

**ARIZONA SUPREME COURT**

STATE OF ARIZONA, ) No. CR-19-0156-PR  
)  
Appellant, ) Court of Appeals Nos.  
) 1 CA-CR 18-0298 &  
v. ) 1 CA-CR 18-0299  
)  
CHRISTOPHER AREVALO, ) Maricopa County Superior  
) Court Nos.  
Appellee. ) CR2017-002116-001 &  
) CR2017-117321-001  
)  

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**BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR  
CRIMINAL JUSTICE IN SUPPORT OF APPELLEE**

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## INTRODUCTION

There can be no doubt that criminal street gangs create a menacing threat to public safety. They recruit pre-adolescent children and encourage them to commit violent crime to further gang interests. It is well within the Legislature's purview to punish gang activity more severely for crimes committed in the furtherance of continued violence. *See* A.R.S. § 13-751(F)(11) (capital aggravating factor for committing murder "to promote, further or assist a criminal street gang"). But when the Legislature punishes mere membership in a gang, as it did in § 13-1202(B)(2), it crosses the line from determining the values of our state to violating the First, Fifth, and Fourteenth Amendment rights to free association and due process.

First in *State v. Meeds*, 244 Ariz. 454 (App. 2018), and now in this case, the court of appeals failed to conduct strict scrutiny analysis to determine whether the statute is narrowly tailored to serve the State's compelling interest in deterring threatening behavior from gang members. Since a sentence enhancement is a separate offense in some contexts,<sup>1</sup> this essentially creates the crime of being a gang member. Just as a person cannot be criminally charged with being a member of the Communist Party, *see Scales v. United States*, 367 U.S. 203 (1961), neither may the government criminalize association. It is the mandate of this Court to strike down this law as unconstitutional.

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<sup>1</sup> *See Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Meeds*, 244 Ariz. at 461 ¶ 14.

## **INTEREST OF *AMICUS 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.

*Amicus* offers this brief because challenging unconstitutional criminal laws is squarely within AACJ's core mission. This case involves a sentence enhancement statute that increases the penalty for threatening or intimidating based not on the crime's connection to gang activity but the criminal's status as a "criminal street gang member"—a term whose statutory definition is both vague and circular. When a criminal statute fails to differentiate between speech and association rights protected by the First Amendment and criminal conduct that is not protected, the statute is repugnant to the due process clauses of the federal and state constitutions.

## ARGUMENTS

### **I. A.R.S. § 13-1202(B)(2) punishes association, not criminal conduct, and thus violates the liberty right protected by the Due Process Clause of the Fourteenth Amendment.**

#### A. The right of free association cannot be criminally punished.

For generations the Supreme Court has held that the right to liberty protected in the Due Process Clause of the Fourteenth Amendment prevents states from criminalizing activities that would otherwise fall under the protection of the First Amendment's freedoms of association, speech, and exercise of one's religion:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. *De Jonge v. Oregon*, 299 U.S. 353, 364 [(1937)]; *Thomas v. Collins*, 323 U.S. 516, 530 [(1945)]. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. *See Gitlow v. New York*, 268 U.S. 652, 666 [(1925)]; *Palko v. Connecticut*, 302 U.S. 319, 324 [(1937)]; *Cantwell v. Connecticut*, 310 U.S. 296, 303 [(1940)]; *Staub v. City of Baxley*, 355 U.S. 313, 321 [(1958)]. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

*NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958). Although each of the above cases involved conduct, the Court found that governments could not limit the associational rights of Communist Party members in *De Jonge*, Jehovah's Witnesses in *Cantwell*, or union organizers in *Staub*. "The fundamental concept of

liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment.” *Cantwell*, 310 U.S. at 303.

One hundred years ago, however, the Court endorsed wholesale limitation on First Amendment rights. In *Schenck v. United States*, 249 U.S. 47, 52 (1919), Justice Holmes likened a Socialist Party pamphlet encouraging civil disobedience to a military draft to “falsely shouting fire in a theatre and causing a panic” and creating a “clear and present danger” that Congress has a responsibility to prevent. The Court also endorsed imprisoning a political candidate in *Debs v. United States*, 249 U.S. 211 (1919), for the crime of making an anti-war and anti-draft speech, and also a pamphleteer for supporting the Russian Revolution in *Abrams v. United States*, 250 U.S. 616 (1919). The Court has since walked back its wholesale support for suppression of anti-war and anti-draft speech. *Watts v. United States*, 394 U.S. 705 (1969); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); *but see United States v. O’Brien*, 391 U.S. 367 (1968) (burning draft card not protected speech).

In *Scales*, the Court held that guilt is personal and, to harmonize with due process, people may only be punished based upon their status as Communist Party members when the relationship between the status and criminal activity is sufficiently substantial to satisfy the concept of personal guilt. *Id.* at 224-225.

Membership, without more, in an organization engaged in illegal conduct, is not such a relationship. *Id.* The Court explained:

It must indeed be recognized that a person who merely becomes a member of an illegal organization, by that ‘act’ alone need be doing nothing more than signifying his assent to its purposes and activities on one hand, and providing, on the other, only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing.

*Id.* at 227. “A member, as distinguished from a conspirator, may indicate his approval of a criminal enterprise by the very fact of his membership without thereby necessarily committing himself to further it by any act or course of conduct whatever.” *Id.* at 228. Constitutional requirements are satisfied

when the statute is found to reach only ‘active’ members having also a guilty knowledge and intent, and which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action.

*Id.* The Court extensively discussed how the evidence and statutory requirements made the connection to personal guilt. As a party leader, Scales taught Communist Party doctrine and advocated violent overthrow of the U.S. Government, and also instructed on the violent methods to do so. *See generally id.* at 230-56. Thus, he was convicted for acting in furtherance of the Communist Party’s criminal enterprise.

The Court reinforced this idea in the years to come. *See Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) (“A law which applies to membership without the ‘specific

intent’ to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of ‘guilt by association,’ which has no place here. Such a law cannot stand.”); *Healy v. James*, 408 U.S. 169, 185-86 (1972) (disapproving imposing criminal sanctions or denying rights and privileges solely because of association with an unpopular organization).

Even if criminal street gangs’ origins are unrelated to First Amendment-protected speech,<sup>2</sup> their members still enjoy the First Amendment freedom to associate with others, until they abuse that right. This Court recently recognized that it is not for courts to critique the beliefs or expression of such associations:

“it is not the role of the courts to reject a group’s expressed values because they disagree with those values or find them internally inconsistent,” and therefore, “[a]s we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression.”

*Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 300 ¶ 138 (2019) (quoting *Boy Scouts of America v. Dale*, 530 U.S. 640, 651 (2000)). It is not sufficient for the law to be content-neutral and serve a compelling government interest; it must also

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<sup>2</sup> The case upon which the court of appeals in *Meeds* relied for holding that the gang statutes do not reach constitutionally-protected activity is *State v. Ochoa*, 189 Ariz. 454, 460-61 (App. 1997). *Ochoa* in turn relied on *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). That case involved commercial marketing literature that is unprotected by the First Amendment, which is not at issue here. Thus, *Ochoa* assumed the fact of what it sought to prove, i.e., that gangs are not entitled to First Amendment associational rights.

be narrowly tailored. *Coleman v. City of Mesa*, 230 Ariz. 352, 360 ¶ 33 (2012). “The [State] may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.” *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980). The law is not powerless to punish gang members. *See In re Nickolas S.*, 226 Ariz. 182, 184 ¶ 9 (2011) (“Consistent with the First Amendment, states and local governments may impose criminal sanctions under narrowly drawn statutes...” (citing *Grayned v. City of Rockford*, 408 U.S. 104, 118-19 (1972))). But such laws must take care to punish the conduct and not the mere association.

The personal guilt requirement in *Scales* appears in A.R.S. § 13-1202(A) but is absent from § 13-1202(B)(2), which instead merely requires membership. As Arevalo stated below, many gang members, including Arevalo himself and the gangs at issue here, engage in First Amendment speech. *See* 4/27/18 RT 6 (citing examples of recording artists and film actors who tapped into their experience as gang members to create art); *id.* at 7 (explaining that White Fences engages in protected speech and association activities). As with members of the Communist Party, a criminal street gang member is not a criminal by virtue of that membership.

B. Due process requires proof of a nexus between membership in a criminal street gang and the criminal conduct

When courts contemplate the intent of the legislature, courts should be mindful of separation of powers, lest the courts become a floating legislature. *State v. Wagstaff*, 164 Ariz. 485, 487 (1990) (citing Ariz. Const. art. 3, and *Federalist No. 47*). “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.” *Nickolas S.*, 226 Ariz. at 186 ¶ 18 (cites omitted). “Courts are not at liberty to impose their views of the way things ought to be simply because that’s what must have been intended, otherwise no statute, contract or recorded word, no matter how explicit, could be saved from judicial tinkering.” *Kilpatrick v. Superior Court in and for Maricopa County*, 105 Ariz. 413, 422 (1970). “We are, however, mindful of our duty to construe this statute, if possible, in a way that not only gives effect to the legislature's intent, but also in a way that maintains its constitutionality.” *State v. Thompson*, 204 Ariz. 471, 478 ¶ 27 (2003) (internal cites omitted). *Amicus* asserts that the statute is unconstitutional as written, and that interpreting a nexus requirement between the association and the context is a legislative rather than judicial act. If this Court seeks to salvage the statute’s constitutionality, however, then the statute would require a nexus.

This Court has never previously addressed this issue, but the court of appeals has regarding other statutes. In *State v. Petrak*, 198 Ariz. 260 (App. 2000), the court

of appeals interpreted the application of A.R.S. § 13-3102(A)(8), which merely prohibits “possessing a deadly weapon during the commission of any felony offense included in chapter 34 of this title,” to the crime of simple possession of drugs. *Petrak* held that the statute would be unconstitutionally vague and overbroad unless a temporal nexus between the weapon and the felony drug offense were inferred as an element. The legislative history of the statute was not very helpful in interpreting legislative intent; there was no amendment to the statute and very little debate, but one legislator said that the “major goal is to let the gangs who have come into Arizona and the drug-lords who want to monopolize our communities to know that we are tired of it, we’re not going to put up with it, and we are going to take back our communities.” *Id.* at 265 ¶ 15 (quoting Debate on H.B. 2080 Before the House Committee of the Whole, 39<sup>th</sup> Legis., 2d Reg. Sess., Feb. 18, 1990 (statement by B. Burns, Rep.)). The court determined that “[t]he thrust of the statute is to deter the use of weapons to facilitate crime.” *Id.* at 266 ¶ 19. *Petrak* required that “the state must prove that the defendant intended or could have used the weapon to further the felony drug offense underlying the weapons misconduct charge.” *Id.*

In *State v. Tucker*, 231 Ariz. 125 (App. 2012), one of the defendants, Armstrong, also challenged the sufficiency of the evidence supporting his conviction for misconduct involving body armor under A.R.S. § 13-3116(A). The court agreed that as in *Petrak*, the body armor statute “implies some relationship between the use

of the body armor and the commission of the offense.” *Id.* at 141 ¶ 37. The court ultimately rejected Armstrong’s argument not because of disagreement on statutory construction but because, “assuming a nexus was required, the state established it and presented sufficient evidence to support Armstrong’s conviction.” *Id.* ¶ 38.

In *Meeds*, the court of appeals recently upheld § 13-1202(B)(2) against a vagueness and overbreadth challenge because the statute “serves a compelling state interest unrelated to the suppression of ideas: to protect the public from threats and intimidation by members of criminal street gangs, who presumably have a much greater ability than non-gang members to make good on those threats.” 244 Ariz. at 465 ¶ 32. The court correctly identified a compelling interest, but it neglected the second part of the strict-scrutiny analysis, i.e., determining whether the statute was narrowly tailored to serve that interest. *See Village of Schaumburg*, 444 U.S. at 637. “Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone...” *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). The court of appeals similarly failed to assess the constitutionality of the statute in Arevalo’s case. *Decision* ¶¶ 7, 9. Because the enhancement statute does not require a nexus between the defendant’s criminal activity and gang membership, it is not narrowly tailored and thus violates due process.

**II. The gang enhancement in § 13-1202(B)(2) is fatally flawed because it depends on vague definitions of what constitutes a “criminal street gang member” and is susceptible to the same problems as profile evidence.**

Arevalo explicitly disclaimed reliance on a vagueness and overbreadth challenge to A.R.S. § 13-1202(B)(2) because he was arguing first in an inferior court that was powerless to reverse *Meeds* and then in the same court that decided *Meeds*. Well-settled precedent holds that the court of appeals should not reconsider and reverse its own cases “unless [it is] convinced that the prior decisions are based upon clearly erroneous principles, or conditions have changed so as to render these prior decisions inapplicable.” *Scappaticci v. Southwest Sav. and Loan Ass’n*, 135 Ariz. 456, 461 (1983) (quoting *Castillo v. Industrial Comm’n*, 21 Ariz. App. 465, 471 (1974)). The court of appeals does not even revisit cases which were decided on different factual premises. *See State v. Jones*, --- P.3d ---, ¶ 15, 2020 WL 1316830, at \*3 (Ariz. App., March 20, 2020) (citing *Scappaticci*).

*Amicus* is concerned that the court of appeals has wrongly decided the question of the statute’s vagueness and overbreadth in *Meeds*. Because Arevalo did not raise the issue himself, this Court cannot address it. “[A]mici curiae ... have no right to create, extend or enlarge the issues.” *Bristor v. Cheatham*, 75 Ariz. 227, 230 (1953); *see also Cave Creek Unified School Dist. v. Ducey*, 233 Ariz. 1, 4 n.2 (2013). Nevertheless, since this Court is interpreting a statute’s constitutionality, it should do so with a view toward avoiding the flaws present in *Meeds* as well as the court of

appeals' decision in this case.

A. § 13-1202(B)(2) is vague and overbroad

At the hearing in this case, Detective Beau Sylvestre testified that he has had conversations with “newer and older” members of the Barrio Hayden Park Locos, the gang associated with Arevalo. He testified that those conversations have enabled him to “develop some institutional history,” including that there are approximately 130 members in that gang. 4/5/18 RT 24-26. He gave examples of how police apply the seven criteria listed in A.R.S. § 13-105(9) to identify a person as a gang member. *Id.* at 28-32. He acknowledged there is nothing in the criteria which requires the individual to commit a crime. Sylvestre asserted that the criteria must be “taken within the context” of the circumstances under which they are applied. *Id.* at 31. He further testified that a person sitting in a courtroom near gang members would not reflect gang activity, but that same person “on the streets hanging out” with the same gang members would be a “very different kind of context.” *Id.* at 31-32.

Defense investigator David Mendoza, a retired Phoenix police officer with 27 years experience, also testified about his experience with, and knowledge of, gangs, gang members, and the statutory gang identification criteria. *Id.* at 51-95. He spent 5 years in the gang unit and 5 years as a school resource officer; those assignments brought him in contact with “at least” 1,000 gang members. *Id.* at 53-54. Mendoza testified that college fraternities, Wall Street companies, or political advocacy

groups meet the definition of criminal street gangs “in some cases.” *Id.* at 57. For example, a fraternity would be a criminal street gang if it engaged in illegal gaming, coordinated sexual assaults, or distributed drugs. *Id.* at 77-78. He clarified, “it would depend on the information that was provided, who did what and what was it that was done. It could fit into the statute.” *Id.* at 81. Mendoza agreed that a fraternity member who drove while intoxicated would not cause the fraternity to be identified as a criminal street gang, however, because “[t]here has to be some aspect of the felony either promoting that individual as part of the fraternity or the fraternity itself.” *Id.* at 78-79. During his cross-examination, the court observed, “[t]he organization doesn’t have to, under the statute, have its purpose to commit criminal acts. We heard testimony from your detective that one of the purposes of the beginning of Hayden Locos was to protect the neighborhood.” *Id.* at 73.

Under A.R.S. § 13-105(9), a “criminal street gang member” is defined by satisfying any two of the following seven criteria: “self-proclamation; witness testimony or official statement; written or electronic correspondence; paraphernalia or photographs; tattoos; clothing or colors; or any other indicia of street gang membership.” Of these, only self-proclamation has specificity. Witness testimony or official statement, written or electronic correspondence, and paraphernalia or photographs are vessels for content without specifying the required or qualifying content. Tattoos does not specify gang tattoos, and as many as 4 in 10 Millennials

have tattoos.<sup>3</sup> Red clothing could cover the Bloods and the Red Hat Society equally. Any attempt to narrow the scope of these terms would be legislating.

The last, “any other indicia of street gang membership,” is a standardless “catch-all”; if that was one of only two criteria that the State could prove at trial, then that would violate due process. This Court has previously held that the “catch-all” aggravating factor under A.R.S. § 13-701(D) could not be used to increase the maximum sentence to which a defendant is exposed. *State v. Schmidt*, 220 Ariz. 563 (2009). There is no logical reason why the reasoning of *Schmidt* would not apply equally in the case of classifying a defendant as a criminal street gang member.

In this case, experienced police officers and the State presumed that a nexus is required to assign personal guilt before A.R.S. § 13-1202(B)(2) applies to any individual. But the statute has no nexus requirement. More importantly, it shows the subjective, ad hoc nature of the criteria: the statute is void of any standards to guide police, prosecutors, judges, or juries. Under the statutory criteria, someone could be classified as a gang member, without ever having committed a crime, just by living in the neighborhood, wearing a particular color hat or shirt, or being stopped in a car with gang members. The specific criteria and the general criteria (“any other indicia of street gang membership”) allow this classification.

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<sup>3</sup> See Pew Research Center, “Millennials: Confident. Connected. Open to Change,” available at <https://www.pewsocialtrends.org/2010/02/24/millennials-confident-connected-open-to-change/> (last visited April 1, 2020).

B. The enhancement is usually proven by inadmissible profile evidence

Gang researchers have found that there are varying levels of gang participation and that membership can be ambiguous. Beth Bjerregaard, *The Constitutionality of Anti-Gang Legislation*, 21 Campbell L. Rev. 31, 44 (1998). “Researchers have discovered that gang membership is a relatively unstable phenomenon with persons often drifting in and out of gang involvement.” *Id.* One researcher suggested that there are several different types of gang members, such as core members, associates, peripheral or fringe members, and wannabes or recruits whose commitment and participation in the group varies. *Id.* at 44-45. Thus, the term ‘member’ could be a gang leader or just someone that wants to say they belong without harboring any criminal intent. The statutory language does not provide a means to determine where an accused stands along this spectrum of memberships and participation.

The combined effect of the statutory language is profiling. When used in criminal prosecutions, profiling tends to show that a defendant possesses one or more characteristics typically displayed by persons engaged in a particular kind of activity. *State v. Lee*, 191 Ariz. 542 (1998). Although there may be legitimate uses for profile evidence, such as when the justification for making a stop or arrest is at issue, profile evidence may not be used as substantive proof of guilt because of the

risk that a defendant will be convicted not for what he did but for what others are doing and thereby creating a “guilt by association.” *Id.*

Improper profiling implicitly invites the fact finder to infer criminal conduct by an individual based on the described characteristics. In *State v. Ketchner*, 236 Ariz. 262, 264 ¶ 13 (2014), this Court reviewed the admissibility of the testimony of a sociologist “who specializes in domestic violence issues,” and the purpose of the testimony was “to educate the jury about domestic violence patterns and general characteristics exhibited by domestic violence victims and abusers.” *Id.* ¶ 14. This Court rejected the State’s argument that the testimony “was not used to show that Ketchner was guilty because he fit a domestic abuser profile, but rather to show that the relationship ... was in many ways typical of relationships involving abuse.” *Id.* at 265 ¶ 16. Although domestic violence profile evidence had not been addressed in Arizona before, this Court reviewed cases from other jurisdictions and noted that they employed similar analysis to the drug-courier-profile evidence at issue in *Lee*. *Id.* ¶¶ 17-18. *Ketchner* found the evidence doubly inadmissible because Ketchner never contested the abusive nature of his relationship, and thus the profile evidence was not probative of any fact at issue in the case.

This Court revisited the issue of profile evidence offered by the domestic violence expert in *State v. Haskie*, 242 Ariz. 582 (2017). In that case, the State asked for an opinion holding that expert testimony constitutes impermissible profile

evidence only where the testimony

(1) establish[es] the existence of a common profile for perpetrators of a certain criminal activity, (2) enumerat[es] the profile's component characteristics, and (3) expressly compar[es] the defendant against each component characteristic to establish guilt by showing that he "matches" the profile in most or all respects.

*Id.* at 587 ¶ 23. Instead, this Court recognized that this "leaves too much room for prejudice and ignores the real possibility that an expert could create a profile without ever explicitly describing it as such," and instead "conclude[d] that the trial court should consider the prejudicial effect of the expert's testimony as a whole, as well as that of each individual statement offered." *Id.* ¶¶ 23-24. This Court also warned trial judges to "exercise great caution in screening, admitting, and limiting this type of evidence," further stating that "[s]uch experts should not be allowed to speak in broad, categorical terms about supposedly 'common' or 'usual' occurrences without empirical support." *Id.* at 588 ¶¶ 25-26. Instead, trial courts should consider each statement offered by the witness and determine whether the relevance in "explain[ing] a victim's seemingly inconsistent behavior" outweighs the prejudicial effect of "suggest[ing] that the defendant possesses some of those characteristics and therefore may have committed the charged crimes." *Id.* at 586 ¶¶ 16-17 (citing *Ariz. R. Evid.* 401-403). Because of the fact-intensive nature of the inquiry, "[t]he outcome of this analysis will, of course, vary from case to case." *Id.* ¶ 18.

It is expected that the State would depend on police officers to testify as

experts to explain to the trier of fact how the statutory criteria for determining gang membership apply to the accused. *E.g.*, *State v. Torres-Mercado*, 191 Ariz. 279 (App. 1997); *State v. Baldenegro*, 188 Ariz. 10 (App. 1996). But, other than self-proclamation, there is nothing about the other criteria that narrow their scope to actual gang members. In any given case, there is a substantial risk that a police officer would create a profile of a gang member with which the defendant may share some characteristics and thereby convict the defendant not based on his own conduct but on the conduct of others.

### **III. The statute presents additional constitutional problems.**

In addition to the issues described above, there are other problems with § 13-1202(B)(2) as written. Most notable is that a person can be convicted of being a criminal street gang member based on past associations and not necessarily on present associations.

*Meeds* implies that the only way to read the statute is that it punishes current membership because it uses the word “is” instead of “was.” 244 Ariz. at 463 ¶ 25. The *Meeds* analysis relies on *Ochoa* for support, and *Ochoa* does not address this question at all. *Amicus* agrees that this reading of the statute is correct, i.e., that the statute does not intend to punish past association but only present association. The problem with the definition of “criminal street gang member,” however, is that it not only fails to place any temporal limitations on the use of past association to prove

present membership, but it even encourages doing such. For example, no one could expect a gang member to be in the process of acquiring a tattoo at the moment of committing a gang-related crime.

The absence of any temporal limitation on the use of past words or deeds to prove present association is problematic because it becomes very easy to convict innocent persons of the gang enhancement under § 13-1202(B)(2). With other gang enhancements in the criminal code, the State must prove that the present crime was committed to further the interests of the gang. *See State v. Riley*, --- P.3d ---, ¶¶ 2-6, 2020 WL 1145988 (Ariz., March 10, 2020) (State proved defendant committed murder “to promote, further or assist a criminal street gang” with evidence that defendant had “the intent of gaining full membership into the Aryan Brotherhood”). But with a statute that punishes membership without any connection to the underlying crime, the State could prove the defendant’s gang membership based entirely on conduct or speech in the distant past.

It is common knowledge that street gangs prey on children. It is equally well-known that children make impulsive decisions due to an underdeveloped prefrontal cortex and for that reason they have great capacity for change. *See generally Miller v. Alabama*, 567 U.S. 460 (2012). Governmental and nongovernmental organizations put considerable effort in helping people leave gangs.<sup>4</sup> If a former gang

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<sup>4</sup> *See, e.g.*, U.S. Dep’t of Justice, Bureau of Justice Assistance, Office of Juvenile

member lacks funds to remove a gang tattoo and has a police file that contains past self-proclamation, then under § 13-1202(B)(2), the State has met its burden to prove gang membership. The defendant would then be placed in the position of having to prove his own innocence of the gang enhancement. Doing so may require him to waive his right not to give evidence by testifying or producing documents.

These problems exist only because the Legislature failed to require a nexus between the underlying crime and the gang membership. For these reasons as well, this Court should strike down § 12-1202(B)(2) as unconstitutional.

### CONCLUSION

For these reasons, *amicus curiae* AACJ request that this Court find § 13-1202(B)(2) violates due process and is unconstitutional.

RESPECTFULLY SUBMITTED this 2d day of April, 2020.

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Justice and Delinquency Protection, Nat'l Gang Center Bulletin (Jan. 2013), available at <https://www.nationalgangcenter.gov/Content/Documents/Getting-Out-Staying-Out.pdf> (last visited March 31, 2020) (discussing ways to get gang members to desist membership and separate themselves from former lifestyle).