No. 16-1489

IN THE

Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

JOE PAUL MARTINEZ,

Respondent.

On Petition for a Writ of Certiorari to the Arizona Supreme Court

BRIEF OF ARIZONA VOICE FOR CRIME VICTIMS, INC., MEMORY OF VICTIMS EVERYWHERE TO RESCUE JUSTICE, AND NATIONAL CRIME VICTIM LAW INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Did the Arizona Supreme Court err in stretching the "overbreadth" test for facial unconstitutionality beyond the First Amendment context to strike down a bail restriction based on an application of the law not present in this case?

2. Did the Arizona Supreme Court err in applying heightened scrutiny—one standard among five used in the lower courts—to strike down a state regulatory measure that denies bail if a judge, after a full adversarial hearing, finds clear proof that the arrestee raped a child?

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[*]

Arizona Voice for Crime Victims, Inc. (AVCV) is an Arizona nonprofit corporation that works to promote and protect crime victims' interests throughout the criminal justice process. To achieve these goals, AVCV empowers victims of crime through legal advocacy and social services. AVCV also provides continuing legal education to the judiciary, lawyers, and law enforcement.

AVCV seeks to foster a fair justice system that (1) provides crime victims with resources and information to help them seek immediate crisis intervention; (2) informs crime victims of their rights under the laws of the United States and Arizona; (3) ensures that crime victims fully understand those rights; and (4) promotes meaningful ways for crime victims to enforce their rights, including through direct legal representation.

A key part of AVCV's mission is giving the judiciary information and policy insights that may be helpful in the difficult task of balancing an accused's constitu-

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[*] Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice of the filing of this brief in compliance with Supreme Court Rule 37.2 and each has consented to the filing of this brief.

tional rights with crime victims' rights, while also protecting the wider community's need for deterrence.

Memory of Victims Everywhere to Rescue Justice (MOVE) was founded in California in 1988 by Gary and Collene Campbell to fight for justice and rights for all crime victims. Since its founding, MOVE has been a national leader in calling for the enactment of constitutional rights for crime victims and for the vigorous enforcement of criminal laws to keep our communities and people safe.

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization located at Lewis & 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; technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as *amicus curiae* in cases involving crime victims' rights nationwide.

STATEMENT OF THE CASE

Amici offer this abbreviated Statement of the Case to highlight the heinous nature of the crimes at issue.

In 2002, more than 80 percent of Arizona voters approved Proposition 103. Proposition 103 amended Arizona's Constitution by rendering a person categorically ineligible for bail if "the proof is evident or the presumption great" that the person committed

the crime of sexual conduct with a minor under age fifteen. Ariz. Const. art. II, § 22(A)(1); *State ex rel. Romley v. Rayes*, 75 P.3d 148, 152 (Ariz. Ct. App. 2003).

By adopting Proposition 103 and denying bail to child predators against whom the proof is evident, Arizona's voters sought to ensure that victims of child predators will receive the full protections they are guaranteed under the Arizona Constitution—including the right "to be free from intimidation, harassment, or abuse, throughout the criminal justice process." Ariz. Const. art. II, § 2.1(A)(1).[1]

Respondent Joe Paul Martinez is precisely the type of child predator that the Arizona electorate had in mind in approving Proposition 103. Prosecutors charged Martinez with committing thirty-one sex crimes against three separate child victims over a sixteen-year period. Eight of the counts charged Martinez with engaging in sexual conduct with a minor under fifteen. Pet. App. 89–97 (Apr. 28, 2014 indictment), 69–79 (Sept. 19, 2014 indictment). Martinez was between 20 and 35 years old when he committed the crimes set forth in the indictments. Pet. App. 77, 98.

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[1] Arizona is by no means unique in guaranteeing crime victims certain constitutionally protected rights. *See*, *e.g.*, Cal. Const. art. I, § 28(b)(1) ("a victim shall be entitled to . . . be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process"); Or. Const. art. I, § 43(1)(a) (guaranteeing crime victims "[t]he right to be reasonably protected from the criminal defendant or the convicted criminal throughout the criminal justice process"). *Cf.* 18 U.S.C. § 3771(a)(1), (8) (guaranteeing crime victims "[t]he right to be reasonably protected from the accused" and "to be treated with fairness and with respect").

The State alleged several aggravating circumstances, including that Martinez (1) "abused his . . . position of trust over the victim[s]"; (2) had "a history of engaging in aberrant sexual behavior"; (3) lied to and evaded police; (4) "attempted to cover up the crime[s]"; and (5) posed a danger to society and to future victims. Pet. App. 63–65. *See also* Pet. App. 83–88 (probable cause statement).

In October 2014 and January 2015, the trial court held adversarial hearings to determine whether Martinez was entitled to bail regarding either of the indictments. *See* Pet. App. 60–62, 66–68. The trial court found "the proof is evident and the presumption great" that Martinez committed seven counts of sexual conduct with a minor under fifteen. Pet. App. 67 (findings for counts 9–10 of April 2014 indictment); Pet. App. 94 (listing counts). *See also* Pet. App. 61 (findings for counts 3–5, 7, and 12–13 of September 2014 indictment); Pet. App. 72–73, 74–75 (listing counts). Accordingly, the trial court ruled that Martinez was ineligible for bail. Pet. App. 67, 61. The trial court also rejected Martinez's facial challenge to the constitutionality of Proposition 103. Pet. App. 54.

Martinez then sought interlocutory review. A sharply divided Arizona Court of Appeals ruled Proposition 103 facially unconstitutional, reasoning that the lack of an individualized determination of dangerousness violated the Due Process Clause of the U.S. Constitution. Pet. App. 37–38. Judge Gould dissented, explaining that "if holding a defendant without bond in a capital case or a murder case is constitutional, and has been for over 200 years, then doing so when a child is the victim of a serious sex

crime is as well." Pet. App. 51 (Gould, J., dissenting). *See also* Pet. App. 38 ("Arizona's procedure for denying bail has one sole purpose: protecting children from persons charged with serious sex crimes.").

The Arizona Supreme Court granted Arizona's petition for review and vacated the Court of Appeals' decision. The Arizona Supreme Court first disagreed with the Court of Appeals (and the Ninth Circuit) that an individualized determination of dangerousness is a due-process prerequisite to the denial of bail. Pet. App. 12–13, 15 (citing *Lopez–Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) (en banc)). The court nevertheless ruled that Proposition 103 was unconstitutional, concluding that sexual conduct with a minor under fifteen "is not in itself a proxy for dangerousness." Pet. App. 16. It reached that conclusion by flipping the traditional facial-challenge inquiry on its head: because sexual conduct with a child could, in theory, "sweep[] in situations where teenagers engage in consensual sex," the court concluded that "evident proof . . . that the defendant committed the crime would suggest little or nothing about the defendant's danger to anyone." *Ibid*. *See also* Pet. App. 18 ("Sexual conduct with a minor *is always a serious crime*. In many but not all instances, its commission *may indicate a threat of future dangerousness* toward the victim or others.") (emphasis added).

In other words, even though the bail provisions of Proposition 103 "operate[] only on individuals who have been arrested for a specific category of extremely serious offenses," the court held that they are nevertheless unconstitutional because sexual conduct with a minor under fifteen "is not inherently predictive of future dangerousness." Pet. App. 15, 18.

SUMMARY OF ARGUMENT

This Court should grant review to make clear that states may, consistent with the Due Process Clause, categorically deny bail to a defendant when —after a full adversarial hearing—a court determines that the "proof is evident or the presumption great" that the defendant engaged in sexual intercourse or oral sexual contact with a child younger than fifteen.

This Court has made clear that the Due Process Clause permits denying bail to offenders who (1) "present a continuing danger to the community" or (2) "present[] a risk of flight." *United States v. Salerno*, 481 U.S. 739, 749 (1987). *See also Schall v. Martin*, 467 U.S. 253, 264 (1984) (ruling community protection constitutes a sufficient governmental interest to justify pretrial detention); *DeMore v. Kim*, 538 U.S. 510, 513 (2003) ("Congress, justifiably concerned that [defendants] who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that [such] persons . . . be detained [without bond]."); *Bell v. Wolfish*, 441 U.S. 520, 534 (1979) ("[T]he Government has a substantial interest in ensuring that persons accused of crimes are available for trials and . . . confinement of such persons pending trial is a legitimate means of furthering that interest.").

Salerno also made clear that there is no constitutional prohibition on categorically denying bail based on the nature of the crime with which a defendant is

charged. 481 U.S. at 753 ("A court may, for example, refuse bail in capital cases.").[2]

Given those principles, Arizona's denial of bail to those charged with sexual conduct with a child under fifteen passes constitutional muster for two independent reasons:

First, as this Court recognized in *Smith v. Doe*, sex offenders present a substantial danger to the community: "The risk of recidivism posed by sex offenders is 'frightening and high.'" 538 U.S. 84, 103 (2003) (noting sex offenders' "dangerousness as a class"). "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune v. Lile*, 536 U.S. 24, 33 (2002) (plurality opinion). *See also United States v. Kebodeaux*, 133 S. Ct. 2496, 2503 (2013) ("There is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals."). Moreover,

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[2] Indeed, 34 states categorically deny bail to persons charged with capital offenses, murder, specified sex offenses, or offenses punishable by life imprisonment. *See* Ala. Const. art. I, § 16; Alaska Const. art I, § 11; Ariz. Const. art. II, § 22; Ark. Const. art. II, § 8; Colo. Const. art. II, § 19; Conn. Const. art. I, § 8; Del. Const. art. I, § 12; Idaho Const. art. I, § 6; Ill. Const. art. I, § 9; Ind. Const. art. I, § 17; Iowa Const. art. I, § 12; Kan. Const. Bill of Rights § 9; Ky. Const. § 16; La. Const. art. I, § 18; Mass. Gen. Laws ch. 276, § 20D; Me. Const. art. I, § 10; Minn. Const. art. I, § 7; Miss. Const. art. III, § 29; Mo. Const. art. I, § 20; Mont. Const. art. II, § 21; N.D. Const. art. I, § 11; N.H. Rev. Stat. § 597:1-c; N.M. Const. art. II, § 13; Neb. Const. art. I, § 9; Nev. Const. art. I, § 7; Ohio Const. art. I, § 9; Or. Const. art. I, § 14; Pa. Const. art. I, § 14; S.D. Const. art. VI, § 8; Tenn. Const. art. I, § 15; Tex. Const. art. I, § 11; Utah Const. art. I, § 8; Wash. Const. art. I, § 20; Wyo. Const. art. I, § 14.

child predators inflict a lifetime of trauma on their victims.

Thus, contrary to the Arizona Supreme Court's conclusion, sexual conduct with a child under fifteen is an accurate proxy for dangerous—especially in a case like Martinez's, where proof was evident and the presumption great that a thirty-five year old engaged in sexual conduct a child under fifteen. *Cf.* Pet. App. 36 ("Sexual conduct with a young minor is unquestionably a serious offense that involves a vulnerable class of victims and severe penalties.").

Second, a defendant convicted of sexual conduct with a minor under fifteen "essentially faces a mandatory sentence of life imprisonment." Pet. App. 41 & n.14 (Gould, J., dissenting). It is widely recognized that the more severe the punishment, the greater the risk that the defendant will flee before facing trial. Indeed, "[i]t has generally been thought . . . that capital offenses may be made categorically nonbailable because 'most defendants facing a possible death penalty would likely flee regardless of what bail was set.'" *Lopez–Valenzuela*, 770 F.3d at 786. And, as this Court has recently explained, life imprisonment is "the second most severe penalty permitted by law." *Graham v. Florida*, 560 U.S. 48, 69 (2010).

Review is especially warranted in this case because the Arizona Supreme Court's decision erroneously impedes states' ability to ensure that victims of these heinous crimes receive the full panoply of rights guaranteed to them under state constitutions—including the right to be free from intimidation, harassment, or abuse throughout the judicial

process. *See*, *e.g.*, Ariz. Const. art. II, § 2.1(A)(1); Cal. Const. art. I, § 28(b)(1); Or. Const. art. I, § 43(1)(a).

Accordingly, this Court should grant the petition for a writ of certiorari and reverse the judgment of the Arizona Supreme Court.

ARGUMENT

I. CRIMINAL SEXUAL CONDUCT WITH A MINOR UNDER FIFTEEN YEARS OF AGE IS A "PROXY FOR DANGEROUSNESS."

As this Court has repeatedly explained, the government has a "legitimate and compelling . . . interest in preventing crime by arrestees." *United States v. Salerno*, 481 U.S. 739, 749 (1987). Indeed, even the Arizona Supreme Court recognized that "certain crimes . . . may present such inherent risk of future dangerousness that bail might appropriately be denied by proof evident or presumption great that the defendant committed the crime." Pet. App. 16 (citing *State v. Furgal*, 13 A.3d 272, 279 (N.H. 2010)).

As over 80 percent of the Arizona electorate recognized in approving Proposition 103, sexual conduct with a minor under fifteen is precisely such a crime. This Court has acknowledged that sex offenders' recidivism rate is "frightening and high." *Smith v. Doe*, 538 U.S. 84, 103 (2003). What's more, the perpetrators of these particularly heinous crimes inflict severe, lifelong trauma on their child victims—further increasing the harm their recidivism will impose on society.

A. Sex Offenders—Especially Those Who Victimize Young Children—Have Alarmingly High Recidivism Rates.

The substantial body of academic literature on recidivism reveals a disturbing rate of future crime, both sexual and non-sexual, committed by sex offenders. Given this wealth of academic literature, it should be unsurprising that many courts—including this Court—have recognized sex offenders' frighteningly high recidivism rates.

1.a. It is well established among the academic community that sex offenders reoffend with sexual crimes at high rates.[3] In fact, sex offender same crime recidivism rates significantly exceed recidivism rates for homicide—a crime for which bail has been denied for centuries in the United States.[4] Sex offenders are more than *two-and-a-half times* more

[3] The true numbers of sex offenses are notoriously underreported. Researchers "widely agree that observed recidivism rates are underestimates of the true reoffense rates." Roger Przybylski, *Adult Sex Offender Recidivism*, *in* Nat'l Crim. Justice Ass'n, *Sex Offender Management Assessment and Planning Initiative* 89, 91 (U.S. Dep't of Justice 2014), https://smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf. Underreporting increases as the victims' age decreases, with a study by the Department of Justice finding that 86 percent of sexual assaults committed against children went unreported. Dean G. Kilpatrick et al., *Youth Victimization: Prevalence & Implications* 6 (U.S. Dep't of Justice 2003), https://www.ncjrs.gov/pdffiles1/nij/194972.pdf.

[4] *See Salerno*, 481 U.S. at 753; *Carlson v. Landon*, 342 U.S. 524, 545–46 (1952) ("[B]ail is not compulsory where the punishment may be death."). *See also* Pet. App. 51 (Gould, J., dissenting) ("[H]olding a defendant without bond in a capital case or a murder case is constitutional, and has been for over 200 years.").

likely to commit another sex offense than a murderer is to commit another murder. Matthew R. Durose et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* 2 (U.S. Dep't of Justice 2016), https://www.bjs.gov/content/pub/pdf/rprts05p0510_st.pdf. Compared to non-sex offenders, sex offenders are four times more likely to be rearrested for another sex crime. Patrick A. Langan et al., *Recidivism of Sex Offenders Released from Prison in 1994* 24 (U.S. Dep't of Justice 2003), https://www.bjs.gov/content/pub/pdf/rsorp94.pdf.

Studies have also repeatedly shown that the sex-offense recidivism rate for sex offenders is over 30 percent. *See* R. Karl Hanson et al., *A Comparison of Child Molesters and Nonsexual Criminals: Risk Predictors and Long-Term Recidivism*, 32 J. Res. Crime & Delinq. 325, 325, 333 tbl. 2 (1995), https://www.atsa.com/sites/default/files/A%20Comparison%20of%20Child%20Molesters%20and%20Nonsexual%20Criminals.pdf (finding 35 percent sex offense recidivism rate); Robert A. Prentky et al., *Child Sexual Molestation: Research Issues* 12 (U.S. Dep't of Justice 1997), https://www.ncjrs.gov/pdffiles/163390.pdf.

This is equally true for those who target children. Child molesters who target boys have been found to have an astonishing 35 percent recidivism rate for sexual offenses. *See*, *e.g.*, Andrew J.R. Harris & R. Karl Hanson, *Sex Offender Recidivism: A Simple Question 2004–03* 7 (Pub. Safety & Emergency Preparedness Can. 2004), https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/sx-ffndr-rcdvsm/sx-ffndr-rcdvsm-eng.pdf.

Even more disconcerting are the studies that analyze the victims of the recidivist child molesters. As one study found, 88.3 percent of the victims of recidivist child molesters were under age fifteen and 79.2 percent were under thirteen. Langan et al., *Recidivism of Sex Offenders Released from Prison in 1994* at 31.

1.b. When released from prison, sex offenders do not limit themselves to committing further sex offenses. In one study, researchers found that 43 percent of sex offenders were rearrested for committing another crime. *Id.* at 2, 13. *See also* Durose et al., *Recidivism of Prisoners Released in 30 States in 2005* at 2 (finding sex offenders are roughly 9 percent more likely than murderers to be rearrested for committing "any offense").[5]

Particularly concerning is the fact that 17.1 percent of sex offenders were rearrested for committing a violent crime. Langan et al., *Recidivism of Sex Offenders Released from Prison in 1994* at 34. As one scholar put it: "[P]olicies aimed at public protection should also be concerned with the likelihood of any form of serious recidivism, not just sexual recidivism." R. Karl Hanson & Kelly Morton-Bourgon, *Predictors of Sexual Recidivism: An Updated Meta-Analysis 2004–02* 4 (Pub. Safety & Emergency Pre-

[5] It is also important to note that "[s]tudies have also shown that some crimes legally labeled as nonsexual in the criminal histories of sex offenders may indeed be sexual in their underlying behavior." Przybylski, *Adult Sex Offender Recidivism* at 90 (although murder and kidnapping are not inherently sexual crimes, "when perpetrated by sex offenders, [they] are usually sexually motivated").

paredness Can. 2004), https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2004-02-prdctrs-sxl-rcdvsm-pdtd/2004-02-prdctrs-sxl-rcdvsm-pdtd-eng.pdf.

Other studies have corroborated these high rates, with two finding a general recidivism rate for sex offenders higher than 50 percent. *See* Hanson et al., 32 J. Res. Crime & Delinq. at 325, 333 tbl. 2; Prentky et al., *Child Sexual Molestation: Research Issues* at 12.

Further supporting the Arizona voters' policy decision, recent studies have found that a significant number of sex offenders not only reoffend, but do so while out on bail. Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009—Statistical Tables* 21 (U.S. Dep't of Justice 2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf (finding 14 percent of rapists released on bail were rearrested before trial).

2. Given the breadth of academic literature on sex offender recidivism, it is no surprise that courts have long recognized that releasing sex offenders into the community is a perilous gamble. *Smith*, 538 U.S. at 103 (noting the "dangerousness" of sex offenders "as a class" due to their "frightening and high" recidivism rates). Moreover, a plurality of this Court has explained that "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune v. Lile*, 536 U.S. 24, 33 (2002) (plurality opinion). *See also United States v. Kebodeaux*, 133 S. Ct. 2496, 2503 (2013) ("There is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals.") (citing studies).

Federal appellate courts also have acknowledged the particularly high rates of recidivism for sex offenders who commit their crimes against children. *See United States v. Irey*, 612 F.3d 1160, 1214 (11th Cir. 2010) ("[P]edophiles who have sexually abused children are a threat to continue doing so.") (citing studies); *Belleau v. Wall*, 811 F.3d 929, 934 (7th Cir. 2016) (noting the "compulsive nature" of child molestation and opining on child molesters' "high rate of recidivism"—especially considering "the heavy punishment they face if caught recidivating").

* * *

Of course, states have a "legitimate and compelling" interest in minimizing sex offender recidivism. *Salerno*, 481 U.S. at 749. *Cf. Seling v. Young*, 531 U.S. 250, 253–54 (2001) (upholding Washington's authority to involuntarily commit sex offenders—even after their release from prison).

Martinez is a living testament to Arizona's legitimate and compelling interest. He was indicted by a grand jury for committing thirty-one sex crimes against three children, over a period of sixteen years. After an adversarial hearing, a judge found the proof evident and the presumption great that Martinez committed no less than seven of those offenses against children under fifteen. Martinez embodies precisely the type of recalcitrant sexual criminal against whom the State needs to protect its citizens. Sex offenders who prey on children present a particularized threat to the safety of the general populace—they are categorically ineligible for bail in Arizona because they "are far more likely to be

responsible for dangerous acts in the community after arrest." *Salerno*, 481 U.S. at 750.

B. Sexual Offenses against Children Are Particularly Heinous Crimes That Cause Severe and Lifelong Harms.

The child victims of sexual crimes suffer trauma so severe that it presents a grave danger to their physical and psychological well-being both as children and later as adults. Allowing those whom a judge finds the proof evident engaged in sexual conduct with a child to remain on the streets pending trial, therefore, presents a substantial risk of severe trauma to children in the community.

1. Child victims of sexual abuse may experience, among other physical symptoms, stomachaches, headaches, and enuresis (involuntary voiding of urine after an age at which continence is expected). Jeffry H. Gallet & Maureen M. Finn, *Corroboration of a Child's Sexual Abuse Allegation With Behavioral Evidence*, 25 Am. Jur. Proof of Facts 3d 189 §§ 4–5 (2017). In addition, these young and vulnerable victims also suffer from "sudden weight loss or gain, abdominal pain, vomiting, urinary tract infections, perineal bruises and tears, pharyngeal infections, and venereal disease." Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana's Amended Aggravated Rape Statute*, 25 Am. J. Crim. L. 79, 87–88 (1997).

The psychological effects child victims of sexual abuse experience are often even worse than the physical ones. "Psychological signs of abuse include sleep disturbances, nightmares, compulsive masturbation, precocious sex play, loss of toilet training, unpro-

voked crying, and regressive behavior. Guilt, poor self-esteem, feelings of inferiority, increased suicide attempts, and self-destructive behavior also accompany incidents of rape and child abuse." *Id.* at 88.

These physical and psychological traumas frequently persist into adulthood. *See* Arthur J. Lurigio et al., *Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice*, 59 Fed. Probation 69, 70 (Sept. 1995) ("Large percentages of adult survivors of child sexual abuse show signs and symptoms of psychopathology."); Josie Spataro et al., *Impact of Child Sexual Abuse on Mental Health: Prospective Study in Males and Females*, 184 Br. J. Psychiatry 416, 418 (2004) ("[There is] a clear association between child sexual abuse validated at the time and serious disturbances of mental health in both childhood and adult life."). The severity and long-lasting duration of these symptoms has led researchers to deem sexual assault involving children a "fate worse than death." Melissa Meister, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 Ariz. L. Rev. 197, 208 (2003).

Furthermore, the trauma children face after being sexually assaulted can result in public safety concerns when these children enter adolescence and adulthood. "[V]ictims of childhood sexual abuse were at greater risk for arrest as juveniles and adults. They were nearly five times more likely than . . . nonvictims to be arrested as adults for sex crimes in general and nearly 30 times more likely . . . to be arrested for prostitution." Lurigio et al., 59 Fed. Probation at 70.

As one study concisely put it: "Long-term follow-up studies with child sexual abuse victims demonstrate that childhood sexual abuse is 'grossly intrusive in the lives of children and is harmful to their normal psychological, emotional, and sexual development in ways which no just or humane society can tolerate.'" Meister, 45 Ariz. L. Rev. at 208.

2. This Court repeatedly has echoed the findings of these academic researchers, recognizing the severe and lifelong injuries caused by child sexual abusers. *See Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008) (referring to sex crimes against children as "devastating in their harm").

As this Court explained in *Ashcroft v. Free Speech Coalition*, the "sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people." 535 U.S. 234, 244 (2002). In *Coker v. Georgia*, Justice Powell remarked that "[t]he deliberate viciousness of the rapist may be greater than that of the murderer," as "[s]ome victims are so grievously injured physically or psychologically that life is beyond repair." 433 U.S. 584, 603 (1977) (Powell, J., concurring in the judgment in part and dissenting in part).

Thus, this Court has repeatedly held that states have a compelling interest in both "safeguarding the physical and psychological well-being of a minor" and protecting "minor victims of sex crimes from further trauma and embarrassment." *Maryland v. Craig*, 497 U.S. 836, 852–53 (1990); *Globe Newspaper Co. v. Sup. Ct. of Norfolk Cty.*, 457 U.S. 596, 607 (1982); *New York v. Ferber*, 458 U.S. 747, 756–57 (1982).

Because of the deleterious effects of abuse on child victims, this Court has likewise "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Craig*, 497 U.S. at 852. In *Craig*, this Court held "that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Id*. at 853.

Here, the Court should consider the well-being of not only the child victimized by her abuser, but also the abusers' future victims—who will suffer immeasurable and irreparable harm when the abuser reoffends while released on bail. *See McKune*, 536 U.S. at 32 (plurality opinion) ("Sex offenders are a serious threat in this Nation. . . . [T]he victims of sexual assault are most often juveniles."); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1739 (2017) (Alito, J., joined by Roberts, C.J., and Thomas, J., concurring in the judgment) ("Repeat sex offenders pose an especially grave risk to children.").

Surely the trauma suffered by the victim (or victims) compounded by the trauma that future victims are likely to suffer outweighs the defendant's right to bail—at least where, as here, the proof is evident or the presumption great that the defendant committed the charged offense. In light of the unfathomable pain and suffering sexual abuse inflicts upon its child victims, Proposition 103's bail provisions "narrowly focus[] on a particularly acute problem in which the Government interests are overwhelming." *Salerno*, 481 U.S. at 750.

* * *

Given the frighteningly high recidivism rates of sexual predators who target children, combined with the life-altering trauma inflicted on their victims, it was entirely reasonable for Arizona's electorate to conclude that sexual conduct with a minor was a sufficient "proxy for dangerousness" to justify categorically denying bail to child predators.

In addition, by approving Proposition 103 (and keeping these dangerous criminals incapacitated pending trial), the Arizona voters also helped to guarantee that victims of these heinous crimes receive their constitutionally protected right to be free from intimidation, harassment, and abuse through the judicial process.

Because Proposition 103 applies only if—after an adversarial hearing—a court concludes that the proof is evident or presumption great that the defendant committed the crime, the Due Process Clause does not render Proposition 103 unconstitutional.

II. DEFENDANTS CHARGED WITH SEXUAL CONDUCT WITH A MINOR UNDER FIFTEEN PRESENT A SERIOUS FLIGHT RISK DUE TO THE LENGTHY SENTENCES THEY FACE.

Detaining persons who present a continuing danger to the community is not the only legitimate justification for denying bail. As this Court has repeatedly recognized, "an arrestee may be incarcerated until trial if he presents a risk of flight." *Salerno*, 481 U.S. at 749 (citing *Bell v. Wolfish*, 441 U.S. 520, 534 (1979)). The more severe the potential punishment for a given crime, the higher the risk that a defendant will flee before facing trial. Sexual con-

duct with a minor carries with it "essentially . . . a mandatory sentence of life imprisonment." Pet. App. 41 (Gould., J., dissenting). Accordingly, Proposition 103 is also constitutionally permissible because it categorically denies bail to a class of offenders that present a high risk of flight.

1. It is well established that "the Government may permissibly detain a person suspected of committing a crime prior to a formal adjudication of guilt." *Bell*, 441 U.S. at 534. As this Court has ruled, "the Government has a substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences." *Ibid*. Consequently, "an arrestee may be incarcerated until trial if he presents a risk of flight." *Salerno*, 481 U.S. at 749.

2. Indeed, the majority of states have historically denied bail in capital cases due to the "considered presumption of generations of judges that a defendant in danger of execution has an extremely strong incentive to flee." *Id.* at 765 n.6 (Marshall, J., dissenting). *See also Lopez–Valenzuela v. Arpaio*, 770 F.3d 772, 782 (9th Cir. 2014) (en banc) ("It has generally been thought . . . that capital offenses may be made categorically nonbailable because 'most defendants facing a possible death penalty would likely flee regardless of what bail was set.'"). *See also* Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. Rev. 837, 845 (2016) (documenting history of denying bail for capital offenses due to flight concerns).

A flight risk can exist even when the defendant is not "in danger of execution." Numerous state con-

stitutions and statutes require courts to deny bail for offenses punishable by life imprisonment. *See* Ill. Const. art. I, § 9; Mass. Gen. Laws ch. 276, § 20D; Nev. Const. art. I, § 7; N.H. Rev. Stat. § 597:1-c; Pa. Const. art. I, § 14.

Moreover, many courts have ruled that a lengthy sentence—not just the possibility of execution or life imprisonment—is a sufficient reason, or a significant factor in the decision, to deny bail. "Historically, persons charged with crimes carrying a severe sentence were denied bail because the flight risk associated with such punishment allowed for no set of conditions that could assure the defendant's presence at trial." *Furgal*, 13 A.3d at 279 (citing William Blackstone, *Commentaries on the Laws of England* 1001–02 (George Chase, 4th ed. 1914)). *See also United States v. Tomero*, 169 F. App'x 639, 641 (2d Cir. 2006) ("[D]efendant's potential for a fifteen-year sentence created a substantial risk of flight that remained a serious concern."); *United States v. Jackson*, 297 F. Supp. 601, 603 (D. Conn. 1969) ("[T]he fact that [defendant] faces a 25 year sentence of imprisonment is alone sufficient to justify the risk of flight ground of the instant order [denying bond].").

3. Sexual conduct with a minor under fifteen carries with it a "severe punishment; if convicted, a defendant essentially faces a mandatory sentence of life imprisonment." Pet. App. 41 (Gould, J., dissenting). As Judge Gould explained, sexual conduct with a child under fifteen "is classified as a 'dangerous crime against children,' and for each act and each victim, a defendant faces a mandatory, flat time presumptive prison term of 20 years; the minimum prison sentence is 13 years, and the maximum prison

sentence is 27 years." Pet. App. 41 n.14 (citing Ariz. Rev. Stat. § 13-705(C), (H), (P)(1)(c)).[6] If the victim is under twelve, the defendant faces a mandatory life sentence without the possibility of parole. Ariz. Rev. Stat. § 13-705(A), (H).

In addition, "[e]ach count must be served consecutively," Pet. App. 41 n.14 (citing Ariz. Rev. Stat. § 13-705(M)), and the defendant "is not eligible for suspension of sentence, probation, pardon or release from confinement . . . until the sentence imposed by the court has been served." Ariz. Rev. Stat. § 13-705(H).

And the defendant's confinement does not necessarily conclude at the end of his sentence: "[A]t the completion of a prison sentence a defendant faces potential commitment to the Arizona State Hospital as a sexually violent person for an indefinite period of time." Pet. App. 41 n.14 (citing Ariz. Rev. Stat. § 36-3701 *et seq.*). *See also Seling*, 531 U.S. at 265 (states may impose involuntary civil commitment on convicted sex offenders—even after they have served their sentence).

Consider what that means for Martinez: If he is convicted of all seven counts for which the trial court found the proof is evident and the presumption great, he faces a mandatory minimum sentence of 91 years and a presumptive sentence of 140 years—

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[6] *See* Ariz. Rev. Stat. § 13-1405(B) (providing sexual conduct with a minor under fifteen is a class 2 felony, punishable under Ariz. Rev. Stat. § 13-705).

without the possibility of parole.[7] Even if he is only convicted of half of the charges, he will spend a minimum of 39 years in prison (and a presumptive 60 years). At the end of that prison term, he still faces indefinite involuntary commitment in the Arizona State Hospital.

* * *

The lengthy—approaching lifetime—sentences for sexual conduct with a child under fifteen create a significant, well-recognized flight risk. As a result, even if the crime were not a sufficient proxy for dangerousness, Arizona's categorical denial of bail would still be constitutional, as the State is entitled to confine persons that present flight risks pending trial.

Indeed, given the extraordinary damage inflicted by child predators and their likelihood to flee pending trial and inflict further damage on children, the electorate overwhelmingly recognized that Proposition 103 was necessary to ensure that victims of these particularly heinous crimes would receive their constitutionally protected right "[t]o be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process." Ariz. Const. art. II, § 2.1(A)(1).

In short, Proposition 103 protects victims' rights under the Arizona Constitution and is wholly consistent with the Due Process Clause. The high risk

[7] Ariz. Rev. Stat. § 13-705(C) (length of sentence); *id.* § 13-705(M) (sentences to be served consecutively); *id.* § 13-705(H) (no possibility of suspension of sentence, probation, pardon, or release).

that a sex offender who preys on children will reoffend, combined with not only the devastating, lifelong trauma suffered by his victims, but also the risk that he will flee pending trial, justifies Arizona's determination that—where the proof is evident or presumption great—defendants charged with sexual conduct with a minor under fifteen are categorically ineligible for bail.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted.

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