No. 25-690

IN THE SUPREME COURT OF THE UNITED STATES

RYAN THORNELL, ET AL.,

Petitioner,

v.

BRADLEY BIEGANSKI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Randal McDonald
Counsel of Record
LAW OFFICE OF RANDAL B. MCDONALD
112 N. Central Ave., Suite 100
Phoenix, AZ 85004
Telephone: 602.325.3092
Randy@rbmcdonaldlaw.com

Attorney for Respondent
Bradley Bieganski

QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit misapplied this Court's settled case law when it granted Respondent a writ of habeas corpus?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed on the cover of this petition.

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, No. 20-266, ___ 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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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Bradley Bieganski respectfully requests that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS 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.

STATEMENT OF JURISDICTION

The court of appeals issued its opinion on August 12, 2025. *Bieganski v. Shinn*, 149 F.4th 1055 (2025). This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW 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

Bradley Bieganski and his wife operated a ministry for underprivileged children in Navajo County, Arizona. They took in children from homes with drug-addled or absent parents and cared for them as if they were their own. For the younger children, this often meant teaching them proper hygiene, including how to bathe themselves. In keeping with his responsibility as their caretaker, Mr. Bieganski would often bathe the young girls in his care.

After a complaint about Mr. Bieganski's practice of bathing the girls, he was arrested and charged with molestation. In 2016, his first trial ended in a mistrial. Then, in *State v. Holle (Holle II)*, 240 Ariz. 300 (2016), the Arizona Supreme Court upended years of settled law and ruled that in Arizona – alone among the fifty states – sexual motivation was not an element of molestation, and prosecutors could convict a person of molestation based on touching alone.

Of course, sexual intent or motivation is an inherent element of sexual molestation. If not, individuals who intentionally touch children's genitals as part of their work or responsibilities – such as Mr. Bieganski and other parents, doctors, nurses, childcare workers, and clergy who perform ritual circumcisions – would commit the crime of molestation every day. What separates their innocent conduct from that which is criminal is the intent – the predicate motivation for the touching. A sexual motive for the touching is the fundamental element of the offense of child molestation.

Stripped of the need to prove sexual motivation beyond a reasonable doubt, the State easily obtained a conviction at Mr. Bieganski's second trial, even though no

evidence suggested sexual motivation – or anything other than that Mr. Bieganski was simply caring for his children.

In 2018, the Arizona Legislature undid *Holle II*, amending the molestation statute to specifically permit the type of conduct for which Mr. Bieganski was convicted. But for him, the damage was done. Bound by *Holle II*, the Arizona Court of Appeals affirmed his conviction. The District Court denied his petition for writ of habeas corpus.

A unanimous panel of the Ninth Circuit, however, reversed, finding that because Mr. Bieganski's conviction fell within a brief period – following *Holle II* but preceding the legislative fix – during which the State was relieved of its burden to prove sexual motivation beyond a reasonable doubt, his conviction was contrary to or an unreasonable interpretation of this Court's clear requirement that the State bear the burden to prove every element of a criminal offense.

The State now seeks this Court's review of that decision. But even the State acknowledges that the Court of Appeals applied the correct legal standard here – it just doesn't like the result. Because there is no genuine dispute about the correct law to be applied, because this Case does not represent any splits in the application of the law between circuits, and because Arizona's outlier statute has now been amended – and no other state shifts the burden in the way Arizona did, this Court should deny the writ.

STATEMENT OF THE CASE

I. ARIZONA HAS LONG CONSIDERED SEXUAL INTEREST AN ESSENTIAL ELEMENT OF SEXUAL MOLESTATION.

A. For about 100 years, Arizona has required the State to prove sexual motivation to convict a defendant of sexual molestation.

Arizona's first molestation law, passed in 1913, required that prohibited acts be carried out "with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires of such person or of such child." Ariz. Rev. Stat. (Penal Code) § 282 (1913).

The legislature amended Arizona's molestation statute in 1965, enacting A.R.S. § 13-653, which states 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." 1965 Ariz. Sess. Laws, ch. 20, § 3.[1] Although the 1965 statute did not expressly state a sexual motivation requirement, the Arizona Supreme Court held that such a requirement was implicit:

> [F]rom 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, a scienter requirement is apparent. As we have said before, where a penal statute fails to expressly state a necessary element of intent or scienter, it may be implied.... [T]herefore, it is certainly possible for a doctor or parent to touch the private parts of a child without "molesting" him by doing so, in which case the statute has not been violated.

[1] The statute was renumbered to § 13-1410 in 1977. *See* 1977 Ariz. Sess. Laws, ch. 142, § 66.

State v. Berry, 101 Ariz. 310, 313 (1966). This remained the law for several decades. Although the statutory text changed in various ways, "courts continued to treat sexual interest as an 'essential element' of the offense." *State v. Holle (Holle I)*, 238 Ariz. 218, 223 (App. 2015), *vacated by State v. Holle (Holle II)*, 240 Ariz. 300 (2016).

In 1983, the legislature enacted A.R.S. § 13-1407(E), which for the first time made lack of sexual interest an "affirmative defense" to the crime of child molestation. *See* 1983 Ariz. Sess. Laws, ch. 202 § 10. But the burden of proving sexual intent still remained on the prosecution. This is because Arizona law required that, upon the defendant raising an affirmative defense, the burden shifted to the State to refute it beyond a reasonable doubt. *See, e.g.*, *State v. Duarte*, 165 Ariz. 230 (1990) ("[O]nce evidence of self-defense is presented, the burden is on the state to prove beyond a reasonable doubt that the conduct was unjustified."). Thus, in practice, the State still had to prove sexual intent beyond a reasonable doubt. *See Holle I*, 238 Ariz. at 224 ("For practical purposes…the enactment of § 13-1407(E) did not significantly change the way courts treated sexual interest.").

In 1993, the statute took the form that it held until Mr. Bieganski's two trials. The 1993 update revised the language to read "[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 under fifteen years of age." 1993 Ariz. Sess. Laws, ch. 255 § 29. The Arizona court of appeals held that the new language, which omitted the verb "molests," eliminated sexual intent as an element of the crime. *State v. Sanderson*, 182 Ariz. 534, 542 (App. 1995).

But it upheld the statute on the understanding that it shifted only the burden of production – and not the burden of proof or persuasion – to the defendant. Thus, while it was the defendant's burden to assert lack of sexual intent as an affirmative defense, the State then bore the burden of proving sexual intent beyond a reasonable doubt. *See id.*; *Holle I*, 238 Ariz. at 225.

B. In 1997, the Arizona legislature modified the law concerning affirmative defenses, with the unexpected result that it caused confusion in the interpretation of previously well-established statutes.

In 1997, the Arizona legislature acted again, not by changing anything in the child molestation statute, but by changing the burden of proof for all affirmative defenses across the board. The new enactment of general application required that "a defendant shall prove any affirmative defense raised by a preponderance of the evidence...." 1997 Ariz. Sess. Laws, ch. 136, § 4; A.R.S. § 13-205(A) (2006). There is no indication the drafters of the 1997 amendment surveyed all affirmative defenses in Arizona law and reflected on the constitutionality of shifting the burden of proof on each one.

The *Sanderson* precedent was grounded on Arizona's prior approach in which the State must disprove affirmative defenses. After the 1997 amendments, the Arizona Court of Appeals split on the question of whether the *Sanderson* approach remained good law. One panel of the court of appeals held that sexual intent continued not to be an element of child molestation under Arizona law, but that section 13-205(A) now placed the burden on the defendant to prove by a preponderance of the evidence that he lacked sexual motivation. *State v. Simpson*,

217 Ariz. 326, 329 (App. 2007). But a different panel of the court of appeals disagreed with *Simpson*, holding that lack of sexual intent is not an "affirmative defense" to child molestation under state law but just a "defense." *Holle I*, 238 Ariz. at 226. *See* A.R.S. § 13-103 (2006). The *Holle I* court held that for this reason the state still must prove sexual intent beyond a reasonable doubt. 238 Ariz. at 226.

C. *Holle II* shattered the previously well-established orthodoxy requiring the State to prove sexual motivation, but two years later the legislature corrected this mistake.

In 2016, a majority of just three justices on the Arizona Supreme Court upended a century of legal precedent, 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 sexual interest." *Holle II*, 240 Ariz. at 301. Then-Chief Justice Bales, along with now-Chief Justice Brutinel, authored a sharp dissent, predicting exactly the situation that Mr. Bieganski now faces:

> **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.

Holle II, 240 Ariz. at 311 (Bales, C.J., concurring in part) (emphasis added).

Chief Justices Bales and Brutinel also found that the majority's burden-shifting approach "renders the statutes unconstitutional." 240 Ariz. at 311 (Bales, C.J. concurring in part):

> 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").

Id. at 312.[2]

Unsurprisingly, Arizona's legislature amended this unconstitutional burden-shifting quickly, and in 2018 corrected the legislation to relieve parents from the nightmare of having to prove that they did not have sexual intent when bathing their own children. 2018 Ariz. Sess. Laws, ch. 266 (amending A.R.S. §§ 13-1401(A)(3) and 13-1407(E)). It also changed the definition of "sexual contact" to provide that it "[d]oes

[2] Although Chief Justice Bales and Brutinel sharply dissented from the majority's reasoning, they agreed with the majority that, even if the statute was unconstitutional, the error would have been harmless in Holle's case because the record reflected "overwhelming evidence that Holle's conduct was motivated by sexual interest." *Holle II*, 240 Ariz. at 302 ¶ 6. Accordingly, the opinion written by Chief Justice Bales, and joined by Justice Brutinel, is characterized as a "concurrence in part" because both justices "concur in the affirmance of Holle's convictions and sentences." *Id.* at 313 ¶ 61 (Bales, C.J., concurring in part).

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.* As the bill's sponsor noted, the amendment was needed because defendants were "guilty until proven innocent." As another legislator indicated, the amendment "shift[ed] the burden back where it should be."[3]

II. AFTER BRADLEY BIEGANSKI'S FIRST TRIAL ENDS IN A MISTRIAL, HE IS RETRIED FOLLOWING *HOLLE II* AND CONVICTED OF SEXUAL MOLESTATION BASED SOLELY ON TOUCHING THAT OCCURRED WHILE HE WAS BATHING HIS FOSTER CHILDREN.

Bradley Bieganski and his wife, both devout Christians, founded the Kingdom Flight Ranch as a ministry to help underprivileged children. Based in Navajo County, Arizona, the Ranch was licensed by the State and several Native tribes to provide foster care and homeschooling for Native children whose parents voluntarily gave up their parental rights. Mr. Bieganski and his wife acted *in loco parentis* for the children who lived with them at the Ranch. Among their parenting duties, the Bieganskis helped the young children (3 to 8 years old) bathe and get ready for Sunday morning church services.

In 2013, Mr. Bieganski was charged with child molestation for touching the genitals of children while bathing them. However, there was no evidence of sexual gratification, self-touching, or any requests by Mr. Bieganski that the girls touch him.

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[3] *See* Video of the Arizona House Judiciary and Public Safety Committee meeting on HB2283 (2018), dated 2/14/2018, available at https://www.azleg.gov/bills/, at 1:34.

To the contrary, the children stated that Mr. Bieganski would come in, wash them, and leave.[4]

During his first trial, and in accordance with long-established Arizona precedent requiring that the State prove "motivated by an unnatural or abnormal sexual interest or intent with respect to children," *State v. Berry*, 101 Ariz. 310, 313 (1966), it was clear the State needed to prove sexual motivation as an element of the offense. That trial ended in a mistrial.

Before Mr. Bieganski's second trial could begin, however, the Arizona Supreme Court decided *Holle II* which held that a defendant – and not the State – bears the burden of proving lack of sexual motivation. 240 Ariz. at 301. Unlike the first trial, where the prosecution shouldered the burden of proving sexual intent, during the second trial the prosecution intended to shift the burden on sexual interest to the defendant. Mr. Bieganski moved to dismiss the charges on the basis that the State's burden-shifting scheme violated his federal constitutional right to due process. 3-ER-520.[5] His counsel urged that "[t]ouching is just touching" and "without the sex, it is not criminal," and that under the State's interpretation of the statute, "the [State] does not have to prove sex in any way." 3-ER-521

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[4] The State of Arizona's Petition for Writ of Certiorari misleadingly alleges that "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." [Cite] However, Mr. Bieganski was acquitted of all conduct alleged by Y.L. Thus, Mr. Bieganski was *only* convicted of conduct that occurred while bathing his foster children.

[5] References to the trial record in this case use the excerpts of record ("ER") filed in the Ninth Circuit.

The state court viewed the burden-shifting as a "significant issue" and noted 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." 2-ER-064. Nevertheless, the court denied Mr. Bieganski's motion to dismiss because it believed it was bound by the Arizona Supreme Court's recent decision in *Holle II*. 1-ER-048

Faced with the presumption that any non-accidental touching amounts to child molestation, Mr. Bieganski endeavored to invoke Arizona's "lack of sexual interest" affirmative defense, which required him to take the stand to admit the allegations – and thus, the underlying offense itself. He testified that he considered the children in his care to be his own daughters and had no sexual interest in them whatsoever. 2-ER-064. Despite Mr. Bieganski's testimony, the prosecutor told jurors during closing argument that Mr. Bieganski "hasn't presented any evidence of a lack of sexual motivation." 2-ER-105.

The judge instructed the jurors:

> Instruction 23. 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.

2-ER-064-65. Unable to carry the heavy burden of proving his own innocence, Mr. Bieganski was convicted of child molestation.

At sentencing, the burden-shifting argument loomed large. Defense counsel urged that there was "no testimony or evidence that there was anything – any sort of attempted sexual conduct." 2-ER-065. Even Mr. Bieganski addressed it on the record, saying, "I thought it was supposed to be innocent until proven guilty, but that's not the case." *Id.* The trial court also recognized the importance of the constitutional question, asking counsel during sentencing

> The three counts he did get convicted of were all bath cases. And your argument just now, let me repeat it and see if I'm making a correct statement or not, your argument to me is, Judge, would any person – the mother or the father bathes the two-year-old and touches her private parts, that, by law, is child molestation, and you're arguing that the [Arizona] Supreme Court case says the burden is on the defendant to show that there was no sexual motive; right?

2-ER-066.

Ultimately, the trial court was bound by *Holle II*. The judge stated "whether you get this case reversed on that legal point, the future will tell. But for me, I'm bound to follow the Arizona Supreme Court, and that's what I did, and that's what I'm going to do now." 2-ER-066. He concluded "we'll leave to another day your issue on *State v. Holle* and see what happens in the future." *Id.*

Mr. Bieganski was sentenced to the presumptive term of 17 years on each of the three counts, to run concurrently. *Id.* His conviction and sentence were affirmed on direct appeal. *See State v. Bieganski*, No. 1 CA-CR 18-0093, 2019 WL 4159822

(Sept. 30, 2019). The Arizona Supreme Court denied review. *Id.* This Court denied certiorari. *See Bieganski v. Arizona*, No. 20-266, 141 S. Ct. 377 (2020).

Bieganski then timely filed a petition for writ of habeas corpus in federal district court, which was denied. *Bieganski v. Shinn*, No. CV–21–01684–PHX–DWL, 2023 WL 4862681 (D. Ariz. July 31, 2023). On appeal, a unanimous Ninth Circuit panel reversed and remanded to the district court with instructions "to issue the writ of habeas corpus." *Bieganski v. Shinn*, 149 F.4th 1055, 1081 (9th Cir. 2025).

REASONS TO DENY THE WRIT

I. THE PETITION DOES NOT ALLEGE AN ISSUE OF SIGNIFICANT NATIONWIDE IMPORTANCE, BUT MERELY ASKS THAT THIS COURT CORRECT A "MISAPPLICATION" OF ITS OWN SETTLED PRECEDENTS.

The State's primary argument for this Court to grant review is that the panel "misapplied the standard of proof, as well as controlling case law." State's Pet. at 7. But this Court's rules specifically explain that mere "error correction" is not this Court's function. See, *e.g.,* this Court's Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction ... is outside the mainstream of the Court's functions and ... not among the 'compelling reasons' ... that govern the grant of certiorari").

And a review of the Petition confirms that the State seems to agree that the Court of Appeals applied the correct law, cited the correct cases, and identified the correct legal principles. For example, by the State's own admission, the Court of

Appeals correctly identified the proper standard of review under 28 U.S.C. § 2254(d)(1). State's Pet. at 7-8. The State also identified the relevant precedents of this Court which control the constitutional question raised by Mr. Bieganski in his petition for writ of habeas corpus, including *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); and *In re Winship*, 397 U.S. 358 (1970). State's Pet. at 10. These are exactly the precedents on which the Court of Appeals relied in its unanimous opinion below. *Bieganski*, 149 F.4th at 1060.

Finally, the State correctly identifies the "rule" which those cases establish, 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." State's Pet. at 12. Again, that is the exact rule explicated in the decision below. *Bieganski*, 149 F.4th at 1069 ("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.'" (quoting *Smith v. United States*, 568 U.S. 106, 110 (2013)); 149 F.4th at 1072 ("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.") (quoting *Holle II,* 240 Ariz. at 308).

In other words, the State seems to concede that the Court of Appeals correctly identified this Court's binding precedents. It just thinks that the Court of Appeals got the wrong result. That is not grounds for this Court to grant certiorari.

II. BECAUSE THE CONSTITUTIONAL INFIRMITY IDENTIFIED BY THIS CASE OCCURRED SOLELY IN ARIZONA AND WAS CORRECTED BY THE LEGISLATURE IN 2018, IT DOES NOT PRESENT AN IMPORTANT QUESTION THAT MERITS THIS COURT'S REVIEW.

At the time of Mr. Bieganski's conviction, every single state in the country – save only Arizona – required the State to prove some element of sexual intent or motivation to obtain a conviction for child molestation or its equivalent. And in 2018, shortly after the Arizona Supreme Court rendered its decision in *Holle II*, the Arizona legislature recognized the constitutional issue with its statute and amended it. Thus, today, there are no states with statutes similar to the one found unconstitutional by the Court of Appeals' decision. This Court's review would thus serve no purpose beyond this single, very specific case involving the interpretation of Arizona's sexual molestation statute that existed between 2016 and 2018.

Not only was Arizona an outlier among all other states, but it has also now adopted a new version of the challenged statute that addresses the constitutional infirmity identified by the Court of Appeals. In 2018 – two years after *Holle II* in response to the outcry from parents fearing they would have to prove that they did not have sexual intent when bathing their own children – the Arizona Legislature corrected the legislation. 2018 Ariz. Sess. Laws, ch. 266 (amending A.R.S. §§ 13-1401(A)(3) and 13-1407(E)). Specifically, the fix changed the definition of "sexual contact" to provide that it "[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* (quoting amended A.R.S. § 13-1401(A)(3)).

The Arizona Court of Appeals has acknowledged that this new statute requires an "act of sexually motivated touching." *Martinez v. Estes*, 258 Ariz. 354, 359 (App. 2024).

Accordingly, even if addressing the outlier among a single state's laws were a justifiable basis for granting a petition for certiorari, that justification no longer exists. Arizona's statute no longer shifts the burden of proof in the manner described by the Court of Appeals decision – and hasn't for almost a decade. This Court's review is thus unnecessary because there is little possibility that this particular question will arise again.

III. THE "CIRCUIT SPLIT" IDENTIFIED BY THE STATE IS ILLUSORY BECAUSE ALL OF THE CASES IN THE STATE'S PETITION AGREE ON THE UNDERLYING LEGAL PRINCIPLE – THEY JUST REACH DIFFERENT CONCLUSIONS BASED ON DIFFERENT FACTS.

The State identifies five cases which it purports to represent a "circuit split" that would warrant this Court's review. State's Pet. at 15-18. The State's focus on a circuit split is understandable to draw this Court's attention to the petition. *See* this Court's Rule 10(a) (conveying that one of our leading considerations in deciding whether to grant certiorari is whether "a United States court of appeals has entered a decision" that conflicts with "the decision of another United States court of appeals"); *see also* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 4.4, p. 4–11 (11th ed. 2019) ("The Supreme Court often ... will grant certiorari where the decision of a federal court of appeals ... is in direct conflict with a decision of another court of appeals on the same matter of federal law").

But the cases to which the State would draw this Court's attention do not indicate anything even remotely approaching a decision "in direct conflict with" a

decision of another circuit. Indeed, these cases correctly applied the exact same principle of law that the Court of Appeals did in this case, identifying the same long-settled precedent. The only reason the State could plausibly argue that they are contrary to the Court of Appeals decision here is that they reached a different result based on wildly different factual circumstances. But applying the same standard in a different case where the facts are significantly dissimilar and reaching the opposite result based on those facts does not a circuit split make.

Each of the cases cited by the State correctly notes the standard applied by the Court of Appeals here – that where an affirmative defense merely negates an element of the offense, the state court improperly shifts the burden of proof to the defendant. *Bieganski*, 149 F.4th at 1069. In applying that general principle, the different decisions cited here merely reach a different result – concluding that the statutes which they reviewed *did not* negate an element of the offense. *Smart v. Leeke*, 873 F.2d 1558, 1565 (4th Cir. 1989) (holding that "despite the overlap of proof of murder and self-defense," it was constitutionally permissible for South Carolina to allocate 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."); *Iromuanya v. Frakes*, 866 F.3d 872, 880 (8th Cir. 2017) (recognizing that "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" but holding that "sudden-quarrel provocation" defense does not negate an element of second-degree murder under Nebraska statute); *Neely v. McDaniel*, 677

F.3d 346, 353 (8th Cir. 2012) (holding that "reasonable mistake of age" defense to statutory rape "would [only] mitigate the offense, not rebut a presumed element" and does not violate due process); *Bland v. Sirmons*, 459 F.3d 999, 1013 (10th Cir. 2006) (holding that "*Patterson*…limited *Mullaney* to situations where a fact is presumed or implied against a defendant" and because Oklahoma law "did not permit the jury to presume malice aforethought, required the State to prove malice aforethought beyond a reasonable doubt, and defined malice and heat of passion as mutually exclusive, the instructions…did not violate *Patterson*."); *Black v. Workman*, 682 F.3d 880, 902 (10th Cir. 2012) (same).[6]

The State's Petition seems particularly fixated on the fact that many of these cases note that *Mullaney* was significantly limited by *Patterson*. State's Pet. at 18. But the Court of Appeals in this case also drew the same conclusion. *Bieganski*, 149 F.4th at 1078 ("Although some aspects of *Mullaney* were read more narrowly in *Patterson*, the Court reaffirmed *Mullaney*'s core principles in *Patterson*, and has continued to cite *Mullaney* with approval."). The State's cases note the same thing – that *Mullaney* remains good law, but has been limited by *Patterson*.

In short, the cases the State cites for the proposition that there is a circuit split demonstrate no such split. Indeed, they demonstrate the opposite – a clear and well-

[6] The State also cites *Aparicio v. Artuz*, 269 F.3d 78, 98 (2d Cir. 2001). There, the burden-shifting claim was not presented for review, but rather as ineffective assistance of counsel. But a federal court reviewing an ineffective assistance claim adjudicated by a state court must apply a "doubly deferential" analysis. *Clark v. Sweeney*, 607 U.S. 7, 10 (2025). Furthermore, *Aparicio* involves a double jeopardy claim and cites *Martin* merely in passing. It is inapposite to this case.

established legal principle being applied to different circumstances with different results. There is no circuit split here.

IV. THE COURT OF APPEALS DECISION WAS CORRECT ON THE MERITS.

Finally, certiorari is not appropriate here because the Court of Appeals correctly held that the Arizona Courts' decisions, which required Mr. Bieganski to disprove the element of sexual motivation, was contrary to or involved an unreasonable application of clearly established federal law.

A. The state court decision is "contrary to" clearly established federal law.

A state court decision is "contrary to" clearly established federal law if it "applies a rule that contradicts the governing law set forth in our cases" or "confronts a set of facts that are materially indistinguishable from" a decision of the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). The Arizona Supreme Court's decision in *Holle II* does both.

Although the Arizona Supreme Court's decision in *Holle II* runs some fifty paragraphs in length, only two paragraphs of that opinion deal with the constitutional due process claim Mr. Bieganski asserts here:

> 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)….
>
> 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.

Holle II, 240 Ariz. at 308 ¶¶ 39-40.

In short, the Arizona Supreme Court reasoned that a state may not shift the burden of proof on "an element of the crime," but that the state legislature remains free to "define the elements of a crime" without any apparent constitutional limit. That is the same argument advanced by Maine in *Mullaney* – an argument which the Supreme Court soundly rejected. This fact alone conclusively demonstrates that *Holle II* is "contrary to" clearly established federal law.

Indeed, *Holle II* does not mention *Mullaney*, much less contend with the constitutional principle it outlined. Nowhere in *Holle II* does the Arizona Supreme Court address the question of the limits of a state's power to redefine an element of an offense as merely an affirmative defense. But *Mullaney* squarely addressed those

limits, and conclusively stated that a state legislature *may not* "redefine the elements of certain crimes" in order to "undermine the many interests [*In re Winship*, 397 U.S. 358 (1970)] sought to protect." 421 U.S. at 698. By "focus[ing] on the wrong questions in denying" Mr. Bieganski's claim, the state court "applied the wrong legal framework" and its decision is "unworthy of AEDPA deference." *Milke v. Ryan*, 711 F.3d 998, 1006-07 (9th Cir. 2013).

Having failed to address *Mullaney*, the state court decision also does not conduct the analysis that it requires. *Mullaney* began its inquiry by looking into the historical context of the criminal statute at issue to determine whether the element in question was "essential" to the charge. 421 U.S. at 692-96. And while the Arizona Court of Appeals had conducted that analysis in concluding that the burden-shifting was unconstitutional, the Arizona Supreme Court explicitly rejected that analysis as unnecessary. *Holle II*, 240 Ariz. at 305 ¶ 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. 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." (internal citations omitted)).

Finally, *Holle II* is contrary to federal law because it "confronts a set of facts that are materially indistinguishable from" *Mullaney* and reaches the opposite result. *Williams*, 529 U.S. at 405. Just as in *Mullaney*, the Arizona legislature attempted to

remove an element that was historically "essential" to the crime of child molestation and "redefine" it an affirmative defense.[7] 421 U.S. at 698. Despite clear evidence that sexual motivation was historically an "important factor" in determining culpability and "the clear trend has been toward requiring the prosecution to bear the ultimate burden" of proving that element, *id.* at 696, the state court reached the opposite conclusion from *Mullaney*, and is thus contrary to federal law.

While the standard set by § 2254(d)(1) is high, and a state court seeking to avoid federal review "does not require citation of our cases – indeed, it does not even require *awareness* of our cases," the state court must still avoid contradicting Supreme Court precedent. *Early v. Packer*, 537 U.S. 3, 8 (2002). The state court decision here has failed that test. *Holle II* (1) failed to cite the relevant federal precedent at issue; (2) failed to appropriately conduct the inquiry that precedent required; and even (3) advanced an argument that the Supreme Court has expressly rejected in longstanding precedent.

In short, its holding is contrary to clearly established federal law.

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[7] As discussed in the Statement of the Case section, above, it seems very likely that the Arizona legislature was not trying to do this – that the result reached by the Arizona Supreme Court in *Holle II* was nothing more than an unintended consequence of the legislature's overhaul of "affirmative defenses" in 1997. The fact that the legislature moved quickly to fix the statute in light of *Holle II* lends credence to this interpretation. Nonetheless, because the Arizona Supreme Court decision interprets the legislature's intent this way, this Court ought to evaluate that interpretation under § 2254(d)(1).

B. The state court decision "involved an unreasonable application of" clearly established federal law.

A state court decision "involves an unreasonable application of" clearly established federal law "if the state court identifies the correct governing legal rule from [Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407.

Viewed through the lens of *Williams*, the state court's decision in Mr. Bieganski's case is unreasonable in at least two ways: first, it "unreasonably refuse[d] to extend [a legal principle from a Supreme Court precedent] to a new context where it should apply," when it failed to extend the ruling of *Mullaney* to a similar case involving an element that had historically been the State's burden to prove – and which every single other American jurisdiction required the State to prove; and second, it "unreasonably applied" *Mullaney* and its progeny by reaching a decision that was contrary to every other court to consider this question.

1. *Holle II* was unreasonable because it failed to extend the principle *Mullaney* applied to homicide offenses to sexual molestation offenses.

While § 2254(d)(1) permits this Court to vacate a conviction only when the state court decision underlying that conviction unreasonably applies "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions," *Williams*, 529 U.S. at 412, there is usually some question as to what, specifically, constitutes "holdings" as

opposed to "dicta" from the Supreme Court's opinions. As noted above, Mr. Bieganski asserts that the holding of *Mullaney* applies not only to homicide crimes, but to all crimes where a particular element is essential to the crime and there is a clear history requiring the state to bear the burden of proof on that element. 421 U.S. at 696. But Mr. Bieganski also acknowledges that a contrary reading of *Mullaney* is that its holding is limited to homicide offenses. *See id.* at 703 ("We…hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case."). However, even if the holding in *Mullaney* applies only to the elements of homicide cases, a state court decision can be vacated under § 2254(d)(1) if it "unreasonably refuses to extend" *Mullaney* "to a new context where it should apply." *Williams*, 529 U.S. at 407.

Where the Supreme Court has established a legal framework for the evaluation of certain types of cases, and its other precedents clearly point to that framework being applied in other adjacent types of claims, it is contrary to federal law not to extend those holdings. *See, e.g., Lafler v. Cooper*, 566 U.S. 156, 164 (2012) (extending the legal framework of *Strickland v. Washington*, 466 U.S. 668 (1984) to plea bargaining). Just as *Lafler* looked at settled Supreme Court case law to determine that a criminal defendant has a right to effective counsel during the plea bargaining process – even though *Strickland* does not so hold – this Court ought to extend the principles of *Mullaney* and *Patterson* to apply to charges of molestation.

Mullaney establishes that the intent requirement is essential in homicide convictions. 421 U.S. at 701. *Patterson* further honed this ruling to apply only to "essential elements" and not to defenses which negate elements of the offense, like extreme emotional distress negates malice. 432 U.S. at 216. But *Patterson* acknowledges that "there are obviously constitutional limits beyond which the States may not go" when defining criminal conduct. *Id.* at 209-10. Logically, that limit is passed where a state attempts to define a crime so expansively as to criminalize a broad range of conduct that is indisputably innocent and place the burden on defendants to prove their conduct was not criminally motivated. *See Winship*, 397 U.S. at 364 (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").

The Arizona Supreme Court's decision in *Holle II* is also in tension with other precedents of the Supreme Court which require that statutes state with clarity the types of conduct that are considered criminal. *X-Citement Video*, 513 U.S. at 78 (refusing to adopt "most grammatical" reading of statute when doing so would criminalize a range of innocent behavior and thereby raise "serious constitutional doubts"); *McDonnell v. United States*, 579 U.S. 550, 576 (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).

Taken as a whole, it is clear that Supreme Court precedent commands that the State bear the burden of proof beyond a reasonable doubt on every element of an offense; *Winship*, 397 U.S. at 364; and that a state may not avoid the requirements of *Winship* by redefining an element as an affirmative defense; *Mullaney*, 421 U.S. at 701, *Patterson*, 432 U.S. at 209-10; or by defining the elements of a crime so broadly as to capture large amounts of otherwise innocent conduct; *X-Citement Video*, 513 U.S. at 78, *McDonnell*, 579 U.S. at 576. And yet, that is precisely what the Arizona Supreme Court has endorsed in *Holle II*. Accordingly, *Holle II* is based on an unreasonable application of clearly established federal law and is not entitled to AEDPA deference. 28 U.S.C. § 2254(d)(1).

2. *Holle II* applies federal law so unreasonably that virtually no other "fairminded jurists" have applied it similarly.

The state court decision at issue here is also an unreasonable application of clearly established federal law because "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with" Supreme Court precedent. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). This will occur, for instance, when the state court decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

As has been more fully explored above, clearly established federal law holds that when a state redefines a crime to exclude an essential element of that offense, it violates due process. *Mullaney*, 421 U.S. at 701, *Patterson*, 432 U.S. at 209-10. Sexual intent or motivation is an essential element of molestation.

The question of whether fairminded jurists could disagree on this proposition should begin with the fact that no fairminded jurists have disagreed with this proposition. No state court has permitted its legislature to do what Arizona's Supreme Court did in *Holle II*. Every state supreme court to have addressed this issue has found that touching by itself – absent sexual motivation or intent or some other indication that the act was of a sexual nature – is not enough to sustain a conviction for molestation. This is so even when the statute it interprets does not explicitly contain a sexual motivation element.

CONCLUSION

The Petition does not raise any significant issues of nationwide importance that warrant this Court's review. It acknowledges that the Court of Appeals applied the correct legal standard but asks merely for this Court to act as an appellate court, correcting what it views as an incorrect weighing of that standard. Furthermore, even if this case did present an issue worthy of this Court's review, Arizona's adoption of a new statute almost immediately following *Holle II* has mooted any need for this Court to get involved because the constitutional infirmity identified by the Court of Appeals decision has been remedied. The purported split identified by the State is no such thing – indeed, the cases cited for that purpose demonstrate that the rule of law applied by the Court of Appeals here is well-settled and does not require this Court's guidance. Finally, the Court of Appeals decision is correct on the merits. For these reasons, Mr. Bieganski respectfully requests that this Court deny Petitioner's petition for writ of certiorari.

Respectfully submitted:

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s/ Randal McDonald
Randal McDonald
Counsel of Record
Law Office of Randal B. McDonald
112 North Central Avenue, Suite 100
Phoenix, Arizona 85004
(602) 325-3092
randy@rbmcdonaldlaw.com
Attorney for Respondent Bieganski