

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee,

v.

KEVIN HARRY MONINGER,

Appellant.

CR-21-0239-PR

Court of Appeals
No. 1 CA-CR 19-0353

Mohave County
Superior Court
No. S8015CR201801598

STATE OF ARIZONA'S SUPPLEMENTAL BRIEF

Mark Brnovich
Attorney General
(Firm State Bar No. 14000)

Linley Wilson
Deputy Solicitor General /
Section Chief of Criminal Appeals

Casey D. Ball
Assistant Attorney General
Criminal Appeals Section
2005 N. Central Ave.
Phoenix, Arizona 85004
Telephone: (602) 542-4686
CADocket@azag.gov
(State Bar Number 034987)
Attorneys for Appellee

ISSUES PRESENTED FOR REVIEW

1. Whether the majority below erroneously held that the unit of prosecution for [A.R.S. § 13–3554](#) (luring a minor for sexual exploitation) is a defendant’s “course of conduct,” contrary to the plain language of the statute, this Court’s precedent, and secondary methods of statutory interpretation.
2. Whether the majority below erroneously held that first-degree luring offenses are probation-eligible, contrary to the plain language of the dangerous-crimes-against-children (“DCAC”) statute, [A.R.S. § 13–705 \(2018\)](#).

TABLE OF CONTENTS

| | Page |
|--|-------------|
| ISSUES PRESENTED FOR REVIEW | ii |
| TABLE OF CONTENTS..... | iii |
| TABLE OF AUTHORITIES | iv |
| SUPPLEMENTAL ARGUMENT..... | 1 |
| I. The Unit of Prosecution for Luring Is Each Distinct Offer of or Solicitation for Sexual Conduct with a Minor. | 1 |
| A. Because the plain language of the statute provides the unit of prosecution, the Court should apply the statute’s text without resorting to secondary methods of interpretation. | 3 |
| B. Even if the unit of prosecution were ambiguous, secondary methods of statutory interpretation support a completed-act unit of prosecution..... | 7 |
| 1. Legislative History | 8 |
| 2. The Statute’s Purpose | 8 |
| 3. The Statute’s Effects..... | 12 |
| II. First-Degree Luring Is Not Probation Eligible..... | 16 |
| CONCLUSION..... | 19 |

TABLE OF AUTHORITIES

| Cases | Page(s) |
|--|----------------|
| <i>Am. Civil Liberties Union of Ariz. v. Ariz. Dep’t of Child Safety</i> , 251 Ariz. 458 (2021)..... | 9 |
| <i>Am. Civil Liberties Union v. Goddard</i> , CIV.00–505 TUC ACM, 2004 WL 3770439, at *1 (D. Ariz. Apr. 23, 2004) | 11 |
| <i>Blockburger v. United States</i> , 284 U.S. 299 (1932) | 6 |
| <i>Calvert v. Farmers Ins. Co. of Ariz.</i> , 144 Ariz. 291 (1985)..... | 18 |
| <i>City of Tucson v. Clear Channel Outdoor, Inc.</i> , 209 Ariz. 544 (2005)..... | 3 |
| <i>Ex parte Snow</i> , 120 U.S. 274 (1887) | 14 |
| <i>Fann v. State</i> , 251 Ariz. 425 (2021) | 4 |
| <i>In re McLaughlan</i> , 252 Ariz. 324 (2022)..... | 18, 19 |
| <i>J.D. v. Hegyi</i> , 236 Ariz. 39 (2014)..... | 3 |
| <i>King v. Burwell</i> , 576 U.S. 473 (2015) | 4 |
| <i>Ladner v. United States</i> , 358 U.S. 169 (1958)..... | 13 |
| <i>Mejak v. Granville</i> , 212 Ariz. 555 (2006)..... | 1, 6, 10, 17 |
| <i>Premier Physicians Grp., PLLC v. Navarro</i> , 240 Ariz. 193 (2016)..... | 16 |
| <i>Robinson v. Shell Oil Co.</i> , 519 U.S. 337 (1997)..... | 5 |
| <i>Stambaugh v. Killian</i> , 242 Ariz. 508 (2017)..... | 3, 5 |
| <i>State v. Agueda</i> , 253 Ariz. 388 (2022)..... | 11 |
| <i>State v. Grainge</i> , 186 Ariz. 55 (App. 1996)..... | 10 |
| <i>State v. Helmer</i> , 203 Ariz. 309 (App. 2002) | 15 |
| <i>State v. Hernandez</i> , 246 Ariz. 407 (App. 2019) | 17 |
| <i>State v. Jones</i> , 235 Ariz. 501 (2014)..... | 18 |
| <i>State v. Jurden</i> , 239 Ariz. 526 (2016)..... | 1, 3, 7, 8 |
| <i>State v. Lopez</i> , 174 Ariz. 131 (1992) | 12 |
| <i>State v. Mixton</i> , 250 Ariz. 282 (2021)..... | 3, 5 |
| <i>State v. Moninger</i> , 251 Ariz. 487 (App. 2021) | passim |
| <i>State v. Padilla</i> , 169 Ariz. 70 (App. 1991) | 4, 5 |
| <i>State v. Sepahi</i> , 206 Ariz. 321 (2003) | 7 |
| <i>State v. Yegan</i> , 223 Ariz. 213 (App. 2009)..... | 8, 12 |
| <i>Toussie v. United States</i> , 397 U.S. 112 (1970) | 15 |
| Statutes | |
| 2022 Ariz. Legis. Serv. ch. 197 (H.B. 2696) | 18 |
| A.R.S. § 1–246..... | 19 |
| A.R.S. § 13–705 (2018) | 16, 17, 18 |
| A.R.S. § 13–1417..... | 16 |

| | |
|---------------------------|--------|
| A.R.S. § 13–2923 | 16 |
| A.R.S. § 13–3506.01 | 9, 11 |
| A.R.S. § 13–3554 | passim |
| A.R.S. § 13–3560 | 5, 12 |
| A.R.S. § 13–3612(1) | 9 |
| A.R.S. § 13–3613(A) | 9, 11 |

Other Authorities

| | |
|---|----|
| <i>Offer</i> , Black’s Law Dictionary (11th ed. 2019) | 4 |
| <i>Solicitation</i> , Black’s Law Dictionary (11th ed. 2019) | 7 |
| Tom Sorell, <i>Online Grooming and Preventive Justice</i> , 11 Crim. L. & Phil. 705, 721 (2017)..... | 10 |

SUPPLEMENTAL ARGUMENT

I. The Unit of Prosecution for Luring Is Each Distinct Offer of or Solicitation for Sexual Conduct with a Minor.

As this Court has explained, “the statutory definition of [a] crime determines the scope of conduct for which a discrete charge can be brought.” *State v. Jurden*, 239 Ariz. 526, 529, ¶ 11 (2016). Here, the plain language of the Luring statute makes each distinct “offer” of or “solicitation” for sexual conduct with a minor a punishable offense. See A.R.S. § 13–3554; see also *Mejak v. Granville*, 212 Ariz. 555, 558, ¶ 18 (2006) (stating Luring “is complete when a person offers or solicits sexual conduct with a minor or a peace officer posing as a minor”). The words “offering” and “soliciting” are two sides of the same coin, and logically carry the same unit of prosecution. Moninger agrees that “there is no meaningful or relevant difference in interpreting the meaning of solicitation and offer here.” See R.P.F.R. at 5. The ordinary meanings of both words, when viewed together, connote a solitary proposal or request for sexual conduct. Indeed, the Majority below even recognized that “a single statement explicitly requesting sexual conduct may constitute a solicitation.” See *State v. Moninger*, 251 Ariz. 487, 494, ¶ 22 (App. 2021).

Yet, despite the plain language of the statute and its own conclusion that a defendant can be convicted of Luring based on a single statement, the Majority isolated the word “soliciting” from the word “offering” and found “soliciting”

ambiguous when so viewed. *Id.* at 492, 494, ¶¶ 14, 22, n.4. Then, after a flawed application of secondary methods of statutory interpretation, the Majority produced a nonsensical “course-of-conduct” unit of prosecution for the word “soliciting,” in which the proposed course of conduct, a concept that connotes a series of acts, could either be “a statement or series of statements requesting sexual conduct.” *Id.* at 492, ¶ 14. But just a few paragraphs later, the Majority contradictorily concluded that the Legislature “did not intend ‘solicit’ to refer to singular acts or statements” because it would (purportedly) result in overly harsh penalties. *Id.* at 493, ¶ 20.

The Majority’s construction of the Luring statute is at odds with both the plain language of the statute and this Court’s previous decisions interpreting it. This Court should hold, consistent with its precedent, that the unit of prosecution for Luring unambiguously refers to each act of proposing or requesting sexual conduct, and not to a course of conduct comprised of repeated solicitations or offers for the same sexual conduct. Alternatively, even if the statute were ambiguous, a faithful application of secondary methods of statutory interpretation shows the Legislature intended to punish each request for sexual conduct, and provided no special exception for repetitious requests.

A. Because the plain language of the statute provides the unit of prosecution, the Court should apply the statute’s text without resorting to secondary methods of interpretation.

“Words in statutes should be read in context in determining their meaning.” *Stambaugh v. Killian*, 242 Ariz. 508, 509, ¶ 7 (2017); *see also J.D. v. Hegyi*, 236 Ariz. 39, 41, ¶ 6 (2014) (“Words in statutes . . . cannot be read in isolation from the context in which they are used.”). This Court seeks to give meaning to every provision, so that none is rendered superfluous. *City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 552, ¶ 31 (2005). “Offer” and “solicit” are not defined for purposes of the Luring statute, so this Court looks to their “natural, obvious, and ordinary meaning[s].” *State v. Mixton*, 250 Ariz. 282, 290, ¶ 33 (2021). Only when a statute “is subject to more than one reasonable interpretation, [do courts] consider secondary principles of statutory interpretation.” *Jurden*, 239 Ariz. at 530, ¶ 15.

The Majority erred when it isolated the word “soliciting” from the rest of the Luring statute. *See Moninger*, 251 Ariz. at 494, ¶ 22 n.4 (declining to construe the word “soliciting” in conjunction with its logical counterpart of “offering”). “A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” *King v. Burwell*, 576 U.S. 473, 492 (2015). Construing the Luring statute as a whole also comports

with “the *noscitur a sociis* canon [of construction]—the principle that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it[.]” *Fann v. State*, 251 Ariz. 425, 435, ¶ 29 (2021).

After consulting a dictionary, the Majority determined the word “soliciting” could “refer to a single act” or “describe repetitive or persistent conduct inherently consisting of multiple actions,” and therefore found the word ambiguous. *Moninger*, 251 Ariz. at 492, ¶ 14 & n.4. But in context, “soliciting” is not ambiguous. When the rest of the statutory language is considered, particularly the word “offering,” only one meaning identified by the Majority is reasonable—the single-act definition. See *King*, 576 U.S. at 492.

The Legislature’s inclusion of the inherently single-act-based term “offer” as one way to commit Luring confirms the Legislature also intended to use the single-act definition of “solicit.” See *Fann*, 251 Ariz. at 435, ¶ 29. An “offer” is “[t]he act or an instance of presenting something for acceptance; specif[cally] a statement that one is willing to do something for another person or to give that person something.” *Offer*, Black’s Law Dictionary (11th ed. 2019); see also *State v. Padilla*, 169 Ariz. 70, 72 (App. 1991) (“An ‘offer’ is not so much a matter of speech as it is an act of presentation for consideration, for acceptance or rejection.”). There is no reason why the Legislature would intend to punish repetitious *offers* of sexual conduct as multiple crimes while punishing repetitious

solicitations as one crime. See *Stambaugh*, 242 Ariz. at 510, ¶ 11 (looking to “the statute as a whole to determine whether [a] provision is subject to more than one reasonable interpretation”). The single-act definition is also the only “natural, obvious, and ordinary meaning.” *Mixton*, 250 Ariz. at 290, ¶ 33.

Although the Majority suggested that the word “offering” could refer to a course of conduct, the Majority expressly declined to interpret that statutory term. See *Moninger*, 251 Ariz. at 494, ¶ 22 n.4. In any event, the Majority relied on passing language from *Padilla* suggesting that a “statute criminalizing an ‘offer’ to sell narcotic drugs was not unconstitutionally overbroad because the statute did not criminalize speech, but a ‘*course of conduct* that may be carried out by speech.” *Id.* (quoting *Padilla*, 169 Ariz. at 72). But *Padilla* explicitly defines an offer as “an act,” and its reference to a course of conduct referred to an offer culminating in the act of selling drugs, not a series of offers. *Padilla*, 169 Ariz. at 72.

Returning to the meaning of “solicit,” the single-act definition is also consistent with the Aggravated Luring statute, which explicitly refers to both offers and solicitations in the singular form. See A.R.S. § 13–3560(A)(2) (describing various scenarios in which “*the offer or solicitation*” can be transmitted along with a visual depiction of harmful material) (emphasis added). The Majority failed to even consider this related offense in its analysis, even though it is comprised of the same underlying offense of simple Luring. See *Stambaugh*, 242 Ariz. at 511, ¶ 16

(considering a related statute to interpret plain meaning of statute at issue). Surely the Legislature did not intend to punish simple Luring as a course of conduct, but punish Aggravated Luring on a separate-act basis.

Finally, the single-act definition comports with a basic concept that even the Majority begrudgingly acknowledged—that “a single statement explicitly requesting sexual conduct may constitute a solicitation[.]” *Moninger*, 251 Ariz. at 494, ¶ 22. For example, if Moninger had sent one text message, stating, “Sabrina, I know you’re only 13 years old, but will you have sex with me?,” all of the statutory elements would be satisfied to prove the completed offense of Luring. Even if Moninger sent no other messages, he would still be criminally liable for Luring based on that single text. Nothing in A.R.S. § 13–3554 requires that Moninger send additional solicitations before he is criminally liable; indeed, as this Court has previously held, “the crime is complete when a person offers or solicits sexual conduct with a minor[.]” *Mejak*, 212 Ariz. at 558, ¶ 18. Thus, any subsequent request for sex, even if identical in nature, would constitute a separate violation of the Luring statute. *See Blockburger v. United States*, 284 U.S. 299, 301 (1932) (finding two violations of the same statute for two separate unlawful sales of morphine because once “the first sale had been consummated, . . . the payment for the additional drug, however closely following, was the initiation of a separate and distinct sale[.]”).

Thus, when the two definitions of “solicit” proffered by the Majority are viewed in context of the whole statute, only the single-act definition is reasonable. The Legislature unambiguously intended “solicit” to mean “[t]he act or an instance of requesting or seeking to obtain something.” *Solicitation*, *Black’s Law Dictionary* (11th ed. 2019). This Court’s analysis can (and should) end here. *See Jurden*, 239 Ariz. at 530, ¶ 15 (“If the statutory language is unambiguous, we apply it as written without further analysis.”); *see also State v. Sepahi*, 206 Ariz. 321, 324 (2003) (“In the end, a statute’s language is the most reliable index of its meaning. . . . While the legislature could have rationally passed [] a statute [in accord with appellant’s proposed construction], it did not do so, and we cannot rewrite the statute to reach such a result.”). Under the single-act unit of prosecution allowed by the statute’s plain language, Moninger’s repeated requests for sex with Sabrina constitute separate offenses. Thus, he was properly convicted of three counts of Luring.

B. Even if the unit of prosecution were ambiguous, secondary methods of statutory interpretation support a completed-act unit of prosecution.

In *Jurden*, this Court resorted to secondary methods of statutory interpretation to determine the unit of prosecution for resisting arrest because statutory ambiguity actually existed. *Jurden*, 239 Ariz. at 530, ¶ 16. There, the Court considered the legislative history, the statute’s purpose, and the effects of

each possible unit of prosecution. *Id.* at 530–32, ¶¶ 18–25. Applied here, these secondary methods of statutory interpretation confirm the Legislature intended the Luring statute to punish individual requests for sexual conduct.

1. *Legislative History*

The legislative history of the Luring statute supports a single-act unit of prosecution. Section 13–3554 was enacted in 2000 as part of a larger computer crimes bill intended to modernize Arizona’s criminal code to account for crimes perpetrated via the internet. See *Moninger*, 251 Ariz. at 493, ¶ 19. The Luring statute was placed in an already-existing chapter of the criminal code—Sexual Exploitation of Children—which was created in 1978 to “prohibit any conduct which causes or threatens psychological, emotional or physical harm to children as a result of such sexual exploitation.” *State v. Yegan*, 223 Ariz. 213, 217, ¶ 14 (App. 2009) (quoting 1978 Ariz. Sess. Laws, ch. 200, § 2(B)(2)). As addressed in more detail below, the placement of the Luring statute in a chapter of the criminal code designed to prohibit conduct that causes harm to minors supports a single-act-based unit of prosecution when each repetitive violation of the statute compounds the harm suffered by a minor.

2. *The Statute’s Purpose*

The Majority discerned two possible purposes for the Luring statute: (1) to prevent the commission of other more serious sex crimes involving children, and

(2) to prevent, “to the extent permitted under the First Amendment, . . . the mere making of sexually explicit communications to minors.” *Moninger*, 251 Ariz. at 492–93, ¶¶ 16, 18. The Majority’s framing of the second objective unjustifiably expands the phrase “offers or solicits sexual conduct” to encompass transmission of all “sexually explicit communications to minors.” Using this false framing, the Majority then reasoned that other statutes like A.R.S. §§ 13–3506.01 (furnishing harmful material to minors), and –3612(1), –3613(A) (contributing to the delinquency of a minor), could better serve the expanded scope of the second objective. *Moninger*, 251 Ariz. at 492–93, ¶17.

Neither of the Majority’s possible purposes considers the plain text of the Luring statute. The most obvious purpose for the statute is, as the statute says, to prevent a person from offering or soliciting sexual conduct with a minor. See *Am. Civil Liberties Union of Ariz. v. Ariz. Dep’t of Child Safety*, 251 Ariz. 458, 463, ¶ 20 (2021) (“[A] statute’s plain language is the best indicator of legislative intent.”). When a minor is solicited for sexual conduct, the minor suffers a harm separate from the harms that arise from engaging in sexual conduct. See *Moninger*, 251 Ariz. at 504–05, ¶ 68 (Morse, J., dissenting) (explaining the process of grooming minors and how repeated requests can “magnify the harm to the minor”). The grooming process can induce significant harms to minors, including depression, sexual dysfunction, drug-dependence, difficulty making friends,

uncertainty over one's gender or sexual preferences, and suicidal and other self-harming tendencies. *Id.* (quoting Tom Sorell, *Online Grooming and Preventive Justice*, 11 *Crim. L. & Phil.* 705, 721 (2017)). It can also lead to the gradual breaking down of barriers that “fosters continued acquiescence to [the defendant’s] sexual crimes.” *State v. Grainge*, 186 *Ariz.* 55, 58 (App. 1996).

Although the Majority’s first suggested purpose—preventing the commission of more serious sex crimes—can potentially be achieved by the prohibition and resulting reduction of solicitous messages, this is not the primary purpose of the statute. That is so because the prevention of more serious sex crimes could already be achieved prior to the creation of the Luring statute via the preparatory-offense statutes. The mere enactment and existence of the Luring statute is evidence that the Legislature sought to do more than simply prevent sexual conduct with a minor. The Legislature intended to punish the harm-inducing solicitation itself. Consistent with that legislative intent, this Court has already rejected the argument that Luring “is equivalent to a preparatory offense.” *Mejak*, 212 *Ariz.* at 558, ¶ 18.

The Majority’s second proposed purpose, along with its recommendation that prosecutors should bring charges under a different statute, is likewise flawed. *See Moninger*, 251 *Ariz.* at 495, ¶ 27 (suggesting that “an isolated statement referencing sexual behavior might more aptly fall within the conduct prohibited by

[A.R.S. § 13–3506.01](#) [furnishing harmful items to minors via the internet].”). As discussed above, the Luring statute is not aimed at merely preventing adults from furnishing harmful items to minors. Moreover, the furnishing statute, [§ 13–3506.01](#), is unenforceable. In 2004, a federal district court permanently enjoined prosecutors from bringing charges under [§ 13–3506.01](#) because the statute is unconstitutional. See *Am. Civil Liberties Union v. Goddard*, CIV.00–505 TUC ACM, 2004 WL 3770439, at *1 (D. Ariz. Apr. 23, 2004).

The Majority also gave a drive-by citation to [A.R.S. § 13–3613](#), which criminalizes contributing to the delinquency of a child as a misdemeanor. *Moninger*, 251 Ariz. at 492–93, ¶ 17. Of course, a misdemeanor prosecution for violating [§ 13–3613](#) is not an adequate substitute for prosecuting an adult for Luring—a felony offense categorized as a dangerous crime against children. Accordingly, that the State could have also charged Moninger with contributory delinquency does not affect the unit of prosecution analysis. Cf. *State v. Agueda*, 253 Ariz. 388, 392, ¶ 24 (2022) (holding that the offenses of “sexual conduct with a minor and contributing to the delinquency of a minor each require proof of elements that the other does not.”).

Finally, even if another statute proscribed the same or similar conduct as Luring, when a defendant can be prosecuted under two separate statutes for the

same conduct, it is well-established that “the prosecutor has the discretion to determine which statute to apply.” *State v. Lopez*, 174 Ariz. 131, 143 (1992).

3. *The Statute’s Effects.*

The Majority criticized the Dissent for focusing on the particular, individualized harm that results from each additional request for sexual conduct with a child, reasoning that the statute “defines the crime of luring only by reference to the defendant’s actions, not its impact upon the victim, and allows for prosecution of a defendant who solicits sex even from a *fictitious* minor.” *Moninger*, 251 Ariz. at 500, ¶ 49 (emphasis in original).

First, the Majority’s cursory reasoning failed to account for the legislative history of Chapter 35, which was established specifically to “prohibit any conduct which causes or threatens psychological, emotional or physical harm to children as a result of such sexual exploitation.” *Yegan*, 223 Ariz. at 217, ¶ 14. Second, the majority also failed to account for the companion statute to simple Luring—A.R.S. § 13–3560 (Aggravated Luring)—which specifically prohibits transmission of “at least one visual depiction of material that is *harmful* to minors[.]” (Emphasis added.) Finally, that the Legislature excluded as a possible defense “that the other person is not a minor” in subsection B, does not define the scope of the unit of prosecution in subsection A. A.R.S. § 13–3554(B). Thus, while the language of A.R.S. § 13–3554 does not directly address the harm caused by offers of or

solicitations for sexual conduct, surrounding statutes and the legislative history show that the Legislature’s purpose in enacting this statute was to prevent the particularized harm that results from each offer of or request for sexual conduct.

Nor would a single-act-based unit of prosecution lead to unduly harsh punishment, as the Majority suggested. *Moninger*, 251 Ariz. at 493, ¶¶ 20–21 (comparing the sentence for three counts of Luring to the sentence for one count of sexual conduct with a minor). In defense of this reasoning, the Majority cited *Ladner v. United States*, 358 U.S. 169, 177 (1958). See *Moninger*, 251 Ariz. at 500, ¶ 48. But in *Ladner*, the United States Supreme Court was interpreting an assault statute that provided for disparate means of committing the offense, ranging from merely resisting an officer to actually injuring them. See *Ladner*, 358 U.S. at 177. The Court reasoned a victim-based unit of prosecution would produce incongruous results because a defendant’s *single act* of pointing a shotgun at five officers would carry a harsher sentence than the *single act* of actually injuring an officer. *Id.* But here, the Majority theorized that *multiple requests* (the behavior proscribed by the statute) for a *single act* would carry a greater sentence than the *single act* of sexual conduct with a minor. Thus, *Ladner* is inapposite.

The Majority also erroneously suggested that an act-based unit of prosecution “risk[ed] giving the State carte blanche to divide a continuous conversation into as many luring charges as it wishes.” *Moninger*, 251 Ariz. at

501, ¶ 51. The Majority’s characterization of Moninger’s conversation as “continuous” obscures a bright-line distinction between separate-act offenses and continuous offenses. Inherently continuous offenses can never be narrowed to any particular act because a defendant must commit several acts before the offense is complete. For example, in *Ex parte Snow*, 120 U.S. 274 (1887), a polygamy case, the defendant was charged with three counts of “unlawful cohabitation.” The defendant had cohabitated with more than one woman over a period of three years with no discernable breaks in that conduct. *Id.* at 281. The prosecutor arbitrarily divided the three charges into periods of one year each. *Id.* The Court first recognized that unlawful cohabitation is inherently a continuous offense “having duration; and not an offense consisting of an isolated act.” *Id.* The Court theorized that, on the government’s theory that the offense could be divided by time periods, a prosecutor could divide an unlawful cohabitation into infinitesimally smaller time periods, subjecting the defendant to overly harsh penalties. *Id.* at 281–82.

But unlike time periods, which can be divided “ad infinitum,” the State is limited in Luring cases by the number of times a defendant offers or solicits sexual conduct. And unlike the mere passage of time (the basis for the separate charges in *Snow*) which occurs without any particular volitional act by the defendant, each request for sexual conduct requires a volitional act. None of Moninger’s messages was spontaneous or uncontrollable, and each evinced a new and separate intent to

request sexual conduct. Thus, the Majority's fears about infinite Luring charges are unfounded.

Conversely, the Majority's decision to make Luring a pseudo-continuous offense may have its own unintended consequences. First, as the State argued in its Petition for Review, the Majority's approach creates a perverse incentive for predators to escalate their solicitations to minors because a single request for sexual conduct is punished no more harshly than a persistent campaign. *See* P.F.R. at 12. Second, in the context of calculating when a statute of limitations begins to run, the United States Supreme Court has cautioned that, absent explicit statutory language indicating the legislature intended to punish a course of conduct, courts should refrain from liberally construing such offenses as continuous. *See Toussie v. United States*, 397 U.S. 112, 115 (1970) (an offense should not be construed as a continuing one "unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one."); *see also State v. Helmer*, 203 Ariz. 309, 312, ¶ 12 (App. 2002) (defining an offense as continuous affected which version of a sentencing statute applied).

Legislative silence on whether a crime is a continuing offense supports the conclusion that it is not. *Toussie*, 397 U.S. at 120. Here, the Legislature has given no explicit indication it intended to make Luring a continuous offense, even though

it knows how to do so. *See, e.g., A.R.S. §§ 13–2923(A) & (D)* (“A person commits stalking if the person intentionally or knowingly engages in *a course of conduct* that is directed toward another person and if that conduct causes [various harms].”) (emphasis added); *–1417* (continuous sexual abuse of a child).

II. First-Degree Luring Is Not Probation Eligible.

The DCAC sentencing statute unambiguously makes all but two first-degree DCAC offenses (sexual abuse and bestiality under *§ 13–1411(A)(2)*) ineligible for probation. *See A.R.S. § 13–705(H) (2018)*. Rather than apply subsection H’s plain language, the Majority instead assumed the Legislature either mistakenly left off luring from the list of exempted offenses, or mistakenly drafted subsection E, which establishes the applicable prison terms for a Luring conviction, “in a way that indicated such offenses are probation-eligible.” *Moninger, 251 Ariz. at 502, ¶ 59 & n.6*. Without even attempting to harmonize subsections E and H, the Majority concluded the subsections were ambiguous. *Id. at ¶ 59 n.6*. Notably, the Majority based its ambiguity finding on the dearth of legislative history and “the legislature’s inaction in the face of court practice” rather than on the language of the statute itself. *Id.*

The Majority erred in three respects. First, it failed to apply the plain language of the relevant DCAC statutory provisions or to “harmonize [them so as to] avoid interpretations that result in contradictory provisions.” *Premier*

Physicians Grp., PLLC v. Navarro, 240 Ariz. 193, 195, ¶ 9 (2016). Subsection H applies to *first-degree* offenses, while subsection E makes no distinction between first- and second-degree offenses. Thus, subsections E and H can be read in harmony. The crime of luring a minor for sexual exploitation is not probation-eligible when the offense is in the first degree—i.e., completed—but could be eligible for probation when the offense is in the second degree—i.e., merely “a preparatory offense.” See A.R.S. § 13–705(O) (2018) (defining first- and second-degree offenses); see also *Mejak*, 212 Ariz. at 556, ¶ 2 & n.1 (observing that “a person could be charged with attempted luring” when “the person solicited is an adult posing as a minor, but is not a peace officer”).¹

Second, the Majority assumed the Legislature made a mistake in drafting the statute. This assumption is erroneous because, “[a]bsent the essential predicate of ambiguity, [courts] cannot rewrite a statute based on the surmise that the

¹ The manner of attempted luring contemplated in *Mejak* is no longer possible because of the 2007 amendments to A.R.S. § 13–3554. But Moninger’s claim that “there is no offense of second degree or preparatory Luring,” see R.P.F.R. at 13, is easily disproven with the following example of attempted Luring: a defendant drafts a text message soliciting sexual conduct with a person he knows is a minor, but after hitting “send” on his phone, the message fails to send and remains undelivered. Cf. *State v. Hernandez*, 246 Ariz. 407, 411, ¶ 13 (App. 2019) (reducing counts of participating in a street gang to attempted participation in a criminal street gang because the defendant’s letters were intercepted by prison officials).

legislature meant to draft it a different way.” *In re McLauchlan*, 252 Ariz. 324, 326, ¶ 15 (2022). By assuming a mistake had been made (despite subsequent amendments that maintained the language at issue), the Majority relieved itself of the burden of harmonizing the statutes.

Third, the Majority erred by applying the legislative-acquiescence doctrine. See *Moninger*, 251 Ariz. at 503, ¶ 59 (“Given the current sentencing practice on this subject and the legislature’s apparent acquiescence to that practice, we hold that a luring conviction is probation eligible.”). The legislative acquiescence doctrine applies only “when a statute construed by *a court of last resort* is reenacted in substantially the same terms.” *State v. Jones*, 235 Ariz. 501, 503, ¶ 12 (2014) (emphasis in original). No decision from this Court has construed § 13–705 (2018) as making Luring probation eligible, and the sentencing chart promulgated by the Administrative Office of this Court is not an adequate substitute for a precedential opinion on the matter. Cf. *Calvert v. Farmers Ins. Co. of Ariz.*, 144 Ariz. 291, 297 n.5 (1985) (declining to apply the legislative-acquiescence doctrine based on the denial of a petition for review because, *inter alia*, “[d]enial of a petition for review has no precedential value.”).

Finally, although a recent amendment to A.R.S. § 13–3554 makes explicit that Luring is not probation-eligible, see 2022 Ariz. Legis. Serv. ch. 197 (H.B. 2696), this amendment has no bearing on the statutory analysis in *Moninger*’s case.

See [A.R.S. § 1–246](#) (notwithstanding subsequent amendments, an “offender shall be punished under the law in force when the offense was committed”). Nor can the recent amendment be interpreted as proof that first-degree Luring was eligible for probation prior to the amendment. See [McLauchlan, 252 Ariz. at 327, ¶ 19](#) (rejecting similar argument because “it is our job to construe the statutory language that was in effect at the time of the actions at issue here.”).

CONCLUSION

For these reasons, the State respectfully requests that this Court vacate paragraphs 7–53 and 58–60 of the court of appeals’ opinion, and reinstate Moninger’s convictions and sentences.

Respectfully submitted,

Mark Brnovich
Attorney General

Linley Wilson
Deputy Solicitor General /
Section Chief of Criminal Appeals

/s/
Casey D. Ball
Assistant Attorney General

Attorneys for Appellee