No. _____

In the Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

JOE PAUL MARTINEZ,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

MARK BRNOVICH
Attorney General

DOMINIC E. DRAYE
Solicitor General
Counsel of Record
RUSTY D. CRANDELL
DAVID R. COLE
OFFICE OF THE ATTORNEY GENERAL
1275 West Washington Street
Phoenix, AZ 85007
(602) 542-3333
solicitorgeneral@azag.gov

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Did the Arizona Supreme Court err in stretching the "overbreadth" test for facial unconstitutionality beyond the First Amendment context to strike down a bail restriction based on an application of the law not present in this case?

2. Did the Arizona Supreme Court err in applying heightened scrutiny—one standard among five used in the lower courts—to strike down a state regulatory measure that denies bail if a judge, after a full adversarial hearing, finds clear proof that the arrestee raped a child?

PARTIES TO THE PROCEEDING

Petitioner is the State of Arizona.

Respondent, who is a defendant in the criminal proceeding below, is Joe Paul Martinez.

Other parties in the proceedings below, who are not parties here, were: Defendant Jason Donald Simpson; Honorable Phemonia Miller, Judge Pro Tempore of the Maricopa Superior Court of the State of Arizona; and Honorable Roland J. Steinle, Judge of the Maricopa County Superior Court of the State of Arizona.[*]

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[*] Defendant Simpson's criminal case was rendered moot after he accepted a plea agreement. App. 5. Commissioner Miller and Judge Steinle were named as nominal parties in the appeal below because Simpson and Martinez sought interlocutory review of these judges' orders denying bail. *See* Ariz. R. Proc. for Special Actions 2.

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PETITION FOR WRIT OF CERTIORARI

Protecting children from sexual abuse is a state interest—and duty—of the highest order. To fulfill this responsibility, Arizona adopted a regulatory measure that denies bail when a judge finds "the proof is evident or the presumption great" that a person has engaged in sexual conduct with a child. Ariz. Const. art. II, § 22(A)(1); Ariz. Rev. Stat. § 13-3961(A)(3). This Court has sanctioned offense-based bail denials for capital crimes and for lawful permanent residents detained pending removal hearings. *United States v. Salerno*, 481 U.S. 739, 753 (1987); *Demore v. Kim*, 538 U.S. 510 (2003). Sexual abuse of a child, with its heinous effects on the victim and high probability of recidivism, is another obvious candidate for an offense-based bail exclusion.

After Respondent Martinez was arrested for sexual crimes against three children spanning over sixteen years, the trial court held an evidentiary hearing and concluded that the proof was evident and the presumption great that he engaged in sexual conduct with a child. It therefore denied bail.

The Arizona Supreme Court reversed, finding the bail provisions facially unconstitutional based on a hypothetical application not presented by the current case. It reasoned that, because a teenage couple engaging in consensual sex might be charged with sexual contact with a minor under age fifteen, the crime in question was not an adequate predictor of dangerousness in *every* case. The problem with this reasoning is that Martinez was not charged for being a high school senior having sex with his freshman girlfriend. Rather, the indictments identify him as a

child rapist who did unspeakable things to three different victims over a span of sixteen years, even making a video recording of his attack in one instance. Needless to say, nothing about his alleged conduct was consensual. The Arizona Supreme Court, by speculating about an imaginary prosecution of consenting teenagers, broke with precedent barring litigants from asserting a facial challenge based on the facts of a different case. When and if those facts ever lead to a prosecution, the parties involved may pursue an as-applied challenge.

Sadly, the Arizona Supreme Court is not alone in failing to appreciate the requirement that a litigant pressing a facial challenge "must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745. At least half a dozen state high courts along with the Second, Tenth, and Federal Circuits do not consider this requirement binding, and the latter two courts have described it as a "result" rather than the test that *Salerno* prescribes. Other courts are more faithful: the Fourth, Sixth, and Seventh Circuits are among those recognizing that *Salerno* and its progeny are the only opinions on this topic to garner support from a majority of this Court. Although the law and logic of *Salerno* should be clear, dicta in other decisions and the unique standard for First Amendment challenges have created confusion. The importance of unifying this area of law is hard to overstate. Lower courts have cited *Salerno* alone over 1,400 times for the standard governing facial challenges.

On the specific topic of bail, the Arizona Supreme Court committed a second error: it applied "heightened

scrutiny" to Arizona's bail statutes rather than the balancing test this Court has prescribed. On this point, the circuits and state supreme courts are fractured five ways: Arizona applied heightened scrutiny; another court applied rational basis review; another applied a balancing test; a fourth found a categorical bar to denying bail based on non-capital crimes; and the final court applied strict scrutiny. This five-way division proves both the importance of settling the standard for due process challenges to offense-based bail rules and the urgent need for doing so.

This Court applies a presumption in favor of certiorari when a federal statute is held unconstitutional. *E.g.*, *United States v. Bajakajian*, 524 U.S. 321, 327 (1998). Some justices have called for similar attention to state laws invalidated in the name of the United States Constitution. *County of Maricopa v. Lopez-Valenzuela*, 135 S. Ct. 428 (2014) (Thomas, J., statement regarding denial of stay pending certiorari) (collecting cases). Whether such a presumption applies or not, the folly of the Arizona Supreme Court's reasoning and confusion in courts of appeals around the country cry out for this Court's review.

OPINIONS BELOW

The opinion of the Supreme Court of Arizona is reported at 387 P.3d 1270. App. 1–18. The opinion of the Arizona Court of Appeals is reported at 377 P.3d 1003. App. 19–51. The opinions of the Maricopa County Superior Court are unreported. App. 52–62, 66–68.

JURISDICTION

The Supreme Court of Arizona issued its opinion on February 9, 2017. On April 13, 2017, Justice Kennedy extended the time for filing a certiorari petition to June 9, 2017. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend XIV. The relevant Arizona constitutional and statutory provisions regarding bail for persons charged with sexual conduct with a minor under fifteen years of age appear in Appendix J (App. 102–06). Ariz. Const. art. II, § 22(A)(1); Ariz. Rev. Stat. § 13-3961(A)(3).

STATEMENT OF THE CASE

A. Statutory Background

A person commits the crime of sexual conduct with a minor under Arizona law "by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age." Ariz. Rev. Stat. § 13-1405(A). A separate offense—a Class 2 felony—applies when the minor is under the age of fifteen. *Id.* § 13-1405(B). Consistent with the gravity of the offense, a defendant convicted of sexual conduct with a minor under age fifteen faces a presumptive prison term of twenty years—and lifetime imprisonment when the victim is twelve or younger—to

be served consecutively for each act and each victim. *Id.* § 13-705.

In 2002, eighty percent of Arizona's voters approved Proposition 103, which (among other things) amended the Arizona Constitution to remove the right to bail when "the proof is evident or the presumption great" that a person committed the crime of sexual conduct with a minor under age fifteen. Ariz. Const. art. II, § 22(A)(1); *State ex rel. Romley v. Rayes*, 75 P.3d 148, 152 (Ariz. Ct. App. 2003). Arizona's Legislature also amended Ariz. Rev. Stat. § 13-3961(A)(3) upon approval of Proposition 103 to deny bail on such proof. These constitutional and statutory provisions are referred to herein as the "Bail Provisions."

The Bail Provisions do not "abolish bail" for a person charged with sexual conduct with a minor under age fifteen or "create an irrebuttable presumption" that bail should be denied. *Rayes*, 75 P.3d at 151. Instead, to show that the "proof is evident or the presumption great," the State has the burden to prove that "all of the evidence, fully considered by the court, makes it plain and clear to the understanding, and satisfactory and apparent to the well-guarded, dispassionate judgment of the court that the accused committed" the crime. *Simpson v. Owens*, 85 P.3d 478, 491 (Ariz. Ct. App. 2004). In sum, proof of the offense "must be substantial." *Id.*

Not only does Arizona law require heightened proof of the offense, but it also safeguards this determination with procedural protections:

- The court must hold a full adversarial hearing where the defendant has legal counsel and a right to be heard, to examine witnesses, and to review in advance witnesses' prior statements. *Id.* at 487, 492–93.
- The court must not treat prosecutorial assertions as proof, and must only admit material evidence. *Id.* at 492–94.
- The court must set forth its analysis and findings on the record. *Id.* at 493.
- The hearing must "take place as soon as is practicable to ensure that the accused is afforded due process and to maintain the presumption of innocence." *Id.* at 495.
- The length of pretrial detention is limited under Rule 8 of the Arizona Rules of Criminal Procedure, which "grants even stricter speedy trial rights than those provided by the United States Constitution." *State v. Spreitz*, 945 P.2d 1260, 1267 (Ariz. 1997).
- Arrestees can also move for reexamination of the conditions of release. Ariz. R. Crim. P. 7.4(b).

B. Charges Against Martinez and Trial Court History

Prosecutors charged Respondent Joe Paul Martinez with thirty-one sex crimes, against three separate child victims, involving six different offenses,[1] spanning over sixteen years—including eight counts of sexual conduct with a minor under fifteen years of age. App. 89–97 (Apr. 28, 2014 Indictment), 69–79 (Sep. 19, 2014 Indictment). Martinez was an adult at the time of each of the crimes charged in the indictments. App. 77, 98; Ariz. Rev. Stat. § 1-215(3). The charges are summarized in the chart below:

#	Date of Crime	Charge
VICTIM A (4/28/14 Indictment)		
1	12/24/13	Attempted Molestation of Child <15
2	12/24/13	Sexual Abuse of Minor <15
3	1/19/12-1/19/14	Sexual Abuse of Minor <15
4	1/19/12-1/19/14	Sexual Abuse of Minor <15
5	1/19/12-1/19/14	Sexual Abuse of Minor <15
6	1/19/12-1/19/14	Sexual Abuse of Minor <15
7	1/19/12-1/19/14	Sexual Abuse of Minor <15

[1] Ariz. Rev. Stat. §§ 13-1001 (attempt), -1402 (indecent exposure), -1404 (sexual abuse), -1405 (sexual conduct with minor), -1410 (molestation of child), -3553 (sexual exploitation of minor).

8	1/19/12-1/19/14	Sexual Abuse of Minor <15
9	1/19/12-1/19/14	Sexual Conduct w/ Minor <15
10	1/19/12-1/19/14	Sexual Conduct w/ Minor <15
11	1/19/12-1/19/14	Indecent Exposure (Minor <15)
VICTIM B (4/28/14 Indictment)		
12	7/18/97-7/18/99	Sexual Conduct w/ Minor <15
13	7/18/97-7/18/99	Sexual Abuse
14	7/18/01-7/18/02	Sexual Conduct w/ Minor
VICTIM A (4/28/14 Indictment)		
15	1/19/12-1/19/14	Sexual Exploitation of Minor <15
16	1/19/12-1/19/14	Sexual Exploitation of Minor <15
17	1/19/12-1/19/14	Sexual Exploitation of Minor <15
VICTIM C (9/19/14 Indictment)		
1	10/22/99-10/21/00	Sexual Abuse of Minor <15
2	10/22/99-10/21/00	Sexual Abuse of Minor <15
3	10/22/99-10/21/01	Sexual Conduct w/ Minor <15
4	10/22/99-10/21/01	Sexual Conduct w/ Minor <15
5	10/22/00-10/21/01	Sexual Conduct w/ Minor <15
6	10/22/00-10/21/01	Sexual Abuse of Minor <15

7	10/22/00-10/21/01	Sexual Conduct w/ Minor <15
8	10/22/02-10/21/03	Sexual Conduct w/ Minor
9	10/22/00-10/21/03	Sexual Conduct w/ Minor
10	10/22/00-10/21/03	Sexual Conduct w/ Minor
11	10/22/99-10/21/01	Indecent Exposure (Minor <15)
12	10/22/99-10/21/01	Molestation of Child <15
13	10/22/99-10/21/00	Sexual Conduct w/ Minor <15
14	10/22/00-10/21/03	Sexual Conduct w/ Minor

The State also alleged aggravating circumstances, including that Martinez abused his position of trust over the victims, had a history of engaging in aberrant sexual behavior, and posed a danger to society and to future victims. App. 63–65; *see also* App. 83–88 (Probable Cause Statement).

The trial court held adversarial hearings on October 30, 2014 and January 27, 2015 to determine whether Martinez was entitled to bail. App. 60–62, 66–68. The trial court found the proof evident and presumption great for seven of the eight charges of sexual conduct with a minor under age fifteen and, as a result, denied bail. *Id.* The trial court also rejected a motion for pretrial release which challenged the facial constitutionality of the Bail Provisions. App. 54. Martinez sought interlocutory review.

C. Appeal from Bail Denial

In a split decision, the Arizona Court of Appeals reversed the trial court and struck down the Bail Provisions under the Fourteenth Amendment. App. 19–51. The court held that the lack of an individualized determination of dangerousness was "constitutionally fatal" and questioned whether bail could be categorically denied even in capital cases. App. 30–33.

The Arizona Supreme Court vacated the court of appeals's decision, recognizing that an "individualized determination" of dangerousness may not be required in every case. App. 15, 18. The court also held that the Bail Provisions were "regulatory, not punitive." App. 12. Nevertheless, characterizing "the right to be free from bodily restraint" as "fundamental," the court subjected the Bail Provisions to what it described as "heightened scrutiny." App. 13–15. As the court articulated this test, the government's interest must be "legitimate and compelling" and the restriction "narrowly focused." App. 14–15.

Addressing the first part of the "heightened scrutiny" analysis, the court, in a two-sentence paragraph, noted generically that the State has a legitimate and compelling interest "in preventing crime by arrestees" and that the crime at issue was "extremely serious." App. 15. The court then concentrated its attention on whether the Bail Provisions were narrowly focused.

Turning the standard for a facial challenge on its head, the court held that the laws were not narrowly focused because the crime of sexual conduct with a minor under age fifteen could "be committed by a person

of any age" and could potentially "sweep[] in situations where teenagers engage in consensual sex." App. 16. In fact, Arizona provides a statutory defense for teenagers who engage in consensual sex, Ariz. Rev. Stat. § 13-1407(F), but this defense was unavailable to Martinez because he was too old and his victims too young. Nevertheless, because of the hypothetical impact on teenagers, the court held that the crime of sexual conduct with a minor under age fifteen could not serve as "a proxy for dangerousness." App. 16. The court did not question whether the crime was an appropriate proxy for dangerousness under circumstances like those presented by this case.

The court further pronounced that the laws were "not narrowly focused given alternatives that would serve the state's objective equally well at less cost to individual liberty." App. 17. From the court's perspective, the State could have evaluated Respondent's risk to the community under a separate bail provision, which is "essentially the same as" *Salerno*'s Bail Reform Act.[2] *Id.* Under the general bail provision, the State must provide clear and convincing evidence that "'no condition or combination of conditions of release may be imposed that will reasonably assure the safety of the other person or the community.'" *Id.* (quoting Ariz. Rev. Stat. § 13-3961(D)). Reasoning that this general procedure could work for the specific crime of sexual conduct with a minor under age fifteen, the

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[2] This is incorrect. The Bail Reform Act requires only probable cause of the offense, not that the proof be evident or the presumption great that the accused committed the offense. *Compare Salerno*, 481 U.S. at 750, *with* Ariz. Rev. Stat. § 13-3961(D).

Arizona Supreme Court struck down the alternative rule created by the voters and the legislature for failing to satisfy the "heightened scrutiny" requirement that bail restrictions be narrowly focused. App. 18.

REASONS FOR GRANTING THE PETITION

This case exposes two issues that have divided the lower courts and are important enough to deserve this Court's resolution. First, the federal government and every State in the Union confronts facial challenges to the constitutionality of their statutes. Yet this Court has acknowledged that its opinions regarding the test for facial challenges are unclear. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 472 (2010). Second, the lower courts have applied at least five different legal standards to assess whether statutes denying bail based on the crime committed comply with the Fourteenth Amendment's Due Process Clause. The Court should grant certiorari to ensure that the Due Process Clause applies uniformly to state laws in every part of the country.

I. The Arizona Supreme Court's Finding of Facial Unconstitutionality Based on an Application Not Present Here Contradicts a Mountain of Precedent.

Respondent Martinez was between age twenty-one and thirty-six at the times of the alleged crimes for which he was denied bail. Thus it makes no sense for the Arizona Supreme Court to find the statute denying him bail facially unconstitutional based on the fact that it might "sweep[] in situations where teenagers engage in consensual sex." App. 16. Martinez was significantly older than his victims, and those victims did not

consent. If Arizona's bail statute might someday ensnare love-struck teenagers who pose no threat to public safety, then those hypothetical defendants can challenge that application of the law. For Martinez's claim of facial unconstitutionality, on the other hand, the lower court's reasoning inverts the standard announced by this Court and embraced by courts around the country. Unfortunately, as this Court has acknowledged, dueling opinions and context-specific exceptions have created confusion over the standard governing facial claims of unconstitutionality. *See, e.g.*, *Stevens*, 559 U.S. at 472 (noting competing tests). The Court should now grant certiorari to resolve that division.

A. The Arizona Supreme Court Identified the Correct Test but Misapplied It.

To prevail on a claim of facial unconstitutionality, the party challenging a law "must establish that no set of circumstances exists under which the [law] would be valid." *Salerno*, 481 U.S. at 745. This "heavy burden" requires upholding a law even if the challengers identify one or more applications that would raise constitutional concerns. *Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995); *Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593 (1987). As a result, a facial challenge "is, *of course*, the most difficult challenge to mount successfully." *Salerno*, 481 U.S. at 745 (emphasis added).

The demanding standard for facial challenges makes sense in light of the upheaval a finding of facial unconstitutionality works among the branches of government. When a court pronounces a duly-enacted law facially unconstitutional, its negation of the

legislative process is total. Thus this Court has explained that facial challenges are disfavored because they "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008); *see also id.* at 450 ("Facial challenges also run contrary to the fundamental principle of judicial restraint . . . ."). *Salerno*, *Washington State Grange*, and the hundreds of cases following them reflect the judicial humility to invalidate only those applications necessary to obtain compliance with the Constitution while leaving in place as much of the legislature's work as possible.

Beyond separation-of-powers concerns, the distinction between facial and as-applied challenges implicates Article III's requirement of a live "case or controversy." U.S. Const. art. III. Thus this Court has rejected a facial challenge seeking "to invalidate legislation on the basis of its hypothetical application to situations not before the Court." *National Endowment for the Arts v. Finley*, 524 U.S. 569, 584 (1998) (quotation omitted).

The Arizona Supreme Court purported to apply *Salerno* in this case, App. 6, 18, but its reasoning is inconsistent with that precedent as announced in this Court and applied in others around the country. *Salerno*'s rule for facial challenges is intuitive and simple: "the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745; *accord Wash. State Grange*, 552 U.S. at 449 (*Salerno* requires that the challenged "law is unconstitutional in all of its applications.").

The Arizona Supreme Court did the opposite. It found the Bail Provisions facially unconstitutional because the crime of sexual contact with a minor under age fifteen "*can* be committed by a person of any age and may be consensual." App. 16 (emphasis added). The court then posited a prosecution "where teenagers engage in consensual sex." *Id.* "*In such instances*," the court continued, commission of the crime would not convey sufficient evidence of dangerousness to satisfy the Due Process Clause. *Id.* (emphasis added). But this is not that case. Martinez is an adult charged with raping children. Whatever constitutional concerns might surround application of the Bail Provisions to consenting teenagers, they are not present in this case. As the *Salerno* court explained this concept, a facial challenge must fail if the contested provisions are appropriate for "'at least some persons charged with crimes' . . . whether or not they might be insufficient in some [other] particular circumstances." 481 U.S. at 751 (quoting *Schall v. Martin*, 467 U.S. 253, 264 (1984)). Indeed, the Arizona court's justification rests entirely on a "hypothetical application" of the Bail Provisions "to situations not before the Court." *Finley*, 524 U.S. at 584.

By focusing on the range of conduct potentially covered by the challenged law, the Arizona Supreme Court's analysis is especially mismatched to a claim under the Due Process Clause. This type of "overbreadth" analysis applies only in the First Amendment context. Courts "have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Salerno*, 481 U.S. at 745; *see also Wash. State Grange*, 552 U.S. at 449 n.6 (noting "a second type of facial challenge in the First Amendment

context"). Outside the First Amendment context, applications beyond the case at bar provide no grounds for finding facial unconstitutionality.

Invalidating a statute *in toto* on the basis of a hypothetical application not presented in the current case—in fact, disturbingly unlike the current case—is incompatible with this Court's decision in *Salerno*. The error is straightforward enough to warrant summary reversal, but the importance of protecting the democratic process and confusion in other courts over the standard for facial unconstitutionality, *see infra* Part I.B, counsels in favor of certiorari.

B. The Lower Courts Are in Disarray over the Correct Standard for Facial Challenges.

Numerous state supreme courts and federal circuit courts follow the "no set of circumstances" test and refuse to allow hypothetical situations to doom a law capable of constitutional application. The Seventh Circuit recently explained its allegiance to *Salerno* based on the remedy that follows from a finding of facial unconstitutionality: "a successful facial attack means the statute is wholly invalid and cannot be applied *to anyone*." *Ezell v. City of Chicago*, 651 F.3d 684, 698 (7th Cir. 2011). Due to the severity of the outcome when a law is facially invalidated, the Seventh Circuit applies *Salerno* to exclude precisely the argument that swayed the Arizona Supreme Court: "[a] person to whom a statute properly applies can't obtain relief based on arguments that a differently situated person might present." *Id.* (quoting *United States v. Skoien*, 614 F.3d 638, 645 (7th Cir. 2010) (en banc)). Unlike in Arizona, a constitutional application— particularly to the party

at bar—is sufficient to defeat a facial challenge in the Seventh Circuit.

The Fourth and Sixth Circuits as well as the District of Columbia Court of Appeals have likewise faithfully applied *Salerno*. The Fourth Circuit applied the no-set-of-circumstances test in a facial challenge to Virginia's procedure for removing children from dangerous domestic environments, under which "as many as three days may pass before judicial review." *Jordan ex rel. Jordan v. Jackson*, 15 F.3d 333, 344 (4th Cir. 1994). Because such an extended delay could occur only in the rare case that "judicial review is not possible prior to the emergency removal" combined with "an intervening back-to-back weekend and holiday," the Fourth Circuit refused to consider this exceptional possibility in a case that did not arise under those circumstances. *Id.* This approach is antipodal to that of the Arizona Supreme Court. Had the Fourth Circuit in *Jordan* proceeded as the court below did here, it would have focused on the holiday weekend hypothetical and determined the law's facial constitutionality on the basis of that single potential application. *See also Dean v. McWherter*, 70 F.3d 43, 44–45 (6th Cir. 1995) (employing the *Salerno* test to reject a facial due process challenge to a Tennessee law "classif[ying] sex offenders as mentally ill and recommend[ing] appropriate treatment").

Of course, courts applying *Salerno* do not always uphold legislation. For example, the District of Columbia Court of Appeals—that jurisdiction's highest court—struck down a firearm regulation because the challenger "carried his burden of showing that every application of [the law] is unconstitutional." *Conley v. United States*, 79 A.3d 270, 277 (D.C. 2013). Insisting

on the high standard in *Salerno* does not determine a lawsuit's outcome. It does, however, assure that courts in these jurisdictions do not nullify the elected branches' lawful work based on a subset of unlawful applications.

Unfortunately, this fidelity to *Salerno* is not uniform. The most common error, reflected in several circuits, is treating *Salerno* "not as setting forth a *test* for facial challenges, but rather as describing the *result* of a facial challenge." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012); *see also Rothe Dev. Corp. v. Dep't of Defense*, 413 F.3d 1327, 1337–38 (Fed. Cir. 2005) ("*Salerno* is of limited relevance here, at most describing a conclusion that could result from the application of the strict scrutiny test."). This approach is irreconcilable with the language of *Salerno* itself: "the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745. Announcing what the challenger must do is not a mere description of a possible outcome. The Tenth and Federal Circuits' approach is therefore incompatible with the circuits that read *Salerno*'s language in its natural way—as announcing a requirement.

Other courts refusing to apply *Salerno* and its progeny have seized on confusion in this Court's precedent. In the years following *Salerno*, Justice Stevens waged a spirited campaign against the no-set-of-circumstances standard, usually in separate opinions. In *City of Chicago v. Morales*, a three-justice plurality rejected the test, only to draw a three-justice dissent demanding *Salerno*'s application. *Compare* 527 U.S. 41, 55 n.22 (1999) (Stevens, J., joined by Souter and Ginsburg, JJ.) *with id.* at 78–83, (Scalia, J., dissenting) *and id.* at 111, (Thomas, J., joined by Rehnquist, C.J.

and Scalia, J., dissenting). On the basis of these dueling opinions, the Second Circuit concluded that it was "not required to apply" *Salerno*. *United States v. Rybicki*, 354 F.3d 124, 131 (2d Cir. 2003) (en banc).[3]

The exception to the pattern of non-controlling opinions is *Kraft General Foods Inc. v. Iowa Department of Revenue & Finance*, 505 U.S. 71 (1992). Justice Stevens's majority opinion in *Kraft* made no reference to *Salerno* but struck down, under the Foreign Commerce Clause, a state tax law that treated dividends from a domestic subsidiary more favorably than those from a foreign subsidiary. The dissenting justices would have refused the facial challenge because the contested taxing scheme did not burden foreign commerce in every instance—some foreign subsidiaries might "engage in little or even zero foreign activity." 505 U.S. at 84 (Rhenquist, C.J., dissenting). Without identifying the test it was applying, the *Kraft* Court reached a holding incompatible with *Salerno* and thereby spawned numerous State supreme court decisions contributing to the current split. *See Caterpillar, Inc. v. Comm'r of Internal Rev.*, 568 N.W.2d 695, 700 n.8 (Minn. 1997); *Conoco, Inc. v. Taxation and Revenue Dept. of State of N.M.*, 931 P.2d 730, 743 (N.M. 1996); *In re Morton Thiokol, Inc.*, 864 P.2d 1175 (Kan. 1993). Still, even *Kraft* has its detractors. Among those is the New Jersey Supreme Court, which considered *Kraft* but concluded

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[3] Another reason the Second Circuit rejected *Salerno*'s no-set-of-circumstances test was that court's belief that the test is "dicta." *Rybicki*, 354 F.3d at 130. If correct, this view further supports certiorari in the present case, where the choice of test cannot be dicta because Martinez's own case is a "circumstance" in which the Bail Provisions can be lawfully applied.

that *Salerno* would remain the standard in New Jersey, even for tax cases. *Whirlpool Properties, Inc. v. Director, Div. of Taxation*, 26 A.3d 446, 468 (N.J. 2011).

The most direct statement of Justice Stevens's competing test appears in his concurring opinion in *Washington v. Glucksburg*, 521 U.S. 702, 740 n.7 (1997) (arguing for a standard borrowed from First Amendment precedent that would find facial unconstitutionality when a law's impermissible applications are "substantial . . . in relation to the statute's plainly legitimate sweep" (quotation omitted)). This test makes less analytical sense than *Salerno* because it would facially invalidate statues that can in some cases be constitutionally applied. It also provides no guidance as to how many impermissible applications tip a law into "facial" invalidity. Yet the Court has declared itself at a draw. *See, e.g.*, *Stevens*, 559 U.S. at 472 (noting competing tests); *Wash. State Grange*, 552 U.S. at 449 (same). Lower courts have done their best to select from among the tests. The New Jersey Supreme Court's prolonged discussion in *Whirlpool* is characteristic. 26 A.3d at 455–57, 466–68; *see also, e.g.*, *Rybicki*, 354 F.3d at 131 (explaining that *Salerno* has never been overruled). Nevertheless, the existence of a competing standard on an issue as foundational as when a court may strike an entire law is itself a reason to grant certiorari.

The machinery for testing state laws against the federal Constitution cannot function differently in some jurisdictions than in others. Yet a survey of the precedent in this area reveals an unsettled rift in this Court's precedent and lower courts that blur content-specific exceptions and treat the test in *Salerno* as a

mere "description" of what happens when courts find facial unconstitutionality. This Court should grant certiorari to clarify that the *Salerno* standard is the rule for facial challenges and that it does not allow wholesale demolition of a state law because a hypothetical application might violate due process.

II. The Court Should Grant Certiorari to Resolve a Five-Way Split over the Due Process Standard Applicable to Offense-Based Bail Exclusions.

A. The Arizona Supreme Court Erred By Applying "Heightened Scrutiny" Instead of the Balancing Test from *Salerno*.

In addition to clarifying the standard applicable to facial challenges, this Court should grant certiorari to resolve the due process standard applicable to offense-based bail exclusions. Because the Eighth Amendment does not prevent legislatures from "defining the classes of cases in which bail shall be allowed in this country," *Carlson v. Landon*, 342 U.S. 524, 545 (1952), courts have analyzed the permissibility of bail exclusions under the Due Process Clause. Due process prohibits governmental action that "shocks the conscience, or interferes with rights implicit in the concept of ordered liberty." *Salerno*, 481 U.S. at 746 (internal quotations omitted).

This Court has "repeatedly" recognized that "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest" protected under the Due Process Clause. *Id.* at 748. In *Salerno*, the Court held that the Bail Reform Act, which authorizes pretrial

detention to prevent crime, did not violate due process. That law authorizes pretrial detention without bail for certain serious offenses when the government demonstrates (1) probable cause that the accused committed the offense, and (2) clear and convincing evidence, after a full adversarial hearing, that the accused poses an unmanageable risk to others. *Id.* at 750.

Permeating the reasoning in *Salerno* is the balancing of public and private interests. The Court evaluated whether the government's interest was "sufficiently weighty" and then compared that to the defendant's liberty interest "on the other side of the scale." *Id.* Ultimately, the Court concluded that pretrial detention under the circumstances of the Bail Reform Act did not "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 751.

The Court in *Salerno* also recognized that the protections in the Bail Reform Act "far exceed[ed]" what was necessary for post-arrest detention in *Gerstein v. Pugh*, 420 U.S. 103 (1975). 481 U.S. at 752. In *Gerstein*, the Court held that "extended restraint of liberty following arrest" was permissible after a judicial determination of probable cause—even if the judicial determination did not include adversarial safeguards. Again, the Court recognized that the "balance between individual and public interests" defines the "process that is due" for seizures, "including the detention of suspects pending trial." *Id.* at 125 n.27; *see also Terry v. Ohio*, 392 U.S. 1, 21 (1968) ("balancing" the need for seizure without probable cause against the invasion which the seizure entailed).

Likewise, in *Demore*, 538 U.S. 510, the Court held that Congress could require permanent resident aliens who were convicted of certain crimes to be detained pending removal proceedings without an individualized determination of flight risk. Recognizing that Congress was "justifiably concerned" that deportable criminal aliens might fail to appear for removal hearings, *id.* at 513, the Court affirmed its "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings," *id.* at 526. Justice Kennedy's concurring opinion also affirmed the balancing of interests involved, clarifying that an individualized determination might become necessary if "unreasonable or unjustified" detention tipped the balance back toward the interests of the accused. *Id.* at 532.

The Arizona Supreme Court departed from this precedent. Instead of evaluating the reasonableness of the detention by balancing competing interests, the Arizona Supreme Court subjected the Bail Provisions to what it described as "heightened scrutiny." App. 14. In so doing, the court did not give special weight to "the State's traditional and 'transcendent interest in protecting the welfare of children.'" *Maryland v. Craig*, 497 U.S. 836, 855 (1990) (quoting *Ginsberg v. New York*, 390 U.S. 629, 640 (1968)). It did not mention that "[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). It did not reference the risk of sex offender recidivism, which this Court has described as "frightening and high." *Smith v. Doe*, 538 U.S. 84, 103 (2003). And it did not discuss that bail can be denied under the Bail Provisions only if a judge finds, after a full adversarial

hearing, that "the proof is evident or presumption great" that the person engaged in sexual intercourse or oral sex with a child—more proof of the offense than the probable cause standard upheld in *Salerno* and *Gerstein*.

Instead, the court characterized the right to be free from bodily restraint as "fundamental" and held that laws that restrict this right violate due process if there is any "alternative[] that would serve the state's objective equally well at less cost to individual liberty." App. 13, 17. This is not the test. If it were true that the Constitution provided a general fundamental right to "freedom from bodily restraint" applicable to all persons in all contexts, then convicted prisoners could invoke this right to demand a lesser sentence—or no sentence at all—to achieve the minimum "cost to individual liberty."

This Court has consistently rejected efforts to create such a right. In *United States v. Sokolow*, for example, the Court recognized that "[t]he reasonableness of [an] officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques." 490 U.S. 1, 11 (1989). Likewise, in *Demore*, the Court held that due process did not require Congress "to employ the least burdensome means to accomplish its goal." 538 U.S. at 528; *see also Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (holding that the Due Process Clause "provides no basis for application of a compelling-necessity standard to conditions of pretrial confinement"). Similarly, the reasonableness of regulatory pretrial detention does not hinge on the State eliminating all conceivable alternatives. The question is whether the regulation reasonably balances

public and private interests. To hold otherwise risks transforming courts into "a legislature charged with formulating public policy." *Schall*, 467 U.S. at 281 (upholding pretrial detention of juveniles to prevent crime).

This risk is on full display in the Arizona Supreme Court's decision below. In that court's estimation, the State's interest could be served "equally well" by requiring clear and convincing proof of dangerousness. App. 17. But the voters of Arizona could—and did—reasonably conclude that the appropriate standard for accomplishing the State's interest is proof "evident" or "presumption great" that a person engaged in sexual conduct with a minor under age fifteen. First, the interest in question could not be greater: "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 757 (1982); *Belleau v. Wall*, 811 F.3d 929, 934 (7th Cir. 2016) (Posner, J.) (citing "the lifelong psychological scars that [] molestation frequently inflicts"). Second, the citizens of Arizona could reasonably choose to serve the community's interest by withholding bail from all persons whom a judge has found very likely to have engaged in sexual conduct with a minor. "[I]n areas fraught with medical and scientific uncertainties," courts are "cautious not to rewrite legislation" and afford legislatures "the widest latitude." *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997) (upholding civil commitment of sexually violent predators). Determining which child molesters will reoffend is notoriously difficult. As a class, the risk of recidivism among convicted sex offenders is "frightening and high." *Smith*, 538 U.S. at 103. But, there is currently no way

to predict with confidence when or whether a particular sex offender will reoffend. *Doe v. Miller*, 405 F.3d 700, 716 (8th Cir. 2005). Because of the high risk of sex offender recidivism as a class combined with the inability to predict individual recidivism, the State could make a reasonable categorical judgment that heightened proof of sexual conduct with a minor under fifteen years of age is an appropriate measure to protect children. *Cf. Smith*, 538 U.S. at 103 ("The Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences.").

Thus, the Arizona Supreme Court departed from this Court's precedent by applying a standard that substituted its judgment for the reasonable judgment of Arizona's voters. The Court should grant certiorari to correct this error.

B. Courts Have Fractured Five Ways on the Standard Applicable to Offense-Based Bail Exclusions.

Courts have divided on the permissibility of, and the standard applicable to, offense-based bail exclusions. Review is necessary to resolve this confusion.

In *Parker v. Roth*, 278 N.W.2d 106, 114 (Neb. 1979), decided before *Salerno*, the Nebraska Supreme Court applied rational basis review in holding that a categorical bail exclusion did not violate the Fourteenth Amendment. The state constitutional provision at issue prohibited bail if the "proof was evident or the presumption great" that a person committed a sexual offense "involving penetration by force or against the

will of the victim." Neb. Const. art. I, § 9. Relying upon English and colonial history, the court held that "the right to bail is not a fundamental right guaranteed under the [United States] Constitution." *Id.* at 114. The court also found that the law passed rational basis review, observing that "[r]ape is one of the ugliest of crimes" and recognizing the "real possibility of repeated acts and further victims pending trial." *Id.* at 117.

In *State v. Furgal*, 13 A.3d 272 (N.H. 2010), the New Hampshire Supreme Court applied a balancing test to uphold a categorical bail exclusion against a federal due process challenge. The statute at issue provided that "[a]ny person arrested for an offense punishable by up to life in prison, where the proof is evident or the presumption great, shall not be allowed bail." N.H. Rev. Stat. § 597:1-c. As in *Parker*, the court in *Furgal* recited the "long history of bail" that permits courts to "focus exclusively upon the evidence of the defendant's guilt" to deny bail when the person is accused of a serious crime. *Id.* at 215. Citing the balancing test from *Salerno*, the court concluded that the state legislature had made a "reasoned determination" that, after heightened proof of a most serious crime, "the risk to the community becomes significantly compelling" and justifies the denial of bail. *Id.*

On the other hand, the Hawaii Supreme Court in *Huihui v. Shimoda*, 644 P.2d 968, 970 (1982), held that categorical bail exclusions for non-capital offenses categorically violate the Due Process Clause of the Fourteenth Amendment. The court conceded that "the interpretation most strongly supported by history" favored upholding a statute which categorically denied bail when the proof was evident and the presumption

great that a defendant committed a serious crime while set free on bail on a felony charge. *Id.* at 975. Nevertheless, the court declared that this history "conflict[ed] with logic and a sound regarding for the purpose of the excessive bail clause." *Id.* (internal quotes omitted). It held that the exclusion was unconstitutional because it did not "allow bail based on other factors which may be directly relevant to a determination of the likelihood of the defendant's committing other crimes while free pending trial." *Id.* at 978–79.

Finally, in *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014), the Ninth Circuit sitting en banc struck down Arizona laws that denied bail when the proof was evident or the presumption great that an undocumented immigrant committed a serious felony offense. Even though the Court in *Salerno* expressly stated that pretrial detention under the Bail Reform Act did *not* offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," 481 U.S. at 751, the Ninth Circuit cited *Salerno* to hold that the categorical bail denial infringed upon a "fundamental right." *Lopez-Valenzuela*, 770 F.3d at 780. It then applied the familiar strict scrutiny standard, even though it did not use that term: "[T]he [challenged provisions] will satisfy substantive due process only if they are narrowly tailored to serve a compelling state interest." *Id.* at 781 (internal quotes omitted). *Cf. id.* at 799 (Tallman, J., dissenting) ("This is strict scrutiny."); App. 14 ("[T]he standard the Ninth Circuit ultimately applied . . . reflects strict scrutiny, the most exacting constitutional review standard. *Salerno* did not require this standard.") (internal citation omitted). Employing the

strict scrutiny test, the Ninth Circuit concluded that the Arizona laws were not narrowly tailored and, therefore, violated due process.

Thus, including Arizona, four state supreme courts and one federal court of appeals have addressed whether offense-based bail exclusions are permissible, and these five courts have adopted five different standards: the Nebraska Supreme Court applied rational basis review; the New Hampshire Supreme Court applied a balancing test; the Arizona Supreme Court applied "heightened scrutiny;" the Ninth Circuit applied strict scrutiny; and the Hawaii Supreme Court held that offense-based bail exclusions for non-capital offenses are categorically barred. The conclusion in each of these courts about the validity of the bail provision at issue predictably followed from the standard applied. The Court should grant certiorari to resolve this confusion.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

MARK BRNOVICH
Attorney General

DOMINIC E. DRAYE
Solicitor General
Counsel of Record
RUSTY D. CRANDELL
DAVID R. COLE
OFFICE OF THE ATTORNEY GENERAL
1275 W. Washington Street
Phoenix, AZ 85007
(602) 542-3333
solicitorgeneral@azag.gov

Counsel for Petitioner

JUNE 9, 2017