

No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**

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RYAN THORNELL, ET AL.,  
*Petitioners,*

v.

BRADLEY BIEGANSKI,  
*Respondent.*

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*On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit*

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED FOR REVIEW**

From 2011 until his arrest in 2013, Respondent Bradley Bieganski operated a girls-only private Christian home-school. Bieganski was arrested after several girls accused him of touching their genitals when they were between the ages of 6 and 9. Bieganski was subsequently convicted of three counts of child molestation. His convictions and sentences were affirmed by the Arizona courts; this Court denied his petition for writ of certiorari, and the district court subsequently denied federal habeas corpus relief. However, the Ninth Circuit reversed the judgment of the district court, and found that the Arizona statutes under which Bieganski was convicted unconstitutionally shifted the burden of disproving an essential element of the crime--sexual motivation--contrary to the Due Process Clause of the Fourteenth Amendment.

The Question Presented is:

Did the Ninth Circuit fail to apply the correct deferential standard of review, as set out in 28 U.S.C. § 2254(d), and also misapply this Court's precedents, set out in *Martin* and *Patterson*, regarding when an affirmative defense improperly shifts the burden of proof to a criminal defendant, in violation of the Due Process Clause?

**PARTIES TO THE PROCEEDING**

In the proceeding below, Bradley Bieganski was the petitioner/appellant and David Shinn and Kris Mayes were the respondents/appellees. Ryan Thornell is the current director of the Arizona Department of Corrections, Rehabilitation and Reentry and is accordingly being substituted for David Shinn. No party is a corporation.

**STATEMENT OF RELATED PROCEEDINGS**

*Bieganski v. Shinn*, 149 F.4th 1055 (9th Cir. 2025) (opinion reversing judgment of district court denying habeas relief). *See* Pet. App. 1–48.

*Bieganski v. Shinn*, No. CV–21–01684–PHX–DWL, 2023 WL 4862681 (D. Ariz. July 31, 2023), rev'd and remanded, 149 F.4th 1055 (9th Cir. 2025) (United States District Court for the District of Arizona order denial habeas relief). *See* Pet. App. 49–80.

*Bieganski v. Arizona*, \_\_\_ U.S. \_\_\_, 141 S. Ct. 377 (2020) (Denial of petition for writ of certiorari to the Court of Appeals of Arizona).

*State v. Bieganski*, No. 1 CA–CR 18–0093, 2019 WL 4159822 (App. Sept. 3, 2019) (Affirmance of convictions and sentences on direct appeal). *See* Pet. App. 99–110.

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## OPINIONS AND ORDERS BELOW

The panel opinion reversing the district court's denial of relief is reported at *Bieganski v. Shinn*, 149 F. 4th 1055 (2025). *See* Pet. App. 1–48.

## JURISDICTION

The Ninth Circuit issued its decision reversing the denial of habeas relief on August 12, 2025. On November 4, 2025, Justice Kagan extended the time to file this petition until December 10, 2025. This Court has jurisdiction under 28 U.S. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides: “No State shall ... deprive any person of life, liberty, or property, without due process of law[.]” U.S. Const. amend. XIV, § 1.

Section (d) of the Antiterrorism and Effective Death Penalty Act of 1996 provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established

Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The relevant sections of the 2013 Arizona Revised Statutes [A.R.S.] provide, in pertinent part:

A.R.S. § 13–1401(2): “Sexual contact” 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.

A.R.S. § 13–1410(A): A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child who is under fifteen years of age.

A.R.S. § 13-1407(E): It is a defense to a prosecution pursuant to ... [§]13–1410 that the defendant was not motivated by a sexual interest....

## INTRODUCTION

In *Bieganski v. Shinn*, 149 F.4th 1055 (9th Cir. 2025), *see* Pet. App. 1–48, a three-judge panel of the Ninth Circuit reversed the judgment of the district court, holding that the former Arizona statutes criminalizing the sexual molestation of a child

unconstitutionally shifted the burden of disproving an essential element of the crime to a defendant, in violation of the Due Process Clause of the Fourteenth Amendment.

Certiorari review is warranted here because the panel failed to properly apply the correct deferential standard of review under 28 U.S.C. § 2254(d) and improperly extended this Court's controlling precedent, set out in *Martin v. Ohio*, 480 U.S. 228 (1987) and *Patterson v. New York*, 432 U.S. 197 (1977), with regard to when an affirmative defense improperly shifts the burden of proof to a criminal defendant in violation of the Due Process Clause.

## STATEMENT OF THE CASE

### **A. Bieganski's sexual molestation of the victims.**

From 2011 until his arrest in 2013, Bieganski operated a girls-only private Christian home-school called Kingdom Flight along with his wife and son. The arrest occurred after three girls attending Kingdom Flight (A.G., Y.L., and J.C.) accused Bieganski of touching their genitals when the victims were between the ages of 6 and 9. The genital contact primarily occurred during a Sunday morning bathing practice in which Bieganski would touch and manually wash the girls' vaginas with his bare hand. In addition to this genital contact, Y.L. also accused Bieganski of touching her genitals on two other occasions: once when she was getting dressed after swimming and another time when she was in the Kingdom Flight girls' room.

**B. Trial and sentencing.**

In a successive indictment resulting from the investigation of Bieganski, the grand jury charged him with seven counts of child molestation, A.R.S. § 13–1410(A) (2013<sup>1</sup>), and two counts of continuous sexual abuse of a minor.

Bieganski initially denied touching the girls' genitals, both to detectives and to his wife, and stated that he instructed the girls to wash their own genitals. However, at trial Bieganski admitted that he washed the girls' genitals with his bare hands but asserted, pursuant to the affirmative defense provided by A.R.S. § 13–1407(E) (2013), that he was not motivated by sexual interest in doing so.

At the conclusion of the State's case, the court granted Bieganski's motion for a judgment of acquittal regarding the continuous sexual abuse of a minor charges, and the State's motion to dismiss one of the child molestation charges involving J.C. The jury then convicted Bieganski of three counts of child molestation involving victims A.G. and J.C. but returned not guilty verdicts for the charges involving Y.L.

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<sup>1</sup> In 2018 the Arizona Legislature amended A.R.S. § 13–1401(A)(3) to change the definition of “sexual contact.” While the primary definition of the term remains the same, the legislature added a provision indicating that sexual contact “[d]oes 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.” In the same bill, which became effective April 25, 2018, the legislature removed the affirmative defense of lack of sexual motivation under A.R.S. § 13–1407(E).

The court sentenced Bieganski to two consecutive terms of 17 years' imprisonment, with 1,576 days' presentence incarceration credit given to the first 17-year term.

**C. Appellate and federal habeas corpus proceedings.**

On appeal, Bieganski challenged his convictions and sentences, contending that former A.R.S. §§ 13–1401, –1410(A), and –1407(E) (which the appeals court characterized collectively as the “child molestation statutes”) were unconstitutional because they impermissibly shifted the burden of proof by requiring a defendant to prove lack of sexual motivation as an affirmative defense.

In affirming Bieganski's convictions and sentences, the state appellate court first held the former child molestation statutes did not unconstitutionally shift the burden of proof to Bieganski, finding that the court was bound by the Arizona Supreme Court's rejection of that argument in *State v. Holle (Holle II)*, 379 P.3d 197, 205, ¶ 40 (Ariz. 2016) (“Treating lack of sexual motivation under [A.R.S.] § 13–1407(E) as an affirmative defense which a defendant must prove does not offend due process.”). *See* Pet. App. 102–03. The court also rejected Bieganski's argument that the child molestation statutes were unconstitutional as applied to him. *See id.* at 106–08.

The Arizona Supreme Court denied review. Subsequently, this Court denied Bieganski's petition for writ of certiorari, *Bieganski v. Arizona*, \_\_\_ U.S. \_\_\_, 141 S. Ct. 377 (2020), in which he contended that the Arizona statutes unconstitutionally shifted the burden of proof to defendants.

Bieganski then timely filed a petition for writ of habeas corpus in federal district court, arguing that the child molestation statutes violated due process by “impermissibly shift[ing] to the accused the burden of proving the only thing that distinguishes criminal from innocent conduct.” After completion of briefing, the magistrate judge recommended dismissal of Bieganski’s petition under AEDPA’s deferential standard of review set out in 28 U.S.C. § 2254(d), noting that Bieganski had failed to support his argument with any United States Supreme Court precedent holding that due process requires a state to include an element of sexual motivation in child molestation statutes. After additional briefing, the district court agreed with the magistrate judge’s recommendation, finding that *Holle II*’s reliance on *Martin v. Ohio*, 480 U.S. 228 (1987), supported a conclusion that the state court’s decision was neither contrary to, nor an unreasonable application of clearly established Supreme Court precedent. However, the district court issued a certificate of appealability with regard to Bieganski’s facial challenge to the statutes.

On appeal, the Ninth Circuit panel reversed the district court, holding—through the misconstruction and improper extension of this Court’s controlling precedent—that the state court’s decision was objectively unreasonable.

**REASONS FOR GRANTING CERTIORARI****I. THE PANEL MISAPPLIED THE AEDPA STANDARD OF PROOF, AS WELL AS CONTROLLING CASE LAW.**

Because the Arizona courts adjudicated this issue on its merits, relief can only be granted under AEDPA if the state court decision was contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1). The phrase “clearly established Federal law,” “refers to the holdings, as opposed to the dicta, of [this Court’s] decisions as of the time of the relevant state-court decision.” *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (quoting *Williams v. Taylor*, 529 U.S. 362 (2000)). Thus, “if a habeas court must extend a rationale before it can apply to the facts at hand,’ then by definition the rationale was not ‘clearly established at the time of the state-court decision.” *White v. Woodall*, 572 U.S. 415, 426 (2014) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)).

The panel began its analysis of the constitutionality of the statute as follows:

[W]e will begin with a candid observation: as a matter of form, the Arizona Supreme Court is correct that Arizona’s child molestation scheme does not shift the burden of proof from the state to the defendant. Therefore, solely as a matter of form, we can find no fault in the court’s decision—much less that the decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United

States.” 28 U.S.C. § 2255(d)(1). On first examination, *Holle II* falls within the Supreme Court’s core pronouncements in *Winship*, *Mullaney*, and *Patterson*, and within the Court’s more recent applications of the burden-shifting analysis in *Smith*, *Martin*, and *Dixon v. United States*, 548 U.S. 1, 126 S. Ct. 2437, 165 L.Ed.2d 299 (2006): the state must prove its case (that the defendant intentionally touched the child) and the defendant must prove his affirmative defense (that he lacked any sexual motivation when he touched the child)....

Pet. App. 30–31. Under AEDPA, the panel should have ended its discussion there and affirmed the district court’s denial of relief.

However, the panel chose to stray from the question properly before it under § 2254(d). The court failed to accurately identify a principal of clearly established federal law that, without extension, made the Arizona statutes unconstitutional. This was error and warrants this Court’s intervention.

**a. 28.U.S.C. § 2254(d)(1)**

Returning to first principles under AEDPA, Bieganski was required to demonstrate that the state court adjudication of his due process claim “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). This required the Ninth Circuit to first identify the “clearly established” precedent before deciding whether the state court had unreasonably applied it. *See Lockyer*

*v. Andrade*, 538 U.S. 63, 71 (2003). “[C]learly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of th[e Supreme] Court’s decisions.” *White*, 572 U.S. at 419 (internal quotations omitted; alteration in original).

Then, after identifying this Court’s clearly established precedent, the Ninth Circuit was required to decide whether the state court’s application of that precedent was unreasonable. But this standard is purposefully difficult to meet, and prevents habeas relief “so long as fairminded jurists could disagree on the correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)) (internal quotation marks omitted). And while “[g]eneral legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of this Court,” *Andrew v. White*, 604 U.S. 86, 94 (2025), “[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations,” *Yarborough*, 541 U.S. at 664. Ultimately, “it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.” *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (internal quotation marks omitted). *See also Renico v. Lett*, 559 U.S. 766, 776 (2010) (“Because AEDPA authorizes federal courts to grant relief only when state courts act unreasonably, it follows that the more general the rule at issue—and thus the greater the potential for reasoned disagreement among fair-minded judges—the more leeway state courts have in reaching

outcomes in case-by-case determinations.”) (internal quotation marks and brackets omitted).

**b. The Ninth Circuit erred in its identification of the clearly established Federal law at issue.**

The panel purported to identify the clearly established Supreme Court precedent at the heart of the state court determination. Quoting *Brinegar v. United States*, 338 U.S. 160 (1949), *In re Winship*, 397 U.S. 358, 363 (1970), and *Davis v. United States*, 160 U.S. 469, 493 (1895), it recognized that states bear the burden of proof in criminal prosecutions, chiefly to maintain the presumption of innocence. Pet. App. 21. The court further recognized that states may allocate the burden of proving an exculpatory fact to defendants, subject to certain due process constraints. *Id.* (citing *Patterson* and *Jones v. United States*, 526 U.S. 227, 241 (1999)). In reliance on these principles and based upon its interpretation of this Court’s holdings in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), *Patterson*, *Jones*, *Morrison v. California*, 291 U.S. 82, 91 (1934), *Tot v. United States*, 319 U.S. 463 (1943), and *Martin*, the Ninth Circuit finally concluded that “[t]hese cases clearly establish that the state is responsible for proving beyond a reasonable doubt the *critical* facts that establish the crime.” Pet. App. 46.

This Court, however, has never gone so far as to graft the critical nature of the facts at issue into its burden shifting test.

First, the Fourteenth Amendment requires that the State prove, beyond a reasonable doubt, “every fact necessary to constitute the crime.” *In re Winship*, 397 U.S. at 364. States, however, have broad

authority to implement and regulate procedures designed to prevent and deal with crime. *Patterson*, 432 U.S. at 201. And, consistent with due process, the State must “prove beyond a reasonable doubt all of the elements included in the *definition* of the offense of which the defendant is charged.” *Id.* at 210 (emphasis added); see also *Smith v. United States*, 568 U.S. 106, 110 (2013) (“The state is foreclosed from shifting the burden of proof to the defendant only when an affirmative defense *does* negate an element of the crime.”) (internal quotation marks omitted) (emphasis in original); *Martin*, 480 U.S., at 233. These holdings establish that, in general, states may burden defendants with proving an affirmative defense so long as the affirmative defense does not negate an element of the crime.

This Court has recognized, however, that due process can further constrain states even where they are careful not to put on the defendant the burden to prove an affirmative defense that negates an element of the offense. See *Patterson*, 432 U.S. at 210. The Court has emphasized that those limits are difficult to define in general terms. See *Morrison*, 291 U.S. at 91; *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986) (“[W]e have never attempted to define precisely the constitutional limits noted in *Patterson*, *i.e.*, the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases....”) (overruled on other grounds by *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). But, where feasible, this Court has endeavored to specify certain limits. For example, this Court has held that a statute may not declare or presume defendants guilty or rest guilt solely on an indictment or proof of identity. *Patterson*,

432 U.S. at 210. That particular limit is not at issue in this case.

The Court has also offered examples of where a state *may* permissibly shift the burden of proof. See *Morrison*, 291 U.S. at 90. That too does not provide a limit that the Arizona laws at issue could have transgressed.

In sum, the clearly established Federal law applicable here, as described in cases like *Patterson*, *Smith*, and *Martin*, is that a state may not place the burden of proof on a defendant to establish an affirmative defense if the affirmative defense negates an element of the crime. And because this Court has gone no farther, it was inappropriate for the Ninth Circuit to do so in a § 2254 case.

**c. The Arizona Supreme Court did not unreasonably apply this Court's precedent.**

The Arizona Supreme Court's application of the above described principles in *Holle II* is clear. There, the court held that:

The United States Supreme Court has held that federal due process does not bar a state from requiring a defendant to establish a defense by a preponderance of the evidence. *Martin v. Ohio*, 480 U.S. 228, 233, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987); see also *Patterson*, 432 U.S. at 205–06, 97 S.Ct. 2319 (holding that state may require defendant to prove defense of extreme emotional disturbance). “The State is foreclosed from shifting the burden of proof to the defendant only

when an affirmative defense [ ] negate[s] an element of the crime. Where instead it excuse[s] conduct that would otherwise be punishable, but does not controvert any of the elements of the offense itself, the Government has no constitutional duty to overcome the defense beyond a reasonable doubt.” *Smith v. United States*, — U.S. —, 133 S.Ct. 714, 719, 184 L.Ed.2d 570 (2013) (internal quotation marks and citations omitted); *see Casey*, 205 Ariz. at 366 ¶ 30, 71 P.3d at 358 (holding that “the legislature has the constitutional authority to shift the burden of proof” for an affirmative defense to the defendant); *Farley*, 199 Ariz. at 545 ¶ 13, 19 P.3d at 1261 (“although due process requires the State to prove every *element* of the offense beyond a reasonable doubt, it does not require the State to prove the absence of an *affirmative defense*”).

States have broad authority to define the elements of a crime. *See Martin*, 480 U.S. at 233, 107 S.Ct. 1098. Likewise, the legislature has broad authority to codify defenses and to define their elements. *See State v. Gray*, 239 Ariz. 475, 479 ¶¶ 16–19, 372 P.3d 999, 1003 (2016) (holding that the legislature may constitutionally define the elements and prerequisites of entrapment defense under A.R.S. § 13–206). As long as a jury is properly instructed that it may find

guilt only if the state proves each element of the crime beyond a reasonable doubt, it does not offend due process to require the defendant to prove by a preponderance of the evidence that, despite proof of every element of the offense, he is nevertheless blameless because of an affirmative defense. *Martin*, 480 U.S. at 233, 107 S.Ct. 1098. Treating lack of sexual motivation under § 13-1407(E) as an affirmative defense which a defendant must prove does not offend due process.

Pet. App. 130–31. This is a straightforward application of *Patterson*, *Martin*, and *Smith*, and the Ninth Circuit recognized as much. See Pet. App. 30 (“[A]s a matter of form, the Arizona Supreme Court is correct that Arizona’s child molestation scheme does not shift the burden of proof from the state to the defendant.”)

But the Ninth Circuit went further, finding the state court’s determination unreasonable. And while this Court has acknowledged that general legal principles can constitute clearly established Federal law under 2254(d)(1), the principles must be “fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.” *Andrew*, 604 U.S. at 95 (quoting *White*, 572 U.S. at 427 (internal quotation marks omitted)). Or put another way, it must be “so obvious that a clearly established rule applies to a given set of facts that there could be no fairminded disagreement on the question.” *White*, 572 U.S. at 427 (internal quotation marks omitted). Because that circumstance is not present here, the Ninth Circuit

exceeded the scope of review allowable under 2254(d)(1).

Ultimately, the Arizona Supreme Court reasonably applied *Patterson, Martin, and Smith*. The statutes at issue did not offend due process under clearly established Federal law because the affirmative defense did not serve to negate an element of the charged conduct, and there is no other clearly established rule of Federal law that they violated.

Because there was no controlling precedent from this Court on the specific question of whether a state could allocate the burden of proof to a defendant to demonstrate lack of sexual motivation as an affirmative defense to child molestation, the Arizona Supreme Court had broad discretion to adjudicate the claim. *See Woods v. Donald*, 575 U.S. 312, 318 (2015). The court exercised that discretion, and because its decision was not “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement,” *White*, 572 U.S. at 419–20 (quoting *Harrington*, 572 U.S. at 103), it cannot be said to have unreasonably applied this Court’s precedent. The Ninth Circuit accordingly erred in holding that Bieganski met his burden under 2254(d)(1), and its decision should be vacated.

**d. The panel’s decision conflicts with the decisions of other federal circuits.**

Finally, certiorari is warranted here because the panel’s decision is contrary to decisions of the Second, Fourth, Eighth, and Tenth United States Circuit Courts of Appeal. The Ninth Circuit’s decision here stands in contrast to the straightforward application

of *Patterson* and *Martin* in these circuits and illustrates why the panel's decision stretched this Court's precedents beyond what is allowable under 2254(d)(1).

For instance, in *Aparicio v. Artuz*, 269 F.3d 78, 98 (2d Cir. 2001), the Second Circuit reviewed a state prisoner's habeas petition alleging that trial counsel was ineffective for failing to raise a double jeopardy argument. In disposing of that claim, the court applied *Martin* and reasoned that the circuit had never held that an affirmative defense is the "functional equivalent" of an element of the offense.

And in *Smart v. Leeke*, 873 F.2d 1558 (4th Cir. 1989), the Fourth Circuit relied on *Martin* in holding that the South Carolina affirmative defense of self defense did not unconstitutionally shift the burden of proof to defendants even though there was some overlap between the defense and the elements of the crime. Importantly, the court reasoned, "it was constitutionally permissible to place the burden of proving self-defense on the defendant as long as the state bore the ultimate burden of proving all the elements of murder beyond a reasonable doubt." *Id.* at 1565. The Sixth Circuit in *Rhodes v. Brigano*, 91 F.3d 803, 808 (6th Cir. 1996), relied on *Martin* for a similar proposition, relating the lesson from *Martin* that "so long as the state is required to prove each element of a crime beyond a reasonable doubt, requiring the defendant to shoulder the burden of proving certain defenses does not inevitably violate due process, even if proof of an affirmative defense may tend to negate an element of the crime."

Similarly, the Eighth Circuit in *Iromuanya v. Frakes*, 866 F.3d 872 (8th Cir. 2017) reviewed the

progression of this Court's burden shifting cases from *Winship* through *Martin* with the following explanation:

To summarize applicable Supreme Court precedent: due process requires the state to prove, beyond a reasonable doubt, every fact necessary to constitute the crime with which a defendant is charged. *In re Winship*, 397 U.S. at 364, 90 S.Ct. 1068. Due process does not, however, require the state to disprove every possible fact that would mitigate or excuse the defendant's culpability. *Patterson*, 432 U.S. at 207, 97 S.Ct. 2319. Nor does a state legislature violate a defendant's due process rights when it allocates the burden of proving an affirmative defense to the defendant when the defense merely excuses conduct that would otherwise be punishable. *Martin*, 480 U.S. at 237, 107 S.Ct. 1098. But when a "defense" necessarily negates an element of an offense, it is not a true affirmative defense, and the legislature may not allocate to the defendant the burden of proving the defense. *Mullaney*, 421 U.S. at 699-701, 95 S.Ct. 1881.

*Id.* at 880. Then, in applying these concepts, the court held that the Nebraska law at issue did not shift the burden of proof to defendants because it did not require defendants to disprove an element of the offense. *Id.*

The Eighth Circuit applied a similar analysis in *Neely v. McDaniel*, 677 F.3d 346, 353 (8th Cir. 2012), reasoning that *Mullaney* was inapposite to its consideration of the petitioner’s claim that an Arkansas solicitation statute and the applicable affirmative defense of reasonable mistake of age unconstitutionally shifted the burden. There, the court explained that the State retained the burden of proof to demonstrate all elements of the offense, even if Arkansas employed strict liability for the victim’s age. *Id.* Ultimately, in the court’s estimation, there was no constitutional infirmity because a mistake in age mitigated the offense rather than rebutted an element of the crime. *Id.*

And in *Black v. Workman*, 682 F.3d 880, 901 (10th Cir. 2012), the Tenth Circuit recognized that *Patterson* had “significantly limited *Mullaney*,” and that it was a reasonable application of *Patterson* to hold that the State was not required to disprove heat of passion in a first-degree murder prosecution with no presumptive elements. In the same vein the court in *Bland v. Sirmons*, 459 F.3d 999, 1013–14 (10th Cir. 2006) held that “*Patterson* ... limited *Mullaney* to situations where a fact is presumed or implied against a defendant,” and that because the state law defined malice and heat of passion as mutually exclusive concepts the Oklahoma first-degree murder statute at issue did not unconstitutionally shift the burden because the State still had to prove every element of the offense.

**CONCLUSION**

Because the Ninth Circuit failed to accord the appropriate measure of deference to the state court judgment under 28 U.S.C. § 2254(d)(1), this Court should grant the petition for writ of certiorari.

Respectfully submitted December 10, 2025.

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## **APPENDIX**

**APPENDIX**

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**APPENDIX A**

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UNITED STATES COURT OF APPEALS,  
NINTH CIRCUIT.

BRADLEY BIEGANSKI,

*Petitioner-Appellant,*

v.

DAVID SHINN, DIRECTOR, ARIZONA  
DEPARTMENT OF CORRECTIONS,  
REHABILITATION, AND REENTRY;  
KRIS MAYES,

*Respondents-Appellees.*

No. 23-1982

|  
Argued and Submitted February 4, 2025  
Phoenix, Arizona

|  
Filed August 12, 2025

Before: Michael Daly Hawkins, Jay S. Bybee, and Bridget  
S. Bade, Circuit Judges.

**OPINION**

BYBEE, Circuit Judge:

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Arizona defines “molestation of a child” as “any direct or indirect touching” of the private parts of a child. Ariz. Rev. Stat. §§ 13-1401(A)(3)(a), 13-1410(A). The Arizona Supreme Court has held that the offense is complete when the child is knowingly or intentionally touched, because the crime of child molestation does not “mention, imply, or require sexual motivation.” *State v. Holle*, 240 Ariz. 300, 379 P.3d 197, 200 (2016). During the period relevant to this appeal, Arizona provided an affirmative defense if the defendant could show by a preponderance of the evidence that he was “not motivated by a sexual interest.” Ariz. Rev. Stat. § 13-1407(E) (2013). In 2017, a jury found Petitioner Bradley Bieganski guilty of child molestation, despite his defense that he was not sexually motivated when he helped bathe girls placed in the care of Bieganski and his wife through the foster care system.

The question in this habeas case is whether Arizona’s statutory scheme unconstitutionally shifted the burden of disproving an essential element of the crime of child molestation to the defendant, contrary to the Due Process Clause of the Fourteenth Amendment as established in the Supreme Court’s decisions in, *inter alia*, *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); and *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The district court concluded that the scheme did not violate the Due Process Clause. We reverse.

## I. BACKGROUND

Since 1913, a year after it became a state, Arizona has punished child molestation in some form. In Section A, we briefly review the history of Arizona’s child molestation statutes, including the Arizona courts’ interpretation of critical portions of those statutes dealing with proof of the defendant’s sexual motivation. In Section B, we recount the procedural history of Bieganski’s case.

### A. Arizona’s Child Molestation Statutes

As relevant to our purposes, Arizona has had three iterations of its child molestation statute. Each of those statutes incorporated slightly different, but significant, formulations of the definition of the crime and the scienter required for the state to prove child molestation. The 1913 and 1965 versions provide important background for the 1993 version, which is the statute Bieganski was convicted under.<sup>1</sup>

1. The 1913 and 1965 Child Molestation Statutes In 1913, Arizona’s first state penal code provided:

Any person who shall willfully and lewdly commit any lewd or lascivious act ... upon or with the body, or any part or member thereof, of a child under the age of fourteen years,

---

1. In 2018, Arizona made significant changes to its affirmative defense to child molestation and the definition of “sexual contact.” *See* Ariz. Rev. Stat. §§ 13-1401(3), 13-1407(C). The current versions of these statutes are not at issue in this case.

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with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony ....

Ariz. Rev. Stat. § 282 (Samuel L. Pattee, comp. 1913). This provision of the penal code was modeled after a California statute. *See id.* Arizona adopted slightly different versions over the next fifty years. *See May v. Ryan*, 245 F. Supp. 3d 1145, 1153–54 & nn. 3–4 (D. Ariz. 2017) (providing a history of the statutes), *vacated in part and rev'd in part on other grounds* 807 F. App'x 632 (9th Cir. 2020) *and sub nom. May v. Shinn*, 954 F.3d 1194 (9th Cir. 2020); *State v. Holle*, 238 Ariz. 218, 358 P.3d 639, 643–47 (Ariz. Ct. App. 2015) (same), *vacated on other grounds*, 240 Ariz. 300, 379 P.3d 197 (2016).

In 1965, Arizona substantially revised the statute. The new version provided in relevant part:

A person who molests a child under the age of fifteen years by fondling, playing with, or touching the private parts of such child or who causes a child under the age of fifteen years to fondle, play with, or touch the private parts of such person shall be guilty of a felony ....

1965 Ariz. Sess. Laws, ch. 20, § 3, *originally codified at* Ariz. Rev. Stat. § 13-653, *recodified at* Ariz. Rev. Stat. § 13-1410; *see* 1977 Ariz. Sess. Laws, ch. 142, § 66.

Shortly after the legislature enacted the 1965 version of § 13-1410, a defendant challenged it as unconstitutionally vague, arguing that it was “applicable to such people as

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parents and doctors who might touch a child's private parts for other than condemning reasons." *State v. Berry*, 101 Ariz. 310, 419 P.2d 337, 339 (1966) (in banc). The Arizona Supreme Court rejected that argument, concluding that the statute "proscribes certain easily recognized acts which combined with a necessary intent constitute a violation." *Id.* at 340. The court resisted the defendant's argument that "the statute [did] not expressly incorporate an element of scienter" and, thus, "the statute could convict innocent minded people." *Id.* The Arizona Supreme Court read into the act a requirement that the state prove "abnormal sexual motivation," reasoning that "[w]hen the words annoy or molest are used in reference to offenses against children, there is a connotation of abnormal sexual motivation on the part of the offender." *Id.* (internal quotation marks and citations omitted). Therefore, "a doctor or parent [may] touch the private parts of a child without 'molesting' him by doing so" and without violating the child molestation statute. *Id.*

Arizona then made two additional changes to the scienter requirement in § 13-1410. First, in 1978, the legislature changed "molests" to "knowingly molests." 1978 Ariz. Sess. Laws, ch. 201, § 133. Second, in 1983, the legislature made explicit what was implicit in the 1965 law after the Arizona Supreme Court's decision in *Berry*: it was a defense to child molestation if "the defendant was not motivated by a sexual interest." 1983 Ariz. Sess. Laws, ch. 202, § 10, *codified at* Ariz. Rev. Stat. § 13-1407(E).<sup>2</sup>

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2. Section 13-1407(E) remained substantially the same at the time of Bieganski's alleged offense, trial, and conviction. *See* 1983 Ariz. Sess. Laws, ch. 202, § 10; § 13-1407(E) (2013). All citations to § 13-1407(E) will be to the version as it existed at that time.

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Following the adoption of this defense, Arizona courts divided over whether the state must still prove that the defendant had touched the child with some kind of sexual interest. First, in *In re Maricopa County Juvenile Action No. JV-121430*, the Arizona Court of Appeals revisited whether “abnormal sexual motivation” was still an element of child molestation. 172 Ariz. 604, 838 P.2d 1365, 1367–68 (Ariz. Ct. App. 1992). The court held that the statute still required the state to prove the defendant’s sexual motivation, but that “abnormal sexual motivation” was no longer the standard. *Id.* Noting that the legislature had added the defense of a lack of sexual interest in § 13-1407(E), the court reasoned that the element of “abnormal or unnatural” sexual interest was “superseded by the less stringent statutory defense of lack of ‘sexual interest,’” although the court also suggested that there was little substantive difference between the two even if the “former standard was ever meant do anything more than ‘distinguish the criminal conduct from innocent conduct as, for example, the act of the physician in treating the child, or the parent in bathing the “private parts.””” *Id.* at 1368 (quoting *State v. Madsen*, 137 Ariz. 16, 667 P.2d 1342, 1344 (Ariz. Ct. App. 1983)). The court concluded that the “logical correlation” of the defense “is that the intent necessary to commit the crime of molestation is ... that the actor be motivated by a ‘sexual interest.”” *Id.* (quoting § 13-1407(E)); accord *State v. Lujan*, 192 Ariz. 448, 967 P.2d 123, 126 (1998) (en banc) (observing that “knowingly molests” in § 13-14107(E) “not only requires that the defendant touch a child’s private parts but that the defendant be motivated by a sexual interest” (citing *JV-121430*, 838 P.2d at 1367–68)).

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In contrast, just three years after *JV-121430*, the Arizona Court of Appeals considered another constitutional challenge to § 13-1410—whether the statute violated due process by “effectively creat[ing] a presumption regarding the existence of sexual motivation which [the defendant] was required to disprove.” *State v. Sanderson*, 182 Ariz. 534, 898 P.2d 483, 491 (Ariz. Ct. App. 1995) (citing *Mullaney*, 421 U.S. 684, 95 S.Ct. 1881). Without mentioning the Arizona Supreme Court’s decision in *Berry*, the Arizona Court of Appeals held that proof of sexual motivation was *not* an element of child molestation that must be proved by the state. *Id.* at 491. Most confoundingly, the *Sanderson* court cited *JV-121430* in support of the proposition that sexual interest was no longer an element of child molestation, a holding directly contrary to *JV-121430*. *Id.* Instead, the legislature had “created an affirmative defense regarding motive” in § 13-1407(E), which the state was required to prove beyond a reasonable doubt once the defendant raised it. *Id.* The court concluded that Arizona’s scheme did not violate the Due Process Clause because the statute “did not allocate the burden of proof on any element to the defendant ....” *Id.* (citing *Patterson*, 432 U.S. at 205–07, 97 S.Ct. 2319).

### **2. The 1993 Child Molestation Statutes and the 1997 Affirmative Defense Statutes**

In 1993, the Arizona legislature substantially revised § 13-1410. 1993 Ariz. Sess. Laws, ch. 255, § 29. Whereas the prior statute punished “[a] person who knowingly molests a child by fondling, playing with, or touching the private

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parts of such child,” 1978 Ariz. Sess. Laws, ch. 201, § 133, the 1993 statute divided the offense between two sections. In § 13-1410(A), the legislature defined “molestation of a child” as “intentionally or knowingly engaging in or causing a person to engage in sexual contact ... with a child under fifteen years of age.” 1993 Ariz. Sess. Laws, ch. 255, § 29. In § 13-1401, the legislature defined the term “sexual contact” in § 13-1410(A) as “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.” 1993 Ariz. Sess. Laws, ch. 255, § 23, *codified at* Ariz. Rev. Stat. § 13-1401(A)(3). The legislature retained the “defense to a prosecution pursuant to ... § 13-1410 that the defendant was not motivated by a sexual interest.” Ariz. Rev. Stat. § 13-1407(E).

In a criminal omnibus bill in 1997, the Arizona legislature substantially revised its framework for affirmative defenses. The legislature amended Arizona Revised Statute § 13-103 to abolish common law affirmative defenses and added § 13-205, which requires a defendant to prove an affirmative defense by a preponderance of the evidence. 1997 Ariz. Sess. Laws, ch. 136, §§ 3, 4. Before that time, Arizona common law provided that the burden of proof regarding an affirmative defense shifted back to the prosecution after the defendant “presented ‘any evidence’ of” the defense. *State v. Farley*, 199 Ariz. 542, 19 P.3d 1258, 1260 (Ariz. Ct. App. 2001) (quoting *State v. Duarte*, 165 Ariz. 230, 798 P.2d 368, 369 (1990) (in banc)). The legislature defined “affirmative defense” as “a defense that is offered and that attempts to justify the criminal

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actions of the accused .... Affirmative defense does not include any defense that either denies an element of the offense charged or denies responsibility, including alibi, misidentification or lack of intent.” 1997 Ariz. Sess. Laws, ch. 136, § 3; *codified at* Ariz. Rev. Stat. § 13-103(B).

In 2007, the Arizona Court of Appeals, for the first time, considered the 1993 version of § 13-1410 against the statutory affirmative defense framework and decided that “sexual interest” was no longer an element of child molestation. *State v. Simpson*, 217 Ariz. 326, 173 P.3d 1027, 1029–31 (Ariz. Ct. App. 2007). First, the court looked to its prior decision in *Sanderson*, which addressed the earlier version of the statute, to conclude that “sexual interest” was not an element of child molestation. *Id.* at 1030. Rather, the court held, lack of sexual interest under § 13-1407(E) was an affirmative defense that the defendant had to prove by a preponderance of the evidence. *Id.* (citing *Farley*, 19 P.3d at 1260). Second, the court reasoned that because the statute had been updated in 1993 to remove the phrase “knowingly molests,” prior decisions from the Arizona Supreme Court (*Lujan*) and the Court of Appeals (*JV-121430*) did not “compel[] th[e] court to interpret ... § 13-1410, as amended, to require proof of ‘sexual interest’ as an element of the offense.” *Id.* at 1030–31.

A different division of the Arizona Court of Appeals expressly disagreed with the *Simpson* court’s interpretation of § 13-1410 in *State v. Holle (Holle I)*, 238 Ariz. 218, 358 P.3d 639 (Ariz. Ct. App. 2015), *vacated* 240 Ariz. 300, 379 P.3d 197 (2016). Although *Holle I* acknowledged that the legislature made a lack of sexual interest a defense to child molestation when it added § 13-

1407(E), the court explained that, in its view, the 1993 amendment did not “significantly alter the elements of molestation” because it did not “do[] so in the text of the molestation statute itself.” *Id.* at 646 (citation omitted). Thus, “sexual interest remained an implicit element of” child molestation that the state was required to prove beyond a reasonable doubt if the defendant raised lack of sexual interest as a defense. *Id.* “To conclude otherwise would force defendants to negate a fact[] of the crime which the State is to prove in order to convict,” violating the defendant’s right to due process. *Id.* at 647 (alteration in original) (internal quotation marks and citations omitted; citing, *inter alia*, *Patterson*, 432 U.S. at 210, 97 S.Ct. 2319). In other words, *Holle I* read the legislature’s post-*Sanderson* abolition of common-law affirmative defenses and shifting of the burden of proof as support for its interpretation that sexual interest was an element of the child molestation offense. *Id.* The court concluded that it was thus “legal error to place the burden of proof on [the defendant] to prove his conduct was not motivated by a sexual interest.” *Id.* (citations omitted); *see also State v. Mendoza*, 234 Ariz. 259, 321 P.3d 424, 428 n.2 (Ariz. Ct. App. 2014) (questioning “whether shifting the burden of proof to a defendant on a defining feature of child molestation—sexual motivation for the touching of a child—would violate federal due process rights” (citing *Winship*, 397 U.S. at 361, 364, 90 S.Ct. 1068)).

The Arizona Supreme Court resolved the conflict between *Holle I* and *Simpson* in *State v. Holle (Holle II)*, 240 Ariz. 300, 379 P.3d 197 (2016). In a 3-2 decision, the Arizona Supreme Court vacated *Holle I* and held that the “plain text” of § 13-1410 and § 13-1401 broadly defined sexual contact as “*any* direct or indirect touching, fondling

or manipulating of another’s private parts,” but “d[id] not implicate the defendant’s motivation.” *Id.* at 200 (emphasis in original; internal quotation marks and citation omitted). “The statutes defining the crimes d[id] not mention, imply, or require sexual motivation.” *Id.* Further, “the statutory scheme ... unequivocally identifie[d] lack of sexual motivation as an affirmative defense.” *Id.* at 201 (citing § 13-1407(E)). And because lack of sexual interest was an affirmative defense, “the Legislature may allocate to defendant the burden of proving it.” *Id.* at 202 (internal quotation marks and citation omitted). Allocating this burden to the defendant did not violate due process, the court reasoned, because the state was still required to prove every element of child molestation. *Id.* at 205. A lack of sexual motivation only “excuse[d] conduct that would otherwise be punishable” and “d[id] not controvert any of the elements of the offense itself.” *Id.* (quoting *Smith v. United States*, 568 U.S. 106, 110, 133 S.Ct. 714, 184 L.Ed.2d 570 (2013)).

Two justices dissented from the majority’s analysis, although they concurred in the judgment. The dissenting justices pointed out that parents who change an infant’s diaper “will likely find little solace from the majority’s conclusion that although they are child molesters ... under Arizona law, they are afforded an ‘affirmative defense’ if they can prove by a preponderance of the evidence that their touching ‘was not motivated by a sexual interest.’” *Id.* at 208 (Bales, C.J., dissenting in part and concurring in the result) (quoting Ariz. Rev. Stat. § 13-1407(E)). For the dissenters, the child molestation statute was unconstitutionally vague because “people do not have fair notice of what is actually prohibited[.]” *Id.* (citing *United*

*States v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008)). “The vagueness problem is not solved by the majority’s characterizing ... § 13-1407(E) as an affirmative defense. Doing so means that the state has shifted to the accused the burden of proving the absence of the very fact—sexual motivation—that distinguishes criminal from innocent conduct.” *Id.* at 209 (citing *Patterson*, 432 U.S. at 209–10, 97 S.Ct. 2319).

In response to the dissent, the majority found it “unpersuasive,” but not incorrect, that the child molestation statute applied to “parents and other caregivers ... whenever they change an infant’s diaper and bathe or otherwise clean a child’s genitals” and to “[p]ediatricians and other medical providers ... when properly and professionally examining a child patient’s private parts.” *Id.* at 205–06 (majority opinion); *see also id.* at 208 (Bales, C.J., dissenting in part and concurring in the result). The court reasoned that the state simply would not “improperly prosecute persons who ... technically violat[e]” the child molestation statute while “clearly engaged in reasonable, acceptable, and commonly permitted activities involving children.” *Id.* at 206 (majority opinion).

*Holle II* was the Arizona Supreme Court’s final word on §§ 13-1410 and 13-1407(E).<sup>3</sup>

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3. There is one other development we should note. In 2017, the Arizona federal district court granted habeas relief under AEDPA to a defendant convicted in 2007 under § 13-1410. *May*, 245 F. Supp. 3d at 1172. In a lengthy opinion, Senior District Judge Neil Wake concluded that Arizona had shifted the burden of proof to the defendant, in violation of *Patterson*, *Mullaney*, and *Winship*. *May*, 245 F. Supp. 3d at 1157–58. The district court found that “Arizona is the only jurisdiction ever to uphold the constitutionality of putting

## B. Bieganski's Conviction

As the Arizona Court of Appeals found,

From 2011 until his arrest in 2013, [Bradley] Bieganski operated a girls-only private Christian home-school called Kingdom Flight along with his wife and son. The arrest occurred after three girls attending Kingdom Flight ... accused Bieganski of touching their genitals when the victims were between the ages of 6 and 9. The genital contact primarily occurred during a Sunday morning bathing practice that Bieganski referred to as an “assembly line” in which he would hurriedly bathe six to eight Kingdom Flight girls in pairs within 30 minutes before departing for a church service.

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the burden of disproving sexual intent on the accused.” *Id.* at 1149. In the district court’s analysis, Arizona had created “[a] regime in which everyone starts out guilty and law enforcement decides who has to prove himself innocent[.]” *Id.* at 1163–64; *see id.* at 1161 (“There is a grievous threat to due process of law from making defendants disprove their own state of mind for conduct that is not wrongful in any sensible way without a bad mental state.”).

We reversed the district court’s judgment on other grounds, not relevant in this case. *May*, 807 F. App’x at 634; *May*, 954 F.3d at 1208. Because we “d[id] not reach the constitutionality of the Arizona child molestation statute,” we “vacate[d] the district court’s judgment in that respect.” *May*, 807 F. App’x at 635. In an opinion filed simultaneously with that unpublished disposition, Judge Frederic Block noted that “Arizona is the only state that places the burden of proving lack of intent on the defendant, and ... it may well be that if the issue ever reached the Supreme Court, it would agree with Judge Wake that it is unconstitutional.” *May*, 954 F.3d at 1218 n.11 (Block, J., dissenting).

*State v. Bieganski*, No. 1 CA-CR 18-0093, 2019 WL 4159822, at \*1 (Ariz. Ct. App. Sept. 3, 2019). Bieganski's first trial, in 2016, ended in a mistrial. *See id.* at \*1 n.3. Bieganski contends, and the state does not disagree, that at his first trial, the state had assumed the burden of showing that he had sexual intent. Between the first and second trials, the Arizona Supreme Court decided *Holle II*, upholding the constitutionality of the child molestation statute and holding that the state had no obligation to prove that the defendant was sexually motivated. *See Holle II*, 379 P.3d at 200–04. Bieganski nevertheless moved to dismiss the charges against him, “alleg[ing] that the statute under which he [was] charged unconstitutionally shift[ed] the burden of proof to him.” At a hearing on the motion to dismiss, the state trial court recognized that this was “a significant issue” and suggested that “the State might just be happy to not risk a reversal by putting the standard instruction in there that they have the burden, and like we’ve done for years.” But because it was bound by *Holle II*, the trial court denied the motion to dismiss.

During his second trial, in 2017, Bieganski took the stand to raise the affirmative defense under § 13-1407(E). As the Arizona Court of Appeals noted, “Bieganski admitted at trial that he washed the girls’ genitals with his bare hand during the Sunday baths,” but “asserted [that] he was not motivated by a sexual interest.” *Bieganski*, 2019 WL 4159822, at \*1. The trial court delivered the following instruction to the jury:

The defendant has raised the affirmative defense of lack of sexual interest with respect to the charged offense of child molestation. The burden of proving each element of an offense

beyond a reasonable doubt also remains with the State. However, the burden of proving the affirmative defense of lack of sexual interest is on the defendant. The defendant must prove the affirmative defense of lack of sexual interest by a preponderance of the evidence. If you find that the defendant has proven the affirmative defense of lack of sexual interest by a preponderance of the evidence, you must find the defendant not guilty of the offenses of child molestation.

The jury returned not-guilty verdicts on three child-molestation charges involving one of the girls but found Bieganski guilty of the three remaining charges of child molestation involving the other two girls. *See id.* at \*2. The court imposed a 34-year prison sentence. *See id.*

Bieganski appealed his conviction, arguing in part that the Arizona child molestation statute violated his right to due process by shifting the burden to him to disprove “the implicit ‘sexual motivation’ element of the offense[.]” The Arizona Court of Appeals found that “no error occurred” because the Arizona Supreme Court had already rejected the same argument in *Holle II*. *Id.* Bieganski unsuccessfully petitioned the Arizona Supreme Court for review, and the U.S. Supreme Court denied his petition for a writ of certiorari, *Bieganski v. Arizona*, \_\_\_ U.S. \_\_\_, 141 S. Ct. 377, 208 L.Ed.2d 98 (2020).

In September 2021, Bieganski sought post-conviction relief under 28 U.S.C. § 2254 in federal district court. In his habeas petition, he continued to challenge the constitutionality of Arizona’s child-molestation statutes.

He argued that Arizona’s child molestation statute shifted the burden to the defendant to prove a lack of sexual interest, and such a shift was contrary to or involved an unreasonable application of federal law as established in *Mullaney* and *Patterson*. The district court denied relief. It held that the Arizona Supreme Court had “identified the correct legal standard established by the United States Supreme Court.” The court found that the Arizona courts’ decision “that the crime of child molestation does not inherently require proof of sexual motivation, and thus a state legislature may, consistent with due process, denominate the absence of sexual motivation as an affirmative defense for which the defendant bears the burden of proof” was not “objectively unreasonable” under that standard. Accordingly, the court denied Bieganski’s habeas petition but granted him a certificate of appealability on this issue.

## II. STANDARD AND SCOPE OF REVIEW UNDER AEDPA

“We review a district court’s denial of a 28 U.S.C. § 2254 petition de novo.” *Catlin v. Broomfield*, 124 F.4th 702, 721 (9th Cir. 2024) (internal quotation marks and citation omitted).

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, our review of Bieganski’s claims is highly deferential to the state court’s decision. *Fauber v. Davis*, 43 F.4th 987, 996 (9th Cir. 2022). “We review the last reasoned state court opinion,” *Musladin v. Lamarque*, 555 F.3d 830, 834–35 (9th Cir. 2009) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S.Ct. 2590,

115 L.Ed.2d 706 (1991)), which here is the decision of the Arizona Court of Appeals in *State v. Bieganski* in 2019.

Because the Arizona Court of Appeals decided this case on the merits, Bieganski must show that the decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]” 28 U.S.C. § 2254(d)(1); see *Harrington v. Richter*, 562 U.S. 86, 99, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). “This is a challenging standard to meet.” *Bolin v. Davis*, 13 F.4th 797, 805 (9th Cir. 2021).

The phrase “clearly established Federal law” in 28 U.S.C. § 2254(d)(1) “refers to the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions as of the time of the relevant state-court decision.” *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). “When [the Supreme] Court relies on a legal rule or principle to decide a case, that principle is a ‘holding’ of the Court for purposes of AEDPA.” *Andrew v. White*, 604 U.S. 86, 145 S. Ct. 75, 81, 220 L.Ed.2d 340 (2025) (per curiam). “In other words, ‘clearly established Federal law’ under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.” *Lockyer*, 538 U.S. at 71–72, 123 S.Ct. 1166 (citations omitted).

“Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law” or alternatively, “if the state court decides

a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.” *Williams*, 529 U.S. at 412–13, 120 S.Ct. 1495. “Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413, 120 S.Ct. 1495.

To satisfy the “unreasonable application” clause, a petitioner “must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Richter*, 562 U.S. at 103, 131 S.Ct. 770. “[T]he writ is not to be used as ‘a second criminal trial’ in which federal courts ‘run roughshod over the considered findings and judgments of the state courts that conducted the original trial and heard the initial appeals.’” *Lambert v. Blodgett*, 393 F.3d 943, 987 (9th Cir. 2004) (quoting *Williams*, 529 U.S. at 383, 120 S.Ct. 1495 (opinion of Stevens, J.)). Instead, we “must begin with the ‘presumption that state courts know and follow the law.’” *Dunn v. Reeves*, 594 U.S. 731, 739, 141 S.Ct. 2405, 210 L.Ed.2d 812 (2021) (citation omitted). We give state court decisions “the benefit of the doubt.” *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam). A writ is thus “a ‘guard against extreme malfunctions in the state criminal justice systems,’ not a substitute for ordinary error correction through appeal.” *Richter*, 562 U.S. at 102–03, 131 S.Ct. 770 (citation omitted). In sum, it is not enough for the state court’s decision to be “incorrect or erroneous,” it

“must be objectively unreasonable.” *Lockyer*, 538 U.S. at 75, 123 S.Ct. 1166 (internal quotation marks and citations omitted).

### III. DISCUSSION

The sole issue on appeal is whether Arizona’s former child molestation scheme—in which *any* knowing or intentional touching of a child was considered child molestation unless the defendant proved by a preponderance of the evidence that he lacked any sexual motivation—shifts the burden of proving an essential element of the offense of child molestation to the defendant in violation of the Due Process Clause of the Fourteenth Amendment. As we discussed above, for purposes of issuing a writ of habeas corpus under AEDPA, it is not sufficient that we conclude that Arizona has done so. We must also determine that any other conclusion would be contrary to, or involve an unreasonable application of, legal principles clearly set forth in the decisions of the U.S. Supreme Court.

#### A. The Due Process Clause and Burden Shifting

Let’s start with some first principles. The U.S. Constitution grants limited authority to Congress to punish crime. *See* U.S. Const. art. I, § 8, cls. 6, 10; art. III, § 3, cl. 2. Although Congress has broadly claimed the power to punish crimes related to its enumerated powers through the Necessary and Proper Clause, *id.* art. I, § 8, cl. 18, at the time of the founding, the states had a well-established body of criminal laws. From the beginning, general criminal law was the province of the states. *See Patterson*, 432 U.S. at 201, 97 S.Ct. 2319 (“[P]reventing

and dealing with crime is much more the business of the States than it is of the Federal Government ....” (citing *Irvine v. California*, 347 U.S. 128, 134, 74 S.Ct. 381, 98 L.Ed. 561 (1954) (plurality opinion)); *see also United States v. Salerno*, 481 U.S. 739, 759 n.4, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (Marshall, J., dissenting) (“The Constitution does not contain an explicit delegation to the Federal Government of the power to define and administer the general criminal law.”).

One consequence of this constitutional allocation of authority is that the states have broad discretion in the defining and punishing of crime. “[T]he States must be permitted a degree of flexibility in defining [crime].” *Schad v. Arizona*, 501 U.S. 624, 638, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (plurality opinion), *abrogated on other grounds by Ramos v. Louisiana*, 590 U.S. 83, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020). States may decide to adopt the common law, borrow from other states, codify recommendations found in the American Law Institute’s Model Penal Code, or address their own perceived problems with innovative criminal provisions. The Constitution does not demand uniformity among the states.

That is not to say that the Constitution does not constrain state criminal law. “[T]here are obviously constitutional limits beyond which the States may not go ....” *Patterson*, 432 U.S. at 210, 97 S.Ct. 2319. But the constraints are few. The two principal constraints on state criminal laws are the Equal Protection and Due Process Clauses of the Fourteenth Amendment, which secure equality and fairness to “any person” subject to the state’s jurisdiction. U.S. Const. amend. XIV, § 1. Only the Due Process Clause is at issue here. That Clause provides

that “no State shall ... deprive any person of life, liberty, or property, without due process of law.” *Id.* The phrase “due process of law” is a capacious phrase including “the best ideas of all systems and of every age ... to draw its inspiration from every fountain of justice.” *Hurtado v. California*, 110 U.S. 516, 531, 4 S.Ct. 292, 28 L.Ed. 232 (1884).

The principle of due process at issue here is that “[g]uilt in a criminal case must be proved beyond a reasonable doubt,” *Brinegar v. United States*, 338 U.S. 160, 174, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949), as to “every fact necessary to constitute the crime charged,” *Davis v. United States*, 160 U.S. 469, 493, 16 S.Ct. 353, 40 L.Ed. 499 (1895). That standard preserves “the presumption of innocence.” *Winship*, 397 U.S. at 363, 90 S.Ct. 1068. The states, as we have noted, have broad leeway in determining what facts are “necessary to constitute the crime charged.” *Id.* The Court has warned that “we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States,” as it is their business “to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion.” *Patterson*, 432 U.S. at 201, 97 S.Ct. 2319 (quoting *Speiser v. Randall*, 357 U.S. 513, 523, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)).

Nevertheless, the Court has also been clear that even if “the Due Process Clause d[oes] not invalidate every instance of burdening the defendant with proving an exculpatory fact,” *Patterson*, 432 U.S. at 203 n.9, 97 S.Ct. 2319, there is “some limit upon state authority to reallocate the traditional burden of proof,” *Jones v. United States*, 526 U.S. 227, 241, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)

(citations omitted). The Court explained the theoretical limits of burden-shifting in *Morrison v. California*:

The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant.... [But] '[i]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' ... For a transfer of burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance.

291 U.S. 82, 88, 90, 54 S.Ct. 281, 78 L.Ed. 664 (1934) (quoting *McFarland v. Am. Sugar Co.*, 241 U.S. 79, 86, 36 S.Ct. 498, 60 L.Ed. 899 (1916)). A state is not required to prove "the nonexistence of all affirmative defenses[.]" *Patterson*, 432 U.S. at 210, 97 S.Ct. 2319. Rather, "[t]he State is foreclosed from shifting the burden of proof to the defendant only 'when an affirmative defense *does* negate an element of the crime.'" *Smith*, 568 U.S. at 110, 133 S.Ct. 714 (quoting *Martin v. Ohio*, 480 U.S. 228, 237, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987) (Powell, J., dissenting)). A state cannot exercise "unlimited choice over characterizing a stated fact as an element," because that "would leave the State substantially free to manipulate its way out of *Winship*." *Jones*, 526 U.S. at 240–41, 119 S.Ct. 1215. The Court expounded on the importance of these principles in *Winship*:

It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in

our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

397 U.S. at 364, 90 S.Ct. 1068.

These are necessarily general prescriptions. In *Morrison*, the Court acknowledged that “[t]he decisive considerations are too variable, too much distinctions of degree, too dependent in last analysis upon a common sense estimate of fairness ... to be crowded into a formula.” 291 U.S. at 91, 54 S.Ct. 281. Nevertheless, just this year the Court reminded us that “[g]eneral legal principles can constitute clearly established federal law for purposes of AEDPA” even if those principles lack “precise contours.” *Andrew*, 145 S. Ct. at 82 (quoting *Lockyer*, 538 U.S. at 72, 123 S.Ct. 1166). We must therefore determine whether the Arizona Supreme Court unreasonably applied these general principles.

## **B. *Holle II* and Child Molestation in Arizona**

### **1. The scope of § 13-1410**

As we have discussed, three separate statutes are at play here—§§ 13-1410(A), 13-1401(A)(3), and 13-407(E). For our purposes, it is useful to combine these sections into a single statement:

A person commits molestation of a child by intentionally or knowingly engaging in or

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causing a person to engage in [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] ... with a child who is under the fifteen years of age. [Except] [i]t is a defense to a prosecution [for child molestation] that the defendant was not motivated by a sexual interest.

Ariz. Rev. Stat. §§ 13-1401(A)(3), 13-1407(E); 13-1410(A).

As we understand these statutes, the *mens rea* demands that a person “intentionally or knowingly” engage in contact with the child. § 13-1410(A). The *actus reus* is the “touching, fondling, or manipulating” of a child’s genitals or anus. § 13-1401(A)(3). The term “fondling” carries a strong connotation of contact with a sexual purpose. Fondle means “[t]o touch or caress (a person or part of the body) intimately or sexually, esp. in an unwelcome or inappropriate way.” *Fondle*, OED.com, [https://www.oed.com/dictionary/fondle\\_v?tab=meaning\\_and\\_use#3955796](https://www.oed.com/dictionary/fondle_v?tab=meaning_and_use#3955796) (last visited Aug. 5, 2025). The terms “manipulating” and “touching” may, but do not necessarily, denote contact with a sexual purpose. Manipulate can mean “[t]o stimulate sexually with the hand,” as well as to “palpate or move (parts of the body) with the hands as a form of therapy” or simply to “handle.” *Manipulate*, OED.com, [https://www.oed.com/dictionary/manipulate\\_v?tab=meaning\\_and\\_use#38434604](https://www.oed.com/dictionary/manipulate_v?tab=meaning_and_use#38434604) (last visited Aug. 5, 2025). And while “touch” may have “euphemistic use with reference to sexual acts,” its definition is more neutral: “To place the hand, finger, or (less commonly) another part of the body in contact with (a person or thing); to make deliberate physical contact with (something) using the hand ...”

*Touch*, OED.com, [https://www.oed.com/dictionary/touch\\_v?tab=meaning\\_and\\_use#18086877](https://www.oed.com/dictionary/touch_v?tab=meaning_and_use#18086877) (last visited Aug. 5, 2025). At oral argument, the state conceded—appropriately—that in this statute “touching” does all the heavy lifting; “fondling” and “manipulating” are subsumed within the broader term “touching.”

Our reading is consistent with the Arizona Supreme Court’s interpretation of the statutes as they existed at the time of Bieganski’s offense and conviction, by which both we and the state are bound. *Mullaney*, 421 U.S. at 691, 95 S.Ct. 1881; *Winters v. New York*, 333 U.S. 507, 514, 68 S.Ct. 665, 92 L.Ed. 840 (1948) (“The interpretation by the [state court] puts these words in the statute as definitely as if it had been so amended by the legislature.” (citations omitted)). The Arizona Supreme Court has acknowledged that “the phrase ‘touching, fondling or manipulating’ in § 13-1401(A)(3) is modified by the word ‘any’ and includes the word ‘touching,’ which is quite broad and comes before the more specific word ‘fondling.’” *Holle II*, 379 P.3d at 201. The Arizona Supreme Court concluded that “the statutory scheme clearly and unambiguously identifies the elements of child molestation ... [and] does not include sexual motivation as an element the state must prove.” *Id.*; *see id.* at 200 (“The statute[] defining the crime[ of child molestation] do[es] not mention, imply, or require sexual motivation. And although the definition of ‘sexual contact’ is broad as it includes ‘any direct or indirect touching, fondling on manipulating’ of another’s private parts, it does not implicate the defendant’s motivation.”). There are important implications that follow from the Arizona Supreme Court’s reading of § 13-1410 in *Holle II*. As the two dissenting justices stated, the child molestation statute applied to “parents and other caregivers ...

whenever they change an infant's diaper and bathe or otherwise clean a child's genitals. Pediatricians and other medical providers would likewise violate those laws when properly and professionally examining a child patient's private parts." *Id.* at 205–06; *see also id.* at 208 (Bales, C.J., dissenting in part and concurring in the result). The true breadth of the statute, however, becomes even more apparent once "the statute [is] viewed in its relation to other relevant [Arizona] law." *Leland v. Oregon*, 343 U.S. 790, 793, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952). Like many other states, Arizona punishes any person charged with caring for a child who neglects the child. If the neglect endangers the life or health of the child, the neglect may be punished as a misdemeanor, Ariz. Rev. Stat. § 13-3619; if the neglect results in serious physical injury, the person may be charged with a felony, *id.* § 13-3623(A), (F)(1)(b). Accordingly, any parent or caretaker who fails to change a child's diapers may be charged with criminal neglect. *See Samantha J. v. Dep't of Child Safety*, No. 1 CA-JV 19-0235, 2019 WL 6320330, at \*1 (Ariz. Ct. App. Nov. 26, 2019) (explaining that mother was charged with child abuse, in part because children "had severe diaper rash" that medical staff described as a "chemical burn" that was diagnosed as cellulitis); *cf. Shawn I. v. Dep't of Child Safety*, No. 1 CA-JV 16-0206, 2016 WL 6956618, at \*1 (Ariz. Ct. App. Nov. 29, 2016) (noting alleged physical abuse of children because of severe diaper rash). But changing the diaper makes one guilty of child molestation. Arizona can thus punish both the changing and the non-changing of a diaper. No matter what choices parents or caretakers make, they have violated Arizona law.

Furthermore, Arizona makes parents, caretakers, medical personnel and others mandatory reporters if they

“reasonably believe[] that a minor is or has been the victim of physical injury, abuse, child abuse, a reportable offense or neglect.” Ariz. Rev. Stat. § 13-3620. Section 13-1410 is among the “reportable offense[s].” *Id.* § 13-3620(P)(4) (a) & n.1. Given the mandatory reporting requirement, a parent who observes a spouse changing a diaper has an obligation to report the violation, under penalty of law. *Id.* § 13-3620(O). Nurses working in the neonatal intensive care unit are mandatory reporters, as are co-workers in a daycare facility. Parents who leave their children briefly with a responsible fourteen-year-old babysitter from down the street are similarly liable to report the babysitter’s act of child molestation when she changed the baby’s diaper while the parents were out. Likewise, the parents and medical personnel would have to report the circumcision of a male child, whether the parents had the procedure done at the hospital or at a bris presided over by their rabbi. The coverage of what the Arizona Supreme Court described as the “plain text” of § 13-1410, that “clearly and unambiguously identifies the elements of child molestation,” and whose “language is clear and unequivocal,” is breathtaking. *Holle II*, 379 P.3d at 200–02 (internal quotation marks and citation omitted)

## **2. The scope of the affirmative defense in § 13-1407(E)**

In *Holle II* the Arizona Supreme Court discussed at length the scope of the statutory affirmative defense to child molestation found in § 13-1407(E). Again, that statute provides that “[i]t is a defense to a prosecution pursuant to ... § 13-1410 that the defendant was not motivated by a sexual interest ...” The court distinguished between a justification defense and an affirmative defense. Under

Arizona law, a justification defense “describe[s] conduct that, if not justified, would constitute an offense, but, if justified, does not constitute criminal or wrongful conduct.” *Holle II*, 379 P.3d at 201 (quoting Ariz. Rev. Stat. § 13-205(A)). When a defendant raises “some evidence” of a justification defense, such as self-defense, the state must then prove beyond a reasonable doubt that the defendant’s conduct was not justified. *Id.* By contrast, an affirmative defense “attempts to excuse the criminal actions of the accused,” even if the state can prove the conduct constituting the crime beyond a reasonable doubt. Ariz. Rev. Stat. § 13-103(B).

As the Arizona Supreme Court explained, justification defenses and affirmative defenses are “mutually exclusive.” *Holle II*, 379 P.3d at 201. If a defendant successfully interposes a justification defense, the jury must not only acquit him, but by law he has not committed “criminal or wrongful conduct.” Ariz. Rev. Stat. § 13-205(A). When a defendant raises an affirmative defense, however, the defendant effectively concedes that he has committed the crime but seeks to “excuse” his actions. Ariz. Rev. Stat. § 13-103(B). An affirmative defense “does not include ... any defense that either denies an element of the offense charged or denies responsibility, including alibi, misidentification or lack of intent.” *Id.* In the context of child molestation, proof of alibi, misidentification, and lack of intent would mean that defendant did not commit the crime because he was either not present or he did not “intentionally or knowingly” “touch[]” the child’s private parts. *Id.* §§ 13-1401(A)(3), 13-1410(A). Both the defendant who successfully raises a defense of alibi, misidentification, or lack of intent and the defendant who successfully raises the affirmative defense of lack of sexual intent must be

found, as a matter of law, “not guilty,” but the verdict fails to capture the difference between one who is factually innocent of the crime and one who is guilty, but excused.

The Arizona Supreme Court rejected the argument that § 13-1410 and § 13-1407(E) shifted the burden of proof of an essential element of child molestation to the defendant because the court distinguished between the *mens rea* defined in § 13-1410 (the offense) and the “motive” defined in § 13-1407(E) (the affirmative defense).

We cannot reasonably interpret the language in § 13-1407(E) as negating an element of child molestation ..., particularly when the statute[] defining the crime[] do[es] not require the state to prove the defendant’s motive; instead ... 13-1410(A) require[s] the state to prove that the defendant “intentionally” or “knowingly” engaged in “sexual contact” with certain aged children.

*Holle II*, 379 P.3d at 200–01 (citation omitted); *see also id.* at 204 (distinguishing “sexual motivation” from the “mental states (‘intentionally or knowingly’) that are statutorily defined and expressly required”). Having drawn that distinction, the court then concluded that § 1407(E) was “clearly not” an “element-negating” justification defense, but rather an affirmative defense because the lack of sexual interest “excuses otherwise criminal conduct.” *Id.* at 202.

Finally, the court concluded that the child molestation statute did not violate the Due Process Clause because

it did not shift the burden of proof from the state to the defendant. *See id.* at 205. Quoting the U.S. Supreme Court, the Arizona Supreme Court stated the rule:

The State is foreclosed from shifting the burden of proof to the defendant only when an affirmative defense [] negate[s] an element of the crime. Where instead it excuses conduct that would otherwise be punishable, but does not controvert any of the elements of the offense itself, the Government has no constitutional duty to overcome the defense beyond a reasonable doubt.

*Id.* (alterations in original) (quoting *Smith*, 568 U.S. at 110, 133 S.Ct. 714). Finally, the court relied on the principle that state legislatures have broad authority to define the elements of a crime, *id.* (citing *Martin*, 480 U.S. at 233, 107 S.Ct. 1098), and similar authority to recognize affirmative defenses and define their elements, *id.* (citation omitted).

### **C. Section 13-1410 as Unconstitutional Burden-Shifting**

Keeping in mind that “*Winship* is concerned with substance rather than ... formalism,” we will begin with a candid observation: as a matter of form, the Arizona Supreme Court is correct that Arizona’s child molestation scheme does not shift the burden of proof from the state to the defendant. Therefore, solely as a matter of form, we can find no fault in the court’s decision—much less that the decision “was contrary to, or involved an unreasonable application of, clearly established Federal

law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2255(d)(1). On first examination, *Holle II* falls within the Supreme Court’s core pronouncements in *Winship*, *Mullaney*, and *Patterson*, and within the Court’s more recent applications of the burden-shifting analysis in *Smith*, *Martin*, and *Dixon v. United States*, 548 U.S. 1, 126 S.Ct. 2437, 165 L.Ed.2d 299 (2006): the state must prove its case (that the defendant intentionally touched the child) and the defendant must prove his affirmative defense (that he lacked any sexual motivation when he touched the child). If *Winship* and its progeny were only concerned with the form, we would affirm the judgment of the district court.

But form is not the only thing at play here. If it were, a statute that criminalized all sexual intercourse as rape, except that the defendant may assert an affirmative defense of consent, would satisfy the form. Another example is a hypothetical—the “‘Felonious Hospital Nursing’ offense”—in which “a hospital nurse is guilty of a crime if patient dies while under the nurse’s watch. As an affirmative defense, the nurse could prove that no act or omission by the nurse caused the death.” *May*, 245 F. Supp. 3d at 1158 n.5; *see id.* (noting that, in response to the hypothetical, Arizona argued that such a law was constitutional). Or consider the example that a state might “define[] murder as mere physical contact between the defendant and the victim leading to the victim’s death, but then set up an affirmative defense leaving it to the defendant to prove that he acted without culpable *mens rea*.” *Patterson*, 432 U.S. at 225 n.8, 97 S.Ct. 2319 (Powell, J., dissenting). In such a case, the state “could be relieved altogether of responsibility for proving *anything* regarding the defendant’s state of mind, provided only

that the fact of the statute meets the Court’s drafting formulas.” *Id.* (emphasis added); see *Mullaney*, 421 U.S. at 699 n.24, 95 S.Ct. 1881 (similar). These hypotheticals follow form, but they should trouble us and invite further inquiry.

Indeed, the U.S. Supreme Court has said that form is not the end of the inquiry. Courts should review for substance and not just for form. In *Mullaney*, referring to burden shifting, the Court observed that “if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes ...” 421 U.S. at 698, 95 S.Ct. 1881. Accordingly, *Winship* “requires an analysis that looks to the ‘operation and effect of the law as applied and enforced by the state.’” *Id.* at 699, 95 S.Ct. 1881 (emphasis omitted) (footnote omitted) (quoting *St. Louis Sw. Ry. Co. v. Arkansas*, 235 U.S. 350, 362, 35 S.Ct. 99, 59 L.Ed. 265 (1914)).

We have profound concerns with the substance of the Arizona scheme, and with the Arizona Supreme Court’s analysis in *Holle II*. Those concerns persuade us that Arizona has shifted the burden of proving the only *fact* that really matters in child molestation cases—whether the defendant touched the child’s private parts with some kind of sexual motive. That fact is the only evidence that is morally inculpatory, what the Supreme Court referred to in the burden-shifting cases as the proof of “sinister significance.” *Morrison*, 291 U.S. at 90, 96, 54 S.Ct. 281 (invalidating California’s effort to shift the burden of proof of an element where “[t]he probability [was] ...

apparent that the transfer of the burden may result in grave injustice in the only class of cases in which it will be of any practical importance”).

Let us focus on how the Arizona statutes work together in practice. First, once the state charges a defendant with child molestation, the state has the burden of proving beyond a reasonable doubt that the defendant intentionally or knowingly touched the child’s genitals. Ariz. Rev. Stat. §§ 13-1410, 13-1401(A)(3). Once it proves that, the state’s case is complete. A jury can convict based on that evidence alone. Second, the defendant may challenge the state’s case on the merits by asserting that he has an alibi (e.g. “I wasn’t present when the child was touched”), that there was misidentification (e.g. “I was present when the child was touched but I wasn’t the one who touched the child”), or that he lacked the requisite intent (e.g. “I touched the child, but I didn’t do so intentionally or knowingly, but accidentally”). These are complete defenses to the charge, but they are not affirmative defenses, but defenses on the merits. *See id.* § 13-103(B). If the jury accepts the defendant’s explanation, it will return a verdict of not guilty, but that verdict could mean either that the state didn’t prove its case or that the jury concluded that the defendant is innocent in fact. Arizona, like most American jurisdictions, does not ask the jury to parse the difference, although some jurisdictions make the distinction.<sup>4</sup> Third,

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4. *See, e.g., Humphries v. County of Los Angeles*, 554 F.3d 1170, 1181–82 & nn. 6, 8 (9th Cir. 2009) (providing an example from California where the Superior Court dismissed the criminal case against the parents, finding they were “factually innocent,” and the juvenile court dismissed an accompanying custody case as “not true”), *rev’d in part on other grounds*, 562 U.S. 29, 131 S.Ct. 447, 178 L.Ed.2d 460 (2010); *see also* Samuel L. Bray, Comment,

if the defendant wishes to assert an affirmative defense, he bears the burden of proceeding. He must come forward and tell the court he intends to raise the affirmative defense; otherwise the affirmative defense has been forfeited or waived. And, to assert the affirmative defense, in the ordinary case, the defendant will have to take the stand, waive his privilege against self-incrimination, and admit that he committed the offense charged by the state—that he intentionally or knowingly touched the child’s genitals. Fourth, having raised the affirmative defense, the defendant has the burden of proving by a preponderance that he was not motivated by a sexual interest; the risk of non-persuasion of that fact rests squarely on the defendant. Ariz. Rev. State. § 13-105. So, for example, if a defendant asserts the affirmative defense, and the jury determines that the case was a close one, but the defendant had only carried his burden by 49 percent, rather than the 51 percent required for preponderance of the evidence, the jury will return a guilty verdict. By implication, that verdict rests on the determination that the defendant had a sexual motivation—as shown by a bare preponderance of the evidence. The defendant is guilty only because he failed to prove the affirmative defense. Fifth, if the defendant successfully proves his affirmative defense, the jury will return a not guilty verdict, but because the defendant asserted an affirmative defense, the verdict means, “guilty but excused.” It does not mean “innocent in fact.” See *Holle II*, 379 P.3d at 202.

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*Not Proven: Introducing a Third Verdict*, 72 U. Chi. L. Rev. 1299, 1299–1300 (2005) (describing Scotland’s scheme in which “[n]ot proven and not guilty are both acquittals, indistinguishable in legal consequence but different in connotation. Not guilty is for a defendant the jury thinks is innocent; not proven, for a case with insufficient evidence of guilt.”).

If § 13-1407(E) is a true affirmative defense, and not an element of the crime of child molestation, then Arizona is under no obligation to provide the affirmative defense. *See Patterson*, 432 U.S. at 209, 97 S.Ct. 2319 (explaining that a state may choose “to recognize a factor that mitigates the degree of criminality or punishment”); *Gratzer v. Mahoney*, 397 F.3d 686, 691 n.4 (9th Cir. 2005) (“States are not required to provide affirmative defenses[.]”). Without the affirmative defense, child molestation in Arizona would be a strict liability crime: touch the child, you are a child molester. That is a dramatic, but not a hyperbolic, conclusion. And it was in its discussion of the affirmative defense that the Arizona Supreme Court sowed the undoing of its own analysis. The court acknowledged that “the criminal code should clearly differentiate between unlawful conduct and innocent, acceptable behavior.” *Holle II*, 379 P.3d at 206. The problem is that § 13-1410 contemplates no “innocent, acceptable behavior.” The statute is so broad that every knowing or intentional touching of a child’s genitals is “unlawful conduct.”

The Arizona Supreme Court never disputed the extraordinary scope of § 13-1410. The court’s answer to the claim that § 13-1410 covers “innocent, acceptable behavior,” was that “prosecutors are unlikely to charge parents, physicians and the like when the evidence demonstrates the presence of an affirmative defense under § 13-1407“ and that there was no evidence “that a diapering parent or a physician conducting an appropriate examination has ever been charged under ... § 13-1410.” *Id.* Thus, for the court, the

bare assertion that, absent a sexual motivation element, ... § 13-1410 will hypothetically lead

to absurd prosecutions does not warrant ignoring the plain language of the ... statute[.]. We cannot and will not assume that the state will improperly prosecute persons, who, though perhaps technically violating the terms of broad statutes such as ... § 13-1410, clearly engaged in reasonable, acceptable, and commonly permitted activities involving children.

*Id.* The Arizona Supreme Court responded to the dissenting justices' "hypothetical, unrealistic concerns about subjecting to criminal prosecutions parents or other child caregivers changing diapers," by explaining that "if a prosecution actually were to result from such innocent behavior ... an 'as applied' constitutional challenge would likely have merit in light of parents' fundamental, constitutional right to manage and care for their children." *Id.* at 207–08 (citing *Santosky v. Kramer*, 455 U.S. 745, 758–59, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)).

There is a good deal to unpack in these statements. Let's start with two observations. First, citizens are not left to "the mercy of *noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010). The Supreme Court has warned us that courts should not "construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell v. United States*, 579 U.S. 550, 576, 136 S.Ct. 2355, 195 L.Ed.2d 639 (2016) (quoting *Stevens*, 559 U.S. at 480, 130 S.Ct. 1577). And, most recently, in *Trump v. United States*, the Court repeated that courts should not "decline to decide significant constitutional questions based on the Government's promises of good faith" in prosecutorial decisions. 603 U.S. 593, 637, 144 S.Ct. 2312, 219 L.Ed.2d

991 (2024). The Arizona Supreme Court cannot avoid the implications of its analysis by assuring us that Arizona prosecutors will act responsibly.

Second, the Arizona Supreme Court’s own language betrays the true purpose of the statute. Prosecuting people such as parents, caregivers, and medical providers who come within the “plain text” of § 13-1410, *Holle II*, 379 P.3d at 200, would be “absurd” and “impermissible,” or—in the court’s own words—“improper[ ],” *id.* at 206. Indeed, the court said, prosecuting parents, caregivers, and medical providers for the ordinary conduct of their responsibilities would be prosecutions for mere “technical[ ] violat[ions]” of the statute. *Id.* Those technical violations are “clearly ... reasonable, acceptable, and commonly permitted activities involving children.” *Id.* Persons conducting such “commonly permitted activities” are, by definition, child molesters under Arizona law. *Id.* “[A]ny” knowing or intentional “touching” of a child’s private parts is child molestation—no exceptions admitted—and a spouse or co-worker who knows of the conduct is under obligation of law, punishable as a felony, to report it to the authorities. Ariz. Rev. Stat. § 13-3620(O).

Notwithstanding the breadth of the statute, the Arizona Supreme Court certainly did not believe that it would be proper for prosecutors to charge parents and others for doing their job. Indeed, the Arizona Supreme Court went so far as to suggest that a prosecutor who brought charges against persons conducting such “reasonable, acceptable, and commonly permitted activities” would violate Arizona’s ethical rules which admonish prosecutors to see “that guilt is decided upon the basis of sufficient

evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.” *Holle II*, 379 P.3d at 206 (quoting Ariz. R. Sup. Ct 42, Ethical Rule 3.8, cmt. 1).

The Arizona Supreme Court’s characterization of parents, caretakers, and medical personnel as “innocent persons,” *id.*, engaged in “innocent behavior,” *id.* at 207, or “innocent, acceptable behavior,” *id.* at 206, cannot be shown from § 13-1410 itself. Changing diapers, bathing children, and conducting medical exams are not innocent behavior under § 13-1410. If a prosecutor were to charge a parent or caretaker or doctor with child molestation for such ordinary conduct, we would well expect that an Arizona jury would return a verdict of not guilty. But under Arizona law, such persons are, in fact and law, guilty of child molestation under § 13-1410. Setting aside the very real possibility of jury nullification, the reason such persons would likely be found not guilty is because they would have successfully asserted the affirmative defense found in § 13-1407(E).

Given our understanding of the interaction between the child molestation statute found in § 13-1410 and the affirmative defense found in § 13-1407(E), there is no such thing as a “technical violation” of the statute, nor is there any “innocent” touching of a child’s private parts. At least not in any legal sense under Arizona law. If the Arizona Supreme Court believed that there is “innocent behavior” that “technically violat[es]” the statute that the state should not “improperly prosecute,” it was using the term “innocent” in *Holle II* in a euphemistic sense, not in a way that had any legal meaning. *Holle II*, 379 P.3d at 206–07. And there is the problem. The Arizona Supreme Court

conceded that “prosecutors are unlikely to charge parents, physicians, and the like when the evidence demonstrates the presence of an affirmative defense under § 13-1407.” *Id.* at 206. If we flip the court’s language, it becomes clear that “*prosecutors are likely to charge parents, physicians and the like when the evidence does not demonstrate the presence of an affirmative defense under § 13-1407.*” The critical factor in the decision to charge or not to charge child molestation therefore turns on whether the prosecutor thinks the affirmative defense can be successfully asserted. Any other decision to prosecute would be “improper[.]” *Id.*<sup>5</sup>

Arizona’s child molestation scheme is not just broad, it is pernicious. It criminalizes every knowing or intentional touching of a child’s private parts, no matter the reason. Everyone who knowingly changes a diaper could be convicted of child molestation, even when the state’s proof of that fact is not proof of any evil interest, but only of “traditionally lawful conduct.” *Staples v. United States*,

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5. Shortly after *Holle II*, in response to public concern over the breadth of the child molestation statute, the Maricopa County Attorney issued an extraordinary press release. He said that “[i]t is incredibly insulting to believe any prosecutor reviewing a case for charging would not be able to tell the difference between an adult taking proper care of a child and the molestation of a child victim.” Press Release, Maricopa County Attorney’s Office, Public Mised on Claims Diaper Changing is Worthy of Felony Prosecution in Arizona (Sept. 20, 2016) (<https://www.maricopacountyattorney.org/CivicAlerts.aspx?AID=402>) (last visited Aug. 5, 2025). He then observed that “[t]he very title[] of the statute[] involved ... Child Molestation—[is] indicative of the sexual nature of the crime[.]” *Id.* He then assured the public that “[o]nly when the touching is of a sexual nature do prosecutors even consider filing charges.” *Id.*

511 U.S. 600, 618, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994). The state's burden of proof under § 13-1410 is only a modest imposition on the prosecutor. But not everyone will be charged. Only those persons whom the prosecutor believes will not be able to prove a negative—that the defendants do not have a sexual motive—will be charged. In the end, the affirmative defense in § 13-1407(E) is not a gratuitous one—one that the Arizona legislature might decide, in its discretion, to do away with. It is, instead, *the* critical provision in the child molestation scheme, because the only people Arizona is truly interested in prosecuting for child molestation are those who were sexually motivated to touch the child.<sup>6</sup> Sexual motivation

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6. Without the affirmative defense, a prosecutor would have no guidance from the legislature for prioritizing prosecutions under § 13-1410 because every parent, caregiver, and medical provider would be a prime suspect for prosecution. This creates a different problem, one noted by the dissenting justices in *Holle II*: vagueness. *See Holle II*, 379 P.3d at 208–09 (Bales, C.J., dissenting in part and concurring in the result). Although § 13-1410 is not itself a vague statute, it covers everyone caring for young children in the most banal of human activities, means that “ordinary people” would not “understand what conduct is prohibited,” and it would encourage “arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Parents, caregivers, and medical personnel, as well as prosecutors—all people of “common intelligence”—would be “forced to guess at the meaning of the criminal law.” *Smith v. Goguen*, 415 U.S. 566, 574, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) (citation omitted). Standing alone, § 13-1410 is so broad that only the existence of the affirmative defense “establish[es] minimal guidelines to govern law enforcement.” *Kolender*, 461 U.S. at 358, 103 S.Ct. 1855.

This tactic runs squarely into the vagueness-related principle that “[t]he Constitution does not permit a legislature to ‘set a net

is “the crucial element separating legal innocence from wrongful conduct.” *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994). And Arizona has foisted the burden of proving the sexual motivation of the defendant on the defendant himself.

This the state cannot do consistent with the Due Process Clause. “[E]very fact necessary to constitute the crime” charged must be proven by the state “beyond a reasonable doubt.” *Winship*, 397 U.S. at 364, 90 S.Ct. 1068. The Supreme Court cases clearly establish that Arizona cannot shift the burden of proof to the defendant. *See Smith*, 568 U.S. at 110, 133 S.Ct. 714; *Mullaney*, 421 U.S. at 698, 95 S.Ct. 1881; *Morrison*, 291 U.S. at 88, 90, 54 S.Ct. 281. Although the prohibition on burden-shifting is a general principle, “[g]eneral legal principles can constitute clearly established federal law for purposes of AEDPA ....” *Andrew*, 145 S. Ct. at 82. That said, we think there are several Supreme Court cases that amply demonstrate that Arizona has crossed the line in this instance.

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large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should set at large.” *City of Chicago v. Morales*, 527 U.S. 41, 60, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (quoting *United States v. Reese*, 92 U.S. 214, 221, 23 L.Ed. 563 (1876)). Absent a sexual interest component, § 13-1410 is “vague ‘not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.’” *Id.* (quoting *Coates v. Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971)). At least, not a standard of conduct that any sensible person would recognize.

First, in *Mullaney*, the Court addressed how its then-recent decision in *Winship* applied to a Maine statute that made “all intentional or criminally reckless killings ... murder ... unless the defendant prove[d] by a fair preponderance of the evidence that it was committed in the heat of passion on sudden provocation.” 421 U.S. at 691–92, 95 S.Ct. 1881. The Court characterized “the presence or absence of the heat of passion on sudden provocation” as “the single most important factor in determining the degree of culpability attaching to an unlawful homicide.” *Id.* at 696, 95 S.Ct. 1881. The presence or absence of that fact determined whether the defendant was guilty of murder or manslaughter, which determined “the degree of criminal culpability.” *Id.* at 697–98, 95 S.Ct. 1881. “By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in *Winship*.” *Id.* at 698, 95 S.Ct. 1881. The Court warned that it would look behind creative statutory schemes: “[I]f *Winship* were limited those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law.” *Id.* at 698, 95 S.Ct. 1881. A state could, for example, “impose a life sentence for any felonious homicide ... unless the *defendant* was able to prove that his act was neither intentional nor criminally reckless.” *Id.* at 699, 95 S.Ct. 1881 (emphasis added) (footnote omitted).

Although some aspects of *Mullaney* were read more narrowly in *Patterson*, 432 U.S. at 212–16, 97 S.Ct. 2319, the Court reaffirmed *Mullaney*’s core principles in *Patterson*, *id.* at 215, 97 S.Ct. 2319, and has continued to cite *Mullaney* with approval. In *Jones v. United*

*States*, the Court explained that in *Mullaney*, the Court “declined to accord the State ... license to recharacterize” the crime, reasoning that “an unlimited choice over characterizing a stated fact as an element would leave the State substantially free to manipulate its way out of *Winship*.” 526 U.S. at 240–41, 119 S.Ct. 1215; *see also id.* at 241, 119 S.Ct. 1215 (suggesting that even a “narrow reading” of *Mullaney* would “ban ... using presumptions to reduce elements to the point of being nominal”); *Francis v. Franklin*, 471 U.S. 307, 317, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) (characterizing *Mullaney* as holding “unconstitutional a mandatory rebuttable presumption that shifted to the defendant a burden of persuasion on the question of intent”).

*Morrison v. California*, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664 (1934), similarly invalidated a broad presumption of guilt, subject to the defendant’s proof of his innocence. Morrison and Doi were convicted of conspiracy to violate California’s Alien Land Law. *See id.* at 84–85, 54 S.Ct. 281. That law prohibited certain noncitizens from owning property in California; Doi was apparently ineligible to own property in California, but Morrison had transferred land to him. *See id.* at 84, 54 S.Ct. 281. The California statute provided that the state had to prove the transfer of property and “allege[] the alienage or ineligibility to United States citizenship of such defendant.” *Id.* The burden then shifted to Morrison to prove that he did not know Doi’s citizenship or eligibility for citizenship. *Id.* The Court reversed the judgments of conviction. Knowledge of one’s alienage was the critical fact determining whether that person had conspired to confer land ownership in violation of the Land Law. The Court concluded that the California statute relieved the

state of the “burden of persuasion” because it “sa[id] in substance that unless [the defendant] can prove [his eligibility to own the land], he will have failed to discharge his burden, and will therefore be found guilty.” *Id.* at 96, 54 S.Ct. 281.

A final example will reinforce our point. In *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943), a provision of the Federal Firearms Act made it a crime for “any person who has been convicted of a crime of violence or is a [fugitive] from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” *Id.* at 464, 63 S.Ct. 1241. But the statute further provided that “the possession of a firearm ... shall be presumptive evidence that such firearm ...was shipped or transported or received ... in violation of [the] Act.” In other words, Congress had defined the crime in terms of possession of a particular kind of firearm—one that had been shipped or transported in interstate commerce. But the government was not required to prove that the firearm had been shipped or transported in interstate commerce; rather, the statute presumed it, and the defendant had to come forward and show that the firearm had *not* been shipped or transported in interstate commerce. The Court had little difficulty in holding that the statute violated the Due Process Clause. Congress had impermissibly “shift[ed] the burden by arbitrarily making one fact, which ha[d] no relevance to guilt of the offense, the occasion of casting on defendant the obligation of exculpation.” *Id.* at 469, 63 S.Ct. 1241. The statute thus “le[ft] the jury free to act on the presumption alone once the specified facts are proved, unless the defendant [came] forward with opposing evidence.” *Id.*

This was “enough to vitiate the statutory provision.” *Id.* at 469, 63 S.Ct. 1241.

Two decisions in which the Court rejected claims of burden shifting further help illustrate the principles. The Court’s decisions in *Patterson* and *Martin* are not contrary to, but consistent with, our conclusion. *Patterson* upheld New York’s homicide scheme under which all intentional killings were charged as murder and the defendant had to prove that he acted under “extreme emotional disturbance” to reduce a murder charge to a manslaughter charge. *Patterson*, 432 U.S. at 198–200, 215, 97 S.Ct. 2319. But in *Patterson*, the Court recognized that New York was still required to prove the essential elements of “death, the intent to kill, and causation,” *see id.* at 206–07, 97 S.Ct. 2319, and that “it [was] not disputed the State may constitutionally criminalize and punish” all intentional killings, *id.* at 209, 97 S.Ct. 2319. Similarly, in *Martin*, the Court upheld Ohio’s scheme requiring a murder defendant to bear the burden to prove self-defense as an exculpatory fact, if at all. 480 U.S. at 233, 107 S.Ct. 1098. The Court again noted that “the State did not exceed its authority in defining the crime of murder as purposely causing the death of another with prior calculation or design,” and the state “did not seek to shift to [the defendant] the burden of proving any of those elements.” *Id.* The Court also rejected the defendant’s argument that self-defense rendered her killing “lawful,” because the argument “founder[ed] on state law” as interpreted by the Ohio Supreme Court. *Id.* at 235, 107 S.Ct. 1098. Although “unlawfulness is essential for conviction,” *Martin* held that the Ohio courts determined the “unlawfulness” at issue to be “the conduct satisfying the elements of aggravated

murder—an interpretation of state law that [the Court] was not in a position to dispute.” *Id.*

Here, we need not “dispute” the Arizona Supreme Court’s interpretation of § 13-1410 to conclude that the statute itself does not require any “unlawfulness” that is “essential for conviction.” *Martin*, 480 U.S. at 235, 107 S.Ct. 1098. *Holle II* itself revealed that “the criminal code” did not “clearly differentiate between unlawful conduct and innocent, acceptable behavior.” 379 P.3d at 206. Instead, what distinguished a “technical[.]” violation of § 13-1410 from a substantive one, or an “improper[.]” prosecution from a proper one, is whether the defendant acted with sexual interest. *Id.* Anyone whom the prosecutor believes will not be able to prove a negative—that he did not act with sexual interest—may be charged. Arizona has thus “exceed[ed] its authority” in formalistically construing § 13-1407(E) only as an affirmative defense to child molestation. *Martin*, 480 U.S. at 233, 107 S.Ct. 1098.

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These cases clearly establish that the state is responsible for proving beyond a reasonable doubt the *critical* facts that establish the crime. Although § 13-1410 defines child molestation as “any touching” of a child’s genitals, the statute only requires the state to prove that the defendant “intentionally and knowingly” touched the child. In Arizona the fact of touching is essential to proving the crime, but everyone implicitly understands that it is not the *sine qua non* of child molestation and, absent some indication that the defendant touched the child with sexual interest, the touching will not be

prosecuted. The core of child molestation in Arizona is that the defendant did so with sexual interest. That has historically been true in Arizona, *see* Part I.A., *supra*, and “Arizona stands alone among all United States jurisdictions in allocating the burden of proof this way,” *May*, 245 F. Supp. 3d at 1149. Without the element of sexual interest, the Arizona Supreme Court told us, we only have a “technical[]” violation of the statute that would be “improper[]” to prosecute. *See Holle II*, 379 P.3d at 206. What distinguishes a technical from a non-technical violation is, precisely, whether the defendant can successfully assert the affirmative defense of lack of sexual motivation. But the state is not required to prove the defendant’s sexual interest. *Holle II* makes clear that the fact is effectively presumed. This is a straightforward violation of clearly established due process principles, as determined by the U.S. Supreme Court. “Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.” *Patterson*, 432 U.S. at 215, 97 S.Ct. 2319.

In the end, once we pierce the form of the state’s scheme, we have little difficulty concluding that Arizona has shifted the burden of proof from the state to the defendant to prove a core element of child molestation—that the defendant touched the child’s private parts with some kind of sexual interest. Arizona has done so in violation of the Due Process Clause of the Fourteenth Amendment, as clearly established in decisions of the United States Supreme Court. 28 U.S.C. § 2254(d)(1). In Bieganski’s case, the Arizona Court of Appeals was bound by *Holle II*. For the reasons we have explained, *Holle*

*II* identified the correct legal principles in the Supreme Court's cases, but its application of those principles to § 13-1410 was an objectively unreasonable one. *See Williams*, 529 U.S. at 413, 120 S.Ct. 1495.

#### **IV. CONCLUSION**

The judgment of the district court is reversed and the matter is remanded to the district court to issue the writ of habeas corpus.

**REVERSED AND REMANDED WITH INSTRUCTIONS.**

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**APPENDIX B**

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UNITED STATES DISTRICT COURT,  
D. ARIZONA

No. CV-21-01684-PHX-DWL

BRADLEY BIEGANSKI,

*Petitioner,*

v.

DAVID SHINN, *et al.*,

*Respondents.*

Signed July 31, 2023

**ORDER**

Dominic W. Lanza, United States District Judge

On September 30, 2021, Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. (Doc. 1.) On November 14, 2022, Magistrate Judge Morrissey issued a report and recommendation (“R&R”) concluding that the petition should be denied and dismissed with prejudice. (Doc. 19.) Afterward, Petitioner filed objections to the R&R (Doc. 22), Respondents filed a response (Doc. 25), and Petitioner filed a reply (Doc. 30).

As explained below, Petitioner’s objections largely lack merit. The only exception is that Petitioner should, contrary to the recommendation in the R&R, be granted a certificate of appealability (“COA”). Otherwise, the Court agrees with the conclusions set forth in the R&R, including that Petitioner is not entitled to habeas relief.

## **RELEVANT BACKGROUND**

### **I. The Charges, Trials, And Sentencing**

From 2011 until his arrest in 2013, Petitioner operated a girls-only private Christian home-school called “Kingdom Flight” along with his wife and son. (Doc. 19 at 2.) The arrest occurred after three girls attending Kingdom Flight (A.G., Y.L., and J.C.) accused Petitioner of touching their genitals when they were between the ages of 6 and 9. (*Id.*) Most of the allegations arose from a Sunday morning bathing practice that Petitioner referred to as an “assembly line,” in which he would hurriedly bathe six to eight Kingdom Flight girls in pairs within 30 minutes before departing for a church service. (*Id.*) The alleged genital contact during that process involved Petitioner touching and manually washing the girls’ vaginas with his bare hand. (*Id.*) Additionally, Y.L. accused Petitioner of touching her genitals on two other occasions: once when she was getting dressed after swimming and another time when she was in the Kingdom Flight girls’ room. (*Id.*) Based on these allegations, Petitioner was charged in 2013 with various counts of child molestation in violation of Arizona law. (*Id.*)

In July 2016, Petitioner’s first trial began. (Doc. 11-1 at 12.) Petitioner contends, and Respondents do not seem to dispute, that the prosecution “assumed the burden of establishing sexual interest” during the first trial. (Doc. 22 at 7.) The first trial “ended without verdicts because J.C. triggered a mistrial by testifying that [Petitioner] had not touched her vagina just once, as the indictment alleged, but rather three times between her sixth and ninth birthdays.” (Doc. 11-1 at 12-13.)

In September 2016, while the charges against Petitioner were still pending, the Arizona Supreme Court decided *State v. Holle*, 379 P.3d 197 (Ariz. 2016). The disputed issue in *Holle* was whether a lack of sexual motivation is an *element* of the crimes of sexual abuse and child molestation under Arizona law (as the defendant argued) or whether a lack of sexual motivation is an *affirmative defense* to those crimes (as the government argued). In a 3-2 decision, the Arizona Supreme Court ruled in the government’s favor, holding that “lack of such motivation is an affirmative defense that a defendant must prove, and thus the state need not prove as an element of those crimes that a defendant’s conduct was motivated by a sexual interest.” *Id.* at 198. The defendant in *Holle* also argued, in the alternative, that “shifting the burden to defendants by making the lack of such motivation an affirmative defense . . . violates due process,” but the court rejected that argument, too. *Id.* at 205-06.

In June 2017, Petitioner filed a motion to dismiss the charges against him, raising the same due process argument the Arizona Supreme Court had rejected

in *Holle*. (Doc. 1-8.) The trial court denied the motion. (Doc. 1-9 [“The Defendant’s motion to dismiss is denied. This Court is bound by the Arizona Supreme Court case of [*Holle*]. Moreover, even if the statute does unconstitutionally shift the burden of proof to the Defendant, dismissal is not an appropriate remedy. The Court could instruct the jury that the State has the burden of proving sexual motivation.”].)

In December 2017, Petitioner’s retrial began. (Doc. 11 at 9.) Petitioner testified and sought to raise the affirmative defense of lack of sexual interest. (Doc. 19 at 2.) Specifically, Petitioner admitted that he had washed the girls’ genitals with soap and his bare hand but denied that he had any sexual interest in doing so. (*Id.*) The trial court, in turn, instructed the jury that Petitioner had to prove lack of sexual interest by a preponderance of the evidence. (*Id.*) The jury ultimately convicted Petitioner of three counts of child molestation involving victims A.G. and J.C. but returned not-guilty verdicts for the charges involving Y.L. (*Id.*)

On January 23, 2018, sentencing took place. (Doc. 11 at 9.) Petitioner was sentenced to concurrent 17-year prison terms, followed by another 17-year term, for a total of 34 years. (Doc. 19 at 2-3.)

## **II. Intervening Developments**

As Petitioner’s case was unfolding, two additional developments (the potential significance of which is discussed in later portions of this order) occurred.

**A. *May v. Ryan***

The first development occurred in March 2017, when another judge of this Court decided *May v. Ryan*, 245 F. Supp. 1145 (D. Ariz. 2017). *May* involved a petition for habeas corpus filed by an Arizona prisoner who had been convicted of child molestation in 2007 following a trial in which the jury was instructed that “the defendant has the burden of proving his own lack of sexual intent by a preponderance of the evidence.” *Id.* at 1150-51. Unlike here, the petitioner in *May* did not raise any constitutional challenges to this instruction at trial or during his direct appeal. *Id.* at 1151-52. Instead, the petitioner first argued in a petition for post-conviction relief (“PCR”) that his trial counsel had been ineffective by failing to raise a constitutional challenge. *Id.* “The superior court denied relief because of procedural default without deciding the merits of the constitutional claim and the state appellate court affirmed.” *Id.*

In *May*, the district court acknowledged that “[b]ecause May failed to preserve the constitutional question at trial, this Court can reach the merits only if there was cause and prejudice for his default.” *Id.* at 1156. However, the court did not begin its analysis by addressing those issues—instead, it explained that because the resolution of the resulting prejudice inquiries would “depend[] largely on the strength of the defaulted federal constitutional objection,” “[i]t therefore makes sense to discuss the law’s constitutionality at the outset.” *Id.* at 1156-57. Turning to the merits of the constitutional claim, the district court provided an exhaustive analysis before concluding that “the burden-shifting scheme of

Arizona’s child molestation law violates the Fourteenth Amendment’s guarantees of due process and of proof of guilt beyond a reasonable doubt.” *Id.* at 1157-65. In part, this analysis turned on the court’s observation that only one other state followed Arizona’s approach. *Id.* at 1160 (“Today the statutes or case law of 48 out of 50 states . . . require some sexual purpose for the crime of child molestation.”). Next, the district court addressed whether the petitioner was prejudiced by his counsel’s failure to raise a constitutional challenge, concluding for various reasons that prejudice existed. *Id.* at 1165-69. Finally, the district court addressed whether the petitioner’s trial counsel engaged in deficient performance by failing to raise the constitutional challenge, concluding that counsel had because “[i]t should have been obvious that the burden-shifting scheme presented a serious constitutional question that could have been dispositive for May. At the time, there was no appellate case assessing the constitutionality of Arizona’s 1997 statutory amendment. Even if there had been a case on point, the constitutional question was a matter of federal law amenable to vindication in later federal court review. [Counsel] performed deficiently by failing to recognize and act on this.” *Id.* at 1169-71. Thus, the district court held that the petitioner was entitled to habeas relief. *Id.* at 1171-72.

In March 2020, the Ninth Circuit issued a memorandum decision reversing the district court’s grant of habeas relief. *May v. Ryan*, 807 F. App’x 632 (9th Cir. 2020). The Ninth Circuit only addressed, on the merits, the district court’s analysis with respect to deficient performance, concluding “that May’s trial counsel was not ineffective for failing to object to the constitutionality of the child molestation

statute. Given the long-standing Arizona rule that the State is not required to prove sexual intent to successfully prosecute a defendant for child molestation, which provided the background for the ‘prevailing professional practice at the time of the trial,’ we cannot conclude that trial counsel’s failure to object to the constitutionality of the statute’s placing the burden of proving lack of intent on the defendant ‘fell below an objective standard of reasonableness.’” *Id.* at 634-35 (citations omitted). The court also went out of its way to “vacate” the portion of the district court’s decision analyzing the constitutionality of Arizona’s child molestation statute: “Because we do not reach the constitutionality of the Arizona child molestation statute, we vacate the district court’s judgment in that respect.” *Id.* at 635.

### **B. 2018 Amendment**

The other development occurred in August 2018, when the Arizona legislature “amended the child molestation statutes.” *State v. Bieganski*, 2019 WL 4159822, \*1 n.1 (Ariz. Ct. App. 2019). Among other things, “[t]he amendment eliminated the affirmative defense of lack of sexual motivation” and “included a definition of ‘[s]exual contact’ . . . [that] ‘[d]oes 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.’” *Id.* (citations omitted).

### III. Direct Appeal

In December 2018, Plaintiff filed his opening brief in his direct appeal from his convictions and sentences. (Doc. 1-2.) As relevant here, Petitioner asserted (1) a Fourteenth Amendment due process claim, under the theory that Arizona improperly shifted the burden of proof onto him to disprove the implicit “sexual motivation” element of the offense; and (2) a claim that the child molestation statutes were unconstitutional “as applied” to him. (Doc. 19 at 3.)

In an unpublished decision issued on September 3, 2019, the Arizona Court of Appeals unanimously rejected these arguments and affirmed. *State v. Bieganski*, 2019 WL 4159822 (Ariz. Ct. App. 2019). As for the due process challenge, the court’s analysis was as follows:

Relying on the federal district court’s rationale in *May*, [Petitioner] argues that the child molestation statutes violate due process because they shift the burden of proof to the defendant regarding the issue of sexual motivation. Our supreme court expressly rejected this argument in [*Holle*].

We are required to follow our supreme court’s decisions. While we consider the opinions of the lower federal courts regarding the interpretation of the Constitution, such authority is not controlling on Arizona courts. Accordingly, no error occurred, and we will not reexamine our supreme court’s decision in [*Holle*].

*Id.* at \*2 (citations omitted). The court also rejected Petitioner’s “as applied” challenge, reasoning as follows:

[Petitioner] also contends that the statutes are unconstitutional “as applied” to him. To support his contention, [Petitioner] relies on the discussion in [*Holle*] concerning the possibility of an “as applied” constitutional challenge for a parent performing a caregiving task such as changing diapers.

The “as applied” discussion in [*Holle*] occurred in a theoretical context and was not involved in the holding. The supreme court found that because the defendant’s actions were “clearly inappropriate,” they could not be construed as parenting or caregiving in any manner, and thus, the court did not address the issue further. [Petitioner’s] “as applied” argument fails for the same factual and legal reasons.

The evidence, including [Petitioner’s] testimony and admissions, established that [Petitioner] performed the barehanded washing of each minor victim’s genitals with no other adult present during a rushed Sunday morning bathing “assembly line” practice for which he did not provide a logical “parental” explanation. He conducted these washing practices even though the girls were old enough to bathe themselves. [Petitioner] never requested permission from any of the parents or guardians to participate personally in the bathing or manual genital washing of the girls, and never discussed the bathing practices the girls would be exposed to with him. [Petitioner’s] wife helped provide care for the girls but did not wash the girls’ genitals and was not involved in the “assembly line.” She provided each girl with a washrag and soap and directed them to clean themselves.

Although [Petitioner] later admitted to the jury that he performed the “washing” acts, when interviewed by law enforcement on the day of his arrest, he denied that the acts occurred, both to the officers and his wife during a phone call.

The jury rejected his efforts at establishing an affirmative defense based upon the evidence presented. The evidence supports the jury’s determination that [Petitioner’s] practices and acts maintain no reasonable connection to a legitimate parental exception as hypothetically contemplated in [*Holle*]. Hence, there was no error.

*Id.* at \*3-4 (citations omitted).

On March 31, 2020, the Arizona Supreme Court denied Petitioner’s petition for review. (Doc. 1-6.)

On October 5, 2020, the United States Supreme Court denied Petitioner’s petition for a writ of certiorari. (Doc. 19 at 3.)

#### **IV. This Action**

On September 30, 2021, Petitioner initiated this action. (Doc. 1.) The Court previously explained that the petition raises one ground for relief—namely, “that the statute under which [Petitioner] was convicted violates his due process rights because it improperly shifts the burden on an element of the offense from the prosecution to the accused.” (Doc. 3 at 2.)

## V. The R&R

The R&R concludes that the petition, although timely filed, should be denied and dismissed with prejudice. (Doc. 19.) As an initial matter, the R&R states that Petitioner's claim is subject to the deferential form of review authorized by 28 U.S.C. § 2254(d) because the Arizona Court of Appeals considered and rejected his due process claim on the merits during his direct appeal. (*Id.* at 4-5.)

The R&R explains that, under § 2254(d), "Petitioner must demonstrate the state court's order was contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts." (*Id.* at 5.) The R&R concludes that Petitioner cannot satisfy this standard. The upshot of the R&R's analysis is that "Petitioner fails to cite United States Supreme Court precedent indicating that due process requires a state to include an element of motivation by sexual interest in child molestation statutes. Indeed, the United States Supreme Court has given states wide latitude to define offenses including the required scienter." (*Id.* at 10.) Elsewhere, the R&R notes that "Petitioner fails to cite any case from the United States Supreme Court that a state violates due process by shifting the burden to the defendant on an 'inherent' element derived from older iterations of a statute or general notions of what separates innocent conduct from criminal conduct," and thus Petitioner "has not shown the Arizona Court of Appeals unreasonably applied any clearly established United States Supreme Court precedent in denying his due process challenge to the child molestation statutes under which he was convicted." (*Id.* at 11.) The R&R

also concludes that, to the extent Petitioner relies on the district court's decision in *May*, that reliance is misplaced for three reasons: (1) the Ninth Circuit subsequently reversed *May* on other grounds without "reach[ing] the constitutionality of the Arizona child molestation statute and thus vacated the district court's judgment in that respect"; (2) "after the Ninth Circuit reversed *May v. Ryan*, no habeas petitioner has been granted relief on the theories Petitioner advances here"; and (3) *May's* analysis was incorrect. (*Id.* at 6-10.) Finally, as for Petitioner's "as applied" theory, the R&R states that the Arizona Court of Appeals' rejection of that theory "was not an unreasonable conclusion" because "Petitioner does not show the court reached its conclusion based on more instances of abuse than were proven . . . or otherwise misinterpreted the facts." (*Id.* at 11-12.)

### LEGAL STANDARD

A party may file written objections to an R&R within 14 days of being served with a copy of it. Rules Governing Section 2254 Cases 8(b) ("Section 2254 Rules"). Those objections must be "specific." *See* Fed. R. Civ. P. 72(b) (2) ("Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations.").

"The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." *See* Fed. R. Civ. P. 72(b)(3).

“In providing for a de novo determination . . . Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate’s proposed findings and recommendations. . . . [D]istrict courts conduct proper de novo review where they state they have done so, even if the order fails to specifically address a party’s objections.” *United States v. Ramos*, 65 F.4th 427, 433 (9th Cir. 2023) (citations and internal quotation marks omitted). *See also id.* at 434 (“[T]he district court ha[s] no obligation to provide individualized analysis of each objection.”).

Additionally, district courts are not required to review any portion of an R&R to which no specific objection has been made. *See, e.g., Thomas v. Arn*, 474 U.S. 140, 149-50 (1985) (“It does not appear that Congress intended to require district court review of a magistrate’s factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings.”); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (“[T]he district judge must review the magistrate judge’s findings and recommendations de novo if objection is made, but not otherwise.”). Thus, district judges need not review an objection to an R&R that is general and non-specific. *See, e.g., Warling v. Ryan*, 2013 WL 5276367, \*2 (D. Ariz. 2013) (“Because de novo review of an entire R & R would defeat the efficiencies intended by Congress, a general objection ‘has the same effect as would a failure to object.’”) (citations omitted); *Haley v. Stewart*, 2006 WL 1980649, \*2 (D. Ariz. 2006) (“[G]eneral objections to an R & R are tantamount to no objection at all.”).

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## ANALYSIS

Having carefully reviewed the R&R, Petitioner's oversized objections, Respondents' response to those objections, and Petitioner's court-authorized sur-reply, the Court concludes that Petitioner's objections (which the Court has reviewed *de novo*)<sup>1</sup> lack merit, except for the final objection concerning the denial of a COA.

1. Petitioner's first objection concerns the R&R's determination that he "has not shown the state court's decision was contrary to, or unreasonably applied, clearly established federal law." (Doc. 22 at 6-11.) In support of this objection, Petitioner reasserts the merits-based arguments he presented to Judge Morrissey; reasserts his contention that *May* was correctly decided; contends that the R&R improperly construed § 2254(d) as requiring him "to identify Supreme Court precedent that is factually identical to the current case," even though "the governing

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1. Respondents fault Petitioner for "repeat[ing] arguments from his Memorandum and Reply" and contend that "[s]uch general objections and repeated arguments are insufficient under Rule 72 and do not trigger the de novo review requirement." (Doc. 25 at 3.) In reply, Petitioner contends that "[a]ny general objections or duplication was included to avoid possible claims of waiver . . . [and] to put Petitioner's objections into context and to provide this Court with a more comprehensive introduction to this case. To the extent that they do not identify specific objections to the R&R, Petitioner submits that they may be viewed as surplusage and their inclusion should not detract from Petitioner's many specific objections." (Doc. 30 at 1.) The Court appreciates the clarification and confirms that it has reviewed *de novo* the five specific objections raised by Petitioner.

law does not have to be based on the same or similar facts”; contends that the R&R also “conflate[d]” the “distinct standards” set forth in § 2254(d); and contends that the R&R misconstrued *Smith v. United States*, 568 U.S. 106 (2013), and failed to analyze several of the Supreme Court cases he previously identified as supporting his position, including *Morissette v. United States*, 342 U.S. 246 (1952), *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), and *Staples v. United States*, 511 U.S. 600 (1994). (*Id.*)

In response, Respondents argue that the R&R applied the correct standard, did not overlook any relevant Supreme Court precedent, and properly addressed *May*. (Doc. 25 at 3-6.) In a footnote, Respondents add: “The offense of child molestation, which requires the State to simply prove the knowing touching of a child’s intimate areas notwithstanding a potentially innocent motive, is analogous to the offense of assault, which simply requires the State to prove reckless, knowing, or intentional injury of some kind notwithstanding a potentially innocent or even noble motive, e.g., a doctor performing lifesaving surgery on an unconscious individual. Accordingly, the offense does not inquire into an individual’s motivation for such contact.” (Doc. 25 at 5 n.1.)

In reply, Petitioner reiterates some of his earlier criticisms of the R&R’s reasoning, reiterates his arguments regarding the relevance of *Morissette*, questions Respondents’ analogy to the crime of assault, and argues that subsequent legislative developments further support his position. (Doc. 30 at 1-2, 6.)

Petitioner’s first objection is unavailing. In *Smith*, the Supreme Court articulated the relevant standard

for assessing the due process implications of placing the burden of proof on a criminal defendant to prove an affirmative defense:

While the Government must prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged, proof of the nonexistence of all affirmative defenses has never been constitutionally required. The State is foreclosed from shifting the burden of proof to the defendant only when an affirmative defense does negate an element of the crime. Where instead it excuses conduct that would otherwise be punishable, but does not controvert any of the elements of the offense itself, the Government has no constitutional duty to overcome the defense beyond a reasonable doubt.

*Smith*, 568 U.S. at 110 (cleaned up). In *Holle*—whose logic is relevant here because, as discussed in more detail below in relation to objection three, the Arizona Court of Appeals incorporated it by reference when rejecting Petitioner’s due process claim—the Arizona Supreme Court recognized that *Smith* provided the relevant standard for evaluating a due process challenge to Arizona’s then-applicable rule characterizing a lack of motivation by sexual interest as an affirmative defense to the crime of child molestation. *Holle*, 379 P.3d at 205. Thus, to the extent Petitioner’s argument is that the decision in his case was “contrary to . . . clearly established federal law,” that argument is easily rejected—the Arizona courts identified the correct legal standard established by the

United States Supreme Court. *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (“[A] state court decision is contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases or if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.”) (citations and internal quotation marks omitted).

Petitioner also contends that the Arizona courts applied the clearly established law in an unreasonable way, because “lack of sexual intent does not excuse conduct that would otherwise be punishable. . . . [B]athing or diapering a child is not wrongful and would not be punishable without sexual intent.” (Doc. 22 at 10-11.) This argument, which dovetails with Petitioner’s second objection (*id.* at 12-13), implicates the “unreasonable application” clause of § 2254(d)(1). *Lockyer*, 538 U.S. at 74 (“[U]nder the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.”) (citations omitted). As the Supreme Court has emphasized, “[t]he ‘unreasonable application’ clause requires the state court decision to be more than incorrect or erroneous. The state court’s application of clearly established law must be objectively unreasonable.” *Id.* at 75. *See also id.* at 75-76 (“It is not enough that a federal habeas court, in its independent review of the legal question, is left with a firm conviction that the state court was erroneous. . . . Rather, that application must be objectively unreasonable.”) (cleaned up).

In assessing whether *Holle*'s application of the *Smith* standard (including *Holle*'s determination that motivation by sexual interest is not an element of child molestation) was objectively unreasonable, it is helpful to begin by summarizing the relevant portions of the court's analysis. The court began by considering the historical development of Arizona's child molestation statute and by engaging in various forms of statutory interpretation, concluding based on that analysis that the intent of the Arizona legislature when enacting the then-current version of the child molestation statute was, indeed, to criminalize intentional and knowing "sexual contact" irrespective of whether the contact was motivated by sexual interest. 379 P.3d at 199-205. *See also id.* at 204 (discussing "the legislature's purposeful decision to make lack of sexual motivation an affirmative defense"). Next, the court explained that, as a separation-of-powers matter, it owed deference to the legislature's chosen approach, because "States have broad authority to define the elements of a crime" and "proscribing certain conduct and defining what constitutes a crime and any defense thereto are solely within the purview of the political branches of government, not the courts." *Id.* at 205-06. The court acknowledged that, as least as a "hypothetical" matter, the "absen[ce of] a sexual motivation element . . . [might] lead to absurd prosecutions," but it held that such hypothetical considerations did "not warrant ignoring the plain language of the subject statutes." *Id.* at 206. Finally, in light of these determinations, the court concluded that the legislature's chosen approach was not invalid as a matter of due process under the standard set forth in *Smith* and other Supreme Court decisions applying the same standard. *Id.* at 205-06.

Petitioner has not established that these conclusions were objectively unreasonable. Conspicuously absent from Petitioner’s briefing is any non-vacated decision by any court holding that sexual motivation is necessarily an element of the crime of child molestation and that a state legislature would violate the Fourteenth Amendment if it sought to define the crime in a different and more expansive manner. Although the absence of such authority is not dispositive,<sup>2</sup> it still counsels against finding that the Arizona courts’ conclusions on that topic were objectively unreasonable for AEPDA purposes. *Cf. Sansing v. Ryan*, 41 F.4th 1039, 1063-64 (9th Cir. 2022) (concluding that habeas petitioner’s contention “that the Arizona Supreme Court’s decision involved an unreasonable application of the Supreme Court’s Eighth Amendment precedent” was “precluded under 28 U.S.C. § 2254(d)(1)” in part because “to our knowledge, no court has adopted [Sansing’s proposed] interpretation of the Eighth Amendment”).

The Court acknowledges that Petitioner has identified, and the district court in *May* further identified, an array of intuitively appealing reasons why a state legislature might choose to define the crime of child molestation as requiring proof of sexual motivation. Nevertheless, the Arizona Supreme Court provided a thorough explanation—which included an exhaustive summary of the development of Arizona law and consideration of various techniques of

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2. *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (noting that “AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied” and does not “prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced”) (citations and internal quotation marks omitted).

statutory construction—in support of its conclusion that the Arizona legislature had chosen to follow a different approach and that the chosen approach did not violate the due process standard set forth in *Smith* and related cases. The Court cannot say that this analysis was objectively unreasonable in the manner than AEPDA requires, particularly in light of the leeway that state legislatures generally possess to define the conduct that is considered criminal under state law.

In a related vein, although the district court in *May* concluded in its since-vacated constitutional analysis that a 50-state survey (which showed that only one other state followed Arizona’s approach) was a sign of the constitutional infirmity of Arizona’s approach, *see May*, 245 F. Supp. 3d at 1160 & n.6, the Supreme Court has rejected similar arguments in other cases involving due process challenges to state-law affirmative defenses. *Martin v. Ohio*, 480 U.S. 228, 234-36 (1987) (upholding the Ohio courts’ determination that self-defense was an affirmative defense to the crime of aggravated murder, because this was “an interpretation of state law that we are not in a position to dispute,” and rejecting the defendant’s due process challenge to this approach, even though “all but two of the States, Ohio and South Carolina, have abandoned the common-law rule and require the prosecution to prove the absence of self-defense when it is properly raised by the defendant,” because “the question remains whether those States are in violation of the Constitution,” “that question is not answered by cataloging the practices of other States,” and “[w]e are no[t] convinced that the Ohio practice of requiring self-defense to be proved by the defendant is unconstitutional”). In the Court’s view, it is significant that *Holle* repeatedly cited

*Martin* as one of the cases supporting its rejection of the due process challenge. *Holle*, 379 P.3d at 205. Although Petitioner has identified reasons why he views *Martin* as distinguishable (Doc. 18 at 20), the fact that the Arizona Supreme Court was able to identify an arguably-analogous United States Supreme Court precedent supporting its decision is alone a reason to conclude that § 2254(d)'s very high bar has not been satisfied here. *Metrish v. Lancaster*, 569 U.S. 351, 357-58 (2013) (“This standard, we have explained, is difficult to meet: To obtain habeas corpus relief from a federal court, a state prisoner must show that the challenged state-court ruling rested on an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”) (cleaned up).

The Court does not mean to suggest that the leeway state legislatures possess when defining the contours of state-law crimes is unlimited. As Petitioner notes (and as the district court in *May* emphasized), the Supreme Court has repeatedly recognized that “constitutional limits exist to States’ authority to define away facts necessary to constitute a criminal offense.” *Apprendi v. New Jersey*, 530 U.S. 466, 486 (2000). *See also Patterson v. New York*, 432 U.S. 197, 202, 210 (1977) (noting that although “it is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,” “there are obviously constitutional limits beyond which the States may not go in this regard”) (citations and internal quotation marks omitted); *Schad v. Arizona*, 501 U.S. 624, 639 (1991) (“In the burden-shifting cases, . . . we have faced the difficulty of deciding, as an abstract matter, what elements an offense must comprise. Recognizing our inability to lay down any bright-line

test, we have stressed that . . . the state legislature’s definition of the elements of the offense is usually dispositive . . . although we recognize that . . . there are obviously constitutional limits beyond which the States may not go.”) (cleaned up). But these observations are pitched at too high of a level of generality to establish that the specific conclusion reached by the Arizona courts in this case—again, that the crime of child molestation does not inherently require proof of sexual motivation, and thus a state legislature may, consistent with due process, denominate the absence of sexual motivation as an affirmative defense for which the defendant bears the burden of proof—was not just incorrect, but objectively unreasonable. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) (“[E]valuating whether a rule application was unreasonable requires considering the rule’s specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.”); *Gibbs v. Covello*, 996 F.3d 596, 603 (9th Cir. 2021) (emphasizing that, under *Yarborough*, state courts have “even more latitude” to decline to find violations of “general” constitutional standards and rejecting habeas petitioners’ claim for relief, even though the merits of the constitutional claim presented a “close” call and “if we were answering [that] question de novo, we might not reach the same conclusion as the California Court of Appeal,” because “AEDPA’s deferential standard of review is particularly important in this case”) (citations omitted).

The other cases cited by Petitioner fail for similar reasons. In some, courts evaluated, under dissimilar circumstances, the due process implications of certain affirmative defenses to other crimes. *Mullaney v. Wilbur*, 421 U.S. 684, 687, 703 (1975) (invalidating, on due process

grounds, a provision of “Maine law requir[ing] a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter,” because “under Maine law malice aforethought was an essential element of the crime of murder” and the challenged requirement thus forced criminal defendants “to negate the element of malice aforethought”). In others, courts generally noted the necessity and importance of intent and scienter requirements. *See, e.g., Morissette v. United States*, 342 U.S. 246, 250 (1952) (emphasizing, in the context of a prosecution for conversion of government property where the defense was that the defendant believed the property had been abandoned, that “[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”).<sup>3</sup> Once again, such general observations fail to establish that the challenged decision here was not simply wrong, but an objectively unreasonable application of clearly established federal law.

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3. The Court notes that *Holle* did not purport to eliminate the requirement that the state prove the element of intent in a child molestation prosecution—it simply defined the required intent as the intent to engage in the challenged act of touching, irrespective of sexual motivation. *Holle*, 379 P.3d at 204 (“[V]iewing sexual motivation as an element of child molestation or sexual abuse would obligate the state to prove additional aspects of a defendant’s mental state beyond the mental states (‘intentionally or knowingly’) that are statutorily defined and expressly required.”). *See also id.* at 200-01 (“noting that “§§ 13–1404(A) and 13–1410(A) require the state to prove that the defendant ‘intentionally’ or ‘knowingly’ engaged in ‘sexual contact’ with certain aged children”).

Finally, although Petitioner places heavy emphasis on the fact that the Arizona legislature amended Arizona’s child molestation statutes in 2018 to eliminate the challenged features at issue in this case, the Court does not see how this development changes the § 2254(d) analysis. There is no evidence that the legislature made this decision because it belatedly came to recognize that “the long-standing Arizona rule” it was displacing, *May*, 807 F. App’x at 634, was somehow unconstitutional in light of the federal due process standards handed down by the United States Supreme Court. To the contrary, Plaintiff’s proffered evidence suggests, if anything, that the change was prompted by public policy considerations. (Doc. 22 at 23.) And even if the Arizona legislature had, in theory, been motivated to act based on constitutional concerns, this still would not demonstrate—for all of the reasons discussed in this order—that the Arizona courts’ contrary resolution of those constitutional concerns reflected an objectively unreasonable application of clearly established federal law.

2. Petitioner’s second objection is to the R&R’s determination that “it was not objectively unreasonable for the Arizona Court of Appeals to conclude that sexual intent is not an element of the crime of Arizona’s child molestation statutes and thus the affirmative defense did not negate any element of the offense.” (Doc. 22 at 12-13.) In response, Respondents contend that this objection is deficient under Rule 72 because it “contains no specific objections to the R&R.” (Doc. 25 at 6 n.2.) In reply, Petitioner disagrees and contends that his second objection was sufficient. (Doc. 30 at 3-4.)

Even assuming that Petitioner’s second objection was sufficient for Rule 72 purposes, and further assuming that this objection (to the extent it seeks to challenge the Arizona courts’ interpretation of state law) is properly raised in a habeas corpus proceeding, the Court concludes that it fails for the reasons described at length above in relation to Petitioner’s first objection.

3. Petitioner’s third objection is to the R&R’s “rejection of his claim that this Court should review *de novo* the molestation statutes because no state court reviewed Petitioner’s claim on the merits.” (Doc. 22 at 13-14.) More specifically, Petitioner argues that (1) Respondents’ counter-arguments on this point should have been deemed waived, because those counter-arguments were only raised in a footnote of their response to the petition; and (2) irrespective of waiver, the Arizona Court of Appeals’ cross-reference to *Holle* in his case was insufficient to qualify as a merits review because “the actual holding [of *Holle*] did not mention due process.” (*Id.*)

In response, Respondents argue that (1) “even were it possible for Respondents to ‘waive’ application of § 2254(d) by arguing the issue in a footnote—given that the state court’s merits decision is plain on the face of the record—no waiver occurred because Respondents did not passingly mention the issue in a footnote . . . [but] provided substantive argument”; and (2) “the court of appeals’ decision was on the merits” because it expressly rejected Petitioner’s due process argument based on *Holle*. (Doc. 25 at 6-8.) Additionally, Respondents argue that *Holle*’s due process discussion was not dicta. (*Id.*)

Petitioner's third objection lacks merit. Petitioner cites no authority in support of the proposition that a state can "waive" the application of § 2254(d) via an omission in a response to a habeas petition and Respondents took sufficient steps, at any rate, to raise the issue in their response to the petition. (Doc. 11 at 26 n.14.) On the merits, the Arizona Court of Appeals expressly noted, in its decision in Petitioner's case, that it was rejecting Petitioner's due process challenge for the reasons stated in *Holle. Bieganski*, 2019 WL 4159822 at \*2 ("Bieganski argues that the child molestation statutes violate due process because they shift the burden of proof to the defendant regarding the issue of sexual motivation. Our supreme court expressly rejected this argument in [*Holle*]. We are required to follow our supreme court's decisions. . . . Accordingly, no error occurred, and we will not reexamine our supreme court's decision in [*Holle*].") (citations omitted). This qualifies as adjudication on the merits in Petitioner's case, irrespective of whether *Holle's* earlier discussion might be characterized as dicta. *Echavarria v. Filson*, 896 F.3d 1118, 1129 (9th Cir. 2018) ("An adjudication on the merits is a decision finally resolving the parties' claims . . . that is based on the substance of the claim advanced. . . . [If] a state court gives an explicit explanation of its own decision, we take the state court at its word.") (cleaned up).

4. Petitioner's fourth objection is to the "the Magistrate's presumption that the state court's recounting of the facts is correct and recommendation that Petitioner has not shown that the Arizona Court of Appeals misconstrued or unreasonably determined the facts in light of the evidence presented in state court." (Doc. 22 at 14-20, capitalization omitted.) More specifically, Petitioner

first takes issue with the statement in the Arizona Court of Appeals' decision that he "did not provide a logical 'parental' explanation" for the assembly-line bathing practice, arguing that this factual determination was unreasonable because there was evidence that the practice was necessary to get the girls ready for church while Petitioner's wife was occupied with other matters. (*Id.* at 15-16.) Next, Petitioner takes issue with the statement that the genital contact "primarily" occurred during the bathing practice, arguing that "the only contact for which he was convicted involved the bathing practice." (*Id.* at 16.) In a related vein, Petitioner objects to the references in the R&R to the allegations of non-bath touching that were made by Y.L., arguing that those references should have been excluded because he was acquitted of the counts related to Y.L. (*Id.* at 16-17.) Next, Petitioner takes issue with the statement in the Arizona Court of Appeals' decision that "the girls were old enough to bathe themselves," arguing that this statement is belied by the record because many of the girls came from troubled backgrounds and some of the girls were referring to baths that occurred years before their interviews. (*Id.* at 17-19.) Next, Petitioner takes issue with the assertion that he initially "denied that the acts occurred," arguing that he was simply describing the bathing policy that was in effect at the time of the questioning (under which the girls were responsible for washing their own private parts) and not the previous bathing policy. (*Id.* at 19.) Finally, Petitioner takes issue with the assertion that he "never requested permission from any of the parents or guardians to participate personally in the bathing or manual genital washing of the girls, and never discussed the bathing practices the girls would be exposed to with him," arguing that this assertion is misleading because "none of the

children’s parents or the State of Arizona ever asked Petitioner about his hygiene plan for the girls in their care.” (*Id.* at 19-20.) Notably, Petitioner does not identify any specific legal conclusion in the R&R that was affected by these purported factual errors—instead, he simply contends, without elaboration, that these errors cause him to object to the R&R’s ultimate recommendation that his petition be denied and to the R&R’s recommendation that an evidentiary hearing be denied. (*Id.* at 21.)

In response, Respondents begin by noting that that, under AEPDA, factual determinations by the state court are presumed correct and Petitioner bears the burden of rebutting this presumption by clear and convincing evidence. (Doc. 25 at 8-9.) Given this standard, Respondents argue that all of Petitioner’s individual challenges fail. More specifically, as for the finding of “no logical parental explanation” for the assembly-line baths, Respondents argue this finding was reasonable in light of Petitioner’s wife’s testimony that she provided the girls with rags and soap and directed them to clean themselves. (*Id.* at 9-10.) As for the references to Y.L., Respondents argue they were appropriate because they were simply provided for the purpose of fully summarizing the allegations against Petitioner and note that both the appellate decision and the R&R clarify that Petitioner was acquitted of those particular charges. (*Id.* at 10-11.) As for the assertion that Petitioner denied ever touching the girls, Respondents argue it was a reasonable interpretation of the facts in light of Petitioner’s unqualified denials that he had ever touched certain girls’ private parts. (*Id.* at 11.) Finally, as for the assertion regarding the lack of permission from the girls’ parents, Respondents note that Petitioner does not deny the literal accuracy of this assertion: “[T]he fact

that he was not asked about his bathing practices does not disprove the court's statement that he never disclosed them to the girls' parents or guardians." (*Id.* at 11-12.)

In reply, Petitioner does not address many of Respondents' arguments. (Doc. 30 at 4-5.) He does, however, note that he provided an explanation for his practice of bare-handed bathing (*i.e.*, fear of bacteria) and suggests that he "denied *inappropriately* touching anyone" during the challenged statements to his wife and law enforcement. (*Id.*, emphasis added.)

Petitioner's fourth objection lacks merit. First, the Court agrees with all of Respondents' arguments as to why Petitioner has failed to meet his heavy burden of demonstrating that the challenged factual determinations were unreasonable. In some cases, Petitioner does not even dispute that the accuracy of the challenged statements—he simply attempts to provide a benign explanation for them. Second, and separately, Petitioner fails to explain why, even if the Court were to conclude that one or more of the challenged factual statements was unreasonably inaccurate, such a determination would entitle him to habeas relief.

5. Petitioner's final objection is to the R&R's recommendation that a COA and leave to appeal *in forma pauperis* be denied. (Doc. 22 at 20-24.) Petitioner contends that he has satisfied the "modest" and "relatively low" standard for the issuance of these forms of relief because "[j]urists of reason could debate each and every issue presented by this habeas petition. Indeed, a number of prominent jurists—including a member of this Court, a member of a Ninth Circuit panel, members

of the Arizona Supreme Court, as well as members of the Arizona Court of Appeals—have all called into question the constitutionality of Arizona’s burden-shifting scheme at issue in this case.” (*Id.* at 21.) Petitioner also contends that he has made the necessary showing with respect to his various factual and other challenges to the as-applied ruling. (*Id.* at 24.)

In response, Respondents argue that a COA should be denied because “the question is not whether jurists would debate the constitutionality of the statute, but whether they would debate that the state court’s findings were not contrary to clearly established federal law or that any facts were unreasonable. No clearly established federal law held that Arizona’s statute was unconstitutional. Nor could reasonable jurists disagree with the R&R’s conclusion that the court of appeals’ rejection of [Petitioner’s] as-applied challenge was not based on an unreasonable determination of the facts in light of the evidence presented in the trial court.” (Doc. 25 at 12-13.)

In reply, Petitioner argues that Respondents’ opposition to his COA request is based on the false premise that “the specific law being challenged [has] to be identical to prior Supreme Court precedent,” when in fact “the Supreme Court’s principles cited by Petitioner, and addressed [in *May*], are fundamental and provide the controlling legal standard regarding element-defining and burden-shifting.” (Doc. 30 at 4-5.)

The Court concludes that Plaintiff’s request for a COA should be granted as to his due process challenge (but not as to any of his other challenges, including his as-applied

and factual challenges). A COA “may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must show that “jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). “[T]his amounts to a modest standard . . . [and] we must be careful to avoid conflating the standard for gaining permission to appeal with the standard for obtaining a writ of habeas corpus.” *Silva v. Woodford*, 279 F.3d 825, 832-33 (9th Cir. 2002) (cleaned up). Here, even though the Court has found that Petitioner is not entitled to habeas relief on any of his claims, the Court also recognizes the possibility that other judges could conclude that the issues presented in relation to the due process claim are adequate to deserve encouragement to proceed further.

Finally, to the extent Petitioner requests leave to proceed *in forma pauperis* on appeal, that request is denied. Petitioner did not proceed *in forma pauperis* during these proceedings, paid the filing fee, and is represented by counsel. (Doc. 3 at 1; Doc. 6.) Additionally, Petitioner has never submitted a financial affidavit. Petitioner offers no reasoned argument why *in forma pauperis status* should be allowed on appeal under these circumstances. *Cf.* 28 U.S.C. § 1915(a)(1) (“[A]ny court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such

prisoner possesses that the person is unable to pay such fees or give security therefor.”).

Accordingly,

**IT IS ORDERED** that:

1. Petitioner’s objections to the R&R (Doc. 22) are **overruled**, except as to the issuance of a certificate of appealability (“COA”) concerning Petitioner’s due process claim.

2. The R&R (Doc. 19) is **accepted**, except as to the denial of a COA concerning Petitioner’s due process claim.

3. The petition (Doc. 1) is **denied and dismissed with prejudice**.

4. A COA is **granted** as to Petitioner’s due process claim but **denied** as to any other claim, including Petitioner’s as-applied and factual challenges. Additionally, leave to proceed *in forma pauperis* on appeal is **denied**.

5. The Clerk shall enter judgment accordingly and terminate this action.

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**APPENDIX C**

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UNITED STATES DISTRICT COURT,  
D. ARIZONA

No. CV-21-01684-PHX-DWL (MTM)

BRADLEY BIEGANSKI,

*Petitioner,*

v.

DAVID SHINN, *et al.*,

*Respondents.*

Signed November 10, 2022

|  
Filed November 14, 2022

**REPORT AND RECOMMENDATION**

Michael T. Morrissey, United States Magistrate Judge

TO THE HONORABLE DOMINIC W. LANZA,  
UNITED STATES DISTRICT JUDGE:

Petitioner Bradley Bieganski filed a petition for a writ  
of habeas corpus pursuant to 28 U.S.C. § 2254. Doc. 1.

## I. SUMMARY OF CONCLUSION

Petitioner was convicted at trial of three counts of child molestation. Petitioner argues Arizona's child molestation statutes deprived him of due process by shifting the burden of proof to the accused to prove a lack of sexual interest. Petitioner is not entitled to relief because he has not shown the state court's decision was contrary to, or unreasonably applied, clearly established federal law. Accordingly, this Court recommends the petition be denied and dismissed with prejudice.

## II. BACKGROUND

### A. Conviction and Sentencing

In 2013 Petitioner was charged with child molestation. Doc. 1-4 at 2. The Arizona Court of Appeals summarized the underlying facts of Petitioner's offense as follows<sup>1</sup>:

¶2 From 2011 until his arrest in 2013, Bieganski operated a girls-only private Christian home-school called Kingdom Flight along with his wife and son. The arrest occurred after three girls attending Kingdom Flight (A.G., Y.L., and J.C.) accused Bieganski of touching their genitals when the victims were between the ages of 6 and 9. The genital contact primarily occurred during a Sunday morning bathing practice that Bieganski referred to as an "assembly line" in which he would hurriedly bathe six to eight Kingdom Flight girls in pairs within 30 minutes before departing for a church service.

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1. The Court presumes the state court's recounting of the facts is correct. 28 U.S.C. § 2254(e)(1).

¶3 The genital contact involved Bieganski touching and manually washing the girls' vaginas with his bare hand. In addition to the genital contact that occurred during the "assembly line" baths, Y.L. also accused Bieganski of touching her genitals on two other occasions: once when she was getting dressed after swimming and another time when she was in the Kingdom Flight girls' room.

Doc. 1-4 at 2-3.

Petitioner's first trial ended in a mistrial. Doc. 1-4 at 3. Before Petitioner's second trial, the Arizona Supreme Court held in *State v. Holle* that lack of motivation by sexual interest is an affirmative defense to a child molestation charge that a defendant must prove by a preponderance of the evidence and accordingly that A.R.S. §§ 13-1401, -1410, and -1407(E) ("child molestation statutes") do not offend due process. 240 Ariz. 300, 301 (2016). Petitioner moved to dismiss the charges, asserting that the child molestation statutes unconstitutionally shifted the burden to Petitioner to prove lack of sexual intent. Doc. 1-8. Relying on *Holle*, 240 Ariz. at 301, the trial court denied the motion. Doc. 1-9.

At his second trial, Petitioner testified and raised the affirmative defense of lack of sexual interest. Doc. 1-4 at 3. He admitted that he washed the girls' genitals with soap and his bare hand but denied he had any sexual interest in doing so. Doc. 1-4 at 3. The court instructed the jury that the defendant must prove lack of sexual interest by a preponderance of the evidence. Doc. 1-4 at 4. The jury convicted Petitioner of three counts of child molestation

involving victims A.G. and J.C. and returned not guilty verdicts for the charges involving Y.L. Doc. 1-4 at 3. Petitioner was sentenced to concurrent 17-year prison terms, followed by another 17-year term, for a total of 34 years. Doc. 1-4 at 3.

### **B. Direct Appeal**

On direct appeal, Petitioner asserted (1) a Fourteenth Amendment due process violation because Arizona's child molestation statutes shifted the burden of proof to the defendant to disprove the implicit "sexual motivation" element of the offense, and (2) the child molestation statutes were unconstitutional "as applied" to Petitioner. Doc. 1-2 at 46-56. As to the burden-shifting argument, the Arizona Court of Appeals held "[o]ur supreme court expressly rejected this argument" in *Holle*, and because the court was required to follow the state supreme court's decisions, no error occurred. Doc. 1-4 at 4. The court also rejected Petitioner's "as applied" challenge, holding "the discussion in [*Holle*] concerning the possibility of an 'as applied' constitutional challenge for a parent performing a caregiving task such as changing diapers . . . occurred in a theoretical context and was not involved in the holding." Doc. 1-4 at 6. Further, the court found the hypothetical legitimate parental exception did not apply because Petitioner's actions "were 'clearly inappropriate,' [and] they could not be construed as parenting or caregiving in any manner." Doc. 1-4 at 6. The court affirmed Petitioner's convictions and sentences. Doc. 1-4 at 9. The Arizona Supreme Court denied Petitioner's petition for review. Doc. 1-6. Petitioner's petition for writ of certiorari was denied on October 5, 2020. Doc. 1-7.

### III. ANALYSIS

Petitioner timely filed a petition for writ of habeas corpus on September 30, 2021. Doc. 1. As stated in this Court's Order:

Petitioner raises one ground for relief, alleging that the statute under which he was convicted violates his due process rights because it improperly shifts the burden on an element of the offense from the prosecution to the accused. Citing *May v. Ryan*, 245 F.Supp.3d 1145 (D. Ariz. 2017), rev'd, 807 F.App'x 632 (9th Cir. 2020), Petitioner notes that this Court has previously found the statute to be unconstitutional, and that the State Legislature amended the statute *after* Petitioner had been convicted and incarcerated to remove the offending clause and clarify the law. (Doc. 1-10 at 7-9).

Doc. 3 at 1. Respondents filed an answer on January 24, 2022 (doc. 11), and Petitioner filed his Reply on May 13, 2022. Doc. 18.

#### A. Standard of Review

Federal habeas claims are governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides that a habeas petition on behalf of a person in state custody shall not be granted with respect to any claim that was "adjudicated on the merits" unless the state court's decision was (1) contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme

Court, or (2) based on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d); *see Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). The AEDPA “reflects the view that habeas corpus is a ‘guard against extreme malfunctions in the state criminal justice systems,’ not a substitute for ordinary error correction through appeal.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)).

Petitioner argues this Court should review de novo the constitutionality of the child molestation statutes because no state court reviewed his claim on the merits. Doc. 1-10 at 33-34. This assertion is without merit because the Arizona Court of Appeals addressed Petitioner’s due process claim and denied relief, holding the Arizona Supreme Court rejected his argument in *Holle*, 240 Ariz. at 308, ¶ 40. Doc. 1-4 at 4. If a state court denied relief on a federal claim, “it may be presumed that the state court adjudicated the claim on the merits,” and this would be true even if the Arizona Court of Appeals decision had been “unaccompanied by an opinion explaining the reasons relief has been denied.” *See Harrington*, 562 U.S. at 99-100. Petitioner’s claim was adjudicated on the merits.

Petitioner’s cites *Lemke v. Ryan*, 719 F.3d 1093, 1097 (9th Cir. 2013), but that case is distinguishable. In *Lemke*, the Ninth Circuit applied de novo review to a waiver issue where the state court did not consider whether the petitioner waived his double jeopardy claim as a substantive matter in his plea agreement and addressed only whether double jeopardy or collateral estoppel barred the petitioner’s retrial. 719 F.3d at 1097, 1099-

1105. By contrast, the Arizona Court of Appeals expressly addressed Petitioner’s claim. In addition, Petitioner’s assertion that the Arizona Supreme Court’s due process holding in *Holle* was merely dicta is not correct. *See Holle*, 240 Ariz. at 301, ¶ 1 (“We hold that lack of [sexual] motivation is an affirmative defense that a defendant must prove.”).

Accordingly, on habeas review, Petitioner must demonstrate the state court’s order was contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). This Court must ask “what arguments or theories supported . . . the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the United States Supreme Court].” *Harrington*, 562 U.S. at 102.

Determining whether there exists “clearly established” United States Supreme Court precedent is a threshold issue that this Court must decide before reaching the question of whether the state court’s decision was contrary to, or unreasonably applied, such precedent. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003); *see also Wright v. Van Patten*, 552 U.S. 120 (2008) (“Because [United States Supreme Court] cases give no clear answer to the question presented, let alone one in [Petitioner’s] favor, it cannot be said that the state court unreasonably applied clearly established Federal law.”) (citation and internal question marks omitted). “[C]learly established Federal law” in § 2254(d)(1) “refers to the holdings, as opposed to the dicta, of this Court’s decisions as of the time of the relevant

state-court decision.” *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

The “unreasonable application” clause requires the petitioner to show the state court decision was “more than incorrect or erroneous.” *Lockyer*, 538 U.S. at 75 (citing *Williams*, 529 U.S. at 413). “The state court’s application of clearly established law must be objectively unreasonable.” *Id.* (citing *Williams*, 529 U.S. at 409). A determination is not objectively unreasonable so long as “fairminded jurists could disagree” on the correctness of the state court’s decision. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). “Evaluating whether a rule application was unreasonable requires considering the rule’s specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.” *Id.* “[E]ven a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Harrington*, 562 U.S. at 102 (citing *Lockyer*, 538 U.S. at 75).

**B. Petitioner Has Not Shown the Arizona Court of Appeals Unreasonably Applied Clearly Established Federal Law**

Petitioner argues that because motivation by sexual interest is an essential, implied element of the crime of child molestation, Arizona’s child molestation statutes violated due process by shifting to the defendant the burden to prove lack of sexual interest. Doc. 1-10 at 27-29.

Here, the relevant statute provided, “[a] person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage

in sexual contact, except sexual contact with the female breast, with a child who is under fifteen years of age.” A.R.S. § 13-1410(A). “ ‘Sexual contact’ 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.” A.R.S. § 13-1401(A)(3).

At the time of Petitioner’s trial, Arizona law also provided that “[i]t is a defense to a prosecution pursuant to § 13-1404 or 13-1410 that the defendant was not motivated by a sexual interest.”<sup>2</sup> A.R.S. § 13-1407(E); *see Holle*, 240 Ariz. at 301 (holding the defendant must prove such affirmative defense by a preponderance of the evidence); *see also* A.R.S. § 13-205(A) (“Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence.”).

Petitioner cites *May v. Ryan*, 245 F.Supp.3d 1145, 1164-71 (D. Ariz. 2017), in which the District Court held that the child molestation statutes’ burden-shifting to the defendant to show a lack of sexual intent “violates the Fourteenth Amendment’s guarantees of due process and of proof of guilt beyond a reasonable doubt” and May’s

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2. In 2018, after Petitioner’s conviction, the Arizona legislature amended the child molestation statutes to remove A.R.S. § 13-1407(E), the subsection establishing the affirmative defense, and to further define “sexual contact” such that it “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.” A.R.S. § 13-1401(A)(3)(b); *see also* 2018 Ariz. Legis. Serv. Ch. 266 (H.B. 2283) (West).

counsel was thus ineffective for not raising the burden-shifting issue.

Petitioner's assertion that this Court may grant habeas relief based on *May*, 245 F.Supp.3d at 1164, is unpersuasive because the Ninth Circuit reversed *May* and held the petitioner received effective counsel "[g]iven the long-standing Arizona rule that the State is not required to prove sexual intent to successfully prosecute a defendant for child molestation . . . which provided the background for the 'prevailing professional practice at the time of the trial.'" *May v. Ryan*, 807 Fed. Appx. 632, 634-35 (9th Cir. 2020) (citation omitted) (quoting *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009)). The Ninth Circuit did not reach the constitutionality of the Arizona child molestation statute and thus vacated the district court's judgment in that respect. *Id.* (citations omitted). Notably, after the Ninth Circuit reversed *May v. Ryan*, no habeas petitioner has been granted relief on the theories Petitioner advances here. *See, e.g., Wentworth v. Ryan*, No. CV-19-01551-PHX-JJT-MHB, 2020 WL 7246436 (D. Ariz. Dec. 9, 2020) (declining to grant habeas relief because, after the Ninth Circuit's decision in *May*, the constitutionality of Arizona's child molestation statutes is "clearly settled" and the petitioner also did not show prejudice because his actions were clearly inappropriate); *Gonzales v. Shinn*, No. CV-18-01907-PHX-ROS, 2020 WL 6081497, at \*8 (D. Ariz. Oct. 15, 2020) (holding the Arizona Court of Appeals did not unreasonably apply United States Supreme Court authority when it declined to instruct the jury that sexual interest was an essential element of child molestation).

Petitioner has likewise failed to show the Arizona Court of Appeals unreasonably applied clearly established

United States Supreme Court precedent. In denying Petitioner's due process claim, the Arizona Court of Appeals followed *Holle*, 240 Ariz. at 305-09, in which the Arizona Supreme Court held it does not offend due process to allocate the burden of proof to the defendant to prove the defense of lack of sexual intent because the state need not prove sexual intent as an element of that offense.

That conclusion is not an unreasonable application of United States Supreme Court precedent. The state must prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. 358, 364 (1970). The state is not constitutionally required to prove "the nonexistence of all affirmative defenses," but there are constitutional limits on the power of state legislatures to "reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes." *Patterson v. New York*, 432 U.S. 197, 210-11 (1977). "The State is foreclosed from shifting the burden of proof to the defendant only when an affirmative defense . . . negate[s] an element of the crime. Where instead it excuse[s] conduct that would otherwise be punishable, but does not controvert any of the elements of the offense itself, the Government has no constitutional duty to overcome the defense beyond a reasonable doubt." *Smith v. United States*, 568 U.S. 106, 110 (2013) (quotation marks and citations omitted).

In *Smith*, the Supreme Court held that the defense of withdrawal from a conspiracy does not negate an element of the conspiracy charge, because "[f]ar from contradicting an element of the offense, withdrawal presupposes that the defendant committed the offense." *Id.* at 111; *see also*

*Patterson*, 432 U.S. at 201-02 (same for defense of extreme emotional disturbance); *Martin v. Ohio*, 480 U.S. 228, 234-37 (1987) (self-defense to aggravated murder); *Dixon v. United States*, 548 U.S. 1, 6-7 (2006) (same for necessity defense, explaining necessity does not negate the *mens rea* of “knowingly”).

In contrast, in *Mullaney v. Wilbur*, 421 U.S. 684, 686-87 (1975), the Supreme Court held a defendant was deprived of due process in bearing the burden to prove the heat-of-passion defense, where “malice aforethought” was an element of the murder statute and the trial court instructed the jury “malice aforethought and heat of passion on sudden provocation are two inconsistent things; thus, by proving the latter the defendant *would negate* the former.” (Emphasis added.)

The Arizona Court of Appeals relied upon *Holle*, 240 Ariz. at 303-04, in denying Petitioner’s due process claim. In *Holle* the Arizona Supreme Court held that the language of the child molestation statutes does not require the state to prove sexual interest. The *Holle* Court declined to find a sexual interest element was implied by the statutory history and case law interpreting prior versions of the statute. *Id.* at 305. The court referenced the 1965 child molestation statute, which provided that a person “who molests a child under the age of fifteen years by fondling, playing with, or touching the private parts of such child or who causes a child under the age of fifteen years to fondle, play with, or touch the private parts of such person shall be guilty of a felony.” *Id.* (quoting former A.R.S. § 13-653). The court at the time read a sexual intent element into that statute. *See State v. Berry*, 101 Ariz. 310, 313 (1966) (holding that “from both the word ‘molest’

itself and the general intent of the Legislature as may be grasped from a reading of the statute as a whole,” and lack of express intent element, a scienter requirement of motivation by sexual interest is apparent). However, the *Holle* Court reasoned that the modern statute no longer required sexual intent be proven, as the 1983 enactment of A.R.S. § 13-1407(E) established the affirmative defense, and a later statutory enactment removed the word “molest” and further defined sexual contact while adding the scienter of intentionally or knowingly. 240 Ariz. at 306-07. The *Holle* court concluded that with the inclusion of a scienter element and other changes to the statutory scheme, it was evident that the Arizona legislature did not intend to require proof of sexual interest as an element of the offense. *Id.*

In support of his argument sexual intent is an inherent element, Petitioner cites Arizona’s 1913 child molestation law, which required the state to prove the prohibited acts were committed “with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires of such person or of such child,” Doc. 1-10 at 23 (quoting Rev. Stat. of Ariz. (Penal Code) § 282 (1913)), and the discussion in *May v. Ryan*, stating “sexual intent has always been essential to the crime of child molestation.” 245 F.Supp.3d at 1160. Petitioner asserts that the element of sexual interest is required by the very fact the child molestation statute would be unconstitutional without it, because sexual interest is the only element rendering child molestation unlawful. Doc. 1-10 at 26, 32 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994)) (holding the scienter requirement must apply to the “crucial element separation legal innocence from wrongful conduct”). This Court is not persuaded by this

argument. As the Arizona Supreme Court noted in *Holle*, the statute requires proof the defendant acted “knowingly or intentionally.” 240 Ariz. at 303 (citing A.R.S. § 13-1410(A)). Petitioner fails to cite United States Supreme Court precedent indicating that due process requires a state to include an element of motivation by sexual interest in child molestation statutes. Indeed, the United States Supreme Court has given states wide latitude to define offenses including the required scienter. *See Martin*, 480 U.S. at 232-33 (noting states have broad authority to define the elements of a crime and there is no constitutional requirement to have “criminal” intent as an element); *Lambert v. California*, 355 U.S. 225, 228 (1957) (holding a “vicious will” is not necessary for conduct to constitute a crime, “for conduct alone without regard to the intent of the doer is often sufficient. There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition”).

Under these circumstances, it was not objectively unreasonable for the Arizona Court of Appeals to conclude that sexual intent is not an element of the crime of Arizona’s child molestation statutes and thus the affirmative defense did not negate any element of the offense. *See May*, 807 Fed. Appx. at 634-35 (citing “the long-standing Arizona rule that the State is not required to prove sexual intent to successfully prosecute a defendant for child molestation”); *Smith*, 568 U.S. at 110 (holding due process is violated only where an affirmative defense negates an element of the offense). In Arizona, sexual intent has not been an express element of the crimes since the 1913 child molestation statute. Moreover, even if Arizona courts read such a requirement into the 1965 statute, the 1993 enactment unequivocally established the required scienter

is “intentionally or knowingly,” and not motivation by sexual interest. *See* 1993 Ariz. Sess. Laws, ch. 255 § 29. Arizona courts did not interpret the 1993 enactment as requiring the State to prove a sexual interest element. *See State v. Sanderson*, 182 Ariz. 534, 542 (Ct. App. 1995) (“[P]roving the existence of such motivation [by sexual interest] was not necessary to establish guilt of child molestation under the [child molestation] statute at issue.”). To warrant habeas relief, Petitioner would have to show that the state court’s determination that the statute lacked a sexual motivation element was unreasonable “beyond any possibility for fairminded disagreement.” *Harrington*, 562 U.S. at 102-03. On this record, Petitioner has not done so.

Moreover, Petitioner fails to cite any case from the United States Supreme Court that a state violates due process by shifting the burden to the defendant on an “inherent” element derived from older iterations of a statute or general notions of what separates innocent conduct from criminal conduct. Petitioner cites *Mullaney*, but in that case, the affirmative defense negated an *express* element of malice aforethought. 421 U.S. at 686-87. This Court cannot conclude the Arizona Court of Appeals unreasonably applied a rule that has not been clearly established. *See Harrington*, 562 U.S. at 101 (“It is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.”).

Petitioner thus has not shown the Arizona Court of Appeals unreasonably applied any clearly established United States Supreme Court precedent in denying his due process challenge to the child molestation statutes under which he was convicted.

### C. Petitioner's "As-Applied" Challenge

Petitioner argues the Arizona Court of Appeals' finding that the evidence supports Petitioner's conviction and that his acts maintain no reasonable connection to a hypothetical legitimate parental exception is "fatally flawed and an unreasonable determination of the facts." Doc. 1-10 at 37. The Arizona Court of Appeals summarized the evidence as follows:

¶14 The evidence, including Bieganski's testimony and admissions, established that Bieganski performed the barehanded washing of each minor victim's genitals with no other adult present during a rushed Sunday morning bathing "assembly line" practice for which he did not provide a logical "parental" explanation. He conducted these washing practices even though the girls were old enough to bathe themselves. Bieganski never requested permission from any of the parents or guardians to participate personally in the bathing or manual genital washing of the girls, and never discussed the bathing practices the girls would be exposed to with him. Bieganski's wife helped provide care for the girls but did not wash the girls' genitals and was not involved in the "assembly line." She provided each girl with a washrag and soap and directed them to clean themselves. Although Bieganski later admitted to the jury that he performed the "washing" acts, when interviewed by law enforcement on the day of his arrest, he denied that the acts occurred, both to the officers and his wife during a phone call.

Doc. 1-4 at 6-7. The court also noted that Petitioner testified he used the bathing practice to save time, to conserve soap

and because he viewed washcloths as “bacteria traps,” but he did not explain why he did not bathe the girls the night before church, shorten his morning routine or attend a later service. Doc. 1-4 at 7.

On these facts, it was not an unreasonable conclusion to determine Petitioner’s actions were not legitimate parental duties. Petitioner argues only that the Arizona Court of Appeals stated the abuse happened “primarily” during the Sunday morning bathing routine, where Petitioner asserts that was the *only* time. Doc. 1-10 at 38. Petitioner does not show the court reached its conclusion based on more instances of abuse than were proven, however, or otherwise misinterpreted the facts. Accordingly, as Petitioner has not shown that the Arizona Court of Appeals misconstrued or unreasonably determined the facts in light of the evidence presented in state court, this Court recommends the petition be denied and dismissed with prejudice.

#### IV. CONCLUSION

The Court concludes that Petitioner has not shown the Arizona Court of Appeals decision was contrary to or unreasonably applied clearly established federal law or unreasonably determined the facts. The record is sufficiently developed, and the Court finds an evidentiary hearing is unnecessary for resolving this matter. *See Rhoades v. Henry*, 638 F.3d 1027, 1041 (9th Cir. 2011). Accordingly,

**IT IS RECOMMENDED** the Petition (doc. 1) be **denied and dismissed with prejudice.**

**IT IS FURTHER RECOMMENDED** a certificate of appealability and leave to proceed *in forma pauperis* on appeal be **denied**. Petitioner has not demonstrated reasonable jurists could find the ruling debatable or jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

This Report and Recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal under Federal Rule of Appellate Procedure 4(a)(1) should not be filed until entry of the District Court's judgment. The parties have fourteen days from the date of service of this Report and Recommendation's copy to file specific, written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(b) and 72. Thereafter, the parties have fourteen days to respond to the objections. Failure to timely object to the Magistrate Judge's Report and Recommendation may result in the District Court's acceptance of the Report and Recommendation without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure to timely object to any factual determinations of the Magistrate Judge may be considered a waiver of a party's right to appellate review of the findings of fact in an order of judgment entered pursuant to the Magistrate Judge's Report and Recommendation. *See* Fed. R. Civ. P. 72.

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**APPENDIX D**

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COURT OF APPEALS OF ARIZONA, DIVISION 1

STATE OF ARIZONA,

*Appellee,*

v.

BRADLEY BIEGANSKI,

*Appellant.*

No. 1 CA-CR 18-0093

FILED 9-3-2019

Review Denied March 31, 2020

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Maria Elena Cruz joined.

**MEMORANDUM DECISION**

McMURDIE, Judge:

¶1 Bradley Bieganski appeals his convictions and sentences for three counts of child molestation. Relying on *May v. Ryan*, 245 F. Supp. 3d 1145 (D. Ariz. 2017),

*affirmed in part, vacated in part*, 76 Fed. Appx. 505, 506–07 (9th Cir. 2019), Bieganski contends that Arizona Revised Statutes (“A.R.S.”) sections 13-1401, -1410, and -1407(E) (collectively, “child molestation statutes”) were unconstitutional<sup>1</sup> and urges us to reconsider our supreme court’s decision in *State v. Holle* (“*Holle II*”), 240 Ariz. 300 (2016). Bieganski further asserts that the superior court erred when it denied his motion for a new trial. For the reasons that follow, we affirm.

## FACTS AND PROCEDURAL BACKGROUND<sup>2</sup>

¶2 From 2011 until his arrest in 2013, Bieganski operated a girls-only private Christian home-school called Kingdom Flight along with his wife and son. The arrest occurred after three girls attending Kingdom Flight

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1. The legislature recently amended the child molestation statutes. *See* H.B. 2283, 2018 Ariz. Sess. Laws, Ch. 266, §§ 1–3 (2d Reg. Sess.) (effective August 3, 2018). The amendment eliminated the affirmative defense of lack of sexual motivation in former A.R.S. § 13-1407(E). *Id.* § 2. The Legislature also included a definition of “[s]exual contact” in A.R.S. § 13-1401(A)(3)(b) that sexual contact “[d]oes 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.” *Id.* § 1. When referring to the child molestation statutes, we refer to them as they existed at the relevant time of the offenses.

2. We view the facts in the light most favorable to upholding the verdict and resolve all reasonable inferences against Bieganski. *State v. Harm*, 236 Ariz. 402, 404, ¶ 2, n.2 (App. 2015) (citing *State v. Valencia*, 186 Ariz. 493, 495 (App. 1996)).

(A.G., Y.L., and J.C.) accused Bieganski of touching their genitals when the victims were between the ages of 6 and 9. The genital contact primarily occurred during a Sunday morning bathing practice that Bieganski referred to as an “assembly line” in which he would hurriedly bathe six to eight Kingdom Flight girls in pairs within 30 minutes before departing for a church service.

¶13 The genital contact involved Bieganski touching and manually washing the girls’ vaginas with his bare hand. In addition to the genital contact that occurred during the “assembly line” baths, Y.L. also accused Bieganski of touching her genitals on two other occasions: once when she was getting dressed after swimming and another time when she was in the Kingdom Flight girls’ room.

¶14 Bieganski admitted at trial that he washed the girls’ genitals with his bare hand during the Sunday baths, but under the affirmative defense provided by A.R.S. § 13-1407(E), asserted he was not motivated by a sexual interest. In a third indictment<sup>3</sup> resulting from the investigation of Bieganski, the grand jury charged him with seven counts of child molestation, class 2 felonies and dangerous crimes against children, and two counts of continuous sexual abuse of a minor, class 2 felonies and dangerous crimes against children.

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3. The first grand jury charged Bieganski with three counts of child molestation, class 2 felonies, each pertaining to one of the three victims. A second indictment followed and was consolidated with the first. A jury trial proceeded on the consolidated indictment but ended in a mistrial. The third indictment issued before the retrial.

¶5 At the conclusion of the State’s case, the court granted Bieganski’s motion for a judgment of acquittal regarding the continuous sexual abuse of a minor charges, and the State’s motion to dismiss one of the child molestation charges involving J.C. The jury then convicted Bieganski of three counts of child molestation involving victims A.G. and J.C. but returned not guilty verdicts for the charges involving Y.L. Pursuant to A.R.S. § 13-705(M), the court sentenced Bieganski to two consecutive terms of 17 years’ imprisonment, with 1576 days’ presentence incarceration credit given to the first 17-year term. *See State v. Jackson*, 170 Ariz. 89, 94 (App. 1991) (presentence incarceration credit is applied only to one of the defendant’s sentences if consecutive sentences are imposed). Bieganski timely appealed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1).

## DISCUSSION

### **A. The Child Molestation Statutes Did Not Violate Due Process by Shifting the Burden of Proof to Bieganski.**

¶6 Relying on the federal district court’s rationale in *May*, Bieganski argues that the child molestation statutes violate due process because they shift the burden of proof to the defendant regarding the issue of sexual motivation.<sup>4</sup>

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4. In relevant part, former A.R.S. § 13-1407(E) provided: “It is a defense to a prosecution pursuant to § 13-1404 or 13-1410 that the defendant was not motivated by a sexual interest.” The superior court correctly instructed the jury regarding the affirmative defense that “[t]he defendant must prove ... lack of sexual interest by a preponderance of the evidence.”

245 F. Supp. 3d at 1164 (“[T]he burden-shifting scheme of Arizona’s child molestation law ... violates due process ...”). Our supreme court expressly rejected this argument in *Holle II*, 240 Ariz. at 308, ¶ 40 (“Treating lack of sexual motivation under [A.R.S.] § 13-1407(E) as an affirmative defense which a defendant must prove does not offend due process.”).

¶7 We are required to follow our supreme court’s decisions. *State v. Smyers*, 207 Ariz. 314, 318, ¶ 15, n.4 (2004) (“The courts of this state are bound by the decisions of [our supreme] court and do not have the authority to modify or disregard [its] rulings.”). While we consider the opinions of the lower federal courts regarding the interpretation of the Constitution, such authority is not controlling on Arizona courts. *State v. Montano*, 206 Ariz. 296, 297, ¶ 1, n.1 (2003) (“We are not bound by the Ninth Circuit’s interpretation of what the Constitution requires.”); *State v. Vickers*, 159 Ariz. 532, 543, n.2 (1989) (declining to follow a Ninth Circuit decision which held Arizona’s death penalty statute unconstitutional because that decision rested on “grounds on which different courts may reasonably hold differing views of what the Constitution requires”); *State v. Chavez*, 243 Ariz. 313, 314, ¶ 4, n.2, 318–19, ¶ 17 (App. 2017) (declining to follow district court decision that disagreed with Arizona Supreme Court authority). Accordingly, no error occurred, and we will not reexamine our supreme court’s decision in *Holle II*.

**B. The Child Molestation Statutes Did Not Violate Bieganski’s “Right to Remain Silent.”**

¶8 Bieganski next argues that the child molestation statutes violated his “right to remain silent,” an issue

he did not raise in the superior court. Therefore, we will review Bieganski's self-incrimination claim for fundamental error only. *State v. Escalante*, 245 Ariz. 135, 138, ¶ 1 (2018). To prevail upon a claim of fundamental error, a defendant must first show that trial error exists. *Id.* at 142, ¶ 21. Once trial error has been established, we must determine whether the error is fundamental. *Id.*

¶9 The Fifth and Fourteenth Amendments protect individuals from compelled self-incrimination at the federal and state levels. U.S. Const. amends. V, XIV, § 1; see *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (holding “that the Fifth Amendment’s exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States”). The child molestation statutes contained no terms of compulsion, and furthermore, former A.R.S. § 13-1407(E) did not require a defendant to admit the underlying elements of the offense. Bieganski argues, nonetheless, that the child molestation statutes “virtually require[d]” a defendant’s testimony. Any “virtual” effect is not protected by the privilege against compelled self-incrimination.

¶10 Assigning the burden of production or persuasion to a defendant to prove an affirmative defense does not violate the privilege against self-incrimination. See *United States v. Rylander*, 460 U.S. 752, 758 (1983) (holding that the Fifth Amendment privilege should not be “convert[ed] from the shield ... which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would otherwise have been his. None of our cases support this view.”) (collecting cases); *Corbitt v. New Jersey*, 439 U.S.

212, 218 (1978) (holding a statute that made first-degree murder defendants who pleaded no contest eligible for sentence of less than life imprisonment did not violate Fifth Amendment privilege); *Williams v. Florida*, 399 U.S. 78, 84 (1970) (“That the defendant faces ... a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.”); *State v. Gray*, 239 Ariz. 475, 479, ¶ 18 (2016) (requiring a defendant asserting an entrapment defense to admit the elements of the offense is not compelled self-incrimination). The child molestation statutes, therefore, did not violate Bieganski’s privilege against compelled self-incrimination by requiring him to prove the affirmative defense. *See Gray*, 239 Ariz. at 479, ¶ 18.

¶11 Moreover, Bieganski’s argument ignores the evidentiary avenues available to prove the affirmative defense without a defendant’s testimony. Bieganski utilized one such avenue by providing evidence from a forensic psychologist as an expert witness. Emphasizing this point, the defendant in *Holle II* did not testify but instead presented his defense through other witnesses, which further confirms the absence of testimonial compulsion or necessity arising from the child molestation statutes. *State v. Holle* (“*Holle I*”), 238 Ariz. 218, 220–21, ¶ 4 (App. 2015), *vacated by Holle II*, 240 Ariz. at 311, ¶ 50; *accord Yee Hem v. United States*, 268 U.S. 178, 185 (1925) (“If the accused happens to be the only repository of the facts necessary to negate the presumption arising from his [drug] possession, that is a misfortune which

the statute under review does not create but which is inherent in the case.”). We find no trial error, much less fundamental error.

**C. The Child Molestation Statutes Did Not Violate Due Process “As Applied” to Bieganski.**

¶12 Bieganski also contends that the statutes are unconstitutional “as applied” to him. To support his contention, Bieganski relies on the discussion in *Holle II* concerning the possibility of an “as applied” constitutional challenge for a parent performing a caregiving task such as changing diapers. *Holle II*, 240 Ariz. at 310–11, ¶ 49 (“But if a prosecution actually were to result from such innocent behavior (*no such case has been cited*), an ‘as applied’ constitutional challenge would likely have merit in light of parents’ fundamental, constitutional right to manage and care for their children.” (emphasis added)).

¶13 The “as applied” discussion in *Holle II* occurred in a theoretical context and was not involved in the holding. *Holle II*, 240 Ariz. at 310–11, ¶ 49. The supreme court found that because the defendant’s actions were “clearly inappropriate,” they could not be construed as parenting or caregiving in any manner, and thus, the court did not address the issue further. *Id.* Bieganski’s “as applied” argument fails for the same factual and legal reasons.

¶14 The evidence, including Bieganski’s testimony and admissions, established that Bieganski performed the barehanded washing of each minor victim’s genitals with no other adult present during a rushed Sunday

morning bathing “assembly line” practice for which he did not provide a logical “parental” explanation.<sup>5</sup> He conducted these washing practices even though the girls were old enough to bathe themselves. Bieganski never requested permission from any of the parents or guardians to participate personally in the bathing or manual genital washing of the girls, and never discussed the bathing practices the girls would be exposed to with him. Bieganski’s wife helped provide care for the girls but did not wash the girls’ genitals and was not involved in the “assembly line.” She provided each girl with a washrag and soap and directed them to clean themselves. Although Bieganski later admitted to the jury that he performed the “washing” acts, when interviewed by law enforcement on the day of his arrest, he denied that the acts occurred, both to the officers and his wife during a phone call.

¶15 The jury rejected his efforts at establishing an affirmative defense based upon the evidence presented. The evidence supports the jury’s determination that Bieganski’s practices and acts maintain no reasonable connection to a legitimate parental exception as hypothetically contemplated in *Holle II*. Hence, there was no error.

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5. Bieganski testified that he used this practice to save time but was unable to provide direct answers regarding why the girls did not bathe for church on Saturday night, why he did not shorten his morning routine, or why they did not attend a later service. Bieganski also testified that he manually washed the girls’ vaginas to conserve soap and because he viewed washcloths as “bacteria traps.”

**D. The Superior Court Did Not Commit Error by Denying the Motion for a New Trial.**

¶16 Finally, Bieganski contends that the superior court erred when it denied his motion for a new trial. A court may grant a new trial if “the verdict is contrary to law or the weight of the evidence.” Ariz. R. Crim. P. 24.1(c) (1). We review the court’s decision on a motion for a new trial for an abuse of discretion. *State v. Parker*, 231 Ariz. 391, 408, ¶ 74 (2013). “A motion for new trial should be granted ‘only if the evidence was insufficient to support a finding beyond a reasonable doubt that the defendant committed the crime.’” *Id.* (quoting *State v. Landrigan*, 176 Ariz. 1, 4 (1993)).

¶17 We review claims of insufficient evidence to support a verdict *de novo*. *State v. Bible*, 175 Ariz. 549, 595 (1993). “[W]e view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction.” *State v. Pena*, 209 Ariz. 503, 505, ¶ 7 (App. 2005). Substantial evidence is evidence that a reasonable person may accept as adequate to support a guilty verdict beyond a reasonable doubt. *State v. Stroud*, 209 Ariz. 410, 411–12, ¶ 6 (2005). “Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction.” *State v. Soto-Fong*, 187 Ariz. 186, 200 (1996) (quoting *State v. Scott*, 112 Ariz. 423, 424–25 (1973)).

¶18 Substantial evidence supports the convictions. As the superior court correctly instructed the jury, the crime of child molestation required proving the following elements:

1. Defendant intentionally or knowingly engaged in or caused a person to engage in any direct or indirect touching, fondling, or manipulation of any part of the genitals or anus by any part of the body or any object or causing a person to engage in such contact with a child;
2. The child was under 15 years of age.

Regarding the statutory elements, each victim was between the ages of six and nine and Bieganski used only his soap-covered bare hand to wash each victim's genitals. Bieganski performed these acts, in what might reasonably be construed as a contrived "assembly line" when each victim was old enough to bathe themselves. Bieganski never informed the victims' parents or guardians about his intentions or practices or sought permission to engage in them with the girls. No other person (such as his wife) performed similar bathing practices; his wife instead elected to toss a washcloth and soap to each girl while directing them to wash. A.G. first reported the acts to a school nurse independently, which thereby initiated the investigation, and the accusations were thoroughly investigated by forensic interviewers and law enforcement.

¶19 Reasonable inferences drawn from the evidence supports the jury's verdicts. *See State v. Fulminante*, 193 Ariz. 485, 494, ¶¶ 27-28 (1999) (finding that defendant's "several false, misleading, and inconsistent statements to police, other witnesses, and his wife," along with evidence of motive, opportunity, and the absence of a rational explanation, provided sufficient evidence to sustain a

conviction). Bieganski testified and provided an expert witness to establish his lack of sexual motivation, but the jury found his defense unpersuasive regarding the A.G. and J.C. charges. Moreover, the jury's acquittal on the Y.L. charges demonstrates the jurors carefully considered the evidence. *See State v. Stuard*, 176 Ariz. 589, 600 (1993) (noting the jurors' decision to acquit the defendant of certain charges "demonstrate[d] the jury's careful and proper consideration of the evidence"). The evidence established each element of child molestation beyond a reasonable doubt, and thus, the superior court did not commit error when it denied the motion for a new trial.

### CONCLUSION

¶20 For the foregoing reasons, we affirm Bieganski's convictions and sentences.

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**APPENDIX E**

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SUPREME COURT OF ARIZONA

STATE OF ARIZONA,

*Appellee,*

v.

JERRY CHARLES HOLLE,

*Appellant.*

No. CR-15-0348-PR

|  
Filed September 13, 2016

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

**OPINION**

VICE CHIEF JUSTICE PELANDER, opinion of the Court:

¶ 1 Under A.R.S. § 13-1407(E), “[i]t is a defense to a prosecution” for sexual abuse or child molestation “that

the defendant was not motivated by a sexual interest.” We hold that lack of such motivation is an affirmative defense that a defendant must prove, and thus the state need not prove as an element of those crimes that a defendant’s conduct was motivated by a sexual interest.

I.

¶ 2 We view the evidence and all reasonable inferences in the light most favorable to sustaining the jury’s verdicts. *State v. Cropper*, 205 Ariz. 181, 182 ¶ 2, 68 P.3d 407, 408 (2003). Jerry Charles Holle’s eleven year-old step-granddaughter, M., told a friend and then the police that Holle had inappropriately touched and kissed her. The State charged Holle with sexual abuse of a minor under age fifteen, A.R.S. § 13–1404; sexual conduct with a minor, A.R.S. § 13–1405; and child molestation, A.R.S. § 13–1410.

¶ 3 Before trial, Holle asked the court to instruct the jury that the State must prove beyond a reasonable doubt sexual motivation as an element of the sexual abuse and child molestation charges. He argued that imposing the burden on him to prove lack of sexual motivation would violate his due process rights. Relying on *State v. Simpson*, 217 Ariz. 326, 173 P.3d 1027 (App. 2007), the trial court disagreed, ruling that under § 13–1407(E) a defendant must prove a lack of sexual motivation by a preponderance of the evidence. The court instructed the jurors to that effect at the close of trial and also instructed them on the elements of the charged offenses, including the statutory definition of “sexual contact,” A.R.S. § 13–1401(A)(3).

¶ 4 At trial, Holle argued that the allegations against him were “blown out of proportion” and that he had always engaged in sexually normal behavior. Holle’s two daughters testified that he never sexually assaulted them or any other children. Other relatives likewise testified about Holle’s sexual normalcy. Early in its deliberations, the jury submitted the following question: “For these accusations to be a crime, must there be sexual intent proven?” The trial court told the jurors to follow the instructions they previously had been given.

¶ 5 The jury found Holle guilty of child molestation and sexual abuse of a minor under age fifteen but was unable to reach a verdict on the charge of sexual conduct with a minor (the trial court, at the State’s request, later dismissed that charge with prejudice). The court sentenced Holle to a ten-year prison term for molestation, followed by a five-year term of probation for sexual abuse.

¶ 6 The court of appeals concluded that the trial court erred in instructing the jury that Holle bore the burden of proving “his conduct was not motivated by a sexual interest.” *State v. Holle*, 238 Ariz. 218, 226 ¶ 26, 358 P.3d 639, 647 (App. 2015). Disagreeing with *Simpson*, 217 Ariz. at 326 ¶ 19, 173 P.3d at 1030, the court held that “§ 13–1407(E) is a defense but not an affirmative defense.” *Holle*, 238 Ariz. at 226 ¶¶ 25–26, 358 P.3d at 647. Rather, the court stated, if a defendant charged with sexual abuse or child molestation “satisfies the burden of production to raise the defense listed under § 13–1407(E), then the state must prove beyond a reasonable doubt that the defendant’s conduct was motivated by a sexual interest.” *Id.* at ¶ 26.

Because the record reflected “overwhelming evidence that Holle’s conduct was motivated by a sexual interest,” however, the court of appeals found that the trial court’s instructional error was harmless and therefore affirmed. *Id.* at 227–28 ¶¶ 31–32, 358 P.3d at 648–49.

¶ 7 Holle petitioned for review regarding the court of appeals’ finding of harmless error, and the State filed a cross-petition for review regarding the court’s application of § 13–1407(E). We granted both petitions to resolve a split of authority between *Simpson* and the court of appeals’ opinion in this case. We have jurisdiction under article 6, section 5(3) of the Arizona Constitution and A.R.S. § 12–120.24.

## II.

¶ 8 We review questions of statutory interpretation and constitutional issues de novo. *State v. Dann*, 220 Ariz. 351, 369 ¶ 96, 207 P.3d 604, 622 (2009). We also review de novo “whether jury instructions correctly state the law.” *State v. Bocharski*, 218 Ariz. 476, 487 ¶ 47, 189 P.3d 403, 414 (2009).

¶ 9 In Arizona, “[a]ll common law offenses and affirmative defenses [have been] abolished.” A.R.S. § 13–103(A). The legislature is empowered to define what constitutes a crime in this state and to prescribe the punishment for criminal offenses. *State v. Bly*, 127 Ariz. 370, 371, 621 P.2d 279, 280 (1980); *see State v. Casey*, 205 Ariz. 359, 363 ¶ 15, 71 P.3d 351, 355 (2003) (superseded by statute, A.R.S. § 13–205(A)) (the legislature, not the judiciary, has “constitutional authority to define crimes

and defenses”); *State v. Viramontes*, 204 Ariz. 360, 362 ¶ 12, 64 P.3d 188, 190 (2003) (“It is not our place to pass on the wisdom of” legislative decisions concerning criminal procedure). This power also extends, at least within constitutional bounds, to defenses. *Cf. State v. Mott*, 187 Ariz. 536, 540–41, 931 P.2d 1046, 1050–51 (1997) (the legislature decides whether “to adopt the defense of diminished capacity” and the “Court does not have the authority” to do so).

¶ 10 Criminal statutes must “give fair warning of the nature of the conduct proscribed.” A.R.S. § 13–101(2). And “[p]enal statutes shall be construed according to the fair import of their terms, with a view to effect their object and to promote justice.” A.R.S. § 1–211(C).

¶ 11 When interpreting a statute, we start with the text because it is the most reliable indicator of a statute’s meaning. *State v. Christian*, 205 Ariz. 64, 66 ¶ 6, 66 P.3d 1241, 1243 (2003). When the text is clear and unambiguous, we need not resort to other methods of statutory interpretation to discern the legislature’s intent because “its intent is readily discernable from the face of the statute.” *Id.*; *see also Sell v. Gama*, 231 Ariz. 323, 327 ¶ 16, 295 P.3d 421, 425 (2013) (if a statute’s language is clear, “it controls unless an absurdity or constitutional violation results”).

#### A.

¶ 12 Holle was convicted of child molestation and sexual abuse. The child molestation statute, A.R.S. § 13–1410(A), provides: “A person commits molestation

of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child who is under fifteen years of age.” The sexual abuse statute, A.R.S. § 13–1404(A), provides: “A person commits sexual abuse by intentionally or knowingly engaging in sexual contact with any person who is fifteen or more years of age without consent of that person or with any person who is under fifteen years of age if the sexual contact involves only the female breast.”

¶ 13 Both statutes require “sexual contact” that the defendant “intentionally or knowingly engag[ed] in.” A.R.S. §§ 13–1404(A), –1410(A). “Sexual contact” is defined as “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.” A.R.S. § 13–1401(A) (3). “Intentionally” means “with respect to a result or to conduct described by a statute defining an offense, that a person’s objective is to cause that result or to engage in that conduct.” A.R.S. § 13–105(10)(a). And “knowingly” means “with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that the person’s conduct is of that nature or that the circumstance exists. It does not require any knowledge of the unlawfulness of the act or omission.” A.R.S. § 13–105(10)(b).

¶ 14 Section 13–1407(E) sets forth a defense to child molestation and sexual abuse:

It is a defense to a prosecution pursuant to § 13–1404 or 13–1410 that the defendant was not motivated by a sexual interest. It is a defense to a prosecution pursuant to § 13–1404 involving a victim under fifteen years of age that the defendant was not motivated by a sexual interest.

**B.**

**1.**

¶ 15 The court of appeals noted that, with the exception of *Simpson*, “sexual interest under § 13–1407(E) has always been treated as an ‘element’” or as “a defense that the state must nevertheless disprove beyond a reasonable doubt.” *Holle*, 238 Ariz. at 226 ¶ 25, 358 P.3d at 647. It therefore concluded that “sexual interest [under § 13–1407(E)] appears to be the type of defense that ‘either denies an element of the offense charged or denies responsibility, including ... lack of intent.’” *Id.* (quoting § 13–103(B)). *Holle* agrees and further contends that sexual motivation is an element of sexual abuse and molestation, requiring the state to prove that element beyond a reasonable doubt if the defendant raises the defense of lack of sexual motivation. “Because sexual motivation is what makes the conduct at issue criminal,” *Holle* argues, “proof of that fact cannot be shifted onto the defendant,” and any statute that purportedly does so “would violate due process.” The State counters that, as *Simpson* held, a defendant’s lack of sexual motivation

under § 13–1407(E) “is clearly and unambiguously an affirmative defense on which the defense alone bears the burdens of proof and persuasion, and is *not* an element” of sexual abuse or child molestation.

¶ 16 The court of appeals’ opinion in this case is premised on the court’s determination that §§ 13–1404 and 13–1410 are ambiguous because those statutes are susceptible to more than one reasonable interpretation, including an interpretation that sexual motivation is an element of those offenses. *Holle*, 238 Ariz. at 222–23 ¶¶ 11, 13, 358 P.3d at 643–44. The court therefore “look[ed] beyond the statutes’ language to determine their meaning.” *Id.* at ¶ 13. We disagree with the court’s underlying premise and approach, finding instead that the statutes are clear and unambiguous.

¶ 17 The plain text of §§ 13–1404(A) and 13–1410(A) defines all the elements of sexual abuse and child molestation. Both statutes identify the requisite “[c]ulpable mental state,” § 13–105(10), “intentionally” or “knowingly,” and describe the prohibited conduct, “sexual contact....” A.R.S. §§ 13–1404, –1410. The statutes defining the crimes do not mention, imply, or require sexual motivation. *Cf. State v. Hunter*, 136 Ariz. 45, 50, 664 P.2d 195, 200 (1983) (discussing that motive is not an element of murder but that motive or lack of motive is a circumstance that may be considered in determining guilt or innocence). And although the definition of “sexual contact” is broad as it includes “*any* direct or indirect touching, fondling or manipulating” of another’s private parts, it does not implicate the defendant’s motivation. *See* A.R.S. § 13–1401(A)(3) (emphasis added).

¶ 18 Furthermore, sexual motivation is identified only in § 13–1407(E), which is part of a section titled “Defenses” that prescribes defenses to various sex crimes. *See State ex rel. Montgomery v. Harris*, 237 Ariz. 98, 102, ¶ 13, 346 P.3d 984, 988 (2014) (stating that although statutory title headings are not part of the law, they can aid in its interpretation). On its face, this statute unambiguously refers to a defendant’s lack of sexual motivation as a defense. We cannot reasonably interpret the language in § 13–1407(E) as negating an element of child molestation or sexual abuse, particularly when the statutes defining the crimes do not require the state to prove the defendant’s motive; instead, §§ 13–1404(A) and 13–1410(A) require the state to prove that the defendant “intentionally” or “knowingly” engaged in “sexual contact” with certain aged children. *See State v. Getz*, 189 Ariz. 561, 564–65, 944 P.2d 503, 506–07 (1997) (rejecting the argument that defenses in § 13–1407 should be injected into the definition of sexual abuse in § 13–1404).

¶ 19 Holle nonetheless argues that sexual motivation is an element of child molestation and sexual abuse for two textual reasons. First, the phrase “sexual contact” in §§ 13–1404 and 13–1410 means that those statutes only prohibit contact related to having or involving sex. But the term “sexual contact” is statutorily defined and applies to “any direct or indirect touching....” § 13–1401(A)(3). We must apply that term as defined by the legislature. Second, Holle asserts that the word “fondling” in the definition of “sexual contact,” *id.* suggests a sexual motive; therefore, the words “touching” and “manipulating” also include that same motive. That argument is unpersuasive because the phrase “touching, fondling or manipulating” in § 13–1401(A)(3) is modified by the word “any” and includes the

word “touching,” which is quite broad and comes before the more specific word “fondling.” And the word “fondling” does not necessarily connote sexual interest. *Fondle*, *Webster’s Third New International Dictionary* (3rd ed. 2002) (“to treat with dotting indulgence” or “to handle tenderly, lovingly, or lingeringly”). In sum, the statutory scheme clearly and unambiguously identifies the elements of child molestation and sexual abuse, §§ 13–1410, –1404, does not include sexual motivation as an element the state must prove, and instead unequivocally identifies lack of sexual motivation as an affirmative defense, § 13–1407(E).

2.

¶ 20 The court of appeals held that “§ 13–1407(E) is a defense but not an affirmative defense.” *Holle*, 238 Ariz. at 226 ¶ 26, 358 P.3d at 647. Again, we disagree.

¶ 21 A defendant in a criminal case can defend a charge by claiming that the state failed to prove all elements beyond a reasonable doubt. But Arizona’s Criminal Code (A.R.S. Title 13) also establishes two categories of statutory defenses: (1) justification defenses, A.R.S. § 13–205(A); and (2) affirmative defenses, A.R.S. § 13–103(A). “Justification defenses describe conduct that, if not justified, would constitute an offense but, if justified, does not constitute criminal or wrongful conduct.” A.R.S. § 13–205(A). With justification defenses, if the defendant presents some evidence of the justification, the state bears the burden of proving “beyond a reasonable doubt that the defendant did not act with justification.” *Id.*; see *State v. King*, 225 Ariz. 87, 89–90 ¶¶ 6, 14–16, 235 P.3d 240, 242–43 (2010) (discussing that a defendant need only produce some evidence to be entitled to a justification instruction).

¶ 22 An affirmative defense is “a defense that is offered and that attempts to excuse the criminal actions of the accused.” A.R.S. § 13–103(B). “[A]n affirmative defense is a matter of avoidance of culpability even if the State proves the offense beyond a reasonable doubt. It ‘does not serve to negative any facts of the crime which the State is to prove in order to convict...’” *State v. Farley*, 199 Ariz. 542, 544 ¶ 11, 19 P.3d 1258, 1260 (App. 2001) (quoting *Patterson v. New York*, 432 U.S. 197, 207, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)).

¶ 23 These categories of defenses are mutually exclusive. A.R.S. §§ 13–103(B) (“Affirmative defense does not include any justification defense”), –205(A) (“Justification defenses ... are not affirmative defenses.”). Affirmative defenses also do not include “any defense that either denies an element of the offense charged or denies responsibility” for that offense. § 13–103(B).

¶ 24 The court of appeals apparently characterized § 13–1407(E) as an element-negating defense under § 13–103(B). *Holle*, 238 Ariz. at 226 ¶ 25, 358 P.3d at 647. Despite that characterization, the court described the defense as a species of a justification defense. *Compare id.* at ¶ 26 (discussing that the state must prove beyond a reasonable doubt that the defendant’s conduct was motivated by a sexual interest if defendant meets his initial burden of production to raise the defense under § 13–1407(E)), *with King*, 225 Ariz. at 89 ¶ 6, 235 P.3d at 242 (noting that “[j]ustification is not an affirmative defense that the defendant must prove,” and that “if the defendant presents evidence of self-defense, the state bears the burden of proving ‘beyond a reasonable doubt that the defendant did

not act with justification”) (quoting A.R.S. § 13–205(A)). But the § 13–1407(E) defense clearly is not a justification defense, and Holle does not argue otherwise.

¶ 25 Instead, contrary to the court of appeals’ holding, § 13–1407(E) is an affirmative defense. On its face, that statute excuses otherwise criminal conduct by a defendant. When the requisite facts are established, § 13–1407(E) provides that a defendant who otherwise violates §§ 13–1404 or 13–1410 is excused from that violation and must be found “not guilty.” That is precisely what an affirmative defense does. *See* § 13–103(B). We thus agree with *Simpson* that “[t]he ‘sexual interest’ provision of § 13–1407(E) is not an element of the offense of child molestation [or sexual abuse], but rather ‘create[s] an affirmative defense regarding motive.’” 217 Ariz. at 329 ¶ 19, 173 P.3d at 1030 (quoting *State v. Sanderson*, 182 Ariz. 534, 542, 898 P.2d 483, 491 (App. 1995)). As such, “the Legislature may allocate to defendant the burden of proving it.” *Farley*, 199 Ariz. at 545 ¶ 14, 19 P.3d at 1261.

### C.

¶ 26 In support of its holding, the court of appeals extensively relied on statutory history and Arizona case law that interpreted prior versions of the child-molestation and sexual-abuse statutes as implying a “sexual interest” element. *Holle*, 238 Ariz. at 222–25 ¶¶ 12–22, 358 P.3d at 643–46. But when, as here, the applicable statutory “language is clear and unequivocal, it is determinative of the statute’s construction,” and we need not employ secondary principles of statutory interpretation. *Janson ex rel. Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991). Nevertheless, we highlight pertinent

aspects of the history of “these confusing statutes and the equally confusing case law they have produced,” *Getz*, 189 Ariz. at 562, 944 P.2d at 504. Critical to our analysis are the legislature’s 1983 enactment of § 13–1407(E), 1983 Ariz. Sess. Laws, ch. 202, § 10 (1st Reg. Sess.), its 1993 overhaul of the child-molestation statute, 1993 Ariz. Sess. Laws, ch. 255, § 29 (removing the word “molests” and changing the required mental state), and its specifically defining “sexual contact,” *id.* § 23. In view of those significant developments that shaped the current statutory scheme, we disagree with the court of appeals’ assertion that “sexual interest remain[s] an implicit element of the offenses” on which the state carries the burden of proof if the defendant “raise[s] the defense listed under § 13–1407(E).” *Holle*, 238 Ariz. at 225 ¶ 22, 226 ¶ 26, 358 P.3d at 646, 647.

¶ 27 Though not controlling on our interpretation of the current statutes, one line of older cases deserves mention. The court of appeals, *Holle*, 238 Ariz. at 223 ¶ 15, 225 ¶ 22, 358 P.3d at 644, 646, like our partially dissenting colleagues, *infra* ¶55, rely largely on *State v. Berry*, 101 Ariz. 310, 419 P.2d 337 (1966). The child molestation statute then in effect provided:

A person who molests a child under the age of fifteen years by fondling, playing with, or touching the private parts of such child or who causes a child under the age of fifteen years to fondle, play with, or touch the private parts of such person shall be guilty of a felony.

*Berry*, 101 Ariz. at 312, 419 P.2d at 339 (quoting former A.R.S. § 13–653). In rejecting the defendant’s constitutional challenge to the statute, the Court reasoned

that “both the word ‘molest’ itself and the general intent of the Legislature as may be grasped from a reading of the statute as a whole,” as well as the statute’s lack of any express “element of intent or scienter,” required the defendant to be “‘motivated by an unnatural or abnormal sexual interest or intent with respect to children.’” *Id.* at 313, 419 P.2d at 340 (quoting *State v. Trenary*, 79 Ariz. 351, 354, 290 P.2d 250, 252 (1955)).

¶ 28 With minimal or no analysis or consideration of statutory changes, subsequent Arizona cases “continued to parrot” that language. *In re Maricopa Cty. Juvenile Action No. JV-121430*, 172 Ariz. 604, 606, 838 P.2d 1365, 1367 (App. 1992); see *State v. Lujan*, 192 Ariz. 448, 451 ¶ 7, 967 P.2d 123, 126 (1998) (addressing pre-1993, former § 13–1410 and, although citing § 13–1407(E), stating in dicta: “ ‘Knowingly molests’ not only requires that the defendant touch a child’s private parts but that the defendant be motivated by a sexual interest.”). The 1983 enactment of § 13–1407(E), however, displaced *Berry* and the other case law that, like *Berry*, interpreted pre-1993 versions of the child molestation statute to include as an implied element of that offense a defendant’s sexual motivation. *Berry* and its progeny were based on statutory deficiencies that no longer exist: the former statute’s use of the undefined word “molest” and the lack of any scienter/intent requirement.

¶ 29 In contrast, the current molestation statute, § 13–1410, differs in four significant ways: (1) “molest” has been excised as an element of the crime, (2) the necessary scienter has been identified and included in the statute, (3) the scienter requirements and essential element of “sexual contact” have been defined, §§ 13–105(10)(a)–(b),

-1401(A)(3), and most importantly, (4) an affirmative defense regarding sexual motivation has been established in § 13-1407(E). Unlike the Court in *Berry*, we are not called upon to clarify an undefined term or to establish scienter.

¶ 30 The court of appeals also misapplied this Court's opinion in *In re Pima Cty. Juvenile Appeal No. 74802-2*, 164 Ariz. 25, 33-34, 790 P.2d 723, 731-32 (1990). See *Holle*, 238 Ariz. at 224 ¶ 20, 358 P.3d at 645. In that case we noted that, unlike the former child molestation statute on which *Berry* and other cases had judicially imposed a sexual motivation element, the sexual abuse statute did not require the defendant to be motivated by an unnatural or abnormal sexual interest. 164 Ariz. at 33-34, 790 P.2d at 731-32. In rejecting the defendant's argument "to read" that additional element into § 13-1404, the Court noted that prior cases relating to the child molestation statutes "were limited to interpreting the word 'molest,' and we did not intend to set a general rule applicable to all sexual abuse statutes." *Id.*

¶ 31 *Getz* likewise refutes the court of appeals' analysis and *Holle*'s argument. In *Getz*, 189 Ariz. at 564, 944 P.2d at 506, we refused to incorporate in the statutory definition of sexual abuse under § 13-1404 a defense in § 13-1407. There, the State argued that § 13-1407(B)'s reference to a minor victim's "incapacity to consent" relieved the State of its burden to prove, for a charge of sexual abuse, that a defendant had "engag[ed] in sexual contact with any person who is fourteen or more years of age *without consent of that person*," when "without consent" was defined by statute and did not include incapacity due to age. *Getz*, 189 Ariz. at 563-64, 944 P.2d at 505-06.

In rejecting the State’s argument that the affirmative defense in § 13–1407(B) changed the elements of sexual abuse, this Court noted there could be “constitutional ramifications of superimposing the affirmative defense statute into the definitional statute.” *Id.* at 565, 944 P.2d at 507. We therefore applied the sexual abuse statute as written. *Id.*

¶ 32 Other secondary principles of construction defeat Holle’s argument. His contention would make § 13–1407(E) superfluous; a defendant would not have to invoke the defense if the state has and fails to carry the burden of proving sexual motivation as an element of the offenses. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 552 ¶ 31, 105 P.3d 1163, 1171 (2005) (“Whenever possible, we do not interpret statutes in such a manner as to render a clause superfluous.”). In addition, the defense provided in § 13–1407(E) is just one of six separate defenses enumerated in that statute. Under Holle’s position, arguably all the defenses listed in § 13–1407 would be implicit elements, that is, circumstances that the state would have to prove beyond a reasonable doubt did not exist. At the very least, it requires a court to pick and choose which are elements and which are defenses, when the statute treats them alike. Either scenario would be plainly inconsistent with the legislature’s decision to designate all those circumstances as statutory “defenses,” not “elements.” *Cf. State v. Gamez*, 227 Ariz. 445, 451 ¶ 36, 258 P.3d 263, 269 (App. 2011) (characterizing the defense under § 13–1407(B) as an “affirmative defense”); *State v. Falcone*, 228 Ariz. 168, 172–73 ¶ 18, 264 P.3d 878, 882–83 (App. 2011) (same).

¶ 33 Likewise, viewing sexual motivation as an element of child molestation or sexual abuse would obligate the state to prove additional aspects of a defendant’s mental state beyond the mental states (“intentionally or knowingly”) that are statutorily defined and expressly required. *See* A.R.S. §§ 13–105(10)(a)–(b), –1404(A), –1410(A). We have no reason to believe the legislature intended those results, particularly when they would be irreconcilable with the statutory language. And the legislature’s purposeful decision to make lack of sexual motivation an affirmative defense is understandable inasmuch as a defendant is in the best position to know his or her motivation.

¶ 34 Other defenses to prosecutions for sexual abuse provided in § 13–1407 also support our view that the legislature did not intend to make sexual motivation an element of sexual abuse under § 13–1404(A). Sections 13–1407(A) and (C) provide defenses if the “sexual contact” was “in furtherance of lawful medical practice” or in “administering a recognized and lawful form of treatment” during an emergency. If sexual motivation is an element of sexual abuse, it is difficult to imagine when these defenses would apply. Lawful medical treatment or emergency care is not sexually motivated, so a prosecution that did not prove sexual motivation would fail without the need to consider these defenses. Conversely, if sexual motivation is proven, the defenses in subsection (A) and (C) could not be shown. The only way to make these defenses viable is to conclude that the legislature intended to omit sexual motivation as an element of sexual abuse but permit medical practitioners and emergency care workers to defend a charge by showing that the sexual contact was motivated by medical care for the minor.

¶ 35 Finally, as *Getz* discussed, superimposing a defense into the statute that defines the crime could have constitutional ramifications. 189 Ariz. at 565, 944 P.2d at 507; see *Bus. Realty of Arizona, Inc. v. Maricopa Cty.*, 181 Ariz. 551, 559, 892 P.2d 1340, 1348 (1995) (noting that courts should try to interpret statutes in a way that avoids constitutional questions if possible). Although the court of appeals essentially treated sexual motivation under § 13-1407(E) as an element the state must prove for sexual abuse or child molestation charges, it placed on the defense the initial “burden of production” regarding sexual motivation. *Holle*, 238 Ariz. at 226 ¶¶ 25–26, 358 P.3d at 647. But that procedural framework would effectively, and arguably unconstitutionally, shift the burden of persuasion inasmuch as the state would not have to prove the “element” of sexual motivation unless the defendant first carried the burden of production. See *Minnesota v. Cannady*, 727 N.W.2d 403, 408 (Minn. 2007) (finding unconstitutional a statutory affirmative defense because, “[b]y placing the burden of production of an *essential element of the offense* on the defendant,” the statute “creates a de facto shift in the burden of persuasion to the defendant on [an] essential element of [the offense]”). Under the court of appeals’ analysis, if a defendant fails to carry his initial burden of production, the element of sexual motivation would be effectively presumed, which would violate due process. See *Casey*, 205 Ariz. at 363 ¶ 13, 71 P.3d at 355 (noting that the state has the burden of proving each element beyond a reasonable doubt); *State v. Mohr*, 150 Ariz. 564, 567–68, 724 P.2d 1233, 1236–37 (App. 1986) (finding that a jury instruction “unconstitutionally shifted the burden of proof to appellant on an element of each offense ... in violation of the principles enunciated

in *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985”).

¶ 36 Because §§ 13–1404, 13–1407(E), and 13–1410 are plain on their face, we must apply those statutes as written. The defenses in § 13–1407 are just that—defenses. They are not elements of the crimes and cannot reasonably be treated as such. *See Getz*, 189 Ariz. at 563–66, 944 P.2d at 505–08; *State v. Sandoval*, 175 Ariz. 343, 345–47, 857 P.2d 395, 397–99 (App. 1993) (stating that trial court erred in dismissing charges against defendant for indecent exposure because defendant’s actions had to be motivated by sexual interest where language of statute defining crime was unambiguous and did not include that as an element); *see also State v. Miranda*, 200 Ariz. 67, 69 ¶ 5, 22 P.3d 506, 508 (2001) (“Courts may not add elements to crimes defined by statute.”).

¶ 37 *Holle* does not cite, nor have we uncovered, any case in which an Arizona court has found an “implicit” element of a crime when the statute itself that defines the crime contains no such element, particularly where, as here, the alleged “implicit” element is contained in a separate statute that identifies “defenses” to the charged offense. Contrary to the court of appeals, we do not view the § 13–1407(E) defense as one that “either denies an element of the offense charged or denies responsibility,” *Holle*, 238 Ariz. at 226 ¶ 25, 358 P.3d at 647 (citing § 13–103(B)). The trial court’s jury instructions comported with the pertinent statutes, including § 13–1407(E). *Cf. State v. Jackson*, 124 Ariz. 206, 207, 603 P.2d 98, 99 (App. 1978) (concluding that the trial court properly instructed the jury on a prior version of child molestation by reciting the

statutory elements of the offense and refusing defendant's request to require proof of an "unnatural or abnormal sexual interest or intentions with respect to children" as "an additional element"), approved in part and vacated on other grounds, 124 Ariz. 202, 203, 205, 603 P.2d 94, 95, 97 (1979).

### III.

#### A.

¶ 38 Holle alternatively argues that the legislature overstepped its constitutional authority by removing sexual motivation as an element of child molestation and sexual abuse and shifting the burden to defendants by making the lack of such motivation an affirmative defense. If § 13-1407(E) is so construed, he contends, it violates due process and produces intolerable, absurd results. We are not persuaded.

¶ 39 The United States Supreme Court has held that federal due process does not bar a state from requiring a defendant to establish a defense by a preponderance of the evidence. *Martin v. Ohio*, 480 U.S. 228, 233, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987); *see also Patterson*, 432 U.S. at 205-06, 97 S.Ct. 2319 (holding that state may require defendant to prove defense of extreme emotional disturbance). "The State is foreclosed from shifting the burden of proof to the defendant only when an affirmative defense [] negate[s] an element of the crime. Where instead it excuse[s] conduct that would otherwise be punishable, but does not controvert any of the elements of the offense itself, the Government has no constitutional

duty to overcome the defense beyond a reasonable doubt.” *Smith v. United States*, --- U.S. ---, 133 S.Ct. 714, 719, 184 L.Ed.2d 570 (2013) (internal quotation marks and citations omitted); see *Casey*, 205 Ariz. at 366 ¶ 30, 71 P.3d at 358 (holding that “the legislature has the constitutional authority to shift the burden of proof” for an affirmative defense to the defendant); *Farley*, 199 Ariz. at 545 ¶ 13, 19 P.3d at 1261 (“although due process requires the State to prove every *element* of the offense beyond a reasonable doubt, it does not require the State to prove the absence of an *affirmative defense*”).

¶ 40 States have broad authority to define the elements of a crime. See *Martin*, 480 U.S. at 233, 107 S.Ct. 1098. Likewise, the legislature has broad authority to codify defenses and to define their elements. See *State v. Gray*, 239 Ariz. 475, 479 ¶¶ 16–19, 372 P.3d 999, 1003 (2016) (holding that the legislature may constitutionally define the elements and prerequisites of entrapment defense under A.R.S. § 13–206). As long as a jury is properly instructed that it may find guilt only if the state proves each element of the crime beyond a reasonable doubt, it does not offend due process to require the defendant to prove by a preponderance of the evidence that, despite proof of every element of the offense, he is nevertheless blameless because of an affirmative defense. *Martin*, 480 U.S. at 233, 107 S.Ct. 1098. Treating lack of sexual motivation under § 13–1407(E) as an affirmative defense which a defendant must prove does not offend due process.

¶ 41 Holle also argues that this conclusion produces absurd and impermissible results. If proof of sexual motivation is not required for charges of child molestation

and sexual abuse, Holle asserts, it would mean that parents and other caregivers commit those crimes whenever they change an infant's diaper and bathe or otherwise clean a child's genitals. Pediatricians and other medical providers would likewise violate those laws when properly and professionally examining a child patient's private parts. These arguments, echoed by the dissent, are unpersuasive.

¶ 42 We agree that the criminal code should clearly differentiate between unlawful conduct and innocent, acceptable behavior without unnecessarily broadly sweeping the latter into the former. Subject to constitutional constraints, however, proscribing certain conduct and defining what constitutes a crime and any defense thereto are solely within the purview of the political branches of government, not the courts. *Casey*, 205 Ariz. at 362 ¶ 10, 71 P.3d at 354.

¶ 43 Although §§ 13-1404 and 13-1410 broadly define sexual abuse and child molestation, prosecutors are unlikely to charge parents, physicians, and the like when the evidence demonstrates the presence of an affirmative defense under § 13-1407. Neither Holle nor the dissent suggests that a diapering parent or a physician conducting an appropriate examination has ever been charged under §§ 13-1404 or 13-1410. In addition, other criminal statutes are comparably broad and, if their elements are proven, require the defendant to assert and prove a valid affirmative defense. For example, Arizona's assault statute, A.R.S. § 13-1203, broadly provides: "A person commits assault by: 1. Intentionally, knowingly or recklessly causing any physical injury to another person; or 2. Intentionally placing another person in reasonable

apprehension of imminent physical injury; or 3. Knowingly touching another person with the intent to injure, insult or provoke such person.” “Physical injury” means “the impairment of physical condition.” A.R.S. § 13–105(33). A medical provider arguably commits an assault whenever he or she causes *any physical injury* to his or her patient, but that doctor can assert the affirmative defense of consent. *See generally* Wayne LaFave, 2 Subst. Crim. L. § 16.2 (2d ed.) (discussing that doctors commit a battery when they perform an operation, but they can raise the consent defense); *see also* W. E. Shipley, Annotation, *Consent as Defense to Charge of Criminal Assault and Battery*, 58 A.L.R.3d 662 (1974) (surveying cases).

¶ 44 Prosecutors have wide discretion in enforcing criminal statutes, charging suspects, and prosecuting offenders. *Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985). Holle’s bare assertion that, absent a sexual motivation element, §§ 13–1404 and 13–1410 will hypothetically lead to absurd prosecutions does not warrant ignoring the plain language of the subject statutes. We cannot and will not assume that the state will improperly prosecute persons who, though perhaps technically violating the terms of broad statutes such as §§ 13–1404 and 13–1410, clearly engaged in reasonable, acceptable, and commonly permitted activities involving children. *See* Ariz. R. Sup. Ct. 42, Ethical Rule 3.8, cmt. 1 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.”); *see generally* P.H.

Vartanian, Annotation, *Duty and Discretion of District or Prosecuting Attorney as Regards Prosecution for Criminal Offenses*, 155 A.L.R. 10 (Originally published in 1945) (surveying cases through 2015). We do not address “hypothetical scenarios where other types of touching might not be deemed criminal,” and in which application of those statutes might present serious constitutional concerns. *State v. Mendoza*, 234 Ariz. 259, 261 ¶ 11, 321 P.3d 424, 426 (App. 2014).

**B.**

¶ 45 Based on an argument Holle did not make and inapposite cases he does not cite, the dissent asserts that our interpretation of the pertinent statutes, based on their plain text, “renders the statutes unconstitutional.” *Infra*, ¶53. Although Holle argued that shifting the burden onto defendants to prove an absence of sexual motivation would violate due process, he has never asserted a “constitutional vagueness problem,” *id.* the lynchpin of the dissent. *Cf. Berry*, 101 Ariz. at 312–13, 419 P.2d at 339–40 (rejecting defendant’s specific argument that prior version of child molestation statute was unconstitutionally vague). Generally we do not address constitutional issues not raised by the parties, let alone base our decision on them. *See State v. Bolton*, 182 Ariz. 290, 297–98, 896 P.2d 830, 837–38 (1995) (constitutional issues not raised or adequately argued below are waived absent fundamental error). But aside from this procedural hurdle, we disagree with the dissent.

¶ 46 The Supreme Court cases on which the dissent relies did not involve affirmative defenses, but instead

addressed laws that contained genuinely vague terms. Unlike those cases, this case does not involve a statute that fails to “provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *United States v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008); *see also Johnson v. United States*, --- U.S. ---, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) (finding void for vagueness the “residual clause” of a violent-felony statute that “involves conduct that presents a serious potential risk of physical injury to another”). Despite their arguable shortcomings, the statutes at issue are not vague—their descriptions of the proscribed “sexual contact” are quite precise, §§ 13–1401(A)(3), –1404(A), –1410(A), and the affirmative defenses identified in § 13–1407 are not only clear but also tend to deter arbitrary enforcement. In previously rejecting a vagueness challenge to § 13–1404, this Court observed that “[t]he statute is phrased with specificity so that reasonable persons will know exactly what is demanded of them,” and that “the statute quite clearly differentiates between conduct that is proscribed and conduct that is not proscribed.” *In re Pima Cty. Juvenile Appeal No. 74802–2*, 164 Ariz. at 28–29, 790 P.2d at 726–27. The dissent’s vagueness argument is incompatible with that case.

¶ 47 In addition, if §§ 13–1404 and 13–1410 were unconstitutionally vague and thus invalid on their face, as the dissent implies, they would be void and unenforceable under any circumstances and should be stricken. *See Coates v. City of Cincinnati*, 402 U.S. 611, 615–16, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1977). But the dissent does not go that far.

Rather, to avoid the statutes' alleged constitutional flaw (criminalizing some acceptable and appropriate behavior), the dissent would effectively rewrite the statutes to require the state to prove sexual motivation, when the statutes clearly contain no such requirement. That we cannot do. *Miranda*, 200 Ariz. at 69 ¶ 5, 22 P.3d at 508; *see also In re Nicholas S.*, 226 Ariz. 182, 186 ¶ 18, 245 P.3d 446, 450 (2011) (“Although courts properly construe statutes to uphold their constitutionality, courts cannot salvage statutes by rewriting them because doing so would invade the legislature’s domain.”).

¶ 48 Nor does the dissent suggest that the statutes are ambiguous or that we misread their plain language. It is one thing to interpret an ambiguous statute in a way that avoids a potential constitutional issue, but it is quite another to rewrite an unambiguous statute to avoid an alleged constitutional issue. And yet that is exactly what the dissent proposes, as it would “interpret the existing statutes as requiring the state to prove that a defendant was ‘motivated by a sexual interest’ to establish a violation of A.R.S. §§ 13–1404(A) or –1410.” *Infra*, ¶56. That interpretation simply cannot be squared with the statutes’ plain language. In short, although we might well agree with the dissent as a matter of policy preference and statutory draftsmanship, none of the dissent’s cited cases justifies rewriting the child molestation and sexual abuse statutes to include sexual motivation as an element of those offenses. *Cf. McDonnell v. United States*, --- U.S. ---, 136 S.Ct. 2355, 2367–68, 2372–73, 195 L.Ed.2d 639 (2016) (rejecting government’s broad interpretation of “official acts” under federal bribery statute when its interpretation was “inconsistent with both [the statutory] text and precedent,” did not comport with statutory-construction

canons, and raised “significant federalism concerns” and constitutional issues).

¶ 49 Finally, the dissent repeats Holle’s hypothetical, unrealistic concerns about subjecting to criminal prosecutions parents or other child caregivers changing diapers. *Infra*, ¶52. But if a prosecution actually were to result from such innocent behavior (no such case has been cited), an “as applied” constitutional challenge would likely have merit in light of parents’ fundamental, constitutional right to manage and care for their children. *See Santosky v. Kramer*, 455 U.S. 745, 758–59, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Neither Holle nor the dissent suggests that the statutes, as applied to Holle, are unconstitutional. *Cf. Holder v. Humanitarian Law Project*, 561 U.S. 1, 18–19, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010) (“We consider whether a statute is vague as applied to the particular facts at issue, for ‘a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.’”) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)); *New York v. Ferber*, 458 U.S. 747, 767, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (“[A] person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court.”). Indeed, the circumstances here support the legislature’s understandable decision to place the burden of proving lack of sexual motivation on the defendant rather than requiring the state to prove it, when (as the court of appeals and our dissenting colleagues conclude in finding harmless error) the touching was clearly inappropriate.

IV.

¶ 50 Based on the language in question and our analysis of the statutory defenses recognized in Arizona, we hold that § 13–1407(E) provides an affirmative defense. The trial court thus properly instructed the jury that Holle’s alleged lack of sexual motivation is an affirmative defense under that statute, requiring him to prove by a preponderance of the evidence that he was not motivated by a sexual interest. Accordingly, we vacate the court of appeals’ opinion and affirm Holle’s convictions and sentences.

BALES, C.J., joined by BRUTINEL, J., dissenting in part and concurring in the result.

¶ 51 Arizona, apparently alone among jurisdictions, has enacted criminal laws broadly stating that a person commits a felony merely by “intentionally or knowingly” touching the genitals or anus of a child or the breast of a female younger than fifteen. A.R.S. §§ 13–1401(3), –1404(A), –1410. The majority concludes that these statutes should be applied literally and therefore require no mental state beyond a person’s intentionally or knowingly touching a child’s “private parts.” *Supra* ¶17.

¶ 52 Parents and other caregivers who have changed an infant’s soiled diaper or bathed a toddler will be surprised to learn that they have committed a class 2 or 3 felony. They also will likely find little solace from the majority’s conclusion that although they are child molesters or sex abusers under Arizona law, they are afforded an “affirmative defense” if they can prove by a preponderance of the evidence that their touching “was

not motivated by a sexual interest.” A.R.S. § 13–1407(E). Such a defense, as the majority notes, does not mean that a crime has not occurred, but instead that the miscreant may avoid “culpability” by persuading the factfinder that the “criminal conduct” should be excused. *Supra* ¶¶22, 25.

¶ 53 The majority’s interpretation, I believe, renders the statutes unconstitutional. No one thinks that the legislature really intended to criminalize every knowing or intentional act of touching a child in the prohibited areas. Reading the statutes as doing so creates a constitutional vagueness problem, as it would mean both that people do not have fair notice of what is actually prohibited and that the laws do not adequately constrain prosecutorial discretion. *See, e.g., United States v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008) (noting that a criminal statute is impermissibly vague if it does not “provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement”); *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 616, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971) (holding ordinance that barred groups from conducting themselves in “annoying” manner on sidewalks was unconstitutionally vague for discretion it allowed in enforcement); *United States v. Reese*, 92 U.S. 214, 220, 23 L.Ed. 563 (1875) (“Every man should be able to know with certainty when he is committing a crime.”).

¶ 54 The vagueness problem is not solved by the majority’s characterizing A.R.S. § 13–1407(E) as an affirmative defense. Doing so means that the state has shifted to the accused the burden of proving the absence of the very fact—sexual motivation—that distinguishes criminal from innocent conduct. Although states have

discretion in assigning to defendants the burden of proving affirmative defenses, the Supreme Court has noted “there are obviously constitutional limits beyond which the States may not go in this regard.” *Patterson v. New York*, 432 U.S. 197, 209–10, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). That limit is passed here if the statutes are construed as criminalizing a broad swath of indisputably innocent conduct but assigning to defendants the burden of proving their conduct was not criminally motivated. See *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (holding that the Due Process Clause “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”).

¶ 55 Fifty years ago, we addressed a similar issue of statutory interpretation in *State v. Berry*, 101 Ariz. 310, 419 P.2d 337 (1966). There the statute provided that a person “molests a child,” and thereby commits a felony, “by fondling, playing with, or touching the private parts of a child[.]” *Id.* at 312, 419 P.2d at 339 (quoting A.R.S. § 13–653 (1966)). This statute was challenged as unconstitutionally vague because by its terms it might apply to “such people as parents and doctors who might touch a child’s private parts for other than condemning reasons.” *Id.* The Court refused to read the statute’s words literally or in isolation, and instead interpreted the statute in light of its intended purpose. *Id.* Noting that “where a penal statute fails to expressly state a necessary element of intent or scienter, it may be implied[.]” the Court concluded that the offense required proof that the acts were motivated by an unnatural or abnormal sexual interest. *Id.* at 313, 419 P.2d 337; *Cf. Staples v. United States*, 511 U.S. 600, 614–15, 114 S.Ct. 1793, 128 L.Ed.2d

608 (1994) (interpreting federal firearms statute as impliedly including *mens rea* requirement when failing to do so “potentially would impose criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of weapons in their possession—makes their actions entirely innocent”).

¶ 56 Although the majority correctly notes that the legislature has revised the pertinent statutes since our decision in *Berry*, I would interpret the existing statutes as requiring the state to prove that a defendant was “motivated by a sexual interest” to establish a violation of A.R.S. §§ 13–1404(A) or –1410. To avoid the constitutional vagueness and burden-shifting problems, I would construe the “defense” referenced in A.R.S. § 13–1407(E) as acknowledging a defendant may deny the implied element that the charged conduct was motivated by a sexual interest, rather than as referring to an affirmative defense. *See* A.R.S. § 13–103(B) (noting that affirmative defense does not include “any defense that either denies an element of the offense charged or denies responsibility, including alibi, misidentification or lack of intent”).

¶ 57 The majority opinion does not convincingly respond to these points. It first states that a “procedural hurdle” should deter us from considering whether its interpretation renders the statutes unconstitutionally vague. *Supra* ¶45. But Holle clearly raised below and before this Court the issue whether due process allows the state to shift to defendants the burden of proving an absence of sexual motivation. In resolving that issue, which involves both statutory and constitutional interpretation, we are not limited to the arguments or legal authorities as

identified by the parties. *See Rubens v. Costello*, 75 Ariz. 5, 9, 251 P.2d 306, 308 (1952). The reason is obvious: when we are interpreting statutes or the constitution, our obligation is to reach the correct conclusion, not merely to pick which party has better articulated a particular legal argument. *See id.*; *Lyons v. State Board of Equalization*, 209 Ariz. 497, 502 n.2, 104 P.3d 867, 872 n.2 (App. 2005) (courts are not “limited to the arguments made by the parties if that would [lead to] an incorrect result”) (citing *Evenstad v. State*, 178 Ariz. 578, 582, 875 P.2d 811, 815 (App. 1993)).

¶ 58 On the merits, the majority opinion is in tension both with itself and recent decisions of the United States Supreme Court. The majority argues that the statutes unambiguously make it a crime to knowingly or intentionally touch a child in the proscribed areas. *Supra* ¶¶16–18. But concluding, as does the majority, that a statute by its terms identifies a broad range of conduct does not resolve whether it is unconstitutionally vague. *Cf. United States v. X-Citement Video Inc.*, 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994) (refusing to adopt “most grammatical” reading of statute when doing so would criminalize a range of innocent behavior and thereby raise “serious constitutional doubts”). The issue instead is whether the statute gives notice of what is actually prohibited and sufficiently constrains prosecutorial discretion. *See McDonnell v. United States*, --- U.S. ---, 136 S.Ct. 2355, 2372–73, 195 L.Ed.2d 639 (2016) (refusing to adopt literal interpretation of “official acts” for purposes of federal bribery statute where doing so would raise “significant constitutional concerns” by bringing “normal political interaction” within sweep of criminal laws).

¶ 59 The majority undermines its own conclusion by observing that substantive due process would prevent applying the statutes to parents in certain situations. *Supra* ¶49. Whatever the contours of a parent’s substantive due process rights to “manage and care for” a child, *id.* they surely do not insulate a parent from criminal penalties for improper contact that is sexually motivated. Thus, the majority must instead be asserting that substantive due process may preclude applying the statutes to parents who do not act with a sexual motivation. That observation, however, merely underscores that if the statutes are read literally they do not identify the conduct they actually criminalize. Nor does it address the vagueness issue with respect to others, such as caregivers, who are not parents but may intentionally touch a child in the proscribed areas for reasons as benign as changing a diaper.

¶ 60 The majority also suggests that prosecutors will exercise their discretion so as not to “improperly” prosecute technical violations of §§ 13–1404 and 13–1410. *Supra* ¶45. But decisions by the United States Supreme Court clearly establish that unduly broad criminal prohibitions cannot be salvaged by assurances that prosecutors will wisely exercise their discretion. *See McDonnell*, 136 S.Ct. at 2372–73 (observing that “we cannot construe a criminal statute on the assumption that the Government will ‘use it responsibly’”) (quoting *United States v. Stevens*, 559 U.S. 460, 480, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010)).

¶ 61 My difference with the majority turns on a fundamental question: may the state, consistent with due process, sweepingly criminalize a broad range of

conduct embracing both innocent and culpable behavior and assign to defendants the burden of proving their innocence? Because I believe the answer is no, I would follow *Berry's* example and interpret §§ 13-1404 and 13-1410 as impliedly requiring the state to prove a defendant acted with a sexual motive. Accordingly, like the court of appeals, I would hold that the trial court erred in instructing the jury that lack of sexual motivation is an affirmative defense that Holle had the burden of proving. On this point, I respectfully dissent from the majority's contrary conclusion. Because I also agree with the court of appeals that the erroneous instruction was harmless beyond a reasonable doubt, I concur in the affirmance of Holle's convictions and sentences.