgender people report being fired, not hired, or denied promotion because they were transgender; and, when compared to the general population, transgender people are twice as likely—and for transgender people of color *four* times as likely—to be unemployed, four times as likely to live in poverty, and twice as likely to be homeless. *NTDS Survey* at 2-4.

*Smith v. City of Salem, Ohio*, 378 F.3d 566, 573–75 (6th Cir. 2004), and because transgender status is a suspect classification, *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015).

A facially neutral statute violates the Equal Protection Clause if its enforcement has a discriminatory effect on a specific group and the government actors are motivated by a discriminatory purpose. *Lacey v. Maricopa County*, 693 F.3d 896, 920 (9th Cir. 2012). Discriminatory effect is established by showing a similarly situated group is not subject to the same enforcement. *Id.* Enforcement can be established through evidence of profiling, threatened arrest, actual arrest, and other coercive conduct. *Rosenbaum v. City & Cnty. of S.F.*, 484 F.3d 1142, 1152-54 (9th Cir. 2007). Discriminatory purpose—that the decision to enforce is at least in part based on an impermissible ground such as gender, sexual orientation, or gender identity or to cause adverse effects on a particular group—can be extrapolated from a variety of facts, including enforcement data. *See Lacey*, 693 F.3d at 922; *see also Washington v. Davis*, 426 U.S. 229, 242 (1976) (discriminatory purpose may be “inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one [group] than another”).

Profiling and selective enforcement against transgender women because of their clothing, hairstyle, makeup, appearance or how they otherwise express their gender also amounts to impermissible sex stereotyping and infringes important First Amendment protections. Profiling transgender women because they act or dress in a manner that defies gender stereotypes is discriminatory enforcement based on gender. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989); *Schwenk*, 204 F.3d at 1202; *see also* Cal. Gov't Code § 11135 (prohibiting government officials from engaging in gender, gender expression, and gender identity discrimination). The communication of a message about gender through clothing and dress is also First Amendment protected expressive activity. *See McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d 699, 704-705 (N.D. Miss. 2010). This is particularly true for transgender individuals who send a message to the world about their gender—that for example, they are women even if assigned the sex of male at birth. *See, e.g., Doe ex rel. Doe v. Yunits*, 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000), *aff'd sub nom. Doe v. Brockton Sch. Comm.*, 2000-J-638, 2000 WL 33342399 (Mass. App. Nov. 30, 2000).

The profiling and discriminatory enforcement of prostitution-related laws against transgender women cause serious harm and indignity. It is vital that transgender women profiled or discriminatorily targeted for prostitution-related offenses, including arrests or convictions under California Penal Code § 647(b),

maintain the ability to mount selective enforcement and as-applied constitutional challenges based on the specific facts of their case.

## **II. GAY MEN ARE DISCRIMINATORILY PROFILED AND TARGETED FOR LEWDNESS AND CRIMES CONCERNING SEXUAL ACTIVITY.**

Solicitation laws and related criminal offenses such lewd conduct and sodomy, which are often used against those suspected of engaging in prostitution, have been used for decades to police gay men's<sup>8</sup> sexual activity while allowing the same heterosexual activity to occur without sanction. During the Great Depression, for example, there was a "boom in arrests" of gay men for "cruising, dancing, cross-dressing, kissing, groping, fondling, and even hand holding in public or semipublic spaces," which police considered violations of laws prohibiting "disorderly conduct, sexual solicitation, lewdness, indecent exposure, vagrancy, loitering, and cross-dressing or even 'disguise.'" William N. Eskridge Jr., *Hardwick and Historiography*, 1999 U. Ill. L. Rev. 631, 660 (1999). The use of sodomy laws to criminalize gay men again ramped up in the 1960s, as the social condemnation of being gay began to weaken. *Lawrence*, 539 U.S. at 570. In 1979, the California Supreme Court observed that the "overwhelming majority" of lewdness arrests in Los Angeles County involved gay men. *Pryor v. Mun. Ct.*, 25 Cal.3d 238, 252 (1979).

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<sup>8</sup> "Gay men" here includes all men who have sex with men.

Despite enormous social and legal progress toward eliminating bias based on sexual orientation, gay men are still being criminalized today through the use of lewd conduct “stings.” See Jordan Blair Woods, *Don’t Tap, Don’t Stare, and Keep your Hands to Yourself! Critiquing the Legality of Gay Sting Operations*, 12 J. Gender Race & Just. 545, 551-553 (Spring 2009) (“*Don’t Tap*”). Even after *Lawrence v. Texas*, police departments in California continue to regularly target and arrest gay men on charges of solicitation and lewdness. See, e.g., *People v. Moroney*, 4LG03026 (Cal. Super. Ct. April 29, 2016) (granting motion to dismiss for discriminatory prosecution where Long Beach Police Department “intentionally targeted” gay men even though there was “lewd conduct involv[ing] both heterosexual and homosexual activity”); *Hope v. City of Long Beach*, CV 04-4249 DT (RZX), 2005 WL 6009954, at \*6-7 (C.D. Cal. Aug. 15, 2005) (denying summary judgment motion in a discriminatory enforcement challenge where there was evidence that the Long Beach police only targeted gay men with sex sting operations while “allowing those interested in engaging in [lewd] heterosexual sex acts to proceed unfettered”) *Brown v. Cnty. of San Joaquin*, CIVS042008FCDPAN, 2006 WL 1652407, at \*7 (E.D. Cal. June 13, 2006) (denying summary judgment in a discriminatory enforcement challenge because plaintiff introduced credible evidence that San Joaquin County Sheriff’s Department targeted only gay men in “decoy” sex stings, despite recent incidents of public heterosexual lewdness); see

also Keleveld, *Public Sex Gets Attention of Sacramento Police*, *The Advocate* (January, 18 2008) (undercover police instructed to “take notice when two men ‘looking like they don’t belong together [walk] out from somewhere’” in the park); *The Advocate*, *LAPD Cracks Down On Park Cruising* (March 13, 2010) (of 90 lewd conduct arrests in Elysian Park, most were gay men).

The limited empirical data available suggests that lewd conduct laws are being selectively enforced against gay men. The perception that gay men more frequently engage in public sex is not accurate. Surveys suggest that people of all sexual orientations engage in public sexual activity, with one poll reporting nearly all people surveyed admitting to public or semi-public lewdness. *Don’t Tap* at 565-566. Yet, as one Los Angeles police officer admits, different-sex sexual partners who are caught engaging in public sex acts are rarely arrested, while, “if there are two men consensually involved in the car, officers arrest them more often than not.” *Stonewalled* at 29. Moreover, LGBTQ people in many communities are also simply more frequently stopped by police than non-LGBTQ people. *See, e.g. Transgressive Policing* at 16 (in 2014 in Jackson Heights, NY, 54 percent of LGBTQ respondents, but only 28 percent of non-LGBTQ respondents, reported that they had been stopped by police). Gay men are also often the victims of police violence. National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2014*, 45, 52-53 (2015)

(16 percent of hate crime violence against LGBT people was perpetrated by law enforcement).

Disproportionate enforcement is often fueled by purposeful and implicit bias. In a 2008 study, 62 percent of police chiefs surveyed believed that “homosexuality constitutes ‘moral turpitude,’” and 56 percent viewed “homosexuality as a ‘perversion.’” Christy Mallory et al., *Discrimination against Law Enforcement Officers on the Basis of Sexual Orientation and Gender Identity: 2000 to 2013*, 2 (November 2013); see also Christine M. Anthony et. al., *Police Judgments of Culpability and Homophobia*, *Applied Psychology in Criminal Justice* 9 (2005) (32 percent of officers believed gay men were “disgusting”).

Given this well-documented history of discriminatory enforcement of lewdness and statutes concerning sexual activity against gay men, the success some men have had in proving discriminatory enforcement, *see supra* at 20-21, and that government actions that discriminate based on sexual orientation receive heightened scrutiny, *see SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 484 (9th Cir. 2014), it is important that people remain able to mount as-applied selective enforcement or purposeful discrimination challenges.

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### III. LGBTQ YOUTH ARE DISCRIMINATORLITY PROFILED AND TARGETED FOR ARREST FOR PROSTITUTION-RELATED CRIMES.

Transgender youth, young gay men of color, and gender non-conforming LGB youth are frequently profiled as sex workers by police. Katayoon Majd, J. et al., *Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts* 62 (2009) (“*Hidden Injustice*”); *Stonewalled* at 24. In one survey 64 percent of transgender youth reported being profiled by police whereas only 26 percent of cisgender youth did. BreakOUT!, *We deserve better: A Report on Policing in New Orleans by and for Queer and Trans Youth of Color* 22 (2014) (“*BreakOUT!*”).

Some examples of the common practice of profiling include:

- In 2001, a 16-year-old gay, white, homeless boy reported that he was subjected to verbal harassment by two officers who would pull over whenever they saw him, assuming he was a sex worker, and subjected him to homophobic comments and slurs, often with sexual undertones. *Stonewalled* at 61-62.
- In 2001, a transgender youth of color was doing safe-sex outreach, when police approached her and arrested her for prostitution. *Id.* at 24.
- In 2004, a Latino and two African American young gay men met at a taco stand where they were profiled, called “fucking faggots,” and detained by two officers for solicitation.” *Id.* at 25.
- In 2009, two LGBT youth, in an interview with an NGO, described being stopped and profiled by police simply while walking down the street together because they were assumed to be sex workers. Christy Mallory et al., *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community* 10-11 (2015) (“*Discrimination*”).



LGBTQ minors who are homeless face a high risk of being sex trafficked and sexually exploited but they are also more likely to be detained in the juvenile justice system for prostitution-related charges. *See Omar Martinez & Guadalupe Kelle, Sex Trafficking of LGBT Individuals: A Call for Service Provision, Research, and Action 2-3 (2013); Angela Irvine “We’ve Had Three of Them”: Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youth in the Juvenile Justice System, 19 Colum. J. Gender & L., 694 (2010) (finding lesbian or bisexual young people are twice as likely as their heterosexual peers to be in detention for prostitution, and gay or bisexual minor boys were ten times more likely).*

LGBTQ youth generally have a highly disproportionate rate of contact with the criminal justice system compared to their heterosexual peers. A 2011 study found LGB youth were 53 percent more likely to be stopped by the police, 60 percent more likely to be arrested before the age of 18, 90 percent more likely to have had a juvenile conviction, and 41 percent more likely to have had an adult conviction, than their heterosexual peers – when controlling for race, socioeconomic status, and criminal behavior. Kathryn E. W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 *Pediatrics* 49, 51, 53 (2011). LGBTQ youth, particularly youth of color and transgender youth, are far

more likely to be profiled by police than non-LGBTQ youth. *See, e.g.* BreakOUT! at 19.

Some experts believe that police are more likely to arrest and charge LGBTQ youth for crimes because “they equate homosexuality with deviancy,” *Hidden Injustice* at 61; *see also*, John M. Keating & Nina C. Remson, *Selective Enforcement and the Impact on LGBT Juveniles*, 282 N.J. Law. 54, 56 (2013), and vague laws such as disorderly conduct, public lewdness and loitering allow for significant discretion on the part of individual police officers, *Stonewalled* at 23. LGBTQ youth also have greater contact with the criminal justice system because they experience high rates of homelessness. As many as 40 percent of homeless youth identify as LGBTQ; many have been kicked out or ran away from their homes because of their sexual orientation/gender expression. Laura E. Durso & Gary J. Gates, *Serving Our Youth: Findings from a National Survey of Service Providers Working with Lesbian, Gay, Bisexual, and Transgender Youth who are Homeless or At Risk of Becoming Homeless* 4 (2012). LGBTQ youth are roughly 4 to 13 times more likely to be homeless than their heterosexual, cisgender peers. *See* Nicholas Ray, *Lesbian, Gay, Bisexual, and Transgender Youth: An Epidemic of Homelessness* 1 (2006) (“*Epidemic*”). Homeless LGBTQ youth are “more likely to be targeted for selective enforcement and other police misconduct.” *Stonewalled* at 54. In turn, homelessness, economic deprivation, lack of access to services, and

discrimination does result in a large number of homeless youth engaging in sex work to find shelter and food to survive. *Epidemic* at 55. One-quarter to one-third of homeless youth engage in survival sex work. *Id.* at 56-57.

The overcriminalization of LGBTQ youth, and their profiling and targeting for prostitution-related enforcement, results in harassment and violence by the police. A 2014 survey showed that 59 percent of transgender youth and 12 percent of LGB youth had been asked by law enforcement officers for sexual favors, and 50 percent of transgender youth and 22 percent of LGB youth reported being called slurs by law enforcement. *BreakOUT!* at 6-7. Almost 70 percent of respondents to a 2008 survey of LGBTQ youth reported that police mistreatment was a “very serious” or “somewhat serious” problem for them. *Hidden Injustice* at 61. This negative treatment chills LGBTQ youth from reporting crimes or turning to the police for help. *See Discrimination* at 6-9; *Epidemic* at 69.

Just one week ago, California enacted historic reform decriminalizing solicitation and engagement in prostitution for people under the age of 18. SB-1322 Commercial Sex Acts: Minors, ch. 654, 2016 Cal. Stat. 1-39. This law was motivated in part by the experiences of homeless LGBTQ youth. Senate Rules Committee, Office of Senate Floor Analyses, *SB-1322 Bill Analysis* 6-7 (Aug.

2016)<sup>9</sup>. Thus, LGBTQ young people can no longer be prosecuted under Cal. Penal Code § 647(b). However, young people can still be prosecuted under loitering, lewdness and disorderly conduct statutes often used to arrest people suspected of engaging in sex work, and nothing expressly prohibits police from continuing to profile or threaten to arrest young LGBTQ people suspected of engaging in sex work. California's reform will hopefully significantly reduce the police profiling, harassment and violence that LGBTQ youth profiled and targeted as sex workers experience. But law enforcement's history of discriminatorily targeting LGBTQ and gender nonconforming youth provides yet another example of why it's important for people to have a mechanism by which to challenge discriminatory enforcement as a class or in individual prosecutions.

#### **IV. PROSTITUTION-RELATED STATUTES ARE DISCRIMINATORILY ENFORCED AGAINST WOMEN WHO SELL SEX.**

Finally, there is a historically entrenched and enduring practice of enforcing prostitution-related offenses significantly more harshly against women who sell sex than men who buy it.<sup>10</sup> In addition to the clear evidence of gender-based enforcement of prostitution laws specifically targeting women who are

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<sup>9</sup> Available at [http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb\\_1301-1350/sb\\_1322\\_cfa\\_20160822\\_105918\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_1301-1350/sb_1322_cfa_20160822_105918_sen_floor.html).

<sup>10</sup> This section addresses the discriminatory enforcement that women—cisgender and transgender—face because they are women. As discussed above, transgender women are subjected to the added burden of profiling based on their transgender status as well.

transgender, *see supra* section I, there is also a long history of discriminatory enforcement of prostitution laws against women—cisgender and transgender—while men are largely spared arrest. In 1920, a New York judge reversed a woman’s conviction for vagrancy for committing prostitution because the male buyers of her services were let go and their lives left unscathed, observing “it has been the custom heretofore followed to arrest the women and let the men go; but the time has come when the custom cannot longer be permitted to continue,” and declaring the practice “unjust discrimination against women.” *People v. Edwards*, 180 N.Y.S. 631, 634-35 (N.Y. Gen. Sess. 1920). Sadly, times have not much changed. Women who engage in sex work “continue to suffer from a double standard of social and criminal justice.” Ruth Rosen, *The Lost Sisterhood: Prostitution in America, 1900-1918*, 171-72 (1982).

Though most prostitution laws no longer explicitly target only women, *see e.g., In re Carey*, 57 Cal. App 297, 302-305 (1922) (upholding a California statute requiring commitment of women convicted of prostitution), gender-blind prostitution laws which apply to both seller and buyer are still disproportionately enforced against women. Throughout the 1970s and 1980s female defendants throughout the country marshaled evidence that police were enforcing laws that criminalized both sides of the sex trade almost entirely against female sellers. *See, e.g., People v. Super. Ct. (Hartway)*, 562 P.2d 1315, 1321-1322 (Cal. Sup. Ct.

1977) (Oakland police used more men than women as decoys for solicitation and had practice of arresting the sex worker but only citing the customer); *In re Elizabeth G.*, 53 Cal.App.3d 725, 729 (1975) (Stockton police arrested almost only women for Cal. Penal Code § 647 violations in 1973 and 1974); *People v. Mun. Ct. (St.)*, 89 Cal.App.3d 739, 743-44 (1979) (granting defendant's discovery motion on a gender-based selective enforcement claim against San Francisco); *City of Yakima v. Johnson*, 16 Wash. App. 143 (1976) (for ten years almost everyone arrested for prostitution was a woman); *See Coyote v. Roberts*, 502 F. Supp. 1342, 1352-53 (D.R.I. 1980), *op. supplemented by Coyote v. Roberts*, 523 F. Supp. 352 (D.R.I. 1981) (police used only male undercover officers and arrested 846 women, but only 251 men, over three year period; all the women, but only three men, were charged); *People v. Burton*, 432 N.Y.S.2d 312, 314 (N.Y. City Ct. 1980) (the "overwhelming" majority of people arrested for prostitution-related offenses in Buffalo were female). In one case, the court dismissed a prostitution charge on discriminatory enforcement grounds where a detective openly testified that it was "general policy that you don't arrest the male." *Com. v. An Unnamed Def.*, 492 N.E.2d 1184, 1186 (Mass. App. 1986). The disproportionate targeting of the women involved in sex work rests on a foundational stereotype that women should be chaste and, when they engage in the sex trade, they therefore are more culpable than the man involved. While most of these early gender discrimination challenges

proved unsuccessful, a consistent national picture of disproportionate targeting of women emerged.

Law enforcement agencies have started to more frequently enforce prostitution-related laws against male buyers, but selective enforcement against female sellers remains prevalent today. Nationwide, in 2014, of those arrested for prostitution and commercialized vice, 66 percent were women and only 34 percent were men. Federal Bureau of Investigation Criminal Justice Information Services Division, *Crime in the United States 2014*: Table 42.<sup>11</sup> In California, the Attorney General's 2014 statewide arrest statistics, which report data on a range of prostitution-related offenses including Cal. Penal Code § 647(b) by gender and location, reveal that approximately two-thirds of those arrested for prostitution-related offenses were female while only one-third were male. California Dep't of Justice, Office of the Attorney General, *CJSC Statistics: Arrests (2005-2014)*.<sup>12</sup> The ten year average—looking at data from 2005-2014—is roughly the same. *Id.* A recent study of California Penal Code 647(f), a prostitution-related statute which under certain circumstances makes solicitation a felony if a person has HIV, no matter what precautions are taken to prevent transmission, also shows a stark

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<sup>11</sup> Available at <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-42>.

<sup>12</sup> Available at <https://oag.ca.gov/crime/cjsc/stats/arrests>. Prostitution offenses include Cal. Penal Codes §§ 266, 315, 316, 647(b), 653.22(a), 653.23(a)(1), 653.23(a)(2), and 25601. See Arrest Offenses Codes, [https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/stats/arrest\\_offense\\_codes.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/stats/arrest_offense_codes.pdf).

gender disparity in enforcement. The study found that women were overrepresented among those who were arrested under the felony solicitation law and that women were nearly three times as likely as white men to be charged and convicted of the felony solicitation offense. *See* Amira Hasenbush et al., *HIV Criminalization in California: Penal Implications for People Living with HIV/AIDS* 18-19 (Dec. 2015). The number of women targeted is likely much higher than even these statistics suggest because transgender women are often wrongly classified as men.

Contrary to State's contention that 647(b) protects women from violence, ER 101-102 (Dkt. No. 21), numerous studies have concluded that criminalization of sex work exposes women to more violence, including by the police. *See supra* at Section I; Katherine Koster, *17 Facts About Sexual Violence and Sex Work*, The Huffington Post (Dec. 4, 2015) (collecting studies). Decriminalization of sex work, by contrast, has been shown to reduce violence. *See* Scott Cunningham & Manisha Shah, *Decriminalizing Prostitution: Surprising Implications for Sexual Violence and Public Health*, Working Paper Series, National Bureau of Economic Research (2013) (decriminalization of indoor prostitution in Rhode Island significantly reduced reported cases of rape); Barbara G. Brents & Kathryn Hausbeck, *Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk, and*



*Prostitution Policy*, 20 J. Interpersonal Violence 270 (2005) (Nevada’s safety regulations for legalized prostitution reduced violence and fear of violence).

As discussed above, profiling women who sell sex based on gender, failure to conform to gender stereotypes, or how one expresses their gender through clothing, appearance, or mannerisms can amount to discriminatory enforcement and is government conduct subject to heightened constitutional scrutiny under federal law and strict scrutiny under state law. *See supra* at Section I. Female sex workers could mount viable challenges to their solicitation charges and show that law enforcement is treating male buyers—who are similarly situated to female sellers because Cal. Penal Code 647(b) aims to deter all parties involved in prostitution—differently based on gender. The data shows a real gender disparity. This disparity combined with evidence in a particular situation could show discriminatory purpose or policy with discriminatory design. Thus, it is important that women continue to have an avenue to challenge the gender discrimination they may experience when the solicitation law is enforced against them.

### **CONCLUSION**

Because the lower court erred in the legal standard it applied, we urge the Court to reverse and remand the lower court ruling.

Dated: October 7, 2016

Respectfully submitted,

s/ Melissa Goodman  
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## CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(c), FRAP 32-1, and FRAP 29(c)(7)(d) I certify that *Amicus Curiae* Brief in Support of Plaintiffs-Appellants is proportionately spaced, has a typeface of 14 points or more, and contains 6,980 words.

Dated: October 7, 2016

Respectfully submitted,

s/ Melissa Goodman  
MELISSA GOODMAN  
Counsel for *Amici*  
ACLU Foundation  
of Southern California

**CERTIFICATE OF SERVICE**

I hereby certify that on October 7, 2016, I caused to be electronically filed the foregoing *Amicus Curiae* Brief in Support of Plaintiffs-Appellants, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 7, 2016

Respectfully submitted,

s/ Melissa Goodman  
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