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9 **SUPERIOR COURT**

10 **MARICOPA COUNTY, ARIZONA**

11 BARBARA LAWALL, an individual and
12 qualified elector, HEATHER GROSSMAN,
13 an individual and qualified elector, BECKIE
14 MILLER, an individual and qualified elector,
15 JOHN GILLIS, an individual and qualified
16 elector,

17 Plaintiffs,

18 v.

19 KATIE HOBBS, in her official capacity as
20 Arizona Secretary of State; ARIZONANS
21 FOR SECOND CHANCES,
22 REHABILITATION, AND PUBLIC SAFETY
23 (SPONSORED BY ASJ ACTION FUND), a
24 political action committee,

25 Defendants.

26 Case No. CV2020-08289

27 **BRIEF OF AMICI CURIAE AMERICANS
28 FOR PROSPERITY, AMERICAN
CONSERVATIVE UNION FOUNDATION,
FAITH & FREEDOM COALITION,
FREEDOMWORKS FOUNDATION, AND R
STREET INSTITUTE IN SUPPORT
OF DEFENDANTS**

(The Honorable Joseph Mikitish)

(Oral Argument: August 4, 2020, 10:00 a.m.)

19 **INTEREST OF AMICI CURIAE¹**

20 *Amici* believe that commonsense criminal justice reforms, like the Second Chances,
21 Rehabilitation and Public Safety Act (“Second Chances Act” or “Act”), are not political “left-
22 right” issues but rather moral and public-policy imperatives that transcend traditional
23 ideological boundaries.

24 **An Ideologically Diverse Coalition:** the Arizona chapter of Americans for Prosperity
25 (“AFP-AZ”) is part of a coalition of organizations that work on criminal justice reform issues.
26 Its sister organization Americans for Prosperity Foundation (“AFPF”) is also a member. This

27 _____
28 ¹ A motion for leave to file has been filed with this brief. All parties have consented to its filing.

1 coalition is part of an emerging political consensus around criminal-justice-reform issues,
2 like the Second Chances Act, and is on the forefront on these important issues. For
3 example:

- 4 • AFP-AZ was part of the First Step Act (“FSA”) coalition, which championed the
5 landmark federal statute on prison and sentencing reform.²
- 6 • AFPP has urged courts to protect the compassionate-release changes in the FSA.³
- 7 • AFPP is part of a broad coalition seeking to address the doctrine of qualified
8 immunity, which wrongly shields egregious law-enforcement abuses from accountability.⁴
- 9 • AFPP opposes mandatory-minimum statutes, like the Armed Career Criminals Act,
10 which can impose draconian sentences for conduct as innocuous as, for example, the
11 possession of a few bullets.⁵
- 12 • AFPP and coalition partners advocate for reforms that give second chances to
13 individuals who have paid their debt to society, so they can access a place to live, jobs,
14 loans, voting, education, skills programs, licenses, and other necessities.⁶

15
16 ² See, e.g., AFP-AZ Encourages the Senate to Vote on the First Step Act (Nov. 15, 2018),
17 <https://bit.ly/3jwNJ4d>; AFP Applauds Congress for Passage of Historic First Step Act (Dec. 20,
18 2018), <https://bit.ly/2OUL4TW>. See also Ivan J. Dominguez, et al., *NACDL and Charles Koch*
Foundation Mark the One-Year Anniversary of the First Step Act, 44 *Champion* 10
(January/February 2020) (discussing efforts to build on this landmark success).

19 ³ See, e.g., Br. of Amici Curiae the American Civil Liberties Union, the National Association of
20 Criminal Defense Lawyers, the American Civil Liberties Union of Ohio Foundation, Due Process
21 Institute, R Street Institute, and Americans for Prosperity Foundation, *United States v. Jackson*, Nos.
19-3623, 19-3711 (6th Cir., filed Apr. 21, 2020).

22 ⁴ See, e.g., Br. of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring
23 the Public’s Truest in Law Enforcement, and Promoting the Rule of Law, *Baxter v. Bracey*, No. 18-
1287 (U.S. Sup. Ct., filed May 31, 2019). See also AFP Signs onto Amicus Brief Opposing
24 Unjustified Expansions of Qualified Immunity (May 14, 2019), <https://bit.ly/3g3hjMs>; QI Bill is Needed
25 Step for Improving Policing (June 23, 2020), <https://bit.ly/39oakeD>.

26 ⁵ See, e.g., Br. of Americans for Prosperity Foundation, *Borden v. United States*, No. 19-5410 (U.S.
27 Sup. Ct., filed May 4, 2020).

28 ⁶ See Josh Kaib, *AFPP to SBA – Remove Unfair Bar to those with Criminal Justice System Contact*
(Apr. 23, 2020), <https://bit.ly/3f5X6EF>; *Expanding Justice Throughout America’s Justice System*,
Stand Together (noting AFPP “is uniting citizens to provide second chances to formerly incarcerated
individuals[.]”), <https://bit.ly/2ZVVc4P>; AFP, *Bi-Partisan Coalition Support Gov. Reynolds’ Proposal*
to Restore Voting Rights (Mar. 12, 2019), <https://bit.ly/30D0iC8>; AFP-KS Applauds Kansas Governor
For “Banning the Box” (May 2, 2018), <https://bit.ly/3hwnau2>.

1 • AFP advocates for civil-asset-forfeiture reform and against excessive fines and fees.⁷
2 AFP has engaged on access to justice issues, particularly the Sixth Amendment right to
3 counsel.⁸ And it has supported expungement, as well as probation and parole, reform.⁹

4 • AFPP has been part of an ideologically diverse cross-section of groups to oppose
5 overcriminalization of innocent conduct, recently asking the U.S. Supreme Court to clarify
6 that a federal anti-computer-hacking statute, the Computer Fraud and Abuse Act, does not
7 criminalize the day-to-day conduct of millions of unsuspecting Americans.¹⁰

8 **Americans for Prosperity – Arizona:** AFP-AZ has an interest in this case because it
9 believes the Second Chances Act is not only sound public policy but also is a moral
10 imperative that the Arizona voters have a right to directly decide on. Arizona’s current
11 sentencing laws lead to cruel, unjust penalties for defendants, collaterally harm their
12 families, damage communities, and undermine the legitimacy of our criminal justice system.

13 **The American Conservative Union Foundation:** The American Conservative Union
14 Foundation (“ACUF”) is a 501(c)(3) organization based in Alexandria, Virginia. Established
15 in 1983, ACUF is dedicated to educating Americans about conservative beliefs and policies
16 at all levels of government. Its Nolan Center for Justice works to reform America’s criminal
17 justice system to improve public safety, foster greater government accountability, and
18 advance human dignity in Washington, DC and in state capitols across the nation.

20 ⁷ See, e.g., Br. of Drug Policy Alliance, National Association for the Advancement of Colored People,
21 Americans for Prosperity, Brennan Center for Justice at NYU School of Law, Freedomworks
22 Foundation, Law Enforcement Action Partnership, and Others as *Amici Curiae* in Support of
23 Petitioners, *Timbs v. Indiana*, No. 17-1091 (U.S. Sup. Ct., filed Sept. 11, 2018). See also Press
24 Release, U.S. Supreme Court Reins In Civil Asset Forfeiture, Unanimously Ruling That Excessive
25 Fines Clause Applies to States, Drug Policy Alliance (Feb. 20, 2019), <https://bit.ly/30YwvEv>.

24 ⁸ See, e.g., AFP-WI: Secure Public Defense Now (May 28, 2019), <https://bit.ly/2ZYjETg>.

25 ⁹ See Arielle Zions, *ACLU, Americans for Prosperity Team Up to Oppose Overturning Presumptive*
26 *Probation*, Rapid City J. (Feb. 20, 2019), <https://bit.ly/2D0WyCD>; AFP-WI Backs Expungement
27 Reform Bill (Jan. 19, 2019), <https://bit.ly/32SH5PC>; AFP, Reinstating Parole Will Safely Reduce
28 Virginia’s Reliance on Prison (May 19, 2020), <https://bit.ly/2WRWaxl>.

27 ¹⁰ Americans for Prosperity Foundation Files Supreme Court Amicus Brief Arguing Computer
28 Hacking Statute Does Not Criminalize Sharing Netflix passwords, Checking Sports at Work (July 8,
2020), <https://bit.ly/3jK3y7R>.

1 **Faith & Freedom Coalition:** The Faith & Family Coalition is a grassroots 501(c)(4)
2 social welfare organization with more than two million members nationwide who believe the
3 greatness of America lies in the character of our people — the simple virtues of faith, hard
4 work, marriage, family, personal responsibility, and helping the least among us. It is
5 committed to educating, equipping, and mobilizing people of faith and like-minded
6 individuals to be effective citizens to support public policy and legislation that strengthens
7 families and communities, promotes time-honored values, and protects the intrinsic worth
8 and dignity of all people as creations in the image of God.

9 **FreedomWorks Foundation:** FreedomWorks Foundation (“FWF”) is a non-profit,
10 non-partisan grassroots organization dedicated to upholding free markets and
11 constitutionally limited government. Founded in 2004, FWF is among the largest and most
12 active right-leaning grassroots organizations, amplifying the voices of millions of activists
13 both online and on the ground. FWF has been active on criminal justice reform issues since
14 2014, educating members of the United States Congress and state legislatures, including
15 the Arizona State Legislature, on smarter sentencing practices, programs to reduce
16 recidivism, and second-chance initiatives.

17 **Arthur Rizer for the R Street Institute:** The R Street Institute is a non-profit, non-
18 partisan public policy research organization. R Street’s mission is to engage in policy
19 research and educational outreach that promotes free markets, as well as limited yet
20 effective government, including properly calibrated legal and regulatory frameworks that
21 support economic growth. The R Street Institute is interested in this case because of the
22 significant constitutional issues and fundamental issue of fairness as they relate to the right
23 to vote.

24 *Amici* write to provide this Court with a broader perspective on the context of this
25 case and why Plaintiffs’ efforts to prevent Arizona voters from deciding on these issues
26 should be rejected.

27 **SUMMARY OF ARGUMENT**

28 Over the last decade and a half, numerous states and the federal government, most

1 recently the Trump Administration, have pursued commonsense criminal justice reforms that
2 have both reduced incarceration rates and increased public safety. Indeed, Arizona was
3 once at the forefront of these efforts when it enacted the Safe Communities Act of 2008,
4 which not only reduced the frequency with which probationers were incarcerated but also
5 reduced Arizona's crime rate, increased public safety, and saved taxpayer money. In many
6 jurisdictions, right-of-center stakeholders, including *amici*, have been the driving force
7 behind these reforms, which continue to be supported by a broad range of organizations
8 that cut across traditional ideological boundaries.

9 These recent consensus-based, empirically grounded reforms demonstrate that it is
10 possible to reduce prison populations and crime rates, while at the same time saving lives,
11 reconnecting families, unifying communities, and saving taxpayers money. States have
12 achieved this by using evidence-based practices that proved there are better ways to deal
13 with crime than long, disproportionate sentences. Indeed, the available data show that most
14 individuals do not benefit from long sentences, which in those cases do not make
15 communities safer for having put people away for long stretches.

16 By promoting a reallocation of fiscal resources to more effective law enforcement
17 strategies, state and federal sentencing-reform measures have made communities safer. A
18 significant benefit of this approach is that we can provide people an opportunity to find
19 redemption and rehabilitation. We can ensure we are appropriately spending taxpayer
20 money when it comes to our incarceration choices for non-dangerous individuals convicted
21 of low-level offenses. And we can help those with substance abuse or mental health issues
22 obtain effective treatment without turning our prisons into rehab clinics. For those who are
23 incarcerated, there are programs in most states to help them get an education, gain
24 marketable skills, and learn to be less volatile. So too with the Second Chances Act.

25 Arizona voters should not be deprived of the opportunity to decide for themselves
26 whether this initiative, and the change it promises, should become law. This Court should
27 reject Plaintiffs' efforts to derail the democratic process through a novel legal theory—
28 supported by thinly veiled, parade-of-horribles handwaving. The people of Arizona are

1 more-than capable of making this choice and have all of the information they need to do so.

2 **ARGUMENT**

3 **I. The Second Chances Act is a Valid Ballot Initiative, and Arizona Voters Should**
4 **Decide the Issue at the Polls.**

5 *Amici* are confident Defendants will expose the fatal flaws in Plaintiffs' arguments.¹¹

6 As such, we do not address them here to refrain from burdening the Court with duplicative
7 briefing. *Amici* write separately only to address Plaintiffs' erroneous characterization of the
8 Second Chances Act. Plaintiffs' misrepresentations of the initiative—which may be intended
9 to persuade the Court that it is bad policy and should therefore be stricken from the ballot on
10 that basis—are equally wrong. The Court should not be tempted into error on that basis and
11 instead should decide this case on the merits.

12 **II. The Second Chances Act Builds on and Adopts Widely Adopted Sentencing-**
13 **Reform Measures that Experience Has Shown to Be Successful.**

14 **A. Arizona's Truth in Sentencing laws are out-of-step with recent empirical**
15 **research and other states' criminal laws.**

16 Although the Complaint suggests otherwise, the status quo in Arizona under its Truth
17 in Sentencing laws is the true threat to public safety and public finances. It is Arizona's
18 current sentencing practices that are outside the mainstream—not the reforms in the
19 Second Chances Act.

20 Mandatory-minimum schemes, like Arizona's Truth in Sentencing, are ineffective,
21 undermine public confidence in the justice system, and can lead to unjust and unnecessary
22 outcomes by being overinclusive.¹² Arizona Town Hall, a nonprofit that brings people
23 together to solve critical policy issues, reported that the Truth in Sentencing statute "requires

24 ¹¹ For avoidance of doubt, *amici* do not wish to minimize the tragedies that the plaintiffs have
25 endured. Nor do *amici* in any way criticize or impugn them. Instead, *amici* believe the legal and
26 policy arguments against the Second Chances Act are flawed.

27 ¹² Matthew C. Lamb, *A Return to Rehabilitation: Mandatory Minimum Sentencing in an Era of Mass*
28 *Incarceration*, 41 J. Legis. 126, 145 (2014) ("A finding that mandatory minimums increase public
safety requires a showing that mandatory minimums deterred crime and reduced recidivism rates. . .
[S]ince mandatory minimums have neither deterred criminal behavior nor reduced recidivism rates,
mandatory minimums have not produced a net increase in public safety.").

1 that offenders serve 85 percent of the sentence imposed by the judge before being eligible
2 for discretionary release. According to The Sentencing Project, Arizona’s incarceration rate
3 is the fourth-highest in the United States.” Arizona Town Hall, Criminal Justice in Arizona
4 Final Report, 140 (2018), available at <https://bit.ly/32RgDG8>. As one federal district court
5 judge remarked about the federal system: “Mandatory minimum sentences mean one-size-
6 fits-all injustice. . . . [They] not only harm those unfairly subject to them, but do grave
7 damage to the . . . criminal justice system Perhaps the most serious damage is to the
8 public’s belief that the . . . system is fair and rational.” Hearing before the Subcomm. on
9 Crime, Terrorism, & Homeland Sec. of the U.S. H.R. Judiciary Comm. (June 2007)
10 (statement on behalf of the Judicial Conf. of the U.S. by the Honorable Paul Cassell),
11 reprinted in 19 Fed. Sent. R. 344, 344–47 (2007). “Society pays a great price when . . . [the
12 government] over-criminalizes conduct. The cycle of poverty, criminality, and incarceration
13 decimates communities, often for no truly good law enforcement reason.” *United States v.*
14 *Young*, 766 F.3d 621, 633 (6th Cir. 2014) (Stranch, J., concurring) (cleaned up). “Perhaps
15 one of the greatest harms is that indiscriminate criminalization erodes the faith of our
16 citizens in the . . . criminal justice system. That loss of faith . . . reverberates through our
17 communities[.]” *Id.* at 634.

18 So too here, as explained by a retired Maricopa County Superior Court Judge with
19 thirty-five years on the bench, the last fifteen of which on criminal matters. See Hon. R.L.
20 Gottsfield, *et al.*, *Fixing Arizona’s Mass Incarceration Dilemma*, 9 L. J. Soc. Just. 5 (2018).
21 As Judge Gottsfield explains, “there are a number of . . . less serious crimes whose
22 sentences could be reduced . . . without any deleterious impact on public safety. . . . [E]ven
23 when offenders deserve incarceration, they may not have deserved the amount of time
24 imposed[.]” *Id.* at 6.

25 *First*, as to Arizona’s problem of over-incarceration, Judge Gottsfield observes that
26 “Arizona imprisons nearly 50% higher than the average for all states, placing Arizona as the
27 sixth highest in incarceration rates in the nation in 2013.” *Id.* at 13. It is notable that since
28 the 2013 data upon which Judge Gottsfield relied, Arizona has become the fourth-highest

1 incarcerator in the country. See The Sentencing Project, State-by-State Data, *available at*
2 <https://bit.ly/3g5oUKh>. “Some may comfort themselves that Arizona’s substantial
3 imprisonment rate is justified by it making the community safer from dangerous and violent
4 criminals.” Gottsfield, 9 L. J. Soc. Just. at 13. But the reality is that “driven by mandatory
5 sentencing, especially in drug cases, and prosecution policies per the War on Drugs,
6 Arizona prisons are in fact stuffed primarily with non-violent, low level offenders.” *Id.* at 13-
7 14.

8 *Second*, as to the financial cost to taxpayers of these policies, Judge Gottsfield
9 explains, the “cost of our high prison incarceration rate is equally staggering. The Arizona
10 Department of Corrections has a budget of about \$ 1 billion annually. That represents 11
11 percent of Arizona’s \$9.2 billion budget for fiscal year 2016.” *Id.* at 14. The “total
12 incarceration budget of Maricopa County increased from \$ 43.8 million in 2004 to \$102.5
13 million in 2015. . . . A lopsided 52 percent of the Maricopa County budget is spent on
14 criminal justice and public safety.” *Id.* at 15.

15 *Third*, the status quo does not improve public safety. As Judge Gottsfield notes:
16 “[p]rioritizing prosecution and incarceration under the present Arizona sentencing structure
17 has dire funding effects on other community needs[.]” *Id.* at 16. Unlike the federal
18 government, Arizona must live within its means. As a result, wasteful spending on one side
19 of the ledger requires cutting resources in other areas. In the case of Arizona’s justice
20 system, the sheer magnitude of overincarceration deprives funding to more effective crime-
21 control strategies such as human trafficking investigations, violent crime task forces, and
22 substance abuse programs.

23 *Fourth*, and of particular relevance in the wake of COVID-19, Judge Gottsfield
24 explains that almost “10 percent of the prison population is 55 years of age or older, nearly
25 doubling since 2007, presumably due to lengthy sentences passed in recent years.” *Id.*
26 “This results in severe increased healthcare costs for DOC. Given that advanced age
27 statistically correlates with substantially reduced recidivism, lengthy prison terms that result
28 in elder incarceration make little sense.” *Id.*

1 Which policies created these problems? An important factor is that Arizona’s Truth in
2 Sentencing requires inmates to serve at least eighty-five percent of their sentence,
3 regardless of good behavior or early-release credits they may earn. Additionally, unduly
4 harsh mandatory-minimum sentences for those purportedly with prior convictions, including
5 for relatively minor infractions, exacerbates Arizona’s problem of over-incarceration. See
6 Gottsfield, 9 L. J. Soc. Just. at 62.

7 None of this makes sense from policy perspective, which is why numerous states and
8 the federal government have taken steps in recent years to *reduce* their prison populations.
9 December 2019 “marked the one-year anniversary of the signing into law of the First Step
10 Act, a landmark bipartisan criminal justice reform measure. . . . Because of provisions in the
11 law . . . more than 3,000 incarcerated individuals have been released, and more than 2,000
12 had their sentences reduced.” Ivan J. Dominguez, *et al.*, *NACDL and Charles Koch*
13 *Foundation Mark the One-Year Anniversary of the First Step Act with the NACDL First Step*
14 *Act Resource Center*, 44 *Champion* 10 (2020). “Three years ago, those of us in the criminal
15 justice reform community would have been shocked to hear about a bill like the First Step
16 Act passing. . . . But with the efforts of the criminal justice reform community pushing from
17 all sides of the political aisle, Congress finally broke the logjam and passed meaningful
18 reform.” Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128
19 *Yale L.J. F.* 791, 817 (2019). The sky did not fall. Instead, since adoption of the FSA, the
20 federal prison population has decreased with no attributable increase in crime or recidivism
21 rates.

22 Indeed, reductions in state prison populations have actually correlated to *lower* crime
23 rates. “[T]he states with the most substantial prison population reductions have often
24 outpaced the nationwide crime drop.” The Sentencing Project, *U.S. Prison Population*
25 *Trends 1999-2015* (May 2017), *available at* <https://bit.ly/3eSmOMt>; *see also* The Sentencing
26 Project, *Fewer Prisoners, Less Crime: A Tale of Three States*, *available at*
27 <https://bit.ly/39mDE5c>. As one expert noted, “[t]hese state reforms did not jeopardize public
28 safety. To the contrary, the Pew Center on the States found that all 17 states that cut their

1 imprisonment rates over the past decade also experienced a decline in crime rates.” Molly
2 Gill, *Turning off the Spigot: How Sentencing Safety Valves can Help States Protect Public*
3 *Safety and Save Money*, 25 Fed. Sent. R. 349 (2013).

4 Texas is a prime example of the paradox that reducing incarceration also reduces
5 crime. Facing a 17,000-prison bed shortage in 2007, Governor Rick Perry turned away from
6 overincarceration. See Right on Crime, *Right on Crime Celebrates Ten Years of Criminal*
7 *Justice Reform in Texas*, Mar. 1, 2017, <https://bit.ly/3g5qCLH>. Using diversion programs for
8 non-violent offenders, increasing resources for drug courts and addiction treatment, and
9 reforming parole, Texas was able to cut its incarceration rate by 11%. See Jerry Madden,
10 *Prison, Probation, and Parole Reforms — The Texas Model*, The Hill, Dec. 9, 2018,
11 <https://coainst.org/3hFhe1R>. Using some of the cost savings to fund recidivism-reduction
12 programs, the re-offense rate dropped from 52% to 16%. See Alan Greenblatt, *Law-And-*
13 *Order Texas Takes On Criminal Justice Reform*, American Conservative, July 12, 2018,
14 <https://bit.ly/2DfHHUH>. As a result, Texas saved \$3 billion and closed eight prisons. See
15 Mark Holden & Brooke Rollins, *Texas Saved \$3B Closing Prisons. Why Rehabilitation*
16 *Works*, Austin-American Statesman, Sept. 25, 2018, <https://bit.ly/31674Rt>. At the same time,
17 its crime rates dropped to 1967 levels. Marc Levin, *More Criminal Justice Reform for Texas*
18 *in 2018*, The Houston Chronicle, Jan. 15, 2018, <https://bit.ly/3g01TZn>.

19 As former Virginia Attorney General Ken Cuccinelli wrote in *National Review*:
20 “Understanding the precise relationship between incarceration and crime rates is a complex,
21 if not impossible, task. But such precision isn’t necessary to see that we can indeed answer
22 . . . [a] central question: Yes. America can have fewer prisoners without more crime. One
23 need only look to the successful efforts in [Texas] for the path forward.” Ken Cuccinelli,
24 *Texas Shows How to Reduce Both Incarceration and Crime*, National Review, May 8, 2015,
25 <https://bit.ly/30W3etM>.

26 Despite other states following Texas’ lead, Arizona is lagging behind by not enacting
27 proven policies that reduce incarceration while improving safety. The Second Chances Act
28 allows Arizona to move past this counterproductive status quo. The states may serve as the

laboratories of democracy, but Arizona’s experiment has failed. In light of the recalcitrance of Arizona’s elected officials, 400,000 voters have signed a petition choosing a different path. It is time to give the people of Arizona an opportunity to weigh in and build on Arizona’s previous criminal-justice-reform successes.¹³

B. The Second Chances Act tracks widespread consensus-based reforms.

“The opportunities for addressing over-incarceration in Arizona seem almost endless. No one looking at the examples afforded by changes taking place at the federal level and in our sister states can doubt that successful approaches are there if Arizona . . . consider[s] them.” Gottsfield, 9 L. J. Soc. Just. at 55. That is what the Second Chances Act would accomplish.

As the summary of the Second Chances Act explains, it “increases earned release credits for good behavior and participation in programs, including rehabilitation and education programs, for people in prison for non-dangerous offenses (as defined); [and] authorizes judicial discretion in the interest of justice when a court imposes a sentence for a non-dangerous offense (as defined)[.]” Ex. A to V. Compl. for Declaratory & Inj. Relief (“Compl.”). As the Act’s findings recognize:

1. The most important goal of our corrections system is public safety. To achieve that, our criminal justice system must do more to rehabilitate people and stop the cycle of crime.
2. Best practices in reducing recidivism require a criminal justice system that holds people who commit crimes accountable and prepares them for release, [and] gives judges discretion to impose the most appropriate

¹³ Arizona’s experience with probation reform underscores why the Second Chances Act is sound public policy. As the CSG Justice Center has explained: “[I]n 2007, . . . [Arizona’s] probation system was in need of repair. In 2008, people who violated the conditions of their probation accounted for one-third of all prison admissions and received, on average, a two-year sentence to prison for failing on probation. As a result, the state spent an estimated \$100 million to send more than 4,000 people to prison annually for violating the conditions of their supervision. . . . In response . . . , Arizona’s legislature enacted the Safe Communities Act of 2008[.]” Justice Center, The Council of State Governments, *Probation Performance: How Arizona’s County Probation Departments Increased Public Safety While Saving Taxpayers Millions* (March 16, 2017), <https://bit.ly/30VmZBW>. This law has not only saved Arizona taxpayers untold millions of dollars but also reduced Arizona’s crime rate.

1 sentence in each case[.]

- 2 3. [T]here are too many people warehoused in prison for non-dangerous
3 crimes long after they are no longer a risk to public safety. Many return to
4 communities unprepared for release and unable to contribute productively
5 to our communities.

6 Second Chances Act § 2. As experience has shown, this approach works—not only
7 reducing recidivism but saving taxpayers money. That is the paradigm of mainstream,
8 sound public policy.

9 As a federal district court recently observed, there is “an ever-increasing body of
10 research that questions the effectiveness of imprisoning convicted defendants for a period
11 greater than reasonably necessary.” *United States v. Vigneau*, No. 97-33, 2020 U.S. Dist.
12 LEXIS 129768, at *17 (D.R.I. July 21, 2020) (citing Marc Mauer, *Long Term Sentences:
13 Time to Reconsider the Scale of Punishment*, 87 UMKC L. Rev. 114 (2018)). It is
14 increasingly evident that “lengthy prison terms for federal offenses have become
15 counterproductive for promoting public safety”; “punitive sentences add little to the deterrent
16 effect of the criminal justice system; and mass incarceration diverts resources from program
17 and policy initiatives that hold the potential for greater impact on public safety.” Mauer, 87
18 UMKC L. Rev. at 121. That proposition holds true at the state level as well. An Ohio court
19 recognized “that lengthy prison sentences do not make the public safer, in part, because
20 long-term sentences produce diminishing returns for public safety as individuals age out of
21 the high-crime years.” *State v. Metz*, 2019-Ohio-4054, ¶ 103 (Ohio Ct. App. 2019) (citing
22 Mauer, 87 UMKC L. Rev. at 121) (edited for clarity).

23 If a non-dangerous offender is sentenced to prison, Arizonans want to know that the
24 offender is participating in activities (e.g., drug and alcohol counseling, mental health
25 treatment, job training) that will make him a better neighbor upon release. Policies that allow
26 the offender to earn reductions in his sentence, if he participates in such activities, present
27 exactly the right incentives. In fact, incentivizing pro-social behavior during incarceration
28 makes prisons safer for corrections staff and promotes public safety by increasing the
chance of successful re-entry into our communities. These were the kinds of incentives
created by the Safe Communities Act in 2008. The Arizona Second Chances Act seeks to

1 replicate that model and expand on that success.

2 Likewise, an important reform to Arizona’s current sentencing practices would be the
3 restoration of judicial discretion to impose a just, proportionate sentence on a case-by-case
4 basis for non-dangerous offenses. Arizona should “re-examin[e] . . . the idea that judicial
5 discretion should be eliminated (as it largely was under the Truth-in-Sentencing regime).
6 Arizona has become one of the leaders in developing and maintaining a system for the
7 selection of judges on merit.” Gottsfeld, 9 L. J. Soc. Just. at 57. “If we understand that we
8 have good judicial officers, and that they are sincere in their determination to follow the law,
9 we can then comfortably give them discretion to evaluate the offenders as well as punish
10 the offenses.” *Id.* These approaches “have succeeded in other jurisdictions, . . . allowing
11 judges to modify sentences that . . . do not fit the crime.” *Id.* That is what the Second
12 Chances Act does; it reduces the mandatory minimum amount of time non-dangerous
13 individuals must spend in prison and allows judges greater sentencing discretion.

14 In short, contrary to Plaintiffs’ suggestion, Arizona’s current sentencing scheme
15 miscalibrates the four traditional rationales for punishment: incapacitation, retribution,
16 deterrence, and rehabilitation. The Second Chances Act seeks to adjust the sentencing
17 structure for non-dangerous offenders to better balance the dual goals of punishment and
18 rehabilitation. The other rationales do not apply to non-dangerous offenders with the same
19 force as they do to those convicted of serious, violent, and predatory acts, who are
20 generally *not* eligible for relief under the Second Chances Act.

21 **C. Plaintiffs’ parade-of-horribles arguments are unpersuasive.**

22 Plaintiffs’ suggestion the Second Chances Act endangers the public is a naked
23 attempt to deflect this Court’s attention from the deficiencies in their legal arguments and
24 should be rejected. Plaintiffs claim the Act would benefit those convicted of engaging in “sex
25 trafficking of 15-year-olds, terrorism, home invasion assaults, aggravated DUI, and even
26 some types of attempted First Degree Murder, among many others.” Compl. ¶ 2. The Act,
27 on Plaintiffs’ telling, “makes it *possible* for convicted terrorists, kidnappers, sex offenders,
28 even as repeat offenders, to receive significantly more lenient sentences.” Compl. ¶ 29

1 (emphasis added). Plaintiffs' concerns are overstated.

2 By definition, the Second Chances Act solely applies to "non-dangerous offenders."
3 That definition categorically excludes certain offenses, including "Molestation of a child as
4 proscribed in Section 13-1410 or a dangerous crime against children as defined in Section
5 13-705; First Degree Murder as proscribed in Section 13-1105 or Second Degree Murder as
6 proscribed in Section 13-1104; [and] Sexual Assault as Proscribed in Section 13-1406."
7 Second Chances Act § 4I-1604.07(O). Individuals convicted of these crimes will not be
8 eligible for any relief under the Act. Further, the definition of "non-dangerous offense"
9 excludes any offense that is "determined by the jury or the Court to be a dangerous
10 offense[.]" *Id.* And Arizona law defines "dangerous offense" to "mean[] an offense involving
11 the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or
12 the intentional or knowing infliction of serious physical injury on another person." Ariz. Rev.
13 Stat. § 13-105(13). Finally, the Second Chances Act does not absolve individuals who meet
14 the definition of "non-dangerous" from punishment; it grants them the mere possibility of
15 earlier release contingent on their good behavior during incarceration.

16 Plaintiffs also claim the Second Chances Act would "grant[] leniency to felony
17 offenders for their third, fourth, or fifth offenses (or more), the Initiative does not provide
18 felony offenders merely with 'Second Chances' . . . ; it provides them with unlimited
19 Chances." Compl. ¶ 34. The Complaint paints a partial picture. In reality, the Second
20 Chances Act aims to address the problem of prosecutorial "charge stacking," whereby
21 someone without prior convictions may be sentenced more harshly as a "repeat offender."
22 See Second Chances Act § 13-703(L); see also *State v. Hannah*, 126 Ariz. 575 (1980)
23 (discussing use of so-called "Hannah priors" at sentencing). Plaintiffs also conspicuously
24 omit a key point: the Second Chances Act intentionally reforms so-called sentence stacking
25 because that policy has been abused by prosecutors to coerce plea deals by threatening
26 individuals with draconian sentences. Sentence stacking is a mandatory-minimum
27
28

1 sentencing scheme that permits prosecutors to levy repeat offender enhancements for
2 multiple charges contained in a single indictment.¹⁴ The manner in which sentence stacking
3 has been wielded by Arizona county attorneys would offend what many Arizonans would
4 consider traditional standards of fair play and justice. Indeed, it was the Governor's veto of a
5 sentence stacking reform bill that planted the seeds for this initiative. The Second Chances
6 Act does not affect prosecutors' ability to enhance sentences for repeat offenders. But it
7 does give judges the discretion to ensure that such enhancements are not abusive or
8 disproportionate. See Second Chances Act § 13-719. Plaintiffs' speculations about the
9 hypothetical "public safety" implications of the Second Chances Act are nothing more than a
10 thinly bound straw man argument, lacking any evidence-based assertion. It is argument by
11 anecdote, nothing more.

12 Plaintiffs also claim the initiative summary "does not disclose that the Initiative would
13 eliminate the requirement that prisoners achieve an eighth-grade literacy level to be eligible
14 for early release. This is a principal provision of the Initiative." Compl. ¶ 4. It is hard to see
15 how removing a requirement that incarcerated persons achieve a certain level of proficiency
16 on state-approved reading tests as a condition of release could objectively be viewed as a
17 "principal provision" of the Act. *Cf. Molera v. Reagan*, 245 Ariz. 291, 297 (2018) (holding
18 initiatives are read with "an objective standard for evaluating the description of the actual
19 provisions"). Even if true, the notion that only incarcerated persons who can pass
20 standardized reading tests should be eligible for early release is nonsensical.

22 ¹⁴ The FSA reformed a sentencing enhancement scheme similar to the Arizona sentence stacking
23 issue. See *generally* Sandeep Dhaliwal, *How Mandatory Minimums Are Weaponized*, N.Y. Times,
24 June 1, 2020, <https://nyti.ms/3g76Tv9>.

24 In 2018, the First Step Act removed a longstanding provision in Section 924(c) that
25 allowed prosecutors to "stack" mandatory and enhanced consecutive penalties for
26 certain crimes. While that did not apply retroactively, some courts have decided to
27 reduce unduly harsh, "stacked" penalties imposed before the First Step Act. . . . The
28 message that prosecutors send to . . . defendants is clear: If you consider exercising
your fundamental right to trial, we will seek penalties that are so excessive that you
will think twice, because we have the power to take sentencing authority away from
the judiciary.

CERTIFICATE OF SERVICE

On July 29, 2020, the foregoing filed pleading, was mailed, or served by facsimile transmission, or by electronic transmission, or by hand-delivery, on the below listed:

The Honorable Joseph Mikitish
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