No. 16-15927
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-Appellants,
v.
GEORGE GASCÓN, District Attorney San Francisco City & County; EDWARD BERBERIAN, JR., District Attorney of Marin County; NANCY O'MALLEY, District Attorney of Alameda County; JILL RAVITCH, District Attorney of Sonoma County; & KAMALA HARRIS, California Attorney General,
Defendants-Appellees.

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

BRIEF OF *AMICI CURIAE* FIRST AMENDMENT LAWYERS ASSOCIATION AND WOODHULL FREEDOM FOUNDATION IN SUPPORT OF APPELLANTS URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), the First Amendment Lawyers Association and the Woodhull Freedom Foundation make the following corporate disclosures:

1. Neither entity is owned by a parent corporation.
2. No publicly traded corporation owns more than 10% of either entity's stock.

Respectfully submitted,

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STATEMENT OF INTEREST AND AUTHORITY OF *AMICI CURIAE*

Counsel for all parties consent to the filing of this *amicus* brief. The brief is therefore submitted without a motion for leave pursuant to Fed. R. App. P. 29(a). In addition, no party's counsel authored the brief in whole or in part, nor has a party or party's counsel contributed money that was intended to fund preparing or submitting the brief. Neither has a person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

The First Amendment Lawyers Association ("FALA") is an Illinois-based, not-for-profit organization comprised of approximately 200 attorneys who routinely represent businesses and individuals that engage in constitutionally-protected expression. FALA's members practice throughout the United States, Canada, and elsewhere in defense of the First Amendment and, by doing so, advocate against governmental forms of censorship. Member attorneys frequently litigate the facial validity of speech-restrictive legislation; in fact, many of the Supreme Court's most recent First Amendment cases were either argued by FALA attorneys or involved the participation of FALA attorneys in some capacity. *See, e.g., Ashcroft v. Free Speech Coalition, Inc.*, 535 U.S. 234 (2002) (successful challenge to Child Pornography Prevention Act argued by FALA attorney and counsel for Appellants H. Louis Sirkin); *United States v. Playboy Entertainment*

Group, Inc., 529 U.S. 503 (2000) (successful challenge to "signal bleed" portion of Telecommunications Act argued by FALA member Robert Corn-Revere). In addition, FALA has a tradition of submitting *amicus* briefs to the federal courts in cases, such as this one, in which the First Amendment right of free speech is endangered. By affirmative vote of its designated Amicus Committee, FALA is authorized to submit this *amicus* brief.

The Woodhull Freedom Foundation is a non-profit organization that works to advance the recognition of sexual freedom, gender equality, and family diversity. The Foundation's name was inspired by the Nineteenth Century suffragette and women's rights leader, Victoria Woodhull. The organization works to improve the well-being, rights, and autonomy of every individual through advocacy, education, and action. Woodhull's mission is focused on affirming sexual freedom as a fundamental human right. The Foundation's advocacy has included a wide range of human rights issues, including, reproductive justice, anti-discrimination legislation, comprehensive nonjudgmental sexuality education, and the right to define ones' own family. Woodhull is concerned that affirmance of the district court's opinion will endanger the well-being and autonomy of sex workers in California and would permit widespread discrimination and violation of constitutional rights of individuals under the guise of enforcing prostitution laws.

On behalf of its Board, the Executive Director of Woodhull has authorized the filing of this *amicus* brief.

ARGUMENT

I. Summary of Argument

Amici First Amendment Lawyers Association and Woodhull Freedom Foundation urge reversal of the district court's decision on the grounds that the challenged provisions of the California Penal Code violate the right of commercial speech guaranteed by the First Amendment.[1] As discussed below, the First Amendment broadly protects the right of businesses and individuals to propose, discuss, and negotiate commercial transactions. This right extends to the solicitation of commercial sexual performances. *See People v. Freeman*, 46 Cal.3d 419, 758 P.2d 1158 (Cal. 1988). By extension, the right also extends to the proposal of intimate sexual relationships, even when entered into for commercial gain. As a result, the district court erred in dismissing Appellants' claim that California's prostitution statute violates the First Amendment.

II. Section 647(b) Of The California Penal Code Violates The Right Of Commercial Expression.

The First Amendment unequivocally protects the right of businesses and individuals to disseminate speech related to commercial transactions. *See, e.g., In*

[1] While this brief focuses on the commercial speech issue, *amici* equally urge reversal on the substantive due process and other constitutional claims raised in Appellants' brief.

Re R.M.J., 455 U.S. 191, 199 (1982); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495-6 (1996) (describing history and importance of advertising in United States). "By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information." *Pacific Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 8 (1986). Indeed, "[i]t is a matter of public interest that [commercial] decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764-5 (1976).

The Supreme Court has adopted a four-part test for determining when restrictions on commercial speech violate this protection. First, the court must determine whether the speech in question concerns lawful activity and is not misleading. Second, the court asks whether the government interest is substantial. If so, the third inquiry is whether the regulation directly advances the government interest asserted and, fourth, whether the regulation is more extensive than necessary to serve the government's interest. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980). The burden rests with the government to justify its restrictions on commercial speech. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). In addition, "a governmental body seeking to sustain a

restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Florida Bar v. Went For It, Inc*., 515 U.S. 618, 626 (1995) (citing *Rubin v. Coors Brewing Co*., 514 U.S. 476, 487 (1995)).

Applying similar First Amendment scrutiny, this Court has stricken bans on sidewalk solicitation of donations, *see Perry v. Los Angeles Police Dept*., 121 F.3d 1365 (9th Cir. 1997); restrictions on solicitation by street performers, *see Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009); bans on sidewalk tables at which non-profit organizations could request donations and disseminate information, *see ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006); bans of solicitation of employment on public sidewalks by day laborers, *see Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011) and *Valle Del Sol, Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013); and restrictions on off-site commercial signage and advertising, *see Metro Lights LLC v. City of Los Angeles*, 551 F.3d 898 (9th Cir. 2009). This Court therefore maintains a strong tradition of protecting commercial speech rights, a tradition it should continue to uphold here.

Section 647 of the California Penal Code violates the right of free expression in several significant ways. First, the regulation, to the extent it applies solely to words and not to conduct, is unsupported by a significant government interest. As

this Court has observed, if the government has an interest in banning the underlying conduct, it may not do so by banning all speech related to that conduct without surviving strict scrutiny review of its efforts. *See Pickup v. Brown*, 740 F.3d 1208, 1216 (9th Cir. 2013) (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010)); *see also Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999) (holding justifications for prohibiting gambling activity insufficient to justify ban on gambling advertising). To the extent the government asserts an interest in prohibiting the spread of sexually transmitted diseases and other purported justifications for banning prostitution, those arguments relate solely to the act of commercial sex and not to speech about the transaction. In fact, nowhere in this litigation has the government asserted any interest at all relative to the dialogue that precedes an intimate commercial sexual relationship. Absent such an interest, the ban on solicitation cannot stand.

Second, even were the government to develop an interest in prohibiting speech as opposed to conduct, the outright ban on all solicitation contained in Section 647 extends much further than necessary to accomplish the government's objective. By criminalizing words alone, the statute penalizes speech even in the absence of any actual physical conduct. *See Kim v. Superior Court*, 136 Cal.App.4th 937, 945 (Cal. App. 2006) (holding that speech itself constitutes an "act in furtherance" of an agreement to engage in prostitution). For example, the

statute would cover a case in which two individuals merely fantasized about engaging in a sexual transaction without ever intending to carry out the activity.[2] As such, the statute steers far wide of its purported target – actual commercial sexual activity – and into the territory of protected expression.

And lastly, although the government may argue otherwise, Section 647 inhibits speech about lawful, not unlawful, commercial transactions. Under California law, it is not a crime to solicit or pay for commercial sexual performances. *See Freeman*, 46 Cal.3d 419, 758 P.2d 1158. The district court's ruling therefore creates an unjustifiable dichotomy: an individual may lawfully pay another person to perform in a commercial depiction of sex but may not even so much as discuss the exchange of an item of value for intimate, unrecorded sex. The First Amendment does not tolerate such an absurd result.

III. Conclusion

For the foregoing reasons, in addition to the reasons set forth in the brief of Appellants, *Amici Curiae* First Amendment Lawyers Association and Woodhull

[2] It is not difficult to imagine the scenario in which a married couple might joke or role play about paying one another for sexual favors without actually intending to exchange a thing of value for sex. In fact, such scenes are depicted rather routinely in movies, television shows, and pop culture. *See, e.g., Date Night* (movie starring Tina Fey and Steve Carrell in which fictitious married couple solicits money in exchange for strip tease while on the run from criminals who mistake them for another couple); *Indecent Proposal* (movie starring Robert Redford and Demi Moore in which husband mulls over proposal from another man to sleep with his wife in exchange for $1 million).

Freedom Foundation urge reversal of the district court's decision dismissing Appellants' First Amendment challenge to Cal. Penal Code Section 647.

Respectfully submitted this 6th day of October, 2016.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that, according to the word count feature in MS Word, the foregoing brief, exclusive of the tables of contents and authorities, contains 2,399 words.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 6, 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.

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