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INTRODUCTION

In recent years, legislative leaders have proposed multiple amendments to the Arizona Constitution and convinced voters that confining criminal defendants before their trial is a necessity to protect the public safety. Until 2002, article II, §22(A)(1) permitted all offenses to be bailable as a matter of right except for capital offenses; but in that year, the voters expanded that list to include sexual assault, sexual conduct with a minor under fifteen, and molestation of a child. A similar expansion of article II, §22(A) was enacted in 2006 and was struck down in *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014), for violating the due process rights of pre-trial detainees.

That the expansion at issue in *Lopez-Valenzuela* targeted arrestees based on their national origin is irrelevant because the Ninth Circuit did not even reach the plaintiffs' equal protection challenge. Following the reasoning of *Lopez-Valenzuela*, Division One properly held that the right of arrestees to be bailable is fundamental and cannot be curtailed except in individual cases where public safety can only be protected by holding a defendant nonbailable. *Simpson v. Miller (Simpson II)*, ___ Ariz. ___, 2016 WL 3264151 (Ariz. Ct. App., June 14, 2016). The practice in Maricopa County has been to deny this fundamental right to arrestees of certain charges; it is time for that practice to end and for the criminal justice system to recognize that the accused is presumed innocent until proven guilty.

INTERESTS OF *AMICI CURIAE*

Arizona Attorneys for Criminal Justice, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

The Maricopa County Public Defender, Maricopa County Legal Defender, Maricopa County Legal Advocate, Pima County Public Defender, and Pima County Legal Defender are the five public defense agencies in the two largest counties of Arizona tasked with defending those accused of felony offenses.

Amici offer this brief because the issue presented concerns the constitutional right of citizens to be bailable cannot be infringed unless the State can prove by clear and convincing evidence that a particular detainee would be a threat to the community as a whole or the victim in particular. *Amici* have defended many thousands of cases involving murder, sexual assault, and sexual offenses involving children and have broad experience with the spectrum of such defendants.

ARGUMENTS

I. Proposition 103 was a solution in search of a problem; its only nonsuperfluous language serves to deny due process to those charged with certain serious offenses.

In 2002, article II, §22 of the Arizona Constitution provided that all persons charged with crimes were bailable with three exceptions: 1) capital offenses; 2) felony offenses committed while admitted to bail for a separate felony charge; and 3) “felony offenses if the person charged poses a substantial danger to any other person or the community, if no conditions of release which may be imposed will reasonably assure the safety of the other person or the community...” With regard to all three categories, the State must demonstrate to the satisfaction of the court that the proof is evident and presumption great that the defendant committed the charged offense. *Simpson v. Owens (Simpson I)*, 207 Ariz. 261 (App. 2004). In order for bail to be denied, the defendant must be afforded “a full-blown adversary hearing, [and] the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.” *United States v. Salerno*, 481 U.S. 739, 750 (1987). It is only because of this protection for the pre-trial detainee that such laws can satisfy due process. *Id.* at 751.

Neither the first category of nonbailable defendants (those charged with capital offenses) nor the second (those arrested for a felony arrest while admitted to

bail for a separate felony offense) include language requiring the court to determine whether any release conditions could reasonably assure the public safety and secure attendance at future hearings. The second category is not at issue in this case; any arguments supporting nonbondability of those who re-offend while admitted to bail are purely hypothetical. By excluding such language regarding risk to the community in the first category, however, the Arizona Constitution implicitly presumes that no conditions of release could reasonably secure attendance at trial and assure public safety. Regardless of the absence of such language, however, Arizona courts must give a constitutional interpretation to the laws where possible. *State v. Thompson*, 204 Ariz. 471, 478 ¶27 (2003). In this case, such may be accomplished by reading *Salerno*'s due process requirements into article II, §22(A)(1).

Where the defendant isailable, the standards for determining appropriate release conditions are set forth in A.R.S. §13-3967(B); in 2002, the list of factors to consider was a list of nine, and it has since been expanded to fifteen. Judges have always been permitted to consider other factors not enumerated; the statute merely directs the judge to consider these at a minimum. This statute is uncontroversial; no one challenges the duty of the judge to consider all relevant factors when deciding on release conditions. And cases in which judges' decisions are later reversed are truly few and far between. *But see Costa v. Mackey*, 227 Ariz. 565, 567 ¶1 (App.

2011) (setting \$75,000,000 cash bond was abuse of discretion). Consistent with *Salerno*, Arizona judges have maintained the power to deny bail to those who pose such a threat to the community or for nonappearance.

Proposition 103 had two components. First, it expanded the list of nonbailable offenses to include sexual assault, sexual conduct with a minor under fifteen, and molestation of a child. Second, it added a new §22(B), which listed three purposes of bail and release conditions as including assuring appearance, protecting against witness intimidation, and protecting the safety of the victim and the community. But all three of these purposes existed in the 2002 version of §13-3967(B). Since there was never any doubt as to the validity of these purposes of bail, it is evident that this new §22(B) was added in order to mislead the electorate into believing these purposes did not already exist.

The ballot pamphlet included five arguments in favor of the measure, and none against. Ariz. Sec’y of State, 2002 Gen. Election Ballot Prop. Guide, Prop. 103, <http://apps.azsos.gov/election/2002/Info/pubpamphlet/english/prop103.pdf>, p.16 (last visited September 2, 2016). Senator Dean Martin, the sponsor of the legislation, wrote:

Last year, the US Supreme Court ruled that sexual predators can be held even after their criminal sentence if they still pose a danger to the community. Now, when sexual predators are caught, they know they could be facing lifetime incarceration.

Slick defense lawyers have been able to reduce million dollar bonds,

allowing predators back on the street for just a few hundred dollars. A sexual predator who knows he is guilty, facing life behind bars, has no incentive to ever return. It has happened time and again.

...

Proposition 103 also gives better tools to judges to set bail conditions beyond just money. Judges will be able to set any conditions of release to protect the community, the victim or their family, or protect against the intimidation of witnesses.

Id. Gubernatorial candidate Matt Salmon's policy director James Morse submitted an even more inflammatory argument, citing four cases where individuals were released on bond and even calling out one judge by name. *Id.* at 17. The fear of the voters was sufficiently stoked that this proposition passed with 80% of the vote. *State ex rel. Romley v. Rayes*, 206 Ariz. 58, 62 ¶12 (App. 2003).

These arguments ignored that a person charged with a crime is presumed innocent by law. Moreover, they assumed that, because the judge cannot know at the time of setting release conditions whether that defendant will commit a serious crime, that it should err on the side of caution and hold the defendant without bond. This speculative future harm in some unforeseeable case, however, does not withstand constitutional scrutiny. As long as the concept of bail exists, there will always be potential for a person admitted to bail to commit a serious offense. Arizona law entrusts judges with the responsibility of applying the factors in §13-3967(B) in a manner that maximizes the likelihood of maintaining the community's safety while also ensuring that the law is being applied fairly.

This was not the only time that the Legislature stoked such fears in the electorate about dangerous criminals fleeing the jurisdiction to avoid justice. In 2006, the Legislature referred Proposition 100 to the voters that added an entirely new category of persons charged with crimes who would be denied bail: those who entered or remained in the United States unlawfully. *See* Ariz. Sec’y of State, [2006 Gen. Election Ballot Prop. Guide, Prop. 100](#), p.13-14 (last accessed September 2, 2016). This prohibition on bail that was based solely on national origin was found to violate the Due Process Clause of the Fourteenth Amendment in *Lopez-Valenzuela*. Although the class action plaintiffs in *Lopez-Valenzuela* were targeted not for the seriousness of their offenses¹ but for their place of birth, the problem in that case and *Simpson II* is the same: expanding the list of offenses for which the defendant may be denied bail without any concern for individualized considerations of the propriety of denial of bail in any particular case. Unlike the racial offensiveness of Proposition 100 in 2006, the target of Proposition 103 in 2002 was people charged with rape or child molestation, who are significantly less politically sympathetic. Yet, this does not change the fact that each individual defendant is presumed innocent.

¹ The definition of “serious offense” governing Proposition 100 was “any class 1, 2, 3 or 4 felony or any violation of §28-1383,” A.R.S. §13-3961(A)(5)(b) (Rev. 2006). This definition encompassed felonies involving drug possession for which probation was mandatory under §13-901.01.

The Maricopa County Attorney's Office (MCAO) notes that facial challenges "are not categorically barred," but, contrary to the United States Supreme Court's recent language in *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), it nevertheless insists that such challenges are "especially disfavored" and disagrees with *Patel*. Petition at 7-10. This argument not only cannot be sustained because it directly opposes the Supreme Court's opinion, but recent experience with review of Arizona law shows the argument to be false as well. In *Arizona v. United States*, 132 S. Ct. 2492 (2012), the Court reviewed Arizona's 2010 enactment of the ill-fated SB 1070 and found that almost all provisions of the law were facially unconstitutional, even though the law had been enjoined prior to its effective date. The Court upheld one provision against a facial challenge under the Fourth Amendment, however, because it was not yet clear that detentions of motorists would in fact be prolonged and for improper purposes, and thus it was proper to allow the state to implement this section and allow affected persons to raise as-applied challenges where appropriate. *Id.* at 2509-10. Nothing in *Arizona v. United States* suggests that such facial challenges are "especially disfavored," and *Patel* put to bed the argument that laws could not be facially challenged as violative of the Fourth Amendment, or any other constitutional provision. 135 S.Ct. at 2449.

The proof that a facial challenge is appropriate, however, is in MCAO's petition itself. MCAO expresses concern that 534 defendants will be released on the

streets if *Simpson II* is not overturned. Motion to Stay filed July 5, 2016, at 8-9 & n.4. Though it is possible that a few defendants have “slipped through the cracks” and received due process, MCAO makes clear that the irreparable harm it was seeking to prevent was to provide due process to these 534 persons who are supposed to be presumed innocent. MCAO seeks not only to deny the substantive due process right to liberty; it even seeks to deny the procedural due process right to a fair hearing. Thus, it is MCAO’s own words that provide the best argument for a facial challenge: the law violates the Fourteenth Amendment in every case. *See Salerno*, 481 U.S. at 745.

MCAO’s motion for stay, at 9, also invokes the right to due process of “victims and Arizona voters.” The right of Arizona voters to ignore the Bill of Rights was dispelled in *Lopez-Valenzuela*, despite Justice Thomas’s concern that, “[a]t the very least, we owe the people of Arizona the respect of our review before we let stand a decision facially invalidating a state constitutional amendment.” *Maricopa County v. Lopez-Valenzuela*, 135 S. Ct. 428 (2015) (Thomas, J., concurring in denial of stay). As for the rights of victims, nowhere in article II, §2.1 of the Arizona Constitution is there a right to keep the accused from having the benefit of constitutional protections. Victims have a right to be heard specifically on the issue of bail, *see* A.R.S. §13-3967, but that right does not extend so far as to direct judges to do their bidding. “[D]enial of due process is a denial of fundamental fairness,

shocking to a universal sense of justice. . . . We therefore hold that when the defendant's constitutional right to due process conflicts with the Victim's Bill of Rights in a direct manner... then due process is the superior right." *State ex rel. Romley v. Superior Court (Roper)*, 172 Ariz. 232, 236 (App. 1992).

As MCAO's arguments are admittedly calling for a denial of due process, they must be rejected. The Court of Appeals properly recognized that "[p]rocedural due process is merely ornamental if the court cannot consider the evidence it produces." *Simpson II*, __ Ariz. __, ¶14, 2016 WL 3264151, *4. Because *Simpson II* was correctly decided, this Court should let that opinion stand by denying review. Even granting review for the purpose of affirming *Simpson II* would cause undue delay to the opportunity of the 534 defendants to receive a fair hearing.

II. Risk assessment instruments used by Pre-Trial Services reflect evidence-based practices and serve Arizona courts well.

In almost all cases of felony arrests in Arizona, including in Maricopa and Pima Counties, the magistrate presiding over initial appearances has the benefit of a Pre-Trial Services report. The risk assessment instruments used for these reports reflect evidence-based practices, and the case workers writing the reports delve into the following information about the arrestee:

- age at time of arrest;

- residential stability and proximity to courthouse to which the arrestee will report;
- employment status and stability;
- support of and responsibility for family and friends;
- whether the current offense is violent;
- prior felony and misdemeanor arrests and convictions, nature of those offenses, and time spent in prison;
- prior warrants for failure to appear;
- holds placed on the arrestee by any law enforcement agencies
- if the arrestee is addicted to drugs, amenability to treatment;
- if the arrestee has mental health issues, whether the arrestee is currently enrolled with a service provider or receiving other treatment; and
- whether the arrestee is suffering from suicidal ideation or is otherwise an immediate threat to self or others.

This list encompasses almost all of the factors listed in A.R.S. §13-3967(B).² These factors reflect evidence-based practices and help the court to determine whether the accused would appear for trial without committing new offenses or threatening any victims. For example, although an arrestee's unlawful presence in the country cannot

² In 2005, the Legislature added whether the charged offenses involve methamphetamine, but not any other illegal drugs. §13-3967(B)(10) (Rev. 2016).

alone cause a person to be held without bond, it is permissibly considered in determining appropriate release conditions.

Additional factors are considered when the offense is intrafamilial. Especially in cases involving sexual offenses or domestic violence, there are concerns of continuing harm to a victim who lives in the same abode as the accused. If the accused is released with standard conditions that the accused should not return to the incident location or have contact with the victim, this means that the accused cannot go home (assuming the victim has not moved first) and is effectively evicted by court order. If the accused has another place to live while the case is pending, however, the accused may still be released.

For an accused who is presumed innocent, the charge alone can destroy a person's life and livelihood. By being held in custody pending trial, the accused's ability to assist in preparing the defense is significantly reduced. Cases involving sexual allegations frequently result in acquittals, especially when allegations are brought many years later. If the accused is convicted at trial, then punishment may be meted. According to MCAO's numbers, 534 defendants are currently held without bond without so much as a hearing to determine the risk to the victim or the community.

In Pima County, on the other hand, use of article II, §22(A)(1) to hold an accused without bond is extremely rare—only a handful in the last several years.

Pima County complies with *Salerno*: using the risk assessment tools described above in setting the least onerous conditions that would reasonably assure the accused's appearance at future court dates while protecting the victim and community. Persons charged with first-degree murder are regularly required to post a \$1,000,000 bond.³ As for those charged with sexual assault or sexual offenses involving children, the initial appearance judge recognizes that being accused of a serious crime (for which the accused is presumed innocent) is not identical to posing an imminent threat to the community while the case is pending. And, in those cases where the defendant's release conditions need to be revisited because new information has to come to light about the risk the defendant now poses to the community, both the prosecutor and Pre-Trial Services have the authority to bring this to the court's attention and to have arrest warrants issued. Ariz.R.Crim.P. 7.5.

Another unrelated expansion of the reach of criminal law impacts this issue. In 1996, voters approved an initiative amending constitutional provisions related to

³ This Court's task force on Fair Justice For All recently suggested that "Arizona should move ahead to implement a risk-based release decision system and eliminate money for freedom to the greatest extent possible ... instead of the more common practice of setting a high-dollar bond as a substitute for trying to keep a high-risk individual in jail." [Report and Recommendations of the Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies](#), at 38. Recognizing that this case "might have some impact on this subject," *id.*, the task force opined that no-bond hearings would be a fairer way to address the matter than obviously unpostable bonds. *Amici* would agree with that so long as *Simpson II* is upheld in that *Salerno* compliance is mandatory.

the jurisdiction of the Superior Court over juveniles. *McGuire v. Lee*, 239 Ariz. 384, 386-87 ¶7 (App. 2016). In addition to offenses that are automatically prosecuted in Superior Court when committed by juveniles, *see id.* ¶8 (quoting A.R.S. §13-501(A)), prosecuting attorneys have discretion to transfer other cases, including sexual offenses committed by juveniles, under A.R.S. §13-501(B). Because juveniles are transferred to Superior Court based solely on the discretion of prosecuting attorneys, §13-504 now allows for Superior Court judges to transfer such cases back to Juvenile Court.

In child sex cases where the alleged perpetrator is also a child, once the case is transferred to Superior Court on the prosecutor's discretion, new release conditions would have to be set. If the State has its way in this case, then children will be detained in the county jail without bond without any regard to what is best for the community or the victim, for as long as the case remains pending in Superior Court. In cases that are reverse transferred to Juvenile Court, the juvenile may have spent many months incarcerated without any reason but for the incorrect application of *Salerno* to article II, §22(A)(1).

The State has a duty to protect the rights of all its citizens—including the criminally accused. Its arguments in this case are too dismissive of the substantive due process right to liberty and the procedural due process right to a hearing. This Court must honor those rights.

CONCLUSION

The Court of Appeals' majority correctly analyzed the legal issue. *Amici* ask this Court to deny review of the State's petition, so that 534 defendants in Maricopa County may be entitled to due process without further delay.

RESPECTFULLY SUBMITTED this 8th day of September, 2016.

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