

**IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT**

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**8 EAP 2020**

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**COMMONWEALTH OF PENNSYLVANIA,  
Appellee**

**v.**

**ERIC ROGERS,  
Appellant**

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**BRIEF FOR *AMICI CURIAE* AEQUITAS, WOMEN'S LAW PROJECT,  
AND 26 ADDITIONAL ORGANIZATIONS SUPPORTING THE  
COMMONWEALTH AND FOR AFFIRMANCE**

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APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF  
PENNSYLVANIA FILED SEPTEMBER 25, 2019, 342 EDA 2017, FROM THE  
JUDGEMENT OF SENTENCE JULY 2, 2015, COURT OF COMMON PLEAS  
OF PHILADELPHIA COUTY, CRIMINAL DIVISION NOS. CP-51-CR-  
0000721-2013, CP-51-CR-0001717-2013, CP-51-CR-0005681-2012,  
CP-51-CR-0007377-2013, CP-51-CR-0007563-2012

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American Civil Liberties Union of Pennsylvania  
California Women's Law Center  
Chicago Alliance Against Sexual Exploitation  
End Violence Against Women International  
Equal Rights Advocates  
Feminist Majority Foundation  
Freedom Network USA  
Gender Equality Law Center  
Harvard Law School Gender Violence Program  
Institute to Address Commercial Sexual Exploitation (CSE Institute) and  
Villanova University Charles Widger School of Law  
Legal Momentum  
National Crime Victim Law Institute  
National Crittenton  
National Network to End Domestic Violence  
National Organization for Women Foundation  
National Women's Law Center  
Pennsylvania Coalition Against Domestic Violence  
Pennsylvania Coalition Against Rape  
Pennsylvania NOW  
Philadelphia NOW  
Southwest Women's Law Center  
WOAR-Philadelphia Center Against Sexual Violence  
Women Against Abuse Legal Center  
Women's Law Center of Maryland, Inc.  
Women's Law Project  
World Without Exploitation

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

*Amici curiae* are 28 nonprofit organizations dedicated to improving societal responses to victims and survivors of sexual and domestic violence and exploitation. Some organizations provide direct services, while many others engage in policy advocacy to improve court and institutional responses to sexual assault and to reduce the incidence of violence against women, children, and members of marginalized groups.

*Amici* share their expertise in this brief in support of a determination that Pennsylvania's Rape Shield Law does not permit the introduction of evidence of a complainant's criminal record for prostitution-related offenses. Introducing this evidence would reinforce prejudicial gender and racial biases that would inhibit justice from prevailing and increase the burden of a criminal record on victims of sexual violence and exploitation.

Individual statements of interest of *Amici* are in the Appendix. Counsel is unaware of anyone other than *Amici* who (i) paid in whole or in part for the preparation of this brief or (ii) authored in whole or in part this brief.<sup>1</sup>

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<sup>1</sup> Teresa Garvey, J.D., and Jennifer Long, J.D., of AEquitas provided substantial assistance in the preparation of this brief. See App., Statement of Interest of *Amici curiae*, AEquitas.



## SUMMARY OF THE ARGUMENT

To admit a victim's prior prostitution arrests and convictions as evidence of consent in a sexual assault prosecution is tantamount to a judicial declaration that individuals in the sex trade<sup>2</sup> cannot be raped. It would require the courts to disregard not only the expansive body of research around the sex trade, but the very intent of Pennsylvania's Rape Shield Law.

This law, which explicitly bars evidence of a rape victim's past sexual conduct (other than conduct involving the defendant, and even then only as it relates to the issue of consent), was adopted to eliminate the prejudicial influence of an archaic and dangerous body of law that protected only the chaste, perpetuated broad notions of consent and left victims exposed to rape and injustice. A large and growing collection of research, scholarship, legal reform, and testimony has shed light on the lived experience of women and girls subjected to sex trafficking or exploitation. These efforts have documented the persistent and severe violence experienced by many individuals in the sex trade. It also sheds light on how evidence of a victim's

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<sup>2</sup> *Amici* avoid the term "prostitute," which conflates a person's experience in the sex trade with their essential personhood. Unless this term is used in a referenced source, *amici* refer to individuals as being in the "sex trade" or "sex industry." *Amici* also understand that individuals involved in the sex trade do so on a continuum, ranging from those who state that they are voluntarily engaging in commercial sex to those who do this because of a lack of other available options, to those subjected to severe coercion. *Amici* recognize that all involved in the sex trade are harmed when prostitution-related convictions are admitted as evidence of consent.

involvement in the sex trade creates bias that adversely impacts the truth-seeking process.

These factors compel the conclusion that a victim's prostitution conviction does not merely lack "any tendency to make a fact more or less probable than it would be without the evidence." Pa. R. Evid. 401(a) (defining relevance). It also serves to confuse and bias the fact-finder by suggesting that individuals with prostitution convictions are "automatically . . . assumed to have consented with anyone at any time,"<sup>3</sup> or to have lied about consent. Engaging in commercial sex, whether by choice or not, is not an invitation to be raped.

Against this backdrop, in a case comprising five separate arrests culminating in the conviction of Eric Rogers (hereinafter Rogers) for 46 crimes, including rape, sexual assault, aggravated assault, and indecent assault involving five victims, Rogers asks this Court to carve out an exception to the Rape Shield Law to permit admission of the past prostitution convictions of two of his five victims,<sup>4</sup> as set forth in Issues 1 and 2 accepted for review in this appeal. To admit this evidence, which

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<sup>3</sup> *United States v. Saunders*, 943 F.2d 388, 392 (4th Cir. 1991) (rejecting the notion that prostitution equates to universal consent).

<sup>4</sup> Although the court opinions at both the trial and appellate level make reference to prostitution convictions of all three adult victims, (Rogers Br. at Ex. A at 7 (Superior Court); Ex. B-2 at 3 (Common Pleas)), Rogers's brief refers to prostitution arrests and convictions of only two victims: A.P. and M.H. (Rogers Br. at 12). The sole evidentiary issue related to C.B. raised at the motion hearing was related to DNA evidence collected from C.B.'s underwear, not criminal history. At the motion hearing, the Commonwealth conceded Rogers would be permitted to question the DNA expert about the additional, unknown source of DNA and to question C.B. about any sexual activity with third parties on the date of the rape. (Rogers Br. at Ex. E).

is highly prejudicial and lacks any probative value, would strike at the very heart of the Rape Shield protections. Moreover, its admission is not compelled by Rogers’s constitutional right to present a complete defense. He was permitted to testify and to argue that the acts with which he was charged were consensual acts in exchange for money; he simply was not permitted to support that testimony and argument with irrelevant and prejudicial evidence.

## **ARGUMENT**

### **I. PENNSYLVANIA’S RAPE SHIELD LAW ELIMINATES THE LEGACY OF ARCHAIC AND BIASED RAPE LAW.**

#### **A. American Rape Law Was Originally Based On The Archaic View That “Unchaste” Women Could Not Be Raped.**

Early American rape law evolved from archaic English law that prioritized the relevance of a woman’s chastity. English common law viewed rape of a virgin as deserving of the highest punishment.<sup>5</sup> In colonial times, a woman’s perceived virtue remained a prerequisite to a determination of rape.<sup>6</sup>

A complainant’s chastity was historically considered legally probative of consent as well as character and therefore credibility. An “unchaste” woman was considered likely to consent, while a “chaste” woman was more likely to resist an

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<sup>5</sup> Estelle B. Freedman, *Redefining Rape* 3-4 (2013); Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 *New Crim. L. Rev.* 644, 656 (2010) [hereinafter Anderson, *Acquaintance Rape Victims*]; Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 *Geo. Wash. L. Rev.* 51, 61-64 (2002) [hereinafter Anderson, *Sexuality License*].

<sup>6</sup> Anderson, *Sexuality License*, *supra* note 5, at 64-67.

assault and assert a valid claim of rape. “Immoral” women were believed more likely to lie.<sup>7</sup>

Lack of chastity was proved by testimony disparaging the victim’s character, as well as brutal cross-examination. In addition to sexual history, the defense would delve into other “inappropriate” behaviors, such as consuming alcohol or drugs, smoking, and being out late at night.<sup>8</sup> Such behavior on the part of a man, of course, was considered to have no bearing on his credibility.<sup>9</sup> For cases involving women in the sex trade, the burden to prove rape was nearly insurmountable.<sup>10</sup>

A woman’s chastity continued to play a central role in American rape cases into the latter half of the twentieth century.<sup>11</sup> The Illinois Supreme Court in 1954 asserted that “[i]n order to show the probability of consent, the general reputation of prosecutrix for immorality and unchastity is of extreme importance and may be shown. The underlying thought is that it is more probable that an unchaste woman would assent to such an act than a virtuous woman.” *People v. Fryman*, 122 N.E.2d

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<sup>7</sup> *Id.* at 69-71; Jennifer Wriggins, Note, *Rape, Racism, and the Law*, 6 Harv. Women’s L.J. 103, 126 (1983), available at <https://digitalcommons.maine.gov/cgi/viewcontent.cgi?article=1042&context=faculty-publications>.

<sup>8</sup> Anderson, *Sexuality License*, *supra* note 5, at 72, 74.

<sup>9</sup> *Id.* at 75.

<sup>10</sup> *See, e.g., State v. Johnson*, 28 Vt. 512, 514 (1856) (citing with approval case law recognizing the relevance of evidence that a rape victim was “a street-walker, and that she associates with persons of lewd and dissolute character . . . to show on her part, a corrupted mind, from which her consent to such an act is the natural result of her inclinations”).

<sup>11</sup> Anderson, *Sexuality License*, *supra* note 5, at 78-80.

573, 576 (Ill. 1954) (citation omitted). Similarly, the Pennsylvania Superior Court approved a jury charge stating that the rape victim's bad reputation with respect to morality and chastity, as well as her lack of virginity, should be considered on the issue of consent. *Commonwealth v. Eberhardt*, 67 A.2d 613, 619 (Pa. Super. Ct. 1949), *overruled by Commonwealth v. Crider*, 361 A.2d 352 (Pa. Super. Ct. 1976).

The impact of the “chastity requirement” on Black women was even more devastating. Before the Civil War, American law viewed female slaves as incapable of being raped. They had no rights and were the property of owners who could rape them at will with no repercussions.<sup>12</sup> Meanwhile, as the laws at the time reflected, the perceived threat of rape of White women by Black men was viewed with unmitigated horror. After the Civil War, rape statutes were rewritten; by 1917, they were facially race-neutral. However, racially motivated practices continued. Black women were considered promiscuous and unchaste by nature and thus incapable of being raped.<sup>13</sup> The legacy of this injustice persists today<sup>14</sup> and risks being compounded by the admission of prostitution-related convictions, which disproportionately impact women of color for reasons discussed *infra* Part III.<sup>15</sup>

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<sup>12</sup> Wriggins, *supra* note 7 at 118; Susan Brownmiller, *Against Our Will: Men, Women and Rape* 153–70 (1975).

<sup>13</sup> Wriggins, *supra* note 7, at 120-21.

<sup>14</sup> Calcasa, *Unrapable: Racism, Hypersexualization, and Sexual Assault in Black Communities*, YouTube (Jan. 19, 2017), <https://www.youtube.com/watch?v=b7QBdFMZu5Y>.

<sup>15</sup> See, e.g., Meredith Dank et al., Urban Inst., *Consequences of Policing Prostitution: An Analysis of Individuals Arrested and Prosecuted for Commercial Sex in New York City* 1, 6-7 (2017), <https://www.urban.org/sites/default/files/publication/89451/consequences-of-policing->

Rogers’s attempt to prove, based on their criminal records for prostitution, that two of his victims consented to sex with him must be rejected as a cynical appeal to an outdated, baseless, and misogynistic perception of women.

**B. Consent Was Framed As Temporally Unrestrained And Nonspecific As To Act And Party.**

The antiquated notion of consent as unconstrained in time and nonspecific as to act or person was a critical underpinning of the archaic chastity requirement. A woman’s consent to sex on one occasion was considered transferable to other parties on other occasions<sup>16</sup> and provided, with respect to victims in the sex trade, a significant degree of immunity for rapists.<sup>17</sup> The principle afforded a rationale for extensive cross-examination of complainants about their sexual history, stigmatizing and blaming them for their assaults.<sup>18</sup>

The rape shield laws adopted across the United States in the 1970’s promised an end to implied consent based on sexual history. The Pennsylvania Legislature disavowed the legal fiction of implicit, temporally unconstrained consent by barring

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prostitution.pdf (Of the individuals involved in more than 1,400 prostitution-related arrests in NYC between 2015 and 2016, 93% were cis females and 5% transgender females. Thirty-four percent were Black/African American, 32% were Asian, 17% were Latino/Hispanic, and 11% were Caucasian).

<sup>16</sup> Anderson, *Acquaintance Rape Victims*, *supra* note 5, at 657-58; Anderson, *Sexuality License*, *supra* note 5, at 53-58.

<sup>17</sup> Deborah Tuerkheimer, *Judging Sex*, 97 Cornell L. Rev. 1461, 1462 n.5 (2012) (“No amount of force was enough to convict a man of raping his wife or a Black woman or a prostitute.” (quoting Dorothy E. Roberts, *Rape, Violence, and Women’s Autonomy*, 69 Chi.-Kent L. Rev. 359, 363-64 (1993))).

<sup>18</sup> *Id.* at 1466.

evidence of a victim’s sexual history, except in the most limited circumstances. 18 Pa. Cons. Stat. § 3104 (2015).<sup>19</sup>

Some rape shield laws, however, have failed to fulfill that promise; in some jurisdictions, statutory or judicially-created exemptions have *de facto* revived the discredited notion that women engage in “patterns of behavior” or have “propensities” from which it is possible to infer consent to sex with a different person on a separate occasion.<sup>20</sup> Offenders exploit these loopholes by targeting victims involved in the sex trade, counting on the systemic bias against these victims to immunize themselves from accountability.<sup>21</sup>

The concept of transferred consent is neither justified nor reasonable. Women do not engage in sex as a reflex or habit;<sup>22</sup> rather, they make decisions on a case by case basis. This includes women in the sex trade. No studies support the proposition that transferable consent has any basis in reality.<sup>23</sup> There is, however, research

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<sup>19</sup> See Susan Caringella, *Addressing Rape Reform in Law and Practice* 114, 117 (2009).

<sup>20</sup> Anderson, *Sexuality License*, *supra* note 5, at 110; Tuerkheimer, *supra* note 17 at 1489-91.

<sup>21</sup> See, e.g., Gary Tuchman, *Green River Killer Avoids Death in Plea Deal*, CNN (Nov. 6, 2003, 2:26 AM), <https://www.cnn.com/2003/LAW/11/05/green.river.killings/> (quoting serial killer Gary Leon Ridgway’s guilty plea statement in which he explained that “I hate most prostitutes. I did not want to pay them for sex. . . I also picked prostitutes as victims because they were easy to pick up, without being noticed. I knew they would not be reported missing right away, and might never be reported missing,” and admitted to targeting women in the sex trade “because I thought I could kill as many as I wanted without getting caught.”).

<sup>22</sup> Tuerkheimer, *supra* note 17, at 1473.

<sup>23</sup> *Id.* at 1474-75.

showing that a person’s involvement in the sex trade does not result in indiscriminate consent or increase the likelihood of fabricated charges.<sup>24</sup>

## **II. A VICTIM’S SEXUAL HISTORY WITH THIRD PARTIES IS IRRELEVANT TO CONSENT.**

### **A. Pennsylvania’s Rape Shield Law Appropriately Rejects The Chastity Requirement And The Notion Of Implicit, Temporally Unconstrained Consent.**

The Pennsylvania General Assembly adopted the Rape Shield Law in 1975 with the intent to prohibit evidence of a complainant’s sexual history with third parties. The reasons why are clear in both the language of the law and the voices of the legislators who supported the law. The legislation eliminated a statutory provision that explicitly allowed a defense of “sexually promiscuous complainants” for specified sex crimes based on “evidence that the alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others,” and replaced it with the Rape Shield Law.<sup>25</sup> At the time of trial in the present case,<sup>26</sup> the statute provided, in pertinent part:

Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual

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<sup>24</sup> Heather D. Flowe et al., *Rape Shield Laws and Sexual Behavior Evidence: Effects of Consent Level and Women's Sexual History on Rape Allegations*, 31 Law & Hum. Behav. 159, 165 (2007).

<sup>25</sup> HB 580, 159th Gen. Assemb., Reg. Sess. (Pa. 1975).

<sup>26</sup> The Rape Shield Law was amended in 2019; those amendments are not pertinent to the issues presented here. 2019 Pa. Legis. Serv. Act 2019-24 (West 2020).



conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

18 Pa. Cons. Stat. § 3104(a) (2018).

The statutory language was intentionally crafted to eliminate any chastity-based defense by treating consent as specific to act and person, excluding past sexual conduct with others. Representative Berson, opposing a proposed amendment to expand admissible prior sexual conduct to include sexual conduct with others, stated:

The major effort in House bill No. 580 was to restructure the law of rape so that evidence of the victim's prior sexual conduct with anyone other than the defendant was irrelevant. Rape is a unique offense in Pennsylvania. As it presently stands, it is the only offense where the victim has to establish her own good conduct. No other offense in this state requires that the victim, the person who has been assaulted, robbed, and so forth, has to establish his own good conduct to be a victim. Rape does. That in our opinion is wrong. This bill seeks to change that.

Pa. Legis. Journal, 159th Gen. Assemb., 1975 Sess., at 3249 (1975).

Rep. Berson further responded in opposition to the proposed amendment:

[I]f his amendment were to go in, it would virtually guarantee that in every single prosecution for rape, the defense will raise the issue of consent, that the victim consented, and thereby be enabled to introduce evidence of her prior sexual conduct. I cannot conceive of a defense attorney not using that as a logical and easy loophole to get around what we are trying to accomplish with this statute. I would, if I were representing a person accused of rape, raise the issue that the victim consented and thereby be enabled to get this testimony in which would otherwise be excluded. I would have to be foolish not to. That is precisely what we are trying to prevent in this legislation. I would again urge that this amendment be rejected.

*Id.* at 3250.

Sen. Jubelirer, commended the Senate for approving the bill:

This bill, Mr. President, significantly changes the evidence that is allowed to be introduced into a trial. The evidence of a victim's prior sexual conduct is no longer a subject of proper cross examination in either statutory rape or in forcible rape. We should have, Mr. President, a situation now where the victim of the heinous crime of rape is no longer treated as the defendant and that the defendant can still receive a very fair trial under the laws of evidence as we have attempted to do here today.

Pa. Legis. Journal, 160th Gen. Assemb., 1976 Sess., at 1462 (1976).

As the legislature recognized, the law was enacted to serve several compelling state policies: to promote the truth-seeking function of a trial by barring the admission of distracting or misleading evidence that has little or no relevance to any material issue in the case but only invites the factfinder to render a verdict based on bias and prejudice; to encourage victims to report their rapes and to testify against their attackers without fear that their personal lives will be opened to scrutiny; and to protect victim-witnesses from harassment and unnecessary embarrassment or humiliation. *See Commonwealth v. Spiewak*, 617 A.2d 696, 701 (Pa. 1992) (acknowledging legislative purposes of Rape Shield Law).

**B. Pennsylvania Courts Have Applied The Rape Shield Law Consistent With The Law's Underlying Intent And Text, While Protecting The Defendant's Right To A Fair Trial.**

This Court has recognized that “[t]he purpose of the Rape Shield Law is to prevent a sexual assault trial from degenerating into an attack upon the victim’s reputation for chastity.” *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1165 (Pa. 1994) (concluding that the Rape Shield Law barred evidence of an argument between complainant and her boyfriend over her supposed infidelity).

While this Court has not had occasion to consider the admissibility of evidence of a victim’s prior act of prostitution with a third party for the purpose of proving that the charged act was a consensual act, the Superior Court has twice addressed the issue. The facts of *Commonwealth v. Dear*, 492 A.2d 714 (Pa. Super. Ct. 1985)—with respect to the rape, the defense presented, and the type of evidence the defendant sought to admit—are indistinguishable from those in the present case. In *Dear*, the defendant approached the victim in a bar and propositioned her for sex, which she declined. *Id.* at 715. When she left the bar, he raped her at gunpoint, firing the gun next to her head and forcing the barrel of the gun into her vagina. *Id.* At trial, the defendant testified that he knew the victim to be a prostitute and that she had willingly agreed to have sex with him in a vacant lot. *Id.* at 716. The trial court denied the defendant’s motion to admit the victim’s three convictions for prostitution that had occurred in the vicinity of the bar. *Id.* at 718. The Superior Court upheld the

defendant's rape conviction, holding that evidence of the victim's convictions for prostitution with third parties had no relevance to the issue of consent with respect to the defendant. *Id.* at 720. The holding in *Dear*, which defendant urges this court to abrogate, is wholly consistent with the legislative intent to exclude evidence of past sexual conduct irrelevant to the issue of consent with a different person on a different occasion.

In *Commonwealth v. Jones*, the defendant sought to introduce evidence of the victim's convictions for prostitution adjudicated both before and after the charged rape. 826 A.2d 900, 902 (Pa. Super. Ct. 2003). The trial court had barred evidence of the *prior* convictions but allowed the evidence of post-assault convictions as “‘circumstantial evidence of whatever value’ that a woman who has been raped in December is unlikely to engage in prostitution in January.” *Id.* at 908. On interlocutory appeal of that ruling, the Superior Court reversed the decision with respect to the post-assault convictions. Recognizing that rape shield laws were intended to remedy “‘the travesty of presenting a noisome stream of defense witnesses testifying to the sexual propensities’ of complaining witness,” *Id.* (quoting *Commonwealth v. Majorana*, 470 A.2d 80, 84 (Pa. 1983)), the court concluded that “‘allowing a defendant to besmirch a complainant with accusation and innuendo based on her conduct after an alleged rape’ and seeking to introduce evidence of prostitution convictions to show ‘a propensity to engage in sexual activity for hire’”

did not serve the law's intended purpose. *Id.* at 908-09. The Superior Court appropriately ruled in both cases that propensity evidence in the form of evidence of acts of prostitution with others is irrelevant. *See also Commonwealth v. Guy*, 686 A.2d 397, 401 (Pa. Super. Ct. 1996) (evidence of a complainant's past solicitation of sex for drugs was barred by Rape Shield: "[E]vidence cannot be used to bolster a consent defense when the admitted purpose of the evidence is to prove that the victim acted in conformity with past behavior on the date in question."). The Superior Court's thoughtful rulings in *Dear* and *Jones* should inform this Court's decision in the instant case.

Although Rogers acknowledges that the evidence he seeks to admit is barred by the literal terms of the Rape Shield Law, he contends its admission is nevertheless constitutionally compelled by his right to present a complete defense. This argument is without merit. The United States Supreme Court has recognized that criminal defendants are constitutionally entitled to "a meaningful opportunity to present a complete defense," a right that arises from the Due Process Clause of the Fifth Amendment and/or the Sixth Amendment's protections to assure a fair criminal trial. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). However, the Supreme Court has repeatedly held that this right does not require the admission at trial of any/all evidence a defendant may wish to present. As explained by the *Holmes* Court:

While the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. . . . Plainly referring to rules of this type, we have stated that the Constitution permits judges “to exclude evidence that is ‘repetitive . . . , only marginally relevant’ or poses an undue risk of ‘harassment, prejudice, [or] confusion of the issues.’”

*Id.* at 326-27 (alteration in original) (citation omitted).

Courts and legislatures may promulgate rules or enact legislation to restrict the admissibility of certain evidence, so long as those restrictions serve valid policy interests. Where this Court has read narrow exceptions into the Rape Shield Law, it has done so in a way that recognizes the important policy interests the legislature promoted when it passed the law. In *Majorana, supra*, which permitted testimony about a recent prior sexual interaction to explain the source of semen, this Court acknowledged that the evidence “could not be offered or admitted to show the victim’s poor reputation for chastity.” 470 A.2d at 81 n.3; *see also Commonwealth v. Jorgenson*, 517 A.2d 1287 (Pa. 1986) (remanding for an evidentiary hearing consistent with *Majorana* to consider the admissibility of evidence related to sexual contact with a third party around the time of the reported rape, for the purpose of explaining an alternative source of semen and injury). Exceptions of this type do not

admit evidence to show consent based on implications of lack of chastity, virtue, promiscuity, or morality.

Rogers has cited numerous cases for the proposition that evidence of sexual conduct with third parties *may* be admissible where it suggests potential bias or motive to falsely accuse the defendant, *e.g.*, *Commonwealth v. Black*, 487 A.2d 396, 401-02 (Pa. Super. Ct. 1985) (holding that evidence of sexual conduct with a third party must be admitted if it “logically demonstrate[s] a witness’ bias, interest or prejudice or . . . properly attacks the witness’ credibility”). These cases have zero relevance to the purpose for which the evidence was proffered in the instant case. Indeed, Rogers has not even argued that the proffered convictions suggest bias or motive on the part of these victims to make a false accusation of rape.

Rogers *does* argue that the convictions were relevant to attack the victim’s credibility. (Rogers Br. at 52-53). However, his argument is that these prior convictions are probative of the victims’ being engaged in prostitution because the convictions were for arrests in the same general area. This argument is not a credibility argument; it is, rather, a pure propensity argument: because the victims were previously arrested in a certain location, their presence there at any other time means they must have been there for the same purpose. It is indistinguishable from the contention that prior consensual sex with a third party is probative of consensual

activity at a different time with a different person—the very purpose for which such evidence is prohibited.

Barring the proffered evidence of convictions did not limit, in any meaningful way, the defendant’s ability to present his defense of “consensual prostitution”—however unlikely such a scenario might be, in view of the horrific injuries inflicted on the victims. Rogers apparently testified at trial that he knew or believed the victims to be engaged in prostitution; he was free to testify about the basis for such knowledge or belief. He was free to testify that prostitution was a common activity in the area and to testify about the entirety of his interactions with the victims before, during, and after their encounter. He was permitted to testify these were consensual acts of prostitution and that he never engaged in the use of force or violence during the encounters. He should not, however, be permitted to introduce evidence with the sole purpose of distracting and misleading the fact-finder by appealing to the stigma that many attach to the sex trade. The trial court correctly assessed the evidence and allegations in its decision barring the defendant from admitting the victims’ prior convictions for prostitution. Such evidence is prohibited, for compelling reasons, by the Rape Shield Law, and its admission was not necessary to afford defendant “a meaningful opportunity to present a complete defense.”

Rogers’s inclusion in his brief of what purports to be a systematic analysis of rape shield cases throughout the country to justify admission of evidence of



prostitution convictions is unavailing. (Rogers Br. at 27-48). The “analysis” includes cases governed by rape shield provisions that are significantly different from Pennsylvania’s and therefore irrelevant to this case, as well as many cases representing outdated views. Several of Rogers’s case descriptions are inaccurate or misleading. He cites one case for the proposition that evidence of prostitution would be relevant on the issue of consent, without noting that the court’s expressed view was *dicta* and the ruling predated the adoption of the state’s rape shield law.<sup>27</sup> He describes another decision as holding that prostitution evidence would be admissible to prove bias or motive; however, the court merely noted that evidence of bias or motive would be admissible generally and observed that evidence of prostitution on the part of the victim was inadmissible hearsay.<sup>28</sup> He even cites to a case in which the defendant’s *own* long-term “customer-prostitute” relationship with the victim was deemed admissible as to consent, rather than acts with third parties.<sup>29</sup> Other cases involve facts, issues, and laws that are markedly different from this case.<sup>30</sup>

Admission of records of prostitution-related offenses is prejudicial, undermines Pennsylvania’s Rape Shield Law, and is not constitutionally required.

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<sup>27</sup> *State ex rel. Pope v. Superior Court*, 545 P.2d 946 (Ariz. 1976).

<sup>28</sup> *State v. Small*, 631 S.W.2d 616 (Ark. 1982).

<sup>29</sup> *Ivey v. State*, 590 S.E.2d 781, 783 (Ga. Ct. App. 2003).

<sup>30</sup> *See, e.g., Commonwealth v. Joyce*, 415 N.E.2d 181 (Mass. 1981) (involving specific facts suggesting potential fabrication for purpose of avoiding arrest for prostitution when police approached the parties in a car).

### **III. THE BURDEN OF A CRIMINAL RECORD FOR PROSTITUTION-RELATED OFFENSES SHOULD NOT BAR SEXUAL ASSAULT VICTIMS FROM SECURING JUSTICE.**

This Court should interpret Pennsylvania’s Rape Shield Law to bar evidence of arrests/convictions for prostitution-related offenses to reflect the growing recognition that prosecution for these offenses is often wrongful.<sup>31</sup> Enforcement of prostitution laws disproportionately harms women and visits even greater injustice on Black women.<sup>32</sup> Enforcement sweeps into its net many who have been exploited in the sex trade. Admission of a criminal record in a subsequent rape case compounds the injustices, subjecting victims to irrelevant cross-examination about their sexual history and disregarding their oppression, for the sake of appealing to bias and prejudice.

#### **A. Arrests And Convictions For Prostitution Are Infected With Gender And Racial Biases That Disproportionately Harm Women, Including Women Of Color And Transgender Women.**

Social inequality is the root cause of the systemic conditions and failures that contribute to the commercial sexual exploitation of women and girls, particularly those who are most vulnerable. Individual and institutional racism and sexism,

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<sup>31</sup> Am. Bar Ass’n, *Workable Solutions for Criminal Record Relief: Recommendations for Prosecutors Serving Victims of Human Trafficking* (2015), [https://www.americanbar.org/content/dam/aba/administrative/domestic\\_violence1/SRP/aba-cdsv-workable-solutions.pdf](https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/SRP/aba-cdsv-workable-solutions.pdf) [hereinafter *Workable Solutions*].

<sup>32</sup> Dank et al., *supra* note 15, at 6-7.

homophobia and transphobia, implicit bias, a lack of diversity within the justice system, and the dearth of specialized training for attorneys and allied professionals on cultural humility and trauma are more specific conditions that result in the misidentification, arrest, and incarceration of victims by the justice system.

Although many statutes prohibiting prostitution, including promotion or patronage, including Pennsylvania's,<sup>33</sup> are facially gender-neutral, selective enforcement of these laws has disproportionately targeted women, particularly women of color and transgender women. This outcome reflects archaic patriarchal gender norms that denigrate female "promiscuity" and endorse male entitlement.<sup>34</sup> Although data on the sex, gender, gender identity, and gender expression of people working in the sex industry is sparse, the existing data show that the majority of those arrested are women.<sup>35</sup> Law enforcement practices have traditionally targeted

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<sup>33</sup> 18 Pa. Cons. Stat. § 5902 (2012) (employing he/him and she/her).

<sup>34</sup> See Alexander H. Updegrave et al., *Criminal Justice System Outcomes for Buyers, Sellers, and Facilitators of Commercial Sex in Houston, Texas*, 65 *Crime & Delinquency* 1596, 1600 (2019).

<sup>35</sup> Federal Bureau of Investigations Data from 2017 shows that 61 percent of people arrested for prostitution and commercialized vice were female, and 39 percent were male. FBI, *2017 Crime in the United States: Table 42*, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-42> (last visited June 8, 2020); U.S. Department of Justice data from 2018 shows that 64% of people arrested for prostitution and commercialized vice were female. *Statistical Briefing Book 2018*, U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, [https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table\\_in=1&selYrs=2018&rdoGroups=3&rdoData=c](https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=1&selYrs=2018&rdoGroups=3&rdoData=c) (last visited June 8, 2020) (data sorted by sex); see, e.g., Jenifer McKim & Michael Bottari, *Massachusetts State Police Data: Far More Women than Men Arrested for Prostitution-Related Offenses*, *Mass Live* (Oct. 5, 2014), [http://www.masslive.com/news/index.ssf/2014/10/massachusetts\\_state\\_police\\_data\\_prostitution\\_arrests.html](http://www.masslive.com/news/index.ssf/2014/10/massachusetts_state_police_data_prostitution_arrests.html).

sellers of sex, who more often are women, rather than the overwhelmingly male buyers.<sup>36</sup>

For example, a Pennsylvania police department paid (as an “informant”) a male private citizen on four occasions to purchase sexual services and engage in sexual activity at a massage parlor. Police arrested the woman for prostitution. *See Commonwealth v. Chon*, 983 A.2d 784 (Pa. Super. Ct. 2009) (affirming the dismissal of charges on the basis of outrageous government conduct). While few reported law enforcement efforts involve conduct as outrageous as that described in *Chon*, many police departments have a history of using male decoys,<sup>37</sup> resulting in disproportionate law enforcement focus on the arrest of women for prostitution. In 2019, there were 401 arrests for selling sex and only 172 for buying sex in Pennsylvania;<sup>38</sup> In 2018, there were 678 cases for selling sex and only 181 cases for buying sex.<sup>39</sup>

In addition, while reliable data on the number of transgender women arrested for prostitution are unavailable due to law enforcement practices related to the recording of arrestee gender, there is ample anecdotal evidence of the frequency with

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<sup>36</sup> *See, e.g.*, Updegrove, *supra* note 34, at 1602; Jacqueline Cooke & Melissa L. Sontag, *Prostitution*, 6 *Geo. J. Gender & L.* 459, 470 (2005); Dank et al., *supra* note 15, at 4-7.

<sup>37</sup> *See, e.g.*, Cooke & Sontag, *supra* note 36, at 477.

<sup>38</sup> Inst. to Address Commercial Sexual Exploitation, Villanova Univ. Charles Widger Sch. of Law, *Report on Commercial Sexual Exploitation in Pennsylvania* 10, 12-13 (Spring 2020), <https://cseinstitute.org/wp-content/uploads/2020/05/Spring-2020-Report.pdf>.

<sup>39</sup> *Id.* at 12.

which police stop and question transgender women on suspicion of prostitution—a widespread practice dubbed by the transgender community as “walking while trans.”<sup>40</sup> This form of profiling by police is especially prevalent for transgender women who are Black.<sup>41</sup>

Perceived sellers of sexual services, usually women, are not only more likely to be arrested, but also more likely to be convicted than buyers of sexual services, who are overwhelmingly men. A study of prostitution in Houston, Texas found that arrested buyers of sexual services were 34 percent less likely to be convicted than sellers.<sup>42</sup> The likelihood of conviction was even greater for Black people, with the researchers finding that they were 55 percent more likely to be convicted for the same type of prostitution-related offense than White people.<sup>43</sup>

These illustrations reveal the reality of racial and gender bias in the enforcement of prostitution laws. This Court should not exacerbate these injustices by admitting a victim’s convictions for prostitution in a rape prosecution.

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<sup>40</sup> See Leonore F. Carpenter & R. Barrett Marshall, *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 Wm. & Mary J. Women & L. 5, 6 (2017).

<sup>41</sup> *Id.* at 12-15; see also Rebecca Pfeffer et al., *Gendered Outcomes in Prostitution Arrests in Houston, Texas*, 12 Crime & Delinquency 1538, 1541 (2019).

<sup>42</sup> Updegrave et al., *supra* note 34, at 1609.

<sup>43</sup> *Id.*

## **B. Arrests And Convictions For Prostitution Unfairly Criminalize Victims Of Trafficking And Exploitation.**

Research in the areas of sex trafficking and sexual exploitation has contributed to a growing understanding that enforcement efforts targeting prostitution frequently result in the arrest of those whose involvement in the sex trade is attributable to force, fraud, coercion, or exploitation.<sup>44</sup> This means the criminal justice system is more likely to punish victims than perpetrators.<sup>45</sup>

The sex trade is complex. Some individuals identify as voluntarily engaging in commercial sex. Others may do so not by choice but because they lack other means to pay for their basic life necessities;<sup>46</sup> still others may be victims of human trafficking who engage in the sex trade under the threat or use of force or other forms of coercion.

Reliable estimates of how many people are trafficked for sexual labor and the frequency of their arrests/convictions for prostitution are unknown due to the underground nature of the commercial sex trade and varying definitions of human

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<sup>44</sup> See Trafficking Victims Protection Act, 22 U.S.C. § 7101(b) (2000). See also Edward J. Alessi et al., *Victimization and Resilience Among Sexual and Gender Minority Homeless Youth Engaging in Survival Sex*, J. Interpersonal Violence OnlineFirst, at 1, 2 (Jan. 10, 2020).

<sup>45</sup> Updegrave et al., *supra* note 34, at 1611.

<sup>46</sup> See, e.g., Alessi et al., *supra* note 44, at 4 (to the extent the data relate to young adults, between the ages of 18 and 26, in the sex trade).

trafficking by jurisdiction and study.<sup>47</sup> Nevertheless, studies and surveys show a substantial overlap between people arrested for prostitution and victims of human trafficking.<sup>48</sup> The National Survivor Network conducted a survey of 130 survivors of human trafficking, including 72 victims of forced sexual labor, and found that 65 percent reported being arrested for prostitution.<sup>49</sup>

The realization that trafficking survivors often have criminal records related to their exploitation has fueled campaigns to erase the burden of these criminal histories.<sup>50</sup> Criminal records follow people throughout their lives, often limiting their ability to obtain employment, educational advancement, and housing because of background checks associated with these benefits and opportunities.<sup>51</sup> To admit evidence of these criminal histories at trial when these survivors of trafficking and exploitation are subsequently raped would only add to the unjust burden of misguided enforcement of laws against prostitution.

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<sup>47</sup> Meredith Dank et al., Urban Inst., *Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major US Cities* 288 (2014); Michelle Madden Dempsey, *What Counts as Trafficking for Sexual Exploitation? How Legal Methods Can Improve Empirical Research*, 3 J. Hum. Trafficking 61, 61-62 (2017) (noting the differences between the legal definitions of trafficking under international and United States law).

<sup>48</sup> See Dempsey, *supra* note 47, at 61-62.

<sup>49</sup> National Survivor Network, *National Survivor Network Members Survey: Impact of Criminal Arrest and Detention on Survivors of Human Trafficking*, at \*1, \*5 (Aug. 2016), <https://nationalsurvivornetwork.org/wp-content/uploads/2019/08/NSNVacate-Survey-2018.pdf>.

<sup>50</sup> See Erin Marsh et al., *State Report Cards: Grading Criminal Record Relief Laws for Survivors of Human Trafficking* 5 (Mar. 2019), <https://polarisproject.org/wp-content/uploads/2019/03/Grading-Criminal-Record-Relief-Laws-for-Survivors-of-Human-Trafficking.pdf>; see also *Workable Solutions*, *supra* note 31.

<sup>51</sup> *Workable Solutions*, *supra* note 31, at 1, 4.

**C. Individuals In The Sex Trade Are Often Targeted For Rape And Other Crimes Of Violence Because Of Their Vulnerability And Perceived Lack Of Credibility.**

Women involved in the sex trade suffer severe violence, including sexual violence, at high rates. Studies show the alarming frequency with which individuals in the sex trade were subjected to sexual violence while engaged in commercial sexual activity, with some studies documenting the rate of victimization as over two-thirds of those surveyed.<sup>52</sup> For victims of human trafficking, violence and threats of violence at the hands of their traffickers are inextricably woven into the dynamics of the crime.<sup>53</sup>

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<sup>52</sup> Kathleen N. Deering et al., *A Systematic Review of the Correlates of Violence Against Sex Workers*, Am. J. Pub. Health e44 (2014) (finding 45-75% of sex workers experience sexual or physical violence based on a systematic review of 42 articles); Julie Bindel et al., *Capital Exploits: A Study of Prostitution and Trafficking in London* 37 (2013) (finding “[o]ver four fifths (85%) of women experienced at least one or more form of violence during their involvement in prostitution”); Melissa Farley & Howard Barkan, *Prostitution, Violence, and Posttraumatic Stress Disorder*, 27 *Women & Health* 37, 45 (1998) (survey of 130 street-based prostitutes in San Francisco found 82% had been physically assaulted and 68% raped while working as prostitutes); see also *Commonwealth v. Hicks*, 156 A.3d 1114 (Pa. 2017) (upholding the defendant’s conviction for the brutal murder and dismemberment of a woman in the sex trade. The Commonwealth had sought to introduce evidence pursuant to Pa. R. Evid. 404(b) of seven other women who had been sexually abused and/or otherwise physically brutalized by Hicks—all of them in the sex trade).

<sup>53</sup> See, e.g., Lauren Copley Sabon, *Force, Fraud, and Coercion—What Do They Mean? A Study of Victimization Experiences in a New Destination Latino Sex Trafficking Network*, 13 *Feminist Criminology* 456, 466 (2018) (“The women’s stories highlight how they . . . were subjected to various forms of fraud, coercion, force, and violence at the hands of their traffickers, handlers, and others while they were involved in sex work.”); Trafficking Victims Protection Act, 22 U.S.C. § 7101(b)(6) (2000) (“Victims are often forced through physical violence to engage in sex acts or perform slavery-like labor. Such force includes rape and other forms of sexual abuse, torture, starvation, imprisonment, threats, psychological abuse, and coercion.”)



Those subjected to sexual violence while engaged in the sex trade find it challenging to report these crimes because of punitive criminal justice responses to prostitution<sup>54</sup> and the stigma associated with both sexual assault and involvement in commercial sexual activity.<sup>55</sup> Prostitution myths posit that those involved are indiscriminate in their sexual activity, assume the risk for the violence they suffer, or are simply incapable of being raped (harkening back to the archaic laws discussed in Part I. A., *supra*). These myths form the faulty foundation used to justify and excuse violence against individuals engaged in the sex trade.<sup>56</sup>

In short, one or more prior convictions for prostitution says nothing about whether any of the acts—the ones resulting in conviction or the one in which rape has been alleged—were consensual. Thus, the probative value of such evidence on the issue of consent is nil. To permit the introduction of evidence of a victim’s criminal records for prostitution in a rape prosecution would only perpetuate harmful stigma and myths, to the detriment of justice in cases of sexual violence against those involved in the sex trade.

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<sup>54</sup> *Workable Solutions*, *supra* note 31.

<sup>55</sup> Cecilia Benoit et al., *Prostitution Stigma and Its Effects on the Working Conditions, Personal Lives, and Health of Sex Workers*, 55 J. Sex Res. 457, 457-60 (2018).

<sup>56</sup> Tasha A. Menaker et al., *Prostitution Myth Endorsement: Assessing the Effects of Sexism, Sexual Victimization History, Pornography, and Self-Control*, 42 Psych. Women Q. 313, 314 (2018); Eric Sprankle et al., *The Role of Sex Work Stigma in Victim Blaming and Empathy of Sexual Assault Survivors*, 15 Sex Res. Soc. Pol’y 242, 244-46 (2018).

## CONCLUSION

For these reasons, *amici* respectfully urge the Court to affirm the ruling below.

Respectfully Submitted,

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**CERTIFICATE OF WORD COUNT COMPLIANCE  
PURSUANT TO PA RULE OF CIVIL PROCEDURE 2135(d)**

Pursuant to Pa. R. App. P. 2135, the text of this *amicus curiae* brief consists of 6,972 words as determined by the Microsoft Word word-processing program used to generate this document.

Dated: June 9, 2020

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**CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY  
PURSUANT TO PA RULE OF CIVIL PROCEDURE 127**

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently from non-confidential information and documents.

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## CERTIFICATE OF SERVICE

I, Amal Bass, hereby certify that I am this day serving a true and correct copy of the foregoing Application and attached Proposed Brief of Amici Curiae, which service satisfies the requirements of Pa.R.A.P.121.

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## **APPENDIX**

### **STATEMENTS OF INTEREST OF INDIVIDUAL AMICI CURIAE**

#### **AEquitas**

AEquitas is a technical assistance provider for prosecutors, law enforcement, advocates, and allied professionals who are called upon to respond to crimes of domestic violence, sexual violence, stalking, human trafficking, exploitation, and related offenses. AEquitas provides training, research assistance, consultation services, and other resources in an effort to improve the investigation and prosecution of these offenses by incorporating best practices based upon the most current research in the disciplines of law, social science, medicine, forensic sciences, police science, and related fields. AEquitas is committed to achieving justice in cases involving sexual violence and exploitation. This commitment includes a strong interest in ensuring that the safety and privacy of victims are protected and that cases are determined based upon relevant evidence rather than common myths, misconceptions, and bias. AEquitas strongly believes that evidence that a victim has been arrested or convicted of prostitution, or has engaged in sexual acts in exchange for money or material gain, has no relevance to the issue of consent to a sexual act with another person. Moreover, many individuals who engage in such activity do so in the context of trafficking or exploitation—a circumstance that is not readily apparent from a police report or a judgment of conviction. It is also universally

acknowledged that law enforcement often do not accurately identify individuals as victims of human trafficking, particularly when they intersect the criminal justice system as defendants or witnesses to prostitution-related crimes. Whether their activities are a product of exploitation or self-identified as voluntary, such individuals are often targeted for violence—including sexual violence—by assailants acting in the belief that these victims will not report the crimes or, if they do so, will not be believed. The rape shield statute, which promotes justice by ensuring that factfinders not be distracted by appeals to outdated conceptions of chastity and morality, is clearly intended to bar this kind of irrelevant and prejudicial evidence.

**American Civil Liberties Union**  
**American Civil Liberties Union of Pennsylvania**

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over two million members dedicated to preserving the Constitution and civil and human rights. The ACLU Women’s Rights Project, co-founded in 1972 by Ruth Bader Ginsburg, has been a leader in efforts to eliminate barriers to women’s full equality in American society. These efforts include advocating for the rights of survivors of gender-based violence and challenging discrimination experienced by sex workers. The ACLU of Pennsylvania is the state affiliate of the ACLU. This case is of significant concern to both the national ACLU and the ACLU of Pennsylvania because exclusion of this type of evidence advances complainants’ rights to sexual



privacy and addresses long-standing biases against sexual assault survivors and those engaged in sex work.

### **California Women's Law Center**

The California Women's Law Center (CWLC) is a statewide, nonprofit law and policy center whose mission is to break down barriers and advance the potential of women and girls through transformative litigation, policy advocacy, and education. For over 30 years, CWLC has placed an emphasis on eradicating all forms of discrimination and violence against women. CWLC has submitted several *amicus* briefs on legal issues affecting survivors of domestic violence and campus sexual assault. CWLC is committed to improving societal responses to victims and survivors of sexual and domestic violence and exploitation.

### **Chicago Alliance Against Sexual Exploitation**

Chicago Alliance Against Sexual Exploitation (CAASE) is a not-for-profit that opposes sexual harm by directly addressing the culture, institutions and individuals that perpetrate, profit from, or support such harms. CAASE engages in direct legal services, prevention education, community engagement, and policy reform. CAASE's legal department provides advice and representation to survivors of sexual assault, including to survivors who were commercially sexually exploited. On behalf of its individual clients and in support of its overall mission, CAASE is interested in seeing that laws and precedent related to sexual assault and commercial

sexual exploitation are appropriately interpreted and applied so as to further—and not undermine—efforts to hold both systems and individuals appropriately accountable for their actions.

### **End Violence Against Women International**

End Violence Against Women International (EVAWI) is a nonprofit organization working to improve criminal justice and community responses to gender-based violence. We work to pursue our vision of a world where gender-based violence is unacceptable; where perpetrators are held accountable, and victims receive the compassion, support, and justice they deserve. We have signed on to join this amicus brief, because of its implications for sexual assault victims who summon the courage to report to law enforcement and participate in the process of an investigation and possible prosecution. We are acutely aware of the many barriers sexual assault victims face, both inside and outside the criminal justice system, including a primary emphasis on victim characteristics as a (perceived) causal factor for the assault, as well as a basis for assigning blame (to the victim). Any past involvement in the sex trade is one such characteristic that can dramatically increase doubt and blame, based on commonly accepted stereotypes and misconceptions, yet it often has no legal relevance to the facts and evidence at issue in the case. This is exactly the type of prejudicial impact that rape shield laws were created to prevent. We therefore stand with our amicus partners in the shared belief that significant and

unnecessary harm would result from expanding the narrow legislative exception to the rape shield protections encoded in Pennsylvania law.

### **Equal Rights Advocates**

Equal Rights Advocates (ERA) is a national civil rights advocacy organization dedicated to protecting and expanding educational and economic access and opportunities for women, girls, and people of all marginalized gender identities. Since 1974, ERA has fought sex discrimination and advanced gender justice through impact litigation, policy reform advocacy, community education and outreach, and by providing free legal assistance to individuals experiencing unfair treatment at work and in school through our Advice & Counseling program. From years of experience working with and representing survivors of sexual violence, ERA sees how biased assumptions and judgements about rape victims—including the false idea that prior sexual history is relevant to survivors' credibility or to whether they consented to the conduct at issue—have a negative effect on their access to justice. ERA firmly believes that evidentiary rules under rape shield statutes must apply to prior prostitution convictions. Exclusion of such convictions not only is consistent with the intention and purpose of those laws; it is essential to ensuring that sex workers, most of whom are economically vulnerable cis and trans women of color, are afforded equal protection of the laws and equal access to justice in our legal system.

## **Feminist Majority Foundation**

The Feminist Majority Foundation is a national organization dedicated to the advancement of women's equality, non-violence, and the empowerment of women and girls in all sectors of society. As such the FMF works to eliminate violence against women and girls and to strengthen laws and public policies working to reduce such violence.

## **Freedom Network USA**

Freedom Network USA (FNUSA) is the largest alliance of human trafficking advocates in the United States. Our 68 members include survivors of human trafficking and those who provide legal and social services to trafficking survivors in over 40 cities, providing comprehensive legal and social services, including representation in immigration cases. In total, our members serve over 2,000 trafficking survivors per year, including adults and minors, survivors of both sex and labor trafficking. FNUSA provides training and advocacy to increase understanding of the wide array of human trafficking cases in the US, including a Department of Justice grant to increase access to housing for human trafficking survivors. FNUSA was been involved in the passage of the Trafficking Victims Protection Act and has been a key advocate in each subsequent Reauthorization. Consensual adult sex workers and sex trafficking victims alike are vulnerable to abuse and exploitation, yet few report that abuse to law enforcement. Stigma and discrimination often

impede the equal protection of those who have been involved in the sex trade, increasing their vulnerability to further abuse and exploitation. FNUSA has an interest in preventing abuse and exploitation by ensuring that all victims are fully protected and have access to justice.

### **Gender Equality Law Center**

The Gender Equality Law Center (GELC) is a nonprofit legal advocacy organization whose mission is to advance laws and policies to combat gender-based discrimination, including sexual harassment, as it affects individuals on the basis of their gender, sexual orientation, gender identity and/or expression. GELC's work focuses on redressing gender bias in four specific areas: economic security; sexual harassment and violence prevention; LGBTQ rights and protections for pregnant workers and parents from workplace discrimination. While GELC's programmatic work targets gender-based discrimination broadly, the Organization's focus is on redressing the needs of low-income individuals and on the intersectionality between gender and other forms of discrimination. In the wake of the #MeToo movement, GELC has worked to help pass expanded legislation to protect victims of sexual harassment and violence, as well as conducted anti-harassment trainings and collaborated on a number of policy proposals to address the need of institutions to create structural changes that go beyond just compliance with anti-discrimination laws.

## **Harvard Law School Gender Violence Program**

The Harvard Law School Gender Violence Program works to reform laws and promote legal policy that prevents and eliminates gender-based violence. We are signing on as amici because of the importance of rape shield laws protection, especially for the vulnerable population of prostituted women. Pennsylvania's Rape Shield Law correctly prohibits the admission of criminal records for prostitution and should be upheld in this case.

## **Institute to Address Commercial Sexual Exploitation (CSE Institute) and Villanova University Charles Widger School of Law**

The Institute to Address Commercial Sexual Exploitation at Villanova University Charles Widger School of Law (hereinafter "CSE Institute") works across the Commonwealth of Pennsylvania and nationally against commercial sexual exploitation (hereinafter "CSE") and sex trafficking. The CSE Institute educates and provides technical assistance to legislators, policy decision makers, and stakeholders to improve legal responses to CSE. The CSE Institute also provides direct legal services to survivors to sex trafficking seeking to vacate convictions, including convictions for prostitution, resulting from their victimization. Inspired by Villanova University Charles Widger School of Law's Catholic and Augustinian mission, the CSE Institute aims to ensure every human being is treated with dignity, compassion, and respect. Our approach is multi-disciplinary, victim-centered, and trauma-informed. The CSE Institute centers the voices of survivors to ensure their

lived experience guides the policies we recommend and the changes instituted by this Commonwealth.

Where our legislature has created laws protecting traditionally oppressed and vulnerable communities, and provided them an avenue toward justice, it is the responsibility of our judiciary to enforce such laws. Pennsylvania's Rape Shield law provides important protections for all victims of rape, and it is imperative that these protections are upheld. A rape victim's sexual history should not be argued at the trial of their aggressor. This is not any less true for women convicted of prostitution, often victims of sex trafficking, forced or coerced into selling sex. They deserve the respect and dignity afforded to every other victim of rape in this Commonwealth—a chance to face their abuser without their own history being up for debate.

### **Legal Momentum**

Legal Momentum, the Women's Legal Defense and Education Fund, is the nation's oldest legal advocacy organization for women and girls. It has particular focus on gender-based violence. Legal Momentum was the leading advocate for the landmark Violence Against Women Act (VAWA) and its subsequent reauthorizations, which seek to redress the historical inadequacy of the justice system's response to sexual and domestic violence. Since 1980 Legal Momentum's National Judicial Education Program (NJEP) educated the judiciary on issues related to the fair adjudication of sexual assault cases. NJEP's curriculum Understanding

Sexual Violence: The Judicial Response to Stranger and Nonstranger Rape and Sexual Assault, has been presented across the country. NJEP's publication, Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case, is utilized by judges and justice system professionals nationwide.

### **National Crime Victim Law Institute**

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational and advocacy organization located at Lewis and Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education and resource sharing. NCVLI accomplishes its mission through education and training of judges, prosecutors, victims' attorneys, advocates, law students, and community service providers; providing legal assistance on cases nationwide; researching and analyzing developments in crime victim law; promoting the National Alliance of Victims' Rights Attorneys & Advocates; and providing information to crime victims and crime victims' attorneys through its website, [www.ncvli.org](http://www.ncvli.org), and the website of its membership alliance, [www.navra.org](http://www.navra.org). NCVLI also participates as amicus curiae in select state, federal and military cases that present victims' rights issues of broad importance.



## **National Crittenton**

National Crittenton catalyzes social and systems change for girls, young women and gender non-conforming young people impacted by chronic adversity, violence, discrimination, and injustice. We serve as the umbrella for the 26 members of the Crittenton family of agencies providing direct services in 31 states and the District of Columbia. Our focus on root causes and cross-system approaches supports the attainment of our vision in which girls and gender expansive young people can define themselves on their own terms and be respected and supported without fear of violence or injustice. National Crittenton utilizes a unique mix of strategies that include national advocacy, supporting the capacity building of Crittenton agencies and other partners, and the leadership of girls, to advance social and systems change.

## **National Organization for Women Foundation**

The National Organization for Women (NOW) Foundation is a 501 (c)(3) entity affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States with chapters in every state and the District of Columbia. NOW Foundation is committed to advancing equal rights for women and to ending sex-based discrimination, sexual harassment and assault and other forms of violence against women.

## **National Network to End Domestic Violence**

The National Network to End Domestic Violence (NNEDV) is a not-for profit organization incorporated in the District of Columbia in 1994 to end domestic violence. As a network of the 56 state and territorial domestic violence and dual domestic violence and sexual assault coalitions and their over 2,000 member programs, NNEDV serves as the national voice of millions of women, children and men victimized by domestic violence, and their advocates. NNEDV was instrumental in promoting Congressional enactment and implementation of the Violence Against Women Act. NNEDV works with federal, state and local policy makers and domestic violence advocates throughout the nation to identify and promote policies and best practices to advance victim safety. There are many reasons why survivors of abuse do not report crimes they have experienced. One of those reasons is the intense scrutiny that victims can face at a criminal trial. This evidence is often highly prejudicial and contains little if any probative value. Rape shield laws help to eliminate the legacy of biased rape laws and seek to encourage victims to report the abuse they have experienced. NNEDV supports any efforts that allow those who have experienced abuse to access the criminal and civil justice systems in a meaningful way.

## **National Women's Law Center**

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and the rights of all people to be free from sex discrimination. Since 1972, NWLC has worked to secure equal opportunity for women and girls. NWLC focuses on issues of key importance to women and their families, including economic security, employment, education, and health, with particular attention to the needs of low-income women, women of color, LGBTQ+ individuals and those who face multiple and intersecting forms of discrimination. The NWLC Fund houses and administers the TIME'S UP Legal Defense Fund which helps people facing sexual discrimination and harassment at work, in education, and in health care find attorneys and funds selected cases of workplace sexual harassment. NWLC has participated as counsel or amicus curiae in a range of cases before the Supreme Court and appeals courts to secure the equal treatment of women under the law.

## **Pennsylvania Coalition Against Domestic Violence**

The Pennsylvania Coalition Against Domestic Violence (PCADV) is a private nonprofit organization working at the state and national levels to eliminate domestic violence, secure justice for victims, enhance safety for families and communities, and create lasting systems and social change. PCADV was established in 1976 as the nation's first domestic violence coalition, and it is now comprised of 59 funded

community-based domestic violence programs across Pennsylvania, providing a range of life-saving services, including shelters, hotlines, counseling programs, safe home networks, medical advocacy projects, transitional housing and civil legal services for victims of abuse and their children. Current PCADV initiatives provide training and support to further advocacy on behalf of victims of domestic violence and their children.

### **Pennsylvania Coalition Against Rape**

The Pennsylvania Coalition Against Rape (PCAR) is a private nonprofit organization. Founded in 1975, PCAR is the oldest anti-sexual-violence coalition in the country and is widely respected at both the state and national levels for its leadership in efforts to prevent sexual violence and to provide support and justice to survivors. Over the past 45 years, PCAR has successfully worked as an agent of change—educating the public, the courts, police, prosecutors, healthcare professionals, educational institutions, and other professionals and entities about the severe and long-lasting impact of sexual violence on victims and their communities. At the core of PCAR’s success is its statewide network of rape crisis centers that provide counseling, crisis intervention, and referral services hospital, court, and police accompaniment; prevention education; and community outreach. PCAR member centers offer confidential crisis support 24 hours a day, seven days a week. PCAR has been at the forefront of collaboration with our allied stakeholders in the

healthcare and justice systems, with a particular focus on providing prosecutors with available resources to try these complex cases. PCAR is committed to ending sexual violence and believes that sexual violence can be prevented. Prevention is the responsibility of the community at large and is possible when we work to promote healthy and positive relationships based upon respect, safety and equality. Upholding the rights of survivors as they access systems in our community is an essential component to equal justice and therefore, Pennsylvania Coalition Against Rape joins this Amicus in support of the Trial Court's ruling.

### **Pennsylvania NOW**

Pennsylvania NOW is the Pennsylvania state chapter of the National Organization for Women, the country's largest feminist grassroots organization. We are a statewide nonprofit and political volunteer organization with over 13,000 contributing members and 20 local chapters around the state. NOW members are people of all ages, genders, classes, and backgrounds, working together to bring about equal rights for all women by using an intersectional lens which takes into account people's overlapping identities and experiences. NOW is driven by six core missions. One of those core missions is to end rape culture, sexual assault, and violence against women. We support this amicus brief and will continue to support

advocacy efforts to ensure that survivors are given the respect and justice they deserve. We stand in solidarity with sex workers.

### **Philadelphia NOW**

The Philadelphia Chapter of the National Organization for Women was formed in the late sixties. Our Chapter is engaged in working to realize a broad vision for progress for women and their families, which is predicated on intersectionality and inclusion. Our chapter is actively engaged in having a multi-generational membership from diverse communities and all walks of life. We strive to communicate with cultural competence both within the organization and externally. Our priority areas include promoting economic security (increasing the minimum wage, paid sick leave, closing the wage gap, for women, targeted policy and systems changes that can impact assets and wealth); agitating for reproductive justice; pushing for common sense immigration reform, fighting for LGBTQ rights and ending violence against women. We continue to advocate and support legislation, policies and lawsuits that forward that core mission.

### **Southwest Women's Law Center**

The Southwest Women's Law Center works to raise New Mexico's women and girls out of poverty and to secure equality, economic justice, and health and safety for them. In its first year of operation, the Southwest Women's Law Center identified a gap in New Mexico laws regarding economic security for survivors of domestic

violence and sexual assault: the lack of job security for survivors who need time off to obtain protective orders, consult with attorneys, meet with law enforcement officials, participate in court proceedings and address the abuse in their lives. SWLC provides research, analysis and technical expertise to advocates service providers and the Governor's Domestic Violence Leadership Commission. The Southwest Women's Law Center is committed to eliminating violence against women in all of its forms and ensuring meaningful enforcement of laws against sexual assault.

### **WOAR-Philadelphia Center Against Sexual Violence**

WOAR-Philadelphia Center Against Sexual Violence is the only rape crisis center in Philadelphia. WOAR's mission is to end all forms of sexual violence through advocacy and education. Each year, WOAR provides professional counseling and court and medical accompaniment to an average of 5,000 victims of sexual violence and reaches more than 65,000 children and adults in the Philadelphia community with educational programs about sexual assault and abuse. WOAR is committed to advocating for the fair and equitable treatment of sexual assault victims and the elimination of barriers due to the persistence of archaic myths.

### **Women Against Abuse Legal Center**

Women Against Abuse is Philadelphia's leading domestic violence advocate and service provider and is among the largest domestic violence agencies in the country. We operate the only emergency safe haven in Philadelphia for people

experiencing intimate partner violence, as well as transitional housing, the Philadelphia Domestic Violence Hotline, and community-wide education to prevent Domestic and Teen Dating Violence. We also operate the nation's first legal center for survivors of intimate partner and sexual violence. We provide legal representation in Protection From Abuse and Protection from Sexual Violence and Intimidation cases. We also have court advocates who assist victims of domestic violence in criminal court by providing options, counseling and safety planning. Our services reach over 10,000 people each year through our residential services, legal services, hotline counseling, education and advocacy. It is our mission to provide quality and compassionate services in a manner that fosters self-respect and independence, and to lead the struggle to end domestic violence.

**Women's Law Center of Maryland, Inc.**

The Women's Law Center of Maryland, Inc. is a nonprofit, public interest, membership organization of attorneys and community members with a mission of improving and protecting the legal rights of women. Established in 1971, the Women's Law Center achieves its mission through direct legal representation, research, policy analysis, legislative initiatives, education and implementation of innovative legal-services programs to pave the way for systematic change. The Women's Law Center is participating as an amicus in *Commonwealth v. Rogers* because, in particular, the Women's Law Center seeks to ensure the physical safety,



economic security, and autonomy of women, and that cannot be achieved unless all parties take responsibility in ending sexual violence against women, particularly in the judicial process.

### **Women's Law Project**

The Women's Law Project (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania that seeks to advance the legal, social, and economic status of all people regardless of gender. To that end, WLP engages in impact litigation and policy advocacy, public education, and individual counseling. Founded in 1974, WLP prioritizes program activities and litigation on behalf of people who are marginalized across multiple identities and disadvantaged by multiple systems of oppression. Throughout its history, the WLP has played a leading role in the struggle to eliminate discrimination based on gender in a wide range of areas. WLP is committed to ending violence against women and children and to safeguarding the legal rights of women and children who experience sexual abuse. To that end, WLP provides representation and counseling to victims of violence, participates in *amicus curiae* briefs challenging bias against victims of abuse in the legal system, and engages in public policy advocacy work to improve the response of the criminal justice system to sexual assault.

## **World Without Exploitation**

World Without Exploitation is a national coalition of over 175 organizations and individuals committed to creating a world where no person is bought, sold, or exploited. Our membership includes survivor led organizations, direct service providers, foster care agencies, advocacy organizations and children's rights programs. Through education, legislative efforts and supporting survivor initiatives, World Without Exploitation works to create a culture where those who have been sexually exploited are treated as victims of a crime and those who exploit are held accountable.