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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiff-Appellant Erotic Service Provider Legal, Education & Research Project hereby certifies that it has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

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STATEMENT OF JURISDICTION

This appeal arises from an order granting a motion to dismiss for failure to state a claim upon which relief can be granted. In the underlying action brought pursuant to 42 U.S.C. § 1983, the District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343, and supplemental jurisdiction over the state law claim under 28 U.S.C. § 1367(a), with authority to grant injunctive and declaratory relief provided by 28 U.S.C. §§ 2201-02 and FRCP 65.

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 in that the District Court's judgment was a final decision that dismissed all of Appellants' claims with prejudice. Pursuant to FRAP 4(a)(1)(A), Appellants timely appealed the judgment, which issued on May 23, 2016, by immediately filing a notice of appeal on May 24, 2016.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in dismissing Appellants' claim that Section 647(b) of the California Penal Code, which targets erotic service providers and those who associate with them, violates the Due Process Clause of the Fourteenth Amendment because it conducted only a rational basis review of the statute?

2. Whether the District Court erred in dismissing Appellants' claim that Section 647(b) of the California Penal Code violates the First Amendment freedom of speech even though the statute criminalizes pure speech?

3. Whether the District Court erred in dismissing Appellants' claim that Section 647(b) of the California Penal Code violates the First Amendment freedom of association even though it criminalizes the selective, intimate association between an erotic service provider and those who associate with them?

4. Whether the District Court erred in dismissing Appellants' claim that Section 647(b) of the California Penal Code violates the Fourteenth Amendment right to earn a living?

STATEMENT OF THE CASE

This case asks the Court to determine whether the State can make it unlawful for individuals to choose to intimately associate if their association also contemplates that one of the individuals will provide something of value to another. The resolution of this question hinges on two bedrock principles of our constitutional jurisprudence. First, all Americans have a fundamental liberty interest protecting them from unwarranted government intrusion in their intimate lives. Second, the State cannot wholly outlaw a commercial exchange that is related to the exercise of a fundamental right.

Our jurisprudence leaves little doubt that private sexual activity is a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Yet, when that intimate activity occurs as part of a voluntary, commercial exchange between consenting adults, the State criminalizes the intimate association and thereby prohibits individuals from exercising their constitutional rights. Appellants wish to engage in sexual relationships and they are willing to pay or to be paid in connection

with those intimate relationships. Thus, they filed suit to enjoin and invalidate California's state law on constitutional grounds.

In moving to dismiss the action below, the State argued that its ban on prostitution is a valid regulation of commerce that does not infringe upon any liberty interest of its citizens. The District Court found the State's motion to dismiss to be well taken and determined that "the intimate association between a prostitute and client, while it may be consensual and cordial, has not merited the protection of the Due Process Clause of the Fourteenth Amendment." (E.R. 8)[1]. Appellants immediately appealed the District Court's judgment.

[1] Appellants' Excerpts of Record will be cited as "E.R." by their page numbers, which continue consecutively across the volumes.

STATEMENT OF FACTS

1. The History of California's Criminalization of Prostitution and Solicitation

Historically, there has been a lack of rigorous and systematic punishment of the commercial exchange of consensual, adult sexual activity within the United States. In fact, for much of our nation's history, the commercial exchange of private sexual activity—at least where its solicitation and consummation was conducted discreetly and not on the public streets—was widely accepted, was not illegal, and was, in fact, integral to our development. *See, e.g.,* Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable,* 74 N.Y.U. L. REV. 1220, 1283 (1999) (noting that "[i]n nineteenth-century California, prostitution was an essential component of industrialization"); *Prostitution and Sex Work,* 14 GEO. J. GENDER & L. 553, 554 (Tom DeFranco & Rebecca Stellato, eds., 2013) (describing how "[u]ntil the nineteenth century, prostitution was generally legal in the United States and flourished in large cities" until "groups concerned with social morality * * * crusaded against prostitution"); Gail M. Deady, Note, *The Girl Next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification Within the*

Prostitution Industry, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 515, 523 (2011).

California took steps to criminalize prostitution in 1872 when it enacted Penal Code Section 647. The original provision defined "vagrants" to include "every lewd and dissolute person, who lives in and about houses of ill-fame, and every common prostitute." Vagrants were subject to a $500 fine or imprisonment for a term not to exceed six months. Cal.Pen.Code § 647 (1872). However, "[p]rostitution and solicitation per se were not outlawed in California until 1961." M. Anne Jennings, Comment, *The Victim as Criminal: A Consideration of California's Prostitution Law,* 64 CALIF. L. REV. 1235, 1240 (1976). In 1961, the vagrancy statute was repealed and replaced with section 647(b), which made prostitution and solicitation a misdemeanor. Professor Arthur H. Sherry, the author of the 1961 law criminalizing the commercial exchange of sex, did "not offer any rationale for section 647(b), unlike the section's other subdivisions, beyond remarking that 'the pimp, the panderer, and the prostitute cannot be permitted to flaunt their services at large.'" *Id.* at 1241-42, n. 31 (citing Arthur H.

Sherry, *Vagrants Rogues and Vagabonds—Old Concepts in Need of Revision,* 48 CALIF. ST. B.J. 801 (1961)).

2. California's State Law

Section 647 of the California Penal Code provides, among other things, that every person who "solicits or who agrees to engage in or who engages in any act of prostitution" is guilty of disorderly conduct, a misdemeanor. Cal.Pen.Code § 647(b).[2] The term "prostitution" is defined by Section 647(b) to include "any lewd act between persons for money or other consideration." Cal.Pen.Code § 647(b). The term "lewd" is not defined by statute, but has been interpreted by the California courts as the touching of the genitals, buttocks, or female breast, for the purpose of sexual arousal or gratification. *See e.g., People v. Freeman,* 758 P.2d 1128, 1130, 46 Cal.3d 419, 424 (Cal. 1988); *Pryor v. Municipal Court,* 599 P.2d 636, 25 Cal.3d 238 (Cal. 1979); *Wooten v. Superior Court,* 93 Cal.App.4th 422, 428-30 (Cal. App. 2001); *People v. Hill,* 103 Cal.App.3d 525 (Cal. App. 1980). Thus, under the statute, to constitute

[2] California's legislature passed SB-420 (2015), a measure which amends Section 647(b) of the Penal Code. The Governor has approved the bill, and it will become effective January 1, 2017. Nevertheless, the amendment of the statute does not alter the analysis of the constitutional questions presented by this case.

the act of prostitution, the genitals, buttocks, or female breasts of either the erotic service provider or the customer must come in contact with some part of the body of the other for the purpose of sexual arousal or gratification of the customer or the provider, and in exchange for money or other consideration. *See e.g., Wooten,* 93 Cal.App.4th at 430-31; *Hill,* 103 Cal.App.3d at 534-35; *Freeman,* 46 Cal.3d at 422-24; Cal.Pen.Code § 647(b).

Section 647(b) further provides that:

> No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act.

Cal.Pen.Code § 647(b). Despite this statutory language, California courts have held that words alone may constitute an act in furtherance of an agreement to engage in prostitution, provided they are a clear and unequivocal statement directed at completing the act of prostitution. *See e.g., Kim v. Superior Court,* 136 Cal.App.4th 937, 945 (Cal. App. 2006). As a result, anyone in California who, in exchange for consideration, engages in, agrees to engage in, or solicits a sexual act for

the purpose of sexual arousal or gratification of the payor or the payee is guilty of a misdemeanor.

The District Attorneys, the Attorney General, and their respective offices are charged with the duty of enforcing state law in the jurisdictions in which they serve. *See* California Const. Art. 5 § 13; California Government Code § 26500. Compelled by this duty, the District Attorneys and the Attorney General are presently enforcing Cal.Pen.Code § 647(b) in contravention of Appellants' constitutional rights.

3. The Impact of California's Law

Appellant K.L.E.S. is a resident of California, who at times has been licensed to provide sexual activity for hire to consenting adults in Nevada. (E.R. 296). C.V., also a resident of California, was arrested on prostitution charges in 2007 in the Northern District of California, but the charges were ultimately dismissed. (E.R. 296). C.V. stopped working as an erotic service provider because she feared arrest and prosecution. (E.R. 296. She now works in an unrelated field. (E.R. 296). J.B. is a resident of Sonoma County, California who previously worked in the erotic service industry in the San Francisco Bay Area,

performing activities that may be considered prostitution under California law, but she now works in an unrelated field. (E.R. 297). K.L.E.S., C.V., and J.B. would all again engage in their chosen profession of erotic service provider but for California's current prohibition and criminalization of sexual activity for hire. (E.R. 297). John Doe is a male with a disability who desires to be able to procure the services of an erotic service provider. (E.R. 297). He would engage in this sexual activity consensually, respectfully, and in the privacy of his own residence. (E.R. 297).

Appellants each fear that they may be prosecuted by the District Attorneys and the Attorney General under California's prostitution or solicitation laws if they engage in sexual activity for hire. (E.R. 297). Appellants have refrained from engaging in voluntary, consensual sexual acts that may be considered prostitution or solicitation under Cal.Pen.Code § 647(b) for the specific reason that they fear prosecution. (E.R. 297). This is a particularly difficult concession for K.L.E.S., who had been licensed to perform identical activities in Nevada, where she was not subject to prosecution. (E.R. 297). Appellants' fear of arrest and prosecution if they choose to again work as erotic service providers

or hire erotic service providers are reasonable and grounded in actual enforcement activities throughout the State of California. (E.R. 297). These enforcement activities impact the sexual privacy rights of Appellants, their partners, and countless others similarly situated.

Additionally, Cal.Pen.Code § 647(b) harms Appellants and threatens the public health because criminalization discourages safer sex practices. For example, when prosecuting cases under Cal.Pen.Code § 647(b), the Appellees use the fact of condom possession as evidence of prostitution-related offenses. By doing so, the Appellees discourage condom use and thwart safer sex practices. *See generally* SEX WORKERS AT RISK: CONDOMS AS EVIDENCE OF PROSTITUTION IN FOUR US CITIES (HUMAN RIGHTS WATCH 2012).

The prohibition on the commercial exchange of private sexual activity also unconstitutionally limits the individuals' rights to earn a living in his or her chosen profession and to enter into and maintain certain intimate or private relationships. Further, the enforcement of California's prostitution laws violates the First Amendment rights of Appellants and others similarly situated by making pure speech a

criminal activity and by defining a crime based solely on the speaker's message and the content of his or her speech.

4. Proceedings in the District Court

Appellants filed their Complaint for Declaratory and Injunctive Relief (E.R. 290-304) on March 4, 2015 against four District Attorneys and the Attorney General of the State of California. Appellees promptly moved to dismiss the case under Fed. R. Civ. P. 12(b)(6). (E.R. 84-289). After the motion to dismiss was fully briefed, the United States Supreme Court issued its decision in *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015). The District Court requested that the parties submit supplemental briefs concerning how the *Obergefell* decision impacted the present case. The parties did so and the District Court thereafter granted Appellees' motion to dismiss for failure to state a claim upon which relief can be granted. (E.R. 1-12). The District Court was "not persuaded by [Appellants'] contention that the Supreme Court has shifted the definition of the protected liberty interest to comprise merely sexual or intimate conduct, as opposed to the relationship in which the sexual or intimate conduct occurs." (E.R. 6). As a result, the District Court applied only rational basis scrutiny when reviewing the

constitutionality of Section 647(b). (E.R. 8). Using this rational basis review, the District Court found that the purported interests offered by the Appellees—"preventing a climate conducive to violence against women and potential human trafficking, preserving the public health, and deterring the commodification of sex" —were legitimate and rationally related to the state law. (E.R. 9).

The District Court granted Appellants leave to amend their Complaint if they could do so while complying with the requirements of Fed. R. Civ. P. 11. (E.R. 11-12). Appellants declined to file an amended complaint, and the District Court issued a judgment dismissing the case with prejudice on May 23, 2016. (E.R. 15). The Appellants timely appealed that judgment.

SUMMARY OF ARGUMENT

The District Court erred in dismissing Plaintiffs' claims when it concluded, based on the pleadings and items subject to judicial notice alone, that Section 647(b) does not implicate a fundamental liberty interest. Although the District Court correctly noted that there is an intimate, consensual association between an erotic service provider and his or her client, the District Court held that this state law infringing

upon that intimate relationship should only be subjected to rational basis review. This was error. Under *Lawrence v. Texas*, 539 U.S. 558, 562 (2003), the District Court should have subjected this state law to something more than a rational basis review because the statute infringes upon Appellants' fundamental liberty interest against unwarranted governmental intrusion in their intimate lives.

When it conducted its deferential, rational basis review, the District Court correctly noted that moral disapproval is not a rational basis for criminalizing conduct. Nevertheless, the District Court incorrectly concluded that "deterring the commodification of sex," "preventing a climate conducive to violence against women and potential human trafficking," and "preserving the public health" were legitimate and rational bases for this unwarranted intrusion into Appellants' intimate lives. In actuality, none of these interests legitimately justify the unwarranted governmental intrusion upon Appellants' intimate lives. As such, the District Court should have denied the State's motion to dismiss.

ARGUMENT

The District Court erred by granting the State's motion to dismiss and holding that Section 647(b) of the California Penal Code withstood Appellants' facial and as-applied challenges. The District Court refused to acknowledge that erotic service providers—like any other person—are entitled to the Fourteenth Amendment's protections against unwarranted government intrusion in their intimate lives. Instead, the District Court concluded that the level of governmental intrusion in our intimate lives is something that should be left to "the arena of public debate and legislative action." (E.R. 8). This was error.

The District Court's order reaching these conclusions and granting the State's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is reviewed by this Court *de novo* and is therefore entitled to no deference. *See, e.g.*, *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1159 (9th Cir. 2012). "Rule 12(b)(6) motions are viewed with disfavor." *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003)(citing *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997)). "Rule 12(b)(6) dismissals are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development."

McGary v. City of Portland, 386 F.3d 1259, 1270 (9th Cir. 2004)(internal citations omitted). Indeed, "the court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is novel or extreme, since it is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader's suppositions." *McGary*, 386 F.3d at 1270 (citing *Elec. Constr. & Maint. Co., Inc. v. Maeda Pac. Corp.*, 764 F.2d 619, 623 (9th Cir. 1985)). Thus, "[w]hen ruling on a 12(b)(6) motion, the complaint must be construed in the light most favorable to the plaintiff[s]." *Broam*, 320 F.3d at 1028 (citing *Park Sch. of Bus. Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995)). "The court must accept as true all material allegations in the complaint, as well as any reasonable inferences to be drawn from them." *Id.* (citing *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998)).

1. THE DISTRICT COURT ERRED IN DISMISSING APPELLANTS' CLAIM THAT SECTION 647(B) VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A. Individuals have a fundamental liberty interest shielding them from unwarranted government intrusion in their intimate lives.

The Due Process Clause of the Fourteenth Amendment of the Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Nearly a century ago, the Supreme Court noted that "this Court has not attempted to define with exactness the liberty thus guaranteed [by the Due Process Clause of the Fourteenth Amendment]." *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). Cases over the past century have applied the Due Process Clause in various contexts, and the Court recently pronounced its understanding of the Clause thusly:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, *and certain intimate conduct.*

Lawrence v. Texas, 539 U.S. 558, 562 (2003) (emphasis supplied); *see also* Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name,* 117 HARV. L. REV. 1893, 1937 (2004).

The importance of *Lawrence* stems from its emphatic rejection of *Bowers v. Hardwick,* 478 U.S. 186 (1986). In *Bowers,* the Court held

that Georgia's criminal prohibition of sodomy was constitutional. *Id.* at 196. The *Bowers* majority analyzed the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Id.* at 190. The *Bowers* majority permitted the state to punish private sexual behavior, relying upon its twin conclusions that such individual rights were not deeply rooted in this Nation's history and tradition, nor were they implicit in the concept of ordered liberty. *Id.* at 194. *Bowers* therefore condoned the state imposing criminal punishments upon its citizens for merely engaging in consensual sexual conduct in the privacy of their home. *Id.* at 196.

Four dissenting justices rejected how the *Bowers* majority framed the issue as whether there is "a fundamental right to engage in homosexual sodomy." *Id.* at 199 (Blackmun, J., dissenting). Rather, Justice Blackmun wrote in his dissent, *Bowers* was "'about the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'" *Id.* (quoting *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Indeed, Justice Blackmun concluded that the statute in *Bowers* "denies individuals the right to decide for themselves whether to engage in

particular forms of private, consensual sexual activity." *Id.* Justice Blackmun thus dissented because "depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do." *Id.* at 214.

The echoes of Justice Blackmuns's dissent in *Bowers* ring through Justice Kennedy's majority opinion in *Lawrence.* In *Lawrence,* the Supreme Court struck down Texas's state law prohibiting two persons of the same sex from engaging in certain intimate sexual conduct as violating the Due Process Clause of the Fourteenth Amendment. 539 U.S. at 578.

The *Lawrence* Court found that the majority opinion in *Bowers* "fail[ed] to appreciate the extent of the liberty at stake" and "misapprehended the claim of liberty there presented to it." *Id.* at 567. The *Bowers* majority limited the issue in that case to whether the Constitution confers "a fundamental right upon homosexuals to engage in sodomy." *Lawrence,* 539 U.S. at 560 (quoting *Bowers,* 478 U.S. at 190). But *Lawrence* emphatically rejects this myopic view of liberty.

Instead, *Lawrence* recognizes an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* at 559. This awareness stems from a long line of cases that recognize the importance of a person's ability to make their own decisions regarding private, sexual matters. *See Skinner v. Oklahoma,* 316 U.S. 535 (1942) (the right to have children); *Griswold v. Connecticut,* 381 U.S. 479 (1965) (the right to use contraception); *Eisenstadt v. Baird,* 405 U.S. 438 (1972) (contraception); *Carey v. Population Services Int'l,* 431 U.S. 678 (1971) (distribution of contraception); *Roe v. Wade,* 410 U.S. 113 (1973) (the right to have an abortion); *Planned Parenthood of Se. Pa. v. Casey,* 505 U.S. 833 (1992) (abortion). Indeed, at least one member of this Court acknowledged the significant impact that *Lawrence* had on the protection of sexual behavior when she noted that "*Lawrence* clarified that licit, consensual sexual behavior is no longer confined to marriage, but is protected when it occurs, in private, between two consenting adults…". *Latta v. Otter,* 771 F.3d 456, 489 (9th Cir. 2014) (Berzon, J., concurring).

As evidence of this emerging recognition of the liberty interest in protecting individuals from unwarranted intrusion in their intimate lives, the *Lawrence* court noted, among other things, that as early as 1955, "[t]he American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for 'criminal penalties for consensual sexual relations conducted in private.'" *Lawrence,* 539 U.S. at 572 (citing ALI, Model Penal Code § 213.2, Comment 2, p. 372 (1980)). Thus, the fact that the Texas statute proscribed homosexual conduct was not integral to the Court's decision in *Lawrence*; rather, the Court's focus was on the fact that the State of Texas had provided for "criminal penalties for consensual sexual relations conducted in private." Texas was intruding into an intimate sphere of Texans' lives—a sphere "where the State should not be a dominant presence." *Id.* at 562. Criminal penalties for consensual sexual relations conducted in private violate "a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Id.* at 578 (citing *Casey,* 505 U.S. at 847). And because of this Constitutional promise, "[t]he State cannot demean

[a person's] existence or control their destiny by making their private sexual conduct a crime." *Id.* at 578.

Justice Scalia dissented in *Lawrence* because to him the *Bowers* court was correct when it held that morality alone can justify a law. He wrote that "[s]tate laws against bigamy, same-sex marriage, adult incest, ***prostitution***, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers'* validation of laws based on moral choices. ***Every single one of these laws is called into question by today's decision***." *Id.* at 590 (Scalia, J., dissenting) (emphasis supplied).

In the present case, the State characterizes *Lawrence* as a decision only about homosexual sodomy, arguing that the *Lawrence* Court did not recognize a fundamental liberty interest against unwarranted governmental intrusion into our intimate lives. Cases subsequent to *Lawrence* confirm that the State is mistaken.

For example, just as Justice Scalia predicted in his dissent in *Lawrence*, laws criminalizing same-sex marriage have already been struck down on Fourteenth Amendment grounds following *Lawrence*. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Latta v. Otter,* 771

F.3d 456, 479 (9th Cir. 2014) (citing *Lawrence*, 539 U.S. at 578). Indeed, *Obergefell* reaffirmed that "*Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability." *Obergefell*, 135 S. Ct. at 2600; *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).

Lawrence has also impacted cases challenging laws that prohibit the sale and distribution of sexual devices. In 2008, the Fifth Circuit applied *Lawrence* to find unconstitutional a Texas law that prohibited the "selling, advertising, giving, or lending of a device designed or marketed for sexual stimulation." *Reliable Consultants, Inc. v. Earle,* 517 F.3d 738 (5th Cir. 2008). In so doing, the Fifth Circuit recognized a right to sexual privacy. *Id.* at 745, n. 32. As the *Reliable Consultants* Court explained:

> The right the Court recognized was not simply a right to engage in the sexual act itself, but instead a right to be free from governmental intrusion regarding "the most private human contact, sexual behavior." That *Lawrence* recognized this as a constitutional right is the only way to make sense of the fact that the Court explicitly chose to answer the following question in the affirmative: "We granted certiorari…[to resolve

> whether] petitioners' criminal convictions for *adult consensual sexual intimacy* in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment."

Id., 517 F.3d at 744 (citing *Lawrence,* 539 U.S. at 564) (emphasis in original).

The Eleventh Circuit has also wrestled with the impact of *Lawrence* in cases involving sexual devices. Approximately a year after *Lawrence* was decided, the Eleventh Circuit held in *Williams v. Attorney General*, 378 F.3d 1232 (11th Cir. 2004), that *Lawrence* did not recognize a right to sexual privacy. Accordingly, the Eleventh Circuit concluded that Alabama could constitutionally prohibit the sale of "sex toys". *Id.* Now, however, a panel of the Eleventh Circuit has called its earlier decision into question. In *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, ___ F.3d. ___, 2016 WL 4088731 (11th Cir. Aug. 2, 2016), a panel of the Eleventh Circuit expressed their belief that their prior decision in *Williams* was wrong and encouraged the Appellants to seek en banc review so that the court could reconsider the Circuit's prior holding limiting *Lawrence*.

Obergefell, *Reliable Consultants*, and *Flanigan's Enterprises* clarify that *Lawrence* is about far more than sodomy. *Lawrence*

recognized that all persons have a fundamental liberty interest against unwarranted governmental intrusion in their intimate lives. The District Court therefore erred when it found that erotic service providers and those who associate with them should not receive this same guarantee of liberty.

B. A court must exercise its reasoned judgment to determine if a law is an unwarranted governmental intrusion in a person's intimate life.

Because the District Court held that erotic service providers and those who associate with them were not entitled to the protections of the Due Process Clause of the Fourteenth Amendment, the District Court conducted only a rational basis review of Section 647(b). This was error. As explained below, *Lawrence*, and this Court's precedent interpreting *Lawrence*, require that laws infringing upon individuals' liberty interest against unwarranted governmental intrusion in their intimate lives must receive a heightened degree of scrutiny.

While *Lawrence* recognized that Americans have a liberty interest against unwarranted intrusion in the choices they make in their intimate lives, the *Lawrence* Court did not squarely address the level of scrutiny to be applied in cases concerning this liberty interest. *See* Nan

D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1117 (2004). In *Lawrence*, just as in *Casey*, "the Court eschewed direct use of fundamental rights language, but made clear that the rights being compared were equivalent and therefore entitled, by whatever standard of review, to equivalent protection." *Id*; *see also* Randy E. Barnett, *Scrutiny Land,* 106 MICH. L. REV. 1479, 1495 (describing *Lawrence* as representing an entirely new and different approach to the Due Process Clause); and *Reliable Consultants, Inc.,* 517 F.3d 738, 746 (5th Cir. 2008) (noting that, under *Lawrence*, the court did not need to address the level of scrutiny to be applied). The Court continued this new approach to the Due Process Clause in *Obergefell,* 135 S. Ct. 2584, when it declined to adhere to the tiered level-of-scrutiny edifice in that case.

The correct approach to the Due Process Clause that is followed by the Supreme Court in these cases involving individuals' intimate choices was best described in *Casey* as follows:

> 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 have always 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 cases make clear that there is no easily-recitable rule to be applied to cases regarding individuals' liberty interest against unwarranted governmental intrusion in their intimate lives. Nevertheless, this Court has outlined the contours of that analysis. In *Witt v. Dept. of Air Force*, 527 F.3d 806 (9th Cir. 2008), this Court "conclude[d] that *Lawrence* applied something more than traditional rational basis review." *Id.* at 817. As a result, this Court held that when the government intrudes upon the rights identified in *Lawrence*: (1) the government must advance an important governmental interest; (2) the intrusion must significantly further that interest; and (3) the intrusion must be necessary to further that interest. *Witt*, 527 F.3d at 819. As this Court explained, "[t]his approach is necessary to give meaning to the Supreme Court's conclusion that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.*

Even though this heightened approach is necessary in a case such as this, the District Court failed to apply this analysis below. Instead,

the District Court merely conducted a deferential, rational basis review. According to the District Court, it was empowered to "go so far as to hypothesize about potential motivations of the legislature, in order to find a legitimate government interest sufficient to justify the challenged provision." (E.R. 9)(internal citations omitted). By applying only this lowest form of scrutiny, the District Court committed error.

C. Section 647(b) cannot survive a heightened level of judicial scrutiny.

If subjected to the heightened degree of scrutiny required by *Lawrence* and *Witt*, Section 647(b) would not have withstood Appellants' constitutional challenge. As explained below, there is no important governmental interest behind Section 647(b). Section 647(B) does not significantly further any such interest, nor is Section 647(B) necessary to furthering any such interest. At a minimum, a Rule 12(b)(6) dismissal was inappropriate because this novel legal claim could better be assessed after a complete factual development of the record. *See McGary,* 386 F.3d 1259.

i. The State resorts to morality to justify Section 647(b), and under *Lawrence* it cannot.

The State claims that Section 647(b) relates to the State's purported interests in: (1) deterring human trafficking and coercion; (2) deterring violence against erotic service providers; (3) deterring the spread of disease; (4) deterring crimes incidental to prostitution; and (5) deterring commodification of sex. (*See* E.R. 101-103). For the ease of discussion, these purported interests can be lumped into three categories: (i) deterring other crimes; (ii) deterring the spread of disease; and (iii) deterring the commodification of sex.

Appellants do not dispute that the State may validly assert an interest in deterring crime and deterring the spread of disease. However, California may not defend Section 647(b) by claiming that it has an interest in deterring "the commodification of sex." Ultimately, this is nothing more than a normative statement and, under *Lawrence*, morality cannot provide a basis for criminalizing conduct.

It is true that this Court, in *Coyote Pub., Inc. v. Miller*, 598 F.3d 592 (9th Cir. 2010), found that the State of Nevada had a state interest "in limiting the commodification of sex." 598 F.3d at 602. However, that case was based on the unique set of facts associated with the State of Nevada and it does not control in the present case for multiple

reasons. First, *Coyote Pub.* was a commercial speech case in which the Court was applying only intermediate scrutiny. More importantly, though, the *Coyote Pub.* Court was assessing whether Nevada could assert a state interest in "limiting" the commodification of sex. This is in contrast to the State of California's claim in the present case that it has an interest in "deterring" the commodification of sex. As the *Coyote Pub.* Court noted, Nevada "struck its own idiosyncratic balance" in which it permits prostitution, subject to extensive regulation. *Id.* at 606. Thus, the *Coyote Pub.* Court was only called upon to weigh whether Nevada could assert a state interest in *limiting* the commodification of sex, as it has done through extensive regulation. This Court in *Coyote Pub.* did not address whether a state could assert an interest in trying to completely *deter* (i.e. prohibit) the "commodification of sex." That issue remains a matter of first impression in this Circuit.

The Fifth Circuit has addressed the issue. In *Reliable Consultants*, 517 F.3d 738, the State of Texas tried to defend its state law criminalizing the purchase and sale of sexual devices by claiming that the state had an interest in "prohibiting the commercial sale of

sex." *Id.* at 745. This is equivalent to the State of California's position in the present case that the state has an interest in "deterring the commodification of sex." The Fifth Circuit rejected this purported state interest, finding that it was nothing more an interest in "public morality." *Id.* And under *Lawrence*, "the fact that a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." 539 U.S. at 560.

While the District Court below correctly determined that moral disapproval is not an adequate basis for criminalizing conduct, it nevertheless found that the State could justify Section 647(b) by claiming to advance an interest in deterring the commodification of sex. This was error.

ii. California's intrusion on Appellants' intimate lives does not significantly further any important governmental interest.

The next factor of the *Witt* analysis requires this Court to determine if Section 647(b) significantly furthers any important governmental interest. Because the State may not defend Section 647(b) by reference to a supposed interest in "deterring the

commodification of sex", it is left to defend the law by claiming that Section 647(b) significantly furthers its two remaining interests: deterring other crimes, and deterring the spread of disease. Section 647(b) does not significantly further either of these interests. To the contrary, California's criminalization of prostitution only serves to increase real crime and to increase the spread of disease.

Under the current regime of prohibition, if a criminal harms an erotic service provider, then the erotic service provider faces the dilemma of contacting the police and the risk of arrest associated therewith. Similarly, if a client of an erotic service provider witnesses what she or he believes to be a crime, she or he must similarly weigh the risk of arrest against the desire to report potential criminal activity. Thus, rather than serving to deter the incidence of other, actual crimes, Section 647(b) in fact discourages some victims and witnesses from contacting the authorities in order to prosecute the offenders. By doing so, this leaves those individuals vulnerable to crime. *See, e.g.*, Ane Mathieson, Easton Branam & Anya Noble, *Prostitution Policy: Legalization, Decriminalization, and the Nordic Model*, 14 SEATTLE J. FOR SOC. JUST. 367, 377 (2015)(noting that serial killers like Gary

Ridgeway "often target women in prostitution because they know they can get away with their crimes more easily.").

Similarly, Section 647(b) does not significantly deter the spread of disease. Comparative studies of sex workers in states where prostitution is or was legal uniformly show that working conditions for erotic service providers are safer and healthier when prostitution is not criminalized. *See, e.g.*, Scott Cunningham & Manisha Shah, *Decriminalizing Indoor Prostitution: Implications for Violence and Public Health* 26-29 (Nat'l Bureau of Econ. Research, Working Paper No. 20281, 2014); Barbara Brents & Kathryn Hausbeck, *Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk and Prostitution Policy*, 20 J. INT'L VIOLENCE 270, 293 (2005). The decriminalization of prostitution in Rhode Island led to a decrease statewide in the incidence of both rape and lower rates of transmission of sexually transmitted infections. *See* Cunningham, *supra,* at 29-30. Similarly, regulated prostitution in Nevada has led to working environments in which erotic service providers are safer from the risk of sexually transmitted infections. *See* Brents, *supra*, at 293.

Decriminalization most often results in the moving of prostitution into controlled, private environments, which results in lower rates of transmission of infections. *See generally* Paul Gertler & Manisha Shah, *Sex Work and Infection: What's Law Enforcement Got to Do with it?,* 54 J.L. & ECON. 811 (2011). Analyses of licensed, legal prostitution regimes commonly show that transmission of infections is higher among participants in illegal prostitution as opposed to regulated prostitution. *See generally* Charlotte Seib, Joseph Debattista, Jane Fisher, Michael Dunne & Jackob Najman, *Sexually Transmitted Infections among Sex Workers and their Clients: Variation in Prevalence Between Sectors of the Industry*, 6 SEXUAL HEALTH 45 (2009); Charlotte Seib, Jane Fisher & Jackob Najman, *The Health of Female Sex Workers from Three Industry Sectors in Queensland, Australia*, 68 SOC. SCI. & MED. 473 (2009). Erotic service providers working in a decriminalized fashion are more likely to practice safer sex (*See* Cunningham, *supra* at 28-29; *see also* Complaint, at ¶32), and to be regularly screened for infections. *See* Bebe Loff, Beth Gaze & Christopher Fairley, *Prostitution, Public Health, and Human Rights Law*, 356 LANCET 1764 (2000). As a result, regulation and decriminalization of prostitution typically shows

astronomically lower rates of transmission of infections than otherwise. *See id.* Thus, Section 647(b) does not significantly further any purported state interest in deterring other crime or deterring the spread of disease.

iii. California's intrusion on Appellants' intimate lives is not necessary to further any important governmental interest.

Lastly, under *Witt*, this Court must determine if Section 647(b) is necessary to further the State's purported interests in deterring other crimes and deterring the spread of disease. As to this factor, this Court explained that "a less intrusive means must be unlikely to achieve substantially the government's interest." *Witt*, 527 F.3d at 819 (citing *Aptheker v. Sec'y of State*, 378 U.S. 500, 508 (1964)(noting that a government interest cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved)).

Here, the State of California's criminalization of prostitution is not necessary to deter actual crimes and it is not necessary to deter the spread of disease. For starters, every single criminal offense recited by the State as a reason justifying Section 647(b) is already separately a

crime in California. *See* Cal.Pen.Code § 236.1 (human trafficking); §§ 207, 208, 209 (kidnapping); §§ 518-527 (extortion); §§ 240, 242, 243 (assault, battery, domestic abuse, sexual violence); § 261 (rape); §§ 189, 192 (murder, manslaughter); § 12022.85 (transmission of sexually transmitted infections); Cal. Health and Safety Code §§ 120921, 120920 (transmission of sexually transmitted infections); § 11053.57 (controlled substances). Thus, regardless of whether the State criminalizes prostitution, it already has the ability to investigate, arrest, and criminally punish any person who commits any of the acts in which the State claims a deterrence interest.

Nor is the criminalization of prostitution necessary to deter the spread of disease. The outright ban on prostitution no more prevents the spread of sexually transmitted infections than would the outright ban on sodomy or, for that matter, sex in general. But *Lawrence* makes clear that the government cannot criminalize sodomy or sex. *See* Section 1(A), *supra*. Texas could not have justified its homophobic ban on sodomy by claiming it had a state interest in deterring the spread of sexually transmitted infections. And California similarly cannot justify

its ban on prostitution on that grounds. Therefore, Section 647(b) also fails the third prong of the *Witt* analysis.

The District Court erred by failing to conduct this heightened level of analysis when reviewing whether Section 647(b) is an unwarranted governmental intrusion into Appellants' intimate lives. When subjected to this heightened level of review, Section 647(b) does not survive Appellants' constitutional challenge.

D. The State cannot wholly outlaw a commercial exchange that is related to the exercise of a fundamental right

The State also argued below that Section 647(b) is constitutional because the law merely criminalizes the sale of sex, not the intimate acts themselves. (*See* E.R. 98). This argument relies upon the false premise that a state may criminalize any commercial transaction, even if the commercial transaction relates to the exercise of a constitutionally-protected right. This argument is not new, and it has been repeatedly rejected by the Supreme Court.

The District Court dodged this issue below. Because the District Court posited that erotic service providers and those who associate with them are not entitled to the protections of the Due Process Clause of the Fourteenth Amendment, it never had to address whether the State

could completely criminalize a commercial exchange that occurs in tandem with the exercise of that constitutionally-protected right.

If the District Court had confronted this issue, it would have been forced to acknowledge that the ability to enjoy or exercise a constitutional right routinely involves a transaction of commerce. The Constitution's protection of a fundamental right would be meaningless if the government could prohibit a citizen from paying or receiving money in the exercise of that right. Thus, there have been numerous instances in which courts have intervened to set aside purported "regulations of commerce" that effectively thwarted a citizen's exercise of a fundamental right. For example:

(1) the right to obtain an abortion would be meaningless if it were completely illegal to pay a doctor to perform the procedure (*See Roe v. Wade,* 410 U.S. 113 (1973));

(2) the right to use contraception would be meaningless if it were completely illegal to sell and distribute contraception (*See Carey v. Population Servs., Int'l,* 431 U.S. 678 (1971));

(3) the right to keep and bear arms would be meaningless if it were completely illegal to purchase and sell arms (*See Illinois Ass'n of*

Firearms Retailers v. City of Chicago, 961 F.Supp.2d 928, 936-38 (N.D.Ill. 2014));

(4) the right to freedom of the press would be meaningless if it were completely illegal to sell newspapers (*See Heffron v. Int'l Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 647 (1981)); and even

(5) the right to engage in political speech would be meaningless if it were completely illegal to give money to political candidates and organizations. (*See Buckley v. Valeo,* 424 U.S. 1, 17, 96 S.Ct. 612 (1976)).

Clearly, the existence of a fundamental right carries with it a co-existent right to engage in commercial transactions in the exercise of that right. *See also Luis v. U.S.*, 136 S. Ct. 1083 (2016) (the right to counsel in a felony criminal trial would be meaningless if it were completely illegal to use lawfully owned property to pay for an attorney). As such, the State also cannot avoid this constitutional challenge by claiming that Section 647(b) is merely a regulation of commerce.

2. THE DISTRICT COURT ERRED IN DISMISSING APPELLANTS' CLAIM THAT SECTION 647(B) VIOLATES THE FIRST AMENDMENT FREEDOM OF SPEECH

Section 647(b) makes it a crime to solicit or agree to engage in prostitution. Furthermore, although the statute provides that "[n]o agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act", California courts have held that words alone may constitute an "act in furtherance" of an agreement to engage in prostitution. *See e.g., Kim v. Superior Court,* 136 Cal.App.4th 937, 945 (Feb. 23, 2006). Therefore, Section 647(b) makes pure speech a criminal activity. The statute uses speech to make engaging in sexual activity in private or even agreeing to engage in sexual activity at some point in the future, which are otherwise lawful acts, crimes based solely on the speaker's message and the content of the speech. The government can assert no compelling or substantial interest in justifying such a regulation of speech, particularly where that speech is communicated privately to only consenting adults.

The State's argument to dismiss Appellants' free speech claim was entirely premised on the belief that the commercial exchange of private sexual activity is illegal. (*See* E.R. 103). The District Court agreed with this assertion and held that "having found that Section 647(b) does not violate the Due Process Clause of the Constitution, the Court finds that there is no constitutional bar to banning commercial speech related to illegal activity." (E.R. 10). Appellants do not contest that a state may ban commercial speech related to an illegal activity. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.,* 447 U.S. 557, 563 (1980) (citing *Pittsburgh Press Co. v. Human Relations Comm'n,* 413 U.S. 376, 388 (1973)). However, as explained in Section 1(D), *supra,* the State cannot constitutionally make the commercial exchange of private sexual activity a crime. As a result, the State also cannot constitutionally criminalize speech relating to the commercial exchange of private sexual activity. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996)(noting that "special care" should be used to review blanket bans on commercial speech that are enacted in order to pursue a nonspeech-related policy).

Therefore, the District Court erred in dismissing Appellants' claim that Section 647(b) violates Appellants' right to free speech.

3. THE DISTRICT COURT ERRED IN DISMISSING APPELLANTS' CLAIM THAT SECTION 647(B) VIOLATES THE FIRST AMENDMENT FREEDOM OF ASSOCIATION.

The First Amendment of the United States Constitution affords constitutional protection to the freedom of association. The Supreme Court has issued decisions referring to constitutionally protected "freedom of association" in two distinct senses. *Roberts v. U.S. Jaycees,* 468 U.S. 609, 617 (1984). The first sense involves freedom of intimate association which provides a right to enter into certain intimate relationships. *Id.* at 617-18. The second sense involves a right to expressive association. *Id.* at 618.

"[B]ecause the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id.* "The freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 545 (1987). "[C]hoices to

enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts,* 468 U.S. at 617-18.

To determine whether any particular relationship merits the protection of the Due Process Clause, the Court should consider factors such as "size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC,* 666 F.3d 1216, 1220-21 (9th Cir. 2012); *see also IDK, Inc. v. Clark County,* 836 F.2d 1185, 1193 (9th Cir. 1988)(courts may consider "the group's size, its congeniality, its duration, the purposes for which it was formed, and the selectivity in choosing participants.").

In the present case, the District Court held that "the First Amendment's protection of freedom of association does not protect the relationships at stake in the context of prostitution." (Order, p. 10). This was error. The association between erotic service providers and those who associate with them is an intimate association. It is of small size, and each person in the consensual association is able to exercise

selectivity when they choose with whom they associate. This association therefore merits the protections of the First Amendment. Hence, the District Court erred in dismissing Appellants' claim for violation of the freedom of association under the First Amendment.

4. THE DISTRICT COURT ERRED IN DISMISSING APPELLANTS' CLAIM THAT SECTION 647(B) VIOLATES THE FOURTEENTH AMENDMENT RIGHT TO EARN A LIVING.

In *Allgeyer v. Louisiana,* 165 U.S. 578, 589 (1897), the Supreme Court explained that:

> The "liberty" mentioned in the [Fourteenth] Amendment means, not only the right of the citizen to be free from the mere physical restraint of his person…but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above-mentioned.

Because Section 647(b) severely infringes on Appellants' ability to earn a living through one's chosen livelihood or profession, it unconstitutionally burdens the right to follow any of the ordinary callings in life; to live and work where one will; and for that purpose to enter into all contracts which may be necessary and essential to

carrying out these pursuits, all liberty interests protected by the Fourteenth Amendment right to substantive due process. *See Allgeyer,* 165 U.S. at 589-90; *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923).

The District Court dismissed this claim because it was "eviscerated by the Court's finding that Plaintiffs have not stated an actionable substantive due process claim related to the criminalization of prostitution. Plaintiffs cannot demonstrate that they maintain a liberty or property interest protected by the Constitution in this chosen, illegal profession." (E.R. 11).

This was error because, as explained in Section 1, *supra,* the District Court's conclusion that working as an erotic service provider is an illegal profession is incorrect. As such, the statute violates Appellants' substantive due process right to earn a living, and the District Court erred is dismissing that claim.

CONCLUSION

For all of the above reasons, this Court should reverse the judgment and the order granting the motion to dismiss, and it should remand the case to the District Court for further proceedings consistent with this Court's order.

RESPECTFULLY SUBMITTED this 30th day of September, 2016.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FRAP 32(a)(7) because it contains 8,508 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/ H. Louis Sirkin
H. Louis Sirkin

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellants state that they are aware of no related cases currently pending in this Court as defined in Rule 28-2.6.

s/ H. Louis Sirkin
H. Louis Sirkin

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 September 30, 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/ H. Louis Sirkin
H. Louis Sirkin

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