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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

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INTRODUCTION / SUMMARY OF THE ARGUMENT

Plaintiffs commenced this lawsuit to challenge California's intrusion upon their fundamental liberty interest in deciding how to conduct their private lives in matters pertaining to sex. Defendants moved to dismiss the action, arguing that California's statute criminalizing prostitution does not violate Plaintiffs' constitutional rights.

After that motion to dismiss was fully briefed, the Supreme Court issued its decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). This Court subsequently ordered the parties to submit additional briefing to aid the Court as it analyzes the effect of this recent precedent on the pending motion to dismiss. (*See Order*, Doc. 38).

As explained below, *Obergefell* vindicates the arguments that Plaintiffs raised in their Opposition to the Motion to Dismiss (Doc. 28). *Obergefell* continues the Supreme Court's jurisprudential theme of shielding private, sexual relationships from governmental oversight. Like *Lawrence v. Texas*, 539 U.S. 558 (2003), *Obergefell* confirms that the Due Process Clause of the Fourteenth Amendment allows individuals to engage in intimate conduct without unwarranted governmental intrusion. Like *Lawrence*, *Obergefell* shows that the backward-looking approach to the Due Process Clause emanating from *Washington v. Glucksberg*, 512 U.S. 701 (1997) does not apply to cases concerning intimate conduct. Finally, like *Lawrence*, *Obergefell* categorically rejects the idea that individuals must rely upon the democratic process rather than the federal courts to protect their constitutional liberties.

Obergefell is not an outlier or an anomaly. Rather, it is one of many points on decades-long continuum of decisions respecting individuals' liberty and sexual autonomy. The case currently before this Court is simply one more point along this continuum.

- ***Obergefell* confirms that the Due Process Clause prevents the State from intruding upon adults as they decide how to conduct their private, sexual lives.**

At the most rudimentary level of analysis, *Obergefell* affects this case because it reaffirms that "*Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability". *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015); *see also Id.* at 2604 (noting that *Lawrence* held that the state cannot demean an individual's existence or control their destiny by making their private sexual conduct a crime).

In their original brief (filed before the Supreme Court's decision in *Obergefell*), Plaintiffs argued at length that under *Lawrence*, laws criminalizing consensual, adult, sexual activity that occurs in private should be struck down as a violation of substantive due process. (*See Opposition*, Doc. 28, p. 5). By its decision in *Obergefell*, the Supreme Court confirmed Plaintiffs' argument that *Lawrence* remains good law, and it therefore struck down another set of laws that brought unwarranted government intrusion into a "sphere[] of our lives and existence * * * where the State should not be a dominant presence." *See Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

But to end the analysis there is to miss the forest for the trees. *Obergefell* shed substantial new light on how courts should analyze claims that the government has violated the Due Process Clause of the Fourteenth Amendment by intruding into those spheres of our lives

where the State should not be a dominant presence. In so doing, *Obergefell* “became a game changer for substantive due process jurisprudence.” See Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 Harv. L. Rev. 147 (2015).

- **Substantive Due Process Prior to *Obergefell***

Prior to *Obergefell* but after *Lawrence*, reasonable minds could disagree as to how a court should analyze a substantive due process claim. See *Witt v. Dept. of Air Force*, 527 F.3d 806, 822 (9th Cir. 2008)(Canby, J., concurring in part and dissenting in part)(noting that “the Supreme Court’s opinion in *Lawrence* never unambiguously states what standard of review it is applying”). This ambiguity presented itself in the original briefs filed with this Court, as the parties espoused their respective views on how the Court should analyze whether the statute at issue in this case, Cal. Pen. Code §647(b), violates substantive due process.

- **The *Lawrence* Court’s substantive due process analysis.**

The Plaintiffs asserted that *Lawrence v. Texas*, 539 U.S. 558, is controlling on this case because it is a substantive due process case that addresses the fundamental liberty interest of adult persons in deciding how to conduct their private lives in matters pertaining to sex. Plaintiffs contrasted *Lawrence* with the substantive due process cases cited by the State (i.e. *Glucksberg* and its progeny), noting that the cases cited by the State do not concern an individual’s liberty vis-à-vis his or her sexuality and intimacy. (Opposition, Doc. 28, p. 10). Thus, Plaintiffs argued that this Court should use the analysis used by the Supreme Court in *Lawrence* (and, prior to *Lawrence*, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) and its predecessors). (Opposition, Doc. 28, pp. 5-6). That analytical framework was described by the *Casey* Court thusly:

The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity by which tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule.

Casey, 505 U.S. at 849 (citing *Poe v. Ullman*, 367 U.S. 497, 542 (1961)(Harlan, J., dissenting from dismissal on jurisdictional grounds)).

These controlling cases make clear that there is no easily-recitable rule to be applied to this case. Rather, the Court should exercise its “reasoned judgment” and determine that California’s statute criminalizing prostitution unnecessarily infringes upon Plaintiffs’ liberty interest in deciding how to conduct themselves in matters pertaining to sex.

- **The *Glucksberg* Court’s substantive due process analysis.**

The State, on the other hand, advocated that this Court should adopt the more formulaic approach used by the courts in a different vein of substantive due process cases. The State argued that “*Washington v. Glucksberg*, 521 U.S. 702, and *Raich v. Gonzales*, 500 F.3d 850, are controlling, and require dismissal of this case.” (Motion to Dismiss, Doc. 21, p. 9). They claim that “Plaintiffs are wrong” in suggesting that this Court should follow the approach used by the Supreme Court in *Lawrence*, *Casey*, and their predecessors. (See Reply, Doc. 29, p. 4).

Under *Glucksberg*, a court will offer protection to a substantive due process right only when it is: (1) carefully defined; and (2) objectively, deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). However, as Plaintiffs noted in their original brief, scholars have sharply criticized the historical context approach from *Glucksberg* as being easily manipulated and producing arbitrary outcomes. (See Opposition, Doc. 28, p. 10).

- ***Obergefell* resolves the ambiguity and demonstrates that this Court should follow *Obergefell, Lawrence, and Casey* as opposed to *Glucksberg*.**

Obergefell now removes all doubt as to this uncertain issue and vindicates the Plaintiffs' argument that the analysis from *Lawrence* – not *Glucksberg* – must be applied to the present case. *Obergefell* flatly rejects *Glucksberg*'s backward-looking approach to the Due Process Clause in cases concerning sexuality and intimacy.

In *Obergefell*, the states resisting same-sex marriage took the same overly-narrow approach that the State has taken in this case. To those states, the same-sex marriage cases were not about intimacy, and they were not about defining spheres of our lives where the State should not be a dominant presence. Rather, they argued that the issue before the Court was only whether there was a constitutional “right to same-sex marriage”. *Obergefell*, 135 S. Ct. at 2602. They then analyzed the constitutional “right to same-sex marriage” under the constraints of the *Glucksberg* analysis, vehemently arguing that such a right was not deeply rooted in this Nation's history and tradition. See Brief for the Respondents at 21-27, 2015 WL 1384104, *DeBoer v. Snyder*, 135 S. Ct. 2584 (No. 14-571).

But the Supreme Court was not persuaded by this constricted view of the issue presented. And the *Obergefell* Court declined the States' invitation to analyze that claim under the test set forth in *Glucksberg*. In fact, the Supreme Court in *Obergefell* analyzed the issue in precisely the same manner as Plaintiffs had in their original brief filed with this Court:

Glucksberg did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.

Obergefell, 135 S. Ct. at 2602.

Just as in *Lawrence*, the Supreme Court in *Obergefell* rejected the “*Glucksberg* Two-Step” as the way to analyze this kind of substantive due process claim. See also *Obergefell*, 135 S. Ct. at 2620-21 (Roberts, C.J., dissenting)(noting that the *Obergefell* majority “jettison[ed]” and “effectively overruled” the *Glucksberg* approach to substantive due process in these cases); Yoshino, *supra*, 129 *Harv. L. Rev.* at 162 (“After *Obergefell*, it will be much harder to invoke *Glucksberg* as binding precedent.”); *Id.* at 166 (“*Obergefell* seems to have laid waste to the entire *Glucksberg* edifice.”).

The State is therefore incorrect when it suggests that *Glucksberg* is binding authority that requires dismissal of this case. To the contrary, *Glucksberg* has been “effectively overruled” and this Court should apply the reasoned analysis called for by *Obergefell, Lawrence, and Casey*.

Under this *Obergefell/Lawrence/Casey* analysis, courts are not restricted to look only to history to determine whether a statute violates substantive due process. “History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” *Lawrence*, 539 U.S. at 572 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998)(Kennedy, J., concurring)).

Freed from the constraints of history and tradition set forth in *Glucksberg*, the *Obergefell* Court was able to take into consideration “new insights” regarding how our paradigm has shifted away from perceiving homosexuals as criminals. *Obergefell* 135 S. Ct. at 2595-96. Similarly, in *Lawrence*, the Court noted a broader, “emerging awareness” that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. *Lawrence*, 539 U.S. at 572. These new insights and this emerging

awareness apply just as strongly to the Plaintiffs in the present case.

For example, Amnesty International, a renowned international human rights nongovernmental organization, voted this past year to support a policy that calls for decriminalization of prostitution and payment for sex. See Doreen Carvajal, *Amnesty International Votes for Policy Calling for Decriminalization of Prostitution*, N.Y. Times, Aug. 11, 2015 (available at <http://www.nytimes.com/2015/08/12/world/europe/amnesty-international-votes-for-policy-calling-for-decriminalization-of-prostitution.html>). Of course, scholars have for years advanced numerous arguments in support of the decriminalization of prostitution. See, e.g., World Health Organization, Consolidated Guidelines on HIV Prevention, Diagnosis, Treatment and Care for Key Populations at 91 (July 2014) (presenting a medical argument); David A.J. Richards, *Commercial Sex and The Rights of The Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. Pa. L. Rev. 1195 (1979)(a moral argument); Julie Pearl, *The Highest Payment Customers: Americas Cities and the Costs of Prostitution Control*, 38 Hastings L.J. 769 (1987) (a utilitarian argument); Sylvia Law, *Commercial Sex: Beyond Decriminalization*, 73 S. Cal. Rev. 523 (2002)(a policy argument); and Martha C. Nussbaum, “*Whether From Reason or Prejudice*”: *Taking Money for Bodily Services*, 27 The Journal of Legal Studies 693 (1998) (a philosophical argument). Under *Obergefell*, this Court should reject *Glucksberg* and must consider these new insights and this “emerging awareness” as it evaluates Plaintiffs’ claims. These new insights and this “emerging awareness” align completely with this nation’s long history and tradition of protecting individuals’ privacy, sexual autonomy, and ability to control their own destinies. See generally *Obergefell*, 135 S. Ct. 2584; *Lawrence*, 539 U.S. 558; *Casey*, 505 U.S. 833; *Carey v. Population Services, Int’l*, 431 U.S. 678 (1971); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

- **Under *Obergefell*, plaintiffs need not rely upon the democratic process to protect their constitutional liberties.**

Lastly, *Obergefell* affects the present case because it forecloses any attempt by the State to argue that this constitutional issue should be resolved through the democratic process rather than in the courts.

In conjunction with the original briefing, the State requested that the Court take judicial notice of certain ballot initiatives concerning the enforcement of prostitution laws in San Francisco and Berkeley. (See Request for Judicial Notice, Doc. 22, ¶¶3-6; see also Motion, Doc. 21, p. 8). The State further argues that “there exists no trend among the states towards [prostitution’s] legalization.” (Motion, Doc. 21, p. 9).

But, like other landmark constitutional cases, *Obergefell* shows that individuals need not wait for the majoritarian legislative process to protect their constitutional rights.

The Supreme Court granted certiorari in *Obergefell* only after the Sixth Circuit Court of Appeals in the same-sex marriage cases notoriously denied same-sex couples their Fourteenth Amendment rights because that court thought it would be “[b]etter in th[at] instance * * * to allow change through the customary political processes”. *DeBoer v. Snyder*, 772 F.3d 388, 421 (6th Cir. 2014)(rev’d by *Obergefell v. Hodges*, 135 S. Ct. 2584 (2014)).

The dissenting judge on that panel chided the majority’s reluctance to protect constitutional rights, writing that “[i]nstead of recognizing the plaintiffs as persons, suffering actual harm * * *, my colleagues view the plaintiffs as social activists who have somehow stumbled into federal court, inadvisably, when they should be out campaigning...” *DeBoer*, 772 F.3d at 421 (Daughtrey, J., dissenting).

After granting certiorari, 135 S. Ct. 1040 (2015), the Supreme Court promptly removed all doubt that federal courts need not wait for the democratic process to prevent a deprivation of an individual’s Fourteenth Amendment rights. As the *Obergefell* Court wrote, “the

Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights.” *Obergefell*, 135 S. Ct. at 2605. And, “when the rights of persons are violated, the Constitution requires redress by the courts, notwithstanding the more general value of democratic decisionmaking.” *Id.* (internal citations omitted).

The same rationale applies to the present case. Section 647(b) of the California Penal Code infringes upon Plaintiffs’ substantive due process rights. The Plaintiffs need not wait for the democratic process to repeal this statute because this Court is vested with the power to declare the statute unconstitutional and to remedy immediately the irreparable harm that Plaintiffs continue to suffer.

- **Conclusion**

Like *Lawrence*, *Casey*, and the prior substantive due process cases regarding sexuality and intimacy, *Obergefell* protects a person’s liberty by preventing governmental intrusion into his or her private, intimate, and sexual life. Plaintiffs seek only that same protection.

For these reasons, together with the reasons originally set forth in Plaintiffs’ Opposition Brief, the Court should deny the Defendants’ Motion to Dismiss.

Dated: January 15, 2016

Respectfully submitted,

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