# ARIZONA COURT OF APPEALS
# DIVISION ONE

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| STATE OF ARIZONA,<br>Appellee,<br>v.<br>TRACY ELISE<br>Appellant. | 1 CA–CR 16–0373<br><br>Maricopa County Superior Court<br>No. CR 2013–001555–007 |

## APPELLEE'S ANSWERING BRIEF


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## QUESTIONS PRESENTED FOR REVIEW

1. Has Elise forfeited her first claim by failing to allege or assert fundamental and prejudicial error in her opening brief? If not, did the trial court commit fundamental error by relying on a ruling against Elise's former co-defendants in a prior proceeding at which Elise was not present (although she was present and had the opportunity to be heard on the same issue in the present case)?

2. Were Elise's religious rights under Arizona's Free Exercise of Religion Act violated by her prosecution for prostitution and related offenses where she ran a house of prostitution under the guise of a religious temple that performed sexual "healings" for a fee?

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## STATEMENT OF THE CASE

Tracy Elise ("Elise") appeals her convictions for conspiracy to commit illegal control of an enterprise, illegal control of an enterprise, operating or maintaining a house of prostitution, six counts of pandering, seven counts of first-degree money laundering, five counts of second-degree money laundering, and one count of prostitution. (R.O.A. 500, at 2–8; 456, at 1–5.) The evidence presented at trial, viewed in the light most favorable to sustaining the jury's verdicts, *see State v. Boyston*, 231 Ariz. 539, 542, ¶ 2 n.2 (2013), reflects the following.

Elise ran a house of prostitution she called the "Phoenix Goddess Temple" in various locations in the greater Phoenix metropolitan area from March 2008 to September 6, 2011. (R.T. 1/4/16, Babicky transcript, at 5; R.T. 2/18/16, p.m., at 60.) At the Goddess Temple, clients would pay a set amount of money to engage in specific sexual acts with the sex worker of their choice. (Exh. 55.001; R.T. 2/24/16, at 17.) Attempting to circumvent Arizona's prostitution statutes, Elise relabeled the exchange to give it an aura of religious significance. For example, clients became "Seekers," sex workers became "Healers" or "Goddesses," and the fee became a "donation." (R.T. 11/24/15, p.m., at 24–25; R.T. 11/30/15, at 133; R.T. 12/01/15, at 36; R.T. 2/24/16, at 73–78.) Each specific sexual act was also assigned its own code word. For

example, manual release was called a "whole body healing," sexual intercourse was called a "sacred union," and oral sex was called a "white tigress." (R.T. 12/8/15, at 55–56; R.T. 12/3/15, p.m., at 14; Exh. 67.002.)

**A. *The sex workers.***

Elise persuaded several vulnerable young women from a variety of difficult life circumstances to work at the Temple, telling them that the lucrative "healing" work was meaningful, legal, and safe. (*See, i.e.*, R.T. 12/14/15, at 49–50, 65; R.T. 12/7/15, p.m., at 10–11, 13, 62; R.T. 11/30/15, at 129; R.T. 12/2/15, a.m., at 44; R.T. 12/07/15, at 45; R.T. 12/09/15, at 134; R.T. 12/10/15, p.m., at 32–33.) Most of the sex workers came from backgrounds involving sexual or physical abuse.[1] (R.T. 11/19/15, p.m., at 69; R.T. 1/4/16, Donoho transcript, at 38–39; R.T. 1/28/16, p.m., at 81; Exhs. 185, 291.) They also typically were facing financial troubles or relationship difficulties. (R.T. 11/19/15, p.m., at 69.)

For example, "Brigid" was living in Louisiana and struggling to support her four children after divorcing her abusive husband.[2] (R.T. 12/14/15, at 5–7,

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[1] Elise admitted that she knew that many of the women had been sexually abused. (R.T. 1/21/16, at 151.)

[2] Sex workers are identified by the Goddess-themed pseudonyms they chose for themselves while working at the Temple to protect their privacy; (continued ...)

112–13.) Brigid had been sexually abused in childhood and had contacted Elise seeking to be healed from her own past abuse. (*Id.* at 5–7, 9–10, 112–13.) Brigid also wanted to learn how to heal others and become certified by the Temple to do "deep core healing" work. (*Id.*)

Lured by Elise's promise that both goals could be accomplished at the Temple, Brigid traveled to Phoenix with her four children; she expected to work for a short period of time sweeping floors, washing laundry, and doing other chores for the temple until she became certified. (*Id.* at 10–11.)

She was shocked to learn during her first "duo sister" training session that she was expected to be topless while sexually gratifying the client/seekers; her reaction was "pretty raw," given her past history of sexual abuse. (*Id.* at 18–22, 93, 113.) Although she had been aware that the client was expecting some kind of "release," Brigid had previously believed that the release could be "energetic or emotional." (*Id.* at 22.)

By this time, Brigid was stuck in Phoenix with her four young children and had no other means of supporting herself. Elise promised Brigid that she would make between $3,000 and $4,000 during her first month of work. (*Id.* at

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( ... continued)
investigators considered them victims of Elise. (R.T. 11/19/15, a.m., at 19–21; R.T. 11/19/15, p.m., at 25.)

47–49, 90, 106–07.) Elise also assured Brigid that the "wounded little girl" inside of her would "break out" and "find her voice" while doing the "healing" work. (*Id.* at 49–50, 64–65, 90, 114.)

In reality, Brigid ended up making far less than that, while being pressured to perform sexually in ways that made her deeply uncomfortable. (*Id.*) Although Brigid had initially been promised that she would not have to do anything that she was not comfortable with, she was ultimately threatened with being fired or losing her room at the Temple if she refused to sexually engage with the client/seekers. (*Id.* at 48–50.) Because she was so frequently pulled from her classes at the Temple to do sessions with client/seekers, Brigid was forced to delay her plans to become certified in "deep core healing" for at least a year (until the course re-started). (*Id.* at 11, 42–43, 101–02.)

Eventually, after hearing a receptionist describe her as "blond" and "busty" to a prospective client/seeker while mentioning in the same breath that the Temple would not provide condoms (so the client/seeker needed to bring his own), Brigid became disillusioned; she felt "soulless in that moment" and "manipulated" by Elise. (*Id.* at 49–50, 57, 64, 90, 114.) Crying and "really, really, really upset," Brigid left the Temple and checked herself into a hospital because she was vomiting repeatedly and had a migraine. (*Id.*)

Before trial began, Brigid was shown some of the advertisements for her services that another sex worker ("Guinevere") had posted on her behalf; she was shocked by their crude sexual nature. (*Id.* at 51–54; R.T. 1/14/16, at 76–77; Exh. 161.) She ultimately felt like the Temple had "let [her] down." (R.T. 12/14/15, at 90.) She summarized her experience with the statement that "a woman can't be building up another woman" while simultaneously "offering her into prostitution." (*Id.* at 49–50, 65.)

**B. *The clients*.**

Most of Temple's client/seekers came from advertisements Elise or the sex workers placed in the escort, body rub, and fetish sections of Backpage (a classified advertising website) or Eros (a national escort advertising service).[3] (R.T. 11/24/15, p.m., at 55–58, 71–80; Exhs. 58, 61.002, 69–70, 89, 146, 161, 229, 293.) The advertisements were often sexually explicit, and typically included suggestive photos and hourly rates for services—usually $204 for 60 minutes and $303 for 90 minutes—and the listed phone number usually went

[3] To work at the Temple, the sex workers were originally required to maintain "at least one personal sponsor ad weekly on Backpage.com." (R.T. 2/24/16, at 43; Exh. 170.) Later, sex workers were allowed to opt out of this practice by paying the Temple additional tithes to run the ads for them. (R.T. 2/24/16, at 10–11.)

directly to the Phoenix Goddess Temple. (*Id.*; R.T. 11/24/15, p.m., at 24–25; R.T. 12/08/15, at 118; Exhs. 69, 293.)

**C. *The receptionists.***

Elise employed three receptionists to answer calls from client/seekers. The receptionists were called "Gatekeepers," and they would set up appointments for a specific date and time based on the sex workers' schedules. (R.T. 11/24/15, p.m., at 24–25.) Receptionists were trained to tell prospective clients that "nothing is guaranteed," and any discussion of the price of the exchange would be immediately shut down. (R.T. 11/30/15, at 120; R.T. 12/16/15, at 27–28.) If a client/seeker asked to have sexual intercourse with a sex worker, the receptionists would direct the client/seeker to the Temple's website; if the prospective client/seeker then called back and wanted to book a "session," the receptionists would schedule it.[4] (R.T. 1/4/16, Donoho transcript, at 33–34.)

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[4] The FAQ section of the Temple webpage explained, in response to a question about whether a "happy ending" would occur, "WE teach that the personal nova (energetic transformation) aka 'orgasm' is our temple's most holy moment. No one can ever guarantee that your energy and soul will connect with the divine as planned by us mere mortals, but we will give you wonderful touch and energy healing, and yes, for most, the holy moment is a given." (R.O.A. 17, Attachment 2 at 2; Exh. 236.)

When prospective client/seekers arrived at the Temple, they would be asked to fill out a "Seeker form," in which they were able to specify the particular type of sexual act or acts they desired, using the language of the Temple. (R.T. 2/24/15, at 17–18; R.T. 1/28/16, at 104; Exh. 66.)

The receptionists would then verify that the particular sex worker was willing to engage in the requested services by referencing a "Mutuality List" that detailed the types of sexual acts that each sex worker was willing to perform. (R.T. 11/30/15, at 120; R.T. 12/16/15, at 14–15, 17–19, 22; Exh. 55.002.) If the selected sex worker was unwilling to perform a requested act, receptionists would steer the client/seekers towards a different sex worker. (R.T. 2/24/16, at 40–41; R.T. 12/14/15, at 37–38.) The receptionists also had a book of photographs of the sex workers for drop-in client/seekers to peruse. (R.T. 11/30/15, at 118–20; R.T. 12/01/15, at 130; R.T. 12/08/15, at 34; R.T. 12/16/15, at 78; Exh. 54.)

The hourly price for a session was typically listed in the advertisements themselves—usually $204 for 60 minutes and $303 for 90 minutes.[5] (*Id.*; R.T.

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[5] Under Elise's direction, her second-in-command (Janet Craven) created a "Temple Gifts" price list, which was included in the training manual for the sex workers and posted in the office near the receptionists, suggesting specific dollar amounts called "offerings of support" for a variety of sexual acts, with different prices depending on the length of time (which corresponded to the (continued ...)

11/24/15, p.m., at 24–25; R.T. 12/08/15, at 118; Exhs. 69, 293.) Budget-conscious client/seekers could purchase a "Temple Hero" card for $1,000 that would entitle them "to receive $1,200 worth of Sacred Healing Bliss with the healer of [their] choice," essentially providing six one–hour sessions for the price of five. (R.T. 1/11/16, at 95–97; Exh. 186.)

**D. *The sessions.***

Once prospective clients were "matched" with a sex worker, the sex worker would lead the client to a smaller room (called a "transformation chamber") containing a massage table (an "altar of light") and a bed (a "grand altar"). (R.T. 11/24/15, p.m., at 50; R.T. 11/30/15, at 39; R.T. 12/1/15, at 44; R.T. 12/03/15, a.m., at 24; R.T. 12/8/15, at 17–23, 135; R.T. 12/10/15, a.m., at 66; R.T. 12/16/15, at 94–95.) A typical session lasted either 60 or 90 minutes, and almost always involved, at a minimum, a topless sex worker and a manual release. (R.T. 11/24/15, p.m., at 27; R.T. 12/01/15, at 119; R.T. 12/3/15, a.m., at 36; R.T. 12/14/15, at 22; R.T. 1/4/16, Donoho transcript, at 22–23; R.T. 1/4/16, Babicky transcript, at 39; Exhs. 55.001; 185 at 2 (Elise explains in a

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( ... continued)
type of act performed), whether the session involved only a single sex worker or "duos," as well as the level of experience of the sex workers (or duos). (Exhs. 12 at P1435, P1483; 55.001; 61.002; R.T. 1/4/16, Babicky transcript, at 17–19.)

recruitment email that "[o]rgasm accomplished with your hands is the fairly normal experience for the men here," and "[i]f you desire to make a living with the men at the current offering of support, $204 an hour, you would need to be amenable to this concept.").) The 90-minute sessions typically concluded with sexual intercourse (a "sacred union"). (Exh. 55.001; R.T. 12/10/15, p.m., at 51–53.)

Any discussion of money during the sessions with the individual sex worker was forbidden, and clients who continued to discuss the matter were referred to the receptionist/gatekeepers. (R.T. 2/24/16, at 65–66; R.T. 12/10/15, p.m., at 51–53.) If a client requested additional services during a session, sex workers were trained to tell the client that the extra services would require more time, and offer to get the receptionist to discuss the matter with the client. (R.T. 12/10/15, p.m., at 51–53; Exhs. 118, 170.) The receptionist would then discuss the details of the exchange with the client while the sex worker was out of the room.[6] (R.T. 12/16/15, at 34–36.) The receptionist would typically say to such clients something like, "The requested donation for

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[6] Elise believed that it was better to have someone other than the sex worker discuss the exchange with the client for legal reasons. (R.T. 12/16/15, at 34–36.)

two hours is" $400, "are you prepared?" (R.T. 1/4/16, Babicky transcript, at 42.)

At the end of each session, clients would leave cash in a bowl-like statue of outstretched hands in each room. (Exh. 12 at P0423, P0424, P1595; R.T. 12/08/15, at 24–25.) Although the cash was called a "donation," very few client/seekers failed to pay the specified amount (usually $204) during the years that the Temple was open. (R.T. 2/24/16, at 65–66; R.T. 12/16/15, at 65, 74 (Of the hundreds of sessions scheduled during a particular receptionist's 17–month tenure, only three seekers failed to pay.).) If a client failed to pay, Elise's second-in-command, Janet Craven, would call the client/seeker to inquire whether services had been satisfactory. (R.T. 11/24/15, p.m., at 55; R.T. 11/30/15, at 124.) Some client/seekers apparently had simply forgotten to pay, and returned to make payment after being contacted. (R.T. 11/24/15, p.m., at 55–57; R.T. 1/4/16, Babicky transcript, at 43–45.)

The sex workers were required to pay ("tithe") a percentage of the cash payment to the Temple (usually 30%); they were permitted to keep the rest. (Exh. 55.001; R.T. 11/30/15, at 126.) New sex workers (called "interns") were required to "tithe" a higher percentage of the hourly rate to the temple until they had worked there for at least 33 hours. (Exh. 55.001; R.T. 12/9/15, at 131.) The money given to the Temple was used to pay bills, the receptionists'

salaries, and Elise's personal expenses (including her home in Sedona, which cost $2,400 per month). (R.T. 12/03/15, a.m., at 37; R.T. 12/16/15, at 55–56.)

Client/seekers who failed to leave a "donation" (or an amount less than the "suggested" amount) were typically unable to book second sessions because the sex workers were unwilling to see them; they were referred instead to group classes about the religious beliefs of the Temple. (R.T. 1/4/16, Babicky transcript, at 45–46.)

Client/seekers who were unhappy with the services because of some mistake by the sex worker provided were offered a $50 discount on their next session. (*Id.* at 19–20.)

**E. *The investigation.***

In January 2011, the Goddess Temple allowed a reporter from the Phoenix New Times to observe a session between one of the female sex workers ("Aphrodite") and one of the few male sex workers at the Temple (Wayne C.). (Exh. 183.) During the session, Aphrodite massaged Wayne's prostate until he ejaculated ("had a personal nova"). (*Id.*) The article reported that the Temple appeared "to be nothing more than a New Age brothel practicing jack psychology techniques." (*Id.* at 2–3.)

As a result of the article, the Phoenix Police Department launched a six-month investigation into the Goddess Temple involving seven undercover

deals; some undercover detectives posed as prospective clients; others posed as would-be sex workers. (R.T. 11/19/15, p.m., at 45–47, 83; R.T. 11/24/15, p.m., at 27–28, 69–83; R.T. 3/1/16, at 96.) As a result of the investigation, the case agent, Detective Amber Campbell, believed that most people came to the Temple with the expectation that they would receive a sexual act. (R.T. 11/24/15, p.m., at 25.) She explained that it had been unnecessary to discuss the money with the sex workers because the amount had already been clear from the ad itself. (*Id.*)

Near the end of the investigation, one of the undercover detectives, Detective Gilbreath, booked a session with Elise. (R.T. 12/8/15, at 117–124.) Elise's ad, entitled "Tantra & Sacred Sexuality with Tracy & Tamar in Sedona now! G-OLDer is better! -50," revealed that Elise charged $240 per hour for "sensual touch" and $330 per hour for "full embrace." (*Id.* at 118–19, 147; Exh. 69.) During the session, Detective Gilbreath intentionally violated the "rules" of the Temple; specifically, he brought up money and discussed specific sex acts without reference to the Temple's preferred terminology. (R.T. 12/09/15, at 88.) When he pulled out $400 to put on the table, instead of telling him that payment was optional, Elise told him that payment was to

occur "after."[7] (*Id.* at 92; R.T. 1/25/16, at 131.) Although he said that he wanted to put his "cockra in her vajakra," Elise never asked him to leave, but instead laughed and clapped.[8] (R.T. 12/09/15, at 93–94; Exh. 250 at 41.) She responded, "We're going to do that." (R.T. 2/22/16, at 32–33.) When the details were settled, Detective Gilbreath received a phone call from another officer to create a pretext for having to leave before the act was consummated. (R.T. 12/8/15, at 140.) He placed $100 on the table, and Elise asked him to come back and complete the session another time. (*Id.* at 141; R.T. 12/09/15, at 88, 93.) As he was leaving, she followed him into the hallway and whispered into his ear that if he were to come back, they would "finish [their] session." (R.T. 12/8/15, at 141.) Neither Elise nor the receptionist ever told Detective Gilbreath that he had to learn or understand certain principles before participating in the session. (R.T. 12/09/15, at 90.) Elise kept the $100. (R.T. 1/28/16, p.m., at 110.)

The department raided the Temple (then located near 24th Street and Thomas in Phoenix) on September 6, 2011. Nearly 40 individuals were

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[7] Elise later claimed that it "offended" and "upset" her that Detective Gilbreath "pulled money out," and that "on a different day, she might have thrown him out." (R.T. 2/18/16, p.m., at 40–41.)

[8] Elise later claimed that she considered this phrase to be "mocking" her beliefs. (R.T. 2/22/16, at 30.)

arrested and charged. (Appx. A to A.B. at 1–5.) After being found incompetent to stand trial, Elise was dismissed from the original case without prejudice. When she was restored to competency, she was charged as the sole defendant in the present case. (R.O.A. 1; Exhs. G and H to Appx. to O.B.)

Elise was charged with 28 counts relating to various prostitution, racketeering, money laundering, and conspiracy acts, as well as knowingly compelling, inducing, or encouraging at least nine different individuals to engage in prostitution. (R.O.A. 1; R.T. 11/27/15, p.m., at 27–34.)

**F. *Trial.***

Elise represented herself throughout the four-month trial. (R.O.A. 498 at 1.) During trial, Elise admitted that she had told a reporter from Phoenix Magazine in March 2010 that the Temple was "walking a thin line," and that "without any reference to the goddess and sacred sexuality, it would be a brothel." (R.T. 2/23/16, a.m., at 40; Exh. 227 at 114.) She also admitted that a seeker who knew the Temple's language could "essentially ask for specific sex acts." (R.T. 2/24/16, at 17.) She likewise made it clear to the jury that she was in charge of the Temple and all its operations. (R.T. 11/19/15, p.m., at 49.)

Thus, according to the parties, the primary issue at trial was whether the money left after the end of the sexual "healing" sessions constituted a fee or a "donation." (R.T. 11/18/15, p.m., at 77–78 ("[S]acred sexuality is absolutely

what I was doing there. I don't deny that sex was part of what we were doing. I don't deny that people left donations, and I will prove to you that people came and didn't leave any money and were allowed to come back or they just came back."); R.T. 2/25/16, p.m., at 28, 48, 74, 78, 85 ("There is no fee. This is a donation[.]"); R.T. 3/1/16, at 6 ("My only defense is lack of criminal intent and that it was not a fee."), 42, 46, 53, 107; R.T. 3/2/16, at 11 ("The central question for you folks is fee, fee arrangement . . . versus Miss Elise talking about a donation.").)

After hearing testimony for four months, the jury implicitly concluded that the "donation" constituted a *de facto* fee arrangement by finding Elise guilty on all counts (of conspiracy to commit illegal control of an enterprise, illegal control of an enterprise, operating or maintaining a house of prostitution, six counts of pandering, seven counts of first-degree money laundering, five counts of second-degree money laundering, and one count of prostitution). (R.O.A. 500, at 2–8; 456, at 1–5; 184.)

On May 19, 2016, Elise was sentenced to a number of relatively short, concurrent prison terms, the longest of which was four years, and the shortest of which was 180 days. (R.O.A. 500, at 5–8.) She also received four years of supervised probation upon her release from prison. (*Id.* at 9.) She filed a timely notice of appeal on May 23, 2016. (R.O.A. 498.) This Court has

jurisdiction under Arizona Constitution Article VI, Section 9, and Arizona Revised Statutes §§ 12–120.21(A)(1), 13–4031, and –4033(A).

## ARGUMENTS

### I

### ELISE HAS FORFEITED HER UNTIMELY RAISED CONSTITUTIONAL DUE PROCESS CLAIM BY FAILING TO ALLEGE FUNDAMENTAL AND PREJUDICIAL ERROR IN THE OPENING BRIEF; MOREOVER, REGARDLESS WHETHER A DIFFERENT JUDGE RULED AGAINST HER CO-DEFENDANTS IN A PRIOR PROCEEDING, ELISE HAD AMPLE OPPORUNITY (WHICH SHE USED) TO ARGUE THE SAME ISSUE IN THE PRESENT CASE.

Elise argues (for the first time on appeal) that the trial court violated her right to due process by relying on a previous court's ruling where she was not present and her rights were not waived. (O.B. at 14.) She belatedly suggests that the prior ruling violated her constitutional due process right to be present and heard. (*Id.*) However, Elise had ample opportunity to be heard on the matter in the present case before the trial court made its final ruling on this issue at the end of the four-month trial. Accordingly, there was no violation of Elise's due process rights.

#### A. STANDARD OF REVIEW.

Given that Elise never specifically argued that the trial court's reliance on a prior court's ruling violated her right to due process because she was not present at the prior ruling, this argument is reviewed for fundamental error

only. *See State v. Rose*, 231 Ariz. 500, 504, ¶ 7 (2013); *State v. Forde*, 233 Ariz. 543, 560, ¶ 52 (2014) ("Because [the defendant] did not raise this issue [presence at a pretrial hearing] to the trial court, we review for fundamental error.").

Under this standard of review, a defendant forfeits the right to obtain appellate relief unless she can affirmatively prove: (1) an error occurred, (2) the error was fundamental in nature, and (3) the error caused her prejudice. *State v. Henderson*, 210 Ariz. 561, 567–69, ¶¶ 19–26 (2005). "The scope of review for fundamental error is limited," and the burden of persuasion is on the defendant. *Id.* at 567, ¶ 19; *State v. Munninger*, 213 Ariz. 393, 397, ¶ 14 (App. 2006).

Although Elise did argue to the trial court (Judge Stephens) that "Judge Welty never heard from me, Your Honor[,]" a general objection is insufficient to preserve an issue for appeal.[9] (R.T. 10/29/15, at 31.) *See State v. Lopez*, 217 Ariz. 433, 434, ¶ 4 (App. 2008). Elise failed to present the constitutional/due

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[9] She made a similar general argument on November 18, 2015. (R.T. 11/18/15, a.m., at 17–18 ("I was not my own attorney when that happened. I was in Rule 11.").)

process nature of her claim to the trial court, and "an objection on one ground does not preserve the issue on another ground."[10] *Id.*

Technically, because *Henderson* places the burden on Elise to establish both that the error is fundamental and that she was prejudiced by it, her failure to argue either in her opening brief means that this Court need not even address this argument on the merits. *See Henderson*, 210 Ariz. at 567-68, ¶ 20 (Where a defendant fails to timely object to error even of constitutional magnitude, he must establish "both that fundamental error exists and that the error in his case caused him prejudice[.]"); *State v. Moreno-Medrano*, 218 Ariz. 349, 354, ¶ 17 (App. 2008) ("Moreno-Medrano does not argue the alleged error was fundamental. That argument is therefore waived.") (internal citations omitted).

**B. PERTINENT FACTUAL BACKGROUND.**

In the earlier case, Judge Welty ruled that two of Elise's former co-defendants (Holly Alsop and Janet Craven) could "not raise A.R.S. § 41–

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[10] While Elise did mention "Constitutional Rights" in the context of the discussion on October 29, 2015, it is clear from context that she was referring to an alleged right to tell the jury about the constitutional provisions regarding free exercise of religion (the substantive topic of Judge Welty's decision), and not any due process/constitutional right to be present and heard. (R.T. 10/29/15, at 31–33.)

1493.01[11] and claim the Free Exercise of Religion Act provides a defense to the charges alleged[.]" (Appx. B to A.B. at 2.) However, Judge Welty also explained in the ruling that he would not prevent any defendant from explaining "the facts and circumstances regarding his/her presence and activities involved in the organization" to the jury. (*Id.*)

In the present case, Judge Stephens discussed Judge Welty's prior ruling with the parties before trial. Stephens explained that although she intended to tentatively follow Welty's ruling, she would not make a final decision until the end of trial, after she knew more about the specific facts of the case. (R.T. 10/29/15, at 29–52, 39 ("You're asking me to tell you in advance what you will be permitted to do. I cannot do that because I don't have a script of the trial. I don't know exactly what evidence the State is going to be eliciting from its witnesses.").) Elise did not object to the trial court's expressly-stated intent to delay the ruling, presumably because Elise was aware that she had no non-religious-based defense whatsoever to the charged offenses, and it was therefore in her best interest to present her religious-based evidence to the jury, regardless of the court's ultimate ruling. (*Id.* at 53.) In accordance with her

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[11] *See* § 41–1493.01(B) ("Except as provided in subsection C, government shall not *substantially* burden a person's exercise of religion . . . .") (emphasis added).

expressly stated, unobjected-to intent to postpone her decision, Judge Stephens ruled on the last day of trial, February 24, 2016, that she concurred with Judge Welty's ruling.[12] (R.T. 2/24/16, at 67–87.)

In the interim, Judge Stephens gave Elise wide latitude to explain her religious beliefs and practices to the jury, allowing Elise to testify for *eleven* trial days about her religious beliefs and her personal history prior to opening the Temple, as well as how she came to engage in the particular practices that were in use at the Temple when it was raided. (R.T. 12/9/15, at 98–99; R.T. 1/12/16, at 92–94, 123–25; R.T. 1/13/16, at 7–81, 128–40; R.T. 1/14/16, at 13–90; R.T. 1/19/16, at 4–79; R.T. 1/21/16, at 50–63, 107–151; R.T. 1/25/16, at 93–148; R.T. 1/27/16, at 4–21, 59–106; R.T. 2/2/16, at 4–65; R.T. 2/18/16, a.m., at 56–67; R.T. 2/18/16, p.m., at 4–22; R.T. 2/22/16, at 10–131; R.T. 2/23/16, a.m., at 17–47; R.T. 2/23/16, p.m., at 1–96; R.T. 2/24/16, at 4–65.) Elise was also permitted to call her son and her sister to testify about the history of her religious beliefs and how they impacted her parents, siblings, and children. (R.T. 1/19/16, at 78–67; R.T. 2/1/16, p.m., at 78–115.) She also presented testimony from various practitioners of sacred sexuality, a sexologist,

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[12] Judge Stephens did explain prior to trial that Elise would "not be allowed to stand and read the Constitution to the jury at trial." (R.O.A. 183 at 3; R.T. 2/24/16, at 67–87, 78.)

the owner of several legal brothels in Nevada ("Nobody knows how to run a brothel better than me"), and the "Naked Life Coach." (R.T. 1/22/16, a.m., at 4–65; R.T. 1/26/16, at 13–80, 121–155; R.T. 2/1/16, a.m., at 25–48; R.T. 2/1/16, p.m., at 4–78.) She was even permitted to call a Methodist clergyman, who testified about the "landscape of sex" in America.[13] (R.T. 1/19/16, at 53–78; R.T. 1/20/16, at 4–159; R.T. 1/22/16, a.m., at 65–209; R.T. 1/22/16, p.m., at 109–125.)

On several occasions throughout trial, *Elise* invoked Judge Welty's ruling to support her arguments that various types of evidence should be admitted as part of her explanation of the factual circumstances surrounding her practices at the Temple. (R.T. 1/20/16, at 120 (proposed expert testimony); R.T. 1/25/16, at 19–23 (a line of questioning); R.T. 2/1/16, p.m., at 116 (proposed witness testimony); R.T. 2/17/16, p.m., at 78 (a print out of the Temple website).

At the end of trial, Judge Stephens read the final jury instructions, explaining that "[t]he crime of prostitution requires proof that the defendant

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[13] These are only a small fraction of the witnesses called by Elise, but they are a representative sample of the lengths to which Elise was permitted to go in painting a full picture of her religious beliefs and other facts surrounding the Temple's existence. (*See* R.T. 2/24/16, at 85 (Judge Stephens points out that Elise had "certainly been permitted to explain to the jury the nature of the Temple and what happened there.").)

knowingly engaged or agreed or offered to engage in sexual conduct with another person under a fee arrangement with that person or any person." (R.T. 2/24/16, at 103.) No religious defense was included in the instructions, although Elise was permitted to argue during closing argument that her beliefs were sincere and that there was no actual fee charged for the sexual healings. (R.T. 2/25/16, p.m., at 28, 39, 48, 55 ("I'm thinking the Constitution is for all religions and it is there to protect minority religions."), 56–59 ("[I]t is up to you to decide if I'm a priestess or a prostitute."), 115–19; R.T. 3/1/16, at 37–89.)

### C. IN THE PRESENT CASE, ELISE HAD AMPLE OPPORTUNITY TO BE HEARD BEFORE THE COURT DECIDED TO FOLLOW JUDGE WELTY'S RULING AT THE END OF TRIAL; THUS, SHE WAS NOT DENIED ANY DUE PROCESS RIGHT TO BE PRESENT AND HEARD AT ALL CRITICAL STAGES OF TRIAL.

"A defendant has a Sixth Amendment right to attend pretrial proceedings critical to the outcome of the proceeding whenever the defendant's presence 'would contribute to the fairness of the procedure.'" *Forde*, 233 Ariz. at 560, ¶ 52 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987)).

Here, however, Elise's argument rests on a false premise—she assumes that because she was a co-defendant in a prior case, it was error for Judge Welty to make a ruling involving her co-defendants when she was not present and in Rule 11 proceedings. However, Judge Welty's ruling in the former case applied only to Elise's co-defendants, and not Elise herself. Although Elise had

made similar arguments in a motion to Judge Welty before being placed in Rule 11 proceedings, Judge Welty never ruled on Elise's motion because she was absent. (Exh. F to O.B., at 4 ("There is one additional defendant who raised an objection to the State's Motion to Preclude [Elise]. That matter *has yet to be heard*. The defendant remains presently in the Rule 11 process.") (emphasis added)).) Thus, although Judge Welty ruled against Elise's co-defendants (Holly Alsop and Janet Craven) regarding a similar motion, Elise's own motion remained pending until the case was dismissed, and it was never resolved.[14] (*See* Appx. A to A.B. at 21–27.)

Because no ruling against Elise regarding this particular issue was ever entered in the prior proceeding, Judge Welty's ruling against Elise's co-defendants was simply persuasive precedent that Judge Stephens was entitled to follow. Nothing prevents a trial court from relying on persuasive precedent in situations that are factually analogous to the one before it. This process is fundamental to our common-law legal system. *Citizens United v. Federal*

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[14] Further confirming this is the fact that nothing was filed relating to Elise in the interim between the hearing date (December 19, 2014) and the filing of Judge Welty's order (December 24, 2012). (Appx. A to A.B. at 1, 2, 27 (showing that all filings during this time period related to Defendants D2 (Alsop), D14 (Craven), or D36 (Boyko)).) Only three items were filed on the date that the trial court ruled on the motions of Elise's co-defendants (December 19, 2012): two minute entries regarding co-defendants Craven and Alsop, and an unrelated motion by co-defendant Boyko. (Appx. B to A.B.)

*Election, Comm'n*, 558 U.S. 310, 377 (2010) (Roberts, J., concurring) ("Fidelity to precedent—the policy of *stare decisis*—is vital to the proper exercise of the judicial function.").

For Elise's argument to work, this Court would have to hold that the hearing on which Judge Welty based his ruling against Elise's co-defendants constituted a critical stage at which Elise had a right to be present in the prior proceeding (despite the fact that she was dismissed from the proceeding). Stated another way, the court would have to rule that a trial court may never make a ruling in a case that involves several defendants unless every defendant is present. But co-defendants are often absent from such proceedings for a variety of reasons (such as Rule 11 or because they are tried *in absentia*), and some defendants are *never* restored to competency. Such a ruling would render competent defendants immune from prosecution as long as they had the foresight to commit their crimes with at least one incompetent (and non-restorable) accomplice.

The hearing on which Judge Welty based his ruling was not a critical stage for Elise because no ruling against her was entered that day (or ever) in the prior proceeding. Elise implicitly acknowledges this in the opening brief when she quotes Judge Stephens as stating that she is relying on Judge Welty's

rulings regarding "*co-defendant*, 001, Polly Alsop[.]" (O.B. at 14 (quoting R.T. 10/29/15, at 16–17) (emphasis in O.B.).)

But even assuming arguendo that a hearing regarding her co-defendants had been a critical stage at which Elise had a right to be present even though no ruling was entered against her,[15] this argument would still fail because Elise had a full and fair opportunity to argue the issue in the present case. *See State v. Dann*, 205 Ariz. 557, 571–72, ¶ 53 (2003) ("When reviewing a defendant's absence from preliminary hearings, the court should examine the record as a whole and determine 'whether [the] accused suffered any damage by reason of his absence.'"). Although defendants have a right "to be present at every stage of the trial," this right applies only to open proceedings where the defendant's presence substantially relates "to the fullness of his opportunity to defend against the charge." *Id.* (citation omitted).

When the case is considered as a whole, Elise clearly did not suffer any harm by reason of her absence at the hearing in the earlier case regarding her two co-defendants. Although Judge Stephens noted in October 2015 that she tentatively intended to follow Judge Welty's ruling, she did not make a final

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[15] *But see Commonwealth v. Tharp*, 101 A.3d 736, 761 (Pa. 2014) (holding that a pretrial conference at which a prosecutor announced a co-defendant's decision to testify was not a critical stage of the proceeding, despite its obvious potential impact on the defendant's case).

ruling on the matter until the end of trial on February 24, 2016. (R.O.A. 421 at 2; R.T. 2/24/16, at 78–81; R.T. 11/18/15, a.m., at 17–18 (Judge Stephens explains to Elise that she will be able to "reargue this issue [Judge Welty's ruling regarding Elise's right to proclaim her religion as a defense] after the case has been presented").) In the intervening months, Elise had ample opportunity to argue her position (and she did, in several motions and at several hearings). For example, she filed a number of motions relating to her proposed defense, both before and after Judge Stephens' final ruling. (R.O.A. 482.) A selection of such motions includes:

- A motion to establish her right to proclaim her religion as essential to her defense/ motion to reconsider earlier ruling. (R.O.A. 165.)
- Supplements to her motion in limine regarding definitions in the jury instructions on February 19, 2016. (R.O.A. 384.)
- Proposed jury instructions regarding the Arizona Constitution and religious freedom on February 19, 2016. (R.O.A. 385.)
- A motion to dismiss or, in the alternative, instruct the jury on FERA. on February 23, 2016. (R.O.A. 389.)
- A "lodging" on proposed jury instruction regarding FERA on February 23, 2016. (R.O.A. 390.)
- A response regarding FERA religious defenses and jury instructions on May 16, 2016. (R.O.A. 482.)

Elise also argued in favor of her proposed jury instructions at several hearings and bench conferences, a selection of which includes:

- An evidentiary hearing on pretrial motions held on October 29, 2015. (R.O.A. 183, at 2–3; R.T. 10/25/15, at 31–33, 35, 41–62.)
- A motions hearing held at the beginning of trial before opening arguments on November 18, 2015. (R.T. 11/18/15, a.m., at 10–17, 19–20.)
- A bench conference regarding whether the court should give the jury any intermediate instructions regarding religious freedom or FERA based on questions that jurors had submitted. (R.T. 12/10/15, a.m., at 6–24.) The court elected not to give any additional instructions until it had fully seen Elise's defense. (R.T. 1/12/16, at 123–25.)
- Oral argument regarding final jury instructions on February 19, 2016. (R.O.A. 387; R.T. 2/19/16, a.m. (discussing jury instructions); R.T. 2/19/16, p.m., at 12–18 (arguing for instructions relating to religious freedom, FERA, and the federal and state constitutions).)
- Continued oral argument regarding final jury instructions held on February 24, 2016. (R.O.A. 421 at 2; R.T. 2/24/16, at 67–70, 72–78, 82, 85.)

Elise was also permitted to fully explain her religious beliefs and practices while presenting the defense case to the jury during almost two months of trial, through the testimony of at least 26 defense witnesses. (R.O.A. 322, at 2 (noting that the defense began to present its case on January 13, 2016); 421, at 2 (noting that the defense rested on February 24, 2016); 425, at 2–4.)

Nor does Elise explain what she would have said at the hearing before Judge Welty that she could not have said in the multiple motions and proceedings mentioned above. Because Judge Welty's ruling related to an

issue of law, no possible harm could have accrued to Elise due her purported failure to be heard unless this Court reverses on substantive, violation-of-religious-rights grounds (discussed in Argument II).

In light of the foregoing, Elise's absence at a single hearing involving her co-defendants in a prior case cannot be said to have prevented her from having the opportunity to be fully heard regarding whether the jury should be instructed regarding the constitutional provisions and statutes associated with religion.

## II

## ELISE'S PROSECUTION DID NOT VIOLATE HER RELIGIOUS RIGHTS BECAUSE SHE WAS ABLE TO PRACTICE HER RELIGIOUS BELIEFS WITHOUT RUNNING AFOUL OF ARIZONA'S CRIMINAL CODE.

Elise argues that she has been denied her fundamental right to practice her religion as protected by the First Amendment and Arizona's Free Exercise of Religion Act ("FERA"). (O.B. at 17.) She claims that she has met her initial burden under FERA of proving that (1) her acts were motivated by religious beliefs, (2) her beliefs were sincerely held, and (3) her prosecution substantially burdened the free exercise of her religious beliefs. (*Id.* at 18–20.) *See State v. Hardesty*, 222 Ariz. 363, 366, ¶ 10 (2009). She further contends that the State has failed to satisfy its burden under FERA of proving that its (allegedly) substantial "infringement [on her religious rights] furthers a

compelling state interest and the prohibition is the least restrictive means of furthering the compelling state interest." (*Id.* at 20.) *See id.*

However, Elise cannot even meet her initial burden of proving that her prosecution substantially burdened the free exercise of her religious beliefs. Nothing prevented (or prevents) her from practicing her sexual healings for free. Nor does Arizona's criminal code prohibit Elise from soliciting or accepting donations to support her religious practices, as long as they are independent of sexual activity. It was merely the *exchange* of sex for a fee that was prohibited. But because Elise remained free to engage in consensual sexual activity (and to solicit donations independent of such activity), there was no burden whatsoever, let alone a "substantial" burden on her free exercise rights.

Stated differently, even assuming that Elise's sexual healings were motivated by sincere religious beliefs, the act of charging money for them was not; Elise maintained throughout her trial that individuals could leave money or not, and that the act of leaving money was not crucial to the sexual healing ceremony.

Finally, even had Elise surmounted these initial burdens, Arizona has a compelling interest in preventing the spread of sexually transmitted disease; reducing criminal activities closely associated with prostitution such as drug

use, robbery, rape, and human trafficking; and discouraging violence against women, as well as the commodification of sex. A general prohibition of prostitution is the least restrictive means for Arizona to protect these compelling state interests.

## A. STANDARD OF REVIEW.

Whether a criminal prosecution violates FERA is reviewed *de novo* because it involves a question of statutory interpretation. *Hardesty*, 222 Ariz. at 365, ¶ 7 (rejecting argument that religious use of marijuana provided a defense against defendant's prosecution for drug possession). Constitutional issues are also reviewed *de novo*. *See State v. Rushing*, 243 Ariz. 212, 225, ¶ 56 (2017).

## B. PERTINENT FACTUAL BACKGROUND.

Throughout trial, Elise claimed that her entire religion and her belief system were on trial. (*See, i.e.*, R.T. 11/24/15, a.m., at 11–12, 32, 41 (referencing Sunday services, ordination classes, healing sexual trauma classes, Mystic Sisters moon circles, sex education for all, and the school associated with the Temple); R.T. 1/6/16, at 31–34, 74–78, 100–105 (referencing tantra meet-ups; butterfly workshops; Friday Night Sex Ed; Moon Circles; and the "talks, lectures, and speeches" the Temple presented).) The State repeatedly reframed the inquiry as relating only to the one-on-one sessions where sex was

exchanged for money. (*See, e.g.*, R.T. 1/28/16, p.m., at 117 (the case agent explains that the goal of the investigation was "to stop the acts of prostitution, not any sort of sexual healing or the good things the Temple may have been doing."); R.T. 12/10/15, a.m., at 56 (the case agent explains that the Friday Night Tantra Meet Up and other similar classes were "completely innocuous, with no criminal activity").)

At the end of trial, Judge Stephens heard argument on whether the jury should be instructed under FERA. (R.T. 2/24/16, at 71–78.) The State argued that Elise was not entitled to such a defense because no substantial burden on her religious practices had occurred, given that she could have practiced "sacred" sexuality without violating the law. (*Id.* at 71–72.) Elise countered that her religion was entitled to receive donations to fund itself, just like any other church, and asserted that she was the victim of a religious hate crime perpetrated by the State. (*Id.* at 73–78.)

The trial court ultimately ruled that no such instruction should be given because of existing Arizona precedent, and explained to Elise that if it were to

instruct the jury regarding FERA, it would also have to instruct the jury that, as a matter of law, FERA is not a defense to prostitution.[16] (*Id.* at 78–81.)

### C. ELISE'S RELIGIOUS RIGHTS WERE NOT VIOLATED.

As an initial point, to the extent that Elise's challenge relies on the First Amendment of the United States Constitution, it fails outright because the prostitution statutes are neutral laws of general applicability.[17] *See Hardesty*, 222 Ariz. at 365. ¶ 7 n.6 (explaining that Hardesty's First Amendment claim regarding the religious use of marijuana was foreclosed because it was "a neutral law of general applicability") (citing *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 881–82 (1990)); *see also Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 459 (9th Cir. 2018), amended, 881 F.3d 792 (9th Cir. 2018) (noting that California's statute

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[16] *See United States v. Anderson*, 854 F.3d 1033 (8th Cir. 2017) (rejecting the argument that defendant was entitled to present to the jury his defense under the federal Religious Freedom Restoration Act (RFRA); "[b]ecause the district court concluded that prosecuting [the defendant] under [the criminal statute] was the least restrictive means to further a compelling government interest, it was proper for the court to reject [the defendant's] defense as a matter of law and to prohibit him from raising it again at trial"); *Hardesty*, 222 Ariz. at 364–65, 369, ¶¶ 1–4, 24 (affirming preclusion of evidence supporting a religious-use defense to marijuana and drug paraphernalia charges because the "defense fails as a matter of law").

[17] FERA, in contrast, employs the compelling government interest test even when a defendant challenges a neutral law of general applicability.

prohibiting prostitution "applies to every person and is punishable by a misdemeanor charge, so it can properly be considered a reasonable law of general application"); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) ("[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.") (citing *Smith*, 494 U.S. at 872).[18]

Under FERA, the government is permitted "to burden the exercise of religion only if the 'application of the burden to the person is both . . . [i]n furtherance of a compelling governmental interest [and] [t]he least restrictive means of furthering that compelling governmental interest.'" *Hardesty*, 222 Ariz. at 365–66, ¶ 9 (quoting § 41–1493.01(C)). If the government violates this section, the violation "provides a 'defense in a judicial proceeding.'" *Id.* (quoting § 41–1493(D)).

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[18] Although Congress later attempted to invalidate *Smith* by passing RFRA, the United States Supreme Court subsequently declared RFRA unconstitutional (at least, as applied against state and local laws and ordinances) in *City of Boerne v. Flores*, 521 U.S. 507, 535–36 (1997). However, because "RFRA is substantially identical to FERA," the Arizona Supreme Court has explained that federal cases interpreting RFRA provide "persuasive authority" to Arizona courts, although they are not technically bound by them. *Hardesty*, 222 Ariz. at 367, ¶ 13 n.7.

Stated another way, "[a] party who raises a religious exercise claim or defense under FERA must establish [as a threshold matter] three elements: (1) that an action or refusal to act is motivated by a religious belief, (2) that the religious belief is sincerely held, and (3) that the governmental action substantially burdens the exercise of religious beliefs." *Id.* at 366, ¶ 10. Only if the defendant first establishes these elements does "the burden shift[] to the state to demonstrate that its action 'furthers a compelling governmental interest' and is '[t]he least restrictive means of furthering that compelling governmental interest.'" *Id.* (quoting § 41–1493.01(C)).

Here, Elise cannot meet her initial burden of establishing any of the first three elements. Even if she could, Arizona's prostitution statutes are the least restrictive means of furthering Arizona's compelling interest in preventing the spread of sexually transmitted disease; reducing criminal activities closely associated with prostitution such as drug use, robbery, rape, and human trafficking; and discouraging violence against women and the commodification of sex.[19]

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[19] Prostitution is defined to mean "engaging in or agreeing or offering to engage in sexual contact under a fee arrangement with any person for money or any other valuable consideration." A.R.S. § 13–3211(5). It is "unlawful for a person to knowingly engage in prostitution." § 13–3214(A).

**1. *The act of charging fees for "sexual healings" (even if labeled as "donations") is not motivated by a religious belief.***

The State does not dispute that Elise appears to sincerely believe in sexual healings. But the relevant question under FERA is whether the act of exchanging money for sexual activity is motivated by a religious belief.[20] Elise does not claim that her religious beliefs required her to engage in sexual activity for a fee—in fact, she claimed the opposite throughout trial:

- "If you couldn't pay, you could still come in." (R.T. 11/17/15, p.m., at 72.)
- "[P]eople give money at the end and can actually leave without giving money." (R.T. 1/25/16, at 129–30.)
- "We accept donations and people can have a healing and not leave money and come back and do it again." (R.T. 1/28/16, p.m., at 52.)
- "[P]eople could leave nothing and come back[.]" (R.T. 2/25/16, p.m., at 29.)
- "The fact is there were people who didn't leave money. They could if they wanted to leave nothing." (R.T. 3/1/16, at 46.)
- "[O]ur arrangements did not allow people to buy sex." (*Id.* at 53)
- "I like the idea that people could come and go and participate freely; and if they left nothing, we always thought pay it forward in the universe." (Id. at 86.)
- "I'm going to tell you that people did see people who were known not to leave money the last time." (R.T. 2/25/16, p.m., at 119–20.)

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[20] The evidence shows that the Temple unquestionably charged fees for sexual activity, even if the fees were called "donations." (*See* R.T. 3/1/16 at 107–14.)

Elise even claimed that if the seeker thought of the "donation" as a payment for services rendered, it would interfere with his religious "healing." (R.T. 3/1/16, at 72 ("[T]o buy a sex act for me is degrading for the man, and it doesn't help him[.]").) Nor was payment required from the perspective of the person doing the healing. (R.T. 5/19/16, at 64 (explaining that she was always willing to do the sessions even if she "went back to [her] chamber and there was no money" because she "didn't harm [herself] and [she] had a good time and [she] fulfilled [her] duty as a priestess"); R.T. 2/25/16, p.m., at 120–21 (explaining that she willingly performed a healing on a seeker who was known not to leave payment, although in this particular case, he did pay).)

Elise also testified that she *did not want* the Temple to be "built on private ceremonies where the requested offerings are a couple of hundred dollars," but instead preferred that people become "activated" in the Temple through socials and group classes. (R.T. 2/2/16, at 38–39.) She also told jurors that she preferred there to be no payment in certain circumstances. (R.T. 2/25/16, p.m., at 78 (claiming that she "did not want" Detective Gilbreath's money because she wanted to receive "donations" only when someone is "blown away by what [she] was able to do to them"), 87 ("I don't want anybody to give me more money unless there is an abundance, and they can

afford to. And when people give less, that is okay because usually I get the amount that is needed to carry on.").)

Although Elise did explain that she believed it was important for client/seekers to contribute *something* to the healings, she later clarified that it was not necessary that the contribution be financial. (R.T. 1/13/16, at 65–66 ("Really the religion of tantra is about weaving[;] that's the Sanskrit definition to give, receive, give receive. The Temple really wasn't interested in having anyone in the building who wanted to just sort of take things and not ever show up in the relationship."); R.T. 1/21/16, at 113 ("Tantra is about weaving[;] to weave is to give and receive. And so we definitely wanted some kind of giving back from our seekers because otherwise it's a one way exchange. And we wanted them—it doesn't have to be money, we wanted them to feel that they're flowing in with us versus just taking something and walking away. Although that did happen.").)

Moreover, Elise's own sacred sexuality "expert" admitted during cross-examination that there is no spiritual aspect to the payment for the healing session. (R.T. 2/2/16, at 65–66, 124 ("[I]f for some reason someone couldn't give me money, is that still sacred? Absolutely."), 128 (Q. "You would agree with me . . . that being paid is not the sacred part of it? In what you're doing in the healing and that part of it, that's the sacred part of it to you, correct?" A.

"Yes.").) Similarly, while questioning a former Temple sex worker, the *pro se* Elise asked, "If you stay in your integrity, it doesn't even matter if you get paid or not because at least you have stayed true to yourself." (R.T. 2/3/16, p.m., at 68.) The sex worker responded, "Correct." (*Id.*)

And, while Elise did state during closing arguments that she believed money could be sacred, she explained that it depended on what the money was spent on; she believed that because she used the money from the sessions to build up her Temple, it became sacred; however, she never claimed that the payment from the private sessions had any religious significance aside from the fact that it was used to support the Temple. (R.T. 2/25/16, p.m., at 63–65; *see also* R.T. 5/19/16, at 58 ("It's not about the money. It's never been about the money. There's easier ways to make money, lots of them.").)

It may be the case that Elise could not have afforded to rent the 10,000 square-foot Temple for her followers without having received payments from the private healing sessions, but this economic reality does not mean that payment was spiritually necessary to effectuate the healings. As a practical matter, Elise predicted that the Temple would "collapse" within three days if the Temple became inundated by client/seekers who wanted to get healings but had no money to pay the sex workers because the sex workers would "freak

out."[21] (R.T. 1/21/16, at 115; R.T. 2/22/16, at 131.) However, payment was always secondary, and simply a means to support the practice of her beliefs rather than any core belief or spiritual requirement. (R.T. 2/18/16, p.m., at 62–63 (explaining that those who gave money made it possible for those who could not afford to give money to receive healing and education; "[i]f everybody didn't give any money," the Temple "wouldn't have programs.").)

**2. *Because no religious belief required Elise to charge fees for the sexual healings, she also fails the "sincerely held" aspect of the FERA test.***

Because by her own admission, Elise does not consider charging fees for sex to be part of her religious beliefs (aside from the general argument that she needs money to fund her religion), it cannot be the case that this missing belief is "sincere."

The sincerity of Elise's *other* beliefs (such as her belief in sacred sexuality, chakras, and tantra, which the State does not dispute) cannot save her from failing this aspect of the test because she and her followers can practice these beliefs without running afoul of the law. The question at issue is whether Elise's religious beliefs require her to exchange sex for money because that

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[21] Elise had been concerned that the New Times article would use the word "donation" and cause the Temple to be flooded with client/seekers who had no interest in learning tantra and simply wanted "healings" for free. (R.T. 1/21/16, at 115.)

alone is what Arizona's prostitution statutes forbid. Given that Elise has never claimed to believe that a person may not be healed unless that person pays for the sexual healing, she cannot satisfy this element.

Jurors asked several questions that suggested that they were wondering why Elise did not simply rely on other, legal ways to fund the Temple such as charging more for classes, steering client/seekers towards classes (to "convert" them and lead to additional financial donations), or seeking donations on the Temple website (unconnected to the sex acts during the sessions). (R.T. 2/23/16, p.m., at 96 ("Couldn't you make more money if they took a class?"); R.T. 2/24/16, at 16–17 ("Why did you charge so little money for the classes you offered, but offered the healings for so much more money[;] if the Temple was in such need of money, why were the charges not the same?"). Elise responded that the classes had been vehicles to recruit, so she had charged less for them; also, since more people attended them, the individual contribution of each attendee could be low. (R.T. 2/23/16, p.m., at 96; R.T. 2/24/16, at 16–17.) Although Elise did not expressly say so, the evidence reflects that her real motive was to maximize revenue for the Temple. As just one example, she admitted on several occasions that "guys don't generally give $500 to have a

nice conversation with a girl they just met on the internet."[22] (R.T. 1/25/16, at 40; *see also* R.T. 2/24/16, at 60–61 (Elise admits that men would not pay $204 per hour to hear Elise or another speaker talk; they were there "for the touch.").)

Responding to a witness's observation that it was legal to give healings without receiving money for it, Elise stated that limiting her practice to such circumstances would permit it to be done only by "hobbyists," dilettantes, and "people who do it on the side," and require every sexual healer to get a secular job instead of devoting his or her whole life to the Temple. (R.T. 1/28/16, p.m., at 82; *see also* R.T. 2/25/16, p.m., at 59 ("If you can't accept donations for healing, you are going to have to work as an amateur or a dilettante."); R.T. 2/24/16, at 75 ("[I]f you prevent us from accepting donations willingly given

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[22] One receptionist testified that she was angry at Elise because she believed that Elise had been in it "for the money" and had taken advantage of sex workers who had previously been abused. (R.T. 1/4/16, Donoho transcript, at 25–27, 38–40; R.T. 12/16/15, at 99–100 ("[I]f [they] are broken[,] how would they be able to help others?").) Alternative fundraising efforts appear to have been rejected by Elise as insufficiently lucrative; the sexologist who testified for Elise wrote a mitigation letter during sentencing stating that she believed that Elise "could easily create a totally legal registered business with a website with her offerings of lectures, classes, and workshops, and within six months could make a decent salary of about $2000 a month minimum[.]" (R.O.A. 467, at 10 (Annie M. Sprinkle).)

then all this healing will not take place because these women will go get jobs as cocktail waitresses at a sushi bar," or do "massage therapy.").)

Expanding on this theme in closing arguments, Elise argued that she had to be allowed to accept monetary payment in exchange for the healings in order to practice her healings full-time:

> It has been suggested that I might just get another job and then do this on the weekends. The problem with that, as a healer wanting to be the best at what I do and continually improving myself, that means I'm always going to have it relegated to a hobby. I have to do all of my things that go with having a job, maybe running a business. I used to own a business. But give all that time to that and then with the spare time go get the training. Figure out how to connect with people who want the healing. Figure out how I'm going to hold that space. Do I have a spare room in my house that I can put into a healing chamber? Am I going to have to set up in my living room because I don't do this all the time? That is really what goes on.

(R.T. 2/25/16, p.m., at 59.) She presented similar arguments at sentencing. (R.T. 5/19/16, at 49–50.)

During cross-examination, Elise admitted that the Backpage ads had targeted people who were not already involved in the Temple. (R.T. 2/23/16, a.m., at 27–28.) The prosecutor observed that the Phoenix Goddess Temple was the only religion of which he was aware that was funded principally by non-believers, and challenged Elise to name any other modern religion that existed under a similar model. (R.T. 2/22/16, at 93–94.) She was unable to do so. (*Id.*)

### 3. *Arizona's prostitution statutes do not substantially burden the free exercise of Elise's religious beliefs.*

Elise contends that "the very existence" of her church will be curtailed if she is unable to support it with "donations and offerings" obtained from the healings. (O.B. at 19.) But despite Elise's arguments to the contrary, religious-based groups have no religious "privilege" to disobey the law in order to generate revenue. The mere fact that other fundraising methods may be less lucrative than prostitution does not mean that the prostitution laws pose a "substantial burden" on her faith.

To meet the "substantial burden" aspect of this test, the believer must assert that the prohibited behavior is required by the defendant's religious beliefs.[23] *See, e.g.*, *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001) (explaining that a ban on selling t-shirts on the National Mall that expressed a religious message did not constitute a "substantial burden" because there remained a multitude of other means the group could spread its message, and the group did not assert that selling t-shirts at that particular location was "central to the exercise of their religion"); *United States v. Sterling*, 75 M.J. 407, 418 (C.A.A.F. 2016) (finding that order to remove signs posted at work

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[23] Alternatively (but not relevant here), the believer could assert that the compelled behavior is forbidden by the believer's religious beliefs.

for religious reasons did not constitute a "substantial burden" on faith of believer because she did not assert that she believed it was "a tenet or practice of her faith to display signs at work"); *Wilson v. James*, 139 F. Supp. 3d 410, 425 (D.D.C. 2015) (finding no "substantial burden" where believer was disciplined for sending email criticizing same-sex marriage because he did not assert that his religion required him "to publicly voice his dissent about homosexuality or same-sex marriage").

Here, as explained above, Elise has never asserted that her religious beliefs require her to exchange sex acts for money. She asserts only that it will be more difficult economically for her to practice her religion full-time if Arizona's prostitution statutes apply to her. But this type of economic burden is easily distinguishable from the "substantial burdens" traditionally recognized in this area. Those whose religious beliefs required them to practice polygamy, engage in animal sacrifice, or use peyote were directly and immediately burdened by laws that prohibited such behavior, and there was no lawful way for adherents to engage in the behavior in any context. *See Reynolds v. United States*, 98 U.S. 145, 162–67 (1878) (polygamy); *Lukumi*, 508 U.S. at 527 (animal sacrifice); *Smith*, 494 U.S. at 891 (peyote).

Here, in contrast, Elise and her followers remain free to practice sexual healings in any context that does not involve the exchange of sex for a fee.[24] *See United States v. Stimler*, 864 F.3d 253, 268 (3d Cir. 2017) (explaining in a RFRA case that "the District Court properly analyzed whether the burden was 'substantial' by looking to acceptable alternative means of religious practice that remained available to the defendants").

While a church could theoretically become far more profitable if it engaged in money laundering, it is not entitled to engage in money laundering (or any other type of criminal behavior) in order to facilitate the practice of its religious beliefs. The constitution guarantees the free exercise of religion; it does not provide churches with a license to flout laws in order to increase their economic prosperity, even if their desire for profit is motivated solely by religious zeal. Elise complains that she and her followers will be required to get other jobs in order to support themselves instead of practicing their religion full-time, but the same is true of all religious devotees who are not independently wealthy. If this is a "burden," it is caused by economic reality,

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[24] In a sense, the prostitution statute is analogous to a large number of other laws prohibiting acts that are not themselves illegal, but which become illegal when paid for, such as adoption, organ donation, or surrogacy. But the fact that a small subset of activity (that involving payment) is illegal does not mean that the general category of behavior is prohibited (or, in this context, "substantially burdened").

not by any violation of Elise's religious rights. *See Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.2d 303, 306 (6th Cir. 1983) ("Inconvenient economic burdens on religious freedom do not rise to a constitutionally impermissible infringement of free exercise."), *cert. denied*, 464 U.S. 815 (1983); *Goodall by Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995) ("It is well established that there is no substantial burden placed on an individual's free exercise of religion where a law or policy merely 'operates so as to make the practice of [the individual's] religious beliefs more expensive.'") (quoting *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) (plurality opinion)).

In sum, Elise cannot meet her burden of establishing the first three elements of the FERA test. However, even had she satisfied these threshold burdens, her prosecution still would not have violated FERA because of the State's compelling interest in prohibiting prostitution and its inability to accomplish these objectives through less-restrictive means.

**4. *Arizona has a compelling interest in preventing prostitution.***

As a matter of law, Arizona has a "legitimate" and "substantial" interest in prohibiting prostitution. *See State v. Freitag*, 212 Ariz. 269, 271, ¶ 9 (App. 2006) (explaining that "the prevention of communicable disease, prevention of sexual exploitation, and reduction of 'the assorted misconduct that tends to

cluster with prostitution'" were all "legitimate state interests in anti-prostitution laws") (quoting *State v. Taylor*, 169 Ariz. 429, 432 (App. 1990)). *Freitag* also recognized that additional "legitimate interests" included "preventing venereal disease, cutting down prostitution-related crimes of violence and theft, and protecting the integrity and stability of family life."[25] 212 Ariz. at 271, ¶ 9 (quoting *People v. Williams*, 811 N.E.2d 1197, 1198 (Ill. App. 2004) (internal punctuation omitted)).

When the case agent (Detective Amanda Herman) was asked at trial to identify the "really big harms of prostitution in society," she explained that prostitution victimizes the sex workers, their clients, and their clients' families (because of the possibility that the client is "bringing home an STD to his wife").[26] (R.T. 1/28/16, a.m., at 41.) She also reported having seen

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[25] "Prostitution has long been regarded in Arizona as 'an evil over which the legislature has almost plenary power.'" *Freitag*, 212 Ariz. at 271, ¶ 8 (quoting, *State v. Green*, 60 Ariz. 63, 66 (1942)); *Green*, 60 Ariz. at 68 (noting that a charge associated with prostitution, "knowingly receiv[ing] money from a prostitute," or pimping was "what is usually considered one of the most disgusting crimes morally to be found in the penal code," and that the very fact of being charged "raises in the mind of the average decent citizen a feeling, perhaps unconscious, of revulsion against the defendant").

[26] Communicable disease could potentially spread exponentially in multiple directions, both from the client to the sex worker (and all the sex worker's future partners) and from the sex worker to the client (and all the client's future sexual partners).

(continued ...)

"prostitution turn into robbery" because the sex worker elected to rob the buyer instead of having sex with him.[27] (*Id.*) She noted that she had personally spoken to "a lot of women" involved in "the life of prostitution" who were carrying STDs. (*Id.*) She also testified that she had "seen sex traffickers become involved in homicides and aggravated assault because they're fighting with each other over territory and that type of thing." (*Id.* at 42.)

Arizona's compelling interest in prohibiting prostitution implicitly encompasses several interests explicitly identified by other jurisdictions. For example, the Ninth Circuit Court of Appeals explained that because of the established link between prostitution and trafficking in women and children, prohibiting prostitution discourages human trafficking. *See Erotic Serv. Provider*, 880 F.3d at 457 (noting that "82% of suspected incidents of human trafficking were characterized as sex trafficking, and approximately 40% of suspected sex trafficking incidents involved sexual exploitation or prostitution of a child" according to statistics kept by the United States Department of Justice). It also discourages violence against women. *Id.* at 457–58 (noting that a "study of 130 prostitutes in San Francisco found that 82% had been

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( ... continued)

[27] The buyer could also elect to rape the sex worker to avoid having to pay for the sex act.

physically assaulted, 83% had been threatened with a weapon, [and] 68% had been raped while working as prostitutes") (internal citation omitted). Moreover, it prevents the "destructive spiral in which women engage in prostitution to support their drug habit and increase their drug use to cope with the psychological stress associated with prostitution," as well as "the transmission of AIDS and other sexually transmitted diseases," in part because sex workers "are more likely to engage in risky sexual behaviors (e.g., sex without a condom, sex with multiple partners) and substance use." *Id.* at 458 (internal citation omitted). The Ninth Circuit concluded that "the interest in preventing the commodification of sex is substantial," and explained that "the criminalization of prostitution is a valid exercise of California's police power[.]" *Id.* at 460. Thus, it held that "the State may criminalize prostitution in the interest of the health, safety, and welfare of its citizens under the Tenth Amendment." *Id.* (rejecting the argument that the State had no compelling interest in prohibiting prostitution in the context of a free speech argument).

Another Ninth Circuit case recognized that "prohibitions on prostitution reflect not a desire to discourage the underlying sexual activity itself but its *sale*." *Coyote Pub., Inc. v. Miller*, 598 F.3d 592, 604 (9th Cir. 2010) (emphasis in original) (upholding restrictions on advertisements of prostitution in Nevada). "In the minds of early opponents, prostitution was closely bound up

with slavery—the paradigmatic case of a dehumanizing market transaction" that violated the principle enshrined by the Thirteenth Amendment that "people may not be bought and sold as commodities." *Id.* at 603–05. The court further explained that prostitution runs counter to "the bedrock idea that '[t]here are, in a civilized society, some things that money cannot buy,'" which is a principle "deeply rooted in our nation's law and public policy." *Id.* at 603 (quoting *In re Baby M*, 537 A.2d 1227, 1249 (N.J. 1988)). The court noted that this principle is evident in laws prohibiting payment for the adoption of a child or for a surrogacy, as well as laws forbidding the sale of human organs. *Coyote*, 598 F.3d at 603. Such public policies are "driven by an objection to their inherent commodifying tendencies—to the buying and selling of things and activities integral to a robust conception of personhood." *Id.* Thus, early criminal laws prohibiting prostitution "were not directed at women themselves but at those profiting from commercialized forms of vice." *Id.* (internal citation and punctuation omitted).

In sum, Arizona has a compelling interest in preventing the spread of sexually transmitted disease; reducing criminal activities closely associated with prostitution such as drug use, robbery, rape, and human trafficking; and discouraging violence against women and the commodification of sex.

**5. *The least restrictive means of accomplishing Arizona's compelling interest in prohibiting prostitution is a criminal statute of general applicability.***

"To prove that [a criminal statute] is the least restrictive means, the State must show that proposed alternatives for achieving the State's compelling interest are ineffective or impractical." *Hardesty*, 222 Ariz. at 368, ¶ 21 (citing § 41–1493.01(C)).

Elise proposes that the Temple be permitted to use a card system to identify believers and exempt them from the prostitution statutes in a manner analogous to the card system used by Native Americans that exempts them from being prosecuted for using peyote for religious purposes. (O.B. at 22; R.O.A. 486, at 4–10; R.T. 5/19/16, at 83.)

However, the Temple was already using a card system, and it was ineffective at preventing the harms targeted by the prostitution statutes. Before the Temple was raided, Elise obtained a one-year conditional permit charter from the Okleveuhah Native American Church. (R.T. 1/6/16, at 150.) The Okleveuhah church was founded by James Mooney to enable his non-Native American friends to use peyote. (R.T. 2/17/16, a.m., at 28–30.) He sold cards online for $200 per card that identified the cardholder as a member of the Okleveuhah Native American Church. (R.T. 2/17/16, p.m., at 105.) There were no requirements to qualify for membership other than making the $200

payment. (*Id.* at 105–06; R.T. 11/24/14, p.m., at 29–33; Exh. 88.) One month after meeting Mooney, Elise began to sell the cards to her sex workers, and split profits evenly with him. (R.T. 12/02/15, p.m., at 38–39.) She also encouraged the sex workers to try to sell the cards to client/seekers, believing they would offer heightened protection against being prosecuted for prostitution. (R.T. 12/14/15, at 55–56.) An undercover police officer was able to purchase a card online by doing nothing other than submitting payment for it. (R.T. 11/24/15, p.m., at 53–54; Exh. 88.) The cards had a one-year expiration date. (R.T. 2/18/16, a.m., at 55–56.)

The Okleveuhah cards failed to prevent sex workers at the Temple from being assaulted. There was testimony from several sources during trial that at least two rapes and one assault had occurred inside the Temple. While testifying for Elise, "Soleil" revealed that she had been sexually assaulted by a male sex worker at the Temple (Wayne C.) for 6 to 8 hours, despite repeatedly asking him to stop the "deep core healing" he claimed would help her recover from childhood sex abuse. (R.T. 1/20/16, at 4, 111–15, 123, 137–38.) Her assault satisfied the legal definition of rape, although Soleil explained that she did not believe that a rape had occurred because intercourse was not involved; she never reported the assault until Elise elicited this testimony while Soleil was on the stand testifying. (*Id.* at 138; R.T. 2/3/16, a.m., at 40.)

Another sex worker ("Leila") reported that the Temple had held a general meeting to discuss another sex worker's ("Tara's") rape while at the Temple. (R.T. 12/03/15, a.m., at 46; R.T. 12/03/15, p.m., at 48.) During a bench conference, the prosecutor confirmed the veracity of Tara's rape, and provided additional information about a third assault against sex worker "Guinevere" that involved bruising, but because the assaults were collateral to the issues at trial, the prosecutor was not permitted to flesh out the details regarding either assault. (R.T. 1/28/16, p.m., at 99–102.)

At another bench conference, Elise explained that she wanted to testify about how she had learned of the assaults and had responded to them; while being questioned by Judge Stephens as to her motive for presenting such testimony, Elise confirmed that she was not going to assert that these events had not occurred. (R.T. 2/3/16, p.m., at 103–106.)

Elise later admitted while testifying that she did not call the police after learning of at least one assault/rape (likely the one involving "Tara"), and that instead, she "talked it out" with everyone at the Temple (likely during the general meeting referenced by Leila). (R.T. 2/22/16, at 59–60.) She also admitted that she permitted the client/seeker involved in Tara's assault to continue to attend the Temple. (R.T. 2/24/16, at 22–24.) During sentencing, Elise called the three incidents "misunderstandings." (R.T. 5/19/16, at 30–34.)

Nor did the card system prevent illicit drugs from being used at the temple. When the Temple was raided, police found peyote and two other items that appeared to be illegal drugs; however, no charges were filed because of the difficulty in proving to whom they belonged. (*Id.* at 45–49.) They also found drug paraphernalia in the form of a glass pipe. (*Id.* at 46.)

Nor did the card system protect against the spread of communicable disease. One sex worker reported that the Temple website stated that "if you are afraid of [an] STD, you just have a fear, you need to get over it." (R.T. 12/07/15, a.m., at 20.) The Temple did not require its sex workers to be tested for STDs; according to Elise's second-in-command, that was "not a concern at all[.]" (R.T. 1/7/16, at 49–50.) The Temple relied on raw coconut oil to prevent STDs, and the sex workers had to supply their own condoms if they desired to use them. (R.T. 12/07/15, a.m., at 20; R.T. 12/10/15, p.m., at 42; R.T. 1/7/16, at 50.)

Nor did the card system protect against the commodification of sex. Sex workers reported that they were rendered fungible in the sense that if they did not want to perform certain sex acts, the receptionist/gatekeepers would simply match the client/seeker with another worker who was willing—often "Guinevere." (R.T. 12/14/15, at 37–38; R.T. 1/20/16, at 149–50.)

Although the State is not required to demonstrate that the specific harms targeted by the prostitution statutes were actually present at the Temple, the fact that many of the harms happened to be present despite the Temple's use of its card system readily confirms that Elise's proposed card system would fail to adequately protect Arizona's compelling interests.

The Temple provided sex acts in exchange for money for years in an indiscriminate manner to any client/seeker willing to pay, regardless of the client/seeker's belief system or willingness to listen to an explanation of the tenets of sacred sexuality. (R.T. 1/6/16, at 79 (Elise admits, "we never knew to what degree the seeker believed in the goddess"); R.T. 11/30/15, at 13 (a sex worker explains that men from Backpage were typically seeking a sexual experience, not knowledge); R.T. 12/01/15, at 121; R.T. 12/02/15, p.m., at 20 (another sex worker explains that only about 20% of the client/seekers were even open to listening to an explanation of sexual spirituality); R.T. 12/15/15, at 25 (another sex worker reported that in all the time she worked at the Temple, only once did a seeker ask for any explanation about any aspect of the Temple, what it taught, or what it stood for); R.T. 12/09/15, at 88–91(one undercover detective was never told that he had to learn or understand certain principles before his session); R.T. 11/24/15, p.m., at 24–25, 31, 80 (another undercover detective was never told that he had to have any sort of spiritual

belief or experience in tantra in order to participate in a session); R.O.A. 17, Attachment 4 at 1 (the Temple website explained that "you do not need to convert to visit with us at the Temple"); Exh. 236.) During one duo sister training session involving Elise and Brigid, after Elise left the room to take a shower, the client/seeker told Brigid that he wished Elise "would stop talking so much" because he was not interested in hearing about the religious teachings of the Temple. (R.T. 12/14/15, at 113–14.)

There were no checks on the provision of sexual healings to non-believers, or even any requirement that the sex workers themselves hold any particular set of beliefs. (R.T. 12/1/15, at 104; R.T. 12/7/15, p.m., at 12 (Elise's second-in-command told an undercover detective that she "didn't necessarily have to believe in their beliefs" in order to work at the Temple), 22; R.T. 12/10/15, a.m., at 68.)

The cardholder system is not plausibly capable of furthering Arizona's compelling interests while exempting Elise and her followers from its prostitution statutes. Because of the thriving demand for sex acts in exchange for money, it is more likely that non-believers would simply purchase the cards in order to gain an effective license to purchase sex—despite their lack of religious beliefs—and paralyze the State's ability to enforce its criminal statutes.

Permitting cardholders to engage in prostitution with impunity would seriously compromise Arizona's ability to protect its citizens from the spread of communicable disease, drug use, robbery, rape, and human trafficking. It would likewise fail to discourage violence against women or the commodification of sex. A uniform prohibition of prostitution is the least restrictive means for Arizona to achieve these interests. *Cf. United States v. Stimler*, 864 F.3d 253, 268 (3d Cir. 2017) (explaining that "the government has a compelling interest in uniform application of laws about violent crimes and that no other effective means of such uniformity existed" that would permit the defendants' use of kidnapping and other violent means to coerce husbands who were Orthodox Jews to give their wives written agreements to divorce, which their religion required to effect a divorce); *United States v. Christie*, 825 F.3d 1048, 1063 (9th Cir. 2016) (holding that prosecution under the Controlled Substances Act for conspiracy to manufacture and distribute marijuana of two ministers who founded a church promoting the religious use and distribution of marijuana was the least restrictive means for Hawaii to achieve its interest in preventing the diversion of marijuana from members of the ministry to non-religious, recreational users, in part because of the thriving public demand for marijuana as opposed to peyote); *United States v. Anderson*, 854 F.3d 1033, 1037 (8th Cir. 2017) (holding that prosecution for conspiracy to distribute

heroin of person professing a religious belief in the need to distribute heroin to non-believers was the least restrictive means for the State to achieve its interests; "we see no way for the Government to accommodate [the defendant] while still furthering its interests").

Here, the only proposed alternative would fail to protect Arizona's compelling interests, and Elise has not identified any other less restrictive alternative to Arizona's prostitution statutes. *See Hardesty*, 222 Ariz. at 368, ¶ 21 (explaining that the State "does not have to show that no less restrictive way to regulate is conceivable, only that none has been proposed"). While it is impossible to prove "that no adequate less restrictive alternative *can* be developed," Arizona has thus met its burden of proving that "there is no less restrictive alternative that would serve the State's compelling public safety interests and still excuse the conduct for which [Elise] was tried and convicted." *Hardesty*, 222 Ariz. at 368–69, ¶¶ 21, 23 (internal citation and punctuation omitted).

## CONCLUSION

Based on the foregoing authorities and arguments, Appellee respectfully requests that this Court affirm Elise's convictions and sentences.

Respectfully submitted,

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