No. 08-1393

In The

Supreme Court of the United States

STEPHEN EDWARD MAY,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition For Writ Of Certiorari To Division One Of The Court Of Appeals Of The State Of Arizona

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Patterson v. New York, 432 U.S. 197, 210 (1977), confirmed that "there are obviously constitutional limits beyond which the States may not go" when defining a crime's elements and its affirmative defenses. In Arizona, the State may convict an individual of child molestation by proving that he intentionally or knowingly touched the genitals of a child. Ariz. Rev. Stat. §§ 13-1401, 1410. To avoid being punished as a child molester, the defendant must raise and prove the affirmative defense that he "was not motivated by a sexual interest." Ariz. Rev. Stat. § 13-1407(E).

The question presented is whether Arizona's child molestation statutes violate an accused's Fourteenth Amendment right to due process because they "manipulate the prosecutor's burden of proof by . . . placing the affirmative defense label on 'at least some elements' of traditional crimes." *Apprendi v. New Jersey,* 530 U.S. 466, 475 (2000) (quoting *Patterson,* 432 U.S. at 210).

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Petitioner, Stephen E. May ("May"), respectfully requests that a writ of certiorari issue to review the decision of Division One of the Arizona Court of Appeals in this case.

OPINIONS BELOW

The Arizona Court of Appeals' decision (Pet. App. 1-11) is unreported. The judgment and order of the Superior Court of Maricopa County (Pet. App. 43, 53-54) is unreported.

STATEMENT OF JURISDICTION

The Arizona Court of Appeals issued its decision on July 24, 2008. The Arizona Supreme Court denied review on February 10, 2009. Petitioner invokes the Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which

> shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant provisions of Arizona law are set forth in the appendix to this petition at Pet. App. 27-31.

STATEMENT OF THE CASE

This case questions whether the "constitutional limits" restricting a state's ability to "reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in [its] statutes," *Patterson v. New York*, 432 U.S. 197, 210 (1977), prohibit Arizona from requiring a person prosecuted for child molestation to prove by a preponderance of the evidence that he "was not motivated by a sexual interest," Ariz. Rev. Stat. § 13-1407(E).

A. Arizona's Definition of the Crime of Molestation of a Child

Arizona defines the crime of child molestation as "intentionally or knowingly engaging in . . . sexual contact . . . with a child who is under fifteen years of age." Ariz. Rev. Stat. § 13-1410(A). "Sexual contact" does not require that the contact be accompanied by

any particular mental state or purpose. Rather, "'[s]exual contact' means any direct or indirect touching, fondling or manipulating of any part of the genitals [or] anus . . . by any part of the body or by any object." Ariz. Rev. Stat. § 13-1401(2). Thus, conviction requires the State to prove only that the defendant (1) intentionally or knowingly (2) touched the genitals (3) of a child less than fifteen years old.

The statutory scheme makes no exception for parental care, medical care, or other instances of legitimate touching. Instead, Arizona purports to separate innocent touching from criminal conduct by providing that "[i]t is a defense to a prosecution pursuant to § . . . 13-1410 that the defendant was not motivated by a sexual interest." Ariz. Rev. Stat. § 13-1407(E). Section 13-1407(E) is an affirmative defense. *See State v. Getz*, 944 P.2d 503, 506 (Ariz. 1997) (describing defenses in section 13-1407 as affirmative defenses); *State v. Simpson*, 173 P.3d 1027, 1030 (Ariz. Ct. App. 2007) (Pet. App. 19). In Arizona, a defendant bears the burden of proving affirmative defenses by a preponderance of the evidence. Ariz. Rev. Stat. § 13-205(A).

Throughout most of Arizona's history, the State had to prove beyond a reasonable doubt that an accused child molester acted with criminal sexual intent. *See State v. Trenary*, 290 P.2d 250, 252 (Ariz. 1955) (interpreting 1939 version of molestation statute to require proof of sexual interest). Similarly from 1965 until 1993, Arizona's Criminal Code defined the crime of child molestation as "knowingly

molest[ing] a child . . . by directly or indirectly touching the private parts of such child." *See* 1965 Ariz. Sess. Laws Ch. 20, §§ 3, 4. The Arizona Supreme Court held that the word "molest" placed in this version of the statute "[a]n essential element . . . that the acts involved be 'motivated by an unnatural or abnormal sexual interest or intent with respect to children.'" *State v. Brooks*, 586 P.2d 1270, 1272 (Ariz. 1978) (quoting *State v. Berry*, 419 P.2d 337, 340 (Ariz. 1966)); *accord State v. Stinson*, 461 P.2d 472, 473 (Ariz. 1969). In contrast, the current statute, passed in 1993, absolves the State of the need to prove the "essential element" acknowledged in *Trenary*, *Brooks*, *Berry*, and *Stinson* and instead requires the defendant to disprove the fact of sexual motivation to avoid conviction.

B. The Procedural History of May's Case

May was tried on seven counts of child molestation. (*See* Pet. App. 2.) Each count involved an allegation that May briefly and indirectly touched a child over clothing. (Record On Appeal 73.) May asked the court to instruct the jury that "[t]he crime of molestation of a child requires proof beyond a reasonable doubt" that he acted "with the motivation of a sexual interest." (Pet. App. 32-35.) During the jury instructions conference, May's counsel reiterated his position that "the State is obliged to prove a motivation of sexual interest as an element of the offense." (Pet. App. 38; *see also* Pet. App. 43.) The State answered that the law clearly places on May the burden to raise

and prove he was *not* motivated by sexual interest (Pet. App. 39-40), further noting that Arizona courts have upheld the constitutionality of requiring an accused to bear the burden of proof on affirmative defenses (Pet. App. 49-50 (citing *State v. Grell*, 135 P.3d 696, 702 (Ariz. 2006), and *State v. Sanderson*, 898 P.2d 483, 491 (Ariz. Ct. App. 1995))). More specifically, the State summarized its position by stating, "There is no element in the crime of child molestation regarding sexual motivation. Affirmative defenses are still viable in Arizona law; lack of sexual motivation is one of those defenses. The defendant constitutionally carries the burden of proving lack of sexual motivation by a preponderance of the evidence." (Pet. App. 51.)

The judge agreed with the State and issued final jury instructions that placed the burden of disproving sexual motivation on the defendant:

> MOLESTATION OF A CHILD
>
> The crime of molestation of a child requires proof that the defendant knowingly touched, directly or indirectly, the genitals of a child under the age of fifteen years. It is a defense to child molestation that the defendant was not motivated by a sexual interest.
>
> AFFIRMATIVE DEFENSE
>
> The defendant has raised the affirmative defense of lack of sexual motivation with respect to the charged offense of molestation of a child. The burden of proving each element of the offense beyond a reasonable doubt

> always remains on the State. However, the burden of proving the affirmative defense of lack of sexual motivation is on the defendant. The defendant must prove the affirmative defense of lack of sexual motivation by a preponderance of the evidence. If you find that the defendant has proved the affirmative defense of lack of sexual motivation by a preponderance of the evidence you must find the defendant not guilty of the offense of molestation of a child.

(Pet. App. 53-54.) After extensive deliberations, during which the jury twice told the judge they were deadlocked, the jury returned guilty verdicts on five counts. (Pet. App. 2-3.) May received five consecutive fifteen-year sentences for a total of seventy-five years. (Pet. App. 3.)

May appealed to the Arizona Court of Appeals, arguing, among other things, that the jury instructions impermissibly relieved the State of its burden to prove every element of the charged crimes beyond a reasonable doubt and thus violated the due process principle articulated in *In re Winship*, 397 U.S. 358, 364 (1970). (May's Ariz. Ct. App. Opening Br. 16.) The State asserted that the current version of the statute defining child molestation did not include the element of sexual motivation. (State's Ariz. Ct. App. Answering Br. 15-16); *see* Ariz. Rev. Stat. § 13-1410(A). Therefore, the State argued, it is not unconstitutional to require the defendant to prove the absence of sexual motivation as an affirmative defense. (State's Ariz. Ct. App. Answering Br. 16.)

The Arizona Court of Appeals held that the jury instruction complied with Arizona law, noting that May's argument was rejected by a recently published opinion, *State v. Simpson*, 173 P.3d 1027 (Pet. App. 12-23). (Pet. App. 4.) May petitioned the Arizona Supreme Court for review, again challenging the jury instructions that placed on him the burden to disprove motivation by sexual interest. (May's Ariz. Sup. Ct. Pet. for Review 6.) The Arizona Supreme Court denied review. (Pet. App. 24.)

REASONS FOR GRANTING THE WRIT

This case calls for this Court to resolve a question it has previously deferred: To what extent may the State remove traditional elements from existing crimes and instead require defendants to disprove those same elements as affirmative defenses? Arizona has always punished intentional touching of a child's genitals only upon proof of the "essential element" that the accused's acts were motivated by sexual interest. *See Brooks*, 586 P.2d at 1272. Because the current statutes require a defendant to disprove sexual interest, Arizona now authorizes criminal punishment for every intentional touching of a child's genitals, unless the accused can carry the burden to disprove his sexual intent. Under this scheme, May was given an effective natural life sentence without the State proving beyond a reasonable doubt the very fact that distinguishes innocent and criminal conduct.

The question presented implicates not only the child molestation statutes of four states,[1] but also the prerogative of all fifty states to alter, by legislative fiat, the burden of proof the Constitution imposes in criminal cases. State courts have already reached conflicting decisions regarding the states' authority to reduce the prosecution's burden in child molestation cases. *Compare State v. Tibbetts*, 281 N.W.2d 499, 500-01 (Minn. 1979) (statute requiring proof that touching "can reasonably be construed as being" for a sexual or aggressive purpose unconstitutionally shifted the burden of proof), *with In re Wentworth*, 651 N.W.2d 773, 776 (Mich. Ct. App. 2002) (statute requiring proof that touching "can reasonably be construed as being" for a sexual purpose *did not* unconstitutionally shift the burden of proof). Arizona's statutes present a narrowly focused, timely vehicle for examining the constitutional limits on the states' ability to redefine crimes and reallocate burdens of proof. *See* Sup. Ct. R. 10(c).

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[1] Mich. Comp. Laws § 750.520a(q) (to establish "sexual contact" the State need prove only that the contact "can reasonably be construed as being" for a sexual purpose); Neb. Rev. Stat. § 28-318 (same); Tenn. Code Ann. § 39-13-501(6) (same).

A. The Court Should Define the Constitutional Limits Identified in *Patterson* Because Arizona Has Manipulated Its Statute So That the State No Longer Must Prove a Fact Necessary for Conviction.

The Constitution requires a state to "try[] to a jury all facts necessary to constitute a statutory offense, and prov[e] those facts beyond a reasonable doubt." *Apprendi*, 530 U.S. at 483-84; *In re Winship*, 397 U.S. at 364 ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). Generally, in determining the necessary elements of a crime, courts defer to state legislatures because the states are "free to choose the elements that define their crimes." *Jones v. United States*, 526 U.S. 227, 241 (1999). "The caveat [is] a stated recognition of some limit upon state authority to reallocate the traditional burden of proof." *Id.* (citing *Patterson*, 432 U.S. at 210). But despite repeated assurances that constitutional limits exist on states' ability "to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes," this Court has left those limits undefined. *Patterson*, 432 U.S. at 210; *see Harris v. United States*, 536 U.S. 545, 557 (2002) (plurality opinion); *Apprendi*, 530 U.S. at 486; *Jones*, 526 U.S. at 241; *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986) (all acknowledging but not defining the limits identified in *Patterson*).

In *Apprendi*, the Court invalidated a so-called "sentencing enhancement" because the fact in question was "the functional equivalent of an element of a greater offense." 530 U.S. at 469, 494 & n.19. The Court noted that the statute at issue in that case did not present a question "concerning the State's power to manipulate the prosecutor's burden of proof . . . by placing the affirmative defense label on 'at least some elements' of traditional crimes." *Id.* at 475 (quoting *Patterson*, 432 U.S. at 210). The Court reaffirmed, however, that it has not "budge[d] from the position that . . . constitutional limits exist to states' authority to define away facts necessary to constitute a criminal offense." 530 U.S. at 486.

Although the Court has never said what would fall beyond the limits identified in *Patterson* and confirmed in *Apprendi*, there have been strong suggestions by members of the Court that call Arizona's child molestation statutes into constitutional question. Foremost, in *Apprendi*, Justice O'Connor criticized the rule announced by the majority, saying that New Jersey could easily evade that rule simply by restructuring the form of the statute. 530 U.S. at 541-42 (O'Connor, J., dissenting). Rejecting the dissent's charge that the opinion's rule could be easily evaded, the Court answered:

> [I]f New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not . . .), we would be

> required to question whether the revision was constitutional under this Court's prior decisions.

Apprendi, 530 U.S. at 490 n.16 (citing *Patterson*, 432 U.S. at 210, and *Mullaney v. Wilbur*, 421 U.S. 684, 698-702 (1975)). Arizona effected exactly the reversal the Court hypothesized in *Apprendi*: now Arizona's child molestation statutes "assum[e] a crime was performed with a [sexual interest] and then requir[e] a defendant to prove that it was not." *See id.*

In posing this hypothetical, the *Apprendi* majority echoed Justice Powell's dissent in *Patterson* that the majority had established an "indefensibly formalistic" rule that "allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime." *Patterson*, 432 U.S. at 223-24 (Powell, J., dissenting). In fact, Justice Powell presciently described another hypothetical, this one a murder statute, which he believed would be clearly unconstitutional, but would nevertheless comply with the formal requirements described by *Patterson*'s majority:

> [A] state statute could pass muster . . . if it defined murder as mere physical contact between the defendant and the victim leading to the victim's death, but then set up an affirmative defense leaving it to the defendant to prove that he acted without culpable mens rea. The State, in other words, could be

> relieved altogether of responsibility for proving anything regarding the defendant's state of mind . . . .

432 U.S. at 224 n.8; *see also id.* at 225 n.9. Arizona has done exactly what Justice Powell feared.

Perhaps inevitably, because *Patterson* left "no principled basis for concluding that such a statute falls outside the 'obvious' constitutional limits the Court invoke[d]," *id.* at 225 n.9, the Arizona legislature has drafted a statute that unilaterally declares those limits non-existent. The current version of the charging statute, Ariz. Rev. Stat. § 13-1410(A), reflects a wholesale revision that, with the deletion of the word "molests," removed from the statute the "essential element . . . that the acts involved be 'motivated by an unnatural or abnormal sexual interest or intent with respect to children.'" *Brooks*, 586 P.2d at 1272 (quoting *Berry*, 419 P.2d at 340); *see* 1993 Ariz. Sess. Laws Ch. 255, § 28. And, although sexual motivation is no longer labeled an element, the availability of the affirmative defense makes clear that criminal culpability continues to hinge on the presence or absence of that fact. Indeed, it is this element of *mens rea* that distinguishes innocent touching of children from touching that the State is trying to punish. *Cf. Patterson*, 432 U.S. at 211 n.13 ("It would be an abuse of affirmative defenses . . . if the purpose or effect were to unhinge the procedural presumption of innocence which historically and constitutionally shields one charged with crime.")

(quoting *People v. Patterson,* 39 N.Y.2d 288, 305-07 (N.Y. 1976) (Breitel, C.J., concurring)).

The affirmative defense of lack of motivation by sexual interest is the tail that wags the dog of the offense of child molestation: *any* criminal punishment depends on the existence of that fact. *See McMillan*, 477 U.S. at 88 (upholding mandatory minimum statute because it gave "no impression of having [the operative sentencing factor] . . . be a tail which wags the dog of the substantive offense"). Over and again, this Court has suggested that such a statute would be unconstitutional. This case demonstrates the need to replace suggestion with certainty.

B. This Court Should Resolve the Tension Between *Apprendi* and *Patterson* So That States Can Discern When a Defendant May Bear the Burden of Proof Regarding Facts Necessary to Authorize Punishment.

The principal dissent in *Apprendi* pointed to a number of apparent inconsistencies created by the majority's holding, among them the tension between the legislative deference approved in *Patterson* and the more searching examination of a statute's function mandated by *Apprendi.* 530 U.S. at 545 (O'Connor, J., dissenting). Justice O'Connor, joined by Chief Justice Rehnquist and Justice Breyer, observed that "[t]he rule set forth in *Patterson* [is] 'that in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of

the elements of the offense is usually dispositive.'" *Apprendi*, 530 U.S. at 534 (O'Connor, J., dissenting) (quoting *McMillan*, 477 U.S. at 85). In contrast, the "actual principle" of *Apprendi* is that "any fact . . . that has the effect, *in real terms*, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 543. Thus, Justice O'Connor found it "difficult to understand why the rule adopted by the Court in [*Apprendi*] . . . would not require the overruling of *Patterson*." *Id.* at 531.

Though Justice O'Connor was of the view that *Apprendi* and *Patterson* are wholly irreconcilable, both cases can be placed in the long line of cases in which the Court has either outlined or given content to the due process command that "the jury find beyond a reasonable doubt every fact necessary to constitute the crime." *Apprendi*, 530 U.S. at 499-500 (Scalia, J., concurring) (citing *In re Winship*, 397 U.S. at 364). In *Mullaney*, the Court held that a Maine statute impermissibly "shifted the burden of proof to the defendant" to negate the murder element of "malice aforethought" by requiring the defendant to prove he acted with "heat of passion on sudden provocation" to reduce the crime to manslaughter. 421 U.S. at 701, 705. The Court spoke in broad terms, rejecting the notion that *Winship* should be "limited to those facts that constitute a crime as defined by state law" because a "State could undermine many of the interests that decision sought to protect" merely by

"redefin[ing] the elements that constitute different crimes." *Id.* at 698.

Patterson upheld New York's murder statute against a challenge based on *Mullaney*, because, although the defendant had the burden to prove "extreme emotional disturbance" to reduce the crime from murder to manslaughter, "New York, unlike Maine, had not made malice aforethought, or any described *mens rea*, part of its statutory definition of second-degree murder." *Apprendi*, 530 U.S. at 485 n.12 (discussing *Mullaney* and *Patterson*). Deference to New York's definition of murder was warranted, the Court reasoned, because the prosecution must prove beyond a reasonable doubt only "the elements included in the definition of the offense" charged; New York remained free to create affirmative defenses and require the defendant to carry the burden on those defenses. *Patterson*, 432 U.S. at 210-11. Yet, the Court recognized that its deference to legislatures left open the door to states' amending criminal statutes to shift the burden of proof on some elements of existing crimes and assured that "there are obviously constitutional limits beyond which the States may not go in this regard." *Id.* at 210.

More than two decades later, *Apprendi* conclusively confirmed in one important regard the constitutional limits on the states' ability to manipulate burdens of proof: any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

Apprendi, 530 U.S. at 490. Put differently, "all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring). That limit on legislative power has been aggressively enforced by this Court since *Apprendi*. *See Ring*, 536 U.S. at 609 (holding that aggravating factors "necessary for imposition of the death penalty" must be found by jury, not judge); *Blakely v. Washington*, 542 U.S. 296, 304-05 (2004) (invalidating Washington's sentencing scheme, which allowed judge-found facts to increase punishment); *United States v. Booker*, 543 U.S. 220, 243-44 (2005) (applying *Apprendi* and *Blakely* to the mandatory federal Sentencing Guidelines); *Cunningham v. California*, 549 U.S. 270, 293 (2007) (invalidating California's determinate sentencing scheme); *cf. Oregon v. Ice*, 555 U.S. ___, ___, 129 S. Ct. 711, 722 (2009) (Scalia, J., dissenting) ("The right to . . . proof beyond a reasonable doubt is a given, and all legislative policymaking – good and bad, heartless and compassionate – must work within the confines of that reality.").

Critically, however, *Apprendi*, *Ring*, *Blakely*, *Booker*, and *Cunningham* considered facts necessary to *increase the degree* of punishment. Those cases and all others have left the core question from *Mullaney* and *Patterson* unanswered: To what extent may states redefine crimes and reallocate burdens of proof

with regard to facts that authorize criminal punishment in the first place?

The Court must clarify this question because, as noted by Justice O'Connor in her *Apprendi* dissent, *Patterson* and *Apprendi* lead lower courts in different directions. Some courts have construed *Patterson* to mean *only* that a criminal statute may not require the defendant to negate an express element of the offense. *See, e.g.*, *United States v. Leal-Cruz*, 431 F.3d 667, 671 (9th Cir. 2005) (holding that due process "forbids shifting the burden . . . only where establishing the defense would necessarily negate an element"); *United States v. Kloess*, 251 F.3d 941, 947-48 (11th Cir. 2001) ("There is agreement, however, [that a]ny defense which tends to negate an *element* of the crime charged . . . must be *disproved* by the government."); *Davis v. Barber*, 853 F.2d 1418, 1421 (7th Cir. 1988) ("*Patterson* makes clear that a state may require a defendant to prove an affirmative defense provided it 'does not serve to negative any facts of the crime which the State is to prove in order to convict.'") (quoting *Patterson*, 530 U.S. at 207); *Wood v. Marshall*, 790 F.2d 548, 550 (6th Cir. 1986) ("If the defense does not bear upon an element of the crime, placing the burden of proof of the defense on the defendant does not violate his due process rights under *In Re Winship*, *Mullaney*, or *Patterson*.").

At the same time, *Apprendi* seems to reject *Patterson*'s extreme deference to legislatures, noting that "the relevant inquiry is one not of form, but of effect." 530 U.S. at 494; *see also Harris*, 536 U.S. at

557 (plurality opinion) ("Though defining criminal conduct is a task generally left to the legislative branch, . . . Congress may not manipulate the definition of a crime in a way that relieves the Government of its constitutional obligations to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt.") (internal quotation marks and citations omitted); *cf. Patterson*, 432 U.S. at 225 (Powell, J. dissenting) ("This decision simply leaves us without a conceptual framework for distinguishing abuses from legitimate legislative adjustments of the burden of persuasion in criminal cases."). Arizona's legislative legerdemain allows this Court to now determine where *Patterson* deference ends and the borders of *Apprendi*-land begin. *Cf. Ring*, 536 U.S. at 613 (Scalia, J., concurring).

C. State Courts Have Reached Conflicting Decisions Regarding the States' Authority to Tamper with the Prosecution's Burden of Proof in Child Molestation Cases.

Arizona's is not the only legislature to enact statutes that manipulate the prosecution's burden to prove sexual intent, beyond a reasonable doubt, in sexual molestation cases. Courts in these states, however, are split on the constitutionality of such statutes. *Cf. Jones*, 526 U.S. at 241-42 (noting that *Patterson*'s "stated recognition of some limit upon state authority to reallocate the traditional burden of

proof" remains open to "a narrow reading . . . [and] a broader reading").

For instance, explaining that its legislature had gone too far, the Minnesota Supreme Court relied on *Winship* and *Mullaney* to hold unconstitutional a jury instruction which, for conviction, required merely that the jury be "satisfied . . . that the touching could reasonably be construed as being for the purpose of satisfying the defendant's sexual impulses." *Tibbetts*, 281 N.W.2d at 500. The court concluded that the language of the instruction unconstitutionally shifted "the degree of proof . . . from acts which *must* be proved beyond a reasonable doubt to acts which *could* reasonably be construed or interpreted to be for an improper purpose." *Id.*; *accord State v. Nye*, 302 N.W.2d 83, 85-86 (Wis. Ct. App. 1981) (relying on *Tibbetts* and explaining that when the "legislature has chosen to make this a crime involving proof of specific intent . . . the legislature cannot then mandate that the specific intent can be proven by evidence which does not satisfy the reasonable doubt standard"), *aff'd* 312 N.W.2d 826 (Wis. 1981), *and abrogated on other grounds as recognized in State v. Shah*, 397 N.W.2d 492, 495 n.4 (Wis. Ct. App. 1986); *see also People v. West*, 724 P.2d 623, 628 (Colo. 1986) ("harmoniz[ing] the 'can reasonably be construed' language with those basic interests underlying the void-for-vagueness doctrine" by construing "sexual contact . . . to mean the intentional touching . . . for the purpose of sexual arousal, gratification, or abuse"). In reaching their decisions, these courts went beyond

the statutes' language and engaged in "an analysis that looks to the operation and effect of the law." *Mullaney*, 421 U.S. at 699 (citation omitted); *see also Apprendi*, 530 U.S. at 494.

Addressing a *Mullaney*-based challenge to a statute almost identical to the one at issue in *Tibbetts,* the Michigan Court of Appeals reached the opposite result. *In re Wentworth*, 651 N.W.2d at 776. The court reasoned that "the statute merely requires the prosecution to establish an intentional contact that could reasonably be construed as being for a sexual purpose." *Id.* (citing *People v. Piper*, 567 N.W.2d 483 (Mich. Ct. App. 1997)). In rejecting the defendant's argument that the statute impermissibly shifted the burden of proof, the court treated "the state legislature's definition of the elements of the offense . . . [as] dispositive," *McMillan*, 477 U.S. at 85 (stating *Patterson*'s rule). *See also Bryan v. State*, 745 P.2d 905, 909 (Wyo. 1987) (concluding that sexual or illicit intent was not an element of a sex offense because the statute required proof only "that a transgressor's acts be reasonably construed as for the purpose of abuse or gratification"); *cf. People v. Vigil*, 127 P.3d 916, 933-34 (Colo. 2006) (calling relevant part of *West* dicta and holding that sexual assault is a "general-intent crime," making voluntary intoxication unavailable as a defense); *State v. Osborn*, 490 N.W.2d 160, 167 (Neb. 1992) (noting that to prove "sexual contact" "the State need not prove sexual arousal or gratification, but only circumstances and conduct which could be construed as being for such a purpose").

Like Michigan, Nebraska, Wyoming, and most recently Colorado, the Arizona Court of Appeals charted a highly deferential path in determining that Arizona Revised Statutes sections 13-1407(E) and 13-1410 properly required May to disprove that his actions were motivated by a sexual interest. (Pet. App. 4); *see Simpson*, 173 P.3d at 1029-30; (Pet. App. 18) (applying "clear and unambiguous" statutory language to hold that Section 13-1410 "does not require the State to prove . . . motivat[ion] by sexual interest"). Especially in light of *Apprendi*'s admonition that "the relevant inquiry is one not of form, but of effect," 530 U.S. at 494, resolving the constitutionality of Arizona's reallocation of the burden of proof on the critical fact of sexual motivation will give Arizona and its sister states much needed clarity on the appropriate level of deference to legislative definitions of crimes.

D. The Constitutional Question Raised Is of Surpassing Importance Because Arizona's Statutes Relieve the State of Its Burden to Prove the Very Fact That Justifies Punishment.

The question at issue here implicates constitutional protections that this Court has characterized as "of surpassing importance." *Apprendi*, 530 U.S. at 476. Indeed, "use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of criminal law. It is

critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *In re Winship*, 397 U.S. at 364. This concern is at its height "in a case . . . where the defendant is required to prove the critical fact in dispute" because the "result . . . is to increase further the likelihood of an erroneous . . . conviction." *Mullaney*, 421 U.S. at 701; *cf.* 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872) ("[A]n accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason.").

Moreover, the interests at the heart of the Constitution's demand for a higher standard of proof in criminal cases are magnified here because of the severe loss of liberty and powerful stigma attached to a child molestation conviction. *See In re Winship*, 397 U.S. at 363. Due process cannot allow the State to visit upon one of its citizens such dire consequences in the absence of proof beyond a reasonable doubt of the very fact – motivation by sexual interest – that makes child molestation so repugnant. *Cf. Apprendi*, 530 U.S. at 495 ("The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment."). By re-labeling the element of sexual interest as an

affirmative defense, Arizona allows an accused to be punished as a *sex* offender with no requirement that the State prove anything *sexual* about the accused's conduct.

CONCLUSION

Arizona has done with its definition of child molestation exactly what Justice Powell feared when he dissented in *Patterson*. 432 U.S. at 223-24 (Powell, J., dissenting). The Court in *Patterson* assured the States and defendants alike that there existed some undefined constitutional limits that would prevent legislative chicanery from circumventing due process. *Id.* at 210 (majority opinion). The Court's intervention is now needed to fulfill *Patterson*'s promise that these constitutional limits do in fact exist.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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