

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 of the City and County of
San Francisco; EDWARD S. BERBERIAN, JR., District Attorney
of the County of Marin; NANCY E. O'MALLEY, District Attorney
of the County of Alameda; JILL RAVITCH, District Attorney of
the County of Sonoma; and KAMALA D. HARRIS,**

Attorney General of the State of California,

Defendants-Appellees

**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* LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, ET AL. ADDRESSING PUBLIC HARMS
INFLICTED BY CRIMINALIZATION OF COMMERCIAL
SEXUAL ACTIVITY, IN SUPPORT OF APPELLANTS**

Carmina Ocampo
Lambda Legal Defense &
Education Fund, Inc.
4221 Wilshire Blvd, Suite 280
Los Angeles, CA 90010
(213) 382-7600

Kara N. Ingelhart
Scott A. Schoettes
Lambda Legal Defense &
Education Fund, Inc.
105 W. Adams St., 26th Floor
Chicago, IL 60603
(312) 663-4413

Hayley Gorenberg
Richard Saenz
Lambda Legal Defense &
Education Fund, Inc.
120 Wall St., 19th Floor
New York, NY 10005-3919
(212) 809-8585

Attorneys for Amici Curiae

[Additional Counsel listed on inside front cover]

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, corporate *Amici* state that they are 501(c)(3) nonprofit organizations. None of the *Amici* has a parent corporation. No publicly owned corporation holds ten percent or more of the stock of any *Amici*, as none of the *Amici* issues any stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENTi

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES..... iv

IDENTITY AND INTERESTS OF *AMICI* 1

INTRODUCTION3

SUMMARY OF THE ARGUMENT.....5

ARGUMENT..... 7

**I. RATIONAL BASIS REVIEW REQUIRES THE COURT
TO CONSIDER NOT ONLY WHETHER THE STATE
HAS PROFFERED A LEGITIMATE GOVERNMENTAL
INTEREST, BUT ALSO WHETHER THE STATUTE IS
RATIONALLY RELATED TO ADVANCING THAT
GOVERNMENTAL INTEREST..... 7**

**I. CRIMINAL LAWS SUCH AS CALIFORNIA’S §647(B),
DRIVE SEX WORK UNDERGROUND AND DAMAGE
PUBLIC HEALTH EFFORTS TO REACH SEX
WORKERS, THEIR CLIENTS, AND TRAFFICKING
VICTIMS.....11**

**A. Criminalization of Sex Workers Reduces Access to
Healthcare Generally and HIV-Related Care in
Particular.11**

**i. Criminalization of Sex Work Impedes Access
to HIV Prevention.....12**

**ii. For Sex Workers Living With HIV,
Criminalization of Sex Work Impedes Access
to HIV-Related Care.17**

B. Use of Condoms as Evidence Undermines Prevention of HIV and Other Sexually Transmitted Infections (STIs), as well as Other Public Health Goals.....	19
i. Condoms Are an Effective Prevention and Sexual Health Management Tool.	20
ii. Using Condoms as Evidence of Prostitution Reduces Use of Condoms and Increases STI Transmission Risk	22
C. Criminalizing Sex Work Drives Violence Against Sex Workers and Victims of Trafficking.	25
i. Where Sex Work Is Criminalized, Sex Workers Suffer Violence at the Hands of Intimate Partners, Clients, Police, and Others.....	25
ii. Violence Resulting From Criminalization Can Increase STI Risk for Sex Workers.....	30
II. DECRIMINALIZATION OF SEX WORK IN OTHER JURISDICTIONS HAS SIGNIFICANTLY IMPROVED PUBLIC HEALTH.	32
A. Where Sex Work Is Decriminalized, Access to Care Improves, STI Rates Decrease, and Safer Sex Practices Increase.	32
B. Where Sex Workers Are Able to Assert Control Over Their Working Environments, Overall Violence Decreases.....	36
CONCLUSION.....	38
CERTIFICATE OF COMPLIANCE	40
CERTIFICATE OF SERVICE.....	41

TABLE OF AUTHORITIES

Cases

City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 441
(1985) 7

Gill v. Office of Personnel Management, 699 F. Supp. 2d 374, at
387 (D. Mass. 2010)..... 8

Heller v. Doe, 509 U.S. 312, at 320 (1993) 8

Lewis v. Thompson, 252 F.3d 567, 590 (2d Cir. 2001) 8

Mathews v. de Castro, 429 U.S. 181, 185 (1976) 7

Rhode Island ex rel. City of Providence v. Choe, No. 61-2003-03314
(6th Div. Dist. Ct. 2003)..... 35

Romer v. Evans, 517 U.S. 620, at 632-33 (1996) 8

Federal Statutes

The Trafficking Victims Protection Act of 2000, 22 U.S.C.A. §§
7101–7110 (West 2016)..... 4

State Statutes

Cal. Health & Safety Code § 120291 17

Cal. Penal Code § 647(f) (West 2015) 17

California Penal Code section 647(b) (West 2015).....	passim
<i>Erotic Service Provider Legal Education & Research Project v.</i> <i>Gascon</i> , No. C 15-01007 JSW, 2016 WL 1258638 (D. N.D.Cal. Mar. 31, 2016)	7

Other Authorities

A. Krüsi et al., <i>Criminalisation of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada—a qualitative study</i> , 4 BMJ Open, Jun. 2, 2014, at 1 (UK), dx.doi.org/10.1136/bmjopen-2014-005191	28
Acacia Shields, Sexual Health & Rights Project, Open Society Foundations, <i>Criminalizing Condoms</i> 27 (2012), https://www.opensocietyfoundations.org/sites/default/files/crimi nalizing-condoms-20120717.pdf	29
Alison J. Rodger et al., <i>Sexual Activity Without Condoms and Risk of HIV Transmission in Serodifferent Couples When the HIV- Positive Partner Is Using Suppressive Antiretroviral Therapy</i> , 316 J. Am. Med. Ass’n 171 (2016)	17
Amnesty International, <i>Explanatory Note on Amnesty International’s Policy on State Obligations to Respect, Protect</i>	

and Fulfill the Human Rights of Sex Workers at 5 (2016),
<https://www.amnesty.org/download/Documents/POL3040632016>
ENGLISH.PDF..... 4

Ariel Lang et al., *Anxiety Sensitivity and PTSD Among Female*
Victims of Intimate Partner Violence, 16 *Depression & Anxiety*
77 (2002) 31

Barbara Brents et al., *The State of Sex: Tourism, Sex and Sin in*
the New American Heartland (2010)..... 36

Basil Donovan et al., The Law & Sex Worker Health Project,
Kirby Institute, *The Sex Industry in New South Wales: A Report*
to the NSW Ministry of Health (2012) (Austl.),
[http://www.acon.org.au/wp-content/uploads/2015/04/NSW-Sex-](http://www.acon.org.au/wp-content/uploads/2015/04/NSW-Sex-Industry-Report-CSRH-2012.pdf)
Industry-Report-CSRH-2012.pdf..... 33

Cal. Dep’t of Pub. Health, *Local Health Jurisdiction STD Data*
Summaries (2016),
[https://www.cdph.ca.gov/data/statistics/Documents/STD-Data-](https://www.cdph.ca.gov/data/statistics/Documents/STD-Data-LHJ-LosAngeles.pdf)
LHJ-LosAngeles.pdf..... 21

Catherine Hakim, *Economies of Desire: Sexuality and the Sex*
Industry in the 21st Century, 35 *Econ. Affairs* 329, 329 (2004) 8, 9

CDC, Dep't Health & Human Serv., No. CS214651, <i>Condom Fact Sheet In Brief</i> (last updated March 25, 2013).....	20-21
CDC, Dep't Health & Human Serv., <i>Perspectives in Disease Prevention and Health Promotion Condoms for Prevention of Sexually Transmitted Diseases</i> , 37 Morbidity & Mortality Wkly. REP. 133 (1988), http://www.cdc.gov/mmwr/preview/mmwrhtml/00001053.htm	20
Cecilia Benoit et al., <i>Community-Academic Research on Hard-to-Reach Populations: Benefits and Challenges</i> , 15 Qualitative Health Res. 263, 264 (2005).....	14
Charles Collins & Ted Duncan, CDC, <i>Presentation at PA 11-1113 Grantee Meeting: Condom Distribution Programs As Structural Intervention</i> (Dec. 6-7, 2011), https://effectiveinterventions.cdc.gov/docs/default-source/condom-distribution-docs/Condom_Distribution_Programs_as_Structural_Interventions.pdf?sfvrsn=0	20
Chris Bruckert and Tuulia Law, <i>Beyond Pimps, Procurers and Parasites: Mapping Third Parties in the Incall/Outcall Sex</i>	

<i>Industry</i> at 88 (JD Drummond rep. copy ed., 2013) (Can.), http://www.nswp.org/sites/nswp.org/files/ManagementResearch %20(4).pdf	25, 29
Concepción Blasco-Ros et al., <i>Recovery from Depressive Symptoms, State Anxiety and Post-Traumatic Stress Disorder in Women Exposed to Physical and Psychological, but not to Psychological Intimate Partner Violence Alone: A Longitudinal Study</i> , BMC Psychiatry Nov. 25, 2010, dx.doi.org/10.1186/1471-244X-10-98	31
Deanna Kerrigan et al., World Bank, <i>The Global Epidemics of HIV among Sex Workers</i> , (2012), http://dx.doi.org/10.1596/978-0- 8213-9774-9	13
Dep't Health & Ageing, Pub. No. 6662, <i>Sixth National HIV Strategy 2010-2013</i> (2010) (Austl.), https://www.health.gov.au/internet/main/publishing.nsf/Content /ohp-national-strategies-2010-hiv/\$File/hiv.pdf	33
Dep't of Just., No. 14-739, <i>Justice Department Releases Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors</i> (Jul. 2014)	18

Div. of HIV and STD Programs, L.A. Cty. Dept. of Pub. Health, <i>2014 Annual HIV/STD Surveillance Report</i> , (Feb. 2016), https://admin.publichealth.lacounty.gov/DHSP/Reports/HIV-STDsurveillanceReport2014.pdf	21
Elena Jeffreys et al., <i>Mandatory Testing for HIV and Sexually Transmissible Infections among Sex Workers in Australia: A Barrier to HIV and STI Prevention</i> , 2 World J. AIDS 203 (2012), http://dx.doi.org/10.4236/wja.2012.23026	32, 33
<i>Enhanced Comprehensive HIV Prevention Planning and Implementation for Metropolitan Statistical Areas Most Affected by HIV/AIDS</i> , CDC (Feb. 9, 2016), http://www.cdc.gov/hiv/research/demonstration/echpp/index.htm l	21
Gilliam Abel, <i>Sex Workers' Utilisation of Health Services in a Decriminalized Environment</i> , 127 N.Z. Med. J. 30 (2014) (N.Z.)	34
Global Network of Sex Work Projects, <i>Stigma and Discrimination Experienced by Sex Workers Living with HIV</i> , at 7 (2015) (Scot.), http://www.nswp.org/sites/nswp.org/files/Stigma%20and%20Dis	

crimination%20Experienced%20by%20Sex%20Workers%20Living%20with%20HIV,%20NSWP%20-%20December%202015.pdf.....	18
<i>HIV Risk Among Persons Who Exchange Sex for Money or Nonmonetary Items</i> , CDC, http://www.cdc.gov/hiv/pdf/group/cdc-hiv-sex-workers.pdf	12
Human Rights Watch, <i>Sex Workers at Risk, Condoms as Evidence of Prostitution in Four US Cities</i> 48 (2012), https://www.hrw.org/sites/default/files/reports/us0712ForUpload_1.pdf	23, 24
Interview by Human Rights Watch with Bamby Salcedo, outreach worker, Transgender Serv. Provider Network, in L.A., Cal. (Mar. 15 2012) (on file with interviewer)	23
Interview by Human Rights Watch with Lola L, sex worker , in L.A., Cal. (Mar. 14 2012) (on file with interviewer)	23
Interview by Human Rights Watch with Serena L., in L.A., Cal. (Mar. 14 2012) (on file with interviewer)	24
Jacqueline Cambell, <i>Health Consequences of Intimate Partner Violence</i> , 359 Lancet 1331 (2002)	32

Jacqueline Golding, <i>Intimate Partner Violence as a Risk Factor for Mental Disorders: A Meta-Analysis</i> , 14 J. Fam. Violence 99 (1999)	31
Jim Braxton et al., CDC, Dep't Health & Human Serv., <i>Sexually Transmitted Disease Surveillance 2014</i> (2015).....	22
Joint United Nations Programme on HIV/AIDS, <i>Sex work and HIV/AIDS</i> (Lindsay Knight & Jill Hannum eds., 2002) [hereinafter UNAIDS, <i>Sex Work</i>] (Switz.), http://data.unaids.org/publications/IRC-pub02/jc705-sexwork-tu_en.pdf	14
Joint United Nations Programme on HIV/AIDS, <i>UNAIDS Guidance Note on HIV and Sex Work</i> , (last updated Apr. 2012) [hereinafter UNAIDS, <i>Guidance Note</i>] (Switz.), http://www.unaids.org/sites/default/files/sub_landing/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf	14, 16
Juhu Thukral & Melissa Ditmore, Sex Workers Project, Urban Just. Ctr., <i>Revolving Door: An Analysis of Street-Based Prostitution in New York City</i> 36 (Bernie Horowitz ed., 2003), http://sexworkersproject.org/downloads/RevolvingDoor.pdf	28

- Kane Mathews, Scarlet Alliance, *The National Needs Assessment of sex workers who live with HIV*, (2008) (Austl.),
<http://www.scarletalliance.org.au/library/hiv-needsassessment08> 18
- Kate Bodkin et al., *Reducing Stigma in Healthcare and Law Enforcement: A Novel Approach to Service Provision for Street Level Sex Workers*, 14 Int'l J. Equity Health, Apr. 9, 2015, at 6,
<https://dx.doi.org/10.1186/s12939-015-0156-0> 15
- Kate Shannon & Joanne Csete, *Violence, condom negotiation, and HIV/STI risk among sex workers*, 304 J. Am. Med. Ass'n 573 (2010) [hereinafter Shannon, *Violence*] 25, 26
- Kate Shannon et al., *Social and structural violence and power relations in mitigating HIV risk of drug-using women in survival sex work*, 66 Soc. Sci. Med. 911, 919 (2008) [hereinafter Shannon, *Social and Structural*] 30
- Kate Shannon et al., *Structural and Environmental Barriers to Condom Use Negotiation with Clients Among Female Sex Workers: Implications for HIV-Prevention Strategies and Policy*,

99 Am. J. of Pub. Health 659 (2009) [hereinafter Shannon, <i>Structural and Environmental</i>].....	27
Leigh Tomppert, Sex Workers Project, Urb. Just. Ctr., <i>Public Health Crisis: An Analysis of the Impact of Using Condoms as Evidence of Prostitution in New York City</i> at 29 (Apr. 2012), http://sexworkersproject.org/downloads/2012/20120417-public- health-crisis.pdf	22
Linda Dahlberg & James Mercy, <i>The History of Violence as a Public Health Issue</i> , 11 Am. Med. Ass’n J. Ethics 167 (2009)	25
Lisa Lazarus et al., <i>Occupational Stigma as a Primary Barrier to Health Care for Street-Based Sex Workers in Canada</i> , 14 Culture, Health & Sexuality 139 (2012) (UK)	11, 13, 14, 19
Los Angeles Cty. Enhanced Comprehensive HIV Prevention Plan. Project, L.A. Cty, Dep’t Health, <i>Workbook #1: Situational Analysis & Goal Setting</i> 19 (CDC, 2011), http://www.cdc.gov/hiv/pdf/prevention_demonstrations_echpp_la _plan1.pdf	12
Lucy Platt et al., <i>Factors Mediating HIV Risk Among Female Sex Workers in Europe: A Systematic Review And Ecological</i>	

<i>Analysis</i> , 3 BMJ Open, Jul. 24, 2013, 10 (UK), dx.doi.org/10.1136/bmjopen-2013-002836.....	30
Michael Goodyear & Linda Cusick, <i>Protection of Sex Workers</i> , 334 BMJ 52 (2007) (UK)	30
NASTAD, <i>Guidelines to end HIV Criminalization In Public Health Practice</i> (2011), https://www.nastad.org/sites/default/files/decriminalization_guidelines.pdf	18
Paul Kobrak, N.Y.C. Dep't of Health & Mental Hygiene, <i>A report to the New York City commissioner of health</i> (2010), reprinted in <i>Public Health Crisis: An Analysis of the Impact of Using Condoms as Evidence of Prostitution in New York City</i> , <i>supra</i> , app. E, at 53-61	24
Prostitution L. Rev. Comm., Ministry Just., <i>Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003</i> (2008) (N.Z.), https://maggiemcneill.files.wordpress.com/2012/04/report-of-the-nz-prostitution-law-committee-2008.pdf	34, 37

Raul Caetano & Carol Cunradi, <i>Intimate Partner Violence and Depression Among Whites, Blacks, and Hispanics</i> , 13 <i>Annals of Epidemiology</i> 661 (2003).....	31
Scott Cunningham & Manisha Shah, Nat'l Bureau Econ. Res., Working Paper No. 20281, <i>Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health</i> (2014), dx.doi.org/10.3386/w20281	35
Stephen P. Kurtz et al., <i>Barriers to Health and Social Services for Street-Based Sex Workers</i> , 16 <i>J. of Health Care for the Poor & Underserved</i> 345, 357 (2005).....	16
<i>The Impact of Decriminalisation on the Number of Sex Workers in New Zealand</i> , 38 <i>J. Soc'y & Pol'y</i> 515 (2009) (U.K.).....	37
Working Group Of The Legal Reg. Of Sexual Serv., Ministry Of Just. & Police, Pub. No. G-0367, <i>Purchasing Sexual Services in Sweden and the Netherlands Legal Regulation and Experiences</i> , (Oct. 8, 2004) (Nor.), https://www.regjeringen.no/globalassets/upload/kilde/jd/rap/2004/0034/ddd/pdfv/232216-purchasing_sexual_services_in_sweden_and_the_netherlands.pdf	9

World AIDS Campaign, *Sex Work and the Law: The Case for*

Decriminalization at 16 (2010),

<http://www.desireealliance.org/conference/Sex%20Work%20and>

[%20the%20Law%20-%20case%20for%20decrim-2.pdf](http://www.desireealliance.org/conference/Sex%20Work%20and%20the%20Law%20-%20case%20for%20decrim-2.pdf) 35

IDENTITY AND INTERESTS OF *AMICI*

Amici curiae Lambda Legal Defense and Education Fund (“Lambda Legal”), AIDS United, APLA Health, The Center for HIV Law and Policy (CHLP), GLBTQ Legal Advocates & Defenders (GLAD), The HIV Prevention Justice Alliance (HIV PJA), National Alliance of State & Territorial AIDS Directors (NASTAD), National Center for Lesbian Rights (NCLR), Positively Trans (T+), Positive Women’s Network-USA (PWN-USA), San Francisco AIDS Foundation (SFAF), Brad Sears (Executive Director, The Williams Institute), Sero Project (Sero), and the Sex Workers Project at the Urban Justice Center are leading public interest organizations and individuals that represent the interests of—and provide services to—people living with HIV. *Amici* respectfully submit this brief to assist the Court in addressing central questions raised in this case, a challenge to the constitutionality of the prostitution and solicitation provision of California Penal Code Section 647(b) (West 2015).¹

¹ This *amicus curiae* brief is filed with the consent of all parties to this proceeding. No party’s counsel authored any portion of this brief. No party or party’s counsel contributed money intended to fund this brief’s

Amici are familiar with the parties' presentation on the issues and believe that additional argument is necessary. *Amici's* submission does not duplicate Appellants' briefing, though *Amici* agree with Plaintiff-Appellants that Penal Code Section 647(b) is unconstitutional and wrongly criminalizes private, consensual, constitutionally protected sexual activity between adults. *Amici* write to inform the court as to how criminal laws against prostitution impede efforts to improve public health, specifically by creating a barrier to HIV prevention and treatment efforts for vulnerable populations.²

preparation or submission. No person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund this brief's preparation or submission.

² Further detail about the work and expertise of each amicus is included as Appendix A attached hereto.

INTRODUCTION

This case asks the Court to decide whether it is constitutionally permissible for the State to outlaw engaging in voluntary adult sexual activity, the most intimate of physical relationships, if money or other valuable consideration is exchanged. Appellants have previously participated in this activity and want to engage in it in the future. To avoid criminal penalties for these types of intimate relationships, Appellants have filed constitutional claims to enjoin and invalidate California's state law prohibiting commercial sex work. As part of its defense of Section 647(b) of the California Penal Code, the State has proffered reducing the transmission of HIV and other sexually transmitted infections (STIs) as a justification for California's sex work ban.

Amici respectfully submit this brief to assist the Court in evaluating complex issues related to HIV and public health. Petitioning sex workers in this case represent a class of people disproportionately affected by HIV. Criminalizing their occupation constrains their access to health care, impairs their ability to get help if they are attacked or otherwise victimized, and creates a reinforcing cycle of stigma, isolation,

violence, and deteriorating health. The District Court's failure to examine the public health justification given by the State and to appreciate the complex dynamics between sex work and public health contributed to the error of the District Court in dismissing this case.

In this brief, *Amici* demonstrate that the statute not only fails to advance any legitimate governmental interest in public health, but actually impedes the health goals it purports to support. If allowed to stand, the District Court's ruling would perpetuate, without adequate examination, a legal scheme that in fact has detrimental public health consequences for sex workers and their clients, as well as victims of sex trafficking.³ Based on their expertise representing and working with people living with HIV, *Amici* urge this Court to remand this matter to the District Court to ensure that the public health arguments related to the criminalization of sex work are properly considered.

³ Sex trafficking is distinct from sex work. Sex workers are “adults (aged 18 and older) of all genders who receive money or goods in exchange for the consensual provision of sexual services, either regularly or occasionally,” whereas sex trafficking requires the element of “force, fraud, or coercion.” Amnesty International, *supra* note 2, at 3; The Trafficking Victims Protection Act of 2000, 22 U.S.C.A. §§ 7101–7110 (West 2016).

SUMMARY OF THE ARGUMENT

The prostitution and solicitation provision of California Penal Code Section 647(b) is not rationally related to the legitimate governmental interest it purports to advance, because decades of experience demonstrate that the law has had the opposite of its intended public health effect. Criminalizing sex work hinders rather than helps people involved in the sex trade to avoid HIV and other STIs. When the government criminalizes sex work, the behavior of people involved in the sex trade is shaped by fear of law enforcement, arrests, and penalties, making it harder to reach them with sound prevention efforts. Criminalization also deters sex workers from going to doctors and clinics or being forthcoming about the activities involved in their occupation when the work they do can result in criminal charges. Furthermore, criminalization deters sex workers from carrying and using condoms, a cheap and effective method of preventing HIV and other STIs—because those condoms may be used as evidence in prosecuting a prostitution-related crime. Sex workers are more likely to be targeted for violence and less likely to get help from law enforcement if they are attacked, because reporting violence against them likely will

reveal their engagement in criminalized activities. By contrast, decriminalization of sex work in other jurisdictions has significantly improved public health and access to care, as well as police relations and the reporting of violence—providing further corroboration of the negative effects of criminalizing sex work.

Because criminalizing sex work worsens public health—for both sellers and buyers—rather than protecting or improving it, the District Court erred in finding the statute rationally related to the state’s legitimate interest in promoting public health.

ARGUMENT

I. RATIONAL BASIS REVIEW REQUIRES THE COURT TO CONSIDER NOT ONLY WHETHER THE STATE HAS PROFFERED A LEGITIMATE GOVERNMENTAL INTEREST, BUT ALSO WHETHER THE STATUTE IS RATIONALLY RELATED TO ADVANCING THAT GOVERNMENTAL INTEREST.

As the District Court noted, rational basis⁴ review under the Due Process Clause of the Fourteenth Amendment is not toothless.

Mathews v. de Castro, 429 U.S. 181, 185 (1976). For a law to be legitimate, it must be “properly cognizable” by the government asserting it and “relevant to interests” it “has the authority to implement.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985). The law must bear a logical relationship to the purpose it

⁴ *Amici* are not taking a position at this time on whether engaging in sexual relations in exchange for valuable consideration is a fundamental right deserving heightened scrutiny in an analysis of the statute’s constitutionality under the Due Process Clause of the Fourteenth Amendment. See *Erotic Service Provider Legal Education & Research Project v. Gascon*, No. C 15-01007 JSW, 2016 WL 1258638 at 3-5 (D. N.D.Cal. Mar. 31, 2016) (addressing whether commercial sexual activity involves a fundamental right deserving of heightened scrutiny in an analysis of the statute’s constitutionality). Because the justifications offered for this statute by the State do not survive even rational basis review, it is unnecessary to address the appropriate level of scrutiny accorded the activity in question for purposes of this brief.

purports to advance. *See Romer v. Evans*, 517 U.S. 620, at 632-33 (1996); *see also Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374, at 387 (D. Mass. 2010). Finally, the justification for the law may not rely on factual assumptions that exceed the bounds of rational speculation. *Lewis v. Thompson*, 252 F.3d 567, 590 (2d Cir. 2001) (citing *Heller v. Doe*, 509 U.S. 312, at 320 (1993) (holding that speculation, while permissible, must still be “rational”)).

The governmental interest purportedly advanced by this statute is the improvement of public health, primarily by reducing transmission rates of STIs, including HIV. The State’s argument presumes that enforcing the criminal prohibition against sex work will in fact significantly reduce the incidence of sexual exchange. However, scientific studies demonstrate that criminalizing sex work does not decrease the amount of sex work taking place. *See Catherine Hakim, Economies of Desire: Sexuality and the Sex Industry in the 21st Century*, 35 Econ. Affairs 329, 329 (2004) (“The commercial sex industry is impervious to prohibitions and cannot be eliminated. Laws which constrain sellers of sexual services or criminalise [sic] purchasers are not evidence-based, and are bound to fail, wasting public resources.”).

In fact, as will be further explained below, the criminalization of sex work has deleterious effects on public health generally and actually increases HIV risk, because criminalization impedes access to healthcare and creates conditions driving riskier sexual activity. *See id.*; *see also* Working Group Of The Legal Reg. Of Sexual Serv., Ministry Of Just. & Police, Pub. No. G-0367, *Purchasing Sexual Services in Sweden and the Netherlands Legal Regulation and Experiences*, (Oct. 8, 2004) (Nor.),

[https://www.regjeringen.no/globalassets/upload/kilde/jd/rap/2004/0034/d](https://www.regjeringen.no/globalassets/upload/kilde/jd/rap/2004/0034/dd/pdfv/232216-)

[dd/pdfv/232216-purchasing_sexual_services_in_sweden_and_the_nederlands.pdf](#)

(criminalizing clients—and not sex workers—did not reduce prostitution, and led to greater exploitation of street sex workers, along with pressure to reduce prices and to provide unprotected sex).⁵ Given

⁵ In addition to studies about sex work in the U.S., *Amici* rely upon studies from select other countries, including Canada, Australia, and New Zealand. Many of the studies regarding the criminal prohibition of sex work and its effects on public health have been conducted internationally. *Amici* have restricted citations in this brief to studies conducted in countries with legal environments and country conditions similar to those in the United States.

these findings and the decades of experience with Section 647(b), the inquiry of the Court with respect to any public health benefits conferred by the statute properly must focus on the actual effects of the statute rather than on the speculative benefits of what could most aptly be described as the fantasy of eliminating or significantly reducing sex work in California.

Amici do not dispute that the State has a valid interest in promoting public health and reducing the spread of disease. However, given the current science and scholarship, the State's claim that maintaining modern prostitution and solicitation law is logically related to protecting public health is demonstrably false. It is not rational to assert a government interest that is actually impeded by the law, nor is it rational to wishfully speculate that the law will start functioning to substantially reduce the incidence of sexual exchange and thereby achieve the goals lawmakers desired. In granting Defendant-Appellees' motion to dismiss, the District Court incorrectly accepted the governmental interests proffered by the State as rationally related to the statute. This Court should reverse the order granting Appellees' Motion to Dismiss and remand the case to the District Court for

proceedings to evaluate the rationality of the State's asserted interests in the statute.

I. CRIMINAL LAWS SUCH AS CALIFORNIA'S §647(B), DRIVE SEX WORK UNDERGROUND AND DAMAGE PUBLIC HEALTH EFFORTS TO REACH SEX WORKERS, THEIR CLIENTS, AND TRAFFICKING VICTIMS.

The criminalization of sex work undermines public health efforts to decrease the transmission of HIV and other STIs. Sex workers are subject to isolation, prosecution, life-threatening violence, and discrimination, all of which hinder access to health care. Conditions in California, as in any state that continues to criminalize sex work, can be unsafe for sex workers, especially for street-based sex workers, because criminalization increases exposure to violence and deters reporting violence to law enforcement for fear of arrest or discrimination based on sex workers' occupation.

A. Criminalization of Sex Workers Reduces Access to Healthcare Generally and HIV-Related Care in Particular.

Laws, policies, discriminatory practices, and stigmatizing social attitudes drive sex work underground, impeding public health efforts to reach sex workers and their clients with HIV prevention, treatment, care and support programs. *See* Lisa Lazarus et al., *Occupational*

Stigma as a Primary Barrier to Health Care for Street-Based Sex Workers in Canada, 14 Culture, Health & Sexuality 139 (2012) (UK) (finding that the quasi-criminalization and stigmatization of sex work acts as a major barrier to health care access).

i. Criminalization of Sex Work Impedes Access to HIV Prevention.

Worldwide, sex workers are a long-established “key population” for HIV, meaning that they are disparately affected by HIV and that public health efforts should target sex workers for HIV prevention and treatment efforts.⁶ See e.g., Los Angeles Cty. Enhanced Comprehensive HIV Prevention Plan. Project, L.A. Cty, Dep’t Health, *Workbook #1: Situational Analysis & Goal Setting* 19 (CDC, 2011),

⁶ In general, higher rates of HIV are documented among sex workers as compared to the general population. See *HIV Risk Among Persons Who Exchange Sex for Money or Nonmonetary Items*, CDC, <http://www.cdc.gov/hiv/pdf/group/cdc-hiv-sex-workers.pdf>. However, the rate of HIV among sex workers is not fixed and can be reduced when the proper environment for public health interventions is created. Accessible healthcare, free HIV testing, and prevention education programs have resulted in Australian sex workers with consistently low rates of STIs and HIV (less than 1%) after decriminalization. Elena Jeffreys et al., *Mandatory Testing for HIV and Sexually Transmissible Infections among Sex Workers in Australia: A Barrier to HIV and STI Prevention*, 2 World J. AIDS 203 (2012), <http://dx.doi.org/10.4236/wja.2012.23026>.

http://www.cdc.gov/hiv/pdf/prevention_demonstrations_echpp_la_plan1.pdf (acknowledging conditions contributing to risk for acquiring or transmitting HIV and identifying sex workers as a group upon which to focus). HIV prevention and treatment interventions for sex workers are cost-effective and can reduce the risk of STI infection for this population. See Deanna Kerrigan et al., World Bank, *The Global Epidemics of HIV among Sex Workers*, (2012), <http://dx.doi.org/10.1596/978-0-8213-9774-9>. Yet sex workers face significant barriers in accessing prevention and treatment. See Lazarus, *supra*, at 139 (finding that 55.9% of respondent sex workers reported occupational stigma and 49.6% reported barriers to accessing health services in the previous six months). The Joint United Nations Programme on HIV/AIDS (UNAIDS) has documented that, in large part due to the criminalization of sex work, sex workers frequently have insufficient access to adequate health services, male and female condoms, water-based lubricants, post-exposure prophylaxis following condomless sex or rape, management of STIs, drug treatment and other harm reduction services, protection from violence and abusive work conditions, and social and legal support. Joint United Nations

Programme on HIV/AIDS, *Sex work and HIV/AIDS* (Lindsay Knight & Jill Hannum eds., 2002) [hereinafter UNAIDS, *Sex Work*] (Switz.), http://data.unaids.org/publications/IRC-pub02/jc705-sexwork-tu_en.pdf; Joint United Nations Programme on HIV/AIDS, *UNAIDS Guidance Note on HIV and Sex Work*, (last updated Apr. 2012) [hereinafter UNAIDS, *Guidance Note*] (Switz.), http://www.unaids.org/sites/default/files/sub_landing/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf.

Due in part to the illegal nature of the work, sex workers often face discrimination and rejection in accessing healthcare, with damaging health results. *See Lazarus, supra*, at 139 (noting that “[i]ndividuals working in the sex industry continue to experience many negative health outcomes” and finding that sex work stigma, fear of disclosure of one’s occupation as a sex worker, and mistreatment by health providers are among the strongest institutional barriers to care). Furthermore, data show that occupational stigma of criminalized work increases vulnerability to stress and diseases, compounding health care needs while simultaneously acting as a barrier to health care services essential to prevention. *See Cecilia Benoit et al., Community-Academic*

Research on Hard-to-Reach Populations: Benefits and Challenges, 15 Qualitative Health Res. 263, 264 (2005) (noting that the strategies sex workers use to address the negative experiences and emotions sex workers navigate because their occupation is criminalized “weaken their social networks and support systems and increase their vulnerability to stress, depression, and other maladies”).

When sex workers do seek out healthcare services, they often are regarded in ways that reinforce criminal stigma, which can deter sex workers from seeking care at all and from disclosing their occupation for fear of discrimination by their healthcare provider and disclosure of their identity and activities to law enforcement. See Kate Bodkin et al., *Reducing Stigma in Healthcare and Law Enforcement: A Novel Approach to Service Provision for Street Level Sex Workers*, 14 Int’l J. Equity Health, Apr. 9, 2015, at 6, <https://dx.doi.org/10.1186/s12939-015-0156-0> (noting that before the healthcare intervention study, “street level sex workers in London reported a negative relationship with healthcare workers and the police. . . .[which] resulted in avoidance of police and health services, which likely serv[ed] to reinforce negative health outcomes and increased exposure to violence”).

Fear of arrest can impose a barrier to HIV testing, as sex workers fear and avoid contact with any type of services because of the possibility of police involvement. See Stephen P. Kurtz et al., *Barriers to Health and Social Services for Street-Based Sex Workers*, 16 J. of Health Care for the Poor & Underserved 345, 357 (2005) (finding that among the most commonly reported impediments to services for sex workers were “fear of authority figures” and “fear [of] arrest on loitering, solicitation, and drug possession charges when going for help [, which was] . . . especially worrisome when seeking health care.”). UNAIDS has identified access to nonjudgmental care as one of the fundamental pillars in ensuring HIV prevention services to sex workers. UNAIDS, *Guidance Note*, *supra*, at 3.

Stigma and mistreatment experienced while receiving healthcare and the lack of trust that providers will maintain privacy and distance from the criminal justice system impede STI and HIV transmission prevention measures—a dynamic that runs counter to the State’s proffered interest in the statute in question.

**ii. For Sex Workers Living With HIV,
Criminalization of Sex Work Impedes Access to
HIV-Related Care.**

With consistent access to quality health care and sufficient support, people living with HIV today can reduce their viral load to what is described as an “undetectable” level and live a long, relatively healthy life. *See* Alison J. Rodger et al., *Sexual Activity Without Condoms and Risk of HIV Transmission in Serodifferent Couples When the HIV-Positive Partner Is Using Suppressive Antiretroviral Therapy*, 316 J. Am. Med. Ass’n 171 (2016). Along with the personal health benefits, a suppressed viral load confers the public health benefit of rendering the person with HIV essentially noninfectious. *Id.*

However, criminalizing sex work and reinforcing stigma associated with it continues to impede efforts to reach and treat sex workers living with HIV.⁷ For sex workers living with HIV, the “double

⁷ Sex workers living with HIV are targets of a second criminal regime—the criminalization of the sex lives of people living with HIV—that also erroneously has been justified as promoting public health. *See* Cal. Health & Safety Code § 120291 (making it a felony to engage in sexual activity with intent to transmit the virus); Cal. Penal Code § 647(f) (West 2015) (making it a felony to engage in sex work if testing HIV positive after a previous conviction under Penal Code Section 647(b)).

stigma” has been shown to affect healthcare services. See Global Network of Sex Work Projects, *Stigma and Discrimination Experienced by Sex Workers Living with HIV*, at 7 (2015) (Scot.), <http://www.nswp.org/sites/nswp.org/files/Stigma%20and%20Discrimination%20Experienced%20by%20Sex%20Workers%20Living%20with%20HIV,%20NSWP%20-%20December%202015.pdf> (“the effects of double stigma were most noticeable in the area of healthcare”). When sex workers living with HIV disclose their occupation and HIV status to healthcare workers, they often experience mistreatment. *Id.* at 7 (quoting Kane Mathews, Scarlet Alliance, *The National Needs Assessment of sex workers who live with HIV*, (2008) (Austl.),

The Williams Institute examined who is charged and convicted under HIV-specific statutes in California and found that “[t]he vast majority (95%) of all HIV-specific criminal incidents impacted people engaged in sex work or individuals suspected of engaging in sex work.” See Amira Hasenbush, et al., Williams Institute, *HIV Criminalization in California: Penal Implications for People Living with HIV* (Dec. 2015). Public health representatives and law enforcement officials alike have called for reform of these laws, in part because there is no evidence they actually promote public health. NASTAD, *Guidelines to end HIV Criminalization In Public Health Practice* (2011), https://www.nastad.org/sites/default/files/decriminalization_guidelines.pdf; Dep’t of Just., No. 14-739, *Justice Department Releases Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors* (Jul. 2014).

<http://www.scarletalliance.org.au/library/hiv-needsassessment08>) (“It has been reported that instances of disclosure of both HIV status and sex work generally led to very poor treatment and harassment, and in one reported case included physical violence by a health care worker”). These negative experiences deter sex workers from necessary healthcare. *See Lazarus, supra*, at 145 (revealing “a high prevalence of occupational stigma among street-based sex workers, with close to half of sex workers reporting immediate barriers to health access”).

B. Use of Condoms as Evidence Undermines Prevention of HIV and Other Sexually Transmitted Infections (STIs), as well as Other Public Health Goals.

In many jurisdictions in the United States, including in California, police and prosecutors consider the mere possession of condoms to constitute evidence of intent to engage in prostitution and other prostitution-related crimes. Arresting and prosecuting people who carry condoms reduces use of an extremely effective and affordable prevention tool, particularly for people engaged in (or profiled as likely to engage in) “street level” sex work. And using condoms as evidence makes managing sexual health more difficult because it forces

individuals to weigh the risk of prosecution for a prostitution-related crime against the risk of transmitting or acquiring HIV and other STIs.

i. Condoms Are an Effective Prevention and Sexual Health Management Tool.

Condom distribution is a cost-effective, important tool for public health departments in the fight against STIs. *See* Charles Collins & Ted Duncan, CDC, *Presentation at PA 11-1113 Grantee Meeting: Condom Distribution Programs As Structural Intervention* (Dec. 6-7, 2011), [https://effectiveinterventions.cdc.gov/docs/default-source/condom-distribution-](https://effectiveinterventions.cdc.gov/docs/default-source/condom-distribution-docs/Condom_Distribution_Programs_as_Structural_Interventions.pdf?sfvrsn=0)

[docs/Condom_Distribution_Programs_as_Structural_Interventions.pdf?sfvrsn=0](https://effectiveinterventions.cdc.gov/docs/default-source/condom-distribution-docs/Condom_Distribution_Programs_as_Structural_Interventions.pdf?sfvrsn=0). For more than three decades, the Centers for Disease Control and Prevention (CDC) has promoted consistent and correct condom use as a key way of significantly reducing the risk of transmission of HIV and other STIs. *See, e.g.,* CDC, Dep't Health & Human Serv., *Perspectives in Disease Prevention and Health Promotion Condoms for Prevention of Sexually Transmitted Diseases*, 37 *Morbidity & Mortality Wkly. REP.* 133 (1988),

<http://www.cdc.gov/mmwr/preview/mmwrhtml/00001053.htm>; *see also* CDC, Dep't Health & Human Serv., No. CS214651, *Condom Fact Sheet*

In Brief (last updated March 25, 2013) (stating that laboratory and epidemiologic studies show that condoms provide an effective barrier for STI pathogens).

Public health departments spend significant resources educating the public on condom use and distributing condoms to at-risk populations. *See, e.g.*, Div. of HIV and STD Programs, L.A. Cty. Dept. of Pub. Health, *2014 Annual HIV/STD Surveillance Report*, (Feb. 2016), <https://admin.publichealth.lacounty.gov/DHSP/Reports/HIV-STDsurveillanceReport2014.pdf>. For instance, in Los Angeles County, where 48,900 persons are estimated to be living with HIV, increased condom distribution to vulnerable populations is a top priority. *Id.*; *Enhanced Comprehensive HIV Prevention Planning and Implementation for Metropolitan Statistical Areas Most Affected by HIV/AIDS*, CDC (Feb. 9, 2016), <http://www.cdc.gov/hiv/research/demonstration/echpp/index.html>. Despite such efforts, reported cases of chlamydia, gonorrhea, and syphilis have been steadily increasing in Los Angeles County over the last five to ten years. Cal. Dep't of Pub. Health, *Local Health Jurisdiction STD Data Summaries* (2016),

<https://www.cdph.ca.gov/data/statistics/Documents/STD-Data-LHJ-LosAngeles.pdf>; *see also* Jim Braxton et al., CDC, Dep't Health & Human Serv., *Sexually Transmitted Disease Surveillance 2014* (2015) (reporting cases of chlamydia, gonorrhea, and syphilis recently increasing nationwide for the first time since 2006).

**ii. Using Condoms as Evidence of Prostitution
Reduces Use of Condoms and Increases STI
Transmission Risk**

There are numerous reports of condoms being confiscated, destroyed or used to justify arrests for prostitution in several major U.S. cities. *E.g.*, Leigh Tomppert, Sex Workers Project, Urb. Just. Ctr., *Public Health Crisis: An Analysis of the Impact of Using Condoms as Evidence of Prostitution in New York City* at 29 (Apr. 2012), <http://sexworkersproject.org/downloads/2012/20120417-public-health-crisis.pdf> (noting that “people can be harassed or arrested for possessing even one condom.” and “[d]espite the fact that most prostitution cases do not go to trial, condoms are frequently vouchered and cited in criminal court complaints and supporting depositions as arrest evidence in prostitution-related cases.”). In some instances, even public health outreach workers who distribute condoms in these communities have

been arrested and charged with prostitution because they (of course) had condoms. Human Rights Watch, *Sex Workers at Risk, Condoms as Evidence of Prostitution in Four US Cities* 48 (2012), https://www.hrw.org/sites/default/files/reports/us0712ForUpload_1.pdf (quoting Interview by Human Rights Watch with Bamby Salcedo, outreach worker, Transgender Serv. Provider Network, in L.A., Cal. (Mar. 15 2012) (on file with interviewer)).

In jurisdictions where police treat condoms as probable cause for arrest, sex workers carry fewer condoms out of fear of the condoms being used against them in a criminal prosecution. *See id.* at 52. A 2012 Human Rights Watch report documented the pervasive belief among Los Angeles sex workers that it is illegal to carry more than three condoms—with many people citing the police as the source for this information. *See id.* at 3, 49 (quoting Interview by Human Rights Watch with Lola L, sex worker , in L.A., Cal. (Mar. 14 2012) (on file with interviewer)) (quoting an outreach worker who said, “when you’re in a high risk area, don’t carry more than three condoms on you because [they] can arrest you [for prostitution],” and Maria, a Los Angeles sex

worker who asked, “Why is the city giving me condoms when I can’t carry them without going to jail?”)

The harmful effects of this enforcement practice extend beyond sex workers to those who may be profiled and *mistaken* for sex workers. See Paul Kobrak, N.Y.C. Dep’t of Health & Mental Hygiene, *A report to the New York City commissioner of health* (2010), reprinted in *Public Health Crisis: An Analysis of the Impact of Using Condoms as Evidence of Prostitution in New York City*, *supra*, app. E, at 53-61 (documenting that respondents—who were sex workers, harm reduction members, service users, and outreach workers—report being profiled as sex workers by police based on race, gender identity and expression, clothing, and location); See Human Rights Watch, *supra*, at 52 (quoting Interview by Human Rights Watch with Serena L., in L.A., Cal. (Mar. 14 2012) (on file with interviewer)) (“Serena L., a former Los Angeles sex worker who is now in school, said, ‘Condoms in purse’ was on my arrest report. I don’t carry condoms because this happened to me[. . .]”).

With fewer condoms on hand and more policing, rates of condom use go down. See *id.* This effect undermines STI prevention efforts and harms public health. In sum, enforcement of Cal. Penal Code section

647(b) through using condoms as evidence directly undermines STI prevention efforts and thus public health.

C. Criminalizing Sex Work Drives Violence Against Sex Workers and Victims of Trafficking.

i. Where Sex Work Is Criminalized, Sex Workers Suffer Violence at the Hands of Intimate Partners, Clients, Police, and Others.

The incidence of violence is also a measure of public health. Linda Dahlberg & James Mercy, *The History of Violence as a Public Health Issue*, 11 Am. Med. Ass’n J. Ethics 167 (2009) (recognizing violence as a public health problem). Where sex work is criminalized, there are alarmingly high rates of physical and sexual violence against sex workers by clients, individuals posing as clients, police, exploitative “pimps” and others. See Kate Shannon & Joanne Csete, *Violence, condom negotiation, and HIV/STI risk among sex workers*, 304 J. Am. Med. Ass’n 573 (2010) [hereinafter Shannon, *Violence*]. Abuse is fueled when perpetrators recognize the barriers criminalized sex workers face to seeking justice, perpetuating physical and sexual violence with impunity. *Id* at 573. Abusive intimate partners can exploit the illegality of sex work and may threaten to expose their partners to police, as tactics of control. Chris Bruckert and Tuulia Law, *Beyond Pimps*,

Procurers and Parasites: Mapping Third Parties in the Incall/Outcall Sex Industry at 88 (JD Drummond rep. copy ed., 2013) (Can.), [http://www.nswp.org/sites/nswp.org/files/ManagementResearch%20\(4\).pdf](http://www.nswp.org/sites/nswp.org/files/ManagementResearch%20(4).pdf) (“[D]isappointed clients can not only withdraw their patronage but also report the business to the police. However unlikely the latter scenario actually is . . . sex workers are mindful of the potentiality. They are also cognizant that such an action could result in (among other things) an investigation, criminal charges, loss of business or workplace, seizure of assets, legal costs, a criminal record and restricted mobility for third parties and sex workers. In this context . . . sex workers are very anxious to keep clients satisfied. This can work against sex workers, for example, in the event that clients are requesting services or prices the sex worker would not otherwise provide”).

To avoid police detection, criminalized sex workers often displace themselves to isolated (and more dangerous) settings, effectively forcing them to trade away their safety and well-being. Shannon, *Violence*, *supra* at 573. (“[Sex work criminalization] gives police broad latitude to arrest and threaten arrest of sex workers, which may cause street-based

sex workers to move from town centers to more isolated spaces such as rural highways or industrial settings where arrest is less likely or there is tolerance of informal sex work. The isolation of these settings, however, can enable violence with impunity as witnesses and places to flee violence are few.”) When criminalization prompts sex workers and their customers to move their encounters off main streets and into less trafficked areas, they are exposed to greater risk of violence, more pressure to engage in unprotected sex, and other hazards. *See generally* Kate Shannon et al., *Structural and Environmental Barriers to Condom Use Negotiation with Clients Among Female Sex Workers: Implications for HIV-Prevention Strategies and Policy*, 99 Am. J. of Pub. Health 659 (2009) [hereinafter Shannon, *Structural and Environmental*].⁸

Zealous enforcement of sex work laws only increases the risk of violence. In Canada, after enforcement efforts focusing exclusively on clients were stepped up in 2014, sex workers reported greater danger to

⁸ Vulnerability to violence also opens workers up to the force and coercion that are the hallmarks of trafficking. In turn, people who are trafficked have reduced control over their work and their choices, leading to worsened health, including added vulnerability to HIV and disease progression.

their personal safety as a result. A. Krüsi et al., *Criminalisation of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada—a qualitative study*, 4 BMJ Open, Jun. 2, 2014, at 1, 4 (UK), [dx.doi.org/10.1136/bmjopen-2014-005191](https://doi.org/10.1136/bmjopen-2014-005191).

One sex worker shared a specific incident with researchers,

While [police are] going around chasing johns away from pulling up beside you, I have to stay out for longer [...]
Whereas if we weren't harassed we would be able to be more choosy as to where we get [into cars], who we get in with you know what I mean? Because of being so cold and being harassed I got into a car where I normally wouldn't have. The guy didn't look at my face right away. And I just hopped in cause I was cold and tired of standing out there. And you know, he put something to my throat. And I had to do it for nothing.

Id. at 5.

Violence against sex workers is often not registered as an offense by the police and in some cases is perpetrated by police. Juhu Thukral & Melissa Ditmore, Sex Workers Project, Urban Just. Ctr., *Revolving Door: An Analysis of Street-Based Prostitution in New York City* 36 (Bernie Horowitz ed., 2003),

<http://sexworkersproject.org/downloads/RevolvingDoor.pdf> (“[P]olice did not take [the sex workers’] complaints seriously and often told them that they should expect violence Thirty percent of sex workers

interviewed told researchers that they had been threatened with violence by police officers, while 27% actually experienced violence at the hands of police.”). Sex workers report severe sexual violence, including forced unprotected sex by police officers, both at the time of arrest for prostitution-related crimes and while in custody on those criminal charges. See Acacia Shields, Sexual Health & Rights Project, Open Society Foundations, *Criminalizing Condoms* 27 (2012), <https://www.opensocietyfoundations.org/sites/default/files/criminalizing-condoms-20120717.pdf>. Fear of being charged with prostitution-related offenses can be a significant barrier to reporting violence. Chris Bruckert & Tuulia Law, *supra*, at 88 (“[S]ex workers are hesitant to report victimization to the police because they fear that they and/or their employer may be charged with prostitution-related offences. Of course, if the acts are not reported, the aggressors will not be held to account. This, as others have noted in relation to the impact of the criminalization of sex workers, means not only that sex workers are denied access to criminal justice redress but also that predators may continue to prey on sex workers”). And the criminalization of sex work means the violence that occurs in the context of sex work has been

largely unmonitored, resulting in few to no legal protections afforded to sex workers by police and judicial systems. Michael Goodyear & Linda Cusick, *Protection of Sex Workers*, 334 BMJ 52 (2007) (UK). The criminalization of sex work perpetuates a cycle of violence against sex workers.

ii. Violence Resulting From Criminalization Can Increase STI Risk for Sex Workers.

Sexual and other physical violence drives additional HIV risk for people already at heightened risk, such as sex workers. See Lucy Platt et al., *Factors Mediating HIV Risk Among Female Sex Workers in Europe: A Systematic Review And Ecological Analysis*, 3 BMJ Open, Jul. 24, 2013, at 1, 10 (UK), [dx.doi.org/10.1136/bmjopen-2013-002836](https://doi.org/10.1136/bmjopen-2013-002836) (finding “evidence shows how violence may increase risk of HIV [for sex workers]”). Violence and threats of violence have been shown to reduce the control sex workers have over transactions with their clients, including their ability to negotiate sexual risk mitigation (*i.e.*, particular types of sexual activities and condom use). See Kate Shannon et al., *Social and structural violence and power relations in mitigating HIV risk of drug-using women in survival sex work*, 66 Soc. Sci. Med. 911, 919 (2008) [hereinafter Shannon, *Social and Structural*] (finding

that “everyday violence and structural power relations experienced by women engaged in survival sex work mediate the negotiation process of risk reduction strategies, resulting in a heightened risk of HIV transmission”).

These assaults related to sex work trigger the negative health effects of intimate partner violence commonly seen in the general population, including poor health overall, physical and sexual injury, and mental health problems such as depression, anxiety, and post-traumatic stress disorder. See Raul Caetano & Carol Cunradi, *Intimate Partner Violence and Depression Among Whites, Blacks, and Hispanics*, 13 *Annals of Epidemiology* 661 (2003); Jacqueline Golding, *Intimate Partner Violence as a Risk Factor for Mental Disorders: A Meta-Analysis*, 14 *J. Fam. Violence* 99 (1999); Ariel Lang et al., *Anxiety Sensitivity and PTSD Among Female Victims of Intimate Partner Violence*, 16 *Depression & Anxiety* 77 (2002); Concepción Blasco-Ros et al., *Recovery from Depressive Symptoms, State Anxiety and Post-Traumatic Stress Disorder in Women Exposed to Physical and Psychological, but not to Psychological Intimate Partner Violence Alone: A Longitudinal Study*, *BMC Psychiatry* Nov. 25, 2010,

dx.doi.org/10.1186/1471-244X-10-98; Jacqueline Cambell, *Health Consequences of Intimate Partner Violence*, 359 Lancet 1331 (2002).

Where sex work is criminalized, violence, fear of violence, and lost trust in law enforcement are linked to reduced access to health and social services, and worsened public health.

II. DECRIMINALIZATION OF SEX WORK IN OTHER JURISDICTIONS HAS SIGNIFICANTLY IMPROVED PUBLIC HEALTH.

In stark – and promising – contrast, in jurisdictions where sex work has been decriminalized, public health has improved markedly. In particular, dramatic improvements have occurred in sexual health, prevention of HIV and other STIs, and the incidence of violence.

A. Where Sex Work Is Decriminalized, Access to Care Improves, STI Rates Decrease, and Safer Sex Practices Increase.

Australia has decriminalized sex work in varying ways across its states and territories since 1979, and subsequent research consistently shows that Australian sex workers have lower rates of STIs than the non-sex worker population. *See* Elena Jeffreys, *supra* note 7. Australian sex workers have consistently low rates of sexually transmissible infections (STIs), including HIV (less than 1%), and high rates of

prophylactic use—a result of Australia’s partnership approach to HIV, sex worker peer education, and safer sex practices in a decriminalized environment. *Id.*; see also Dep’t Health & Ageing, Pub. No. 6662, *Sixth National HIV Strategy 2010-2013* (2010) (Austl.), [https://www.health.gov.au/internet/main/publishing.nsf/Content/ohp-national-strategies-2010-hiv/\\$File/hiv.pdf](https://www.health.gov.au/internet/main/publishing.nsf/Content/ohp-national-strategies-2010-hiv/$File/hiv.pdf).

Sex workers maintain these improvements across various states in Australia. In New South Wales, the Law and Sex Worker Health (LASH) 2011 report found that condom use approaches 100% in Sydney brothels, and STI rates are at historic lows. See Basil Donovan et al., The Law & Sex Worker Health Project, Kirby Institute, *The Sex Industry in New South Wales: A Report to the NSW Ministry of Health* (2012) (Austl.), <http://www.acon.org.au/wp-content/uploads/2015/04/NSW-Sex-Industry-Report-CSRH-2012.pdf>; Effective prevention education, access to free and anonymous testing, and the strong uptake of condom use by sex workers are key factors identified in the successful HIV prevention engagement of New South Wales sex worker communities. *Id.* at 12. Conversely, threat of

recriminalization of sex workers affects sex workers' active use of government-provided healthcare services.⁹

In 2003, New Zealand decriminalized sex work. *See* Prostitution L. Rev. Comm., Ministry Just., *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (2008) (N.Z.), <https://maggiemcneill.files.wordpress.com/2012/04/report-of-the-nz-prostitution-law-committee-2008.pdf>. Since the law changed, sex workers are more likely to have a personal doctor, to disclose to their doctor that they are sex workers, and to use the government guide on health and safety practices within the sex trade. *See* Gilliam Abel, *Sex Workers' Utilisation of Health Services in a Decriminalized Environment*,

⁹ An HIV criminalization case out of Australia, demonstrates the relationship between criminalization and sex workers' willingness to access healthcare. After the Australia Capital Territory decriminalized indoor and private sex work and instituted HIV-related care designed for sex workers, the state at one point saw a dramatic drop in sex worker attendance at outreach medical services after a sex worker living with HIV was jailed under the HIV criminalization laws. Elena Jeffreys, *supra* note 7, at 205. Out of concern that if they tested positive they would be criminalized based on HIV-positive status *because* they were sex workers, many sex workers in Australia became fearful of testing for HIV through government-run healthcare providers. One cohort of outreach service providers saw a 92% drop in attendance during the four-week period following the court case.

127 N.Z. Med. J. 30 (2014) (N.Z.) (discussion of healthcare use and accessibility post decriminalization in New Zealand). Additionally, New Zealand sex workers have reported that it is easier to get clients to use condoms in a decriminalized environment. World AIDS Campaign, *Sex Work and the Law: The Case for Decriminalization* at 16 (2010), <http://www.desireealliance.org/conference/Sex%20Work%20and%20the%20Law%20-%20case%20for%20decrim-2.pdf>.

The United States has similarly seen marked improvements in public health outcomes after decriminalization of sex work. From 2003 until 2009, Rhode Island unintentionally decriminalized prostitution through a statutory amendment that resulted in a legal loophole allowing indoor sex work. *Rhode Island ex rel. City of Providence v. Choe*, No. 61-2003-03314 (6th Div. Dist. Ct. 2003) (discovering that a May 1980 amendment to section 11-34 of the General Laws of Rhode Island had inadvertently decriminalized). The state saw 39% fewer cases of female gonorrhea. See Scott Cunningham & Manisha Shah, Nat'l Bureau Econ. Res., Working Paper No. 20281, *Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health* (2014), [dx.doi.org/10.3386/w20281](https://doi.org/10.3386/w20281). Additionally, rates of higher-risk sex

acts (such as receptive anal sex) decreased substantially, and condom use during oral sex—which otherwise involves a significant risk for some STIs (though not HIV)—increased. *Id.*

Additional evidence from Nevada (where indoor sex work is legal) suggests indoor sex workers report feeling safe in their decriminalized working environment. Largely because the police, employers and co-workers were more available to protect them in a decriminalized environment, eighty-four percent (84%) said their job felt safe. Barbara Brents et al., *The State of Sex: Tourism, Sex and Sin in the New American Heartland* (2010). Decriminalized conditions also promote safer sex as workers feel more empowered to reject riskier sexual propositions.

B. Where Sex Workers Are Able to Assert Control Over Their Working Environments, Overall Violence Decreases.

During the period of decriminalized indoor prostitution in Rhode Island, the overall number of reported rapes in the state decreased by 31%, which can be an important indicator of police/ community

relations.¹⁰ Studies show that reducing encounters between sex workers and police enforcing prostitution-related laws fosters higher rates of sex workers reporting violence to police. A New Zealand study reported that 70% of sex workers surveyed reported they were more likely to report violence to the police after decriminalization than before. Prostitution L. Rev. Comm. *supra*. And research suggests that New Zealand's decriminalization had little impact on the number of people working in the sex industry. See Gilliam Abel et al., *The Impact of Decriminalisation on the Number of Sex Workers in New Zealand*, 38 J. Soc'y & Pol'y 515 (2009) (U.K.). Removing criminal laws against prostitution is an important step toward increasing health and safety for sex workers and for communities.

¹⁰ This decrease in assaults did not reflect increased policing in 2003. See Cunningham & Manisha, *supra* (explaining that researchers ran statistical models using non-sex crimes as an intrastate “placebo” to “net out any unobserved factors that determine crime other than [the decriminalization by] judicial decision”). In fact, the study revealed that rape is the only crime that showed a sharp decrease post-2003.

CONCLUSION

The District Court erred by granting the State's motion to dismiss and holding that section 647(b) of the California Penal Code "bear[s] a logical relationship" to advancing public health. Contrary to assertions made by the State, the prostitution and solicitation law undermines public health efforts in STI prevention and care, as well as efforts to reduce violence against women and victims of trafficking. As demonstrated above, the State's justification for section 647(b) relies on factual assumptions—sex work will decrease and public health will improve as a result of this law—that "exceed the bounds of rational speculation" and in fact run counter to the State's proffered goals. Thus, the statute does not bear a logical relationship to the purpose the State purports to advance with the statute. Because the State's justification relies on faulty assumptions repeatedly disproven by reproducible research, this Court should reverse the decision of the District Court and should allow proceedings to dispute the rationality of the law's justification.

For all of the above reasons, this Court should reverse the Order Granting Appellees' Motion to Dismiss and remand the case to the District Court.

RESPECTFULLY SUBMITTED this 7th day of October 2016.

LAMBDA LEGAL
Carmina Ocampo

By: /s/ Carmina Ocampo
Carmina Ocampo

Attorneys for *Amici* Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FRAP 32(a)(7) because it contains 7000 words, excluding those parts exempted by FRAP 32(a)(7)(B)(iii), as determined by the word-counting feature of Microsoft Word.

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

/s/ Carmina Ocampo
Carmina Ocampo

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 7, 2016.

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

/s/ Carmina Ocampo
Carmina Ocampo

APPENDIX

A

APPENDIX A

Lambda Legal Defense and Education Fund

Lambda Legal is the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbian women, gay men, bisexual people, transgender people (“LGBT” people) and people living with HIV through impact litigation, education and public policy work. Through its HIV Project, Lambda Legal litigates and advocates for the rights of people living with HIV and, through this and other components of its work on behalf of the LGBT community, combats HIV-related stigma, bias and misinformation. Lambda Legal won the first HIV discrimination lawsuit in the country in 1983, and has fought to promote and defend the rights of people living with HIV across the United States, and to advance the use of accurate medical and scientific evidence as a basis for legal decision-making regarding the rights of people living with HIV, as well as prevention efforts. Lambda Legal’s HIV expertise is particularly relevant to the case at bar and will assist the Court as it considers the complex issues presented in this appeal.

The mission of AIDS United is to end the AIDS epidemic in the United States through national, regional and local policy/advocacy, strategic grant-making, and organizational capacity building. With partners throughout the country, AIDS United works to ensure that people living with and affected by HIV/AIDS have access to the prevention and care services they need and deserve. AIDS United programs and initiatives include the development and implementation of sound public health policy in response to the HIV/AIDS epidemic. The organization works to advance federal policies that improve the quality of life and ensure access to treatment and care for all those living with HIV/AIDS.

AIDS United

The mission of AIDS United is to end the AIDS epidemic in the United States through national, regional and local policy/advocacy, strategic grant-making, and organizational capacity building. With partners throughout the country, AIDS United works to ensure that people living with and affected by HIV/AIDS have access to the prevention and care services they need and deserve. AIDS United programs and initiatives

include the development and implementation of sound public health policy in response to the HIV/AIDS epidemic. The organization works to advance federal policies that improve the quality of life and ensure access to treatment and care for all those living with HIV/AIDS.

APLA Health

APLA Health's mission is to achieve health care equity and promote well-being for the lesbian, gay, bisexual, and transgender (LGBT) and other underserved communities and people living with and affected by HIV. We are a nonprofit, federally qualified health center serving more than 14,000 people annually. We provide 20 different services from 15 locations throughout Los Angeles County, including: medical, dental, and behavioral health care; pre-exposure prophylaxis (PrEP) counseling and management; health education and HIV prevention; and sexually transmitted disease (STD) screening and treatment. For people living with HIV, we offer housing support; benefits counseling; home health care; and the Vance North Necessities of Life Program food pantries; among several other critically needed services. Additionally, we are leaders in advocating for policy and legislation that positively impacts the LGBT and HIV communities, provide capacity-building assistance to health departments across the country, and conduct community-based research on issues affecting the communities we serve.

The Center for HIV Law and Policy (CHLP)

The Center for HIV Law and Policy ("CHLP") is a national legal and policy resource and strategy center for people living with HIV and their advocates. CHLP's interest in this case is consistent with its mission to secure fair treatment under the law for all individuals living with HIV and similar disabilities. CHLP believes that government support and inconsistent, scientifically unsupported application of criminal and civil laws to people living with HIV are at direct cross-purposes with government-funded HIV prevention and treatment campaigns. Continued criminalization of sex work, through §647(b) of the California Penal Code, facilitates detrimental health consequences for sex workers, their clients and the public at large.

GLBTQ Legal Advocates & Defenders (GLAD)

GLBTQ Legal Advocates & Defenders (GLAD) is a public interest legal organization dedicated to ending discrimination based upon sexual orientation, HIV status, and gender identity and expression. For over three decades, GLAD's AIDS Law Project has litigated cases establishing privacy rights, access to health care, equal employment opportunity, and sound public health policies for people with HIV. GLAD was counsel in *Bragdon v. Abbott*, 524 U.S. 624 (1998), which involved a dentist who refused to provide dental care to people with HIV, and established nationwide antidiscrimination protections for people with HIV under the Americans with Disabilities Act.

The HIV Prevention Justice Alliance (HIV PJA)

The HIV Prevention Justice Alliance (HIV PJA) is a diverse, national human rights network at the intersection of HIV/AIDS and economic, racial and social justice. Together, we confront HIV/AIDS by mobilizing against the social drivers of the epidemic in the United States. As organizations and individuals, we share information, collaborate on strategic campaigns and take bold action to win lifesaving policy changes. To help establish health equity, we focus on intersectional issues in human rights and social justice that affect our families and communities. Through this work, we're paving the road to the end of the AIDS epidemic in our lifetimes.

Of those intersectional issues, we have focused on sex workers rights, the end of HIV criminalization, and reducing stigma through educational webinars and presentations across the country. We also are working in coalition with Sex Workers Outreach Project (SWOP), Desiree Alliance and other sex workers' rights organizations. We understand there is no way to end the HIV/AIDS epidemic without addressing sex workers' rights and the ways in which people of color and transgender individuals are disproportionately impacted by these laws.

National Alliance of State & Territorial AIDS Directors (NASTAD)

Founded in 1992, the National Alliance of State & Territorial AIDS Directors (NASTAD) is a non-profit association that represents public

health officials who administer HIV and hepatitis health care, prevention, education, and supportive service programs funded by state and federal governments in all 50 U.S. states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and the U.S. Pacific Islands. NASTAD's mission is to end the intersecting epidemics of HIV, viral hepatitis, and related conditions by strengthening domestic and global governmental public health through advocacy, capacity building, and social justice. NASTAD's mission is furthered by fair treatment under the law for all individuals living with or impacted by HIV.

National Center for Lesbian Rights (NCLR)

The National Center for Lesbian Rights is a national organization committed to protecting and advancing the rights of lesbian, gay, bisexual, and transgender people, including those living with HIV and sex workers, through impact litigation, public policy advocacy, public education, direct legal services, and collaboration with other social justice organizations and activists.

Positively Trans (T+)

Positively Trans (T+) is an advocacy and support group of transgender people living with HIV. It is a constituent-led project grounded in the principle that we, as transgender people living with HIV, are capable of forming our own network, telling our own stories, and developing our own advocacy strategies in response to inequities, stigma, and discrimination as a result of punitive laws and lack of legal protections in our local communities. We support grassroots effort to repeal criminal laws against sex workers, people living with HIV and people who use drugs.

Positive Women's Network-USA (PWN-USA)

Positive Women's Network-USA (PWN-USA) is a national membership body of women living with HIV that exists to strengthen the strategic power of all women living with HIV in the United States. We combat stigma, advocate for human rights-grounded policy, and promote leadership by women living with HIV. In addition to our national membership of over 3000 women living with HIV, we advocate at a local and state level. Among other places, PWN-USA chapters are active in the Bay Area and San Diego, CA. PWN-USA believes in self--

determination, sisterhood and solidarity. Every day we inspire, inform and mobilize women living with HIV to advocate for changes that improve our lives and uphold our rights. Sex worker rights, including bodily autonomy for sex workers, are integral to our mission.

San Francisco AIDS Foundation (SFAF)

San Francisco AIDS Foundation works at the federal, state, and local levels to stop the spread of HIV, and to protect the health and human rights of people and communities affected by HIV/AIDS. We believe that San Francisco can be the first U.S. city to end the HIV epidemic. Every day we provide free prevention and care services to people in hard-hit neighborhoods—and advocate for them to public officials—because we can envision the day when we beat HIV.

Brad Sears (Executive Director, The Williams Institute)

R. Bradley (Brad) Sears is the founding director and current Executive Director of the Williams Institute, and an Adjunct Professor at UCLA School of Law. Sears helped to create and develop the Williams Institute's core programs and strategies. Sears has published a number of research studies and articles, primarily on discrimination against LGBT people in the workplace and HIV discrimination in health care. At UCLA School of Law, he teaches courses on sexual orientation law, disability law, and U.S. legal and judicial systems. Sears has given hundreds of academic and community presentations on HIV/AIDS and LGBT legal issues. He has testified before Congress and a number of state legislatures, authored amicus briefs in key court cases, helped to draft state and federal legislation. He is the Roberta A. Conroy Scholar of Law and Policy and the Associate Dean of Academic Programs and Centers for the UCLA School of Law.

Sero Project (Sero)

Sero is a network of people with HIV and allies fighting for freedom from stigma and injustice. Sero is particularly focused on ending inappropriate criminal prosecutions of people with HIV for non-disclosure of their HIV status, potential or perceived HIV exposure, or HIV transmission. Sero's HIV criminalization work includes original research, raising public awareness through community education efforts, and outreach to people with HIV who have been criminalized to

create a network of advocates who can speak first-hand about the effects of criminalization on their lives. By engaging and empowering them to advocate on their own behalf and to tell their compelling personal stories, we help build a growing grassroots movement to mobilize the advocacy necessary to end HIV criminalization and promote a human rights-based approach to ending the HIV epidemic.

The Sex Workers Project at the Urban Justice Center

The Sex Workers Project at the Urban Justice Center provides client-centered legal and social services to individuals who engage in sex work, regardless of whether they do so by choice, circumstance, or coercion. One of the first programs in the nation to assist survivors of human trafficking, the Sex Workers Project has pioneered an approach to service grounded in human rights, harm reduction and in the real life experiences of our clients. Our professional service providers are multilingual, non-judgmental and bring more than ten years of experience. As the only US organization meeting the needs of both sex workers and trafficking victims, the Sex Workers Project serves a marginalized community that few others reach. We engage in policy and media advocacy, community education and human rights documentation, working to create a world that is safe for sex workers and where human trafficking does not exist.