

IN THE ARIZONA SUPREME COURT

BARBARA LAWALL, an individual) No. CV-20-0223-AP/EL
and qualified elector, HEATHER)
GROSSMAN, an individual and)
qualified elector, BECKIE MILLER, an) Maricopa County Superior Court No.
individual and qualified elector, JOHN) CV-2020-008289
GILLIS, an individual and qualified)
elector,)
)
Appellants,)
)
v.)
)
KATIE HOBBS, in her official capacity)
as Arizona Secretary of State;)
ARIZONANS FOR SECOND)
CHANCES, REHABILITATION, AND)
PUBLIC SAFETY (SPONSORED BY)
ASJ ACTION FUND), a political action)
committee,)
)
Appellees.)

**BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL
JUSTICE AND PIMA COUNTY PUBLIC DEFENDER’S OFFICE
IN SUPPORT OF APPELLEES**

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INTERESTS OF *AMICI CURIAE*

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. 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.

Pima County Public Defender's Office is the second largest indigent defense agency in Arizona. Its eighty attorneys represent persons accused of felony and misdemeanor offenses in adult and juvenile court as well as children and parents in dependency and severance proceedings, and its appellate unit represents clients in appellate and postconviction proceedings.

Amici offer this brief because the Second Chances, Rehabilitation, and Public Safety Act ("the Initiative") is important legislation that voters have the constitutional right to consider. Appellants' challenge to the Initiative's 100-word description is based on misunderstandings of criminal law¹ derived from an intent to

¹ To the extent Appellants rely on the Legislative Council analysis, "[i]t is

undermine the Initiative rather than to give effect to the language of its proponents. *Calik v. Kongable*, 195 Ariz. 496, 498 ¶10 (1999) (“Our primary purpose is to effectuate the intent of those who framed the provision and, in the case of an [initiative], the intent of the electorate that adopted it.”) (quoting *Jett v. City of Tucson*, 180 Ariz. 115, 119 (1994), alteration in *Calik*). As explained below, the Initiative does not suffer the fatal flaw described in *Molera v. Reagan*, 245 Ariz. 291 (2018), where initiative drafters blatantly misled electors about the scope of a proposed tax increase to induce electors to sign.

ARGUMENTS

I. Appellants incorrectly claim that the Initiative’s description of nondangerous offenses is misleading.

The Initiative distinguishes between dangerous and nondangerous offenses by making nondangerous offenses eligible for earned release credits of one day for every day served (“50% time”), while dangerous offenses remain “85% time” under A.R.S. §41.1604.07. Section 13-105(13), defining “dangerous offense,” spans 32 words and includes separately defined five terms: “deadly weapon” (§13-105(15)), “dangerous instrument” (§13-105(12)), “intentionally” (§13-105(10)(a)), “knowingly” (§13-105(10)(b)), and “serious physical injury” (§13-105(39)).

emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803).

Appellants do not argue that the statutory language is misleading (as was the case in *Molera*), instead focusing their attack on the description for not providing a precise definition of “nondangerous offense.” Appellants rely on dictionaries and colloquial uses of “dangerous” without reference to statutes. OB at 12. But the Initiative’s description refers to nondangerous offenses “(as defined),” which implies “as defined in Arizona law,” and thus reference to dictionary definitions violates rules of statutory construction. *Cf. State v. Pena*, 235 Ariz. 277, 279 ¶6 (2014) (“*Absent statutory definitions*, courts apply common meanings and may look to dictionaries.”) (emphasis added).

Seemingly agreeing electors would understand “(as defined)” as referring to statutes, Appellants search the criminal code for crimes that should be considered as “dangerous” despite not qualifying as “dangerous” under §13-105(13). Appellants’ list is short: 1) conspiracy to commit first-degree murder; 2) child sex trafficking; 3) abuse of vulnerable adult; 4) kidnapping; 5) “home invasion crimes”; and 6) terrorism. OB at 12. Appellants have gravely misread the law while imposing their partisan political view of certain crimes on the drafters. *Amici* address each in turn.

“Conspiracy to commit a class 1 felony is punishable by a sentence of life imprisonment without possibility of release on any basis until the service of twenty-five calendar years...” §13-1003(D). There are only two class 1 felonies: first-degree

murder and second-degree murder.² Because “release on any basis” from this life sentence may not be sought until 25 calendar years are served, such offenders are not eligible for early release credits, i.e., they must do “flat time.” *See* §13-105(4) (defining “calendar year” as “three hundred sixty-five days actual time served without release [on any basis]”); *State v. Hasson*, 217 Ariz. 559, n.3 (App. 2008) (recognizing statutory definition of “calendar years” means “flat time”).

Child sex trafficking has a special sentencing scheme that is especially severe. Under §13-3212(G), the person is only eligible for release under §31-233 or if the sentence is commuted. This means the offender is ineligible for early release credits pursuant to §41-1604.07. For this reason, the Initiative would have no effect on sentences for this crime. Moreover, prosecutors recently were victorious in this Court arguing for applicability of this more severe statute over the dangerous-crimes-against-children (DCAC) statute even when a police officer poses as a minor. *State ex rel. Polk v. Campbell*, 239 Ariz. 405 (2016).

The law recognizes that kidnapping can be a nondangerous or dangerous offense, depending on the circumstances. The statutory definition requires nothing more than a restraint with an intent to commit some other offense on the person.

² Arguably, conspiracy to commit second-degree murder is a nonexistent crime because agreement to kill necessarily implies premeditation. *See Evanchyk v. Stewart*, 202 Ariz. 476 (2002) (conspiracy to commit first-degree murder cannot be predicated on felony murder).

§13-1304(A)(1)-(6). Examples of the kinds of kidnappings that electors would likely consider dangerous involve taking a child or holding a person at gun- or knife-point, *i.e.*, dangerous offenses. Notably, Appellants use dictionary definitions throughout its pleadings but avoid doing so with kidnapping—no doubt because “kidnap” is defined as “to seize and detain or carry away by unlawful force or fraud and often with a demand for ransom.”³ Similarly, vulnerable adults may be abused in a dangerous manner, but the elements of §13-3623(B) may be proven even absent any *likelihood* of serious physical injury.

“Home invasion crimes” shows Appellants’ desire to score political points. There is no such thing as a second-degree burglary committed as a dangerous offense, because the mere possession of “explosives, a deadly weapon or a dangerous instrument in the course of” the offense, even if it is not used, escalates the offense classification to first-degree burglary. §13-1508(A). “Home invasion” connotes armed home invasion where the home’s occupants are held at gunpoint, thereby including other dangerous offenses such as kidnapping, armed robbery, and aggravated assault.⁴ Residential burglary is certainly one of the most (if not the most)

³ See <https://www.merriam-webster.com/dictionary/kidnapping> (last visited August 11, 2020).

⁴ “Home invasion robberies have the following five features:

- Offender entry is forced and/or unauthorized (except in some drug-related robberies)
- Offenders seek confrontation (*i.e.*, the intent is to rob)

violative of all nondangerous offenses; for this reason, a resident of the home is presumed to act reasonably by shooting an intruder. §13-419. Nevertheless, burglary, without proof of more facts, is nondangerous under Arizona law.

It is peculiar that Appellants included the sixth crime, terrorism, since the definition of terrorism includes, as an element, “any felony, including any completed or preparatory offense, that involves the use of a deadly weapon or a weapon of mass destruction or the intentional or knowing infliction of serious physical injury...” §13-2301(C)(12). This element tracks the language of “dangerous offense” in §13-105(13) and is subsumed by that definition; all acts of terrorism are *per se* dangerous offenses. Furthermore, §13-2308.01(C) permits a court to punish a person convicted of terrorism either by life, natural life, or a term of years between 10-25 years; presumably, the more serious “terrorists” would receive a life or natural life sentence.

Title 13, Arizona Revised Statutes, spans hundreds of pages and contains thousands of crimes. Appellants scoured the criminal code to come up with a list of six alleged “nondangerous offenses.” Appellants are mistaken as a matter of law as

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- Confrontation occurs inside dwellings
 - Offenders use violence and/or the threat of violence
 - Offenders demand and take money and/or property.”

Arizona State University Center for Problem-Oriented Policing, “Home Invasion Robbery,” available at <https://popcenter.asu.edu/content/home-invasion-robbery-0> (last visited August 11, 2020).

to all six. The Initiative description was not misleading, and thus this Court should affirm the lower court ruling.

II. Eliminating *Hannah*/*Hauser* priors has the effect of vesting greater discretion in trial judges to impose fair sentences.

The creation of “*Hannah* priors” and “*Hauser* priors”⁵ has had a devastating impact on justice in criminal sentencing over the last 40 years. It shifted the balance of power in the courtroom from the impartial judge to one of the parties: the prosecutor. Divesting trial judges of authority to impose what they consider a fair sentence in any given case has resulted in Arizona’s prison population skyrocketing, without a corresponding benefit to public safety to show for it.⁶ Worse, it has created “a system of pleas, not a system of trials,” *Lafler v. Cooper*, 566 U.S. 156, 170 (2012), because defendants cannot bear the risk of losing a trial where the judge has limited discretion at sentencing.

With the repeal of §13-703(A), judges will enjoy broader discretion to craft

⁵ See *State v. Hannah*, 126 Ariz. 575 (1980) (offenses committed on different occasions may be punished as prior convictions); *State ex rel. Romley v. Hauser*, 209 Ariz. 539 (2005) (offenses too old to be punished as historical prior convictions may nonetheless serve to eliminate probation eligibility).

⁶ See FWD.us, *Arizona’s Imprisonment Crisis: Part 1, The High Price of Prison Growth*, Sep. 2018 at 6, 9-19, available at: <https://36shgf3jsufe2xojr925ehv6-wpengine.netdna-ssl.com/wp-content/uploads/2018/09/The-High-Price-of-Prison-Growth.pdf> (showing longer prison sentences than the national average based in part on enhancements like “*Hannah*” priors without lower crime rates than neighboring states) (last visited August 11, 2020).

fair sentences for individual cases. Persons convicted of multiple offenses prior to arrest could be eligible for probation or receive harsh, consecutive sentences, depending on judges' considered judgment. For example, in *State v. Flores*, 236 Ariz. 33, 34 ¶¶1-3 (App. 2014), the defendant was convicted of seven counts of trafficking in stolen property (all class 2 felonies). The judge was required to sentence Flores as a repetitive offender and thereby imposed concurrent, slightly mitigated sentences (a typical practice when prosecutors insist on tying judges' hands), the longest of which was seven years. *See* A.R.S. §§13-702(D), 13-703(I) (providing sentencing ranges). If the Initiative passes, similar defendants would be eligible for probation, but they could also receive consecutive sentences totaling decades in prison, with the decisions belonging to seasoned and impartial judges rather than prosecutors.⁷

Enacting new §13-719 would also permit judges to fashion an appropriate sentence. This is hardly revolutionary; it is essentially how federal courts have functioned since the Supreme Court held in *United States v. Booker*, 543 U.S. 220 (2005), that the U.S. sentencing guidelines were advisory and not mandatory.

⁷ A similar bill that received overwhelming bipartisan support last year was vetoed by Gov. Ducey after Pima County Attorney (and lead Plaintiff/Appellant here) Barbara LaWall and then-Maricopa County Attorney Bill Montgomery “strongly urge[d]” a veto in a letter to the governor. *See* Bud Foster, “Prison Reform Bill Vetoed by Gov. Doug Ducey,” KOLD News 13 (Jun. 13, 2019), available at: <https://www.kold.com/2019/06/11/prison-reform-bill-vetoed-by-gov-doug-ducey/>. The assertions in that letter are similar to the arguments in Appellants’ brief.

Electors who signed this petition were interested in “authoriz[ing] judicial discretion in the interest of justice”—exactly as the Initiative’s description states.

Appellants complain that the Initiative’s description of these changes as “amend[ing] two sentencing statutes” is confusing and misleading. OB at 22-23. This phrase accurately and unambiguously describes those principal provisions. *See Molera*, 245 Ariz. at 298 ¶31 (“Ambiguity is the root of confusion.”). Nor does it mislead electors into thinking the Initiative does something other than what it purports to do. Instead, the Initiative followed this Court’s guidance that “[g]iven the description’s required brevity, the initiative sponsors need not [describe] this change in great detail...” *Id.* ¶30. Appellants’ argument is a political argument and not a legal argument, and thus it must fail.

CONCLUSION

Amici ask this Court to affirm the lower court ruling.

RESPECTFULLY SUBMITTED this 12th day of August, 2020.

By /s/ David J. Euchner

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