16-15927

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs and Appellants,

v.

GEORGE GASCON, in his official capacity as District Attorney of the City and County of San Francisco; EDWARD S. BERBERIAN, JR., in his official capacity as District Attorney of the County of Marin; NANCY E. O'MALLEY, in her official capacity as District Attorney of the County of Alameda; JILL RAVITCH, in her official capacity as District Attorney of the County of Sonoma; and KAMALA D. HARRIS, in her official capacity as Attorney General of the State of California,

Defendants and Appellees.

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

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INTRODUCTION

Plaintiffs (collectively, "ESP") seek to invalidate more than 140 years of California law sanctioning prostitution as a misdemeanor crime. ESP contends that laws criminalizing prostitution violate the constitutional rights of adults who wish to buy or sell sex, specifically substantive due process and freedom of intimate association. Such a ruling would invalidate laws throughout the Ninth Circuit, for ESP's arguments are not specific to California's laws, but attack generally any law that criminalizes prostitution.

The district court properly dismissed ESP's complaint for failure to state a cognizable constitutional claim. But for a handful of rural counties in Nevada, prostitution is a crime in every state, and courts have consistently upheld these laws against constitutional challenges like this one. No court has held that the relationship between prostitute and client is the kind of highly personal relationship protected by the Constitution, and ESP provides no convincing argument, based either on law or on public policy, to hold otherwise. This Court should affirm the district court's judgment.

STATEMENT OF JURISDICTION

The Attorney General agrees with ESP's Statement of Jurisdiction with one exception. The statement that the district court "had supplemental jurisdiction over the state law claim under 28 U.S.C. § 1367(a)," is incorrect.

The Attorney General moved to dismiss as barred, pursuant to Eleventh Amendment sovereign immunity, ESP's claim based on violation of the California Constitution. ESP's Excerpts of Record ("ER") at 0105-06. ESP did not oppose dismissal for lack of supplemental jurisdiction in the trial court. *Id*. at 0082.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court properly determine that California Penal Code section 647(b), which criminalizes prostitution, is subject to rational basis review because it does not impinge on a fundamental right protected by the Fourteenth Amendment's Due Process Clause?

2. Did the district court properly determine that Penal Code section 647(b) survives rational basis review?

3. Did the district court properly determine that that the relationship between prostitute and client is not an associational right protected by the First Amendment?

4. Did the district court properly determine that there is no First Amendment free speech right to solicit prostitution?

5. Did the district court properly determine that there is no due process liberty or property interest in earning a living as a prostitute?

STATEMENT REGARDING ADDENDUM

In accordance with Ninth Circuit Rule 28-2.7, the addendum to this brief includes section 647(b) of the California Penal Code; the portion of Senate Bill 420 that amends section 647(b) of the California Penal Code, effective January 1, 2017; the First Amendment of the U.S. Constitution; and the Fourteenth Amendment, section 1 of the U.S. Constitution.

STATEMENT OF THE CASE

I. CALIFORNIA PENAL CODE SECTION 647 CRIMINALIZES PROSTITUTION.

Prostitution has been a criminal misdemeanor in California since at least 1872, when Penal Code section 647 was first enacted,[1] but the nature of the crime has evolved over time. As originally enacted, section 647 targeted status, providing that "vagrants," defined to include "[e]very lewd or dissolute person," "[e]very person who lives in and about houses of ill-fame," and "[e]very common prostitute," were subject to punishment by a $500 fine, imprisonment in jail for a term not exceeding six months, or both. SER 006-7; *see* ER 0112, 0117, Arthur H. Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CAL. L. REV. 557, 562

[1] California's Penal Code was codified in 1872. *See* The Attorney General's Supplemental Excerpts of Record ("SER") 002, 006-7.

& n.38 (1960). In 1961, the legislature repealed that statute, and replaced it with one that sanctioned conduct, not status. SER 009-10; 1961 Cal. Stat. 1671, CAL. PENAL CODE § 647(b). The 1961 enactment of section 647, provided, in pertinent part:

> Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor:
>
> * * *
>
> (b) Who solicits or engages in any act of prostitution.

1961 Cal. Stat. 1671, CAL. PENAL CODE § 647 (1961).

The version of section 647(b) in effect when this lawsuit was filed targeted more specific conduct. It provided:

> Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor:
>
> * * *
>
> (b) Who solicits or who agrees to engage in or who engages in any act of prostitution. A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the

> commission of an act of prostitution by the person agreeing to engage in that act. As used in this subdivision, "prostitution" includes any lewd act between persons for money or other consideration.

CAL. PENAL CODE § 647 (2015).

After this case was filed, in September 2016 the Legislature enacted Senate Bill 420, which amended section 647. 2016 Cal. Legis. Serv. Ch. 734 (SB 420) § 1.4 (West).[2] In pertinent part, the amendment creates three classifications:

> (1) An individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with the intent to receive compensation, money, or anything of value from another person. . . .
>
> (2) An individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with another person who is 18 years of age or older in exchange for the individual providing compensation, money, or anything of value to the other person. . . .
>
> (3) An individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with another person who is a minor in exchange for the individual providing compensation, money, or anything of value to the minor. . . .

Id. The statute as amended decriminalized solicitation of prostitution by children. It provides:

[2] SB 420 will become effective January 1, 2017. CAL. CONST. art. IV, § 8(c)(1).

> [T]his subdivision does not apply to a child under 18 years of age who is alleged to have engaged in conduct to receive money or other consideration that would, if committed by an adult, violate this subdivision. A commercially exploited child under this paragraph may be adjudged a dependent child of the court pursuant to paragraph (2) of subdivision (b) of Section 300 of the Welfare and Institutions Code and may be taken into temporary custody pursuant to subdivision (a) of Section 305 of the Welfare and Institutions Code, if the conditions allowing temporary custody without warrant are met.

Id. (adding subdivision (5) to section 647(b)).

The new provision protecting children from criminal sanctions for soliciting prostitution is part of a broader legislative effort recognizing that such children are themselves victims of sex trafficking.[3] *See, e.g.*, 2016 Cal. Legis. Serv. Ch. 425 (SB 794) (requiring child welfare agencies and probation departments to implement policies and procedures to increase services to address the needs of children who are, or are at risk of becoming, victims of commercial sexual exploitation); 2016 Cal. Legis. Serv. Ch. 641

[3] Human trafficking is the deprivation or violation of the personal liberty of another, including "substantial and sustained restriction of another's liberty accomplished through force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury" with the intent to obtain forced labor or services. CAL. PENAL CODE § 236.1(a), (h)(3), (h)(5) (2012). Sex trafficking is human trafficking in which the forced labor or services is a commercial sex act. 22 U.S.C. § 7102; *see* CAL. PENAL CODE § 236.1.

(AB 2221) (adding section 236.16 to the Penal Code, which provides that minors who are victims of human trafficking be provided with assistance from local victim witness assistance centers); Cal. Legis. Serv. Ch. 749 (AB 2027) (amending section 679.11 of the Penal Code to make it easier for child victims of sex trafficking to obtain temporary immigration benefits).

Also in 2016, the legislature enacted other laws to protect victims of human trafficking from criminal liability. These laws provide an affirmative defense of coercion (that the person was coerced to commit the offense as a direct result of being a human trafficking victim), Cal. Legis. Serv. Ch. 636 (AB 1761); and a right to seek relief from a conviction for solicitation or prostitution where that conviction directly resulted from being a victim of human trafficking, Cal. Legis. Serv. Ch. 650 (SB 823 (enacting CAL. PENAL CODE § 236.14).

II. PROCEDURAL HISTORY.

Plaintiffs are Erotic Service Provider Legal, Education & Research Project, three former "erotic service providers" who wish to engage in sex for hire in this district, and a potential client who wishes to engage an "erotic service provider" for such activity. ER 0292, 0296-97, ¶¶ 6, 25-28. Defendants are the district attorneys of the City and County of San Francisco,

Marin County, Alameda County and Sonoma County, and the Attorney General of California (collectively, the "State").

The complaint alleges that section 647(b) runs afoul of four separate constitutional guarantees, and is unconstitutional both facially and as-applied. ER 0298-0302, ¶¶ 35-40, 43-46, 49-52, 55-57. ESP alleges that adults have a fundamental right to engage in private, consensual, commercial sexual conduct; that the statute is therefore subject to strict scrutiny; that no legitimate government interest could possibly justify California's prostitution laws; and that the law is neither narrowly tailored nor the least restrictive means for advancing any government interest. ER 0298-99, ¶¶ 35-38. The complaint also alleges that the statute violates ESP's First Amendment right to enter into intimate or private relationships, that the statute's prohibition on solicitation violates their First Amendment right to free speech, and that the statute violates their Fourteenth Amendment due process right to earn a living. ER 0299-302, ¶¶ 43-45, 49-51, 55-56. The district court granted the Attorney General's motion to dismiss the complaint for failure to state a claim without leave to amend, in which the district attorneys joined. ER 0001, 0011, 0084, 0091.[4]

[4] The joinders are ECF Nos. 23-26.

The district court defined ESP's asserted fundamental interest as the intimate association between prostitute and client, and held that this interest is not "a fundamental right requiring the application of strict scrutiny" to Penal Code section 647. ER 0008. Applying rational basis review, the court considered the State's asserted government interests in "preventing a climate conducive to violence against women and potential human trafficking, preserving the public health, and deterring the commodification of sex." ER 0009. While the court observed that "moral disapproval is not an adequate or rational basis for criminalizing conduct," it concluded that criminalizing prostitution has other justifications, "including promoting public safety and preventing injury and coercion." ER 0010. The court determined that the State had "proffered sufficient legitimate government interests" to satisfy rational basis review, and therefore dismissed the substantive due process and freedom of association claims for inability to state a claim as a matter of law. ER 0010-11. The court similarly dismissed the free speech claims because "there is no constitutional bar to banning commercial speech related to illegal activity." ER 0010. Finally, the court held that there is no constitutionally protected liberty or property interest in the profession of prostitution. ER 0011.

The district court granted leave to amend the complaint. ER 0011-12. ESP instead filed this appeal. ER 0017.

SUMMARY OF THE ARGUMENT

California Penal Code section 647(b) does not violate substantive due process, freedom of intimate association, freedom of speech, or any liberty or property interest in employment as a prostitute. A long line of cases establishes that the relationship between prostitute and client is not one that the Constitution protects. Accordingly, the trial court properly applied rational basis review, and found that section 647(b) survives this deferential standard. The argument that *Lawrence v. Texas*, 539 U.S. 558 (2003), and its progeny recognized a substantive due process right to buy and sell sex distorts the reasoning of these cases and is unconvincing. Arguments advanced by amici, that there are better ways to address the ills associated with prostitution, may be worthy of public discussion but do not demonstrate that the law offends the Constitution.

ESP's other constitutional claims fail with the substantive due process claim. The claim based on freedom of intimate association is subsumed within the substantive due process claim. The claims based on freedom of speech and a liberty and property right to pursue employment as a prostitute similarly fail. As ESP concedes, the State may ban commercial speech

related to an illegal activity, and there is no right to pursue a profession that the State has deemed a crime. Accordingly, the judgment of the district court should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews de novo a decision granting a motion to dismiss for failure to state a claim. *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1159 (9th Cir. 2012). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations and internal quotation marks omitted).

In determining the constitutionality of a statute, absent circumstances triggering a higher level of scrutiny, rational basis review applies. *Romero-Ochoa v. Holder*, 712 F.3d 1328, 1331 (9th Cir. 2013). "Such review does not provide 'a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *Id*. (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). The issue is not whether the legislature has chosen the

best means for achieving its purpose, but only whether there are plausible reasons for the legislature's action. *Id*.

II. THERE IS NO SUBSTANTIVE DUE PROCESS RIGHT TO BUY OR SELL SEX.

A. The Prostitute Client Relationship Is Not the Kind of Personal Relationship Protected as a Fundamental Right

The Supreme Court and this Court have recognized that Fourteenth Amendment substantive due process protects "highly personal relationships" as a fundamental right. *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984); *IDK, Inc. v. Clark County*, 836 F.2d 1185, 1192 (9th Cir. 1988). "By the very nature of such relationships, one is involved in a relatively few intimate associations during his or her lifetime." *IDK*, 836 F.2d at 1193. Laws that cause a "significant deprivation" of a fundamental right are subject to strict scrutiny, rather than rational basis review. *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1310-11 (9th Cir. 1982); *Haw. Boating Ass'n v. Water Transp. Facilities Div.*, 651 F.2d 661, 664-65 (9th Cir. 1981). Here, rational basis review applies because the relationship between prostitute and client is not among the personal relationships substantive due process protects.

This Court's decision in *IDK* is controlling. That case held that the relationship between paid escort and client is not an intimate relationship

protected by substantive due process. *IDK*, 836 F.2d at 1193. The Court weighed the relevant factors: "the group's size, its congeniality, its duration, the purposes for which it was formed, and the selectivity in choosing participants," and rejected the claim that the relationship between paid escort and client was constitutionally protected, explaining:

> As a couple, an escort and client are the smallest possible association. In other regards, however, the relationship between escort and client possesses few, if any, of the aspects of an intimate association. It lasts for a short period and only as long as the client is willing to pay the fee. . . . While we may assume that the relationship between them is cordial and that they share conversation, companionship, and the other activities of leisure, we do not believe that a day, an evening, or even a weekend is sufficient time to develop deep attachments or commitments. In fact, the relationship between a client and his or her paid companion may well be the antithesis of the highly personal bonds protected by the fourteenth amendment

Id. This analysis applies with equal or greater force to the relationship between prostitute and client.

This Court's subsequent decision in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013), is consistent. In *Pickup*, the Court held that "[t]he relationship between a client and psychoanalyst lasts only as long as the client is willing to pay the fee. Even if analysts and clients meet regularly and clients reveal secrets and emotional thoughts to their analysts, these

relationships simply do not rise to the level of a fundamental right." *Id*. at 1233 (citation omitted). In both *IDK* and *Pickup*, this Court held that because the relationships were not constitutionally protected, the statutes at issue were subject to rational basis review. *See Pickup*, 740 F.3d at 1231; *IDK*, 836 F.2d at 1195.

B. Arguments That There Is a Fundamental Right to Buy or Sell Sex Are Meritless.

ESP makes several misguided arguments that the relationship between prostitute and client is a fundamental right, and that laws infringing that right must survive strict scrutiny. As set forth below, these arguments — that *Lawrence v. Texas* and its progeny require this conclusion, that the test for a fundamental right is merely "reasoned judgment," and that the relationship between prostitute and client is "a necessary corollary" of the right to have intimate personal relationships — all are meritless.

1. *Lawrence v. Texas* does not suggest that there is a constitutional right to engage in prostitution.

ESP mistakenly relies on *Lawrence v. Texas*, 539 U.S. 558, to support its claim that prostitution is a fundamental right. In *Lawrence*, the Supreme Court struck down a Texas law making it a crime for two persons of the same sex to engage in sodomy, ruling that "two adults who, with full and mutual consent from each other, engaged in sexual practices common to a

homosexual lifestyle . . . are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime." 539 U.S. at 578.

ESP's contention that in *Lawrence* "the Supreme Court has shifted the definition of the protected liberty interest to comprise merely sexual or intimate conduct, as opposed to the relationship in which the sexual or intimate conduct occurs," *see* ER 0006, distorts the Court's analysis. *See Muth v. Frank*, 412 F.3d 808, 818 (7th Cir. 2005) (rejecting an argument that adult consensual incest falls within the rights protected under *Lawrence*, and holding that "*Lawrence* did not announce a fundamental right of adults to engage in all forms of private consensual sexual conduct").

The focus in *Lawrence* was not on sexual acts per se, but on the right of consenting adults to engage in sex as one expression of a protected personal relationship. 539 U.S. at 566-67. On these grounds the Court overruled its earlier decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), rejecting the analysis that focused on sodomy as merely a sex act, rather than as part of the expression of a personal relationship. *Id*. at 566-67. The Court reasoned, "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." *Id*. at 567.

In this same vein, the *Lawrence* Court found that *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), "reaffirmed the liberty protected by the Due Process Clause" and "again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education." *Lawrence*, 539 U.S. at 573-74. Quoting from *Casey*, the *Lawrence* Court explained:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id. at 574. *Lawrence*'s core message is that sex may be an important part of personal relationships that are protected as fundamental rights, not that sex itself is a fundamental right.

Lawrence also was explicit that the relationships it sought to protect did not encompass the relationship between prostitute and client. The Court explained:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might

> not easily be refused. *It does not involve public conduct or prostitution.* . . .

Id. at 578 (emphasis added).

Nor is there any indication that the Court in *Lawrence* intended to overrule its earlier decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990), which decision is incompatible with a conclusion that prostitution is constitutionally protected. In *FW/PBS*, the Court rebuffed a challenge to regulations governing motels that rent rooms for less than 10 hours, which were designed to suppress prostitution. *Id*. at2 37. The Court rejected the motel owners' argument that the regulations placed an unconstitutional burden on the right to freedom of association under *Roberts v. United States Jaycees*, 468 U.S. at 618, and held that "[a]ny 'personal bonds' that are formed from the use of a motel room for fewer than 10 hours" are not protected intimate associations under the Due Process Clause. 493 U.S. at 237.

2. Decisions postdating *Lawrence* do not suggest that its reasoning can be used to protect prostitution.

ESP's argument that decisions issued after *Lawrence*, specifically *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008), protect sexual conduct broadly,

including prostitution, also lack merit. Appellants' Opening Brief ("AOB") at 22-23.

In striking down state laws banning same-sex marriage, the *Obergefell* Court emphasized that the right protected by the Constitution was the right to marry. *See, e.g.*, 135 S. Ct. at 2593-2594 ("From their beginning to their most recent page, the annals of history reveal the transcendent importance of marriage."); *id.* at 2599 ("[C]ivil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition."). Unlike prostitution, marriage has long been recognized as intimate association that is constitutionally protected. *See id*. at 2598; *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987); *Roberts v. United States Jaycees*, 468 U.S. at 619-620.[5]

[5] This Court's decision in *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), likewise focused not on sex, but on the underlying relationship of which it is a part, and quoted *Lawrence* for that proposition:

> Just as "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse," *Lawrence*, 539 U.S. at 567, 123 S. Ct. 2472, it demeans married couples—especially those who are childless—to say that marriage is simply about the capacity to procreate.

Id. at 472. ESP's suggestion that Judge Berzon's statement that *Lawrence* recognized a right to engage in "licit, consensual sexual behavior . . . when it (continued…)

Obergefell focused on personal relationships within marriage, not sex, much less prostitution. ESP's statement that *Obergefell* "reaffirmed that '*Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminality'," AOB at 23 (quoting *Obergefell* at 2600), ignores the context in which that statement was made, namely that "same-sex couples have the same right as opposite-sex couples to enjoy intimate association." *Obergefell*, 135 S. Ct. at 2600.

ESP also mistakenly relies on *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, which struck down a Texas law that criminalized the sale of sexual devices. That decision, too, considered sex as one expression of a personal relationship. The Fifth Circuit explicitly rejected the suggestion that its decision was "equivalent to extending substantive due process protection to the 'commercial sale of sex'," explaining:

> The sale of a device that an individual may choose to use during intimate conduct with a partner in the home is not the "sale of sex" (prostitution). Following the State's logic, the sale of contraceptives would be equivalent to the sale of sex because contraceptives are intended to be used for the pursuit of sexual gratification unrelated to procreation. This argument

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(…continued)
occurs in private," *id*. at 489 (Berzon, J., concurring) has no relevance to prostitution, which is illicit, not licit, conduct.

> cannot be accepted as a justification to limit the sale of contraceptives. The comparison highlights why the focus of our analysis is on the burden the statute puts on the individual's right to make private decisions about consensual intimate conduct. Furthermore, there are justifications for criminalizing prostitution other than public morality, including promoting public safety and preventing injury and coercion.

Id. at 746. In short, neither *Obergefell* nor *Reliable Consultants* support recognizing the purchase or sale of sex as a fundamental right.[6]

Other decisions following *Lawrence* have declined to extend it to prostitution or the other types of sexual conduct the *Lawrence* Court disclaimed. *See, e.g.*, *People v. McEvoy*, 215 Cal. App. 4th 431, 439-440 (Ct.App. 2013) (holding that the criminalization of incest between two consenting adults does not violate the due process rights explicated in *Lawrence); Muth v. Frank*, 412 F.3d at 818 (to the same effect); *State v. Romano*, 155 P.3d 1102, 1109-1112 (Haw. 2007) (holding that Hawaii's prostitution statute did not violate defendant's right to privacy under the Due Process Clause); *832 Corp. v. Glouster Twp.*, 404 F. Supp. 2d 614, 625

[6] ESP incorrectly relies on *Flanigan's Enterprises, Inc. v. City of Sandy Springs*, 831 F.3d 1342 (11th Cir. 2016). AOB at 24. *Flanigan* held that consenting adults do *not* have a constitutional right to sexual intimacy that would encompass a right to buy, sell or use sexual devices. 831 F.3d at 1348. The fact that the panel suggested that an *en banc* court could reach a contrary conclusion on the right to use sex toys does not suggest anything about extending constitutional protection to prostitution.

(D.N.J. 2005) (holding that police raid on a club where patrons publicly engaged in consensual sex was not a violation of substantive due process); *People v. Williams*, 811 N.E.2d 1197, 1198-99 (Ill. App. 2004) (holding that *Lawrence* did not apply to acts of prostitution).

Nor is there any evidence in the aftermath of *Obergefell* of a trend toward recognizing sexual conduct per se as a fundamental right. For example, in *Beverly Hills Suites LLC v. Town of Windsor Locks*, 136 F. Supp. 3d. 167, 186 (D. Conn. 2015), the district court held that "swingers" who engage in casual sex in a hotel do not have a constitutionally protected right of association. In so doing, the court relied on *FW/PBS, Inc. v. City of Dallas*, 493 U.S. at 237. The *Beverly Hills* court observed that "[t]he Constitution does not recognize a generalized right of social association. The right generally will not apply, for example, to business relationships, chance encounters in dance halls, or paid rendezvous with escorts." 136 F. Supp. 3d at 186 (quoting *Sanitation & Recycling Indus., Inc. v. City of N.Y.*, 107 F.3d 985, 996 (2d Cir. 1997)).[7]

[7] Even if consensual sexual conduct divorced from any protected personal relationship were a constitutionally protected fundamental right (and it is not), the law ESP challenges does not prohibit sex, but the business of prostitution. As a general rule, a business relationship is not an intimate relationship entitled to constitutional protection. *IDK*, 836 F.2d at 1193

(continued…)

3. Arguments for scrutiny less deferential than rational basis review are meritless

ESP argues that even if strict scrutiny does not apply, the relevant legal standard is less deferential than rational basis review. None of these arguments has any legal foundation.

First, ESP appears to argue, incorrectly, that the legal standard to be applied in reviewing Section 647(b) is "reasoned judgment," and not "rational basis review." AOB at 25. Courts apply reasoned judgment in determining whether an *asserted interest* is a fundamental right protected by the due process clause; it is not a standard of review to be applied to the challenged statute itself. As the Supreme Court in *Obergefell* explained, "[c]ourts must exercise *reasoned judgment* in identifying interests of the person so fundamental that the State must accord them its respect." 135 S. Ct. at 2589 (emphasis added).

(…continued)
(paid escort and client do not enjoy a constitutionally protected intimate relationship); *Sanitation & Recycling Indus., Inc. v. City of N.Y.*, 107 F.3d at 996 ("The right [of intimate association] generally will not apply, for example, to business relationships"); *Hartman v. Walker*, No. 1:13-CV-355, 2015 WL 5470261, at *18 (E.D. Tex. Sept. 16, 2015) (relationship between an employee and his employer is not a constitutionally-protected intimate relationship); *Commonwealth v. McGee*, 35 N.E.3d 329 (Mass 2015) (commercial sexual activity is not constitutionally protected). Nothing in *Lawrence*, *Obergefell* or subsequent case law suggests any departure from these established principles.

Next, ESP mistakenly suggests that "heightened" scrutiny is warranted based on *Witt v. Department of Air Force*, 527 F.3d 806 (9th Cir. 2008). AOB at 27. At issue in *Witt* was a law that discriminated on the basis of sexual orientation, falling squarely within the interests protected in *Lawrence*. 527 F.3d at 809. The *Witt* court did not purport to state a broad rule for review of any laws regulating sexual conduct, but instead held that "when the government attempts to intrude on the personal and private lives of homosexuals, in a manner that implicates the rights in *Lawrence*" it is subject to heightened scrutiny. *Id*. at 819.[8] *See In re Golinski*, 587 F.3d 901, 904 (9th Cir. 2009) (describing *Witt* heightened scrutiny as "a balancing test for state sanction of homosexuality").

4. Prostitution is not a necessary corollary to a constitutionally-protected relationship.

While it acknowledges that Penal Code section 647(b) prohibits only the sale of sex, not sex itself, AOB at 37, ESP argues that the State may not "criminalize a commercial exchange that occurs in tandem with the exercise

[8] Moreover, the *Witt* court concluded that heightened scrutiny must be based on the application of the law to plaintiff's specific circumstances. 527 F.3d at 819. Here, ESP has no cognizable as-applied claim, since there are no allegations that the individual plaintiffs are being prosecuted or threatened with prosecution. *See Hoye v. City of Oakland*, 653 F.3d 835, 857-58 (9th Cir. 2011).

of [a] constitutionally protected right," because to do so would render the Constitution's protection of that right meaningless, AOB at 38. This attempt to compare criminalizing prostitution with restrictions on the right to obtain an abortion, the right to use contraceptives, the right to bear arms, the right to freedom of the press, the right to engage in political speech, and the right to counsel in a criminal case, AOB at 38-39, all fail. Even if there were a fundamental right to engage in sex (and there is not), these would be false analogies.

For example, one cannot reasonably use contraceptives if one cannot buy them. So a prohibition on the sale of contraceptives unduly burdens a citizen's fundamental right to use contraceptives, "not because there is an independent fundamental 'right of access . . .', but because such access is essential to exercise the constitutionally protected right." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688 (1977). But the act of prostitution is not "essential to the exercise" of the right of privacy or any other fundamental right. Sex is not a commodity, like contraception or a firearm, that cannot be reasonably obtained if not purchased. Unlike abortion, sex does not require the specialized services of a medical provider, for which payment reasonably is expected. One can have personal, intimate relationships, including sexual relationships, without engaging in

prostitution. Absent some other limiting law or regulation, such as laws against incest, pedophilia, and the like, ESP can engage in sexual relations with any willing partner. ESP just cannot pay or be paid for it.

The Supreme Court has been careful to emphasize that in striking laws, for example, restricting doctors from providing medical advice about contraceptives, it is not protecting commerce, but the underlying relationship that a regulation of commerce impinges upon. In *Griswold v. Connecticut*, the Court stated:

> We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. *This law, however, operates directly on an intimate relation of husband and wife* and their physician's role in one aspect of that relation.

381 U.S. 479, 482 (1965) (emphasis added.). The Court also emphasized that the anti-contraception laws at issue in that case used "means having the maximum destructive impact" on that marital relationship. *Id*. at 485.

III. SECTION 647(B) SURVIVES RATIONAL BASIS REVIEW.

The district court correctly held that the Attorney General "proffered sufficient legitimate government interests that provide a rational basis to

justify the criminalization of prostitution in California." ER 0010. The contrary arguments offered by amici fail to undermine this showing.[9]

A. Criminalization of Prostitution Is Rationally Related to the State's Interests in Deterring Human Trafficking, Violence, Drug Use, and Transmission of Sexually Transmitted Diseases.

The State offered four justifications for criminalizing prostitution —to deter human trafficking, violence (especially violence against women), drug use, and transmission of sexually transmitted diseases (STDs). Any one of these satisfies rational basis review. These are plausible, even compelling, reasons for a State's decision to criminalize prostitution, instead of legalizing it. Criminalization of prostitution reduces the demand for prostitution. *See* Sigma Huda (Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women &

[9] ESP does not argue that the statute lacks any rational basis, arguing exclusively that heightened scrutiny applies because the prostitute client relationship is a fundamental right. Amici Children of the Night and Lambda Legal Defense and Education Fund ("Lambda Legal") argue that the statute cannot survive "any standard of review," including rational basis. Children Amicus Brief at 5; *accord* Lambda Legal Amicus Brief at 7 n.4. The issue should not be considered, because it is not raised in Appellants' Opening Brief. *Sanchez-Trujillo v. I.N.S.* 801 F.2d 1571, 1581 n.9 (9th Cir. 1988), *abrogation on other grounds recognized in Cordoba v. Holder*, 726 F.3d 1106, 1116 (9th Cir. 2013) ("An amicus brief may not frame the questions to be resolved in an appeal"). But, as set forth below, even if the Court is inclined to consider them, these arguments would fail on the merits.

Children), UN Comm'n on Human Rights, *Integration of the Human Rights of Women and a Gender Perspective*, 17, U.N. Doc. E/CN.4/2006/62 (Feb. 20, 2006) [hereafter Huda] (urging that allowing prostitution "to remain or become legal . . . encourages the demand side of trafficking and is therefore to be discouraged"); Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. Pa. L. Rev. 1729, 1773 (May 2010) (criminalization of prostitution drives down demand); Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 301-04 (2011) [hereafter *Trafficking, Prostitution*] (same). Persons who, like the individual plaintiffs in this case, are deterred from becoming prostitutes, can avoid the associated evils of increased exposure to violence, illegal drugs and disease.

1. To deter human trafficking

The federal government recognizes that there is a link between prostitution and trafficking in women and children. *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 600 (9th Cir. 2010). *See* ER 0130-43, U.S. Dep't of State, *The Link Between Prostitution and Sex Trafficking* (Nov. 24, 2004); ER 0134, 0136, Bureau of Justice Statistics, U.S. Dep't of Justice, *Characteristics of Suspected Human Trafficking Incidents*, 2008-2010 1, 3 (April 2011) (reporting that 82% of suspected incidents of human trafficking

were characterized as sex trafficking, and more than 40% of sex trafficking involved sexual exploitation or prostitution of a child). Indeed, the distinction between a prostitute and a sex trafficking victim is blurred because of the coercion that prostitution typically involves. *See* Huda at 9; John Elrod, *Filling the Gap: Refining Sex Trafficking Legislation to Address the Problem of Pimping*, 68 VAND. L. REV. 961, 974-75 (Apr. 2015) [hereafter *Filling the Gap*]; *Trafficking, Prostitution* at 299-300; ER 0147, 0156, Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 118 (2006) [hereafter *What We Must Not Know*].

2. To deter violence, particularly violence against women.

Prostitution creates a climate conducive to violence against women. *See United States v. Carter*, 266 F.3d 1089, 1091 (9th Cir. 2001); ER 0147-55, *What We Must Not Know* at 109-17 (addressing pervasive violence in prostitution and concluding that "[r]egardless of prostitution's status (legal, illegal, zoned or decriminalized) or its physical location (strip club, massage parlor, street, escort/home/hotel), prostitution is extremely dangerous for women."); ER 0184, ER 0194, Sylvia A. Law, *Commercial Sex: Beyond*

Decriminalization, 73 S. Cal. L. Rev. 523, 533 nn.47-48 (2000) [hereafter, *Commercial Sex*] (reporting that a "study of 130 prostitutes in San Francisco found that 82% had been physically assaulted, 83% had been threatened with a weapon, [and] 68% had been raped while working as prostitutes," and that another study "demonstrate[ed] that violence is pervasive in the lives of all categories of women who sell sex for money"). A study of prostitutes in Colorado found that "active [female] prostitutes were almost 19 times more likely to be murdered than women of similar age and race during the study period." John J. Potterat, et al., *Mortality in a Long-term Open Cohort of Prostitute Women*, Vol. 159, No. 8, AM. J. OF EPIDEMIOLOGY 778, 782 (2004) [hereafter, *Mortality*].[10]

3. To deter illegal drug use.

There is a substantial link between prostitution and illegal drug use. *See Colacurcio v. City of Kent*, 163 F.3d 545, 554, 557 (9th Cir. 1998) (holding that requirement that nude dancers maintain distance from nightclub patrons served state interest in controlling prostitution and drug sales, and observing that several courts have upheld such requirements for

[10] Studies suggest that prostituted women also suffer from post-traumatic stress at levels equivalent to combat veterans, victims of torture and raped women. *Trafficking, Prostitution* at 286 & n.49.

the same dual purpose); ER 0274-85, Amy M. Young, et al., *Prostitution, Drug Use, and Coping with Psychological Distress*, J. DRUG ISSUES 30(4), 789-800 (2000). Studies have shown that there is a high level of drug use among prostitutes, both because many prostitutes sell sex to obtain money to buy drugs and because prostitutes use drugs as a coping measure. ER 0275, 0280-82 (describing a destructive spiral in which women engage in prostitution to support their drug habit and increase their drug use to cope with the psychological stress associated with prostitution).

4. To reduce the transmission of HIV/AIDs and other STDs

Legislatures are afforded broad discretion in adopting measures for the prevention of contagious and infectious diseases. *Jacobson v. Massachusetts*, 197 U.S. 11, 37-38 (1905); *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015); *Love v. Superior Court*, 226 Cal. App. 3d 736, 740 (Ct. App. 1990).

Prostitution is linked to the transmission of AIDS and other STDs. *See, e.g., Love v. Superior Court*, 226 Cal. App. 3d 736 (1990) (upholding mandatory AIDS testing and counseling for persons convicted of soliciting where the Legislature "has determined that those who engage in prostitution activities represent a high-risk group in terms of their own health, in

contracting AIDS, and in terms of the health of others, in spreading the virus"); *N. Mariana Islands v. Taman*, No. 2009-SCC-0044-CRM 2014 WL 4050021, at *3 (N. Mar. I. Aug. 14, 2014) (prostitutes pose a health risk for sexually transmitted diseases); Center for Disease Control & Prevention, HIV Risk Among Persons Who Exchange Sex for Money or Nonmonetary Items (updated Sept. 26, 2016); *available at* http://www.cdc.gov/hiv/group/sexworkers.html [hereafter, HIV Risk] (stating that sex workers "are at increased risk of getting or transmitting HIV and other sexually transmitted diseases (STDs) because they are more likely to engage in risky sexual behaviors (e.g., sex without a condom, sex with multiple partners) and substance abuse.").

The risk of HIV infection and sexually transmitted diseases is elevated among drug-injecting prostitutes. *See* ER 0207-08, *Commercial Sex* at 547-48. One study found that "data suggest that the nexus of injecting drug use, drug overdose, and acquisition of HIV [infection] was the most important nonviolent contributor to heightened mortality" among prostitutes. *Mortality* at 778, 781. *Accord* Julia Bindel & Liz Kelly, *A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Switzerland*, Children & Women

Abuse Studies Unit, London Metropolitan University, 11 (2002) [hereafter, Bindel & Kelly].[11]

B. The Arguments of Amici Do Nothing to Undermine the Rational Bases for Criminalizing Prostitution.

Under rational basis review, the issue is not whether the Legislature has chosen the best means for achieving its purpose, but only whether there are plausible reasons for the legislature's action. *Romero-Ochoa v. Holder*, 712 F.3d 1328, 1331 (9th Cir. 2013). Neither ESP nor amici dispute the importance of the State's interest in deterring human trafficking, violence, illegal drug use and the spread of HIV/AIDs and other sexually transmitted diseases. Instead they argue that legalizing prostitution is a more effective way of dealing with some of these ills. These are not grounds to invalidate

[11] In the district court, the Attorney General also argued that criminalization of prostitution was rationally related to the State's interest in deterring the commodification of sex. Although the district court rejected this argument, finding that under "*Lawrence*, moral disapproval is not an adequate or rational basis for criminalizing conduct," ER 0010, ESP devotes a whole section of the Opening Brief to the argument that the district court erred in finding that "the State could justify Section 647(b) by claiming to advance an interest in deterring the commodification of sex." *Id*. at 31, *see id* at 28-31.

the statute. *See id.* Rather, these are issues for the kind of public discussion that influences public policy.[12]

Amicus Children of the Night argues that legalization will help prostitutes leave the industry. Children of the Night Amicus Brief at 3. Programs to assist prostitutes to exit the sex industry should be encouraged, but the speculation that legalization furthers that effort is just that, and ignores evidence that legalization increases the demand for prostitution, in turn driving up the supply. *See* Huda at 17. Differences in history, customs, laws, social services, and a myriad of other factors make comparisons with other jurisdictions inexact. However, the German government has concluded that the Prostitution Act legalizing the sex industry in German "has not recognizably improved the prostitutes' means for leaving prostitution." Report by the German Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act) 79 (2007), *available at* https://ec.europa.eu/anti-

[12] In reaching its decision in this case, the district court expressed concern that to extend constitutional protection to prostitution would "place 'the matter outside the arena of public debate and legislative action' where it more properly resides." ER 0008 (quoting *Raich v. Gonzales*, 500 F.3d 850, 863 (2007)). The Legislature's recent amendments to section 647(b) are emblematic of evolving legislative innovations for dealing with the complicated problems associated with prostitution, including sex trafficking, violence, drug abuse, and disease transmission.

trafficking/sites/antitrafficking/files/federal_government_report_of_the_impact_of_the_act_regulating_the_legal_situation_of_prostitutes_2007_en_1.pdf. [hereafter, German Federal Government Report].

The available research shows that legalizing prostitution does not eliminate illegal prostitution. *See* Malinda Bridges, *What's Best for Women, Examining the Impact of Legal Approaches to Prostitution in Cross-National Perspective and Rhode Island*, Honors Project Overview, Paper 54 19 (2012), *available* at http://digitalcommons.ric.edu/honors_projects/54 (noting that only about four percent of prostitutes in the Netherlands are registered); Bindel & Kelly at 13-15 (2002) (noting, inter alia, that in 2001 police and industry estimated that illegal brothels in Victoria outnumbered legal brothels four-to-one). Since prostitution was legalized in parts of Australia, illegal brothels, street prostitution, and child prostitution, including children under the age of ten, has surged. *See* Chariane K. Forrey, Note, *America's "Disneyland of Sex": Exploring the Problem of Sex Trafficking in Las Vegas and Nevada's Response*, 14 Nev. L.J. 970 (Summer 2014) ["Forrey"]. *See also* Bindel & Kelley at 13-14 (noting that after brothels were decriminalized, the number of brothels in Sydney had increased exponentially to 400-500, most of which were not licensed); U.K. Home Office, *Paying the Price: a Consultation Paper on Prostitution* § 9.26

(July 2004) [*Paying the Price*] (noting that "[i]n Germany there are about 50,000 [prostitutes] registered, with an estimated 150,000 non-registered."). *See id.* § 9.20.

Despite the fact that prostitution is legal in parts of Nevada, including brothels located within one hour of Las Vegas, illegal prostitution in Las Vegas generates billions of dollars annually. Forrey at 970. According to the U.S. Justice Department, although Las Vegas has only one quarter of the population of New York City, it has three times the number of juvenile arrests, and the average age of a child prostitute is 14. *Id*. at 971; *see* Office of Inspector Gen., U.S. Dep't of Justice, Audit Rep. 09-08, *The Federal Bureau of Investigation's Efforts to Combat Crimes Against Children* 7 n.122 (2009) (showing Las Vegas among the 13 highest intensity child prostitution areas in the United States).

The State rationally could conclude that legalizing prostitution leads to increased sex trafficking and involvement of organized crime in prostitution. A paper issued by the United Kingdom Home Office concluded that licensing brothels did not deliver significant improvements in the level of crime associated with prostitution, noting that in Australia, "ownership of brothels . . . remain in the hands of cartels," and that in the Netherlands "organized crime associated with prostitution had increased rather than

decreased following the licensing of brothels." *Paying the* Price, § 9.17; *accord, Filling the Gap* at 974-75 (citing *Trafficking, Prostitution* at 301-304). A 1999 United Nations Save the Children Report found that the Australian states of Victoria and New South Wales, where prostitution is legal "were the two worst states for abuse of children through prostitution." *Paying the Price*, § 9.19. And the Netherland's legalization policy appears to have facilitated sex trafficking and forced prostitution. Hannah Carrigg, *Prostitution Regimes in Netherlands and Sweden: Their Impact on the Trafficking of Women and Children in Illicit Sex Industries*, THE MONITOR 10-11 (Fall 2008).

Legalized prostitution does not necessarily reduce violence against prostitutes. The German government has concluded that the Prostitution Act legalizing the sex industry in German has not measurably improved prostitutes' social protection or working conditions, and appears not to have reduced crime. German Federal Government Report at 79. *See generally* ER 0149, *What We Must Not Know* at 111.

Children of the Night argues that legalization of prostitution will move prostitution from the street to a safer, indoor setting. But the experience of countries that have legalized indoor prostitution does not support that hypothesis. *See* Bindel & Kelly at 14-15. For example, a significant

increase in street prostitution was reported in Victoria, Australia after brothels were legalized. *Id*. at 15. *See Paying the Price* § 9.21.[13] There is also disagreement about whether indoor prostitution is safer than street prostitution. A consultation paper issued by the United Kingdom's Home Office concluded that "some of the most serious exploitation, including children abused through prostitution and trafficked women kept in debt bondage, takes place in off-street premises." *Paying the Price* § 9.13.[14]

Amicus Lambda Legal does not disagree that higher rates of HIV are documented among prostitutes as compared to the general population. Lambda Amicus Brief at 12 & n.6. *See* HIV Risk. Its argument that prostitutes would receive better healthcare if prostitution were legal is based on numerous unsupported assumptions, including that the current system has

[13] One of the authorities on which the ACLU relies, Scott Cunningham & Manisha Shah, *Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health*, Working Paper 20281, Nat'l Bureau of Econ. Research 5 n.2 (July 2014), suggests that decriminalizing the indoor sex market may not affect the street prostitution market, since "the labor market for street and indoor workers is quite separate. Therefore, it is unlikely that street workers are transitioning into the indoor market since street and indoor workers are not substitutes." (citation omitted).

[14] The argument that legalization of prostitution will remove the stigma of being a prostitute also appears unsupported. Studies suggest that legalization has not destigmatized prostitution, but makes women more vulnerable to abuse, because they lose anonymity. Bindel & Kelly at 14.

no deterrence value (i.e., the number of prostitutes will remain fixed, whether prostitution is legal or not), that prostitutes will operate within that legalized system, that prostitutes in a legal regime will be able to afford to and will obtain regular health screening and take medication, and that healthcare providers can be expected to preserve patient confidentiality in a regime where prostitution is legal, but cannot be expected to do so in a regime in which prostitution is a crime.

IV. SECTION 647(B) DOES NOT INFRINGE FREEDOM OF ASSOCIATION, FREEDOM OF SPEECH, OR A DUE PROCESS RIGHT TO EARN A LIVING.

ESP's remaining claims fail for many of the same reasons as its substantive due process claim.

A. The Law Does Not Infringe Freedom of Association

ESP argues that section 647(b) violates its right to freedom of association under the First Amendment because it prevents ESP from entering into and maintaining "certain intimate and private relationships." AOB at 42. However, where, as here, the claim is based on an intimate relationship, rather than an expressive one, the right of association is protected, not by the First Amendment, but by the Fourteenth Amendment's Substantive Due Process Clause. *Pickup v. Brown*, 740 F.3d at 1233; *IDK, Inc. v. Clark County*, 836 F.2d at 1193. Accordingly, this claim is

duplicative of ESP's substantive due process claim, and fails for the same reasons. *See Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1500 (9th Cir. 1987) (holding that "freedom of intimate association is coextensive with the right of privacy; both the freedom of intimate association and the right of privacy describe that body of rights that protect intimate human relationships from unwarranted intrusion or interference by the state").

B. The Law Does Not Infringe Freedom of Speech.

ESP's free speech challenge to section 647(b)'s prohibition on soliciting prostitution also fails, because "Plaintiffs do not contest that a state may ban commercial speech related to an illegal activity." AOB at 41 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388 (1973)). Thus, ESP's First Amendment free speech argument is wholly dependent on its substantive due process argument, AOB at 41, and fails for the same reasons.[15]

[15] The amici brief filed by First Amendment Lawyers Association and Woodhull Freedom Foundation (collectively, "FALA") argues that the statute is unconstitutional because a conviction hypothetically could be sought based on pure speech, e.g., "where two individuals merely fantasized about engaging in a sexual transaction" or a married couple might joke about the subject. FALA Amicus Brief at 6-7 & n.2. FALA further argues that, because paying actors to perform sexual acts depicted in non-obscene films

(continued…)

C. The Law Does Not Infringe the Right to Earn a Living.

ESP's claim that section 647(b) unconstitutionally deprives the individual plaintiffs of their liberty right to earn a living as prostitutes is likewise dependent on the claim that they have a substantive due process right to work as prostitutes, AOB at 45, and fails for the same reasons. As ESP concedes, *id*., there is no constitutional right to engage in illegal employment. *See Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir. 1995) (holding that a protectable liberty interest in employment arises only "where

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(…continued)
was held not to be prostitution in *People v. Freeman*, 46 Cal. 3d 419, 424-425 (1988), the ban on solicitation is an "absurd result" that "[t]he First Amendment does not tolerate." FALA Amicus Brief at 7. These theories were not raised in the District Court or in the Opening Brief, and should not be considered in this appeal. *See Sanchez-Trujillo v. I.N.S.* 801 F.2d at 1581 n.9. They also fail on the merits.

An as-applied challenge must be based on alleged facts, not hypothetical speculation. *See Hoye v. City of Oakland*, 653 F.3d at 857-58. And the FALA Amicus brief cites no authority for the proposition that prostitution and adult films must be treated the same. Indeed, the converse is true. The *Freeman* court held that, even if the filmmaker's "conduct could somehow be found to come within the definition of 'prostitution' literally, the application of the pandering statute to the hiring of actors to perform in the production of a nonobscene motion picture would impinge unconstitutionally on First Amendment values." 46 Cal. 3d at 425 (citing *Joseph Burnstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), for the proposition that the court's analysis "must begin with the premise that a nonobscene motion picture is protected by the guaranty of free expression found in the First Amendment").

not affirmatively restricted by reasonable laws or regulations of general application").[16]

CONCLUSION

The judgment of the district court should be affirmed.

Dated: November 30, 2016

Respectfully submitted,

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DOUGLAS J. WOODS
Senior Assistant Attorney General
TAMAR PACHTER
Supervising Deputy Attorney General

S/ SHARON L. O'GRADY

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Attorneys for Appellee Attorney General Kamala Harris

SA2016102749

[16] The brief filed by the American Civil Liberties Union Foundation of Southern California and 18 other organizations (collectively, "ACLU") argues that Section 647(c), as enforced by the police, profiles and targets women, transgender women, gay men, and lesbian, gay, bisexual, transgender and questioning youth in violation of the Equal Protection Clause. ACLU Brief at 8-30. The ACLU also asks the Court to leave intact a person's ability to bring an as-applied challenge "when enforcement is discriminatory or unconstitutional." *Id*. at 8, 25-30. The complaint does not allege a violation of the Equal Protection Clause or discriminatory enforcement of the law, and nothing in the District Court's decision fairly can be read as foreclosing an as-applied equal protection challenge based on specific facts. *See* ER at 0001-12; 0298-302.

16-15927

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs and Plaintiffs,

v.

GEORGE GASCON, in his official capacity as District Attorney of the City and County of San Francisco, et al.

Defendants and Appellees.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: November 30, 2016

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
TAMAR PACHTER
Supervising Deputy Attorney General

S/ SHARON L. O'GRADY

SHARON L. O'GRADY
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Attorneys for Appellee Attorney General Kamala Harris

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 16-15927

I certify that: (check (x) appropriate option(s))

[X] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

[X] Proportionately spaced, has a typeface of 14 points or more and contains **9,040** words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

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[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

[ ] This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

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This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

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☐ 4. **Amicus Briefs**.

☐ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

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☐ Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed.R.App.P. 32 (a)(1)(5).

November 30, 2016
Dated

s/ Sharon L. O'Grady
Sharon L. O'Grady
Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name: **Erotic Service Provider Legal, Education & Research Project, et al. v. Gascon, et al.** No. **16-15927**

I hereby certify that on November 30, 2016, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

BRIEF OF APPELLEE KAMALA D. HARRIS

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 30, 2016, at San Francisco, California.

Susan Chiang	s/ Susan Chiang
Declarant	Signature

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ADDENDUM

California Penal Code § 647(B)

Effective: January 1, 2015

Except as provided in subdivision (l), every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

* * *

(b) Who solicits or who agrees to engage in or who engages in any act of prostitution. A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act. As used in this subdivision, "prostitution" includes any lewd act between persons for money or other consideration.

Senate Bill No. 420, Section 1.4 (Portion Amending California Penal Code section 647(B) Effective January 1, 2017)

AN ACT to amend Section 647 of the Penal Code, relating to prostitution.

[Filed with Secretary of State September 27, 2016.]

The people of the State of California do enact as follows:

* * *

SEC. 1.4. Section 647 of the Penal Code is amended to read:
647. Except as provided in paragraph (5) of subdivision (b) and subdivision (l), every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:
* * *

(b) (1) An individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with the intent to receive compensation, money, or anything of value from another person. An individual agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation by another person to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in an act of prostitution.

(2) An individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with another person who is 18 years of age or older in exchange for the individual providing compensation, money, or anything of value to the other person. An individual agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation by another person who is 18 years of age or older to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in an act of prostitution.

(3) An individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with another person who is a minor in exchange for the individual providing compensation, money, or anything of value to the minor. An individual agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation by someone who is a minor to so engage, regardless of whether the offer or solicitation was made by a minor who also possessed the specific intent to engage in an act of prostitution.

(4) A manifestation of acceptance of an offer or solicitation to engage in an act of prostitution does not constitute a violation of this subdivision unless some act, in addition to the manifestation of acceptance, is done within this state in furtherance of the commission of the act of prostitution by the person manifesting an acceptance of an offer or solicitation to engage in that act. As used in this subdivision, "prostitution" includes any lewd act between persons for money or other consideration.

(5) Notwithstanding paragraphs (1) to (3), inclusive, this subdivision does not apply to a child under 18 years of age who is alleged to have engaged in conduct to receive money or other consideration that would, if committed by an adult, violate this subdivision. A commercially exploited child under this paragraph may be adjudged a dependent child of the court pursuant to paragraph (2) of subdivision (b) of Section 300 of the Welfare and Institutions Code and may be taken into

temporary custody pursuant to subdivision (a) of Section 305 of the Welfare and Institutions Code, if the conditions allowing temporary custody without warrant are met.

First Amendment of the U.S. Constitution

Restrictions on Powers of Congress

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, Section 1 of the U.S. Constitution

Citizenship

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.