No. _____

In the Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

GUY JAMES GOODMAN,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Arizona Supreme Court err in holding that *United States* v. *Salerno*, 481 U.S. 739 (1987), prohibits a State from denying bail to an arrestee when a judge, after a full adversarial hearing, finds clear proof that the arrestee committed sexual assault?

2. Did the Arizona Supreme Court err in joining a growing number of jurisdictions that hold a statute facially unconstitutional even if it is capable of constitutional application in some circumstances?

PARTIES TO THE PROCEEDING

Petitioner is the State of Arizona.

Respondent, who was a defendant in the criminal proceeding below, is Guy James Goodman.

The other party in the proceedings below, who is not a party here, is: The Honorable Kevin B. Wein, Commissioner of the Superior Court of the State of Arizona, in and for the County of Maricopa.[*]

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[*] Commissioner Wein was named as a nominal party in the appeal below because the State sought interlocutory review of Commissioner Wein's order granting bail. *See* Ariz. R. Proc. for Special Actions 2.

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PETITION FOR WRIT OF CERTIORARI

Arizona voters enacted Proposition 103 to protect themselves from persons who very likely committed one of several heinous crimes. As relevant to the current case, Proposition 103 removes the possibility of bail 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).

Respondent meets the conditions for pretrial detention under Proposition 103. DNA evidence and his own pretrial admission constitute "evident" proof of sexual assault, as the trial court recognized. On appeal, a divided Arizona Supreme Court invalidated Proposition 103 as facially unconstitutional under the Due Process Clause. In doing so, it came down on the wrong side of two legal questions that have divided courts around the country: the substantive standard for offense-based bail exclusions and the threshold for facial unconstitutionality.

On the first question, the Arizona court rejected the due process balancing mandated by this Court in *United States* v. *Salerno*, 481 U.S. 739 (1987), in favor of "heightened scrutiny." App. 7. It did so on the theory that Proposition 103 limits a fundamental right to freedom from bodily restraint. *Ibid*. This standard is one of five different tests that State supreme courts and federal courts of appeals have applied to offense-based bail exclusions. Those standards vary from rational basis on one end of the spectrum to a categorical ban on the other. Such disparate interpretations of the Due Process Clause are inconsistent with a common national charter.

Second, this case asks the Court to clarify the standard for facial challenges in the same context that gave rise to the leading—but by no means universal—expression of what a facial challenge must show. That standard, announced in *Salerno*, requires that "no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745. This Court has recognized, however, that subsequent opinions have cast doubt on the no-set-of-circumstances test, with the result that now the standard "is a matter of dispute." *United States* v. *Stevens*, 559 U.S. 460, 472 (2010). Lower courts around the nation have noted the lack of clarity. *E.g., Bahlul* v. *United States*, 840 F.3d 757, 799 n.1 (D.C. Cir. 2018) (describing "controversy in recent years about whether the *Salerno* standard universally applies"). These different standards for facial unconstitutionality mean that applications that would survive in one jurisdiction are prohibited in another—all in the name of the same provision of the federal Constitution. This Court has noted the problem and should now provide needed clarity to the lower courts.

OPINIONS BELOW

The opinion of the Supreme Court of Arizona is reported at 417 P.3d 787. App. 1–33. Justices Gould and Lopez in dissent incorporated their earlier partial dissent in *Morreno* v. *Brickner*, 416 P.3d 807 (Ariz. 2018). App. 34–73. The opinion of the Arizona Court of Appeals is reported at 395 P.3d 1111. App. 74–81. The decision of the Maricopa County Superior Court is unreported. App. 82–85.

JURISDICTION

The Supreme Court of Arizona issued its opinion on May 25, 2018. On August 8, 2018, the Chief Justice extended the time for filing a petition for certiorari until September 24, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend XIV. The relevant Arizona constitutional and statutory provisions regarding bail for persons charged with sexual assault appear in Appendix F. App. 89–98. Ariz. Const. art. II, § 22(A)(1); Ariz. Rev. Stat. §§ 13-3961(A)(2), 13-1401, 13-1406.

STATEMENT OF THE CASE

A. Statutory Background

In Arizona, a person commits the crime of sexual assault "by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person." Ariz. Rev. Stat. § 13-1406(A); see also Ariz. Rev. Stat. § 13-1401 (defining terms). In 2002, eighty percent of Arizona's voters approved Proposition 103, which amended the Arizona Constitution to eliminate the possibility of bail when "the proof is evident or the presumption great" that a person committed one of several crimes, including sexual assault. Ariz. Const. art. II, § 22(A); *Arizona ex rel. Romley* v. *Rayes*, 75 P.3d 148, 152 (Ariz.

Ct. App. 2003). Arizona's Legislature also amended Ariz. Rev. Stat. § 13-3961 upon approval of Proposition 103 to conform to the new rule. This Petition refers to these constitutional and statutory provisions collectively as "Proposition 103."

Proposition 103 does not "abolish bail" for a person charged with sexual assault or "create an irrebuttable presumption" that bail should be denied. *Rayes*, 75 P.3d at 151. Instead, to show that the "proof is evident or the presumption great," the State has the burden to 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). In sum, proof of the offense "must be substantial." *Ibid*.

Not only does Arizona law require heightened proof of the offense, but it also safeguards this determination with procedural protections:

- The court must hold a full adversarial hearing where the defendant has legal counsel and a right to be heard, to examine witnesses, and to review in advance witnesses' prior statements. *Id.* at 487, 492–493.
- The court must not treat prosecutorial assertions as proof, and must only admit material evidence. *Id.* at 492–494.
- The court must set forth its analysis and findings on the record. *Id.* at 493.

- The hearing must "take place as soon as is practicable." *Id.* at 495.
- The length of pretrial detention is generally limited to 150 days under Rule 8.2(a)(1) of the Arizona Rules of Criminal Procedure, which "grants even stricter speedy trial rights than those provided by the United States Constitution." *Arizona* v. *Spreitz*, 945 P.2d 1260, 1267 (Ariz. 1997).
- Arrestees can later move for reexamination of the conditions of release. Ariz. R. Crim. P. 7.4(c).

B. Charges Against Goodman and Trial Court History

On November 5, 2010, three women went out for drinks in downtown Tempe, where they met Respondent Guy James Goodman. After returning to one woman's apartment, the other two women and Goodman asked to spend the night because they had all been drinking. App. 86.

The apartment's owner allowed her guests to sleep on a couch located on the first floor of the apartment while she went to her own bedroom on the second floor. *Ibid*. She awoke to find that Goodman had come into her room, climbed into bed with her, pulled down her underwear, and penetrated her vagina with his fingers. *Ibid*. The victim screamed at Goodman and immediately ran to her neighbor's apartment where she told a friend that Goodman had sexually assaulted her. *Id.* at 87. After the friend confronted Goodman, he denied committing a crime but nevertheless fled in his van. *Ibid.*

After reporting the sexual assault to police the following day, the victim received a medical forensic exam. *Ibid*. A witness also identified Goodman in a photographic line-up. *Ibid*. Several weeks later, a detective in the Special Victim's Unit of the Tempe Police Department conducted an interview with Goodman. Goodman admitted that he had slept on the victim's bed but denied committing a sexual crime against her. *Ibid*. The detective obtained cheek swabs of Goodman's DNA and submitted them along with the medical forensic kit to the Arizona Department of Public Safety Crime Lab. The lab later confirmed that the DNA profile from the victim's genital swabs matched the DNA profile from Goodman. *Ibid.*

On February 22, 2017, Goodman was arrested for one count of sexual assault. After being advised of his *Miranda* rights, Goodman initially stuck to his original story that he did not sexually assault the victim. However, when confronted with the DNA results, Goodman admitted that the victim had been asleep when he placed his fingers in her vagina. He also acknowledged that the sexual act was without her consent. *Id.* at 88. Five days later, Goodman was charged with one count of sexual assault, a class 2 felony.

C. Offense-Based Bail Proceedings

Goodman's charge coincided with the first in a trio of cases—this being the third—through which the Arizona Supreme Court invalidated Proposition 103. See *Simpson* v. *Miller*, 387 P.3d 1270 (Ariz. 2017), *cert. denied sub nom. Arizona* v. *Martinez*, 138 S. Ct. 146 (2017). In *Simpson*, the court struck down an offense-based bail exclusion for the crime of sexual conduct

with a minor under fifteen years of age. Ariz. Const. art. II, § 22(a)(1). *Simpson* held that persons charged with this crime—even after a neutral judge finds rigorous proof of the offense—possess a "fundamental" right "to be free from bodily restraint." *Simpson*, 387 P.3d at 1276. As such, the court followed the Ninth Circuit and concluded that bail restrictions are subject to "heightened scrutiny," which requires the offense-based exclusion to serve as a "convincing proxy for unmanageable flight risk or dangerousness." *Id.* at 1277 (citing *Lopez-Valenzuela* v. *Arpaio*, 770 F.3d 772 (9th Cir. 2014)).

Applying the heightened scrutiny standard, the *Simpson* court concluded that heightened proof of sexual assault of a child was insufficient. Turning the standard for a facial challenge on its head, the court held that the underlying crime was not a proxy for dangerousness because the child's consent was not an available defense, and, as such, sexual conduct with a minor could potentially "sweep[] in situations where teenagers engage in consensual sex." *Id.* at 1278.[1] Because of the hypothetical impact on teenagers, the court held that the crime of sexual conduct with a minor under age fifteen could not serve as "a proxy for dangerousness." *Ibid.* The court further pronounced that an individualized assessment of dangerousness in which the State bears the burden of proof would serve

[1] In fact, Arizona provides a statutory defense for teenagers who engage in consensual sex, Ariz. Rev. Stat. § 13-1407(F), but this defense was unavailable to the defendant in *Simpson* because he was an adult charged with having sexual contact with multiple young children.

the State's interest "equally well" compared to the offense-based rule in Proposition 103. *Ibid*.

For Goodman, the decision in *Simpson* came at just the right time. Although *Simpson* concerned a different crime, the trial court immediately applied its holding to all offense-based restrictions on bail. App. 77. As such, the trial court concluded that the State could deny bail to Goodman only if it provided heightened proof of the offense and proved by clear and convincing evidence that "no condition or combination of conditions of release may be imposed that will reasonably assure the safety of the [victim] or the community." Ariz. Rev. Stat. § 13-3961(D). While the court found that prosecutors had met the standard under Proposition 103, it held that Goodman was entitled to bail because the State had not provided clear and convincing proof of his dangerousness pending trial. App. 77 (citing *Simpson*).

The court of appeals reversed on the straightforward reasoning that sexual assault can never occur in a non-dangerous manner because lack of consent is an element of the crime. App. 80 (citing Ariz. Rev. Stat. § 13-1406).

Despite this "understandable" logic, App. 18, the Arizona Supreme Court reversed and struck down Proposition 103 as facially unconstitutional in a 4-3 decision. In so doing, the court made the "heightened scrutiny" test for offense-based bail exclusions even more difficult, holding that a crime's inherent dangerousness is not enough. App. 17. Instead, an offense-based bail restriction can survive only if the State proves "that most persons charged with sexual assault" or a "significant number" will "likely commit

another sexual assault or otherwise dangerous crime pending trial if released on bail." App. 13. Not only that, the State must also prove that no other alternative exists "that would serve the state's objective equally well at less cost to individual liberty." App. 16.

Justice Bolick, who authored the *Simpson* decision, dissented with two other justices. He pointed out that the majority, by concluding that the "nature of the crime is irrelevant to the risk of future dangerousness," ignores that "sexual assault is by definition a uniquely horrific act." App. 24. That fact, combined with the "frightening and high" risk of sex offender recidivism, *Smith* v. *Doe*, 538 U.S. 84, 103 (2003), prompted this Court to "establish that a state may categorically regulate sex offenders as a class for public safety purposes." App. 24–27. The dissent then concluded with an uncommon plea for this Court to review the case:

> [W]e urge the Supreme Court to review this decision. If we are correct that its precedents allow Arizona to deny pretrial release to those who by proof evident or presumption great have committed sexual assault, this Court has unnecessarily invalidated a part of our organic law. As a matter of comity and federalism, we urge the Supreme Court to correct the error if this Court has misread its precedents.

App. 30–31.

Justice Gould, joined by Justice Lopez, filed a separate dissent, incorporating their partial dissent in *Morreno* v. *Brickner*, 416 P.3d 807 (Ariz. 2018), decided less than a month before the current case. App. 31.

Justice Gould argued that the Arizona Supreme Court's decision in *Simpson* was wrongly decided because it turned the facial challenge test from *Salerno* "on its head." App. 32. The analysis in *Simpson*, adopted again in *Morreno* and the current case, allows facial invalidation of a statute based on a single hypothetical unconstitutional application, rather than requiring the defendant to show that the law was unconstitutional in *all* its applications. As such, the majority decision below continued the streak of error by "abandon[ing] the facial standard set forth in *Salerno*," and replacing that test with an "impossible" overbreadth standard. App 31–33.

REASONS FOR GRANTING THE PETITION

The Arizona Supreme Court's rejection of offense-based bail restrictions reflects two areas of division and confusion in the lower courts. First, two circuits and four State high courts apply different levels of scrutiny to bail limitations of this type. That division proves that this Court's ruling in *Salerno* has not resolved the issue and requires further development. Second, the lower courts split along lines that this Court has itself acknowledged regarding the correct burden of proof for a litigant seeking to invalidate a statute as facially unconstitutional. Again, *Salerno* should announce the controlling rule, but uncertainty remains. The Court should grant certiorari to resolve these simmering divisions on important issues concerning the interaction of State bail regulation and the federal Constitution.

I. Most States Have Offense-Based Bail Restrictions, but the Standard for Due Process Review is Unclear.

A. The Decision Below is Contrary to Precedent from this Court.

The Eighth Amendment, which specifically addresses the right to bail, allows the States to "defin[e] the classes of cases in which bail shall be allowed in this country." *Carlson* v. *Landon*, 342 U.S. 524, 545 (1952). Because the Eighth Amendment does not "accord a right to bail in all cases," *ibid.,* Respondent and the court below turn to the Due Process Clause to find a constitutional impediment to offense-based bail exclusions. Substantive due process prevents governments from engaging in conduct that "shocks the conscience, or interferes with rights implicit in the concept of ordered liberty." *Salerno*, 481 U.S. at 746 (citations and quotations omitted). But under this Court's precedent, Arizona's policy of denying bail after the State has proved that an arrestee likely committed sexual assault passes this test.

This Court has "repeatedly" recognized that "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." *Id.* at 748. In *Salerno*, the Court upheld the Bail Reform Act, which authorizes pretrial detention without bail for certain serious offenses when the government demonstrates (1) probable cause that the accused committed the offense, and (2) clear and convincing evidence, after a full adversarial hearing, that the accused poses an unmanageable risk to others. *Id.* at 750.

Permeating the reasoning in *Salerno* is the balancing of public and private interests. In rejecting the argument that due process lays down a "categorical imperative" against detention to prevent public danger, the Court identified ten cases where it had balanced the "Government's regulatory interest in community safety" against "an individual's liberty interest" and stated that it would evaluate due process challenges to pretrial detention based on community danger "in precisely the same manner" that it had previously done. *Salerno*, 481 U.S. at 748–749. Not one of those cases applied anything resembling heightened scrutiny.

For example, in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), the Court approved extended pretrial detention with only a judicial finding of probable cause, even when the finding was not accompanied by adversarial protections. The Court explained that the "balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases, *including the detention of suspects pending trial*." *Id.* at 125 n.27 (emphasis added). Likewise, in *Addington* v. *Texas*, 441 U.S. 418, 431 (1979), the Court held that due process allows detention of dangerous individuals who are mentally unstable under a "clear and convincing" evidence standard because it "strikes a fair balance between the rights of the individual and the legitimate concerns of the state." Consistently, the Court in *Bell* v. *Wolfish*, 441 U.S. 520, 531–532 (1979), specifically rejected the argument that due process requires conditions of pretrial confinement to be justified by a "compelling necessity." Instead, the Court upheld the restrictions at issue because they "were reasonable responses . . . to legitimate security

concerns." *Id.* at 561; see also *Carlson*, 342 U.S. at 537–542 (deferring to Congress' policy of detaining potentially dangerous aliens facing deportation without an individualized determination). As a final example, in *Schall* v. *Martin*, 467 U.S. 253, 263, 268 (1984), the Court held that pretrial detention of juveniles to prevent crime "serve[d] a legitimate regulatory purpose compatible with the 'fundamental fairness' demanded by the Due Process Clause" by "strik[ing] a balance" between the interests of society and juveniles.

By relying on these cases, the Court in *Salerno* did exactly what the Court had done for decades: employing the metaphor of a scale, it assessed the reasonableness of regulatory pretrial detention by striking a balance between the community's interest in safety and the individual's interest in release. 481 U.S. at 750–751. As in *Bell*, the government was not required to justify pretrial detention under a "compelling necessity" standard. Rather, the Court deferred to Congress's judgment that individuals detained under the Bail Reform Act were "far more likely to be responsible for dangerous acts in the community after arrest." *Id.* at 750. Finally, undermining any claim that heightened scrutiny applied in *Salerno*, the Court specifically held that denying bail "under the[] circumstances" of the Bail Reform Act did not offend a fundamental right. *Id.* at 751.

The Arizona Supreme Court has departed from this precedent in several ways. First, in spite of *Salerno*'s holding that an arrestee's right to go free is not "ranked as fundamental," *ibid.*, the Arizona Supreme Court has announced a "fundamental" right to "freedom from

bodily restraint." App. 7; *Simpson*, 387 P.3d at 1276. Second, the Arizona court has struck down two offense-based bail restrictions that require *greater* confidence in the arrestee's guilt than the law upheld in *Salerno*. Proposition 103 denies bail only after a full adversarial hearing in which a judge finds "the proof is evident or presumption great" that the person committed the crime. *Simpson*, 387 P.3d at 1275. This standard exceeds the probable cause standard upheld in *Salerno* and *Gerstein*. Finally, *Simpson* held that an offense-based bail restriction cannot stand if there is any "alternative[] that would serve the state's objective equally well at less cost to individual liberty." *Id.* at 1278. But in the identical context, this Court has repeatedly held that due process does not require a legislature "to employ the least burdensome means to accomplish its goal," *Demore* v. *Kim*, 538 U.S. 510, 528 (2003); see also *Bell*, 441 U.S. at 533 (holding that the Due Process Clause "provides no basis for application of a compelling-necessity standard to conditions of pretrial confinement").

In the decision below, the Arizona Supreme Court drifted farther from the substantive holding of *Salerno*. Rather than balancing societal and private interests as *Salerno* requires, the Arizona Supreme Court insisted that the State prove that "a significant number" or even "*most* persons" charged with sexual assault would "likely commit another sexual assault or otherwise dangerous crime pending trial if released on bail." App. 13 (emphasis added). Going even farther astray, the court also held that due process requires the State to prove that there is no other alternative that "would serve the state's objective equally well at less cost to individual liberty." App. 16.

As one of the dissents recognized, this standard strays so far from *Salerno* that it effectively abolishes offense-based bail exclusions. App. 33 (Gould, J., dissenting). It is doubtful that the rule below would even tolerate *Salerno*'s acknowledged exception for bail in capital cases or *Demore*'s exception for aliens facing deportation. 481 U.S. at 753; *Demore*, 538 U.S. at 530. After all, neither *Salerno* nor *Demore* established that half—or some similar "significant number"—of the persons charged with the crimes at issue would reoffend during pretrial release. Such analysis was unnecessary because this Court recognizes the States' prerogative to "mak[e] reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith*, 538 U.S. at 103. This Court's precedents doom the decision below. It is impossible that the Arizona Supreme Court could have been following *Salerno*, *Demore*, and *Smith* while announcing a legal standard absent from all of them and incompatible with each.

In faulting the State for not showing that "most persons charged with sexual assault" will reoffend before trial, App. 13, the lower court installed itself as "a legislature charged with formulating public policy." *Schall*, 467 U.S. at 281 (upholding pretrial detention of juveniles to prevent new offenses). It did so in declaring that the State's interest would be served "equally well" by a standard under which it must prove individual dangerousness by clear and convincing evidence. App. 16. This Court's precedent tells a different story. The rate of recidivism among sex offenders is "frightening and high." *Smith*, 538 U.S. at 103. Unfortunately, there is no way to predict with confidence when or whether a particular sex offender

will reoffend. *Doe* v. *Miller*, 405 F.3d 700, 716 (8th Cir. 2005). This Court has long recognized that, "in areas fraught with medical and scientific uncertainties," courts are "cautious not to rewrite legislation" and instead afford legislatures "the widest latitude." *Kansas* v. *Hendricks*, 521 U.S. 346, 360 n.3 (1997) (upholding civil commitment of sexually violent predators). Judged by this standard, the decision of 80% of Arizona voters to withhold bail on a class-wide basis is both reasonable and entitled to deference. The Arizona Supreme Court's contrary determination that the public is protected "equally well" by other means is simply a legislative disagreement.

This Court's precedent has long mandated a balancing of interests under the Due Process Clause rather than heightened scrutiny. The Court has likewise refused to enshrine a generic but fundamental right to freedom from bodily restraint. And this Court does not require States to show least restrictive means or 50% recidivism rates before imposing offense-based regulatory measures. In each of these particulars, the Arizona Supreme Court departed from this Court's precedent, and certiorari is necessary to correct the error.

B. Federal Circuit Courts and State Supreme Courts Have Endorsed Five Different Tests for Pre-Trial Bail Restrictions.

Courts are divided on the permissibility of, and the standard applicable to, pretrial bail restrictions. In fact, the courts that have addressed the question of offense-based bail restrictions have adopted five different standards for scrutiny under the Due Process Clause. Review is necessary to resolve this confusion.

The Nebraska Supreme Court applies rational basis review. *Parker* v. *Roth*, 278 N.W.2d 106, 114 (Neb. 1979); *Nebraska* v. *Boppre*, 453 N.W.2d 406, 418 (Neb. 1990) (applying *Parker*). The provision at issue in *Parker* mirrored Arizona's law, prohibiting bail if the "proof was 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 court held that "the right to bail is not a fundamental right guaranteed under the [United States] Constitution." *Parker*, 278 N.W.2d at 114. The court also found that the law passed rational basis review, observing that "[r]ape is one of the ugliest of crimes" and recognizing the "real possibility of repeated acts and further victims pending trial." *Id.* at 116. Nebraska's rational basis standard represents the greatest degree of deference to the judgment of the political branches.

In New Hampshire, the courts apply a balancing test, consistent with what Petitioner asks this Court to establish as the law of the land. In *New Hampshire* v. *Furgal*, 13 A.3d 272 (N.H. 2010), the New Hampshire Supreme Court considered a categorical bail exclusion that, like Nebraska's law in *Parker*, established a process similar to Arizona's. The statute at issue provided that "[a]ny 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." N.H. Rev. Stat. § 597:1-c. As in *Parker*, the court in *Furgal* recited the "long history of bail" that permits courts to "focus exclusively upon the evidence of the defendant's guilt" to deny bail when the person is accused of a serious crime. 13 A.3d at 279. Citing the balancing test from *Salerno*, the court concluded that

the State legislature had made a "reasoned determination" that, after heightened proof of a very serious crime, "the risk to the community becomes significantly compelling" and justifies the denial of bail. *Ibid.* The Arizona Supreme Court rejected this type of balancing in favor of heightened scrutiny, but New Hampshire's approach is consistent with *Salerno* and *Demore* and reflects appropriate deference to legislative judgments surrounding the allocation of risk.

Just last month, the Eleventh Circuit in *Walker* v. *City of Calhoun*, No. 17-13139, — F.3d —, 2018 WL 4000252 (11th Cir. Aug. 22, 2018), employed the same approach as the New Hampshire Supreme Court in *Furgal*. In assessing what process the Constitution requires in setting bail for indigent arrestees, the Eleventh Circuit rejected the argument that *Salerno* recognized a "fundamental right to pretrial liberty" that would require heightened scrutiny. *Id.* at *10. That is, the court rejected both the legal standard and the justification offered by the Arizona Supreme Court. Instead, the Eleventh Circuit observed that *Salerno* "employed a general due process balancing test between the State's interest and the detainee's" that was "a far cry from strict—or even intermediate—scrutiny." *Ibid.*

On the other end of the spectrum, the Ninth Circuit sitting en banc in *Lopez-Valenzuela* v. *Arpaio*, 770 F.3d 772 (9th Cir. 2014), struck down an Arizona law that denied bail when the proof was evident or the presumption great that an undocumented immigrant committed a serious felony offense. Even though the Court in *Salerno* expressly stated that pretrial detention under the Bail Reform Act did *not* offend

"some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," 481 U.S. at 751, the Ninth Circuit cited *Salerno* to hold that the categorical bail denial infringed upon a "fundamental right." *Lopez-Valenzuela*, 770 F.3d at 780. It then applied the familiar strict scrutiny standard, even though it did not use that term: "[T]he [challenged provisions] will satisfy substantive due process only if they are narrowly tailored to serve a compelling state interest." *Id.* at 781 (quotes omitted). *Cf. id.* at 799 (Tallman, J., dissenting) ("This is strict scrutiny."); *Simpson*, 387 P.3d at 1277 ("[T]he standard the Ninth Circuit ultimately applied . . . reflects strict scrutiny, the most exacting constitutional review standard.") (citation omitted). Employing the strict scrutiny test, the Ninth Circuit concluded that the bail regulations were not narrowly tailored and, therefore, violated due process.

In *Simpson* and again here, the Arizona Supreme Court "agree[d] with the Ninth Circuit" in misreading *Salerno* as "appl[ying] 'heightened scrutiny'" because of a fundamental right to be free from bodily restraint, but it rejected the Ninth Circuit's strict scrutiny in favor of the heightened scrutiny at issue in this appeal. *Simpson*, 387 P.3d at 1276–1277; App. 8.

Going even further than the Ninth Circuit, the Supreme Court of Hawaii categorically prohibits offense-based bail restrictions and mandates individualized determinations of dangerousness in which the State bears the burden of proof. In *Huihui* v. *Shimoda*, 644 P.2d 968, 970 (Haw. 1982), that court held that offense-based bail exclusions for non-capital offenses violate the Due Process Clause of the

Fourteenth Amendment. The court conceded that "the interpretation most strongly supported by history" favored upholding a statute that categorically denied bail when the proof was evident and the presumption great that a defendant committed a serious crime while free on bail for a felony charge. *Id.* at 975. Nevertheless, the court concluded that this history "conflict[ed] with logic and a sound regard for the purpose of the excessive bail clause." *Ibid.* (quotes omitted). It held that the exclusion was unconstitutional because it did not "allow bail based on other factors which may be directly relevant to a determination of the likelihood of the defendant's committing other crimes while free pending trial." *Id.* at 978–979.

In sum, four States and two federal courts of appeals have adopted five different standards for determining whether offense-based bail exclusions are permissible under the Due Process Clause: the Nebraska Supreme Court applies rational basis review; the New Hampshire Supreme Court and the Eleventh Circuit apply a balancing test; the Arizona Supreme Court applies "heightened scrutiny;" the Ninth Circuit applies strict scrutiny; and the Hawaii Supreme Court holds that, except for capital crimes, offense-based bail exclusions are always barred. As three justices urged below, the Court should grant certiorari to resolve this confusion. App. 30–31 (Bolick, J., dissenting).

II. As this Court Has Acknowledged, Lower Courts Are Confused and Divided over the Standard for Claims of Facial Unconstitutionality.

In addition to the substantive question whether due process requires an individualized determination of dangerousness for each arrestee who likely committed sexual assault, this case invites the Court to clarify the long-disputed burden for litigants aiming to declare a law facially unconstitutional. Fittingly, the most-cited precedent on this point is *Salerno*. There, the Court explained that the party challenging a law "must establish that no set of circumstances exists under which the [law] would be valid." *Salerno*, 481 U.S. at 745. The competing standard, imported from First Amendment overbreadth cases, asks whether a law's unconstitutional applications are "substantial when judged in relation to the statute's plainly legitimate sweep." *City of Chicago* v. *Morales*, 527 U.S. 41, 52 (1999) (opinion of Stevens, J.) (quotes omitted).

From these competing standards has followed acknowledged confusion among the lower courts. This Court itself recognized that the standard for a facial challenge "in a typical case is a matter of dispute." *United States* v. *Stevens*, 559 U.S. 460, 472 (2010). But where previous cases did not require resolution of this festering issue, *ibid.,* the holding below survives only if the no-set-of-circumstances test does not apply. This Court should take the opportunity to confirm that courts should not invalidate applications of duly enacted statutes that do not offend the Constitution.

A. By Its Own Acknowledgement, this Court's Precedent Is Unclear.

Facial unconstitutionality is "strong medicine" to be used "only as a last resort." *Broadrick* v. *Okla.*, 413 U.S. 601, 613 (1973). When a court pronounces a duly enacted law facially unconstitutional, its negation of the legislative process is total. Thus this Court has explained that facial challenges are disfavored because they "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 451 (2008); see also *id.* at 450 ("Facial challenges also run contrary to the fundamental principle of judicial restraint . . . .").

As consequential as a holding of facial unconstitutionality is, the standard governing such claims is unsettled. Two competing tests have emerged in recent decades.[2] The first, identified with *Salerno*, requires the party seeking facial invalidation to establish that "no set of circumstances exists under which the [law] would be valid." 481 U.S. at 745. This test's roots extend to pre-*Salerno* cases, including other pretrial detention cases like *Schall* v. *Martin*, 467 U.S. 253 (1984). There, the Court observed that "in some circumstances" the contested provision might "not pass

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[2] In two contexts, a different standard applies. Challenges to prior restraints on speech or to regulations of abortion require less than the no-set-of-circumstances showing. *E.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757–58 (1988); *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992). Neither context is at issue in this case.

constitutional muster" but refused to declare the law "invalid 'on its face'" because it was capable of constitutional application in at least some cases. *Id.* at 273. Similar reasoning prevailed in other cases outside the context of pretrial detention. See *Anderson* v. *Edwards*, 514 U.S. 143, 155 n.6 (1995) (citing *Salerno* to reject facial challenge under public assistance statute); *Cal. Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 594 (1987) (rejecting facial claim of preemption but expressly reserving judgment on "any future application of the Coastal Commission permit requirement that in fact conflicts with federal law").

The competing test for facial unconstitutionality emerged more recently through separate opinions by Justice Stevens but has now fought its predecessor to a draw. In *Washington* v. *Glucksburg*, 521 U.S. 702 (1997), Justice Stevens argued in a concurring opinion that the Court has never "actually applied" the no-set-of-circumstances standard, even in *Salerno* itself. *Id.* at 740 (Stevens, J., concurring). He instead applied the alternative test for First Amendment overbreadth, concluding that "Washington's statute prohibiting assisted suicide has a 'plainly legitimate sweep,'" which "provides a sufficient justification for rejecting respondents' facial challenge." *Id.* at 740 n.7. This reasoning could hardly be a more direct departure from *Salerno*, which stated that "we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." 481 U.S. at 745.

Two years later, Justice Stevens continued the campaign against *Salerno* in *City of Chicago* v. *Morales*, 527 U.S. 41 (1999). There, a three-justice plurality rejected the no-set-of-circumstances test, only

to draw a three-justice dissent demanding *Salerno*'s application. Compare 527 U.S. at 55 n.22 (Stevens, J., joined by Souter and Ginsburg, JJ.) with *id.* at 78–83, (Scalia, J., dissenting) and *id.* at 111, (Thomas, J., joined by Rehnquist, C.J. and Scalia, J., dissenting). Later cases have likewise noted the ongoing disagreement. *E.g., United States* v. *Booker*, 543 U.S. 220, 274–75 (2005) (Stevens, J., dissenting).

Rather than leaving the "legitimate sweep" test to concurring (or dissenting) opinions, the Court has now acknowledged this standard on equal footing with the no-set-of-circumstances test. "To succeed in a typical facial attack," the Court explained recently, a plaintiff must "establish that no set of circumstances exists under which [the law] would be valid, *or* that the statute lacks any plainly legitimate sweep." *Stevens*, 559 U.S. at 472 (emphasis added; quotations and citations omitted). Before proceeding to the special standard for First Amendment cases, the Court noted that "[w]hich standard applies in a typical case is a matter of dispute." *Ibid.* On this point at least, the Court is united. Justice Stevens also recognized that "[t]he appropriate standard to be applied in cases making facial challenges to state statutes has been the subject of debate within this Court." *Glucksburg*, 521 U.S. at 739 (Stevens, J., concurring); see also *Booker*, 543 U.S. at 275 n.1.

By the Court's own admission, the question how to determine whether a State law is facially unconstitutional remains unresolved. Yet, declaring a law unconstitutional in all of its applications is among the most drastic measures a court can take. The Court should grant certiorari to shed light on what a litigant

must show to invalidate a State law in all of its applications.

B. The Lower Courts Are Divided over the Correct Standard for Facial Challenges.

Given the uncertainty in this Court's case law, federal courts of appeals and State supreme courts have divided on the standard for facial challenges. As the Sixth Circuit summarized the problem, "precedent regarding facial challenges" outside the context of the First Amendment, is "inconsistent." *Simon* v. *Cook*, 261 F. App'x 873, 883 (6th Cir. 2008). The California Supreme Court expressed the same view: "the standard governing facial challenges has been a matter of some debate." *In re Guardianship of Ann S.*, 202 P.3d 1089, 1099 (Cal. 2009). In the same vein, the Ninth Circuit observed that this Court has "cast some doubt on the no set of circumstances requirement." *Hotel & Motel Ass'n of Oakland* v. *City of Oakland*, 344 F.3d 959, 971 (9th Cir. 2003) (quotation omitted). And the D.C. Circuit noted the "controversy in recent years about whether the *Salerno* standard universally applies." *Bahlul* v. *United States*, 840 F.3d 757, 799 n.1 (D.C. Cir. 2018). These statements reflect an untenable discord over a type of claim that occurs in every circuit and every State in the nation. Our common Constitution should not invalidate statutory applications in one jurisdiction while permitting them in another. The Court should grant certiorari to bring clarity to this long-simmering divide.

In addition to the four courts above that have noted the uncertainty over facial challenges, many more have lined up on different sides of a split over *Salerno*'s continuing vitality.

1. On one side of the divide, numerous State supreme courts and federal courts of appeals follow the no-set-of-circumstances test. For example, the Seventh Circuit explained its allegiance to *Salerno* based on the remedy that follows from a finding of facial unconstitutionality: "a successful facial attack means the statute is wholly invalid and cannot be applied *to anyone*." *Ezell* v. *City of Chicago*, 651 F.3d 684, 698 (7th Cir. 2011). Due to the severity of the outcome when a law is facially invalidated, the Seventh Circuit applies the no-set-of-circumstances standard to ensure that "[a] person to whom a statute properly applies can't obtain relief based on arguments that a differently situated person might present." *Ibid.* (quoting *United States* v. *Skoien*, 614 F.3d 638, 645 (7th Cir. 2010) (en banc)). Unlike in Arizona, the existence of some constitutional applications is sufficient to defeat a facial challenge in the Seventh Circuit.

The Second, Fourth, Fifth, and Eighth Circuits as well as the District of Columbia Court of Appeals have likewise faithfully applied *Salerno*. The Fourth Circuit applied the no-set-of-circumstances test in a facial challenge to Virginia's procedure for removing children from dangerous domestic environments, under which "as many as three days may pass before judicial review." *Jordan by Jordan* v. *Jackson*, 15 F.3d 333, 344 (4th Cir. 1994). Because such an extended delay could occur only in the rare case that "judicial review is not possible prior to the emergency removal" combined with "an intervening back-to-back weekend and holiday," the Fourth Circuit refused to allow this exceptional possibility to foreclose the law's application in other, more conventional circumstances. *Ibid.* This approach is antipodal to that of the Arizona Supreme

Court. Had the Fourth Circuit in *Jordan* proceeded as the Arizona Supreme Court did in this case and in *Simpson*, it would have focused on the holiday weekend hypothetical and determined the law's facial constitutionality on the basis of that single potential application.

The Fifth Circuit likewise recently affirmed its adherence to the no-set-of-circumstances test for facial unconstitutionality. In *City of El Cenzio, Tex.* v. *Texas*, 890 F.3d 164, 187 (5th Cir. 2018), the court reasoned that, for "a facial challenge, it is not enough" that the contested provision will "often" violate the Fourth Amendment. *Ibid.* Instead, if any such violations occur, "the proper mechanism is an as-applied, not a facial challenge." *Id.* at 190. The same reasoning controls in the Eighth Circuit. *Barrett* v. *Claycomb*, 705 F.3d 315, 321 (8th Cir. 2013) (reasoning that if a challenged statute "could conceivably be implemented in such a way as to comply with the Fourth Amendment," the "facial challenge must fail") (quotation omitted). And the Second Circuit also generally applies the no-set-of-circumstances test, though it has described *Salerno*'s prescription as "dicta," suggesting that it feels free to switch to the other side of the split in a future case. *United States* v. *Rybicki*, 354 F.3d 124, 130 (2d Cir. 2003) (en banc).

Of course, courts applying *Salerno* do not always uphold legislation. For example, the District of Columbia Court of Appeals—that jurisdiction's highest court—struck down a firearm regulation because the challenger "carried his burden of showing that every application of [the law] is unconstitutional." *Conley* v. *United States*, 79 A.3d 270, 277 (D.C. 2013). The same

result followed in the Eleventh Circuit, which found no set of circumstances in which Florida's involuntary commitment statute could be constitutionally applied. *J.R.* v. *Hansen*, 803 F.3d 1315, 1320 (11th Cir. 2015). Courts' insistence on the high standard in *Salerno* does not determine a lawsuit's outcome. It does, however, assure that the judiciary does not nullify the elected branches' lawful work based on a subset of unlawful applications.

2. On the other side of the division in the lower courts are jurisdictions favoring some form of the "legitimate sweep" test imported from the First Amendment context. Without so much as mentioning *Salerno* or the no-set-of-circumstances test, the Sixth Circuit recently held that a facial challenge "fails where the statute has a 'plainly legitimate sweep.'" *Ne. Ohio Coal. for the Homeless* v. *Husted*, 837 F.3d 612, 632 (6th Cir. 2016). As authority for this test, the court cited *Washington State Grange* and its reference to *Glucksburg* as announcing one of two tests from which a litigant could choose. *Ibid.* (citing *Wash. State Grange*, 552 U.S. at 449 (quoting *Glucksberg*, 521 U.S. at 740 n.7)).

The Tenth and Federal Circuits sidestep the no-set-of-circumstances rule by insisting that *Salerno* was not "setting forth a *test* for facial challenges, but rather . . . describing the *result* of a facial challenge." *Doe* v. *City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012); see also *Rothe Dev. Corp.* v. *Dep't of Defense*, 413 F.3d 1327, 1337–1338 (Fed. Cir. 2005) ("*Salerno* is of limited relevance here, at most describing a conclusion that could result from the application of the strict scrutiny test."). This approach is irreconcilable with the

language of *Salerno* itself: "the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745. Announcing what the challenger "must" do is not merely a description of a possible outcome. The Tenth and Federal Circuits' approach is therefore incompatible with the circuits that read *Salerno*'s language in its natural way—as announcing a requirement.

State supreme courts have seized on a different reason to repudiate the no-set-of-circumstances test. The *Morales* plurality attempted to distinguish *Salerno* "because this case comes to us from a state—not a federal—court." 527 U.S. at 55 n.22. In Pennsylvania, the State's high court has eschewed the no-set-of-circumstances standard as "based on dicta" and "not controlling for state courts." *Pennsylvania* v. *Ickes*, 873 A.2d 698, 702 (Pa. 2005). To justify this departure, the court cited *Morales* before importing the First Amendment overbreadth test in a case brought under the Fourth Amendment. *Ibid*. Whatever latitude States enjoy in contracting or expanding their own constitutions,[3] Pennsylvania's approach to the federal Constitution undermines that document's uniform applicability across the nation. The application of a law that would be permissible in another State would fail in Pennsylvania because the latter jurisdiction more readily strikes down statutes *in toto*. This incongruity is especially troubling in cases like the

[3] In Utah, for example, the supreme court has rejected the no-set-of-circumstances standard in a challenge brought solely under the takings clause of the Utah Constitution. *Utah Pub. Empls. Ass'n* v. *Utah*, 131 P.3d 208, 215 (Utah 2006).

present one that implicate parallel statutes in different States. See *Lopez-Valenzuela*, 770 F.3d at 788 nn.10–11 (identifying States with offense-based bail denials).

In addition, at least three State supreme courts decline to apply the no-set-of-circumstances test on the basis of *Kraft General Foods Inc.* v. *Iowa Dep't of Revenue & Fin.*, 505 U.S. 71 (1992). Unlike the cases in which Justice Stevens expressly criticized *Salerno*, his opinion in *Kraft* earned the support of a majority of the Court. Without citing *Salerno* at all, *Kraft* struck down, under the Foreign Commerce Clause, a State tax law that treated dividends from a domestic subsidiary more favorably than those from a foreign subsidiary. *Id.* at 82. The dissenting justices would have refused the facial challenge because the contested taxing scheme did not impermissibly burden foreign commerce in every instance—some foreign subsidiaries might "engage in little or even zero foreign activity." 505 U.S. at 84 (Rhenquist, C.J., dissenting). Without identifying the test it was applying, the *Kraft* Court reached a holding incompatible with *Salerno* and thereby spawned numerous State supreme court decisions refusing to apply the no-set-of-circumstances test in tax cases. *See Caterpillar, Inc.* v. *Comm'r of Internal Rev.*, 568 N.W.2d 695, 700 n.8 (Minn. 1997); *Conoco, Inc.* v. *Taxation & Revenue Dept. of State of N.M.*, 931 P.2d 730, 743 (N.M. 1996); *In re Morton Thiokol, Inc.*, 864 P.2d 1175 (Kan. 1993). Lest it appear that a consensus has formed in this substantive area of law (akin to First Amendment cases), courts do not uniformly follow *Kraft*. Among those is the New Jersey Supreme Court, which considered *Kraft* but concluded that *Salerno* would remain the standard in New Jersey, even for tax

cases. *Whirlpool Properties, Inc.* v. *Director, Div. of Taxation*, 26 A.3d 446, 467–468 (N.J. 2011) (discussing dueling opinions from this Court and noting "uncertainty over the use of *Salerno*").

3. Underscoring the lower courts' confusion in this area are courts that vacillate between the two competing standards. Just as this Court in *Stevens* described the "typical analysis" with reference to *Salerno* "or" *Glucksburg*, 559 U.S. at 472, so too several State high courts decline to make a decision. California admittedly entertains two standards. *Guardianship*, 202 P.3d at 1099. The more rigorous option resembles no-set-of-circumstances, while the looser alternative invalidates statutes that are unconstitutional "in the generality or great majority of cases." *San Remo Hotel L.P.* v. *City & Cty of San Francisco*, 41 P.3d 87, 107 (Cal. 2002) (emphasis omitted).

The District of Columbia Circuit appears to have adopted a similar either/or approach in the wake of *Stevens*. *Jawad* v. *Gates*, 832 F.3d 364 (D.C. Cir. 2016). The plaintiff in *Jawad* asserted that a statutory provision authorizing military tribunals to dispose of certain claims related to enemy combatants was facially unconstitutional for violating Article III. *Id.* at 370. To prevail, the D.C. Circuit explained, "Jawad must show 'that no set of circumstances exists under which [the law] would be valid, *or* that the statute lacks any plainly legitimate sweep.'" *Ibid.* (quoting *Stevens*, 559 U.S. at 472; emphasis added). The court then resolved the dispute without endorsing either test but instead noting that the disputed provision "can constitutionally be applied" to non-habeas, detention-

related claims. *Ibid.* It remains unclear whether the court viewed those applications as exceptions that foreclose a no-set-of-circumstances showing or as a sufficiently broad "legitimate sweep" of the statute.

* * *

The judicial machinery for testing State laws against the United States Constitution should not function differently in some jurisdictions than in others. Yet a survey of decisions in this area reveals an unsettled rift in this Court's precedent and lower courts that blur content-specific exceptions and treat the test in *Salerno* as one of several options from which they can choose or as a mere "description" of what happens when courts find facial unconstitutionality. This Court should grant certiorari to clarify that *Salerno*'s no-set-of-circumstances standard is the rule for facial challenges. The current case allows the Court to begin the process of clarification in the context of bail restrictions—the same context in which the no-set-of-circumstances test most recently garnered the support of a majority of the Court.

C. This Case Illustrates the Risk of Deviating from the No-Set-of-Circumstances Test.

The *Salerno* majority was correct to require a party asserting facial unconstitutionality to show "that no set of circumstances exists under which the [law] would be valid." 481 U.S. at 745 *accord Wash. State Grange*, 552 U.S. at 449 (*Salerno* requires that the challenged "law is unconstitutional in all of its applications."). This demanding standard makes sense in light of the upheaval a finding of facial unconstitutionality works among the branches of government, and none of the

countervailing interests that apply in the First Amendment context have ever been read to apply as a general matter. *Salerno*, *Washington State Grange*, and the hundreds of cases following them reflect the judicial humility to invalidate only those applications necessary to obtain compliance with the Constitution while leaving in place as much of the legislature's work as possible.

The Arizona Supreme Court has made a practice of doing the opposite. The wellspring of Arizona's error is *Simpson*. There, the Arizona Supreme Court considered a sister provision to the one at issue in this case. The central paragraph in *Simpson* invalidates the law as facially unconstitutional because it "sweeps in situations where teenagers engage in consensual sex. In such instances, evident proof or presumption great that the defendant committed the crime would suggest little or nothing about the defendant's danger to anyone." *Id.* at 349. But "such instances" were not before the court; the case at bar concerned a grown man who serially raped multiple children. As Justices Gould and Lopez explained in their *Morreno* dissent several months later, *Simpson* "stands the test for a facial challenge on its head." App. 67 (Gould, J., dissenting).

The same error persists in the current case. App. 31–33 (Gould, J., dissenting). As both dissents below emphasize, the elements of sexual assault imply an inherent risk to the community, which this Court has noted. App. 25–26 (Bolick, J., dissenting); App. 32–33 (Gould, J., dissenting) (citing *Smith*, 538 U.S. at 103, *McKune* v. *Lile*, 536 U.S. 24, 32–33 (2002)). To identify a counterexample that could do the work of the

hypothetical love-struck teenagers in *Simpson*, Respondent posited a sexual assault committed by someone who "intentionally deceiv[ed] the other person to believe that they are legally married" and thus into having non-consensual sex with him. Goodman Supp. Br. at 13. Although frivolous, Respondent's argument typifies the Arizona Supreme Court's logic in these cases: as long as a challenger can identify one circumstance in which a law might deny due process, then the law is facially unconstitutional.

Under *Salerno*, a facial challenge must fail if the contested provisions are appropriate for "'at least some persons charged with crimes' . . . whether or not they might be insufficient in some [other] particular circumstances." 481 U.S. at 751 (quoting *Schall*, 467 U.S. at 264). Whatever constitutional concerns might surround application of Proposition 103 to consenting teenagers or faux spouses, they are immaterial to facial challenges where the law can be applied constitutionally to persons—like the defendants in both *Simpson* and the present case—who do not fit the hypothetical. Indeed, the Arizona court's approach runs headlong into this Court's rejection of a facial challenge seeking "to invalidate legislation on the basis of its hypothetical application to situations not before the Court." *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 584 (1998) (quotation omitted); *see also Wash. State Grange*, 552 U.S. at 450. The facts of the current case give no reason to think that Respondent's case presents an application of Proposition 103 that offends due process.

Even assuming for the sake of argument that there exist actions constituting sexual assault that do not

implicate a sufficient community interest to overcome an arrestee's interest in obtaining bail, those few circumstances are no basis for invalidating a statute *in toto*. The Constitution is not so blunt an instrument. If anything, it calls for judicial restraint in invalidating the work of the legislative branch or, as here, the people acting through direct democracy.

Finally, due process is a natural context in which to affirm the no-set-of-circumstances standard because due process does not implicate the "chilling" concerns underlying the overbreadth analysis that is properly confined to First Amendment cases. Where a statute restricting speech is concerned, the Court has indulged a "prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612. This concern with the chilling effect of regulation does not apply to areas of criminal procedure where, unlike speech, the underlying conduct is not something the Court wishes to protect. While the "strong medicine" of facial unconstitutionality might more readily be dispensed in speech cases, *id.* at 613, *Salerno* correctly prescribed the no-set-of-circumstances standard as the general rule.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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SEPTEMBER 24, 2018

APPENDIX

APPENDIX

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APPENDIX A

IN THE
SUPREME COURT OF THE
STATE OF ARIZONA

No. CR-17-0221-PR

[Filed May 25, 2018]

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,*	)
GUY JAMES GOODMAN, *Real Party in Interest.*	)

Appeal from the Superior Court in Maricopa County
The Honorable Kevin B. Wein, Commissioner
No. CR2017-108708
AFFIRMED

Opinion of the Court of Appeals, Division One
242 Ariz. 352 (App. 2017)
VACATED

COUNSEL:

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JUSTICE TIMMER authored the opinion of the Court, in which CHIEF JUSTICE BALES, VICE CHIEF JUSTICE BRUTINEL, and JUSTICE PELANDER joined. JUSTICE BOLICK, joined by JUSTICES GOULD and LOPEZ, dissented. JUSTICE GOULD, joined by JUSTICE LOPEZ, dissented.

JUSTICE TIMMER, opinion of the Court:

¶1 Persons charged with sexual assault must not be released on bail if they pose a danger of committing new sexual assaults or other dangerous crimes while awaiting trial. The question here is how this may be accomplished in a manner that furthers this public-safety goal while preserving an accused's constitutionally guaranteed liberty interest.

¶2 Article 2, section 22(A)(1), of the Arizona Constitution and A.R.S. § 13-3961(A)(2) categorically prohibit bail for all persons charged with sexual assault if "the proof is evident or the presumption great" that the person committed the crime, without considering other facts that may justify bail in an individual case. We hold that these provisions, on their face, violate the Fourteenth Amendment's Due Process Clause. Unless the defendant is accused of committing sexual assault while already admitted to bail on a separate felony charge, the trial court must make an individualized bail determination before ordering pretrial detention. *See* Ariz. Const. art. 2, § 22(A)(2)–(3).

BACKGROUND

¶3 The Arizona Constitution provides that all persons charged with crimes shall be bailable unless the accused is charged with a crime that falls within an exception and the proof is evident or the presumption great that he committed that crime. Ariz. Const. art. 2, § 22(A). Before 2002, these exceptions were limited to capital offenses, felony offenses committed while the accused is on bail for a separate felony charge, and felony offenses when the person charged poses a substantial danger to any other person or the

community and no conditions of release would reasonably assure safety. A.R.S. § 13-3961, historical note.

¶4 In 2002, Arizona voters added to the listed exceptions by passing Proposition 103, which amended article 2, section 22(A)(1), to forbid bail when the proof is evident or the presumption great that an accused committed sexual assault, sexual conduct with a minor under fifteen years of age, or molestation of a child under fifteen years of age ("Proposition 103 offenses"). *See id.*; *see also* A.R.S. § 13-3961(A)(2)–(4) (codifying Proposition 103). Proposition 103 also declared that the purposes of bail and any conditions for release include "[a]ssuring the appearance of the accused," "[p]rotecting against the intimidation of witnesses," and "[p]rotecting the safety of the victim, any other person or the community." Ariz. Const. art. 2, § 22(B); A.R.S. § 13-3961, historical note.

¶5 In *Simpson v. Miller* (*Simpson II*), 241 Ariz. 341, 349 ¶ 31 (2017), *cert. denied*, *Arizona v. Martinez*, 138 S. Ct. 146 (2017), this Court held article 2, section 22(A)(1), and § 13-3961(A)(3) facially unconstitutional as they related to charges of sexual conduct with a minor under fifteen years of age. After *Simpson II* the superior court required individualized bail determinations pursuant to § 13-3961(D) for all persons charged with Proposition 103 offenses. Section 13-3961(D) provides, in relevant part:

> [A] person who is in custody shall not be admitted to bail if the person is charged with a felony offense and the state certifies by motion and the court finds after a hearing on the matter that there is clear and convincing evidence that

> the person charged poses a substantial danger to another person or the community or engaged in conduct constituting a violent offense, that no condition or combination of conditions of release may be imposed that will reasonably assure the safety of the other person or the community and that the proof is evident or the presumption great that the person committed the offense.

¶6 In 2017, the State charged Guy Goodman with sexually assaulting a victim in 2010. "A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person." A.R.S. § 13-1406(A). The state can charge a person with sexual assault at any time as no statute of limitations applies to the offense. *See* A.R.S. § 13-107(A).

¶7 Over the State's objection that sexual assault remains a non-bailable offense after *Simpson II*, the superior court conducted a § 13-3961(D) bail hearing. A police officer testified that the victim claimed that Goodman, a guest in the victim's home after a night of socializing, touched her vaginal area beneath her underwear while she was sleeping and without her consent. DNA tested from an external vaginal swab confirmed this contact. The officer also said that Goodman, when confronted with the DNA results, admitted digital penetration. The court ruled that although there was proof evident or a presumption great that Goodman committed the offense, the State had failed to "meet its burden of clear and convincing evidence to show that [Goodman] poses a substantial danger to other persons or the community." (The State did not assert that Goodman committed a "violent

offense," which is defined as either a dangerous crime against children or terrorism. A.R.S. § 13-3961(D).) The court reasoned that "[t]here was no evidence of any recent felony criminal history or prior similar offenses or arrests nor any evidence of criminal offenses between the time of this alleged offense in 2010 and today," nor any history of contact, threats, or intimidation aimed at the victim or any witnesses. The court set bail at $70,000, required that Goodman's movements be electronically monitored upon release, and imposed other conditions, including that he not possess any weapons, use non-prescription drugs, or contact the victim.

¶8 On special action review, the court of appeals vacated the bail order, holding that "[s]exual assault remains a non-bailable offense" after *Simpson II*, and so a § 13-3961(D) hearing is not required. *State v. Wein*, 242 Ariz. 352, 353 ¶ 1 (App. 2017).

¶9 We granted review to determine whether the categorical denial of bail for persons charged with sexual assault, when the proof is evident or the presumption great as to the charge, violates due process, an issue of statewide importance. Although Goodman pleaded guilty and was sentenced while this matter was pending, we nevertheless decide the issue because it is capable of repetition yet could evade review due to the temporary duration of pretrial detention. *See State v. Valenzuela*, 144 Ariz. 43, 44 (1985). We have jurisdiction pursuant to article 6, section 5(3), of the Arizona Constitution and A.R.S. § 12-120.24.

DISCUSSION

I. Restrictions on pretrial detention: the *Salerno* standards

¶10 The constitutional validity of Proposition 103's prohibition on bail for defendants accused of sexual assault is an issue of law we review de novo. *See Simpson II*, 241 Ariz. at 344 ¶ 7. As the challenging party, Goodman bears the "heavy burden" of demonstrating that the restriction is facially unconstitutional. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

¶11 The Due Process Clause prohibits the government from punishing an accused by jailing him before trial. *See id.* at 746. But if pretrial detention is regulatory rather than punitive, the government's interest can, in appropriate and exceptional circumstances, outweigh an individual's "strong interest in liberty," an important, fundamental right. *Id.* at 748, 750; *see also id.* at 755 ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

¶12 In *Salerno*, the United States Supreme Court used a two-step standard to determine whether the Bail Reform Act's provisions permitting pretrial detention constituted impermissible punishment or potentially permissible regulation. *Id.* at 747. "Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on [1] whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and [2] whether it appears excessive in relation to the alternative purpose assigned to it." *Id.* (internal

quotation marks and alterations omitted) (quoting *Schall v. Martin*, 467 U.S. 253, 269 (1984)). The Court concluded that the Act was regulatory. *Id.* at 748; *cf. Simpson II*, 241 Ariz. at 347 ¶ 20 (applying the *Salerno* standard).

¶13 The *Salerno* Court next used a two-step "heightened scrutiny" standard to determine whether the Bail Reform Act, although regulatory, nevertheless violated the due-process restriction on pretrial detention. *Salerno*, 481 U.S. at 748–50; *Simpson II*, 241 Ariz. at 348 ¶ 23. Under that standard, pretrial detention is constitutionally permissible if the government has both a "legitimate and compelling" purpose for restricting an accused's liberty, and the restriction is "narrowly focuse[d] on a particularly acute problem." *Salerno*, 481 U.S. at 749–50, 752. The Court determined that the Act met this standard. *Id.* at 750–51; *cf. Simpson II*, 241 Ariz. at 345, 348 ¶¶ 9, 23 (applying the second *Salerno* standard to conclude that the categorical prohibition of bail for arrestees charged with sexual conduct with a minor under age fifteen violates due process).

¶14 Consistent with *Salerno* and *Simpson II*, we first examine whether Proposition 103's categorical prohibition on bail for arrestees charged with sexual assault is regulatory or punitive. If the latter, the prohibition constitutes a per se due-process violation. *See Simpson II*, 241 Ariz. at 347 ¶ 20. If the restriction is regulatory, we must determine whether it nevertheless violates due process. Finally, we decide whether any due-process violation renders the restriction facially unconstitutional.

II. Application here

A. Regulation vs. punishment

¶15 In *Simpson II*, we concluded that Proposition 103's categorical prohibition of bail for an arrestee charged with sexual conduct with a minor under age fifteen, when the proof is evident or presumption great that the person committed the offense, is regulatory rather than punitive. *Id.* For the same reasons, Proposition 103's identical prohibition on bail for persons charged with sexual assault is regulatory.

B. Due process

1. Legitimate and compelling purpose

¶16 The publicity pamphlet for Proposition 103 reflects that the measure's purpose was both to ensure that sexual predators facing potential life sentences would be present for trial and to keep "rapists and child molesters" from endangering others while awaiting trial. The senator who sponsored the legislation placing Proposition 103 on the ballot explained to voters that "sexual predators . . . know they could be facing lifetime incarceration" and therefore "ha[ve] no incentive to ever return" to court, making Proposition 103 necessary to "keep dangerous sexual predators off our streets." *See* Ariz. Sec'y of State, 2002 Publicity Pamphlet 16 (2002), http://apps.azsos.gov/election/2002/Info/pubpamphlet/english/prop103.pdf ("Publicity Pamphlet"). Others echoed the senator, focusing on the need to "prevent the worst sexual predators from jumping bail or even simply walking our neighborhoods," stopping "rapists and child molesters" from reoffending, and treating

"bail for rapists and child molesters . . . like bail for murderers." *Id*. at 16–17.

¶17 Ensuring that an accused is present for trial serves a legitimate and compelling purpose. *Cf. Salerno*, 481 U.S. at 749 ("[A]n arrestee may be incarcerated until trial if he presents a risk of flight."). And the government has an equally compelling interest in protecting victims and the public from those who would commit sexual assault while on pre-trial release. *See id.* at 747 ("There is no doubt that preventing danger to the community is a legitimate regulatory goal."); *Simpson II*, 241 Ariz. at 348 ¶ 24 (finding that Proposition 103's prohibition on bail for persons accused of sexual contact with a minor under fifteen years of age serves the legitimate and compelling purpose of crime prevention).

¶18 Goodman takes issue with our analysis in *Simpson II* and argues that Proposition 103 did not advance a legitimate and compelling government purpose because voters were misled by suggestions that, without the categorical prohibition, courts would have to grant bail to persons charged with Proposition 103 offenses. We disagree. The Publicity Pamphlet stated that without the measure, persons charged with Proposition 103 offenses would be "eligible for bail," not automatically granted bail. Publicity Pamphlet, *supra* ¶ 16 at 16.

¶19 The prohibition on bail for those charged with sexual assault serves legitimate and compelling regulatory purposes and thus satisfies the first prong of the *Salerno* standard.

2. Narrowly focused measure

¶20 Proposition 103's categorical prohibition of bail for persons charged with sexual assault is "narrowly focused" if the proof is evident or the presumption great regarding the charge, and a sexual assault charge either presents an inherent flight risk or inherently demonstrates that the accused will likely commit a new dangerous crime while awaiting trial even with release conditions. *Simpson II*, 241 Ariz. at 348–49 ¶¶ 26, 30.

a. Flight risk

¶21 A sexual assault charge does not present an inherent flight risk. "Sexual assault" concerns an array of deviant behaviors and, depending on individual circumstances, punishment ranges from 5.25 years' imprisonment to life imprisonment. A.R.S. § 13-1406(B)–(D). The State does not cite any authority, and we are not aware of any, suggesting that the prospect of imprisonment for a non-capital offense inherently predicts that an accused will not appear for trial. *Cf. Simpson II*, 241 Ariz. at 349 ¶ 26 ("Historically, capital offense charges have been considered to present an inherent flight risk sufficient to justify bail denial."). And even if the possibility of a life sentence presents an inherent flight risk, a concern expressed in the Publicity Pamphlet, *supra* ¶ 16, the prohibition is excessive as it sweeps in those arrestees facing only a term of years' imprisonment if convicted.

b. Future dangerousness while awaiting trial

¶22 To begin, the question here is not whether sexual assault is a deplorable crime that endangers and dehumanizes victims — it is, and it does. *Cf. Coker v.*

Georgia, 433 U.S. 584, 597 (1977) (describing rape as "highly reprehensible" and "the ultimate violation of self" after homicide). The pertinent inquiry is whether a sexual-assault charge alone, when the proof is evident or the presumption great as to the charge, inherently demonstrates that the accused will pose an unmanageable risk of danger if released pending trial. *See Simpson II*, 241 Ariz. at 349 ¶ 30; *cf. Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (stating in the civil commitment context that "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground" to justify commitment and that some additional factor is required to narrow the class to persons "who are unable to control their dangerousness"). For three reasons, we agree with Goodman that it does not.

¶23 First, Proposition 103 does not provide any procedures to determine whether a person charged with sexual assault would pose a danger if granted pre-trial release. *Cf. Foucha v. Louisiana*, 504 U.S. 71, 81–82 (1992) (invalidating Louisiana's continued detention of insanity acquittees who are no longer mentally ill because, "[u]nlike the sharply focused scheme" in *Salerno*, which involved individualized assessment, Louisiana's scheme does not include "an adversary hearing at which the State must prove . . . that [the acquittee] is demonstrably dangerous to the community"); *Salerno*, 481 U.S. at 742–43, 747, 750 (finding that the Bail Reform Act was narrowly focused on preventing danger to the community because, in part, a court could only order pre-trial detention after conducting a "full-blown adversary hearing" and finding that no conditions would "assure . . . the safety of any other person and the community"). A court's finding that the proof is evident or the presumption

great only shows a likelihood that an accused committed the charged sexual assault. *See Simpson II*, 241 Ariz. at 346 ¶ 16 (describing the standard as requiring substantial proof that the accused committed the charged crime). It does not address the likelihood that an accused would commit a new sexual assault or other dangerous crime if released pending trial. *Cf. United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006) ("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.").

¶24 Second, nothing shows that most persons charged with sexual assault, or even a significant number, would likely commit another sexual assault or otherwise dangerous crime pending trial if released on bail. *Cf. Simpson II*, 241 Ariz. at 348–49 ¶¶ 26, 30 (stating that any category of crime must serve as "a convincing proxy" for future dangerousness (citation and internal quotation marks omitted)). Indeed, this showing would be a difficult undertaking. *Cf. Schall*, 467 U.S. at 279 ("We have also recognized that a prediction of future criminal conduct is an experienced prediction based on a host of variables which cannot be readily codified.") (internal quotation marks omitted).

¶25 The State points to recidivism rates among sex offenders as evidence of the likelihood that sexual assault arrestees would commit a new sexual assault pending trial if released on bail. The cited empirical studies are not illuminating, however, as they concern a wide variety of sex crimes besides sexual assault, arrive at disparate conclusions, and for the most part do not focus on the relatively short time period between

arrest and trial. Regardless, none of the studies cited reflects that most convicted rapists reoffend, the highest number being 5.6% reoffending within five years of release from prison. *See* Matthew R. Durose et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, at 2 (U.S. Dep't of Justice 2016), https://www.bjs.gov/content/pub/pdf/rprts05p0510_st.pdf. And the only cited study concerning accused rapists released on bail reflects that 3% committed another unspecified felony pending trial. *See* 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.

¶26 *Smith v. Doe*, 538 U.S. 84 (2003), and *McKune v. Lile*, 536 U.S. 24 (2002), relied on by Justice Bolick in his dissent, do not persuade us that recidivism rates justify a categorical denial of bail. *See infra* ¶ 45. At issue in *Smith* was whether Alaska's registration requirement for convicted sex offenders imposed punishment so that any retroactive application would violate the Ex Post Facto Clause. *Smith*, 538 U.S. at 89. Employing a test like the one used in *Salerno* to determine whether an act is regulatory or punitive, the Court concluded that the registration requirement was regulatory. *Id*. at 105–06. In rejecting an argument that application of the registration requirement to all convicted sex offenders without regard to their future dangerousness was excessive in relation to a proper regulatory purpose, the Court noted that a sex-offense conviction could provide evidence of a "substantial risk of recidivism," and that Alaska could "legislate with respect to convicted sex offenders as a class, rather

than require individual determination of their dangerousness." *Id.* at 103–04.

¶27 But *Smith* did not establish that a state can regulate sex offenders as a class in *every* situation without violating due process, as Justice Bolick asserts. *See infra* ¶¶ 45–47. Indeed, the Court suggested the opposite by distinguishing Alaska's sex-offender-registration requirement from a Kansas act that authorized civil commitment of sexually violent predators for a maximum of one year, subject to new commitment proceedings. 538 U.S. at 104 (citing *Hendricks*, 521 U.S. at 364). In *Hendricks*, the Court rejected a due-process challenge to the Kansas act, reasoning that because it required an individualized finding of future dangerousness linked with a "mental abnormality" or "personality disorder," it sufficiently "narrow[ed] the class of persons eligible for confinement to those who are unable to control their dangerousness." 521 U.S. at 358. (Contrary to Justice Bolick's characterization, the *Hendricks* Court's due-process analysis did not turn on the potential that sexually violent predators could be indefinitely confined. *See infra* ¶ 48.) The *Smith* Court concluded that a similarly individualized risk assessment was not necessary to uphold Alaska's law as regulatory, noting that "[t]he State's objective in *Hendricks* was involuntary (and potentially indefinite) confinement of particularly dangerous individuals," which made individual assessments appropriate given "[t]he magnitude of the restraint." *Smith*, 538 U.S. at 104. The Court contrasted sex-offender registration as a "more minor condition" and concluded that in that context "the State can dispense with individual predictions of future dangerousness and allow the

public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions." *Id.* Pretrial detention is more like civil commitment than sex-offender registration, making this case closer to *Hendricks*. And *Smith* does not support a conclusion that the risk of recidivism by some persons on pretrial release justifies categorically dispensing with individual assessments of that risk.

¶28 *McKune* addressed whether requiring convicted sex offenders to admit their crimes as part of an in-prison rehabilitation program violated the Fifth Amendment privilege against self-incrimination. 536 U.S. at 29. The Court began its analysis by noting that "[s]ex offenders are a serious threat in this Nation" and "[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." *Id.* at 33. The empirical study relied on by the Court for this conclusion, however, reflects that 7.7% of convicted rapists released from prison in 1983 were rearrested for rape within three years. *See* U.S. Dep't of Justice, *Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983*, at 6 (1997), https://www.bjs.gov/content/pub/pdf/rpr83.pdf. Although we share the *McKune* Court's view that sex offenders are a "serious threat," the post-conviction recidivism rates do not inherently demonstrate that a person charged with sexual assault will likely commit another sexual assault if released pending trial, particularly if conditions like GPS monitoring are imposed.

¶29 Third, alternatives exist "that would serve the state's objective equally well at less cost to individual liberty." *Simpson II*, 241 Ariz. at 349 ¶ 28. The Arizona

Constitution already forbids bail for those charged with any felony when the proof is evident or the presumption great as to the charge, "the person charged poses a substantial danger to any other person or the community," and "no conditions of release which may be imposed will reasonably assure the safety of the other person or the community." Ariz. Const. art. 2, § 22(A)(3); *see also* A.R.S. § 13-3961(D) (codifying art. 2, § 22(A)(3)). Also, a court can set bail and impose restrictions intended to preserve public safety, like the GPS monitoring imposed on Goodman. *See* Ariz. Const. art. 2, § 22(B)(3) ("The purposes of bail and any conditions of release that are set by a judicial officer include . . . [p]rotecting the safety of the victim, any other person or the community.").

¶30 The court of appeals reached a different conclusion from ours by mistakenly focusing on the dangerousness of sexual assault and not on whether a charge inherently predicts the commission of a new sexual assault or otherwise dangerous offense pending trial. *Wein*, 242 Ariz. at 355 ¶ 5; *see also Hendricks*, 521 U.S. at 358; *Simpson II*, 241 Ariz. at 349 ¶ 30. The court seized on a citation signal to interpret *Simpson II* as turning on the fact that sexual conduct with a minor under fifteen years of age could be committed with a victim's consent and therefore "may involve a defendant who is not a danger to the community." *Wein*, 242 Ariz. at 353 ¶¶ 7–8. The court reasoned that after *Simpson II*, a charge of sexual assault, which is always non-consensual, "fulfills the requirement for finding inherent dangerousness." *Id.* ¶ 9. Justice Bolick shares this view. *See infra* ¶ 42.

¶31 In retrospect, the court of appeals' confusion is understandable. We should have immediately explained that just as commission of sexual conduct with a minor under fifteen years of age is not always dangerous, it does not inherently demonstrate future dangerousness pending trial. *See Simpson II*, 241 Ariz. at 349 ¶ 27. We made that point later in the opinion. *See id.* ¶ 30 ("[T]he state may deny bail categorically for crimes that inherently demonstrate future dangerousness" when the proof is evident or the presumption great, but "[w]hat it may not do, consistent with due process, is deny bail categorically for those accused of crimes that do not inherently predict future dangerousness."); *see also Morreno v. Hon. Brickner / State*, 790 Ariz. Adv. Rep. 24 ¶ 21 (May 2, 2018) ("The mere charge itself [in *Simpson II*] was not a convincing proxy for future dangerousness, and therefore not narrowly focused, because it swept in situations that are not predictive of future dangerousness."). Justice Bolick's view that showing proof evident or presumption great that an accused committed sexual assault alone demonstrates future dangerousness is at odds with *Simpson II*'s holding and also disregards key aspects of *Salerno*'s reasoning and holding. *See infra* ¶ 50; *see also Morreno,* 790 Ariz. Adv. Rep. 24 ¶ 21.

¶32 Contrary to the dissent's assertion, *infra* ¶ 46, we reaffirm our view expressed in *Simpson II* that due process does not require individualized determinations in every case. 241 Ariz. at 348 ¶ 26. Indeed, we recently rejected a due-process challenge to article 2, section 22(A)(2), of the Arizona Constitution, which precludes bail "[f]or felony offenses committed when the person charged is already admitted to bail on a separate felony

charge and where the proof is evident or the presumption great as to the present charge." *Morreno*, 790 Ariz. Adv. Rep. 24 ¶ 38. We concluded that the state had a legitimate and compelling interest in "preventing defendants from committing new felonies while on pretrial release from a prior felony charge," and article 2, section 22(A)(2), narrowly focused on this objective by applying only to defendants who, in fact, likely reoffended while on release. *Id*. ¶¶ 31, 34 (citation and internal quotation marks omitted). "In such cases, an individualized determination serves no narrowing function and is therefore unnecessary." *Id*. ¶ 34. But unlike *Morreno*, the issue here is whether a sexual assault charge inherently predicts that a defendant will commit another dangerous offense pending trial. Due process requires an individualized assessment of this risk because it is not categorically demonstrated, as is the risk presented by a felon who has already reoffended while on pretrial release.

¶33 In sum, although Proposition 103 has legitimate and compelling regulatory purposes, its categorical prohibition of bail for persons charged with sexual assault, when the proof is evident or the presumption great as to the charge, is not narrowly focused on accomplishing those purposes. The *Salerno* standard is unmet, meaning the categorical prohibition of bail violates substantive due process. *See Simpson II*, 241 Ariz. at 349 ¶ 30.

III. Facial unconstitutionality

¶34 The Arizona Attorney General, in an amicus role, and Justice Gould, in his dissent, argue that even if Proposition 103's categorical prohibition on bail for those charged with sexual assault violates Goodman's

substantive-due-process rights, he failed to establish that the prohibition is facially unconstitutional. To succeed on a facial challenge, an admittedly difficult feat, "the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Salerno*, 481 U.S. at 745.

¶35 Here, Proposition 103's categorical prohibition of bail for everyone charged with sexual assault deprives arrestees of their substantive-due-process right to either an individualized determination of future dangerousness or a valid proxy for it. *See Morreno*, 790 Ariz. Adv. Rep. 24 ¶ 15. There is "no set of circumstances" under which the prohibition would be valid because it lacks either of these features in every application.

¶36 Echoing his partial dissent in *Morreno*, Justice Gould asserts that (1) the prohibition here is not facially unconstitutional because it applies to arrestees who would, in fact, likely commit a new sexual assault while on pretrial release, and (2) we apply an overbreadth analysis that is properly confined to First Amendment cases. *See id.* ¶¶42, 49 (Gould, J. concurring); *infra* ¶¶ 54, 56. We reject these arguments for the same reasons we did in *Morreno*. *See Morreno*, 790 Ariz. Adv. Rep. 24 ¶¶ 20–23.

CONCLUSION

¶37 As in *Simpson II*, we do not lightly set aside citizen-enacted constitutional provisions, whether they are narrowly passed or approved "overwhelming[ly]" by

Arizona's voters (an irrelevancy for constitutionality purposes). *Infra* ¶ 39. Nevertheless, article 2, section 22(A)(1), and § 13-3961(A)(2) are facially unconstitutional because they categorically prohibit bail without regard for individual circumstances. To be clear, courts can deny bail to a person charged with sexual assault when the proof is evident or the presumption great as to the charge and must do so when that person "poses a substantial danger to another person or the community." A.R.S. § 13-3961(D). Before doing so, however, courts must engage in an individualized determination by conducting a § 13-3961(D) hearing. We affirm the superior court and vacate the court of appeals' opinion.

BOLICK, J., joined by GOULD, J., and LOPEZ, J., dissenting.

¶38 Although our colleagues' opinion has substantial merit, we conclude that the differences between the crime of sexual assault at issue here and the crime of sexual conduct with a minor at issue in *Simpson II* are of constitutional magnitude, justifying Arizona citizens' determination that those who are likely to be adjudged guilty of sexual assault should be held without bail pending trial.

¶39 We begin by recognizing, as did the Court in *Simpson II,* that the challenged provision is part of our state's organic law, whose review against federal constitutional challenges we undertake with "great care" and whose provisions "we strive whenever possible to uphold." 241 Ariz. at 345 ¶ 8. In a close case, we should not expansively construe United States Supreme Court precedents to compel ourselves to

invalidate a provision of our constitution; we should seek to the fullest extent possible to harmonize the two. We conclude that no such irreconcilable conflict exists here and that the majority too lightly sets aside the voters' overwhelming determination that those who are shown to be likely guilty of sexual assault should not be released pending trial. The framework set forth by the United States Supreme Court in *Salerno*, while recognizing core liberty interests implicated by pretrial incarceration, emphasized that it has "repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." 481 U.S. at 748. This is one of those appropriate circumstances.

¶**40** In *Simpson II*, we held that individual determinations of future dangerousness are not necessary in all cases, but that where pretrial incarceration is categorically required, the crime giving rise to such conditions must serve as a "convincing proxy for unmanageable flight risk or dangerousness." 241 Ariz. at 348 ¶ 26 (quoting *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 786 (9th Cir. 2014)). The Court's determination that sexual conduct with a minor was not an adequate proxy for dangerousness was based on the crime's definition, which encompassed consensual activity so that dangerousness was not "inherent" in the crime. *Id.* at 349 ¶¶ 26–27 ("The crime can be committed by a person of any age, and may be consensual," thereby "sweep[ing] in situations where teenagers engage in consensual sex. In such instances, evident proof or presumption great that the defendant committed the crime would suggest little or nothing about the defendant's danger to anyone."). The Court's analysis made clear that where a crime is not a

convincing proxy for dangerousness, an individual assessment of dangerousness is necessary to deny pretrial release. But where a crime is a convincing proxy for dangerousness, a determination by proof evident or presumption great that a defendant committed the crime is sufficient to establish dangerousness and to sustain a categorical prohibition of bail.

¶**41** Sexual assault is by definition an extremely dangerous crime. As this Court highlighted in *Simpson II*, absence of consent is a defining feature of sexual assault. *Id.* ¶ 27 (citing A.R.S. § 13-1406(A) defining sexual assault as "intentionally or knowingly engaging in sexual intercourse or oral sexual contact . . . without consent of such person"). Our statutes carefully define and circumscribe the term "without consent," which can occur in four discrete circumstances: where the victim (a) "is coerced by the immediate use or threatened use of force against a person or property"; (b) "is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep[,] or any other similar impairment of cognition and such condition is known or should reasonably have been known to the defendant"; (c) "is intentionally deceived as to the nature of the act"; or (d) "is intentionally deceived to erroneously believe that the person is the victim's spouse." A.R.S. § 13-1401(A)(7). Thus, by definition, sexual assault necessarily involves the sexual violation of a person through force, coercion, or deception. As such, it is an inherently dangerous crime, and proof evident or presumption great that a defendant has committed the crime demonstrates that the defendant is dangerous.

¶42 As noted in *Simpson II*, the crime at issue there was *defined* to encompass both consensual and nonconsensual acts. 241 Ariz. at 349 ¶ 27. Here the crime is defined *only* to encompass nonconsensual sexual violations. The Court highlighted that distinction because the risk of future dangerousness encompasses not only the likelihood of recidivism but the inherent danger and human impact of the crime. The majority now "explain[s]" that the nature of the crime is irrelevant to the risk of future dangerousness. *Supra* ¶ 31. In that way, it removes from the constitutional equation that sexual assault is by definition a uniquely horrific act, in which a person's most intimate parts are violated through force, coercion, or deception.

¶43 As the United States Supreme Court recognized in *Coker v. Georgia*, sexual assault

> is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. *Short of homicide, it is the "ultimate violation of self."* It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community's sense of security, there is public injury as well.

433 U.S. 584, 597–98 (1977) (emphasis added) (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)).

¶44 Unsurprisingly, then, the Supreme Court has recognized that sexual crimes justify distinctive legislative treatment in the confinement context.

¶45 In *Smith v. Doe*, 538 U.S. 84 (2003), the Court upheld a state's sex-offender registry against an Ex Post Facto Clause challenge. Although a distinct provision of the Constitution, the Ex Post Facto Clause is closely related to substantive due process because it likewise "forbids the application of any new punitive measure to a crime already consummated." *Kansas v. Hendricks*, 521 U.S. 346, 370 (1997) (quoting *Lindsey v. Washington*, 301 U.S. 397, 401 (1937)). In *Smith*, the challengers argued the law was excessive in relation to its regulatory purpose because it "applies to all convicted sex offenders without regard to their future dangerousness," 538 U.S. at 103, which parallels Goodman's argument here. The Court held that the state reasonably "could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism." *Id.* Specifically, the Court cited findings justifying "grave concerns over the high rate of recidivism among convicted sex offenders and *their dangerousness as a class*." *Id.* (emphasis added); *see also McKune v. Lile*, 536 U.S. 24, 32–33 (2002) ("Sex offenders are a serious threat in this Nation. . . . 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. . . . [T]he

rate of recidivism of untreated offenders has been estimated to be as high as 80%.").

¶46 The majority acknowledges that sex offenders constitute a serious threat but is unconvinced that recidivism statistics "inherently demonstrate that a person charged with sexual assault will likely commit another sexual assault if released pending trial." *Supra* ¶ 28. That conclusion misstates the constitutional requirement and implies the necessity of individualized assessments in every case, which we expressly rejected in *Simpson II*. 241 Ariz. at 348 ¶ 26 ("[W]e do not read *Salerno* or other decisions to require such individualized determinations in every case," but rather to require that its procedure serve as a convincing proxy for dangerousness.); *accord State v. Furgal*, 13 A.3d 272, 278–79 (N.H. 2010), *cited with approval in Simpson II*, 241 Ariz. at 349 ¶ 26. Rather, the Constitution requires only that the state reasonably could conclude that the risk of dangerousness requires pretrial confinement of those who are determined to have likely committed sexual assault. *See, e.g.*, *Smith*, 538 U.S. at 103 ("The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences."); *see also id.* at 104 ("The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness," did not violate the clause.).

¶47 *Smith* and related cases establish that a state may categorically regulate sex offenders as a class for public safety purposes, both because of the uniquely

horrific nature of the crimes and sex offenders' propensity for recidivism. Indeed, while the statute in *Smith* exposed *all* sex offenders to special burdens, the provision here deals only with a particularly heinous and dangerous subcategory of sex offenders. Nor does it amount to a substantial difference that *Smith* involved convicted sex offenders, given that the bail exclusion here applies only to defendants who are demonstrated at an adversarial hearing to have committed sexual assault by proof evident or presumption great. As we noted in *Simpson II*, the procedure to determine proof evident or presumption great is "robust," requiring a prompt and complete adversarial hearing with specific factual findings in which "the state's burden 'is met if all of the evidence, fully considered by the court, makes it plain and clear to the understanding . . . [and] dispassionate judgment of the court that the accused committed'" the crime. 241 Ariz. at 346 ¶ 16 (alteration in original) (quoting *Simpson v. Owens*, 207 Ariz. 261, 274 ¶ 40 (App. 2004)).

¶48 The majority notes that *Smith* distinguished the earlier opinion in *Hendricks*, *supra* ¶ 27, which upheld a statute requiring an individualized assessment of dangerousness for involuntary civil commitment for sexual offenders who were likely to recidivate due to mental abnormalities or personality disorders. *Hendricks*, 521 U.S. at 350–52. The scheme at issue differed from the prohibition of bail here in two crucial respects. First, it involved involuntary civil commitment after, and in addition to, the criminal sentence. *Id.* at 351–52. Further, the period of involuntary commitment was potentially indefinite. *Id.* at 364; *see also Foucha*, 504 U.S. at 83 (striking down

"indefinite detention of insanity acquittees" in the absence of sufficient safeguards). As the Court observed in *Smith*, the "magnitude of the restraint made individual assessment appropriate." 538 U.S. at 104.

¶49 In contrast to *Hendricks*, which exposed sex offenders to potentially indefinite involuntary commitment after having fully served their sentences, the bail prohibition here applies only to defendants who by proof evident and presumption great are likely to have committed sexual assault and whose pretrial confinement will be only temporary. It thus provides greater protection than the baseline requirement of a probable cause finding for pretrial confinement upheld by the Supreme Court in *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). Additionally, the Arizona Constitution, statutes, and rules guarantee a speedy trial. *See* Ariz. Const. art. 2, § 24 (guaranteeing the right of criminal defendants to speedy trial); A.R.S. § 13-114(1) (same); *see also* Ariz. Const. art 2, § 2.1(A)(10) (guaranteeing the right of crime victims to speedy trial); A.R.S. § 13-4435(A) (same); A.R.S. § 13-4435(D) (limiting continuances to "extraordinary circumstances" and when "indispensable to the interests of justice"). The Arizona Rules of Criminal Procedure prescribe time for trials, including 150 days after arraignment for defendants in custody. Ariz. R. Crim. P. 8.2(a)(1). Rule 8.6 provides that the court must dismiss any prosecution when it determines that the applicable time limits are violated. Those protections ensure that defendants adjudged by proof evident or presumption great to have committed sexual assault will be subjected only to the pretrial detention necessary to protect the public against dangerous criminal acts.

¶50 For all of those reasons, we conclude that the bail-exclusion provision here fits comfortably within the *Salerno* framework. First, the provision applies to "a specific category of extremely limited offenses." *Salerno*, 481 U.S. at 750. Indeed, it is far more limited than the array of offenses for which bail was restricted in the law at issue in *Salerno*. *Id.* at 747 (citing 18 U.S.C. § 3142(f), which includes crimes of violence, offenses with a penalty of life imprisonment or death, serious drug offenses, and certain repeat offenders)). Second, it is narrowly focused on "preventing danger to the community," *id.* at 747, because it is limited to a crime that the Supreme Court has recognized as particularly dangerous and whose perpetrators are likely to commit similar crimes in the future, *see, e.g.*, *Smith*, 538 U.S. at 103–04; *supra* ¶¶ 45–47. Third, like the "full-blown adversary" hearing in *Salerno*, 481 U.S. at 750, pretrial detention in Arizona is preceded by a hearing requiring not merely probable cause but proof evident or presumption great. Although the Bail Reform Act at issue in *Salerno* included individualized assessments of dangerousness, *id.*, the nature of the crime here, as discussed above, justifies categorical treatment so that an adversarial hearing regarding probable guilt serves as an ample proxy for dangerousness. Fourth, the duration of pretrial detention is limited by speedy-trial guarantees and rules. *See id.* at 747. Finally, if any doubt exists that these safeguards "suffice to repel a facial challenge," the Court in *Salerno* admonishes that the protections sustained there are "more exacting" and "far exceed what we found necessary to effect limited pretrial detention" in other cases. *See id.* at 752.

¶51 *Simpson II* also suggests that the existence of less-restrictive alternatives may demonstrate the bail exclusion is not narrowly focused in some instances. 241 Ariz. at 349 ¶ 28. However, we emphasized that individualized determinations of dangerousness are unnecessary if the crime is a convincing proxy for unmanageable flight risk or dangerousness. *Id.* at 348–49 ¶ 26 (noting that historically, bail is often denied categorically to capital defendants due to flight risk). We expressly 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." *Id.* at 349 ¶ 26. As discussed above, the Supreme Court's decisions in *Smith* and *McKune* make clear that sexual assault is a uniquely grave and dangerous crime. The statutory definition limiting sexual assault to nonconsensual acts narrowly focuses the bail exclusion to an especially serious and inherently dangerous crime. The extensive safeguards further ensure narrow focus and satisfy the *Salerno* standards. Indeed, we held recently in *Morreno* that individualized dangerousness determinations are unnecessary to categorically deny bail to felony defendants who are arrested for *any* new felonies before trial. 790 Ariz. Adv. Rep. 24 ¶¶ 34–35. We therefore conclude that the majority unnecessarily oversteps by concluding that federal precedent compels it to invalidate a provision of our constitution.

¶52 If it is presented the opportunity to do so, we urge the Supreme Court to review this decision. If we are correct that its precedents allow Arizona to deny pretrial release to those who by proof evident or presumption great have committed sexual assault, this

Court has unnecessarily invalidated a part of our organic law. As a matter of comity and federalism, we urge the Supreme Court to correct the error if this Court has misread its precedents. In the meantime, with great respect to our colleagues, we dissent.

GOULD, J., joined by LOPEZ, J., dissenting.

¶53 For the reasons set forth in my partial dissent in *Morreno v. Hon. Brickner / State*, 790 Ariz. Adv. Rep. 24 ¶¶ 39–71, I also dissent from the majority's decision today. Specifically, I conclude the sexual assault bond restriction contained in article 2, section 22(A)(1), of the Arizona Constitution (and codified in A.R.S. § 13-3961(A)(2)) is facially constitutional. Additionally, while I do not join in Justice Bolick's dissenting opinion to the extent he applies the overbreadth analysis used in *Simpson II*, I do join in his analysis and conclusion that the bond provision at issue here is facially constitutional.

¶54 As it did in *Simpson II*, the majority abandons the facial standard set forth in *Salerno*, 481 U.S. at 745, substituting the overbreadth standard used by the Ninth Circuit in *Lopez-Valenzuela*, 770 F.3d 772. *See Morreno*, 790 Ariz. Adv. Rep. 24 ¶¶ 39–45 (discussing *Salerno's* standard for facial challenges and *Simpson II's* adoption of the overbreadth standard used in *Lopez-Valenzuela*). Thus, applying *Simpson II's* overbreadth standard, this Court strikes down yet another offense–based bond provision. Now, the only remaining offense–based restriction is for capital offenses. Undoubtedly, this provision cannot survive the majority's overbreadth test. *See Morreno*, 790 Ariz. Adv. Rep. 24 ¶¶ 64, 67–68, 70 (discussing how offense-

based bond restrictions cannot survive the *Simpson II* overbreadth standard).

¶55 Here, like *Simpson II*, the majority contends that to be facially valid, sexual assault must serve as a "valid proxy" for future dangerousness and "inherently demonstrate[] that [an] accused will likely commit a new dangerous crime while awaiting trial." *See supra* ¶¶ 20, 35. Thus, if there are instances where a defendant charged with sexual assault might remain crime–free on pretrial release, the crime cannot serve as a "valid proxy" for future dangerousness.

¶56 Not only does the majority's approach create an impossible standard for "inherently dangerous" crimes, it essentially turns Salerno on its head. In contrast to the majority approach, Salerno provides that "[t]he fact that the [act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Salerno*, 481 U.S. at 745. Thus, applying *Salerno*, the subject provision survives a facial challenge because there are instances where a defendant who commits sexual assault poses a danger to the victim or the community. Indeed, as Justice Bolick notes in his dissent, the United States Supreme Court has expressly recognized that sex offenders are a "serious threat" to this "Nation," and that such offenders pose a risk of recidivism. *See supra* ¶¶ 44-46 (Bolick, J., dissenting). Admittedly, this does not mean that all sex offenders will reoffend, or that even most will reoffend. But any offender charged with sexual assault, when the proof of the offense is evident or the presumption great, inherently presents a risk of danger to society, and the pronouncements of the United States Supreme Court do show that at least some sex

offenders almost certainly will commit new crimes while on pretrial release. Under *Salerno*, this is sufficient to survive a facial challenge. *Supra* ¶ 54.

¶57 In abandoning *Salerno*, the majority has effectively imposed a due process requirement that all determinations denying pretrial release must include an individualized determination of future dangerousness. There is, of course, no authority for this requirement. Indeed, *Salerno* did not impose such a requirement. *See Morreno*, 790 Ariz. Adv. Rep. 24 ¶¶ 59–62.

¶58 In response, the majority asserts that *Morreno* upheld a categorical bond restriction that did not provide an individualized determination. *Supra* ¶ 32. While true, *Morreno* addressed a bond restriction involving defendants who had already been charged with a felony and, while on pretrial release, committed another felony. Of course, preventing defendants from committing new crimes while on pretrial release is the very objective the voters sought to achieve in passing the subject bond provision, particularly when a defendant has been charged with a serious crime such as sexual assault. *Supra* ¶¶ 4, 16.

¶59 Applying the *Salerno* standard, I would deny Goodman's facial challenge. Following *Salerno* does not leave Goodman without a remedy. As I noted in *Morreno*, he can assert that the sexual assault provision is unconstitutional as applied to him. 790 Ariz. Adv. Rep. 24 ¶ 69. Therefore, I dissent.

APPENDIX B

IN THE
SUPREME COURT OF THE
STATE OF ARIZONA

No. CV-17-0193-SA

[Filed May 2, 2018]

JAMES FELIX MORRENO, *Petitioner*,	)
v.	)
THE HONORABLE NICOLE BRICKNER, COMMISSIONER OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF MARICOPA, *Respondent Commissioner*,	)
STATE OF ARIZONA EX REL. WILLIAM G. MONTGOMERY, MARICOPA COUNTY ATTORNEY, *Real Party in Interest*.	)

Special Action from the Superior Court in
Maricopa County The Honorable Nicole Brickner, Commissioner
No. CR 2016-107138
No. CR 2016-130854
AFFIRMED

Order of the Court of Appeals, Division One
No. 1 CA-SA 17-0143

COUNSEL:

James J. Haas, Maricopa County Public Defender, Brian Thredgold (argued), Timothy Sparling, Rachel A. Golubovich, Deputy Public Defenders, Phoenix, Attorneys for James Felix Morreno

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Mark Brnovich, Arizona Attorney General, Dominic E. Draye, Solicitor General, Rusty D. Crandell, Assistant Solicitor General, Phoenix, Attorneys for Arizona Attorney General

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VICE CHIEF JUSTICE PELANDER authored the opinion of the Court, in which CHIEF JUSTICE BALES, and JUSTICES BRUTINEL, TIMMER, and BOLICK joined. JUSTICE GOULD, joined by JUSTICE LOPEZ, dissented in part and concurred in the result.

VICE CHIEF JUSTICE PELANDER, opinion of the Court:

¶1 Article 2, section 22(A)(2), of the Arizona Constitution ("the On-Release provision") precludes bail "[f]or felony offenses committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge." We hold that, on its face, the On-Release provision satisfies

heightened scrutiny under the Fourteenth Amendment's Due Process Clause.

I.

¶2 James Morreno was indicted for possession of marijuana and possession of drug paraphernalia, both felonies, in March 2016. After his initial appearance in that case, Morreno was released on his own recognizance. As a condition of his release, Morreno was ordered to "refrain from committing any criminal offense."

¶3 In May, the police received reports of a suspicious person and contacted Morreno. He admitted possessing marijuana and a marijuana pipe and was again charged with felony possession of marijuana and possession of drug paraphernalia. His initial appearance in that case was scheduled for July, but Morreno failed to appear and an arrest warrant was issued.

¶4 Morreno was arrested in 2017 and held without bail pursuant to the On-Release provision. Relying on *Simpson v. Miller (Simpson II)*, 241 Ariz. 341 (2017), he moved to modify his release conditions and argued that the On-Release provision was facially invalid because it deprived him of a pre-detention individualized determination of future dangerousness to which he was constitutionally entitled. The superior court disagreed and denied the motion.

¶5 Morreno filed a petition for special action, which the court of appeals stayed pending this Court's decision on whether to grant review in a similar case. Thereafter, Morreno filed a petition for review in this

Court challenging the superior court's ruling and the court of appeals' stay order.

¶6 Although Morreno has since pleaded guilty to the charged offenses in both cases (rendering his constitutional challenge moot as applied to him), we granted review to address the facial constitutionality of the On-Release provision, a recurring issue of statewide importance. We have jurisdiction under article 6, section 5(3), of the Arizona Constitution.

II.

¶7 We review de novo the validity of the On-Release provision. *See Simpson II*, 241 Ariz. at 344 ¶ 7.

¶8 In 1970, Arizona voters passed Proposition 100, and thereby amended the state constitution, adding among other things the On-Release provision. *See* Ariz. Const. art. 2, § 22(A)(2); *see also* Ariz. Sec'y of State, Referendum and Initiative Publicity Pamphlet 2–4 (1970), http://azmemory.azlibrary.gov/cdm/compoundobject/collection/statepubs/id/10654. Under that provision, a defendant charged with a felony allegedly committed while "already admitted to bail on a separate felony charge" is ineligible for bail "where the proof is evident or the presumption great as to the [new] charge." Ariz. Const. art. 2, § 22(A)(2). A defendant like Morreno who was released on his own recognizance on a prior charge "has been 'admitted to bail' for purposes of [the On-Release provision]." *Heath v. Kiger*, 217 Ariz. 492, 493 ¶ 1 (2008).

¶9 Throughout the briefing in this Court and below, Morreno framed his argument as a facial challenge to the On-Release provision. At oral argument in this Court, Morreno initially confirmed that position before

contending that the provision is unconstitutional as applied to him. We consider only the facial challenge because Morreno's guilty plea renders moot any as-applied challenge.[1]

III.

¶10 Morreno's challenge to the On-Release provision requires us to revisit the delicate balance between "state interests of the highest order" and "the fundamental due process right to be free from bodily restraint." *Simpson II*, 241 Ariz. at 345 ¶ 9.

¶11 Our court of appeals has upheld and applied the On-Release provision against constitutional attack. *See State ex rel. Romley v. Superior Court*, 185 Ariz. 160, 164 (App. 1996) (ordering the defendant "to be held without bond pending trial" when proof was evident and presumption great that he committed a felony while released on bail on prior charge); *State v. Garrett*, 16 Ariz. App. 427, 429 (1972) (same, and finding the On-Release provision's purpose and policy "entirely reasonable"). Morreno argues that those cases do not survive *Simpson II* and that the On-Release provision "deprives defendants of due process because it fails to comport with" our opinion in that case. Under *Simpson II*, he contends, bail "cannot be denied without a showing of [future] dangerousness following an individualized adversarial hearing" under A.R.S. § 13-

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[1] We similarly do not address Morreno's contention that the On-Release provision conflicts with Proposition 200, adopted by Arizona voters in 1996 and codified in A.R.S. § 13-901.01, which requires probation in limited circumstances for those convicted of certain crimes involving the possession or use of marijuana or drug paraphernalia.

3961(D), and not before considering various factors such as those set forth in A.R.S. § 13-3967(B). The State, in contrast, argues that the On-Release provision is constitutional under *Simpson II* because it is "not offense-based," but is instead "status-based" and narrowly focused on "recidivistic tendencies."

¶12 Before evaluating these arguments, we first address the Attorney General's assertion that "*Simpson II* was incorrect" and should be overruled "to the extent that it misapplies the facial challenge and substantive due process tests from *United States v. Salerno*, 481 U.S. 739 (1987)." Echoing an argument we rejected in *Simpson II*, the Attorney General contends that this Court misapplied the standard for evaluating facial challenges and erroneously pronounced a "heightened scrutiny standard for due process challenges to bail restrictions." Justice Gould's partial dissent mirrors those contentions, with which we disagree.

¶13 In *Simpson II*, we applied a "heightened scrutiny" standard derived from *Salerno* to hold that the Fourteenth Amendment's Due Process Clause prohibits the state from automatically denying bail to all defendants charged with sexual conduct with a minor under age fifteen. *Simpson II*, 241 Ariz. at 344 ¶ 1, 348 ¶ 23. In so holding, this Court invalidated the no-bail provisions in article 2, section 22(A)(1), of the Arizona Constitution and A.R.S. § 13-3961(A)(3) as they related to that charged offense, and we rejected the State's argument that "the challenged provisions [were not] unconstitutional on their face because they may not be unconstitutional in all instances." *Simpson II*, 241 Ariz. at 349 ¶ 31.

¶14 In *Simpson II*, we recognized that a party challenging a law as facially unconstitutional "must establish that it 'is unconstitutional in all of its applications.'" 241 Ariz. at 344–45 ¶ 7 (quoting *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015)); *see also Salerno*, 481 U.S. at 745 (stating that a successful facial challenge requires "the challenger [to] establish that no set of circumstances exists under which the [law] would be valid"). We also recognized that in some instances the commission of sexual conduct with a minor "may indicate a threat of future dangerousness toward the victim or others." *Simpson II*, 241 Ariz. at 349 ¶ 31. That was not determinative, however, because the offense of sexual conduct with a minor "is not inherently predictive of future dangerousness," and therefore "detention [in those cases] requires a case-specific inquiry." *Id.*

¶15 *Simpson II* does not contradict *Salerno* or the other cases on which the Attorney General and Justice Gould's dissent rely. *Salerno* rejected a facial challenge to the 1984 Bail Reform Act because of its "extensive safeguards," which required not only a showing of probable cause for the charged offense, but also a showing "by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." 481 U.S. at 750, 752 (citing 18 U.S.C. § 3142(f)). The provisions at issue in *Simpson II*, in contrast, lacked any such safeguards and by their terms categorically denied bail to all defendants charged with sexual conduct with a minor under age fifteen — a crime that does not inherently predict future dangerousness. 241 Ariz. at 349 ¶ 27. Thus, a facial challenge succeeded because the no-bail provisions deprived such defendants of what

substantive due process requires: an individualized determination of, or a valid proxy for, future dangerousness. *Id.* ¶ 30.

¶16 That some defendants who are charged with sexual conduct with a minor may properly be denied bail when other facts are present (i.e., evidence of future dangerousness or flight risk) does not defeat a facial challenge. *See id.* ¶ 31 (noting that in arguing against a facial challenge, the State "confus[ed] the constitutionality of detention in specific cases with the requirement that it be imposed in all cases"). The facial challenge was to the denial of bail based merely on the charge without considering other facts that may — or may not — justify denying a defendant bail in a particular case.

¶17 *Patel* illustrates this point well. There, the government — much like the State here — argued that a statute should not be subject to a facial challenge because in some circumstances the conduct it authorized would be constitutionally permissible (there, a search of hotel guest records; here, pretrial detention). *Patel*, 135 S. Ct. at 2450–51. The United States Supreme Court rejected that argument, noting that "the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant." *Id.* at 2451.

¶18 Based on due process principles, the Court likewise has invalidated other laws that categorically denied important, protected interests without regard to individual circumstances. In *Stanley v. Illinois*, for example, the Court struck a state law under which "the children of unwed fathers became wards of the State upon the death of the mother." 405 U.S. 645, 646

(1972). Rejecting the law's "blanket exclusion" that "viewed people one-dimensionally," the Court concluded that, "as a matter of due process of law, [the father] was entitled to a hearing on his fitness as a parent before his children were taken from him." *Id.* at 649, 655. And though recognizing the possibility that "most unmarried fathers are unsuitable and neglectful parents" and that Mr. Stanley was "such a parent and that his children should be placed in other hands," the Court nonetheless noted that "all unmarried fathers are not in this category; some are wholly suited to have custody of their children." *Id.* at 654. Accordingly, the law could not stand because it "needlessly risk[ed] running roughshod over the important interests of both parent and child." *Id.* at 657; *cf. Foucha v. Louisiana*, 504 U.S. 71, 81–83 (1992) (distinguishing *Salerno* and finding unconstitutional a state statute under which a defendant found not guilty by reason of insanity was committed indefinitely to a psychiatric hospital unless he proved that he was not dangerous).

¶19 Here, that some defendants may properly be held without bail when they commit an offense while "on-release" — for example, pursuant to article 2, section 22(A)(3) — does not mean (as the Attorney General suggests) that the On-Release provision necessarily survives a facial challenge. We therefore decline his invitation to overrule or limit *Simpson II*.

¶20 Justice Gould's partial dissent is unpersuasive for several reasons. It selectively relies on portions of *Salerno* in describing the standard for finding a law facially unconstitutional but disregards key features of the Bail Reform Act that, as discussed, *see supra* ¶ 15, were critical to *Salerno*'s analysis and conclusion. *See*

also United States v. Stephens, 594 F.3d 1033, 1038 (8th Cir. 2010) (noting that *Salerno* "lauded the Bail Reform Act's procedures"). As *Salerno* observed, the Bail Reform Act required individualized hearings in which "the Government [had to] 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." 481 U.S. at 750. The dissent overlooks the *Salerno* Court's analytical emphasis that the Act contained those important "procedural protections" and "narrowly focuse[d] on a particularly acute problem," *id.* at 750–52, features that were critical to its holding, *id.* at 751. It was only those "narrow circumstances" and the Act's "extensive [procedural] safeguards" that "suffice[d] to repel a facial challenge." *Id.* at 752. Nothing in *Salerno* suggests that the Court would have upheld the Act against a facial challenge even absent those safeguards, all of which were lacking in *Simpson II*. *See supra* ¶ 15.

¶21 The dissent's failure to recognize these key aspects of *Salerno*, in turn, causes it to incorrectly assert that *Simpson II* deviated from *Salerno* and to mischaracterize *Simpson II* as applying an "overbreadth analysis." *See infra* ¶¶ 39, 48. The provisions at issue in *Simpson II* were facially invalid because they did not — indeed, could not — afford any defendant what due process requires: an individualized hearing or a convincing proxy for future dangerousness. The mere charge itself was not a convincing proxy for future dangerousness, and therefore not narrowly focused, because it swept in situations that are not predictive of future dangerousness. *Simpson II*, 241 Ariz. at 349 ¶ 27; *see*

also Salerno, 481 U.S. at 750 (noting that the Bail Reform Act required "convincing proof that the arrestee, *already indicted or held to answer for a serious crime*, presents a demonstrable danger to the community" (emphasis added)). Thus, *Simpson II* did not misapply the *Salerno* facial standard but instead comports with *Salerno*'s analysis. *See United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006) ("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.").

¶22 The dissent seemingly equates every facial challenge with an overbreadth challenge, which misapprehends those distinct doctrines. In essence, the dissent's quarrel with *Simpson II* is not with its application of *Salerno*'s standard for facial unconstitutionality, but with its application of *Salerno*'s "narrow focus" standard. *Simpson II*'s application of that standard is consistent with *Salerno*'s ultimate holding: "When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat." *Salerno*, 481 U.S. at 751. Again, the Bail Reform Act in *Salerno* had numerous narrowing features that the provisions in *Simpson II* lacked. Key among these are a "careful delineation of the circumstances under which detention will be permitted" and "convincing proof that the arrestee . . . presents a demonstrable danger to the community." *Salerno*, 481 U.S. at 750–51.

¶23 Here, Morreno's facial challenge under *Salerno* is based on his argument that it is never constitutionally permissible to detain a person without bail based merely on proof evident or presumption great that the person committed a felony while "on-release" from another felony charge. Although we ultimately reject that argument for the reasons stated below, it still is properly considered a facial challenge. Under *Patel*, which the dissent does not convincingly address, the facial challenge is not barred by the fact that a person might be legally detained for reasons in addition to those required by the On-Release provision. *See State v. Ryce*, 368 P.3d 342, 354 (Kan. 2016) ("*Patel* emphasizes that the scope of circumstances we examine is determined and limited by the application of the statute—we do not consider the entire universe of possible scenarios, we must instead look to the circumstances actually affected by the challenged statute."). To be sure, the dissent's arguments here echo Justice Alito's dissent in *Patel*, but the *Patel* majority rejected Justice Alito's approach, and we likewise reject the dissent's mistaken view of *Simpson II*.

IV.

¶24 The Due Process Clause places significant limitations on the state's ability to detain a defendant charged with violating the law. *See Simpson II*, 241 Ariz. at 346 ¶ 13. In *Simpson II*, we explained that to meet constitutional standards, a pretrial detention scheme "may be used only for regulatory rather than punitive purposes" and must satisfy the rigors of "heightened scrutiny" under the Due Process Clause, requiring that the scheme be "narrowly focused on

accomplishing the government's objective." *Id.* at 346 ¶ 13, 348 ¶¶ 23, 25. The On-Release provision meets these demands.

A.

¶25 We look to legislative intent (or here the intent of Arizona voters) to determine whether a pretrial detention scheme is punitive or regulatory. *Id.* at 347 ¶ 20. The 1970 publicity pamphlet for Proposition 100 indicates that the purpose of the proposed amendment was to address the "rapidly increasing crime rate in Arizona" caused by "repeat offenders . . . who continue their lives of crime while out on bail, awaiting trial." Ariz. Sec'y of State, Referendum and Initiative Publicity Pamphlet 3 (1970), http://azmemory.azlibrary.gov/cdm/compoundobject/collection/statepubs/id/10654; *see also Heath*, 217 Ariz. at 496 ¶ 14 (recognizing Proposition 100's "purpose is to prevent those charged with felonies but released pending trial from committing additional crimes").

¶26 There is no indication that the number of people denied bail under the On-Release provision is excessive in relation to that goal. Indeed, the provision applies only when strong evidence (more than probable cause) exists that a defendant committed another felony while on release from a prior felony charge. *See Simpson v. Owens (Simpson I)*, 207 Ariz. 261, 274 ¶ 40 (App. 2004); *see also Simpson II*, 241 Ariz. at 346 ¶ 16. We therefore conclude, and Morreno does not specifically contest, that the On-Release provision is regulatory. *See Simpson II*, 241 Ariz. at 347 ¶ 20, 348 ¶ 24 (concluding that the challenged provisions "are regulatory, not punitive, and therefore do not constitute a per se due process violation" when "[a]ll ballot arguments

supporting Proposition 103 focused on protecting public safety by preventing additional crimes," and noting that those state interests are "'both legitimate and compelling'" (quoting *Salerno*, 481 U.S. at 749)).

B.

¶27 "Heightened scrutiny" under the Due Process Clause ensures that, absent "special circumstances," the government does not "restrain individuals' liberty prior to . . . criminal trial and conviction." *Salerno*, 481 U.S. at 749. To satisfy heightened scrutiny's rigors, the state's interest in enforcing a pretrial detention scheme must be "legitimate and compelling," and the scheme must be "narrowly focuse[d] on a particularly acute problem." *Simpson II*, 241 Ariz. at 348 ¶ 23 (alteration in original) (internal quotation marks omitted) (quoting *Salerno*, 481 U.S. at 749–50).

¶28 Morreno contends that *Simpson II* controls here, such that "[a]rticle 2, § 22(A)(2) is unconstitutional under the Due Process Clause" because "the State cannot hold [him] in custody without bond unless it first demonstrates [his] future dangerousness." In his view, the On-Release provision is a "hard-line," categorical denial of bail that fails to provide what due process requires: a pre-detention adversarial hearing of the type provided for in A.R.S. §§ 13-3961(D) and 13-3967(B).

¶29 We disagree. Although *Simpson II* guides our analysis, it is not dispositive of the very different provision at issue here and does not require an individualized determination of dangerousness in every case to comply with due process principles. *See* 241 Ariz. at 348 ¶ 26 ("[W]e do not read *Salerno* or other

decisions to require . . . individualized determinations in every case."). And despite Morreno's attempt to liken the On-Release provision to the constitutional and statutory provisions at issue in *Simpson II*, there are important differences. Unlike the sexual-conduct-with-a-minor provisions involved in *Simpson II*, the On-Release provision does not categorically deny bail to all defendants accused of committing enumerated crimes. Thus, unlike *Simpson II*, the issue here is not whether a particular charged offense is "in itself a proxy for dangerousness," *id.* at 349 ¶ 27, or for unmanageable flight risk, *id.* at 346 ¶ 17. Rather, the issues are twofold: whether the state has a "legitimate and compelling" interest in preventing defendants from committing new felonies while on pretrial release from another felony charge, and whether denying bail to such a defendant (when the proof is evident or the presumption great he or she committed a new felony while on release from another felony charge) is "narrowly focuse[d]" on pursuing that goal. *Id.* at 348 ¶ 23 (quoting *Salerno*, 481 U.S. at 749–50).

¶30 "The government's interest in preventing crime by arrestees is both legitimate and compelling." *Salerno*, 481 U.S. at 749; *accord Schall v. Martin*, 467 U.S. 253, 264 (1984) (rejecting due process challenge to statute that permitted pretrial detention of any juvenile arrested on any charge after a showing that the person might commit some undefined future crimes). The On-Release provision implicates that interest. Likewise, the state unquestionably has a legitimate and compelling interest in preventing defendants from committing new crimes while on pretrial release from prior criminal charges. *See Rummel v. Estelle*, 445 U.S. 263, 276 (1980) (providing

that states have a legitimate interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law"). Committing a felony while on release, especially when a term of release requires crime-free conduct, evidences repeated lawlessness that society need not tolerate. And although the On-Release provision applies before any finding of guilt or conviction, its required showing of "proof evident" or "presumption great" for the "present charge[d]" offense committed while on release convincingly suggests recidivist tendencies. Ariz. Const. art. 2, § 22(A)(2).

¶31 The primary issue here, then, is whether the On-Release provision is "narrowly focused on accomplishing the government's objective" of preventing defendants from committing new felonies while on pretrial release from a prior felony charge. *Simpson II*, 241 Ariz. at 348 ¶ 25. The On-Release provision has two important features that limit its scope. By its terms, the provision does not deny bail to all criminal defendants alleged to have committed any crime while on pretrial release, but to a smaller subset who are charged with felonies committed while on release from a prior felony charge. And importantly, the provision applies only where the "proof is evident or the presumption great," Ariz. Const. art. 2, § 22(A)(2), a "robust" standard that requires an evidentiary hearing, *Simpson II*, 241 Ariz. at 346 ¶ 16, as to the defendant's guilt of the felony he allegedly committed while on pretrial release, *see Simpson I*, 207 Ariz. at 274 ¶ 40 (discussing the proof evident/presumption great standard). These features together help ensure that the provision's reach does not extend beyond the

government's legitimate and compelling interest in preventing arrestees from committing additional felonies while on release from prior felony charges.

¶32 Morreno contends that the On-Release provision is not narrowly focused because some felonies, including the drug offenses with which he was charged, are neither inherently dangerous nor predictive of future dangerousness. But he incorrectly presumes that the only state interest that could justify pretrial detention of "on release" offenders is future dangerousness. *Salerno* recognizes that a state has a compelling interest in preventing crime (not just dangerous crime) by arrestees, and that interest is even stronger when there is proof evident that the defendant violated the conditions of his first release by committing the second charged offense. The defendant's liberty interest, conversely, is reduced because it was already restricted by his arrest and release under conditions for the first charge. Under those circumstances, "the government's interest is sufficiently weighty," such that the defendant's right to be free from physical restraint is "subordinated to the greater needs of society." *Salerno*, 481 U.S. at 750–51.

¶33 Conditioning pretrial release on a defendant refraining from committing new crimes while on pretrial release from prior criminal charges is neither a new nor remarkable concept. *Rendel v. Mummert*, 106 Ariz. 233, 238–39 (1970) ("Pretrial release with restrictions placed upon a defendant's actions has long represented a compromise between the liberties that a person normally enjoys and the right of the state to insure compliance with its processes."); *see also* A.R.S. § 13-3967(C) (permitting the revocation of release "[o]n

a showing of probable cause that the defendant committed *any offense* during the period of release" from a prior felony charge (emphasis added)). Moreover, the possibility of having pretrial release revoked for a subsequent felony is entirely consistent with the government's interest in preventing further crimes and avoiding recidivism, "assur[ing] compliance with its laws[,] and preserv[ing] the integrity of the judicial process by exacting obedience with its lawful orders." *Paquette v. Commonwealth*, 795 N.E.2d 521, 530 (Mass. 2003); *see also id.* at 529 (stating that, aside from "any inquiry into dangerousness, a court has inherent power to revoke a defendant's bail for breach of *any* condition of release" (emphasis added)).

¶34 We acknowledge the "variety of state procedures for implementing otherwise valid recidivism [laws]." *Parke v. Raley*, 506 U.S. 20, 27 (1992). Although the On-Release provision's approach apparently is not widely applied, Arizona is not alone in denying bail to defendants charged with additional, on-release felonies. *See*, *e.g.*, Tex. Const. art I, § 11a(a)(2) (denying bail to defendants "accused of a felony less than capital . . . committed while on bail for a prior felony for which he has been indicted"); Utah Const. art. I, § 8(1)(b) (denying bail to "persons charged with a felony . . . while free on bail awaiting trial on a previous felony charge"); Iowa Code § 811.1(1) (denying bail to "defendant[s] awaiting judgment of conviction" who commit "a second or subsequent offense" of various felonies, including those involving marijuana possession); *State v. Burgins*, 464 S.W.3d 298, 301 (Tenn. 2015) ("A defendant may forfeit her right to bail by subsequent criminal conduct."); *cf. Parke*, 506 U.S. at 26 ("[Recidivism] laws currently are in effect in all

50 States, and several have been enacted by the Federal Government, as well." (internal citations omitted)). Regardless, what matters is that due process does not require an individualized hearing to reaffirm a defendant's recidivism risk when the state has met its burden of showing proof evident or presumption great that he engaged in recidivist behavior while on release. In such cases, an individualized determination serves no narrowing function and is therefore unnecessary.

¶35 In enacting the On-Release provision, Arizona voters left "the keys to continued freedom" in the hands of felony defendants who enjoy pretrial release.[2] *Rendel*, 106 Ariz. at 238. Yet, even before the Arizona voters adopted the On-Release provision in 1970, Arizona statutes conditioned release on an arrestee's "good behavior" and cautioned that release could be revoked based on probable cause to believe the arrestee committed a felony while on release. *See* 1969 Ariz. Sess. Laws, ch. 129, § 5. In any case, we fail to understand how a defendant could complain "that his constitutional right to liberty has been violated when . . . the deprivation thereof was an inevitable consequence of his alleged failure to conform his conduct to the law[] . . . and to the explicit condition of his earlier release." *Paquette*, 795 N.E.2d at 530. Indeed, if a defendant "actively avoids all intended associations with the criminal elements of our society,"

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[2] As of April 2, 2018, the Arizona Rules of Criminal Procedure have been amended to incorporate the On-Release provision into a defendant's initial appearance. Order Amending Rules 4.2, 5.1, 5.4, 7.2, and 7.4, Rules of Criminal Procedure, No. R-17-0015 (Ariz. 2017).

or here avoids knowingly possessing illegal drugs or paraphernalia, "he will be able to avoid situations that could result in the revocation of his bail." *Rendel*, 106 Ariz. at 238.

V.

¶36 We briefly address and reject Morreno's suggestion that denying bail to recidivist felons is absurd in light of *Simpson II* and *Chantry v. Astrowsky*, 242 Ariz. 355 (App. 2017). According to Morreno, upholding the On-Release provision "effectively rule[s] that a person charged with possession of marijuana is inherently more dangerous than a person charged with having sex with a minor or molesting a child." Again, the On-Release provision is concerned not with future dangerousness but rather with preventing additional felonies by defendants while on release from a prior felony charge, and the provision is narrowly focused on that legitimate and compelling governmental interest. Morreno ignores a critical component of *Simpson II* and *Chantry* and again overlooks the substantial differences between the provisions at issue in *Simpson II* and the On-Release provision here. In short, while on release Morreno continued to engage in conduct that implicated him in new crimes despite specific warnings to refrain from any illegal conduct while on pretrial release. This conduct placed him squarely within the government's interest in preventing future crime by arrestees. *See Rummel*, 445 U.S. at 284 (stating that recidivism laws "segregate . . . from the rest of society" "one who repeatedly commits criminal offenses serious enough to be punished as felonies"). This is a far cry from *Simpson II* and *Chantry*, where the defendants'

charges were not inherently predictive of future conduct. *See Simpson II*, 241 Ariz. at 349 ¶ 27; *accord Chantry*, 242 Ariz. at 355 ¶ 3.

¶37 Finally, although our conclusion that the On-Release provision meets constitutional standards is neither based nor dependent on state statutes or rules, it comports with Arizona's pretrial release scheme. Under Arizona law, "[u]pon a finding of probable cause that the defendant committed a felony [while on] release, the defendant's release may be revoked." A.R.S. § 13-3968(B); *see also* Ariz. R. Crim. P. 7.5(d)(2) (authorizing courts to revoke pretrial release when "there is probable cause to believe a person committed a felony during the period of release").[3] It is well-established that this release condition passes substantive due process muster, *see Rendel*, 106 Ariz. at 238–39; *Burgins*, 464 S.W.3d at 306, and is a "necessary step to ensure compliance with our legal system and preserve its integrity," *Paquette*, 795 N.E.2d at 530. In other words, the state may constitutionally revoke release when a defendant violates a release condition, even though such revocation directly implicates the defendant's due process right to be free from unwarranted pretrial restraint. That the state may constitutionally deny bail for a subsequent felony charge under these circumstances, as the On-Release provision requires, is entirely consistent with that principle.

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[3] The 2018 amendments to the Arizona Rules of Criminal Procedure, which took effect January 1, 2018, did not materially alter Rule 7.5(d)(2). *See* Order Amending the Arizona Rules of Criminal Procedure, No. R-17-0002 (Ariz. 2017).

VI.

¶38 For the reasons stated above, we uphold the constitutionality of article 2, section 22(A)(2), of the Arizona Constitution and affirm the superior court's order denying Morreno bail.

JUSTICE GOULD, joined by JUSTICE LOPEZ, dissenting in part and concurring in the result.

¶39 I concur in the majority's decision denying Morreno's facial challenge to Arizona's On-Release provision. *See* Ariz. Const. art. 2, § 22(A)(2). However, I respectfully dissent from the majority's use of the overbreadth analysis contained in *Simpson II* to reach this result.

I.

¶40 The standard for facially challenging the constitutionality of a statute is set forth in *United States v. Salerno*, 481 U.S. 739, 745 (1987):

> A facial challenge to a legislative [a]ct is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [a]ct would be valid. The fact that the [act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.

¶41 This standard was in place before *Salerno* and has been affirmed on many occasions. *See City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015) ("Under

the most exacting standard the Court has prescribed for facial challenges, a plaintiff must establish that a law is unconstitutional in all of its applications." (citation and internal quotation marks omitted)); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) ("[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' i.e., that the law is unconstitutional in all of its applications." (quoting *Salerno*, 481 U.S. at 745)); *Reno v. Flores*, 507 U.S. 292, 301 (1993) (noting that to prevail on a facial challenge, a party must show there are no set of circumstances under which the regulation would be valid); *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984) (stating that a statute is invalid on its face if "it is unconstitutional in every conceivable application"); *see also City of Chicago v. Morales*, 527 U.S. 41, 78–80 (1999) (Scalia, J., dissenting) (discussing cases pre-*Salerno* applying the facial challenge standard).

¶**42** Under *Salerno*, facial challenges based on the overbreadth of a statute are limited to the First Amendment context.[4] *Salerno*, 481 U.S. at 745; *see also United States v. Stevens*, 559 U.S. 460, 473 (2010) (stating that "[i]n the First Amendment context, however, this Court recognizes a second type of facial challenge, whereby a law may be invalidated as overbroad" (internal quotation marks omitted));

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[4] Facial overbreadth challenges have also been recognized in the context of abortion statutes. *Sabri v. United States*, 541 U.S. 600, 609–10 (2004) (stating that facial challenges based on overbreadth are recognized in "relatively few settings," including free speech and abortion).

Vincent, 466 U.S. at 801 ("[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds."). The reason for permitting First Amendment overbreadth challenges was clearly stated by the United States Supreme Court in *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973):

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn . . . . Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

¶43 Outside the First Amendment context, there are a number of reasons for strictly limiting facial challenges. One reason is that "constitutional rights are personal and may not be asserted vicariously." *Broadrick*, 413 U.S. at 610. However, when a person facially attacks a statute, he seeks to strike down a statute that is constitutionally applied to him but "may conceivably be applied unconstitutionally to others." *Id.* In addition, "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange*, 552 U.S. at 451.

¶44 Limiting facial challenges is also based on the principle that courts must be careful in striking down statutes with respect to parties and factual applications that are not before it. *Id.* at 449–50; *Broadrick*, 413 U.S. at 610–11. Facial challenges alleging overbreadth not only "invite judgments on fact-poor records," but they "allow a determination that the law would be unconstitutionally applied to different parties and different circumstances" that are not before the court. *Sabri*, 541 U.S. at 609. At bottom, courts must exercise judicial restraint under such circumstances, recognizing that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick*, 413 U.S. at 610–11.

II.

¶45 While the majority, in reliance on *Simpson II*, purports to apply *Salerno*'s standard, in practice it does not. *See supra* ¶ 14; *Simpson II*, 241 Ariz. at 344–45 ¶ 7 (stating a facial challenge requires "the party challenging the law [to] establish that it 'is unconstitutional in all of its applications'") (quoting *Patel*, 135 S. Ct. at 2451). Rather, it abandons the facial standard set forth in *Salerno*, substituting the overbreadth standard used in *Simpson II* and by the Ninth Circuit in *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014).

A.

¶46 In *Simpson II*, defendants asserted that article 2, section 22(A)(1), of the Arizona Constitution (and its corresponding provision in A.R.S. § 13-3961(A)(3)) was facially invalid. *Simpson II*, 241 Ariz. at 344 ¶ 5. The

constitutional provision at issue stated that a defendant was ineligible for bail or pretrial release if (1) he was charged with committing the crime of sexual conduct with a minor under the age of fifteen, and, (2) after an evidentiary hearing, the court determined the proof was evident or the presumption great that the defendant committed this crime. *Id*. at ¶ 2.

¶47 Applying the "heightened scrutiny" test used by the Ninth Circuit in *Lopez-Valenzuela*, *Simpson II* sustained the defendants' facial challenge on the grounds the subject provision violated substantive due process. *Id*. at 346, 348, 349 ¶¶ 17, 23, 30; *see also Lopez-Valenzuela*, 770 F.3d at 780 (discussing the application of a "heightened scrutiny" standard to a pretrial detention statute). *Simpson II* recognized that the purpose of the bond provision, protecting children from potentially dangerous sex offenders, was both legitimate and compelling. *Id*. at 348 ¶ 24. However, the Court determined that the provision was not "narrowly focused" to achieve this purpose. *Id*. at 348–49 ¶¶ 25–28. In reaching this conclusion, *Simpson II* held that the offense-based bond provision did not allow a court to make an "individualized determination" as to a defendant's dangerousness. *Id*. ¶¶ 25–26. The Court held that absent such an individualized hearing, any offense-based approach must be premised on crimes that "inherently predict future dangerousness," *id.* at 349 ¶ 30, and therefore serve as a "convincing proxy for unmanageable flight risk or dangerousness," *id*. at 348–49 ¶¶ 26–27 (quoting *Lopez-Valenzuela*, 770 F.3d at 786).

¶48 Ultimately, *Simpson II* concluded that the bond provision, on its face, violated due process because

sexual conduct with a minor is not a "convincing proxy for . . . dangerousness." *Id*. at 348-49 ¶¶ 26-27. What is remarkable about this conclusion is that in reaching it, the Court abandoned *Salerno* and employed an overbreadth analysis. On the one hand, the Court recognized that there were circumstances where the provision would be valid. The Court stated that "[s]exual conduct with a minor is always a serious crime," and "[i]n *many but not all instances*, its commission may indicate a threat of future dangerousness." *Id*. at 349 ¶ 31 (emphasis added). On the other hand, the Court speculated that there were circumstances where the provision might not be valid. Specifically, the Court stated that the crime might involve "consensual sex" between two teenagers and, under such a scenario, the fact a "defendant committed the crime would suggest little or nothing about the defendant's danger to anyone." *Id*. ¶ 27. Thus, the Court concluded, even where the proof is evident or the presumption great that a defendant has committed sexual conduct with a minor, detention on this basis "sweeps in situations" where a defendant might not pose a danger to the community. *Id*.

¶**49** Thus, setting aside the well-established standard for facial challenges, *Simpson II* struck down a statute that had clear constitutional applications. The bond provision in *Simpson II* limited detention to those cases where the state proved, by the "robust" standard of proof evident/presumption great, *id.* at 346 ¶ 16, that a defendant penetrated a child's anus or vagina with his penis or some object; had oral contact with a child's penis, vulva, or anus; or engaged in masturbation with a child's penis or vagina. *See* A.R.S. §§ 13-1405(A), –1401(A)(1), (4). In passing this constitutional

provision, the people of Arizona made a judgment that, under these limited circumstances, a legitimate and compelling purpose — protecting children from severe sexual abuse — was served by temporarily detaining a defendant pending trial. At a minimum, this constitutional provision survives a facial challenge. Indeed, it is reasonable to conclude that in those cases where the proof is evident/presumption great that a thirty, forty, or fifty-year-old defendant sodomizes a five-year-old or has sexual intercourse with an eight-year-old, he may, if released before trial, pose a danger to his victim or other children in the community. *See State v. Furgal*, 13 A.3d 272, 279 (N.H. 2010) (stating that New Hampshire's no bond procedure is limited to the "most serious offenses"; the procedure reflects the fact "[t]he legislature has made a reasoned determination that when 'the proof is evident or the presumption great,' the risk to the community becomes significantly compelling, thus justifying the denial of bail.").

¶50 Despite the "many instances" where the subject bond provision would protect the community by detaining dangerous sex offenders, *Simpson II* focused on one hypothetical situation — "consensual sex" between teenagers — in rendering the statute invalid on its face. Of course, this "consensual sex" hypothetical is based on a legal impossibility; a child under the age of fifteen cannot consent to such acts. *See State v. Fischer*, 219 Ariz. 408, 414–15 ¶ 20 (App. 2008) (stating that consent is not an element of the offense of sexual conduct with a minor, and that a defendant may commit the crime "regardless of a minor's purported consent"). Moreover, the defendants in *Simpson II* certainly did not fall into the Court's hypothetical

scenario; they were middle-aged men who repeatedly sexually abused young children. But, more fundamentally, the Court departed from well-established law and struck down the provision as overbroad because it could conceivably "sweep in" defendants who did not pose a danger to the community.

¶51 At bottom, *Simpson II* adopted the flawed analysis used in *Lopez-Valenzuela*. There, the court struck down a state constitutional provision ("Proposition 100") denying bail for undocumented immigrants charged with any of a broad range of felonies. *Lopez-Valenzuela*, 770 F.3d at 791. *Lopez-Valenzuela* took some extraordinary liberties in construing *Salerno*, including some interpretations that were expressly rejected by *Simpson II*. For example, *Lopez-Valenzuela* construed *Salerno* as applying strict scrutiny to detention statutes. *Id*., at 791. *Simpson II* recognized, of course, that "*Salerno* did not require this standard." *Simpson II*, 241 Ariz. at 348 ¶ 23.

¶52 *Simpson II* also disagreed with *Lopez-Valenzuela*'s conclusion that *Salerno* required "all statutory bail schemes" to include the specific procedural safeguards contained in the Bail Reform Act to satisfy due process. *Id*., at 347 ¶ 21. Rather, *Simpson II* recognized that in *Salerno* the United States Supreme Court "found that the Bail Reform Act's safeguards 'are more exacting' and 'far exceed' those found sufficient in other contexts." *Id*., at 347 ¶ 21 (citing *Salerno*, 481 U.S.at 752). In support of this conclusion we also cited the following holding from *Furgal*, 13 A.3d at 278-79: "[w]e do not read *Salerno* to

hold that all statutory bail schemes must include an individualized inquiry into a defendant's dangerousness in order to pass constitutional muster." *Simpson II*, *Id*.

¶53 Unfortunately, *Simpson II* also adopted several holdings from *Lopez-Valenzuela* that find no basis in *Salerno*. One of the most striking examples is *Simpson II's* reliance on the notion that any offense-based, categorical bond provision must be based on a crime that is a "convincing proxy for unmanageable flight risk or dangerousness." *Id*., at 348-49 ¶¶ 25-26. This standard was derived from *Lopez–Valenzuela*. 770 F.3d at 786. Of course, the idea of a crime constituting a "convincing proxy" for dangerousness is not found anywhere in *Salerno*. Rather, in creating this novel test, *Lopez–Valenzuela* relied on *United States v. Kennedy*, 618 F.2d 557, 558–59 (9th Cir. 1980), which noted 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.'" (emphasis added). However, with no explanation, *Lopez–Valenzuela* modified this statement from *Kennedy*, concluding that a crime was not a "convincing proxy" for an "unmanageable flight risk" so long as "*many*" defendants did not pose a flight risk. *Id*., at 785. (emphasis added). *Simpson II* then decided to raise the bar even higher, concluding that a crime is not a convincing proxy for dangerousness unless "all" defendants charged such a crime pose a danger to the community. *Id*., at 348-49 ¶¶ 26-27, 30-31.

¶54 Additionally, *Simpson II* set aside *Salerno's* standard for facial challenges and adopted *Lopez-Valenzuela's* overbreadth standard. In crafting its own

novel standard for reviewing a facial challenge outside the First Amendment, *Lopez-Valenzuela* held that:

> [E]ven if *some* undocumented immigrants pose an unmanageable flight risk or undocumented immigrants on average pose a greater flight risk than other arrestees, [the provision] plainly is not *carefully limited* because it employs an *overbroad, irrebuttable presumption* rather than an individualized hearing to determine whether a particular arrestee poses an unmanageable flight risk.

Id. at 784 (second and third emphases added). Applying this standard, *Lopez-Valenzuela* concluded that Prop 100 violated due process because it "employs a profoundly *overbroad irrebuttable presumption*, rather than an individualized evaluation, to determine whether an arrestee is an unmanageable flight risk." *Id*. at 791 (emphasis added).

¶55 Apart from *Lopez-Valenzuela*, the majority attempts, without success, to find cases that support *Simpson II*. For example, its citation to *Patel* is misplaced. In *Patel*, a group of motel operators brought a facial challenge to a municipal code provision requiring them to provide certain guest records to the police. *Id*. 135 S. Ct. at 2447-48. In response to this facial challenge, the City argued that there were situations where searches authorized by the code provision were constitutionally valid. Specifically, the City argued that a search of guest records would be valid if based on consent, exigent circumstances, or a search warrant. *Id*. at 2450-51.

¶56 Applying the *Salerno* standard, *Patel* stated that a party seeking facial relief must show "that no set of circumstances exists under which the [statute] would be valid." *Id*. at 2450. (quoting *Salerno*, 481 U.S. at 745). *Patel* concluded the motel operators met this standard, because the only valid applications urged by the City were irrelevant to its constitutional analysis. While the City's proposed applications (a search warrant, consent or exigent circumstances) provided constitutional grounds for obtaining a guest's hotel records, such searches were not regulated or authorized by the code provision itself. *Id*. at 2450-51. Thus, *Patel* emphasized that "the proper focus of the constitutional inquiry" must be those "applications of the statute in which it actually authorizes or prohibits conduct," and "not those for which it is irrelevant." *Id.* at 2451 (internal citations omitted).

¶57 *Patel* provides no support for *Simpson II*. *Patel* applied *Salerno's* standard for facial challenges; it did not apply *Simpson II's* overbreadth analysis. Additionally, unlike *Patel*, *Simpson II* addressed relevant applications of the subject bond provision. Stated another way, *Simpson II* did not address circumstances where a defendant was being held without bond on grounds that were neither regulated nor authorized by article 2, section 22(A)(1), of the Arizona Constitution. Rather, the Court addressed circumstances that fell squarely within the terms of the subject constitutional provision: the denial of bail to defendants charged with sexual conduct with a minor under the age of fifteen when the proof was evident/presumption great that they committed the crime.

¶58 The majority also claims that *Simpson II* is consistent with other cases where the United States Supreme Court has invalidated laws "that categorically denied important, protected interests, regardless of the particular circumstances." *See supra* ¶ 18. I agree that, as a general matter, the United States Supreme Court has struck down laws categorically denying important rights. However, I am not sure what relevance this broad statement has to this case. This general proposition certainly does not provide a justification for abandoning *Salerno* or abrogating the United States Supreme Court's well-established rule that facial challenges based on overbreadth are restricted to the First Amendment. *See supra* ¶ 43.

¶59 Moreover, what is relevant here is that the United States Supreme Court has upheld categorical pretrial detention statutes as constitutional. *Salerno* itself recognized that bond may be categorically denied in a capital case. *Salerno*, 481 U.S. at 753; *see also Simpson II*, 241 Ariz. at 345, 349 ¶¶ 10, 26 (recognizing that pretrial detention is permitted for capital crimes and sexual assault); *Demore v. Kim*, 538 U.S. 510, 517–18, 521, 523, 531 (2003) (holding that a categorical approach detaining undocumented immigrants during deportation proceedings who had been convicted of an "aggravated felony" did not violate due process); *cf. Jennings v. Rodriguez*, 138 S. Ct. 830, 846–47 (2018) (recognizing that under 8 U.S.C. § 1226(c), undocumented immigrants are ineligible for release based on the commission of certain enumerated offenses).

¶60 While liberty, in its broadest sense, is fundamental, the nature of the right is constrained by

the circumstances of each case. Persons "may face substantial liberty restrictions as a result of the operation of our criminal justice system," including arrest and detention of an individual suspected of committing a crime "until a neutral magistrate determines whether probable cause exists," incarcerating an "arrestee" "until trial if he presents a risk of flight," and detaining a defendant who poses "a danger to witnesses." *Salerno*, at 749. Indeed, the fact that every defendant charged with a felony is subject to some pretrial release restrictions demonstrates that once a person is charged with a crime, his liberty interest is reduced. *See* A.R.S. § 13-3967(E)(2) (stating that in cases where a defendant has committed a sex offense, he is prohibited "from having any contact with the victim"); Ariz. R. Crim. P. 7.3(a)(1) (stating that "every order of release must contain" a restriction the defendant not leave the state "without the court's permission"). The majority recognizes this principle when, in reference to the On-Release provision, it states "[t]he defendant's liberty interest . . . is *reduced*, because it was already restricted by his arrest and release under conditions for the first charge." *Supra* ¶ 32 (emphasis added).

¶61 Thus, before a court can consider a due process challenge, it must first identify the nature of the liberty interest at stake. *See Washington v. Glucksberg*, 521 U.S. 702, 722 (1997) (stating a court must carefully formulate the liberty interest at stake in substantive due process cases); *cf. Demore*, 538 U.S. at 521, 523 (recognizing that while "the Fifth Amendment entitles aliens to due process of law in deportation proceedings," "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly

makes rules that would be unacceptable if applied to citizens" (internal quotation marks omitted)); *Schall v. Martin*, 467 U.S. 253, 264–65 (1984) (explaining that a juvenile's liberty interest in "freedom from institutional restraints . . . is undoubtedly substantial . . . . But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody.") (citation omitted); *cf. Morrissey v. Brewer*, 408 U.S. 471, 481–82 (1972) ("[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." (quoting *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)).

¶62 *Salerno* illustrates this point. There, the Court did not analyze a defendant's liberty interest in the context of some generalized liberty interest. Rather, it focused on a defendant's liberty interest in the context of a temporary, pretrial detention where he is charged with a serious crime and the "the Government [has proved] by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community." *Salerno*, 481 U.S. at 750–51. The Court concluded that "*[u]nder these circumstances*, we *cannot* categorically state that pretrial detention 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id*. at 751 (emphasis added) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). In short, the Court concluded that temporary pretrial detention under the Bail Reform Act did not implicate a fundamental right. *Cf.*

Glucksberg, 521 U.S. at 720–21 (stating due process "protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'") (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

¶63 The majority's reliance on *Stanley v. Illinois*, 405 U.S. 645 (1972) is misplaced. Unlike *Salerno*, *Stanley* did not involve a statute where a defendant charged with committing a serious felony is temporarily detained pending trial. Rather, in *Stanley*, the statute at issue permanently deprived all unwed fathers of custody of their children. 405 U.S. at 649–51. The statute presumed, without the benefit of a hearing, evidentiary showing, or even an allegation of parental unfitness, that *all* unwed fathers were unfit parents. *Id*. at 650. Thus, the issue was not whether the existing statute was deficient in protecting the rights of some fathers; rather, *Stanley* addressed a statute permanently depriving an entire class of citizens of their parental rights without *any* procedural protections. *See also Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (distinguishing the reduced liberty interest identified in *Salerno* from the total deprivation of liberty occurring under a Louisiana statute where persons, who were not charged with any crime, were detained indefinitely in a psychiatric hospital, despite the fact they were not suffering from a mental illness and could only be released by proving to the court they were not dangerous).

B.

¶64 In fidelity to *Simpson II*, the majority once again abandons *Salerno* and applies the novel *Lopez-Valenzuela* overbreadth standard to analyze Morreno's

facial challenge. *See supra* ¶¶ 14–16, 18. While the majority strives to distinguish the On-Release provision from the offense-based provision in *Simpson II*, I do not think it can for one simple reason: no categorical bond provision can survive scrutiny under the *Simpson II* overbreadth standard. Indeed, even *Simpson II's* holding that capital murder and sexual assault provide a convincing proxy for dangerousness collapse under the weight of the overbreadth standard, because it is always *possible* to think of factual scenarios where such offenses may not "inherently" predict future dangerousness or provide a reliable "proxy for dangerousness." *See Simpson II*, 241 Ariz. at 348–49 ¶¶ 26–27, 30.

¶65 Applying *Simpson II* to the On-Release provision demonstrates this point. The majority first claims that the On-Release provision has a different purpose (preventing recidivism) than *Simpson II* (protecting the victim and the community). It then concludes that the On-Release provision, unlike the provision in *Simpson II*, is narrowly focused on accomplishing this purpose because it only applies to (1) defendants "who are charged with felonies committed while on release from a prior felony charge, and (2) the state must show the "proof is evident or the presumption great" the defendant committed the new felony. *Supra* ¶ 31.

¶66 But is a defendant who commits a new felony while on pretrial release for another felony *always* a risk to recidivate? Stated another way, are there factual scenarios where a defendant might not conceivably pose a risk to re-offend, and yet is "swept in" by the "overbroad" On-Release provision? Undoubtedly, we can speculate about such scenarios.

As one example, consider a defendant who is arrested and charged for possessing marijuana. After he is arrested and booked into jail, the judge releases him on his own recognizance. The defendant is then picked up by his girlfriend, who is driving his car. Unfortunately, the defendant left his marijuana pipe in the car, and fifty feet from the jail a police officer pulls him over for a broken tail light. Defendant consents to a search of the car, the pipe is discovered, and defendant is charged with a new felony: possession of drug paraphernalia. Does the defendant's arrest for this new felony indicate he is a risk to commit new felony crimes while on pretrial release?

¶67 Of course, like the "consensual sex" scenario in *Simpson II*, this hypothetical stands the test for a facial challenge on its head. Rather than the *defendant* establishing there are no circumstances where the On-Release provision would be valid, an overbreadth analysis invites a court to speculate about circumstances where the law might *not* operate constitutionally.

¶68 To be clear, I think the On-Release provision is constitutionally valid because Morreno has failed to make a successful facial challenge under *Salerno*. The On-Release provision is narrowly focused on its purpose of preventing crime because, in many circumstances, when a defendant commits a new felony while on release it "strongly suggests recidivist tendencies." *Supra* ¶ 30. Thus, Morreno cannot show that there is "no set of circumstances exists under which" the On-Release provision would be valid. *Salerno*, 481 U.S. at 745. The point, however, is that the On-Release provision is valid using the *Salerno*

standard; it can never be valid using the *Simpson II* standard.

¶69 Applying the *Salerno* standard does not, as Morreno contends, leave him without a remedy. He can assert, just as he did here on the grounds of facial invalidity, that the On-Release provision is unconstitutional as applied to him. *Cf. Schall*, 467 U.S. at 273 ("It may be, of course, that in some circumstances detention of a juvenile would not pass constitutional muster. But the validity of those detentions must be determined on a case-by-case basis."); *Hernandez v. Lynch*, 216 Ariz. 469, 481 ¶ 47 (App. 2007) (Kessler, J., concurring) (stating that defendant challenging his detention under former Proposition 100 was not precluded from making an as-applied challenge). Under such a challenge, this Court need not speculate about other cases or situations where the On-Release provision may or may not violate due process. Rather, we need only consider whether a *particular* defendant's constitutional rights were *actually* violated.

¶70 Ultimately, I am concerned that *Simpson II's* overbreadth analysis will open the floodgates to facial challenges. *Simpson II* may well require courts in this state to consider an increasing number of facial challenges asserted by parties who have not and cannot show that a statute is unconstitutional as to them. Rather, such litigants may seek to invalidate a statute because it may conceivably violate the constitutional rights of someone else who is not before the court — whether that person actually exists or is simply a hypothetical construct designed to invalidate the statute. Of course, this will require courts in many

instances to speculate about the validity of an entire statutory scheme or a constitutional provision without the benefit of a developed factual record or concrete facts.

¶71 To avoid this unworkable scenario, the United States Supreme Court has adopted a very demanding standard for facial challenges. While it is not impossible, making a successful facial challenge is extremely difficult; indeed, it is "the *most* difficult challenge to mount successfully." *Salerno*, 481 U.S. at 745 (emphasis added); *see also Patel*, 135 S. Ct. at 2447, 2451 (concluding that because there were no relevant circumstances under which the subject municipal code was valid, it was facially invalid). Thus, because I think it is wise to apply the *Salerno* standard to facial challenges, and, because I do not believe *Simpson II* follows that standard, I dissent.

APPENDIX C

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

No. 1 CA-SA 17-0072
No. 1 CA-SA 17-0077
(Consolidated)

[Filed April 25, 2017]

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 Commissioner,

GUY JAMES GOODMAN,
Real Party in Interest.

Petition for Special Action from the Superior Court
in Maricopa County
No. CR2017-108708-001
No. CR2017-107553-001
The Honorable Kevin B. Wein, Commissioner

JURISDICTION ACCEPTED;
RELIEF GRANTED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Lisa Marie Martin
Counsel for Petitioner

Maricopa County Public Defender's Office, Phoenix
By Nicholaus Podsiadlik, Jamie A. Jackson
Counsel for Real Party in Interest Goodman

Michael L. Freeman, Scottsdale
Counsel for Real Party in Interest Henderson

OPINION

Judge Jon W. Thompson delivered the Opinion of the Court, in which Presiding Judge Randall M. Howe and Judge Lawrence F. Winthrop joined.

T H O M P S O N, Judge:

¶1 This consolidated special action concerns bail in sexual assault cases following *Simpson v. Miller* (*Simpson II)*, 241 Ariz. 341, 387 P.3d 1270 (2017). The state argues that trial courts are erroneously holding bail hearings for individual defendants charged with sexual assault. It asserts that no hearing is required for a determination of future dangerousness. The real parties in interest assert *Simpson II* requires a finding of individualized dangerousness for each defendant before denying bail. Because this issue is important and the potential threat to the community great, we have, in a previously entered order, accepted jurisdiction and granted the state relief. Sexual assault remains a non-bailable offense.

JURISDICTION

¶2 Special action jurisdiction is available when there is no other equally plain, speedy or adequate remedy by appeal. Ariz. R. Spec. Act. 1(a). Another critical factor is whether the case presents an issue of statewide importance affecting numerous cases. *Lind v. Sup. Ct.*, 191 Ariz. 233, 236, ¶ 10, 954 P.2d 1058, 1061 (App. 1998). The issue presented here is of statewide importance, is likely to recur numerous times, and is an issue of first impression following *Simpson II*. There is no remedy by appeal. For these reasons, we accepted special action jurisdiction.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 On February 9, 2017, our supreme court issued *Simpson II*. On February 13, 2017, the Maricopa

County superior court issued a "Protocol for Setting *Simpson v. Miller* Review Hearings." That protocol stated of *Simpson II*:

> In summary, the ruling held unconstitutional the portion of A.R.S. 13-3961(A) [2010] that allowed a defendant charged with Sexual Assault, Sexual Conduct with a Minor under 15, or Molestation of a Child under 15 to be held without bond if the Court has only made a "proof evident and presumption great" finding. The ruling held that in addition to a finding of proof evident and presumption great, the State must prove by clear and convincing evidence (at a "full blown adversary hearing") that no condition or combination of conditions of release may be imposed that will reasonably assure that the safety of the other person or community (per A.R.S. § 13-3961(D) [2010]).

¶4 Goodman and Henderson were each charged with one count of sexual assault under Arizona Revised Statutes (A.R.S.) § 13-1406 (2010), a class 2 felony. In both cases, the superior court held an evidentiary hearing to determine whether the defendant could properly be held without bail under A.R.S. § 13-3961(D). In both cases, the superior court found proof evident and presumption great that the defendants committed sexual assault. However, because the court found that the state did not prove by clear and convincing evidence that the defendants were an ongoing danger to the community or to the victim, both defendants were held to be bailable. Defendant Goodman was allowed a $70,000 secured appearance

bond. Defendant Henderson was allowed a $50,000 secured appearance bond.

DISCUSSION

¶5 In *Segura v. Cunanan*, this court provided the historical context of bail in this state.

> Not all defendants are entitled to bail. Since statehood, the Arizona Constitution has provided that all offenses are bailable, "except for capital offenses when the proof is evident or the presumption great." Ariz. Const. art. 2, § 22 (as quoted in *Wiley v. State*, 18 Ariz. 239, 158 P. 135 (1916)). Over the years, the list of nonbailable offenses was expanded, and by 2006 included capital offenses, sexual assault, certain crimes against children, offenses committed when the person charged is on bail on a separate felony charge, and felony offenses if the person charged poses a substantial danger to any other person. Ariz. Const. art. 2, § 22. In each case, the standard of proof was that the proof is evident or the presumption great as to the charge. *Id.*; *see also* A.R.S. § 13–3961 (Supp. 2007) (statutory provision supplementing constitution).

219 Ariz. 228, 234, ¶ 24, 196 P.3d 831, 837 (App. 2008) (addressing the availability of bail to persons charged with serious felony offenses and in the country illegally). Section 22(A)(1) of our Constitution now reads that "All persons charged with a crime shall be bailable by sufficient sureties, except: For capital offenses, sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age when the proof is evident or

the presumption great." This case presents questions of law, which we review de novo. *US West Commc'ns, Inc. v. Ariz. Corp. Comm'n*, 201 Ariz. 242, 244, ¶ 7, 34 P.3d 351, 353 (2001).

¶6 In *Simpson II*, the court examined whether bail was potentially available to Defendant Martinez, who was charged with sexual conduct with a minor under the age of fifteen. The court said:

> The crime charged against Martinez, however, is not in itself a proxy for dangerousness. Section 13–1405(A) states, "A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age." Section 13–1405(B) classifies felonies for sexual conduct with a minor under age fifteen but does not alter the definition of the crime. The crime can be committed by a person of any age, and may be consensual. Hence, as the court of appeals noted, *Simpson*, 240 Ariz. at 215[,] ¶ 20, 377 P.3d at 1010, the offense sweeps in situations where teenagers engage in consensual sex. In such instances, evident proof or presumption great that the defendant committed the crime would suggest little or nothing about the defendant's danger to anyone. *Cf. A.R.S. § 13–1406 (defining sexual assault as "intentionally or knowingly engaging in sexual intercourse or oral sexual contact . . . without consent of such person")*.

Simpson II, 241 Ariz. at 349, ¶ 27, 387 P.3d at 1278 (emphasis added). The court concluded, as an issue of first impression, that due to the possibility that

teenage consensual sex might be charged under the terms of the offense, a blanket prohibition on bail for the crime of sexual conduct with a minor violated due process rights. *Id.* at ¶ 31. It went on to require that before a denial of bail, in sexual conduct with a minor cases, an individualized determination must be made that the defendant is dangerous even when proof is evident or the presumption great that the defendant committed the crime. *Id.*

¶7 Sexual assault is not a crime like sexual conduct with a minor which could potentially include consensual situations and which, therefore, may involve a defendant who is not a danger to the community. The Court expressed this comparison with a "Cf." citation. The Bluebook explains the citation signal "Cf." as "Cited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. Literally, 'cf.' means 'compare.'" The Bluebook: A Uniform System of Citation R. 1.2(a), at 59 (Columbia Law Review Ass'n et al. eds. 20th ed. 2015*); see State v. Nixon*, 1 CA–CR 16–0391, 2017 WL 1278849, slip op at *3, ¶ 10 (Ariz. App. April 6, 2017) (same).

¶8 *Simpson II* used the Cf. citation to highlight the difference between the two offenses. This citation makes sense because A.R.S. § 13-1406(A) reads: "A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person *without consent* of such person[]" (emphasis added). Unlike sexual conduct with a minor, lack of consent is an element of the crime of sexual assault. A.R.S. §§ 13-1405 (2010), -1406 (2010). We are bound by our Supreme Court's analysis in

Simpson II and have no authority to overrule or disregard it. *See State v. Sullivan*, 205 Ariz. 285, 289, ¶ 15, 69 P.3d 1006, 1009 (App. 2003).

¶9 *Simpson II* held that persons charged with sexual conduct with a minor under fifteen years of age are entitled to a hearing as to dangerousness. Sexual assault remains a non-bailable offense. Where proof is evident or the presumption is great that a defendant committed sexual assault, the non-consensual nature of the crime fulfills the requirement for finding inherent dangerousness. No section 13-3961(D) hearing need be held.

CONCLUSION

¶10 For the above stated reasons, the state is granted relief.

AMY M. WOOD • Clerk of the Court
FILED: AA

APPENDIX D

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2017-108708-001 DT

[Filed February 27, 2017]
[Electronically Filed 03/01/2017 8:00AM]

STATE OF ARIZONA	)
	)
v.	)
	)
GUY JAMES GOODMAN (001)	)
	)

COMMISSIONER KEVIN B. WEIN

CLERK OF THE COURT
T. Gaulke
Deputy

KATHLEEN CAMPBELL TYMA

JAMIE ALLEN JACKSON

PSA - RELEASE & REPORTS

MINUTE ENTRY

2:07 p.m.

Courtroom 3D, South Court Tower

State's Attorney:	Kathleen Campbell Tyma
Defendant's Attorney:	Jamie Jackson
Defendant:	Present

A record of the proceedings is made digitally in lieu of a court reporter.

This is the time and date set for an Evidentiary Hearing in the above-entitled cause number.

Following a request by the State to hold the defendant without bail at the Defendant's initial appearance the Court held a hearing on Feb 27, 2017 pursuant to ARS §13-3961(D). Prior to the hearing the State made a motion to vacate the hearing on the grounds that the Arizona Supreme Court opinion in *Simpson v. Miller,* __ Ariz. __ , 2017 WL 526027 (Feb. 9, 2017) applied only to Defendants charged with Sexual Conduct with a Minor Under the Age of Fifteen and therefore this Defendant, who has been charged with sexual assault, is not entitled to an evidentiary review hearing. For the reasons outlined on the record and in prior minute entries, the Court denied the State's motion to vacate the evidentiary review hearing. The State also moved to stay the case pending review of the Court's decision denying the motion to vacate. For the reasons stated on the record, the Court denied that motion and the review hearing was conducted.

Witness Patricia Ramirez is sworn and testifies.

The witness is excused.

After consideration of the testimony presented, the Court denied the State's motion to hold the Defendant

without bail and further held that Defendant may be released subject to the conditions outlined below.

The Court found that the State had met its burden to show that there is proof evident or presumption great that this Defendant committed the charged offense. The Court found that the reporting by the victim and other witnesses as relayed through reliable hearsay by the Officer was credible and that reporting, along with the admission of the Defendant, was sufficient to meet the State's burden.

The State did not meet its burden of clear and convincing evidence to show that the Defendant poses a substantial danger to other persons or the community. While it is clear that there is evidence that Defendant posed a danger to the Victim on the right in question there was no evidence introduced that Defendant poses an ongoing danger to the Victim or the community. There was no evidence of any recent felony criminal history or prior similar offenses or arrests nor any evidence of criminal offenses between the time of this alleged offense in 2010 and today. There was no evidence of prior history between the Victim and the Defendant. Likewise, there was no evidence introduced of any contact between the Defendant and the Victim following the night in question and no evidence of any threats or efforts at intimidation by the Defendant towards the Victim or any witnesses. Accordingly, release of the Defendant subject to the following conditions is warranted.

Defendant shall be released from custody at such time as he can post a $70,000 secured appearance bond. If Defendant is able to post this bond, he shall be released to pretrial services with electronic monitoring.

The monitoring device shall be installed before release from custody. The type of monitoring shall be determined by the Adult Probation Department. In addition, the following release conditions are also imposed if Defendant is released from custody:

- Defendant shall not return to the scene of the alleged crime.
- Defendant shall not initiate contact with the alleged complainant or witness.
- Defendant shall not initiate contact with the alleged victim or victims.
- Defendant shall not possess any drugs without a valid prescription.
- Defendant shall not possess any weapons.
- Defendant shall continue to provide the court with proof of his local address.
- Defendant shall continue to reside at his present local address.

3:02p.m. Matter concludes.

APPENDIX E

Guy Goodman DOB [redacted] PC Statement Tempe Police #2010-171480

On 02/22/2017 at 0935 hours, Guy Goodman was placed under arrest for One Count of Sexual Assault which occurred on 11/06/2010 while at the location of [redacted]

The victim was identified as an adult female who resided at the location. She reported the sexual assault on 11/06/2010. After Tempe Patrol Officers arrived on scene she provided her statement. She stated on 11/05/2010 she and other female friends socialized while in the downtown Tempe area. They met a male (later identified as Guy Goodman). After being in the downtown Tempe area, they relocated to her residence [redacted]. Alcoholic beverages were consumed by the victim as well as Guy Goodman. Guy asked if he could spend the night at her residence due to consuming alcohol. Other females were present at the apartment. Two females encouraged the victim to allow Guy to spend the night at the apartment due to his alcohol consumption. The victim agreed but stated she did not feel comfortable due to not knowing Guy Goodman.

The victim allowed her two friends and Guy Goodman to sleep on her couch located on the first floor of the apartment. The victim went to her bedroom located on the second floor. She awoke to find Guy Goodman performing digital penetration without her consent. He pulled her under underwear down during the incident. She yelled at him. The victim immediately went to

apartment#[redacted] She told a friend, Guy digitally penetration her without her consent. Her friend entered the victim's apartment and confronted Guy on the sexual assault. He denied committing a crime and fled the area in his van while he was being yelled at.

The victim participated in a medical forensic exam. A witness later identified the Guy Goodman in a photographic line-up.

On 12/4/2010, a detective in the Special Victim's Unit conducted an interview with Guy Goodman. During the course of the interview, Guy denied committing a sexual crime against the victim. He stated he slept on her bed although the victim was covered with a blanket. Guy was asked if there was any reason his DNA would be found on the victim's vagina. He replied, "No." He stated he never touched the victim. The detective obtained a sample of his DNA via buccal swabs.

The medical forensic kit and sample of his DNA was submitted to the Arizona Department Public Safety Crime Lab.

On 05/18/2016, a Scientific Examination Report was completed by AZDPS. The results/interpretations provided the following:

"The YSTR DNA profile from item 18.8 (external genital swabs) matches the YSTR DNA profile from item 20 (G.Goodman) at 8 YSTR loci."

After many attempts of locating the victim she was located. She was willing to aid in prosecution.

On 02/22/2017, Guy Goodman was arrested and transported to the City of Tempe Police Station. He was advised of his Miranda Warnings. He advised he understood each of his rights.

He recalled the prior contact with the first detective (during the year of 2010). He described the victim's apartment as well as was consistent with his initial statements. However, when confronted on the DNA scientific analysis he provided many statements of evidentiary value. He admitted the victim was sleeping when he placed his fingers in her vagina. He admitted the sexual act was without her consent. He looked into a camera that was in the interview room, while pointing to it he apologized to the victim.

He was booked and held to see a judge.

APPENDIX F

Constitution and Statutes

Ariz. Const. Art. 2 § 22. Bailable offenses

Section 22. **A.** All persons charged with crime shall be bailable by sufficient sureties, except:

1. For capital offenses, sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age when the proof is evident or the presumption great.

2. For felony offenses committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge.

3. For felony offenses if the person charged poses a substantial danger to any other person or the community, if no conditions of release which may be imposed will reasonably assure the safety of the other person or the community and if the proof is evident or the presumption great as to the present charge.

4. For serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge.

B. The purposes of bail and any conditions of release that are set by a judicial officer include:

1. Assuring the appearance of the accused.

2. Protecting against the intimidation of witnesses.

3. Protecting the safety of the victim, any other person or the community.

Ariz. Rev. Stat. § 13-3961. Offenses not bailable; purpose; preconviction; exceptions

A. A person who is in custody shall not be admitted to bail if the proof is evident or the presumption great that the person is guilty of the offense charged and the offense charged is one of the following:

1. A capital offense.

2. Sexual assault.

3. Sexual conduct with a minor under either of the following circumstances:

(a) At the time of the offense, the person was at least eighteen years of age and the victim was under thirteen years of age.

(b) At the time of the offense, the victim was thirteen or fourteen years of age and the person was at least ten years older than the victim.

4. Molestation of a child under either of the following circumstances:

(a) At the time of the offense, the person was at least eighteen years of age and the victim was under thirteen years of age.

(b) At the time of the offense, the victim was thirteen or fourteen years of age and the person was at least ten years older than the victim.

5. A serious felony offense if there is probable cause to believe that the person has entered or remained in the United States illegally. For the purposes of this paragraph:

(a) The court shall consider all of the following in making a determination that a person has entered or remained in the United States illegally:

(i) Whether a hold has been placed on the arrested person by the United States immigration and customs enforcement.

(ii) Any indication by a law enforcement agency that the person is in the United States illegally.

(iii) Whether an admission by the arrested person has been obtained by the court or a law enforcement agency that the person has entered or remained in the United States illegally.

(iv) Any information received from a law enforcement agency pursuant to § 13-3906.

(v) Any evidence that the person has recently entered or remained in the United States illegally.

(vi) Any other relevant information that is obtained by the court or that is presented to the court by a party or any other person.

(b) "Serious felony offense" means any class 1, 2, 3 or 4 felony or any violation of § 28-1383.

B. The purposes of bail and any conditions of release that are set by a judicial officer include:

1. Assuring the appearance of the accused.

2. Protecting against the intimidation of witnesses.

3. Protecting the safety of the victim, any other person or the community.

C. The initial determination of whether an offense is bailable pursuant to subsection A of this section shall be made by the magistrate or judicial officer at the time of the person's initial appearance.

D. Except as provided in subsection A of this section, a person who is in custody shall not be admitted to bail if the person is charged with a felony offense and the state certifies by motion and the court finds after a hearing on the matter that there is clear and convincing evidence that the person charged poses a substantial danger to another person or the community or engaged in conduct constituting a violent offense, that no condition or combination of conditions of release may be imposed that will reasonably assure the safety of the other person or the community and that the proof is evident or the presumption great that the person committed the offense for which the person is charged. For the purposes of this subsection, "violent offense" means either of the following:

1. A dangerous crime against children.

2. Terrorism.

E. On oral motion of the state, the court shall order the hearing required by subsection D of this section at or within twenty-four hours of the initial appearance unless the person who is subject to detention or the state moves for a continuance. A continuance that is granted on the motion of the person shall not exceed five calendar days unless there are extenuating

circumstances. A continuance on the motion of the state shall be granted on good cause shown and shall not exceed twenty-four hours. The prosecutor shall provide reasonable notice and an opportunity for victims and witnesses to be present and heard at any hearing. The person may be detained pending the hearing. The person is entitled to representation by counsel and is entitled to present information by proffer or otherwise, to testify and to present witnesses in the person's own behalf. Testimony of the person charged that is given during the hearing shall not be admissible on the issue of guilt in any subsequent judicial proceeding, except as it might relate to the compliance with or violation of any condition of release subsequently imposed or the imposition of appropriate sentence or in perjury proceedings, or for the purposes of impeachment. The case of the person shall be placed on an expedited calendar and, consistent with the sound administration of justice, the person's trial shall be given priority. The person may be admitted to bail in accordance with the Arizona rules of criminal procedure whenever a judicial officer finds that a subsequent event has eliminated the basis for detention.

F. The finding of an indictment or the filing of an information does not add to the strength of the proof or the presumption to be drawn.

G. In a hearing pursuant to subsection D of this section, proof that the person is a criminal street gang member may give rise to the inference that the person poses a substantial danger to another person or the community and that no condition or combination of conditions of release may be imposed that will

reasonably assure the safety of the other person or the community.

Ariz. Rev. Stat. § 13-1401. Definitions; factors

A. In this chapter, unless the context otherwise requires:

1. "Oral sexual contact" means oral contact with the penis, vulva or anus.

2. "Position of trust" means a person who is or was any of the following:

(a) The minor's parent, stepparent, adoptive parent, legal guardian or foster parent.

(b) The minor's teacher.

(c) The minor's coach or instructor, whether the coach or instructor is an employee or volunteer.

(d) The minor's clergyman or priest.

(e) Engaged in a sexual or romantic relationship with the minor's parent, adoptive parent, legal guardian, foster parent or stepparent.

3. "Sexual contact":

(a) Means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact.

(b) Does not include direct or indirect touching or manipulating during caretaking responsibilities, or interactions with a minor or vulnerable adult that an

objective, reasonable person would recognize as normal and reasonable under the circumstances.

4. "Sexual intercourse" means penetration into the penis, vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva.

5. "Spouse" means a person who is legally married and cohabiting.

6. "Teacher" means a certificated teacher as defined in § 15-501 or any other person who provides instruction to pupils in any school district, charter school or accommodation school, the Arizona state schools for the deaf and the blind or a private school in this state.

7. "Without consent" includes any of the following:

(a) The victim is coerced by the immediate use or threatened use of force against a person or property.

(b) The victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant. For the purposes of this subdivision, "mental defect" means the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another.

(c) The victim is intentionally deceived as to the nature of the act.

(d) The victim is intentionally deceived to erroneously believe that the person is the victim's spouse.

B. The following factors may be considered in determining whether a relationship is currently or was previously a sexual or romantic relationship pursuant to subsection A, paragraph 2, subdivision (e) of this section:

1. The type of relationship.

2. The length of the relationship.

3. The frequency of the interaction between the two persons.

4. If the relationship has terminated, the length of time since the termination.

Ariz. Rev. Stat. § 13-1406. Sexual assault; classification; increased punishment.

A. A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person.

B. Sexual assault is a class 2 felony, and the person convicted shall be sentenced pursuant to this section and the person is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by § 31-233, subsection A or B until the sentence imposed by the court has been served or commuted. If the victim is under fifteen years of age, sexual assault is punishable pursuant to § 13-705. The presumptive term may be aggravated or mitigated within the range under this section pursuant to § 13-701, subsections C, D and E. If the sexual assault involved the intentional or knowing administration of

flunitrazepam, gamma hydroxy butyrate or ketamine hydrochloride without the victim's knowledge, the presumptive, minimum and maximum sentence for the offense shall be increased by three years. The additional sentence imposed pursuant to this subsection is in addition to any enhanced sentence that may be applicable. The term for a first offense is as follows:

Minimum	**Presumptive**	**Maximum**
5.25 years	7 years	14 years

The term for a defendant who has one historical prior felony conviction is as follows:

Minimum	**Presumptive**	**Maximum**
7 years	10.5 years	21 years

The term for a defendant who has two or more historical prior felony convictions is as follows:

Minimum	**Presumptive**	**Maximum**
14 years	15.75 years	28 years

C. The sentence imposed on a person for a sexual assault shall be consecutive to any other sexual assault sentence imposed on the person at any time.

D. Notwithstanding § 13-703, § 13-704, § 13-705, § 13-706, subsection A and § 13-708, subsection D, if the sexual assault involved the intentional or knowing infliction of serious physical injury, the person may be

sentenced to life imprisonment and is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by § 31-233, subsection A or B until at least twenty-five years have been served or the sentence is commuted. If the person was at least eighteen years of age and the victim was twelve years of age or younger, the person shall be sentenced pursuant to § 13-705.