

No. 16-15927

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

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**EROTIC SERVICE PROVIDER LEGAL, EDUCATION & RESEARCH  
PROJECT; K.L.E.S.; C.V.; J.B.; AND JOHN DOE**  
*Plaintiffs-Appellants*

v.

**GEORGE GASCÓN, District Attorney of the City and County of San  
Francisco; EDWARD S. BERBERIAN, JR., District Attorney of the County  
of Marin; NANCY E. O'MALLEY, District Attorney of the County of  
Alameda; JILL RAVITCH, District Attorney of the County of Sonoma; and  
KAMALA D. HARRIS,**  
**Attorney General of the State of California,**  
*Defendants-Appellees*

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**On Appeal from the United States District Court  
for the Northern District of California  
Honorable Jeffrey S. White, Case No.: C 15-01007 JSW**

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**BRIEF OF *AMICUS CURIAE* CHILDREN OF THE NIGHT  
SUPPORTING PLAINTIFFS-APPELLANTS  
EROTIC SERVICE PROVIDER LEGAL, EDUCATION &  
RESEARCH PROJECT, K.L.E.S.; C.V.; J.B.; AND JOHN DOE AND  
SUPPORTING REVERSAL**

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Jerald L. Mosley  
Law Offices of Jerald L. Mosley  
372 S. Santa Anita Ave.  
Pasadena, California 91107  
(626) 710-6621

*Attorney for Amicus Curiae*

**CORPORATE DISCLOSURE STATEMENT**

*Amicus curiae* Children of the Night is a nonprofit corporation with no parent corporation and no shareholders.

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*Amicus Curiae* Children of the Night submits this brief in support of plaintiffs-appellants Erotic Service Provider Legal, Education & Research Project, K.L.E.S., C.V., J.B., and John Doe.<sup>1</sup>

Pursuant to Fed. R. App. P. 29(a) and Circuit Rule 29-3, *amicus curiae* inquired of all parties to this appeal whether they would consent to the filing of this brief. All parties have consented to its filing.

### **STATEMENT OF IDENTITY AND INTEREST**

Children of the Night (“*Amicus*”) is a non-profit organization established in 1979. Although the specific purpose of this corporation is to provide intervention in the lives of children who are sexually exploited and vulnerable to or involved in prostitution and pornography, it provides life-changing services to adults as well as children. Its services are designed to intervene, rescue, socialize, educate and permanently remove both children and adults from prostitution. Over the last 37 years, Children of the Night has rescued over 10,000 American children and countless adults from prostitution right here in the United States. It has placed over 100 children in colleges.

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<sup>1</sup> No party to this appeal nor counsel for such party authored this brief in whole or in part, and no such party or counsel or any person, other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

From 1981 to 1989 *Amicus* operated the nation's first drop-in center for prostitutes in the heart of Hollywood. The center received both adult and child clients who found themselves forced to work as prostitutes for survival. Along with the drop-in center, *Amicus* managed street teams working throughout the western region of the United States and reaching out to adults, children, males, females, and transgender individuals working as prostitutes.

*Amicus*' hotline is a vital element of its service to both adults and minors. At its inception the hotline was instrumental in the identification, arrest, and prosecution of the Hillside Stranglers in 1980. One particularly important way it serves minors is by providing a number for children to call from anywhere in the United States. *Amicus* is designed to respond to the child's call, to provide skilled child care workers around the clock, to intervene with the police and to assist the child in escaping from dangerous conditions. Indeed, in response to the call, *Amicus* arranges transportation to an airport, a pre-paid flight to Los Angeles International Airport, and a child care worker to meet the child at the airport. It then shelters the child in a safe home within 24 hours of the child's call for help.

The only service that is exclusively for children is *Amicus*' comprehensive shelter home which opened in 1992 for children ages 11-17 who are victimized by prostitution. The home features an on-site school and college placement program. After youngsters complete the rigorous and comprehensive program of academic

and life-skills education, caseworkers are available to provide ongoing case management.

As of 2011 *Amicus* has instituted a program to assist clients of any age who want to obtain a high school equivalency certificate. *Amicus* offers online academic assessments, tutoring, funding for states' tests, assistance with registering for equivalency exams and transportation to testing sites throughout the country. It is committed to helping anyone obtain an education enabling them to enter the military, obtain civil service jobs or attend educational institutions of higher learning. It provides real opportunities which will permanently remove people from the streets of our nation.

Based on its long-standing service, *Amicus* enjoys an exceptional expertise on the lives and needs of children and adults in prostitution and the effect on their lives of California law and policy. *Amicus* has discovered through its years of caring for, protecting, and educating prostitutes, who are often destitute and vulnerable, that California's Penal Code section 647(b), which broadly criminalizes anyone engaged in prostitution, does not serve to protect these needy individuals. To the contrary, it stifles their opportunities, brands them as pariahs, and makes it difficult for them to obtain protection, safety and traditional social services. It all too often leaves them no alternative but to remain in, or return to, prostitution.

## PRELIMINARY STATEMENT

In dismissing the action below without trial the district court not only made rulings on the nature of the rights affected by California Penal Code section 647(b) and the applicable standard for statutory review, but it also ruled on a complex factual issue: whether the state has an interest in maintaining this broad anti-prostitution provision. The brief discussion of state interest appears on pages 9–10 of the dismissal order, but the court spends very little time discussing the issue or why it is appropriate to rule on this factual matter without the benefit of evidence submitted at trial. Of greatest importance to *Amicus*, the discussion makes no mention of the baleful effect that criminalizing prostitution has on the lives of the troubled and vulnerable adults and children it serves.

Section 647(b) stands apart from other Penal Code provisions which do serve to protect those in great need of protection. Rape, sex with minors, battery, abduction and trafficking are all serious offenses covered elsewhere in the code. The district court's order does not articulate any substantive rationale for maintaining section 647(b) in light of these other penal provisions and in light of the counter-productive and harmful effects of the section.

The district court's dismissal should be reversed and the matter remanded for a full trial where evidence on all factual issues can be presented. Despite the district court's references to ostensibly protective functions of section 647(b) (pp



9-10), adequately aired facts will bring to light the severe harms to which 647(b) subjects the state's most needy. Those facts will demonstrate not only that there is no legitimate protective rationale for the section but that the extreme harm done by the section undermines *any* rationale for the state's treatment of the troubled, wayward and marginalized as disposable.

## ARGUMENT

### I. SECTION 647(b) FAILS CONSTITUTIONAL REVIEW UNDER ANY STANDARD OF STATUTORY REVIEW.

*Amicus* defers to appellants the analysis of constitutional due process and the standard of review applicable to their appeal. However, although *Amicus* does not suggest that a minimal standard of statutory review is appropriate, its discussion below raises issues that undermine the constitutionality of section 647(b) under any standard of review. Thus, *Amicus* notes case authority outlining that minimal standard under the Due Process clause applicable below. In *Meyer v. Portfolio Recovery Associates, LLC*, 707 F.3d 1036, 1045 (9<sup>th</sup> Cir. 2012) this court held that under substantive due process standards a statute must not be arbitrary and must implement a rational means of achieving a legitimate governmental end even where a fundamental right is not implicated. In *United States v. Salerno* 481 U.S. 739, 751, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), the High Court held that under substantive due process standards, pretrial detention violates an individual's strong

and fundamental interest in liberty—an interest which can only be overcome “where the government’s interest is sufficiently weighty.”

## **II. THE PERVASIVE HARMS EFFECTED BY SECTION 647(b) DEFEAT ITS LEGITIMACY.**

### **A. Harmful Effects of Legislation Defeat any Underlying State Interest.**

The harms done by the means a legislature chooses to reach its goals may themselves defeat the validity of those means under constitutional analysis. In *Hodgson v. Minnesota*, 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990), the Supreme Court found that Minnesota’s requirement that a minor notify both of her parents before terminating her pregnancy was unconstitutional in that it was not reasonably related to legitimate state interests. The majority opinion supported its holding with an extensive harms-done analysis of the statute.

Likewise, the harmful effects section 647(b) has on the very individuals it seeks either to protect or to correct renders the provision unconstitutional under any standard of review. Based on its extensive experience, *Amicus* provides below an overview of the real-world effects of section 647(b): effects which could and should be evidenced at trial.

**B. Section 647(b) Endangers, Isolates, Stigmatizes, and Locks  
Individuals into Prostitution.**

**1. Criminalization Itself Exposes Prostitutes to Harm and  
Isolates Them from Protection.**

*Amicus*' extensive experience has shown that criminalizing prostitution does not serve to protect prostitutes from violence, trafficking, health problems or coercion. To the contrary, it exposes them to harm, including blackmail when the fear of arrest or losing custody of their children makes prostitutes vulnerable to blackmail and extortion.

Compounding the abusive climate in which many prostitutes must live is the fact that criminalization makes it extremely difficult for them to seek out law enforcement for protection. Criminalization transforms those in the sex trade into a hidden population that is fearful of accessing law enforcement or public services for protection or other benefits because of the constant threat of arrest.

Many men and women prostitutes seek *Amicus*' help when they encounter hardships and dangers associated with prostitution including difficulty in leaving an abusive pimp. Because prostitution is criminalized they have nowhere else to turn without risking arrest and incarceration.

Not only does section 647(b) place a prostitute in a helpless position after she has been victimized, but it increases the likelihood of her being victimized by a

predator who anticipates she will not report crimes. In short, criminalization makes her an inviting target, a target for a range of abuses including rape. If she is on the street, she is vulnerable to assault by a criminal who knows she will probably not report an assault and, if she does, she may not be taken seriously. If she is in a private location with a client, although she is breaking the law, she retains the fundamental right to control her own body, and she may indeed make every effort to do just that by setting clear limits as to what she will and will not do. When the client forcefully breaches those limits, he is a rapist. But he is a rapist who knows that it will be extremely difficult for her to report his crime and if she courageously does go to the police her credibility may well be made an issue draped as she is with the mantle of an outlaw. In essence, criminalizing her publicizes her vulnerability to assault.

The fears of a prostitute not only hold her<sup>2</sup> back from reporting crimes against *herself*, but keep her from reporting crimes against others which she has witnessed. Hence, it affects the lives of other victims in that it degrades law enforcement's general capacity to investigate and apprehend predators who abuse or traffic children or adults in the sex trade.

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<sup>2</sup> *Amicus* serves both males and females. The female pronoun is used generically here only because females make up the majority of those swept up into prostitution.

Criminalization also affects the lives of children who are not prostitutes. A mother who is making ends meet by selling sexual services is in a very difficult position in trying to provide the protection for her children that any mother strives for. She faces the possible termination of her parental rights if she calls upon traditional social or law enforcement agencies to protect her children if they are threatened with physical or sexual abuse.

A trial on the merits would thoroughly discredit the that criminalizing individuals under 647(b) can or should be used as a tool for investigating abuse, violence and trafficking. It is not a tool that ultimately benefits those trapped in a life of abuse, violence or coercion.

From a broader perspective, the contention that the threat of prosecution for prostitution is needed in order to pry information about trafficking out of reluctant prostitutes suggests that the criminalization of a population can be justified on the sole ground that it creates a tool for intimidating witnesses into cooperating with law enforcement. Be that as it may, law enforcement has the opportunity to question suspects or witnesses in their investigations of violence or trafficking whether or not sex work itself is illegal.

## **2. Criminalization Locks a Prostitute into a Life of Prostitution.**

Since its creation, *Amicus* has striven to provide educational opportunities and a future to those it serves, and it has placed over 100 in colleges. But the branding effect of an arrest or a conviction record under section 647(b) is an enormous impediment to that effort. A conviction for prostitution sets one apart from mainstream society and obstructs access to legitimate jobs, especially those requiring licensure. In effect, an arrest record stymies a prostitute's effort to do what, presumably, the state wants her to do: change her life, and pursue a stable career. In short, criminalization locks a prostitute into prostitution.

Sadly, *Amicus*' experience shows that at the same time that criminalization blocks legitimate options it increases illegitimate ones. Jails are the largest and most effective recruiting ground used by pimps. Women incarcerated for prostitution hear from other inmates about the unique opportunities provided by their pimp. The pimp then visits the potential recruit and promises her a better life.

Small nonprofit organizations like Children of the Night work hard to turn around the lives of those trafficked or otherwise trapped in an abusive life in the sex trade. But a great deal of their work is taken up in an untiring effort to combat the negative effects of the criminalization of prostitution. Those negative effects

have reached constitutionally relevant proportions, and they thoroughly undermine any interest the state may have in turning prostitutes into criminals.

In short, the law does not serve to improve lives and extricate individuals trapped in desperation and powerlessness. It does not lift hopes or provide opportunities to turn a damaged and destitute life around. Whatever theoretical claims may be heard about the beneficial effects of criminalizing these individuals, the facts on the ground, facts confronted every day by Children of the Night, demonstrate otherwise, and those facts must be aired at trial.

### CONCLUSION

In light of the pervasive harms effected by section 647(b), *Amicus* respectfully requests that the order of dismissal entered below be reversed and the matter remanded for a trial on the merits.

Respectfully submitted this 4th day of October, 2016.

JERALD L. MOSLEY  
LAW OFFICES OF JERALD L. MOSLEY

By: s/ Jerald L. Mosley  
Jerald L. Mosley  
Attorney for *Amicus Curiae* Children  
of the Night

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,368 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

s/ Jerald L. Mosley  
Jerald L. Mosley



**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 5, 2016.

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.

s/ Jerald L. Mosley  
Jerald L. Mosley