Dear members of the committee,

My name is Francesca Maviglia and I'm here to testify in support of H. 22, "An act relating to sexual exploitation of a person who is being investigated by law enforcement".

I'm a public health professional and for the last three years I've been working with the Global Health Justice Partnership, an initiative based at the Yale Law School and Yale School of Public Health that conducts policy research and advocacy on issues at the intersection of law, health, and human rights. In particular, through my role I have been involved in several projects related to the health and rights of sex workers. For the past year and a half, I have also been working as a research consultant for the Sex Worker Project of the Urban Justice Center, a national organization offering legal services to people who engage in sex work and survivors of human trafficking while also engaging in advocacy to promote the human rights of sex workers.

Over the past year, the Global Health Justice Partnership and the Sex Workers Project have been developing a joint project to map avenues for accountability for sex workers who are victims of police violence. As part of this project, we have conducted a review of the national landscape of protections from sexual exploitation for sex workers who are being investigated by police.

What we have found is a fairly bleak picture. Sex workers have very few recognized rights and paths for legal recourse for police sexual violence during an investigation, including undercover raids, and generally in the course of arrests. Law enforcement investigations of sex work and trafficking are largely unregulated, leaving officers with wide discretion, particularly in undercover operations. The crime of prostitution, in many states, is proven simply by an agreement to exchange a sex act for something of value; the commission of the sex act itself is not necessarily required. Even so, many undercover officers have sexual contact with the sex workers they are investigating, including complete sexual intercourse, under the guise of gathering sufficient evidence to make an arrest.

In recent years, more and more sex workers or people who were profiled as sex workers have been speaking up about their experience of being subjected to this conduct by an undercover police officer, and brought attention to the issue. In 2016, in Pennsylvania, a woman named Heather Strausbaugh decided to go to trial for a prostitution charge to expose to the public the police tactics she had experienced.[1] Her arrest occurred after an undercover police officer took off his clothes and lied down with her in bed, where she touched his genitals. In 2017, an Alaskan sex worker described to a journalist the experience of having complete sexual intercourse with a man whom she thought was a normal client, only to realize that he was an

[1]Segelbaum, D., & Ruland, S. (2019). *Tactics in prostitution stings raise questions*. The Washington Times. Retrieved March 23, 2023, from https://www.washingtontimes.com/news/2019/may/25/tactics-in-prostitution-stings-raise-questions/

undercover officer when he announced that he was going to arrest her after the act. She said that she felt violated and raped by this experience.[2]

We know that these testimonies, while valuable, are only scratching the surface of the phenomenon. A 2009 study involving 247 sex workers in San Francisco, CA found that 14% described having been threatened with arrest unless they agreed to have sex with a police officer, 8% had been arrested after having sex with a police officer; and 5% had been arrested after refusing to have sex with a police officer.[3] A 2022 review of studies of police-perpetrated violence against sex workers found that similar reports of sexual contact during undercover investigations and arrests were common across the country, from Maryland to Colorado to California.[4]

The review conducted by the Global Health Justice Partnership and the Sex Worker Project has highlighted that when such abuses happen, sex workers have very little ground to seek legal recourse.

Conversations around criminal justice reform in the last few years have highlighted the many barriers involved in prosecuting police officers or otherwise obtaining relief for misconduct and civil rights violations, including qualified immunity. On the state level, police have been allowed to engage in otherwise criminalized conduct, such as acts which would constitute "patronizing a prostitute", through either non-prosecution, where either no claim is made against the officer or the prosecutor's office does not pursue any action against the officer, or, if prosecuted, potential protection from liability due to the public authority defense, where the defendant "seeks exoneration based on his reasonable reliance on the authority of a government official to engage him in a covert activity."[5]

In the first place, undercover police are seldom, if ever, prosecuted. In fact, many undercover officers receive explicit assurances from the local prosecutor before the operation even begins that they will not be prosecuted.[6] In a case where police sexual misconduct was charged and prosecuted, the public authority defense could provide a liability shield for officers, in justifying what would otherwise be criminal conduct "when that action is taken by a police officer (or a private person under the direction of a police officer) in order to effectuate an arrest."[7]

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[2] *Police Are Allegedly Sleeping with Sex Workers Before Arresting Them.* (n.d.). Retrieved March 23, 2023, from https://www.vice.com/en/article/59mbkx/police-are-allegedly-sleeping-with-sex-workers-before-arresting-them

[3] Lutnick, A., & Cohan, D. (2009). Criminalization, legalization or decriminalization of sex work: What female sex workers say in San Francisco, USA. *Reproductive Health Matters*, 17(34), 38–46. https://doi.org/10.1016/S0968-8080(09)34469-9

[4] Murphy-Stanley, A. (2022). The Paradox of Salvation: Police-perpetrated sexual violence against Sex Workers in the United States. Student Theses. https://academicworks.cuny.edu/jj_etds/248

[5] *United States v. Theunick*, 651 F.3d 578, 589 (11th Cir. 2011) (citing *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1368 n. 18 (11th Cir. 1994)); Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155, 170 (2009).

[6] *Id*, at 171.

[7] Joh, *supra note* 1, at 170.

In recent years, a few states have removed sexual contact or sexual penetration from the legitimate scope of investigation, and therefore immunity. In 2017, the Michigan legislature passed a bill to prohibit police officers from engaging in sexual penetration in the course of their duties as it relates to prostitution offenses.[8] In 2014, the Hawaii legislature passed a bill that prohibited sexual penetration and police officer-initiated sexual contact.[9] Similar efforts in Alaska were unsuccessful due to law enforcement advocacy to maintain the preexisting exemption allowing for such sexual contact.[10]

Additionally, our review of case law points to a strong reluctance from the courts to identify police officers engaging in sexual contact with sex workers as misconduct. In a few cases, sex workers being charged with prostitution offense have invoked the "outrageous government conduct defense", which concerns cases where the defendant's conviction was obtained by methods which offend the Due Process Clause. This defense, if accepted by the courts, would function as a bar to prosecution of the person sexually assaulted by police for a prostitution charge, or other charges related to the investigation. Therefore, it could disincentivize police officers from engaging in this type of misconduct, as it would result in the inability to obtain a conviction, and it would also lead to a formal finding in the public record that police sexual conduct with a person under investigation constitutes misconduct.

However, our review of key "outrageous government conduct" cases related to undercover investigations of sex workers or undercover investigations where an officer has sexual contact with a defendant highlights that most courts continue to reject the outrageous government conduct defense: we were only able to find two cases in which the court recognized due process violations (see Appendix at the end of this document for information about these cases).

The barriers to criminal processes against police officers for alleged wrongdoing, and the lack of will by the courts to name a clear limit of investigatory tactics used by law enforcement, all point to the need for proactive reforms by the legislature to clearly ban this conduct and create avenues for recourse should it occur.

Recent legislative efforts in Hawaii, Michigan, and Alaska, despite the failure of the latter, show some promising movement to protect sex workers from what various legal scholars have characterized as rape-by-deception. We commend the Vermont legislature for proactively taking steps to introduce these protections in your state, and for including a broader range of sexual

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[8] H.B. 4355, 99th Leg., (Mich. 2017); MICH. COMP. LAWS § 750.451b.
[9] H.B. 1925, 27th Leg., (Haw. 2014); S.B. 2377, 27th Leg., (Haw. 2014).
[10] Tracy Clark-Flory, *Alaska Police: We Need To Have 'Sexual Contact' with Sex Workers*, VOCATIV (May 10, 2017), https://www.vocativ.com/428218/alaska-police-sexual-contact-sex-workers/index.html; Michelle Theriault Boots, *Bills to ban police sexual contact with prostitutes they investigate met with opposition*, ALASKA DAILY NEWS (May 7, 2017), https://www.adn.com/alaska-news/crime-courts/2017/05/07/bills-to-ban-police-sexual-contact-with-prostitutes-they-investigate-met-with-opposition/; Lilly Dancyger, *Alaska Cops Defend Their 'Right' to Sexual Contact With Sex Workers Before Arresting Them*, GLAMOUR (July 10, 2017), https://www.glamour.com/story/alaska-cops-defend-sexual-contact-sex-workers-arrests.

conduct than sexual penetration alone in the draft of the bill. We strongly support passing this bill with the strongest possible protections for people investigated, detained, arrested, or otherwise in police custody.

Appendix: Outrageous Government Conduct Cases

Case	Court found due process violation?	Nature of sexual contact	Reasoning
Commonwealth v. Sun Cha Chon, 983 A.2d 784 (Pa. Super. Ct. 2009)	Yes.	A confidential informant, **under direction of law enforcement** and with money provided by law enforcement, went to the same massage parlor four times and had varying levels of sexual contact including sexual intercourse with suspected sex workers.[11]	Using the test set forward by *United States v. Cuervelo* and refined by *United States v. Nolan-Cooper*, the court affirmed the trial judge's finding that the police conduct was outrageous because "they permitted or acquiesced in the most intimate of sexual encounters," "even though it was unnecessary to their investigation, and they learned very little by doing so."[12]
State v. Tookes, 699 P.2d 983 (Haw. 1985)	No.	A confidential informant, **under direction of law enforcement** and with money provided by law enforcement**,** had sexual intercourse with two sex workers being investigated.[13] Specified that one of the sex workers initiated the physical contact.	Used a balancing test of policy considerations in favor of crime detection and punishment against the policy of fair treatment. The agent's actions did not increase the criminality of what was already occurring. While perhaps unethical conduct, the conduct was not outrageous in the constitutional sense.[14]

[11] *Commonwealth v. Sun Cha Chon*, 983 A.2d 784, 789 (Pa. Super. Ct. 2009).
[12] *Id.* at 789.
[13] *State v. Tookes*, 669 P.2d 983, 985 (Haw. 1985).
[14] *Id.* at 986-87.

State v. Bordeaux, No. A13-0609, 2013 Minn. App. Unpub. LEXIS 916 (Minn. Ct. App. Oct. 7, 2013)	No.	In discussing price for sexual conduct, a sex worker stated that she usually charged $40. The officer then asked if she would let him ejaculate on her breasts for $40.[15]	Court found that the subsequent language was necessary to make the arrest (saying that one *usually* charges $40 to engage in sexual conduct is neither a specific offer nor a specific agreement to engage in sexual conduct), and, while lewd, did not rise to the level of outrage that shocks the conscience and violates due process, given its context of an undercover officer making a case for a vice arrest with an alleged sex worker. Court specifically declined to adopt the proposition that mere language alone could *never* constitute outrageous conduct.[16]

[15] *State v. Bordeaux*, No. A13-0609, 2013 Minn. App. Unpub. LEXIS 916, at *1-2 (Minn. Ct. App. Oct. 7, 2013).
[16] *Id.* at *6-7.

State v. Burkland, 775 N.W.2d 372 (Minn. Ct. App. 2009)	Yes.	Undercover officer investigating massage parlor. Posing as a client, the officer agreed to pay extra for the defendant to perform the massage topless. The massage lasted for an hour, the **officer asked if he could touch the defendant's breasts and massaged them while the defendant rubbed the officer's penis.**[17] The officer asked for additional sexual services if he put on a condom, which the defendant declined.	Legal standard: "whether officer conduct in a prostitution investigation is sufficiently outrageous to violate due process is determined by the nature of the officer's conduct and whether the conduct is justified by the need to gather evidence sufficient to arrest the target of the investigation for the offense."[18] Here, the officer initiated the sexual contact, he allowed the defendant to rub his penis while he massaged her breasts. This conduct was not at the behest of the defendant to dispel suspicion that he was an officer and was not necessary to secure evidence for the arrest. "We conclude that when a police officer's conduct in a prostitution investigation involves the initiation of sexual contact that is not required for the collection of evidence to establish the elements of the offense, this conduct, initiated by the investigating officer, is sufficiently outrageous to violate the 'concept of fundamental fairness inherent in the guarantee of due process."[19]
Municipality of Anchorage v. Flanagan, 649 P.2d 957 (Alaska Ct. App. 1982)	No.	Officer and defendant both undressed after the defendant agreed to a price in exchange for a sexual act. Officer **allowed** the sex worker to stroke his penis for a few seconds and prepare to engage in fellatio before stopping and arresting.[20]	Officer's conduct may be questionable, but not outrageous.[21]

[17] *State v. Burkland*, 775 N.W.2d 372, 373-74 (Minn. Ct. App. 2009).
[18] *Id.* at 375.
[19] *Id.* at 376.
[20] *Municipality of Anchorage v. Flanagan*, 649 P.2d 957, 959 (Alaska Ct. App. 1982).
[21] *Id.* at 963.

State v. Thoreson, No. A06-454, 2007 WL 1053205 (Minn. Ct. App. Apr. 10, 2007)	No.	**Officer asked** a sex worker to undress completely as a means to prove defendant's intent to commit prostitution by eliciting a verbal agreement after the defendant had indicated some level of agreement already.[22]	Court noted that the district court finding that the officer did not make the request for his own pleasure, was supported by the record, and found that the conduct may be morally objectionable, but not outrageous.[23] Notably, Judge Randall's dissent strongly criticizes such law enforcement tactics,[24] stating they are not necessary to proving the crime of prostitution.[25]
Tuy Thi Marko v. Lungren, No. C 97-1146 SI, 1998 WL 204979 (N.D. Cal. Apr. 20, 1998)	No.	Undercover sting operation targeting tanning and massage parlors. A confidential informant, who was told not to engage in any sexual act while in the massage parlor, **allowed** the defendant to "tickle" his scrotum, climb on top of him nude, kiss his back, and fellate him. This went on for at least 5 seconds, but it took approximately 2 minutes for detectives to enter the room after the signal was provided.[26]	The 9th Circuit has only recognized two situations which meet the outrageous conduct standard: where police have been brutal in employing coercion or where "the government operates a criminal enterprise for an extended period of time."[27] Neither of those situations were present here.
State v. Morris, 272 N.W.2d 35 (Minn. 1978)	No.	Officer **exposed his penis at the sex worker's request** to confirm he was not an officer after she told the officer he could get oral sex for $20.[28]	There was no unlawful or sufficiently outrageous police conduct to bar the defendant's conviction.[29]

[22] *State v. Thoreson*, No. A06-454, 2007 WL 1053205, at *1.
[23] *Id.* at *3-*4.
[24] *Id.* at *11 (Randall, J., dissenting) ("If the police are going to arrest a suspected prostitute, go ahead and make the arrest—but do not sport with her. That is all that happened here.").
[25] *Id*. at *6.
[26] *Thi Marko v. Lungren*, No. C 97-1146 SI, 1998 WL 204979 at *1-*2 (N.D. Cal. Apr. 20, 1998).
[27] *Id.* at *3.
[28] *State v. Morris*, 272 N.W.2d 35, 35-36 (Minn. 1978).
[29] *Id.*

State v. Crist, 281 N.W.2d 657 (Minn. 1979)	No.	Officer, **upon the defendant's request** before she would negotiate a price and in order to collect evidence to make the arrest, **exposed his penis**.[30]	Case is controlled by *State v. Morris* — the conduct does not violate due process.[31]
State v. Artishon, No. C6-01-910, 2002 Minn. App. LEXIS 177 (Minn. Ct. App. Feb. 5, 2002)	No.	Officer touched the defendant's bare breasts at the sex worker's request to confirm he was not an officer. The defendant then offered to perform oral sex in exchange for $25.[32]	Court agreed that the officer's act of touching the defendant's bare breasts was more physically invasive than the officers exhibiting their penises in *Morris* and *Crist*, but did not view this difference as sufficiently significant to find that it would shock the conscience and violate due process, particularly as the touching was consensual and requested.[33]
State v. Emerson, 517 P.2d 245 (Wash. Ct. App. 1973)	No.	An agent for the vice control unit, under the direction of other officers, visited the same home on five occasions. He **had sexual intercourse** with a different girl each time after paying them first with money provided by the police department.[34]	"Public policy requires that crime be detected and its perpetrators punished. Public policy also requires that a defendant be fairly treated."[35] The public policy standard, and the fact that the agent did not "instigate or solicit the commission of the crime for which defendant was convicted," support the claim that the officer's conduct was not outrageous.[36]

[30] *State v. Crist*, 281 N.W.2d 657, 658 (Minn. 1979).
[31] *Id.*
[32] *State v. Artishon*, No. C6-01-910, 2002 Minn. App. LEXIS 177, at *2 (Minn. Ct. App. Feb. 5, 2002).
[33] *Id*. at *5-6.
[34] *State v. Emerson*, 517 P.2d 245, 246 (Wash. Ct. App. 1973).
[35] *Id.* at 248.
[36] *Id.* at 249.