IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA,

Petitioner,

v.

THE HONORABLE KEVIN B. WEIN, Commissioner of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the COUNTY OF MARICOPA,

Respondent Commissioner,

MARLIN BRYAN HENDERSON,

Real Party in Interest.

STATE OF ARIZONA,

Petitioner,

v.

THE HONORABLE KEVIN B. WEIN, Commissioner of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the COUNTY OF MARICOPA,

Respondent Judge,

GUY JAMES GOODMAN,

Real Party in Interest.

Case No. CR-17-0221-PR

Arizona Court of Appeals, Div. 1, No. 1 CA-SA 17-0072 (consolidated with No. 1 CA-SA 17-0077)

Maricopa County Superior Court Case Nos. CR2017-108708-001 CR2017-107553-001

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF ARIZONA IN SUPPORT OF REAL PARTIES IN INTEREST

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INTRODUCTION AND SUMMARY OF ARGUMENT

Prior to his conviction, an accused is afforded the presumption of innocence: "the bedrock, axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law."[1] To categorically deny the right to bail outside of the capital context eviscerates this presumption, violates due process, and causes unnecessary and widespread individual and community harm.

In declaring a defendant ineligible for bail based solely on his arrest for a particular crime, Arizona has overstepped the traditional—and permissible—role of bail in the criminal justice system. Moreover, Arizona's law is an outlier: 44 states have no such outright denial of bail in noncapital cases, and only one other rejects bail categorically for people accused of sex offenses. Finally, as highlighted by increased national attention, overbroad pretrial detention wreaks havoc on individuals and communities and is unnecessary to ensure community safety and the efficient administration of courts.

Article II, Section 22 of the Arizona Constitution and Arizona Revised Statute § 13-3961(A) (collectively, "the Prop 103 laws") represent an impermissibly broad deprivation of this norm. As this Court recently held in *Simpson v. Miller (Simpson II)*, due process forbids the state from denying bail categorically "for those accused

[1] *Betterman v. Montana*, 136 S. Ct. 1609, 1614 (2016) (internal citation omitted).

of crimes that do not inherently predict future dangerousness."[2] Put differently, a categorical prohibition on bail that is "not narrowly focused to protect public safety…violates the Fourteenth Amendment's due process guarantee."[3] As the charge of sexual assault alone cannot predict the future dangerousness of a particular defendant, Arizona's Prop 103 laws are not narrowly tailored to protect public safety. Amici therefore urge this Court to overrule the decision of the Court of Appeals, making clear that categorical prohibitions on bail for those charged with non-capital offenses are unconstitutional.

ARGUMENT

I. Categorical Denials of the Right to Bail Run Afoul of Due Process

It is undisputed that "[i]n our society liberty is the norm, and detention prior to trial…is the carefully limited exception."[4] Importantly, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."[5] But under the Prop 103 laws, criminal defendants accused of sexual assault are still deemed *categorically ineligible* for any form of pretrial release. The law holds accused persons in pretrial detention without any individualized determination of whether they pose a flight risk or danger to the

[2] 241 Ariz. 341, ¶ 30 (2017).
[3] *Id*. at ¶ 1.
[4] *United States v. Salerno*, 481 U.S. 739, 755 (1987).
[5] *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

community. State courts are thus stripped of the power to set bail even when they would find that a defendant poses no such risk. The Prop 103 laws effectively punish persons accused of sexual assault before any juror swears an oath, any witness takes the stand, any trial exhibit is offered into evidence, or any verdict is rendered. In other words, the Prop 103 laws eviscerate the presumption of innocence. And, troublingly, this is done with complete disregard for the facts of an individual case or the history and characteristics of an individual defendant.

A. Courts have Emphasized that Pretrial Liberty is the Norm Since *United States v. Salerno*

In its landmark case upholding the constitutionality of the 1984 Bail Reform Act, *United States v. Salerno*, the Supreme Court began to establish minimum standards for a pretrial detention statute to pass constitutional muster.[6] *Salerno* emphasized the narrow scope of the Bail Reform Act's pretrial detention mechanism, as well as the rigorous process afforded accused persons when the government seeks pretrial detention.[7] The Court noted that the Bail Reform Act "operates only on individuals who have been arrested for a specific category of extremely serious offenses," and that the government must make a probable cause showing "that the charged crime has been committed by the arrestee, *but that is not*

[6] 481 U.S. at 750.
[7] *Id.*

enough."[8] Finally, "[i]n a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person."[9] The Court specifically cautioned against laws without such narrowly-tailored and procedurally-robust mechanisms, distinguishing the limitations in the Bail Reform Act from a "scattershot attempt to incapacitate those who are merely suspected of these serious crimes."[10]

The United States Supreme Court has made clear that its holding in *Salerno* was not an invitation to expand pretrial detention practices; quite the opposite.[11] Significantly, while *Salerno* authorized the use of pretrial detention in certain narrow circumstances, the Supreme Court has never authorized a categorical denial of the right to bail. "Neither *Salerno* nor any other case authorizes detaining someone in jail while awaiting trial, or the imposition of special bail conditions, based merely on the fact of arrest for a particular crime."[12]

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[8] *Id.* (emphasis added).
[9] *Id*. (internal citation omitted).
[10] *Id.*
[11] *See Foucha*, 504 U.S. at 83 ("The narrowly focused pretrial detention of arrestees permitted by the Bail Reform Act was found to be *one of those carefully limited exceptions permitted* by the Due Process Clause") (emphasis added).
[12] *United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006).

Numerous courts have emphasized the need for individualization in setting bail in other contexts. For example, in *Pugh v. Rainwater*, the Fifth Circuit highlighted the need for thoughtful, tailored inquiries in the bail context, noting, the impact of decisions on release conditions "vary under varying circumstances."[13] On this basis, courts have invalidated bail systems that rely on mandatory schedules to set money bail for specific offenses. For example, the Eastern District of Missouri entered an order requiring a prompt individualized hearing prior to pretrial detention.[14]

More recently, the Court of Appeals for the First Appellate District of California, in holding reliance on bail schedules without considering a defendant's ability to pay and alternatives to money bail violate the constitutional guarantees of due process and equal protection, noted the "fundamental requirement" that pretrial release decisions "must be based on factors related to the *individual defendant's circumstances*."[15] Similarly, the Supreme Judicial Court of Massachusetts, in holding that judges are required to consider each defendant's financial resources when setting bail, relied on "common law" and "constitutional principles" when

[13] 572 F.2d 1053, 1057 (5th Cir. 1978).
[14] *See Pierce v. City of Velda City*, 2015 WL 10013006, at *1 (E.D. Mo. Jun. 3, 2015).
[15] *In re Humphrey*, 2018 WL 550512, at *19 (Jan. 25, 2018) (Cal. Ct. App. Jan. 25, 2018) (emphasis added).

declaring any reasonable pretrial release determination "must be based on the *individual character and circumstances* of each defendant."[16]

Other courts have found the mere imposition of mandatory *conditions* of pretrial release unconstitutional.[17] These decisions further emphasize the fundamental nature of the right to pretrial liberty and demonstrate the need for individualization at all phases of the bail process.

B. Arizona's Categorical Denial of the Right to Bail for Those Charged with Sexual Assault is not Narrowly Tailored

In *Simpson II*, this Court held that a categorical prohibition on bail that is "not narrowly focused to protect public safety…violates the Fourteenth Amendment's due process guarantee."[18] Such a holding compels the same result in this case. Arizona's categorical prohibition on bail for those charged with sexual assault—like

[16] *Brangan v. Commonwealth*, 477 Mass. 691, 699 (2017) (emphasis added).
[17] *See United States v. Vujnovich*, No. 07-20126-01, 2008 WL 687203, at *2 (D. Kan. Mar. 11, 2008) (finding Adam Walsh Act unconstitutional as applied to plaintiff because magistrate imposed electronic monitoring solely based on crimes charged); and *United States v. Arzberger*, 592 F. Supp. 2d 590, 601 (S.D.N.Y. 2008) (finding Adam Walsh Act unconstitutional because "no defendant is afforded the opportunity to present particularized evidence to rebut the presumed need to restrict his freedom of movement"); *Scott*, 450 F.3d at 874–75 (finding unconstitutional a pretrial release condition requiring defendant to submit to mandatory drug tests, without individualized hearing to establish that condition was needed).
[18] 241 Ariz. at ¶ 1.

its categorical prohibitions on bail for those charged with sexual conduct with a minor and molestation of a child—is not narrowly focused to protect public safety.

Here, like in *Simpson II*, "[t]he challenged prohibitions…are not narrowly focused given alternatives that would serve the state's objective equally well at less cost to individual liberty."[19] Anyone charged with sexual assault is subject to A.R.S. § 13-3961(D), a procedure that allows the court to deny bail on the state's motion following a hearing. This procedure, which "is essentially the same as the one upheld in *Salerno*," allows the state "to deploy the entire range of permissible conditions of release to ensure community safety, including GPS monitoring."[20]

Such monitoring—when appropriate, after individualized consideration—could satisfy the state's interest in community safety while better protecting an individual's "fundamental due process right to be free from bodily restraint."[21] Evidence suggests that the recidivism rate for sex offenders may be significantly lowered with the use of GPS monitoring at the pretrial stage as well as at post-conviction.[22] Thus, Arizona's categorical denial of bail to those accused of sexual

[19] *Id*. at ¶ 28.
[20] *Id*. at ¶ 29.
[21] *Id*. at ¶ 9.
[22] Stephen V. Gies, et al., *Monitoring High-Risk Sex Offenders with GPS Technology: An Evaluation of the California Supervision Program* xvii-xviii (March 31, 2012).

assault is not narrowly tailored because any potential risk of future dangerousness can be managed with the less restrictive imposition of GPS monitoring.

Given such alternatives to categorically denying bail, the Prop 103 laws cannot withstand heightened scrutiny. Due process simply does not allow the government to override "the importance and fundamental nature" of an "individual's strong interest in liberty" through a "scattershot attempt" to protect public safety while ignoring viable alternatives that would achieve the same outcome.[23]

C. The Charge of Sexual Assault is not a Proxy for Future Dangerousness

In *Simpson II*, this Court read *Salerno* to not require an individual determination of dangerousness in every case, so long as the procedure used by the government "serve[s] as a convincing proxy for unmanageable flight risk or [future] dangerousness."[24]Arizona's procedure to determine when the proof is evident or the presumption great as to the charge of sexual assault, however, does not serve as a such a proxy. First, sexual assault can be committed in either a dangerous or non-dangerous manner as that term is defined in A.R.S. § 13-105(13).[25] Moreover, an offense's alleged dangerousness at the time of its commission does not provide

[23] *Salerno*, 481 U.S. at 750.
[24] *Simpson II*, 241 Ariz. at ¶ 26, (citing *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 786 (2014)); *Id*. at ¶30.
[25] *See also*, A.R.S. §§ 13-1406(A)-(B), *contra* A.R.S. § 13-1406(D).

individualized information about the future dangerousness of a particular defendant. Nor does a crime's nonconsensual nature.[26]

In fact, it is unlikely that the simple accusation of any crime could serve as a proxy for future dangerousness. Not even capital offenses serve as proxies for future dangerousness. Rather, "[h]istorically, capital offense charges have been considered to present an inherent *flight risk* sufficient to justify bail denials."[27]

Data from the Department of Justice Bureau of Justice Statistics ("BJS") and the Arizona Department of Corrections ("DOC") seem to confirm this. In a 2016 report, BJS found that individuals who had been convicted of a sex offense (including rape and sexual assault) had the lowest rate of re-arrest following release from prison.[28] Similarly, in a 2005 report, DOC found that those convicted of sex offenses (including sexual assault) had the lowest recidivism rate among all prisoners released from DOC between 1990 and 1999.[29] In fact, over 90% of those

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[26] *See e.g.* A.R.S. § 13-1802(A)(2) (defining theft as using the property or services of another for a period longer than to which the owner consented).
[27] *Simpson II*, 241 Ariz. at ¶ 26. (emphasis added).
[28] Joshua A. Markman, et al., Department of Justice Bureau of Justice Statistics, *Recidivism of Offenders Placed on Federal Community Supervision in 2005: Patterns from 2005 to 2010*, at 6 (June 2016), available at: https://www.bjs.gov/content/pub/pdf/ropfcs05p0510.pdf (last viewed Feb. 9, 2018).
[29] Arizona Dep't of Corrections, *Arizona Inmate Recidivism Study, Executive Summary*, at 6 (May 2005), available at: https://corrections.az.gov/sites/default/files/recidivism_2005.pdf (last viewed Feb. 9, 2018).

convicted of sex offenses in Arizona during that period were not convicted of a new felony within three years of release.[30] Clearly, if those *accused and presumed innocent* of sexual assault posed an unmanageable risk of future dangerousness, then recidivism rates of those *convicted* of sexual assault would be higher than those convicted of other, bail-eligible crimes. The data, however, shows the opposite.

In response to such data, the Government argues "neither *Simpson II* nor *Salerno* requires the presentation of precise empirical data to demonstrate a law's narrow focus."[31] As the Court in *Lopez-Valenzuela* explained, however, under *Salerno* whether a law "narrowly focuses on a particularly acute problem is part of th[e] inquiry," thus making empirical data relevant.[32] Moreover, courts routinely rely upon empirical data when deciding cases such as this.[33]

Finally, the facts of this case demonstrate that the charge of sexual assault is not a proxy for future dangerousness. Petitioner Goodman's alleged offense occurred approximately seven years before the indictment, with no other felony criminal history in the interim.[34] As Respondent judge found, "there was no

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[30] *Id*.
[31] Response to Petition for Review at 13-14.
[32] *Lopez-Valenzuela*, 770 F.3d at 884 (citing *Salerno*, 481 U.S. at 750) (internal quotation omitted).
[33] *See e.g. Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. 318, 326 (2012) (relying on BJS data).
[34] Petition for Review at 4.

evidence introduced that [Mr. Goodman] poses an ongoing danger to the [alleged] Victim or the community."[35] To categorically deny bail for individuals like him cannot be justified by the state's interest in community safety. To do so runs afoul of Due Process and eviscerates the presumption of innocence.

II. Arizona's Categorical Bail Denial Law Departs from the Well-Established Tradition of Release in Noncapital Cases

The Prop 103 laws are nearly unprecedented in the United States. The vast majority of states do not provide for any categorical denials of bail in noncapital cases. The law in nine states—Georgia,[36] Hawaii,[37] New Jersey,[38] New York,[39] North Carolina,[40] Rhode Island,[41] Virginia,[42] West Virginia,[43] and Wisconsin[44]—do not provide for categorical bail denials, even in capital cases. In thirty-five states—

[35] *Id*.
[36] Ga. Code § 17-6-1.
[37] Haw. Rev. Stat. § 804-3.
[38] N.J.S.A. 2A: 162-19.
[39] N.Y. Crim. Proc. Law § 530.20.
[40] N.C. Gen. Stat. §§ 15A-533–34.
[41] R.I. Super. R. Crim. P. 46.
[42] Va. Code § 19.2-120 (setting forth numerous rebuttable presumptions favoring pretrial detention, but all determined by a judge at a hearing).
[43] W. Va. Code § 62-1C-1.
[44] Wis. Const. art. I, § 8.

Alabama, [45] Alaska, [46] Arkansas, [47] California, [48] Colorado, [49] Connecticut, [50] Delaware,[51] Florida,[52] Idaho,[53] Illinois,[54] Indiana,[55] Iowa,[56] Kansas,[57] Kentucky,[58] Louisiana, [59] Maine, [60] Massachusetts, [61] Minnesota, [62] Missouri, [63] Montana, [64]

[45] Ala. Const. art. I, § 16.
[46] Alaska Const. art. I, § 11.
[47] Ark. Const. art. II, § 8.
[48] Cal. Const. art. I, § 12.
[49] Colo. Const. art. II, § 19; *see also* Colo. Rev. Stat. § 16-4-101.
[50] Conn. Const. art. I, §8(a).
[51] Del. Const. art. I, § 12.
[52] Fla. Const. art. I, § 14.
[53] Idaho Const. art. I, § 6.
[54] Ill. Const. art. I, § 9.
[55] Ind. Const. art. 1, § 17 (categorical denial of bail for murder and treason only); *see Fry v. Indiana*, 990 N.E. 2d 429, 449 (Ind. 2013) (identifying treason as a capital offense).
[56] Iowa Const. art. I, § 12.
[57] Kan. Const. Bill of Rights § 9.
[58] Ky. Const. § 16.
[59] La. Const. art. I, § 18.
[60] Me. Const. art. I, §10.
[61] Mass. Gen. Law 276 § 20D
[62] Minn. Const. art. I, § 7.
[63] Mo. Const. art. I, § 20.
[64] Mont. Const. art. 2, § 21.

Nevada,[65] New Hampshire,[66] New Mexico,[67] North Dakota,[68] Ohio,[69] Oklahoma,[70] Oregon,[71] Pennsylvania,[72] South Carolina,[73] South Dakota,[74] Tennessee,[75] Texas,[76] Vermont,[77] Washington,[78] and Wyoming[79]—bail is only categorically denied when a defendant is accused of a capital crime or a crime punishable by life imprisonment.

Of the remaining six states that authorize categorical bail denials for noncapital cases, Arizona and Nebraska stand alone in categorically prohibiting an individualized bail consideration when a defendant is accused of a sex offense.

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[65] Nev. Const. art. I, § 7.
[66] N.H. Rev. Stat. §§ 597:1, 1-c.
[67] N.M. Const. art. II, § 13.
[68] N.D. Const. art. I, § 11.
[69] Oh. Const. art. I, § 9. In addition to capital cases, the Ohio state constitution prohibits bail for persons charged with felonies who "pose[] a substantial risk of serious physical harm to any person or to the community." However, amici's research suggests that persons in this latter category are still afforded an individualized hearing about the danger presented to the community upon release.
[70] Okla. Const. art. II, § 8; *see also* 22 Okla. Stat. § 1102 (setting forth procedures for bail hearing in noncapital cases).
[71] O.R.S. § 135.240 (denying bail for murder, aggravated murder, or treason); O.R.S. § 166.055(3) (treason is punishable by life imprisonment); O.R.S. § 163.115 (murder punishable by life imprisonment).
[72] Pa. Const. art. I, § 14.
[73] S.C. Const. art. I, §15.
[74] S.D. Cod. Law § 23A-43-2.
[75] Tenn. Const. art. I, § 15.
[76] Tex. Const. art. I, §§11, 11(a).
[77] Vt. Const. CH II, § 40.
[78] Wash. Const. art. I, § 20.
[79] Wyo. Const. art. I, § 14.

Maryland includes an outright denial of bail for persons accused of escape.[80] Michigan contains a categorical denial of bail for defendants with two or more violent felony convictions in the past fifteen years, defendants accused of committing a violent felony while out on bail, and defendants accused of murder or treason.[81] Mississippi categorically denies bail only for capital offenses and in cases in which the accused has previously been convicted of a capital offense or crime punishable by twenty years in prison.[82] Finally, Utah categorically denies bail only as to defendants charged with committing a capital offense or a felony while free on bail from another felony charge.[83]

Only in Nebraska is there a law as far-reaching as the Prop 103 laws.[84] Notably, the Eighth Circuit determined that this provision violated the Excessive Bail Clause of the Eighth Amendment.[85] As the Eighth Circuit stated, "[i]t is sufficient to observe that the Nebraska procedures *provide for no inquiry into the*

[80] Md. Code. Cr. P. § 5-202. The Maryland statute creates rebuttable presumptions against release for other crimes including drug kingpin charges, but those release determinations are made at an individualized hearing.
[81] Mich. Const. art. I, § 15.
[82] Miss. Const. art. 3 § 29.
[83] Utah Code Cr. P. § 77-20-1.
[84] Neb. Const. art. I, § 9 ("All persons shall be bailable by sufficient sureties, except for . . . sexual offenses involving penetration by force or against the will of the victim . . .").
[85] *Hunt v. Roth*, 648 F.2d 1148, 1164–65 (8th Cir. 1981), *vacated as moot sub nom. Murphy v. Hunt*, 455 U.S. 478 (1982).

dangerousness of the individual, and no such finding appears in the record of this case. Instead, Nebraska has made a legislative determination that an entire class of accused persons is not entitled to bail."[86] The Supreme Court later reversed the Eighth Circuit's decision on mootness grounds, as the defendant was convicted during the pendency of his § 1983 claims in federal court, but left its reasoning undisturbed.[87]

The Arizona and Nebraska laws passed in 2006 and 1986, respectively, are of recent vintage compared to the longstanding history of denying bail only in capital cases. "From the passage of the Judiciary Act of 1789 to the present Federal Rules of Criminal Procedure, federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail."[88] Prop 103 laws' break from tradition marks the beginning of a dangerously slippery slope.

Even the widely-accepted use of categorical denials of bail in capital offenses is not absolute. Courts have long held that arrest for a capital case may constitute a "convincing proxy" for risk of flight, as "most defendants facing a possible death penalty would likely flee regardless of what bail was set, but those facing only a

[86] *Id.* at 1164 (emphasis added).
[87] *Murphy v. Hunt*, 455 U.S. 478 (1982).
[88] *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

possible prison sentence would not[.]"[89] However, "[i]f in any particular case the presumed likelihood of flight should be made irrebuttable, it would in all probability violate the Due Process Clause."[90] Given that the Supreme Court has signaled that there may be constitutional problems with categorical denials of bail in the capital context, an expansion of such denials for less serious offenses becomes even more untenable.

III. Pretrial Detention Causes Widespread, Irreparable, and Unnecessary Harm

The Supreme Court has recognized that "[p]retrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."[91] Moreover, the "traditional right to freedom before conviction permits the unhampered preparation of a defense," whereas being locked in a jail inhibits a defendant's ability to prepare for trial.[92]

These concerns have borne out in social science data. Pretrial detention is a key driver in the overcrowding of our nation's jails: approximately seventy percent

[89] *United States v. Kennedy*, 618 F.2d 557, 559 (9th Cir. 1980) (per curiam) (collecting cases).
[90] *Salerno*, 481 U.S. at 765, n. 6 (Marshall, J., dissenting).
[91] *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (internal citation omitted).
[92] *Stack*, 342 U.S. at 4.

of those jailed in the United States have not yet been convicted.[93] In Arizona over three-quarters of those in our county jails have not been convicted.[94] Controlling for other factors, pretrial detention is the greatest predictor of a conviction due to the immense pressure on the accused to plead guilty.[95] Upon conviction, those jailed pretrial tend to receive longer sentences than those released.[96] Moreover, those who are detained pretrial run high risks of losing jobs, child custody, and housing.

Beyond offending the Constitution, the Prop 103 laws' blanket pretrial detention is not necessary. As this Court has recognized, Arizona has a compelling interest in addressing serious crimes and ensuring citizen safety.[97] But these purposes are not disturbed by the implementation of an individualized bail hearing, as evidenced by the overwhelming national practice of providing such hearings. In

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[93] In 2017, 443,000 of the 630,000 inmates in U.S. jails were awaiting their trial. Prison Policy Initiative, "Mass Incarceration: The Whole Pie 2017," available at: https://www.prisonpolicy.org/reports/pie2017.html (last viewed February 9, 2018).

[94] In 2015, approximately 10,100 of the 13,360 inmates in Arizona jails were awaiting trial. Vera Institute for Justice, "Incarceration Trends," 2015, available at: http://trends.vera.org/incarceration-rates?data=pretrial&geography=states (last viewed Feb. 9, 2018).

[95] *See* Christopher T. Lowenkamp, Marie VanNostrand & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* 10–11 (2013); Mary T. Philips, New York City Crim. Justice Agency, Inc., *Pretrial Detention and Case Outcomes, Part 1: Nonfelony Cases* 25–29 (2007); Human Rights Watch, *Every 25 Seconds: The Human Toll of Criminalizing Drug Use* 88 n.216 (2016) (discussing pressure to plead guilty while in pretrial detention among all defendants).

[96] Lowenkamp, *supra* at 3–4 (2013).

[97] *See Simpson II*, 241 Ariz. at ¶ 20.

determining the appropriate means to achieve the purposes of ensuring court appearance and public safety, due process demands courts consider release conditions less restrictive than incarceration, including "third party custody; maintaining employment; abiding by restrictions on place of abode or travel; reporting on a regular basis to a designated law enforcement agency; complying with a curfew," executing an unsecured bond, location monitoring, and any other conditions a court deems reasonably necessary.[98] Indeed, by empowering courts to conduct such inquiries, it is possible for states to honor public safety concerns and the constitutional protections of due process and the presumption of innocence.

[98] *United States v. Hanson*, 613 F. Supp.2d 85, 88 (D. D.C. 2009) (listing several conditions).

CONCLUSION

The Prop 103 laws represent an impermissible expansion of the categorical bail denials traditionally reserved for capital cases. These laws unconstitutionally reverse the presumption of innocence and deny individuals due process of law, while causing unnecessary individual and community harm. Amici respectfully request this Court reverse the decision of the Court of Appeals, making clear that a categorical prohibition on bail for those charged with sexual assault without an individualized determination of future dangerousness is unconstitutional.

Respectfully submitted, this 9th day of February, 2018.

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