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IN THE MUNICIPAL COURT OF THE CITY OF PHOENIX

COUNTY OF MARICOPA STATE OF ARIZONA

STATE OF ARIZONA, Plaintiff, v. MONICA RENEE JONES, Defendant.	**MEMORANDUM IN SUPPORT OF RULE 20 MOTION FOR JUDGMENT OF ACQUITTAL** No. 20139021636

Monica Jones is charged with a misdemeanor for violating Phoenix Municipal Code ("City Code"), Section 23-52(A)(3) (or, the "Section"). This Section prohibits the "manifest[ation] [of] an "intent to commit or solicit an act of prostitution," and enumerates specific circumstances to be considered in determining whether intent is manifested. Specifically, Section 23-52(A)(3), provides that a "person is guilty of a misdemeanor who":

> Is in a public place, a place open to public view or in a motor vehicle on a public roadway and ***manifests an intent to commit or solicit an act of prostitution***. Among the circumstances that may be considered in determining whether such an intent is manifested are: [(1)] that the person repeatedly beckons to, stops or attempts to stop or engage passersby in conversation or repeatedly, stops or attempts to stop, motor vehicle operators by hailing, waiving [sic] of arms or any other bodily gesture; [(2)] that the person inquires whether a potential patron, procurer or prostitute is a police officer or searches for articles that would identify a police officer; or [(3)] that the person requests the touching or exposure of genitals or female breast;

City Code § 23-52(A)(3) (emphasis added).

This provision violates both the Arizona and U.S. Constitutions, and therefore this prosecution must be dismissed. Section 23-52 is facially overbroad and infringes on expression protected by the First Amendment of the U.S. Constitution and the free speech protections of the Arizona Constitution, art. 2, § 6 ("Freedom of Speech and Press"), *see Coleman v. City of Mesa*, 284 P.3d 863, 872 n.5 (Ariz. 2012) (observing that, in some respects, Article 2, Section 6 is "more protective of free speech rights than the First Amendment (*citing State v. Stummer*, 219 Ariz. 137, 194 P.3d 1048 (Ariz. 2008) (applying more strict standard for evaluating content-based secondary effects regulations))). It is also unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and the under the Arizona Constitution, art. 2, §4 ("Due Process of Law"), *see State v. Speer*, 212 P.3d 787, 795 (Ariz. 2009) (apparently applying same standard under Due Process Clause of the Fourteenth Amendment of the U.S. Constitution to section 4). Each constitutional infirmity is addressed in turn.

I. PHOENIX CITY CODE 23-52(A)(3) VIOLATES THE FIRST AMENDMENT.

A. Section 23-52 Places Too Great a Burden on Expression Protected by the First Amendment.

The First Amendment, applied to the State through the Fourteenth Amendment, prohibits abridgement of the freedom of speech. It protects "pure speech" as well as expressive conduct, or "conduct intending to express an idea" that "is 'sufficiently imbued with elements of communication." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058-59 (9th Cir. 2010) (quoting *Spence v. State of Washington*, 418 U.S. 405, 409-11 (1974)). Expressive conduct involves (1) "[a]n intent to convey a particularized message" through conduct where (2) "the likelihood [is] great that the[se] messages w[ill] be understood by those" viewing the messages conveyed. *Spence*, 418 U.S. at 409. The Section burdens both pure speech and expressive conduct.

1. The Section Impermissibly Restricts "Pure Speech."

When the government restricts actual, verbal speech, as done by the Section, it has

the burden of proving the constitutionality of its actions. *United States v. Playboy Entm't, Grp., Inc.*, 529 U.S. 803, 816 (2000). In its enumeration of illustrative "circumstances," the Section effectively criminalizes verbal speech including "engag[ing] passersby in conversation . . . inquir[ing] whether a potential patron, procurer or prostitute is a police officer . . . [and] . . . request[ing] the touching or exposure of genitals or female breast." Phoenix City Code 23-52(A)(3).

The Section "differentiates based on the content of speech on its face," *See ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 791-92 (9th Cir. 2006), and is thus content-based. *See Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir. 1998) (restriction was content-based because a law enforcement officer had to look at the expressive material to know whether it was permitted under the ordinance). For instance, a law enforcement officer could only determine whether the speech is permissible under the Section by examining what was said, *e.g.*, did the individual inquire whether another was a police officer?[1] Request the touching or exposure of genitals? Such restrictions only "pass constitutional muster . . . if they are the least restrictive means to further a compelling interest." *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998). The Section plainly cannot meet this test.

Even assuming the government has a compelling interest in prohibiting prostitution, a measure that criminalizes a broad range of legal speech surely cannot be the "least restrictive" means to furthering such an interest.[2] There are clearly other less restrictive

[1] There are multiple non-criminal reasons one might inquire if someone is a police officer. Particularly for transgender individuals and gay men, who are often targeted police for engaging in constitutionally protected conduct such as consensual non-commercial sexual activity and gender-expression communicating a clear message, one might inquire of a person's status as an officer to protect themselves from arrest for perceived criminality stemming from their sexual orientation or gender identity. *Cf. U.S. v. Lanning*, 723 F.3d 476, 483 (4th Cir. 2013) (striking down disorderly conduct regulation due to vagueness and likelihood of discriminatory and arbitrary enforcement in case involving sting operation that resulted in Defendant's arrest [and] was aimed not generally at sexual activity in the Blue Ridge Parkway…[but] rather… specifically targeted [at] gay men").

[2] Even assuming the Section is content-neutral, the Section does not "serve a significant government interest, leaving open ample alternative channels of expression," *ACLU of Nevada*, 466 F.3d at 792, for the same reasons that it cannot pass constitutional muster under the more stringent content-based standard.

means to prohibit prostitution than by restricting a range of protected speech. Assuming the statute was intended to prevent prostitution, one clear alternative, already prohibited by Section 23-52(A)(2), is for the City to prohibit the affirmative solicitation of prostitution. *See Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 962-66 (9th Cir. 2012) (striking down ordinance where at least one viable alternative to burden on speech was present). This provision properly reserves the definition of the elements of the crime for the legislature. As noted, the vague and open-ended language in the instant statute allows a patrol officer to determine that words neutral on their face, such as "are you a police officer", are in fact code for: "I intend to commit prostitution and want to know if you are a cop." The absence of clear direction in this statute ensures that protected speech and acts will necessarily go into the determination to target and arrest.

2. The Section Impermissibly Restricts Conduct.

a. The Section Overtly Criminalizes Protected Conduct, Including Talking and Waving of Arms.

The Section also unconstitutionally criminalizes broad conduct "sufficiently imbued with elements of communication" by barring anything that might—"manifest[] an intent to commit or solicit an act of prostitution," as evidenced by a non-exclusive list of enumerated "circumstances." Not only is there "[a]n intent to convey a particularized message" in various aspects of the proscribed conduct as qualified by the statute, *e.g.*, "engag[ing] [a] passersby in conversation" or "repeatedly, stop[ing] or attempt[ing] to stop, motor vehicle operators by hailing, waiving of arms or any other bodily gesture"—but also "the likelihood [is] great that the[se] messages w[ill] be understood by those" viewing them. *Spence v*, 418 U.S. at 409. For example, the acts of waving and gesturing with one's arms may convey the message, "please stop, I am lost" or "please stop, I need assistance."

b. The Section Also Criminalizes Protected Conduct that Expresses Gender Identity, as Illustrated by its Application to Ms. Jones.

The Section also prohibits conduct that expresses gender identity. A person's gender expression and in their clothing, are expressive choices protected by the First

Amendment. *See e.g., Tinker v. Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969) (wearing an armband to express particular views is protected under the First Amendment); *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 427-28 n.21 (9th Cir. 2008) (wearing t-shirts with religious messages unquestionably protected by the First Amendment); *Doe ex. rel. Doe v. Yuntis*, No. 001060A, 2000 WL 33162199 at *3 (Mass Supr., Oct. 11, 2000) (in allowing free speech claim to proceed, Court found that "by dressing in clothing and accessories traditionally associated with the female gender, [plaintiff] is expressing her identification with that gender"); *see also Zalewska v. County of Sullivan*, 316 F.3d 314 (2d Cir. 2013) ("[T]here may exist contexts in which a particular style of dress may be a sufficient proxy for speech to enjoy full constitutional protection.").

The First Amendment protects the expression of one's gender identity through clothing and other items consistent with that gender. Clothing amounts to protected speech because it can "symbolize ethnic heritage, religious beliefs, and political and social views." *Canady v. Bossier Parish School Bd.*, 240 F.3d 437, 440 (5th Cir. 2001). For a transgender individual, like Ms. Jones, by wearing clothing and other items associated with a particular gender, one expresses their identification with that gender. Like clothing that symbolizes one's ethnic or religious beliefs, here Ms. Jones's "tight fitting black dress," which prompted the officer to stop her, communicated the message, that she is a woman and that the fact that she was assigned male at birth did not change her female identity. For Ms. Jones, who was assigned male at birth but who is now female, wearing a dress, a skirt, or women's pants is a critically important expression of identity. "[G]ender nonconformity communicates ideas from one person to another. In particular, gender nonconformity communicates core elements of one's identity and is related to the free speech values of autonomy and self-realization." Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech,* 19 Wm. & Mary J. Women & L. 187, 195 (2013). This is true whether that gender non-conformity is perceived or actual. We live in a world where "social context renders gender nonconformity

legible as speech," thus, when a person assigned male at birth, and perceived as such by police officers or others, is wearing a dress or another item of clothing typically worn by women, the message is not lost on the rest of society. *Id.* In fact, this message is often what triggers a police stop in the first instance.

For transgender women with prior prostitution-related convictions or previous criminal justice system contact, the effect of this profiling of gender amounts to status-based criminalization. Often transgender women known to the police or who live in or visit areas known for prostitution are targeted when going about their daily routines. By its terms, the Section, permits officers to stop and arrest a person because of who they are—*i.e*, a transgender woman (a "man" wearing a tight fitting black dress), talking to her friends ("other prostitutes") in their neighborhood (an area known for prostitution))—and not for what they did. This status-based targeting, which is itself unconstitutional, stems in the first instance from the protected speech of one's clearly communicated message about her gender. *See, e.g, Robinson v. California*, 370 U.S. 660 (1963) (striking down California law that made the status of drug addiction a crime). The particular facts of this case illustrate that the Section sweeps up protected, gender-expressive conduct. Here, there is no serious doubt that Ms. Jones would ***never*** have been stopped by the police but for her transgender identity, perceived gender non-conformity and dress. Officers testified [or the police report confirms] that one of the first things they noticed was her "tight fitting black dress." They also testified that they have ***never*** arrested a man, dressed in traditionally male clothing, under this ordinance. Quite simply, whatever the Section says, it is clear that in this case Ms. Jones was arrested in large part because of her protected conduct; that requires a judgment of acquittal.

c. The Burden Imposed by the Section is Impermissible.

Where, as here, a court must evaluate the constitutionality of limitations on conduct involving "speech and nonspeech," the court must apply the four-part test set forth in *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Under this test, a government regulation is

sufficiently justified:

> [(1)] if it is within the constitutional power of the Government; [(2)] if it furthers an important or substantial governmental interest; [(3)] if the governmental interest is unrelated to the suppression of free expression; and [(4)] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. (emphasis added). Even assuming, *arguendo*, that Section 23-52(A)(3) passes the first three parts of the *O'Brien* test, it fails *O'Brien's* final test by criminalizing an unlimited quantum of First Amendment-protected conduct.

The restriction imposed by section 23-52(A)(3) is *substantially* greater "than is essential" to the furtherance of the City's interest in this case, the prevention of prostitution. Even assuming that the City has an important or substantial interest in preventing prostitution, the Section prohibits the nebulous concept of "manifest[ation**]** of an intent to commit or solicit an act of prostitution," and prohibits actions that are indisputably legitimate under the First Amendment, *e.g.*, engaging a passerby in conversation.[3] *See ACLU of Nevada*, 466 F.3d at 791-92 ("It is beyond dispute that solicitation is a form of expression entitled to the same constitutional protections as traditional speech."). Put differently, section 23-52(A)(3) prohibits—by its own terms—a range of perfectly legitimate activities, to the extent that they also suggest or show an intent to engage in prostitution. The prohibition of a range of legitimate speech actions is hardly "essential" to the furtherance of the City's purported interest in preventing prostitution. *O'Brien*, 391 U.S. at 376.

B. Section 23-52 Is Overbroad.

Under First Amendment overbreadth doctrine, "a statute is facially invalid if it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008); *see also United States v. Stevens*, 559 U.S. 460, 473 (2010) (law is facially

[3] Notably the list of "manifestations" in the statute is, by its terms, not exclusive, thus a police officer could presumably use any other observation she feels like as proof of a "manifestation." Such boundless discretion is unconstitutionally vague, as discussed below.

overbroad under the First Amendment if a "substantial number of its applications are unconstitutional, judged in relation to the statue's plainly legitimate sweep" (*quoting Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008))). The Section clearly prohibits a "substantial amount of protected speech," *Williams*, 553 U.S at 292, by criminalizing constitutionally protected activities, among other things, beckoning, gesturing, and inquiring. Again, there is clearly a right to solicit or engage with individuals in a public forum, *ACLU of Nevada*, 466 F.3d at 791. And the public has a right to receive information and gather ideas, including those related to police officers performing their duties. *See Gilk v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (videotaping police officers performing their responsibilities fits "comfortably" within the First Amendment).

As the Supreme Courts of Florida and Nevada have both found, while invalidating their own similar prostitution statutes, such language is "substantially overbroad because it criminalizes conduct—for example, beckoning to or waiving at another—that merely indicates prostitution loitering . . . [and] criminalizes conduct that is constitutionally protected." *Silvar v. Eighth Judicial District Court*, 129 P.3d 682, 688 (Nev. 2006); *see also Wyche v. State*, 619 So.2d 231, 234 (Fla. 1993) (invalidating Florida prostitution loitering law stating "First Amendment freedoms need breathing space to survive [so] government may regulate in the area only with narrow specificity").

II. PHOENIX CITY CODE 23-52(A)(3) VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

"A criminal statute is void for vagueness if it is 'not sufficiently clear to provide guidance to citizens concerning how they can avoid violating it and to provide authorities with principles governing enforcement.'" *United States v. Zhi Yong Guo*, 634 F.3d 1119, 1121 (9th Cir. 2011) (quoting *United States v. Jae Gab Kim*, 449 F.3d 933, 942 (9th Cir. 2006)). The City Ordinance is facially unconstitutional as it "fails to provide a person of ordinary intelligence fair notice of what is prohibited," and is "so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *United States v. Kilbride*,

584 F.3d 1240, 1257 (9th Cir.2009) (*quoting Williams*, 553 U.S. at 304); *see also United States v. Harris*, 705 F.3d 929, 932 (9th Cir. 2013). Put differently, where, as in this case, the law "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application," *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972), no conviction under that law can occur.

The Section allows for arbitrary enforcement by law enforcement officers. Officers may determine whether a wide range of circumstances, including protected speech and expressive conduct, "manifests" the intent to commit prostitution. This standardless language encourages, as Ms. Jones's case, seriously discriminatory enforcement, *Kilbride*, 584 at 1257, and is impermissibly vague in violation of the due process clause.

III. *SAVIO* IS WRONGLY DECIDED, AS NUMEROUS COURTS HAVE IMPLICITLY OR EXPLICITLY HELD.

Almost 20 years ago, the Arizona Court of Appeals upheld the Section against a challenge on both vagueness and overbreadth grounds.[4] *State v. Savio,* 924 P.2d 491, 493 (App. 1996). As to vagueness, *Savio* held the Section sufficiently definite because the criteria listed "are not exclusive and that other conduct may also form the basis of an arrest." *Id.* And *Savio's* holding as to overbreadth reasoned that the Section was not overbroad because "an officer must look to probable cause" and realize that "conduct such as flagging down a cab or conversing to obtain petition signatures occurs in a clearly different context than gesturing or conversing for the purposes of soliciting prostitution and would not justify any criminal inference." *Id.* That decision was wrong then and it is certainly wrong today.

Interpreting statutes almost identical to the Section at issue here, the supreme courts of both Florida and Nevada have reached the opposite conclusion as that reached by the Court of Appeals in *See, e.g., Savio. Silvar*, 129 P.3d at 688; *Wyche*, 619 So.2d at 234. Rightly so. The court's reasoning in *Savio* cannot be reconciled with the requirements of

[4] *Savio* addressed only vagueness and overbreadth and said nothing about the other grounds raised above.

the Arizona and United States Constitutions. Where, as in the United States, a criminal statute is void if its words do not provide sufficient guidance to citizens about what not to do, *how is it possibly better if a statute, like the Section, explicitly allows an officer to consider* ***anything*** *in reaching an arrest decision?* Put differently, how does having a statute that criminalizes ***more*** than what is written in that statute, possibly make that statute less vague? Following the court's reasoning to its logical conclusion, the constitutional infirmities in the law are rescued by the fact that an officer can have unlimited discretion in determining what constitutes one's manifestation of an intent to engage in prostitution. Similarly, how does a judicially created need to "look to probable cause" tell us what that probable cause might be for or might be based upon? How can you define a statute's substantive elements by "looking to probable cause," an inquiry which depends on those very elements? *Savio* is simply wrong.

Furthermore, even if *Savio* was somehow correct at the time of its decision, it is no longer viable today. Since *Savio*, the U.S. Supreme Court, and intermediate state and federal appellate courts, have given further content to the contours of the First and Fourteenth Amendment. Subsequent authority strongly suggests *Savio* cannot stand. For example, in *City of Chicago v. Morales*, 527 U.S. 41, (1999), the U.S. Supreme court clearly emphasized that local governments do not have the authority to enact ordinances that effectively provide "absolute discretion" to police officers," impermissibly "enstrust[ing] lawmaking to the moment-to-moment judgment of the policeman on his beat." *Id.* (*quoting Kolender v. Lawson*, 621 U.S. 352, 360 (1983)). Indeed, post-*Savio* decisions interpreting substantially similar enactments have found such enactments unconstitutional. *See, e.g.*, *Silvar*, 129 P.3d at 688; *City of W. Palm Beach*, 112 So. 3d 723 (Fl. Ct. App. 2013) (finding ordinance criminalizing "loitering with intent to commit prostitution" was unconstitutionally vague and overbroad). In light of *Morales* and its progeny, *Savio* must be overturned.

IV. CONCLUSION

Section 23-52 is facially overbroad and infringes on speech and expression protected by the First Amendment of the U.S. Constitution and the free speech protections of the Arizona Constitution, art. 2, § 6 and unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and the under the Arizona Constitution, art. 2, §4. Section 23-52(A)(3) thus violates both the Arizona and U.S. Constitutions, and therefore this prosecution must be dismissed.

Dated: March 14, 2014

By: _____

Milo Iniguez

Copy of the foregoing mailed/hand delivered/telecopied
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