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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

STATE OF ARIZONA, Appellee v. MONICA RENEE JONES, Appellant	No. (Municipal Court No. 20139021636) **APPELLANT'S MEMORANDUM** **(ORAL ARGUMENT REQUESTED[1])**

[1] Given the number of issues, including constitutional issues, Jones believes that the Court would be greatly aided by oral argument. For the same reasons, Jones believes the Court will also be substantially assisted by the filing of a Reply Brief.

Introduction and Statement of the Case

Monica Jones is a full-time college student studying social work at Arizona State University. She is also an internationally recognized advocate for the rights of transgendered people, of which she is one. She was arrested on May 17, 2013 near her home in Phoenix, after accepting a ride to her neighborhood bar from a "handsome," [4/11/2014 Trial Transcript ("Tr.") at 108:9-20], undercover Phoenix Police Department ("PPD") officer ("officer") who offered to drive her. "[F]our minutes" after Jones accepted the ride, another officer pulled the car over in a pre-planned traffic stop orchestrated as part of a larger PPD anti-prostitution sting. [Tr. at 77:8-10] Jones was charged with, and convicted of, violating Phoenix Municipal Code ("City Code"), Section 23-52(A)(3) ("Section 23-52(A)(3)" or the "Code"), which criminalizes "manifest[ing] an intent to commit or solicit an act of prostitution" ("Manifesting").

Jones's conviction under this bizarre ordinance cannot stand. ***First***, her bench trial was rife with error. The trial court erroneously: (1) admitted evidence of Jones's prior conviction, (2) considered Jones's potential punishment in finding her guilty, and (3) denied her a jury trial. ***Second***, the numerous trial errors cumulatively require reversal as a matter of due process. ***Third***, there is insufficient evidence to support Jones's conviction. And ***finally***, City Code § 23-52(A)(3) is invalid under the First Amendment and the free speech protections of the Arizona Constitution, art. 2, § 6 and under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and the Arizona Constitution, art. 2, § 4.

Statement of Facts

At the start of Jones's bench trial in Phoenix Municipal Court on April 11, 2014, the court denied Jones's Rule 20 motion challenging the Code under the free speech and due process guarantees of the U.S. and Arizona Constitutions.[2] [Tr. at 38:11–39:20] During the presentation of evidence, only Jones and the officer testified, offering conflicting versions of events. For her part, Jones explained she was going out that night and anticipated only getting drinks with the officer. [Tr. at 110:11-16] In contrast, the officer testified that Jones displayed behavior

[2] The ACLU of Arizona was permitted to participate and argue the Rule 20 Motion as *amicus*. [Tr. at 8:2-4]

indicating prostitution activity. [Tr. at 57:6-22] No other witnesses testified, nor was any other evidence admitted. In rendering his decision, the judge explained, in relevant part, that:

> I also have to consider factors such as mode of intent by any witnesses testifying. And with respect to this particular proceeding, the Defendant having acknowledged, admitted, a record of not too long ago, less than two years ago, of a – prior conviction, the – a motive to avoid a mandatory 30-day sentence would be something that I can't ignore. When evaluating the credibility of the witnesses in front of me, I do find that the State has met its burden. I'm going to find the Defendant guilty.

[Tr. at 128:5-14] With this, Jones was sentenced to 30 days in jail and a $150 fine.[3] [*Id.* at 131:13-22] Jones filed a timely notice of appeal on April 17, 2014. [*See* Notice of Appeal]

Issues Presented for Review

1. Where the trial court explicitly relied on evidence of Jones's prior conviction in reaching its judgment, explicitly considered Jones's potential punishment in finding her guilty, and denied her a jury trial, must its judgment of conviction be reversed?

2. Do the numerous trial errors here, each independently worthy of reversal, cumulatively require reversal as a matter of due process?

3. Where the only evidence against Jones failed to establish a purportedly necessary element of the crime, namely her intent to commit prostitution, is that evidence sufficient to sustain her conviction?

4. By infringing on expression and speech protected by the First Amendment of the U.S. Constitution and the free speech protections of the Arizona Constitution and by failing to provide notice of the conduct proscribed and guidelines for enforcement, is the Code unconstitutional?

[3] The Court also imposed fees for jail recovery. [*Id.* at 131:23-25]

Argument

I. THE CONVICTION MUST BE REVERSED DUE TO NUMEROUS ERRORS.

A. Evidence of Jones's Prior Conviction Was Improperly Admitted and Explicitly Relied Upon Under Rule 404(b).

Arizona Rule of Evidence 404(b) prohibits the admission of evidence of a prior crime "to prove the character of a person in order to show action in conformity therewith." Here, citing Rule 404(b), the trial court allowed the State to cross-examine Jones about her prior misdemeanor conviction for prostitution over her objection.[4] [*See* Tr. at 40:24-41:4, 117:12-22] In doing so, the court abused its discretion. *See State v. Payne*, 233 Ariz. 484, 503, 314 P.3d 1239, 1258 (2013).

Prior convictions are admissible under Rule 404(b) only "to establish motive, intent, absence of mistake or accident, identity and common scheme or plan." *State v. Terrazas*, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997) (citation and internal quotation marks omitted). But "the bare fact of a defendant's prior conviction would rarely, if ever, be probative of any legitimate Rule 404(b) purpose; instead, it is the facts and circumstances underlying such a conviction which hold probative value." *State v. Wilkerson*, 559 S.E.2d 5, 11 (N.C. App. 2002) (Wynn, J., dissenting), *adopted by* 571 S.E.2d 583 (N.C. 2002) (reversing Court of Appeals decision "[f]or the reasons stated in the dissenting opinion").

Here, the State introduced no facts other than the bare fact of conviction and that the prior conviction "relate[d] to an oral sex allegation." [Tr. at 117:18-22] Instead, in pretrial briefing, the State simply argued that the prior conviction was admissible to prove "intent, knowledge, and absence of mistake or accident." [3/3/2014 State's Resp. to Def.'s Mot. to Preclude Impeachment (Rule 404) ("Impeachment Resp.") at 1] Nowhere did the State explain *how* the conviction itself

[4] The State did not argue here that the prior conviction was admissible under Rule 609(a). Nor could it have given that the conviction was not for a crime "punishable by death or by imprisonment for more than one year," Rule 609(a)(1), or for a crime the elements of which required proving "a dishonest act or false statement," Rule 609(a)(2).

could be used to prove any purpose, including intent,[5] and nowhere did it cite any similarity between the facts underlying the prior conviction and those underlying the charge here. Nor, for that matter, did the trial court.

While no Arizona case has considered the precise issue presented here, the Minnesota Supreme Court has considered and rejected the exact arguments made by the State in this case. In *State v. Clark*, the court held that "a defendant charged with prostitution may not be cross-examined with regard to previous arrests for and guilty pleas to charges of loitering with intent to solicit for prostitution." 293 N.W.2d 49, 52 (Minn. 1980). There, like here, the State argued that the prior prostitution convictions were admissible under Rule 404(b) to prove intent, motive, and absence of mistake. *Id.* at 50-52; [*see also* Impeachment Resp.] Also like here, the prior conviction was used to impeach the Defendant on cross-examination, ***not*** in the State's case-in-chief.

In holding that the trial court abused its discretion by allowing the State to ask the Defendant about the prior convictions on cross-examination, the court stated: "None of the proper purposes enumerated in Rule 404(b) were material issues in the case, despite the fact that intent is an element of the crime of prostitution. The real issue was credibility." *Clark*, 293 N.W.2d at 51-52. The same is true here. There, "[t]he sergeant testified that defendant propositioned him. The defendant testified that she knew [the sergeant] was a police officer and so did not proposition him." *Id.* at 52. Jones's case is a nearly verbatim replica of the Minnesota case. [*See* Tr. at 54-57, 111][6]

Given that the trial court relied ***explicitly*** on Jones's prior conviction in explaining its reasons for convicting her, [Tr. at 128:7-11 (during weighing of credibility explaining her prior conviction as "something that I can't ignore")], there is ***at least*** a reasonable probability that the

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[5] As discussed more fully below, the Code does not have an intent requirement and is therefore unconstitutional. That the Code does not have an intent requirement also makes it even less likely that evidence of Jones's prior conviction has a proper purpose under 404(b).

[6] Even assuming the evidence of Jones's prior conviction were admissible under 404(b), its admission was more prejudicial than probative. *See* Ariz. R. Evid. 403. Assuming further that the evidence had any probative value, it was highly prejudicial and made it likely that the trier of fact would assume that Jones had a propensity to commit prostitution.

verdict would have been different had Jones's prior conviction not been erroneously admitted. *See State v. Dann*, 205 Ariz. 557, 570, 74 P.3d 231, 244 (2003) (noting that "courts will not reverse a conviction based on the erroneous admission of evidence unless there is a reasonable probability that the verdict would have been different had the evidence not been admitted") (citations and internal quotation marks omitted). The trial court's error was therefore not harmless, and Jones's conviction must be vacated.

B. The Trial Court Committed Reversible Error by Considering Jones's Potential Punishment in Finding Her Guilty.

"[A] trial has one purpose—to seek the truth." *State v. Hatter*, 381 N.W.2d 370, 375 (Iowa Ct. App. 1985) (citing *United States v. Havens*, 446 U.S. 620, 626-27 (1980)), *aff'd*, *Hatter v. Iowa Men's Reformatory*, 932 F.2d 701 (8th Cir. 1991). "Penalties have nothing to do with the factual determination that a defendant did or did not commit a crime." *Id.* And so, Arizona courts have held that it is an error to consider a defendant's possible punishment in reaching a verdict. *See State v. Eisenlord*, 137 Ariz. 385, 396, 670 P.2d 1209, 1220 (App. 1983) ("It is improper for the jury to consider defendant's possible punishment in reaching its verdict."); *see also Shannon v. United States*, 512 U.S. 573, 579 (1994) (holding that punishment should not be considered by fact-finder because it is "irrelevant" to fact-finder's task of determining guilt); *State v. Tims*, 143 Ariz. 196, 198, 693 P.2d 333, 335 (1985) (same).

In explaining his reasons for finding Jones guilty, the trial judge abandoned this fact-finder's obligation, explicitly discrediting Jones's testimony because her "motive to avoid a mandatory 30-day sentence would be something that [he] can't ignore." [Tr. at 128:7-11] But, as a fact-finder, the trial court ***was required*** to ignore Jones's potential sentence. It did not. This error mandates reversal. *See State v. Henderson*, 210 Ariz. 561, 567, 115 P.3d 601, 607 (2005) (reversing conviction where error deprived defendant of fair trial).

Even more fundamentally, though, the trial court's foundational assumption that Jones had a motive to lie was both untrue and unconstitutional. Jones had a motive to testify falsely only if she actually committed a crime, which she did not. As the Second Circuit has explained "a defendant does not always have a motive to testify falsely. An innocent defendant has a motive

to testify truthfully." *United States v. Gaines*, 457 F.3d 238, 246 (2d Cir. 2006). Furthermore, the court's application of this logical fallacy is an error of constitutional magnitude insofar as assuming "that the defendant's interest in the outcome of the case creates a motive to testify falsely impermissibly undermines the presumption of innocence because it presupposes the defendant's guilt." *United States v. Brutus*, 505 F.3d 80, 87-88 (2d Cir. 2007). Discounting Jones's testimony because of her personal interest in the outcome was especially pernicious where, as in *Gaines*, "[t]his was a close case" that "boiled down to the credibility of [the Defendant's] testimony." *Gaines*, 457 F.3d at 250.

That these cases arise in the jury instruction context and, thus, are about what the fact-finder ***might*** consider in making its decision, renders their principles more applicable here, not less. Unlike in the case of a jury trial, we need not guess here what factors influenced the finder of fact. The trial court explicitly announced that Jones's personal interest in the case caused him to discount her testimony. Put differently, while appellate courts in *Gaines* and *Tims* reversed convictions because the fact-finders there ***could have*** impermissibly discounted the defendants' testimony, in Jones's case we ***know*** the fact-finder did so. The U.S. and Arizona Constitutions forbids this. Thus, the error deprived Jones of her right to a fair trial, and her conviction must be reversed on this basis. *See Henderson*, 210 Ariz. at 567, 115 P.3d at 607.

C. The Trial Court Unconstitutionally Refused Jones's Demand for a Jury.

A defendant has a constitutional right to trial by jury if the offense has a common law antecedent that guaranteed a right to trial by jury. *See Derendal v. Griffith*, 209 Ariz. 416, 419, 104 P.3d 147, 150 (2005). Accordingly, the issue here is whether there is a "common law antecedent" to Manifesting "that guaranteed a right to trial by jury at the time of Arizona statehood." *Id.* at 425, 104 P.3d at 156. ***There is***, and thus the trial court erred in denying Jones's demand for a jury.

To determine whether there is a common law, jury-eligible, antecedent to a modern offense, the court considers whether the offenses are of the same "character," where "the modern offense contains elements comparable to those found in the common law offense." *Id.* at 419, 104 P.3d at 150. Put differently, the elements must be "comparable" or "substantially similar,"

but they need not be "identical." *Crowell v. Jejna*, 215 Ariz. 534, 539-40, 161 P.3d 577, 582-83 (App. 2007).

The elements of Manifesting (while uncertain) appear to be: (1) "manifest[ing] an intent" to commit or solicit prostitution (2) in a public place. City Code § 23-52(A)(3). ***A similar offense existed at common law.*** At common law, public indecent conduct—specifically, (1) "immoral" or indecent conduct—such as prostitution related-acts—(2) committed in public—was punishable at common law and triable by jury. *See Bailey v. United States*, 98 F.2d 306, 308 (D.C. Cir. 1938) (citing *Anderson v. Commonwealth*, 26 Va. 627 (Va. Gen. Ct. 1826))[7]; *see also State v. Le Noble*, 216 Ariz. 180, 182, 164 P.3d 686, 688 (App. 2007) ("We look to English common law to determine whether resisting arrest was a common law crime.").

This common law offense and Manifesting have ***substantially similar elements***: (1) sexually-related acts that are (2) committed in a public place. *Crowell*, 215 Ariz. at 539-40, 161 P.3d at 582-83; *see also id.* at 540, 161 P.3d at 583 ("Nowhere does *Derendal* instruct that the elements of the modern-day offense must be identical to a common-law antecedent."). Thus, the offense of public indecent conduct is a common law antecedent to Manifesting, and Article 2, Section 23 of the Arizona Constitution preserved the right to trial by jury for those charged with Manifesting. Jones was entitled to a jury, and her conviction without one must be vacated. *See, e.g., Bosworth v. Anagnost*, 234 Ariz. 453, 323 P.3d 736, 739 (App. 2014).

D. The Cumulative Impact of These Trial Errors is a Deprivation of Due Process.

Even assuming that no single error identified here "rises to the level of a constitutional violation or would independently warrant reversal" (as each do), the cumulative effect of the

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[7] Relying on *Bailey*, the State argued that "under the jury-eligibility test set forth in *Derendal*, Defendant is not entitled to a jury trial for the crime of prostitution as prohibited by [City Code § 23-52(A)(3)]." [State's Mot. Opposing a Jury Trial at 4] The State concluded, and the trial court agreed, that Manifestation, was not jury-eligible because, at common law, prostitution was "prosecuted under the offense of incontinence or as acts of vagrancy." [*Id.* (citing *Bailey*, 98 F.2d at 308)] But Jones was not convicted ***merely*** of prostitution. And clearly, *Bailey* says much more than the State disclosed: *Bailey* explained that "at common law mere incontinent acts were not indictable, and ***it was only when immoral conduct became offensive by its publicity that the common law courts assumed jurisdiction to punish it.***" 98 F.2d at 308 (emphasis added). In other words, *Bailey* confirms that even though private, immoral acts were not "indictable," such "immoral" acts became indictable when they were accompanied by an element of publicity rendering them of concern.

errors committed during trial violates Jones's right to due process.[8] *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973)). When determining whether cumulative trial errors amount to a constitutional violation, the reviewing court views the harm caused by the errors against evidence of the defendant's guilt. *Id.* at 927-28. That is, "trial errors are more likely to be prejudicial to a defendant . . . when [as here] the government's case on a critical element is weak." *Id.* at 928. The ***only*** evidence here is the disputed testimony of one police officer who, even though he clearly could have, did not record his encounter with Jones. With such weak proof, each of these errors discussed above, and certainly all of them together, prejudiced Jones and rendered her trial a failure of due process, warranting reversal.

E. The Conviction Must Be Reversed Because the Evidence Was Insufficient to Establish that Jones Violated City Code § 23-52(A)(3).

The State presented insufficient evidence of Jones's specific intent to engage in, or solicit, prostitution, and this Court must reverse a conviction where, as here, "no substantial evidence supports [it]."[9] *State v. Fimbres*, 222 Ariz. 293, 297, 213 P.3d 1020, 1024 (App. 2009) (citation and internal quotation marks omitted). "Substantial evidence is proof that 'reasonable persons could accept as adequate . . . to support a conclusion of [a] defendant's guilt beyond a reasonable doubt.'" *State v. Bearup*, 221 Ariz. 163, 167, 211 P.3d 684, 688 (2009) (1st alteration in original) (citation omitted). While the Court must resolve any conflicting evidence "in favor of sustaining the verdict," *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989), this Court has a duty to identify such occasions where evidence is insufficient to establish every element of the

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[8] To the extent Arizona law disregards this principle and conflicts with federal law, the Supremacy Clause and the Fourteenth Amendment Due Process Clause demand that federal due process principles control. *See* U.S. Const. art. VI, cl. 2; *see also Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (noting that "the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor").

[9] To survive a constitutional vagueness challenge, Manifesting must at least require the State to prove Jones held the specific intent to commit or solicit prostitution. Because Manifesting contains no such requirement, the law is unconstitutional as demonstrated in Section II, *infra*. Even assuming, though, that Manifesting somewhere satisfies this constitutional requirement as a ***facial*** matter, this section of the brief explains why the evidence ***in this case*** was insufficient on this element of the offense.

crime, *State v. Kindred*, 232 Ariz. 611, 613, 307 P.3d 1038, 1040 (App. 2013), or—like this one—amounts to pure "speculation," *State v. Sanchez*, 181 Ariz. 492, 494, 892 P.2d 212, 214 (App. 1995).

Any inference drawn from the circumstances of her arrest that Jones ***intended*** to prostitute is "purely speculative," and thus "do[es] not constitute substantial evidence." *Dodd v. Boies*, 88 Ariz. 401, 404, 357 P.2d 144, 146 (1960) (citation and internal quotation marks omitted). In reviewing for substantial evidence, "an inference cannot . . . stand in the face . . . of another inference equally reasonable." *Id.* (alterations in original) (citations and internal quotation marks omitted). The evidence produced at trial is susceptible to multiple inferences, equally as reasonable as the one adopted by the trial judge. For example, Jones, a young woman who was walking to her local bar on a Friday night (as she always did) [Tr. at 104:15-105:4], who saw a "handsome guy" [*id.* at 108:9-11], and who got in his car [*id.* at 109:1-3], could have just as plausibly been, and indeed according to Jones was, only flirting with the officer, ***never intending to solicit or engage in sexual activity for money***. The choice between these inferences must have depended on speculation. *See Dodd*, 88 Ariz. at 404, 357 P.2d at 146. And "reasonable persons" could not accept this evidence "as adequate . . . to support a conclusion of [Jones's] guilt beyond a reasonable doubt." *Bearup*, 221 Ariz. at 167, 211 P.3d at 688 (1st alteration in original) (citation and internal quotation marks omitted).

II. THE CONVICTION MUST BE REVERSED BECAUSE CITY CODE § 23-52(A)(3) IS UNCONSTITUTIONAL.

City Code § 23-52(A)(3) violates both the U.S. and Arizona Constitutions, and is therefore invalid. It 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"), and is facially overbroad. *See Coleman v. City of Mesa*, 230 Ariz. 352, 361, 284 P.3d 863, 872 n.5 (2012) (observing that, in some respects, Article 2, Section 6 is "more protective of free speech rights than the First Amendment"). City Code § 23-52(A)(3) is also unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment of the U.S.

Constitution and under the Arizona Constitution, art. 2, § 4 ("Due Process of Law"). *See State v. Speer*, 221 Ariz. 449, 457, 212 P.3d 787, 795 (2009).

As a threshold matter, the Code does not require that the proscribed Manifesting be with specific intent; instead, the Code merely prohibits conduct that "manifests" an "intent." *See City of W. Palm Beach v. Chatman*, 112 So. 3d 723, 727 (Fla. Dist. Ct. App. 2013) (invalidating statute that prohibited "loitering with the intent to commit prostitution" as unconstitutionally vague because it lacked intent requirement); *see also Silvar v. Eighth Judicial Dist. Court In & For Clark Cnty.*, 129 P.3d 682, 688 (Nev. 2006) (similarly invalidating ordinance criminalizing loitering "in a manner and under circumstances manifesting the purpose" to engage in prostitution for lack of required intent). As explained below, the Code is unconstitutional, and it is particularly so in light of the fact that it lacks an intent requirement.

A. City Code § 23-52(A)(3) Violates the First Amendment.

City Code § 23-52(A)(3) is a content-based restriction on speech, and it cannot survive strict scrutiny. It is also overbroad on its face.

1. City Code § 23-52(A)(3) places too great a burden on expression protected by the First Amendment.

The First Amendment prohibits abridgement of the freedom of speech. It generally protects, among other things, "pure speech" or expression. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058-59 (9th Cir. 2010). City Code § 23-52(A)(3) criminalizes such protected speech ***by, for example, prohibiting*** "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."

Moreover, the Code "differentiates based on the content of speech on its face," *see ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 793 (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). In other words, a Phoenix Police officer can only determine whether speech is permissible under the Code by examining what was said, e.g., did the

individual inquire whether another was a police officer or request the touching or exposure of genitals? Thus, because the Code imposes a restriction on the content of protected speech, it is invalid unless the ***State*** "can demonstrate that it passes ***strict scrutiny***—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (emphasis added); *see also S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998) (such restrictions only "pass constitutional muster . . . if they are the least restrictive means to further a compelling interest") *amended on other grounds by* 160 F.3d 541 (9th Cir. 1998).[10]

The Code cannot meet this test. Even assuming the State has a compelling interest in prohibiting prostitution, a measure that criminalizes a broad range of legal speech cannot be the "least restrictive" means to furthering such an interest.[11] There are other less speech-restrictive means to prohibit prostitution than by restricting a range of protected speech. For instance, assuming the Code was intended to prevent prostitution, one clear alternative, already prohibited by City Code § 23-52(A)(2), is for the City to prohibit the solicitation of prostitution. *See Alvarez*, 132 S. Ct. at 2551 (striking down statute where there was "at least one less speech-restrictive means" by which the government could achieve its purpose).[12]

2. City Code § 23-52(A)(3) is Overbroad.

A law is facially overbroad in violation of the First Amendment if a "'substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate

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[10] Jones also doubts that the State's "chosen restriction on the speech at issue [is] 'actually necessary' to achieve its interest," as it must constitutionally be. *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012) (citation omitted). There is no "direct causal link" between prohibiting the wide range of behaviors prohibited under the Code and prostitution. *Id.*

[11] Even assuming the Code is content-neutral, the Code 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.

[12] Even if the Court should find that the Code does not regulate pure speech by its content, the text fails to meet even intermediate scrutiny applied to expressive conduct, or conduct that 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 v. State of Washington*, 418 U.S. 405, 410-11 (1974); *see also United States v. O'Brien*, 391 U.S. 367, 376 (1968) (articulating test for intermediate scrutiny).

sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)); *see also United States v. Williams*, 553 U.S. 285, 292 (2008) ("[A] statute is facially invalid if it prohibits a substantial amount of protected speech.").

As discussed above, the Code sweeps up vast amounts of protected speech.[13] It does so by criminalizing constitutionally protected activities, such as beckoning or attempting to stop or engage a passerby in conversation, or inquiring whether a person is a police officer or, as here, by criminalizing clothing choices.[14] There is unquestionably a right to 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, e.g., Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (videotaping police officers fits "comfortably" within the First Amendment). In short, constitutionally protected conduct could easily be interpreted as conduct that "manifests an intent" to commit or solicit prostitution. The Code is thus overbroad because it unnecessarily sweeps a substantial amount of protected speech within its prohibitory language.

That nearly 20 years ago in *State v. Savio*, 186 Ariz. 487, 489, 924 P.2d 491, 493 (App. 1996), the Court of Appeals wrote ***one short paragraph to the contrary*** does not constrain this Court in light of subsequent opinions of the U.S. Supreme Court, *e.g.*, *Stevens*, which illustrate the robust nature of the overbreadth doctrine. *See State v. Superior Court In & For Pima Cnty.*, 2 Ariz. App. 458, 460, 409 P.2d 742, 744 (1966) ("The position of the Arizona Supreme Court . . . is binding upon this court unless recent interpretations of the [U.S.] Constitution by the [U.S.] Supreme Court have rendered the position of the Arizona Supreme Court untenable."). Indeed other courts considering similar statutes after *Savio* have rightly held them to be overbroad in

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[13] Notably, "[t]he first step in overbreadth analysis is to construe the challenged statute" as "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). As explained above, the Code does not have an intent requirement on its face.

[14] Though the Code makes no explicit reference to clothing, the Code's list is non-exclusive and the officer here plainly considered Jones's clothing in his arrest decision, further indicating the impermissible discretion afforded to officers under the Code. *See infra* note 17.

light of those Supreme Court precedents. *See, e.g.*, *Chatman*, 112 So. 3d at 727; *Silvar*, 129 P.3d at 688.

B. City Code § 23-52(A)(3) Violates the Due Process Clause of the Fourteenth Amendment.

City Code § 23-52(A)(3) is also impermissibly vague.[15] "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *see also United States v. Harris*, 705 F.3d 929, 932 (9th Cir. 2013) (articulating standard). The Code does ***both***.

First, the Code fails to provide adequate notice of the conduct it criminalizes. While it prohibits "manifest[ing] an intent to commit or solicit an act of prostitution," it does not define "manifesting," other than by providing a laundry list of examples. Defendants are left guessing as to the behavior that would subject them to arrest under the Code. Is it impermissible to flirt with someone on the street or in a car? Sell coffee in a bathing suit in a place open to public view?[16] Hail a cab? Wear a "tight fitting black dress?" It is difficult to imagine how anyone on a Phoenix street (or in a car) would know if he or she were violating the Code. Because the Code fails to draw a clear line between innocent and criminal behavior, it is void for vagueness. *See Morales*, 527 U.S. at 56-57 (law prohibiting "remain[ing] in one place with no apparent purpose" did not provide adequate notice as was it was "difficult to imagine how any citizen standing in a public place . . . would know if he or she had an 'apparent purpose'").

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[15] Jones has standing to raise a vagueness challenge. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010) ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)). The ordinance was enforced against her and her conduct was ***not*** clearly proscribed by § 23-52(A)(3). This is especially true given that "the vaguer an ordinance is, the less likely it will be found to 'clearly proscribe' conduct." *Hunt v. City of Los Angeles*, 638 F.3d 703, 711 (9th Cir. 2011).

[16] One Phoenix business—licensed by the City—is doing just that. *See* Bikini Beans Espresso coffee shop opens in Phoenix, abc15, http://www.abc15.com/news/region-phoenix-metro/north-phoenix/bikini-beans-espresso-coffee-shop-opens-in-phoenix-.

Second, the Code violates "'the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Morales*, 527 U.S. at 60 (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). The Code's language criminalizes a substantial amount of innocent conduct—as established above—and "'necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat.'" *Id.* (quoting *Kolender*, 461 U.S. at 360). Specifically, the Code gives officers "vast discretion" to determine whether a wide range of circumstances, including protected speech and expressive conduct, "manifests" the intent to commit prostitution. *Id.*[17]

Just as *Savio* is not binding as to interpretations of the First Amendment, it is not binding as to the determination of whether the Code is constitutional under the Fourteenth Amendment in light of subsequent federal authority. For example, after *Savio*, the U.S. Supreme Court decided *Morales*, affirming and strengthening the principle that a statute is unconstitutionally vague if, as the Code does, it encourages arbitrary or discriminatory enforcement. *See Morales*, 527 U.S. at 56; *see also Chatman*, 112 So. 3d at 727 (relying on *Morales* and holding ordinance criminalizing "loitering with intent to commit prostitution" was unconstitutionally vague in part due to the potential for arbitrary law enforcement).

* * *

In short, the Code infringes on constitutionally protected expression and unnecessarily sweeps up broad areas of protected speech. The Code is also unconstitutionally vague twice-over. It criminalizes ordinary people, doing ordinary things—things like walking a certain way and asking certain questions—which they cannot know are against the law. *See, e.g.*, *Morales*, 527 U.S. at 56-57. And the Code "impermissibly delegates basic policy matters to policemen . . . for

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[17] Perhaps most troubling, this standard-less language may encourage, as in this case, seriously discriminatory enforcement. *See Desertrain v. City of Los Angeles*, __ F.3d. __, 2014, No. 11-56957, WL 2766541, at *9 (9th Cir. June 19, 2014). Where, as here "a statute provides 'no standards governing the exercise of . . . discretion,' it becomes 'a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Id.* (alteration in original) (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972)). Jones would not have been stopped but for her transgender identity—the officer identified her as a transgender woman (a "man" wearing a tight fitting black dress), talking to her friend (another prostitute) in their neighborhood (an area known for prostitution). [*See* ACLU *amicus curiae* Brief; *see also* Tr. at 42:8-17, 67:16-21, 52:16-17, 105:12-22]

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, 108-09 (1972). Jones's conviction resulted from these attendant dangers. The constitutions of this State and this Country require that her conviction, and this law, be voided.

Conclusion

Monica Jones was convicted of a misdemeanor she didn't commit, pursuant to an unconstitutional statute, in a trial where she was denied the jury to which she was constitutionally entitled, and where the judge expressly found her guilty based on his impermissible consideration of her potential punishment and of her prior misdemeanor criminal history. Whether for one of these reasons, or for all of them, her conviction must be reversed.

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