No. 18-391

In the Supreme Court of the United States

STATE OF ARIZONA, PETITIONER

v.

GUY JAMES GOODMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF FOR THE STATES OF TEXAS, NEBRASKA, ARKANSAS, COLORADO, GEORGIA, LOUISIANA, AND NEW MEXICO AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Nebraska, Arkansas, Colorado, Georgia, Louisiana, and New Mexico.[1] The States have an inherent interest in their ability to execute their laws. That is especially so where, as here, the laws at issue are designed to promote public safety. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2178 (2016) (public safety is a State's "paramount interest") (quoting *Mackey v. Montrym*, 443 U.S. 1, 17 (1979)). And this Court has long recognized the government's "legitimate and compelling" "interest in preventing crime by arrestees." *United States v. Salerno*, 481 U.S. 739, 749 (1987).

An overwhelming majority of States categorically deny bail to persons charged with capital offenses, murder, specified sex offenses, or offenses punishable by life imprisonment. *See infra* p. 5. The Arizona Supreme Court has now cast doubt on the validity of those practices. Amici thus respectfully ask this Court to reverse the decision below and uphold the broad national consensus that States may categorically deny bail to certain classes of arrestees when proof of the crime is evident.

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici contributed monetarily to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

I.A. States have a foundational interest in the protection of their citizens from dangerous criminals. That is why for centuries, a clear majority of States have categorically denied bail to certain classes of arrestees when the proof of guilt is evident or the presumption great.

States most commonly categorically deny bail for capital offenses. But many States categorically deny bail for non-capital offenses as well. Some deny bail for crimes of violence. Others deny bail to arrestees accused of dangerous crimes who might reoffend if released. Still others deny bail to arrestees who face particularly severe sentences, to ensure that such arrestees have no opportunity to flee or otherwise evade justice.

B. Arizona's Proposition 103 reflects the view of the people of Arizona that sexual assault ranks among the most dangerous and heinous crimes for which bail should be categorically denied when the State presents adequate proof of guilt. Proposition 103 does not permit the denial of bail merely by the fact of an arrest. Instead, it includes myriad procedural safeguards and protections to ensure that bail is denied only when no serious doubt exists as to the defendant's guilt. With those safeguards, Arizona ensures that it is exceedingly unlikely that an arrestee's liberty interest will be unjustly infringed.

C. In concluding that persons who are almost certainly guilty of sexual assault do not merit bail, the people of Arizona joined the broad nationwide consensus that bail may be categorically denied for society's most horrific crimes. Sexual assault is, after all, inherently a

crime of violence—one that rightly carries severe penalties. And this Court has acknowledged and even documented the particularly high recidivism rates associated with perpetrators of sexual assault. Against that factual and legal backdrop, the people of Arizona enacted Proposition 103 to ensure that sexual assault perpetrators cannot harm others, evade justice, or intimidate the witnesses against them—especially their victims.

II. This case presents a prime opportunity for the Court to declare that States may categorically deny bail to violent criminals. Indeed, the record before the Court makes this an easy case. Witness testimony, DNA evidence, and Goodman's own confession all but assure his conviction. Against that overwhelming evidence of guilt, the Court is well positioned to restate its previous recognition that sexual assault is a particularly heinous crime of violence with a high recidivism rate. By reiterating those principles, this Court can—and should—reverse the Arizona Supreme Court's wayward analysis.

ARGUMENT

I. Proposition 103 Reflects a Nationwide Consensus That States May Categorically Deny Bail for Serious Crimes When the State Presents Evident Proof of Guilt.

Protecting its citizens is one of a sovereign State's most compelling interests. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2178 (2016) (public safety is a State's "paramount interest") (quoting *Mackey v. Montrym*, 443 U.S. 1, 17 (1979)). As a result, this Court has long held that there is no constitutional prohibition on categorical denials of bail based on the nature of the offense. *See United States v. Salerno*, 481 U.S. 739, 753 (1987) (Constitution does not prohibit denial of bail in capital cases).

The people of Arizona properly advanced that interest when they enacted Proposition 103 by an overwhelming margin. Arizona joined a clear majority of States that categorically deny bail to certain dangerous arrestees.

A. For centuries, most States have enforced the categorical denial of bail for serious crimes.

When the voters of Arizona enacted Proposition 103, they joined a centuries-old practice of denying bail to dangerous criminals when proof of guilt is evident. For example, while the Texas Constitution provides for bail "by sufficient sureties," it explicitly excepts "capital offenses, when the proof is evident." Tex. Const. art. I, § 11. Thirty-six States take the same view, denying bail

for capital offenses when the proof is evident or the presumption great.[2]

But other States deny bail to an even broader set of offenses. For example, the Colorado Constitution denies bail not only for capital offenses, but also for other "crime[s] of violence" that are "alleged to have been committed while on probation or parole resulting from the conviction of a crime of violence." Colo. Const. art. II, § 19(1)(b)(I). In addition, bail must be denied as to any crime of violence for any arrestee with two previous felony convictions if one such conviction was for a crime of violence. *Id.* § 19(1)(b)(III).

The California Constitution similarly authorizes the denial of bail for certain violent offenses. It provides an exception to the general rule of bail release upon sufficient sureties for "[f]elony offenses involving acts of violence on another person, or felony sexual assault offenses

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[2] *See* Ala. Const. art. I, § 16; Alaska Const. art I, § 11; Ariz. Const. art. II, § 22A; Ark. Const. art. II, § 8; Cal. Const. art. I, §§ 12(a), 28(f)(3); Colo. Const. art. II, § 19(1)(a); Conn. Const. art. I, § 8(a); Del. Const. art. I, § 12; Fla. Const. art. I, § 14; Idaho Const. art. I, § 6; Ill. Const. art. I, § 9; Ind. Const. art. I, § 17; Iowa Const. art. I, § 12; Kan. Const. Bill of Rts. § 9; Ky. Const. § 16; La. Const. art. I, § 18(A); Me. Const. art. I, § 10; Mass. Gen. Laws ch. 276, § 20D; Minn. Const. art. I, § 7; Miss. Const. art. III, § 29(1); Mo. Const. art. I, § 20; Mont. Const. art. II, § 21; Neb. Const. art. I, § 9; Nev. Const. art. I, § 7; N.H. Rev. Stat. § 597:1-c; N.M. Const. art. II, § 13; N.D. Const. art. I, § 11; 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(1); Wash. Const. art. I, § 20; Wyo. Const. art. I, § 14.

on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others." Cal. Const. art. I, § 12(b). It likewise contemplates the denial of bail for "[f]elony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released." *Id.* § 12(c).

Louisiana takes a similar approach, authorizing the denial of bail to certain persons charged with "crime[s] of violence." La. Const. art. I, § 18(B). That is, a person charged with a crime of violence "shall not be bailable if, after a contradictory hearing, the judge or magistrate finds by clear and convincing evidence that there is a substantial risk that the person may flee or poses an imminent danger to any other person or the community." *Id.* The same goes for persons charged with offenses related to "a controlled dangerous substance" as defined in Schedule I of the federal Schedule of Controlled Substances. *Id.*; La. Stat. § 40:961(7). Further, a person previously released on bail for a crime of violence or for producing, manufacturing, or distributing a controlled dangerous substance is categorically ineligible for bail if the person previously failed to appear and an arrest warrant was issued and not recalled or the prior bail was revoked or forfeited. La. Code Crim. Proc. art. 312(B).

Other States categorically deny bail based on the punishment associated with a particular offense. For ex-

ample, the Illinois Constitution denies bail for any offense "for which a sentence of life imprisonment may be imposed as a consequence of conviction." Ill. Const. art. I, § 9. It further includes "felony offenses for which a sentence of imprisonment, without conditional and revocable release, shall be imposed by law as a consequence of conviction, when the court, after a hearing, determines that release of the offender would pose a real and present threat to the physical safety of any person." *Id.*

Massachusetts, New Hampshire, Rhode Island, and Washington follow the punishment-based approach of Illinois. In New Hampshire and Rhode Island, bail is unavailable to persons charged with offenses punishable by life imprisonment. N.H. Rev. Stat. § 597:1-c ("Any person arrested for an offense punishable by up to life in prison, where the proof is evident or the presumption great, shall not be allowed bail."); R.I. Const. art. I, § 9 (generally authorizing bail except "for offenses punishable by imprisonment for life . . . when the proof of guilt is evident or the presumption great."). Rhode Island likewise prohibits bail (upon the same standard of evident guilt or great presumption) for offenses involving the use or threatened use of a dangerous weapon by a person previously convicted of that offense or an offense punishable by life imprisonment, or for offenses involving the unlawful sale, distribution, manufacture, or delivery of any controlled substance, or the possession of a controlled substance punishable by imprisonment for ten years or more. R.I. Const. art. I, § 9.

Massachusetts, Michigan, Oklahoma, and Washington are similar, except they permit (rather than require)

the denial of bail for certain offenses. By statute, Massachusetts authorizes the denial of bail for any offense punishable by life imprisonment. Mass. Gen. Laws ch. 276, § 20D. So does Washington. Wash. Const. art. I, § 20 ("Bail may be denied for offenses punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons . . . ."). Michigan authorizes the denial of bail, when the proof is evident or the presumption great, to persons charged with murder, treason, or any violent felony allegedly committed while the defendant was on bail pending the disposition of a prior violent felony charge or on probation or parole following a prior conviction for a violent felony. Mich. Const. art. I, § 15(b), (d). Oklahoma authorizes the denial of bail not only for capital offenses and offenses punishable by life imprisonment, but also for violent offenses, offenses where the defendant was previously convicted of multiple felony offenses arising out of different transactions, and offenses involving controlled dangerous substances for which the maximum sentence is at least ten years' imprisonment. Okla. Const. art. II, § 8(A).

Still other States authorize denying bail when public safety requires confinement. For example, the Mississippi Constitution provides that for any offense punishable by 20 years or more of imprisonment, the court may deny bail "upon making a determination that the release of the person or persons arrested for such offense would constitute a special danger to any other person or to the community or that no condition or combination of conditions will reasonably assure the appearance of the person

as required." Miss. Const. art. III, § 29(3). Similarly, Georgia authorizes bail release only when a court finds that the defendant poses no significant (1) risk of fleeing the jurisdiction or failing to appear, (2) threat or danger to any person, (3) risk of committing any felony pending trial, (4) risk of intimidating witnesses or otherwise obstructing the administration of justice. Ga. Code Ann. § 17-6-1(e)(1). And for defendants in Georgia charged with a serious violent felony who were previously convicted of a serious violent felony, there is a rebuttable presumption that no condition or combination of conditions will reasonably assure both the defendant's court appearance and the safety of the community. *Id.* § 17-6-1(e)(3).

Several other States, including New Mexico, Ohio, Pennsylvania, and Utah have adopted this safety-based approach. *See* N.M. Const. art. II, § 13 (denying bail for any felony "if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community"); Ohio Const. art. I, § 9 (denying bail for "a substantial risk of serious physical harm to any person or to the community"); Pa. Const. art. I, § 14 (denying bail when "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person"); Utah Code § 77-20-1(2) (denying bail where a "person would constitute a substantial danger to any other person or to the community, or is likely to flee the jurisdiction of the court, if released on bail").

Most relevant here, several States deny bail for sexual assault. Like the Arizona Constitution, the Nebraska

Constitution explicitly prohibits bail if the "proof is evident or the presumption great" that a person committed a sexual offense "involving penetration by force or against the will of the victim." Neb. Const. art. I, § 9. The Nebraska Supreme Court has upheld that provision against constitutional challenges. *See Parker v. Roth*, 278 N.W.2d 106, 114 (Neb. 1979); *State v. Boppre*, 453 N.W.2d 406, 418 (Neb. 1990). Similarly, as noted above, the California Constitution provides for the denial of bail for "felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others." Cal. Const. art. I, § 12. And Michigan authorizes the denial of bail to persons charged with first degree criminal sexual conduct, unless the court finds by clear and convincing evidence that the defendant is unlikely to flee or endanger another person. Mich. Const. art. I, § 15(c); *see also* Mich. Comp. Laws § 750.520(b) (defining first degree sexual conduct).

This litany of examples shows that States have wide discretion to regulate pre-trial release. They have exercised that discretion in a variety of ways, and each of those policy choices falls within the boundaries set forth in the Constitution—either under the Eighth Amendment's express regulation of bail or, as here, under the generalities of the Due Process Clause.

B. In enacting Proposition 103, the people of Arizona demonstrated through their democratic process that sexual assault counts among the dangerous and serious crimes meriting categorical denial of bail.

For decades, Arizona—like most other States—has categorically denied bail to persons arrested for certain classes of offenses when little doubt exists as to guilt. *See* Pet. App. 3-4. For example, Arizona has long denied bail as to capital offenses, as well as felony offenses committed while the accused is on bail for a separate felony charge. *See id.* These limitations reflect sensible public policy: when a State presents convincing evidence of guilt, persons accused of the most heinous and dangerous crimes should remain confined pending trial, lest they harm others, flee justice, or intimidate witnesses. *See* Ariz. Const. art. 2, § 22B; Ariz. Rev. Stat. § 13-3961, historical note; *see also* Pet. App. 3-4 (describing same).

In 2002, by an overwhelming margin, the voters of Arizona extended the classes of crimes for which bail could be denied when proof of the offense is evident. *See* Ariz. Const. art. II, § 22(A); *State ex rel. Romley v. Rayes*, 75 P.3d 148, 152 (Ariz. Ct. App. 2003) (noting 80% support for Proposition 103); *see also* Pet. App. 4 (describing Proposition 103). In passing Proposition 103, Arizona voters unmistakably expressed, through their democratic procedures, their view that sexual assault ranks among society's most vile and violent crimes. *See* Ariz. Const. art. II, § 22(A). The people of Arizona reasonably believe that when it comes to bail, an apparent

rapist is situated no differently than an apparent murderer. Both might offend again while on bail, both have strong incentives to evade re-apprehension, and both present a general danger to the public and a particular danger to potential witnesses. *See* Ariz. Const. art. 2, § 22(B); Ariz. Rev. Stat. § 13-3961, historical note.

The people of Arizona wisely enshrined in Proposition 103 a series of procedural protections to ensure that bail is denied only in a manner that does not unconstitutionally infringe an arrestee's constitutional liberty interest. Proposition 103 does not deny bail based only on the fact of arrest. Instead, Proposition 103 requires that bail be denied only when a judge finds "the proof is evident or the presumption great" that an arrestee has committed sexual assault. Ariz. Const. art. II, § 22(A)(1); Ariz. Rev. Stat. § 13-3961(A)(2). That is a "substantial" requirement: the State must prove that "all of the evidence, fully considered by the court, makes it plain and clear to the understanding, and satisfactory and apparent to the well-guarded, dispassionate judgment of the court that the accused committed" the crime of sexual assault. *Simpson v. Owens*, 85 P.3d 478, 491 (Ariz. Ct. App. 2004).

And even that may not be enough to deny bail. Arizona law imposes several additional protections to ensure that bail cannot be denied except in the limited cases where little doubt exists as to guilt. *See id.* at 487, 492-95. These procedures constitute substantial protections to ensure that only those who are almost assuredly guilty remain confined pending their trial. *See id.*

Through Proposition 103, the people of Arizona placed their State in good company among the States

that have decided that certain non-capital offenses are serious and dangerous enough to merit the denial of bail. *See supra* Part I.A & n.2.

C. Sexual assault is an inherently dangerous crime with a high rate of recidivism.

The people of Arizona had good reason to designate sexual assault among the crimes for which bail must be denied. This Court has already recognized that sexual assault is an inherently dangerous crime. Over four decades ago, the Court declared that sexual assault "is the 'ultimate violation of self'" after only homicide. *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (quoting Lisa Brodyaga et al., U.S. Dep't of Justice, Rape and Its Victims: A Report for Citizens, Health Facilities, and Criminal Justice Agencies (1975)). This Court has further held that a State may reasonably conclude "that a conviction for a sex offense provides evidence of substantial risk of recidivism." *Smith v. Doe*, 538 U.S. 84, 103 (2003). After all, the "high rate of recidivism among convicted sex offenders" confirms "their dangerousness as a class." *Id.* There can be no doubt, as this Court has recognized, that "[s]ex offenders are a serious threat in this Nation." *McKune v. Lile*, 536 U.S. 24, 32 (2002); *see also Salerno*, 481 U.S. at 750 (juvenile sex offenders "are far more likely to be responsible for dangerous acts in the community after arrest").

Arizona law confirms this Court's observations. Indeed the dissent below correct noted that under Arizona law, "[s]exual assault is by definition an extremely dangerous crime." Pet. App. 23 (Bolick, J., dissenting). Ari-

zona law defines sexual assault as "intentionally or knowingly engaging in sexual intercourse or oral sexual contact . . . without consent of such person." Ariz. Rev. Stat. § 13-1406(A). The term "without consent" most commonly means that the victim "is coerced by the immediate use or threatened use of force against a person or property." Ariz. Rev. Stat. § 13-1401(A)(7)(a). Sexual assault, then, "is defined *only* to encompass nonsconsensual sexual violations." Pet. App. 24 (Bolick, J., dissenting). As Justice Bolick explained, "sexual assault necessarily involves the sexual violation of a person through force, coercion, or deception." Pet. App. 23 (Bolick, J., dissenting). It thus "is an inherently dangerous crime." *Id.* It follows that when the State puts on evident proof of guilt, the State has necessarily demonstrated that the defendant is dangerous. *Id.*

It follows that in denying bail to sexual assault arrestees, Arizona is no different from numerous other States that deny bail to individuals who commit crimes of violence. For example, as set out above, Colorado and Louisiana both deny bail in connection with certain "crime[s] of violence." *See* Colo. Const. art. II, § 19; La. Const. art. I, § 18(B). Rape is indisputably among the most horrific crimes of violence. *See Coker*, 433 U.S. at 597–98.

Proposition 103 also places Arizona among States to deny bail to individuals likely to pose a danger to their communities if released. As set out above, Mississippi, New Mexico, Ohio, Pennsylvania, and Utah all provide for the denial of bail when, subject to various procedural safeguards, a court finds the defendant may offend again if released. *See* Miss. Const. art. III, § 29; N.M. Const.

art. II, § 13; Ohio Const. art. I, § 9; Pa. Const. art. I, § 14; Utah Code § 77-20-1(2). This Court has already recognized the "dangerousness" of sex offenders "as a class" due in part to their high rates of recidivism. *See Smith*, 538 U.S. at 103. Proposition 103 is thus no more controversial or unconstitutional than the long-settled practice in numerous other States.

Arizona also is no different from the States that deny bail for crimes that could carry life sentences. Sexual assault in Arizona is punishable by life imprisonment. Ariz. Rev. Stat. § 13-1406(B)-(D); *see also* Pet. App. 11 (noting under Arizona law, punishment for sexual assault can include life imprisonment). Massachusetts, New Hampshire, and Washington all recognize that such a stern penalty merits the categorical denial of bail due to the enhanced flight risk associated with life sentences. *See* Mass. Gen. Laws ch. 276, § 20D; N.H. Rev. Stat. § 597:1-c; Wash. Const. art. I, § 20. In Proposition 103, the people of Arizona reached the same uncontroversial conclusion.

II. The Record Below Makes This an Excellent Vehicle to Hold That Categorical Denials of Bail Do Not Facially Violate the Constitution.

Arizona rightly denied bail to Goodman. The record below provides the Court a good opportunity to hold that the operation of Proposition 103 on these facts did not offend the Constitution.

Indeed, there is no real doubt that Goodman committed the rape as the State alleged. Goodman's victim testified that he sexually assaulted her after she had been drinking. Pet. App. 86-87. She received a medical forensic exam corroborating her testimony and confirming—

via DNA testing—that Goodman was the assailant. *Id.* at 87-88. When confronted with the DNA evidence, Goodman confessed to the sexual assault. *Id.* at 88.

The trial court thus had little difficulty concluding that Goodman's guilt is obvious. *See id.* And his crime—felony sexual assault—is undoubtedly a crime of violence. *Coker*, 433 U.S. at 597-98. Moreover, this Court has already recognized the high recidivism connected with sexual assault, which is why the *Smith* Court held that sex offenders may be regulated as a class for public safety purposes. *Smith*, 538 U.S. at 103.

So the Court is well positioned to answer the straightforward question the petition presents: did the Arizona Supreme Court err in holding that a State may not deny bail to an arrestee when a judge, after a full adversarial hearing, finds clear proof that the arrestee committed sexual assault? *See* Pet. i. The broad national consensus, combined with Proposition 103's procedural safeguards and this Court's pronouncements, make the answer clearly—and easily—"yes."

* * *

The petition demonstrates that courts around the Nation have disagreed on how to assess the constitutionality of categorical denials of bail. *See* Pet. 16-20. The Supreme Courts of Nebraska and New Hampshire have properly rejected constitutional challenges to categorical denials of bail. *See New Hampshire v. Furgal*, 13 A.3d 272, 277-80 (N.H. 2010); *Parker*, 278 N.W.2d at 114. Other courts, including the Ninth Circuit and the Supreme Court of Hawaii, have misapplied this Court's precedents and the U.S. Constitution to uphold chal-

lenges to categorical denials of bail. *See Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014); *Huihui v. Shimoda*, 644 P.2d 968, 970 (Haw. 1982).

This case provides the Court an opportunity to clarify that the approach adopted by the Ninth Circuit, Supreme Court of Hawaii—and now the Supreme Court of Arizona—is inconsistent with the Constitution's requirements.

CONCLUSION

The petition for a writ of certiorari should be granted, and the Arizona Supreme Court's decision should be reversed.

Respectfully submitted.

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