No. 16-1489

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 Supreme Court Of Arizona

BRIEF FOR RESPONDENT JOE PAUL MARTINEZ IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Arizona Supreme Court err in unanimously sustaining a facial challenge to an Arizona constitutional provision and statute that together bar defendants charged with certain crimes from presenting, and having considered at a hearing, evidence that they should be admitted to bail because they are neither a danger to the community nor a flight risk prior to trial?

2. Did the Arizona Supreme Court err in applying the rule of heightened scrutiny this Court announced in *United States v. Salerno*, 481 U.S. 739 (1987) to determine that Arizona's constitutional and statutory ban on bail for certain sexual offenses violates the due process guarantee of the U.S. Constitution where the Arizona court determined that the state law categorically denies bail to a class of defendants "accused of crimes that do not inherently predict future dangerousness." *Simpson v. Miller*, 387 P.3d 1270, 1278 (2017).

LIST OF PARTIES

Petitioner is the State of Arizona. Respondent is Joe Paul Martinez. Jason Donald Simpson,[1] Honorable Phemonia Miller, Judge Pro Tempore of the Maricopa Superior Court of the State of Arizona, and Honorable Ronald J. Steinle, Judge of the Maricopa Superior Court of the State of Arizona were also parties in the proceedings below.

[1] Mr. Simpson pled guilty prior to the Arizona Supreme Court hearing his bail-related challenge, "making his case moot." *Simpson*, 387 P.3d at 1273. Mr. Martinez is still incarcerated pending trial. He has a pretrial conference set for August 16, 2017.

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OPINIONS BELOW

The opinion of the Supreme Court of Arizona is reported at 387 P.3d 1270. *See* Petitioner's Appendix ("Pet. App.") 1-18. The opinion of the Arizona Court of Appeals is reported at 377 P.3d 1003. *See* Pet. App. 19-51. The opinions of the Maricopa County Superior Court are unreported. *See* Pet. App. 52-62, 66-68.

JURISDICTION

The Arizona Supreme Court issued its judgment on February 9, 2017. On April 13, 2017, Justice Kennedy extended the time for filing a certiorari petition to June 9, 2017, and the State of Arizona filed the Petition on June 9, 2017.

Even though Mr. Martinez has not yet been convicted, this judgment is "final for jurisdictional purposes," because, "'the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case.'" *Florida v. Thomas*, 532 U.S. 774, 777, 779 (2001) (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 481 (1975)). Pursuant to 28 U.S.C. § 1257(a), this Court has jurisdiction to review this judgment because a "right . . . is specially set up or claimed under the Constitution."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In relevant part, the Fourteenth Amendment of the U.S. Constitution provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Arizona Constitution article II, section 22(A)(1) provides that "[a]ll persons charged with a crime shall be bailable by sufficient sureties, except . . . [f]or capital offenses, sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age when the proof is evident or the presumption great."

Arizona Revised Statute ("A.R.S.") Section 13-3961(A)(3) provides that "[a] person who is in custody shall not be admitted to bail if the proof is evident or the presumption great that the person is guilty of the offense charged and the offense charged is . . . [s]exual conduct with a minor who is under fifteen years of age."

STATEMENT OF THE CASE

A. The Prop 103 Laws.

In 2002, Arizona voters approved Proposition 103, which amended Arizona Constitution article II, section 22(A)(1) and A.R.S. Section 13-3961(A)(3) (collectively, the "Prop 103 Laws") to categorically deny bail to defendants charged with certain offenses "if the proof is

evident or the presumption great that the person is guilty of the offense charged." A.R.S. § 13-3961. A trial court judge weighing bail for a defendant in a case charging these offenses is *prohibited* from hearing evidence of anything other than the defendant's possible guilt. Unlike his or her federal colleagues and colleagues in most other states, an Arizona judge cannot, for example, consider, "the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings." 18 U.S.C. § 3142(g)(3)(A).

B. The Arizona Superior Court Denies Bail to Mr. Martinez.

In April 2014, a grand jury returned an indictment against Mr. Martinez, alleging, among other charges, two counts of sexual conduct with a minor, a non-bailable offense. In response to Mr. Martinez's petition for bail, the Superior Court conducted a "*Simpson* hearing" and found that the proof was evident or the presumption great of Mr. Martinez's guilt. *See Simpson v. Owens*, 85 P.3d 478, 491 (Ariz. App. 2004) (outlining procedures for such a hearing).[2] Consequently,

[2] At a *Simpson* hearing, an arrestee can dispute whether there is proof that he or she actually committed the charged offenses, but may not refute the Prop 103 Laws' irrebuttable presumption that he or she poses an unmanageable flight risk and

and pursuant to the Prop 103 Laws, the Superior Court held Mr. Martinez non-bailable as a matter of right. After a year and a half in custody, Mr. Martinez again moved for release. He challenged the Prop 103 Laws, arguing that they deprive him of due process by categorically denying him bail without first determining that he is a flight risk or danger to the community. The Superior Court denied the motion.

C. The Arizona Court of Appeals Holds The Prop 103 Laws Unconstitutional.

In November 2015, both Mr. Martinez and another defendant, Jason Donald Simpson, filed separate petitions for Special Action at the Court of Appeals, asking for interlocutory review of the trial court's refusal to afford them constitutionally proper bail hearings – hearings comporting with the applicable requirements of due process announced in *United States v. Salerno*, 481 U.S. 739 (1987). The Arizona Court of Appeals consolidated the petitions and heard argument. On June 14, 2016, the Court of Appeals accepted jurisdiction and held the Prop 103 Laws facially unconstitutional.

The Court of Appeals held that the Prop 103 Laws violate due process because they "require[] denial of bail without considering whether any release conditions could ensure victim and community safety." Pet. App. 22.

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that no conditions short of incarceration will ensure the arrestee's availability for trial.

In reaching this result, the Arizona Court of Appeals acknowledged that its analysis was controlled by *United States v. Salerno*, in which this Court held that the Bail Reform Act of 1984 comported with substantive due process. 481 U.S. at 749. The Arizona Court of Appeals recognized that, in holding the Bail Reform Act constitutional, *Salerno* focused on three considerations: "(1) it applied only to those arrested for a specific group of extremely serious offenses, a category of persons that Congress specifically found to be far more likely to commit dangerous acts in the community post-arrest; (2) it required the government to demonstrate probable cause that the person committed the charged offense; *and* (3) it required the government to demonstrate by clear and convincing evidence, in a 'full-blown adversary hearing,' that '*no conditions of release can reasonably assure the safety of the community or any person*.'" Pet. App. 25 (quoting *Salerno*, 481 U.S. at 750). Each of these safeguards, the Arizona Court of Appeals concluded, was "constitutionally necessary" for a bail measure to comport with due process. Pet. App. 27.

Accordingly, the court held that "the absence of the third *Salerno* factor" – a hearing to determine dangerousness – "[wa]s constitutionally fatal" to the Prop 103 Laws. Pet. App. 30. Absent such a hearing, the Court of Appeals concluded, the Prop 103 Laws do not "create the required 'carefully limited' or 'narrowly focuse[d]' exception to the general rule of bail" sufficient to satisfy due process. Pet. App. 35-36 (alteration in original)

(quoting *Salerno*, 481 U.S. at 750, 755). To hold otherwise, it explained, "would open wide the door to the automatic denial of bail for all serious, or violent, or sexual offenses, or all offenses involving a vulnerable victim – a result that would only serve to eviscerate constitutional due process rights." Pet. App. 36-37.

Moreover, because "*no* person charged with the offense [identified in the Prop 103 Laws] can receive the constitutionally required hearing," the Court of Appeals concluded that the Prop 103 Laws were "'unconstitutional in all of [their] applications'" and therefore facially unconstitutional. Pet. App. 23-24 (quoting *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449 (2015)).

One judge dissented. He argued that the categorical, "offense-based approach to bail" contained in the Prop 103 Laws is constitutional. The judge argued that the factors articulated in *Salerno* were not constitutional prerequisites. Pet. App. 43. Instead, the dissenting judge emphasized that "a defendant's Due Process right to liberty is not absolute." Pet. App. 38 (Gould, J., dissenting). Against this background, he argued that the Prop 103 Laws were sufficiently "narrowly tailored to achieve [an] important, compelling purpose" because they are limited to "defendants charged with extremely serious crimes" and because such defendants received a pre-trial hearing to evaluate the likelihood that they committed the offense. Pet. App. 40, 41.

The State petitioned the Arizona Supreme Court for review.

D. The Arizona Supreme Court Unanimously Holds the Prop 103 Laws Unconstitutional.

The Arizona Supreme Court granted the State's petition for review. After hearing oral argument, on February 9, 2017, it unanimously held that the Prop 103 Laws are facially unconstitutional in "violat[ion] [of] the Fourteenth Amendment's due process guarantee." Pet. App. 4.

As a threshold matter, the Arizona Supreme Court held that heightened scrutiny should apply in evaluating whether mandatory detention laws comport with due process. Pet. App. 13. Under this standard, to comport with due process, the court held that an act's provisions must be "narrowly focused." Pet. App. 14-15.

Unlike the Court of Appeals, however, the Arizona Supreme Court held that "three factors set forth in *Salerno* are [not] due process prerequisites" and are instead "indicia reflecting the constitutionality of the statute at issue in *Salerno*." Pet. App. 12. Accordingly, the Arizona Supreme Court held that an individualized determination of dangerousness is not required to satisfy due process in every case, so long as the state chooses a procedure that "'serve[s] as a convincing proxy for unmanageable flight risk or dangerousness.'" Pet. App. 15-16 (quoting *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 786 (9th Cir. 2014) (en banc)).

The Supreme Court held, however, that the offense in question here, sexual conduct with a minor, "is not in itself a proxy for dangerousness" because the offense criminalizes a broad range of conduct, by a broad range

of differently situated individuals. Pet. App. 16. Because this crime does "not inherently predict future dangerousness," the Supreme Court held that an individual evaluation of dangerousness is required in each case. Pet. App. 18.

Finally, the Supreme Court rejected the State's argument that the challenged provisions were not facially unconstitutional because "they may not be unconstitutional in all instances." Pet. App. 18. The court explained that the State was "confusing the constitutionality of detention in specific cases with the requirement that it be imposed in all cases." Pet. App. 18. The Court held the Prop 103 Laws are facially unconstitutional because all defendants subject to them are denied the hearing to which they are constitutionally entitled. Pet. App. 18.

REASONS FOR DENYING THE PETITION

I. The Arizona Supreme Court Properly Applied the *Salerno* Standard to Hold the Prop 103 Laws Facially Unconstitutional.

The Petition asserts that the Arizona Supreme Court improperly applied a First Amendment overbreadth analysis in evaluating whether the Prop 103 Laws are facially unconstitutional. Not so.

The Arizona Supreme Court correctly identified and applied the test that this Court has articulated as

the standard for evaluating the facial validity of statutes restricting bail: to successfully mount a facial challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745.

Under the Prop 103 Laws, it is uncontroverted that not a single defendant receives the hearing to which all defendants are constitutionally entitled. Rather, in *every* case, *every* defendant is unconstitutionally denied that hearing. *See Lopez-Valenzuela*, 770 F.3d at 789 (noting that because the statute was not "'carefully limited' as *Salerno*'s heightened scrutiny test requires, 'the *entire statute* fails [*Salerno*'s] decision rule and would thus be invalid in all of its applications.'"[3] (alteration in original) (quoting Scott A. Keller & Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes in Toto*, 98 Va. L. Rev. 301, 331 (2012))). Thus both the Arizona Court of Appeals and the Arizona Supreme Court properly held that the Prop 103 Laws fail *Salerno*'s "no-set-of-circumstances" test by denying *all* defendants charged with certain crimes a constitutionally adequate bail hearing. To comply with the rule announced in *Salerno*, reasoned the Arizona Supreme

[3] Illustratively, any defendant could successfully challenge the Prop 103 Laws on the grounds that they fail to provide a constitutionally required hearing. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 376 (2010) (Roberts, C.J., concurring) (noting that a statute is facially invalid when "[g]iven the nature of th[e] claim . . . any other [plaintiff] raising the same challenge would also win").

Court, every defendant charged with the crime of sexual conduct with a minor is entitled to "a case-specific inquiry" regarding their dangerousness. Pet. App. 18.

The Arizona Supreme Court did not, as Petitioner claims, apply an "overbreadth standard" and "'invalidate [the] legislation on the basis of its hypothetical application to situations not before the Court.'" Pet. 14-16 (quoting *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 584 (1998)). The court's only reference to a "hypothetical application" of the Prop 103 Laws was in the context of its substantive due process analysis and particularly in providing an example to demonstrate that the categorical ban on bail imposed by the Prop 103 Laws could not stand.

Specifically the Arizona Supreme Court held that "the state *may* deny bail categorically for crimes that inherently demonstrate future dangerousness, when the proof is evident or presumption great that the defendant committed the crime."[4] Pet. App. 17-18. But it held that this was not such a case. The court explained

[4] As he did below, Mr. Martinez continues to doubt whether the categorical denial of bail for any non-capital offense could ever withstand heightened scrutiny. The Ninth Circuit has identified this as an "open question." *Lopez-Valenzuela*, 770 F.3d at 785. Relatedly, though raising an issue not presented by this case, the statements by the dissenting judge in the Arizona Court of Appeals, reiterated by *amici* here, presuming that this Court has affirmed the constitutionality of categorical denials of bail for capital defendants are without foundation. *See Salerno*, 481 U.S. at 765 n.6 (Marshall, J., dissenting) ("If in any particular case the presumed likelihood of flight [for a capital offense] should be made irrebuttable, it would in all probability violate the Due Process Clause.").

that "[t]he crime charged against Martinez," and at issue in the Prop 103 Laws, "is not in itself a proxy for dangerousness." Pet. App. 16. This is because, the court reasoned, the crime of sexual conduct with a minor "can be committed by a person of any age, and may be consensual" and, for example, "sweeps in situations where teenagers engage in consensual sex." Pet. App. 16. Accordingly, because of the wide spectrum of conduct encompassed within this one crime as defined by the legislature, due process requires an individualized determination for each person charged with that crime, including for Mr. Martinez.

In any event, even if the Arizona Supreme Court had incorrectly applied the standard set forth in *Salerno* (it did not), this error would not warrant this Court's review. "[M]isapplication of a properly stated rule of law" is ordinarily not a basis for this Court to grant a petition for a writ of certiorari. Sup. Ct. R. 10; *see also* Stephen M. Shapiro, et al., *Supreme Court Practice* § 5.12(c)(3) (10th ed. 2013) ("[E]rror correction . . . is outside the mainstream of the Court's functions and, generally speaking, not among the 'compelling reasons' . . . that govern the grant of certiorari[.]").

II. This Case Is Not A Proper Vehicle for Resolving Any "Disarray" Over the Legal Standard for Facial Challenges.

Petitioner also urges this Court's review based on a claim that lower state and federal courts are in "[d]isarray over the [c]orrect [s]tandard for [f]acial [c]hallenges," including whether to apply *Salerno*'s no-set-of-circumstances test.[5] Pet. 16. As a threshold matter, Petitioner has never before questioned that the *Salerno* standard applies in this case. And this newly created issue is no justification for granting certiorari. Pet. 16; *see also United States v. Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider issue that "was raised for the first time in the petition for certiorari"). But even had Petitioner raised this argument below, this Court should deny the petition because any purported conflicts almost certainly would not be reached or resolved were this Court to accept review.

First, no party has ever even raised the alleged disputes identified by Petitioner, much less argued that they are material to the resolution of this case. *See Conway v. Cal. Adult Auth.*, 396 U.S. 107, 110 (1969)

[5] It is unclear exactly what aspect of this "disarray" that Petitioner is asking this Court to resolve. Petitioner points to a variety of purported discrepancies related to the application and use of the test for facial challenges. *Compare* Pet. 18 (describing courts as "treating *Salerno* 'not as setting forth a *test* for facial challenges, but rather as describing the *result* of a facial challenge'" (quoting *Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012))), *with* Pet. 20 (describing no-set-of-circumstances test and determination of whether a statute lacks a "plainly legitimate sweep" as competing tests).

("Were we to pass upon the purely artificial and hypothetical issue tendered by the petition for certiorari we would not only in effect be rendering an advisory opinion but also lending ourselves to an unjustifiable intrusion upon the time of this Court."). In fact, neither the parties nor any court in this matter have ever questioned that Mr. Martinez was required to establish "that no set of circumstances exists under which the [Prop 103 Laws] would be valid." *Salerno*, 481 U.S. at 745. Nor could they. This Court has expressly held that this no-set-of-circumstances test applies to statutes restricting bail. *Id.*

Second, this Court would not have to reach the viability of *Salerno*'s no-set-of-circumstances test because the Prop 103 Laws fail under even a less stringent formulation of the test for facial invalidity. This Court has noted that "[w]hile some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a 'plainly legitimate sweep.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 739-40 and n.7 (1997)). The Prop 103 Laws do not have a plainly legitimate sweep. Instead, as the Arizona courts correctly held, they wrongly deny proper bail hearings to *every* defendant charged with a wide range of conduct.

For all of these reasons, this Court should decline to grant certiorari in this case.

III. The Arizona Supreme Court Correctly Held that Heightened Scrutiny Applies to Statutes Restricting Bail.

Certiorari should also be denied because the unanimous decision of the Arizona Supreme Court applied the correct test announced by this Court for evaluating laws that deny access to bail.

Petitioner contends that the constitutionality of statutes restricting bail must be judged by a general "balancing [of] competing interests" and not by applying "heightened scrutiny," as the Arizona Supreme Court did. Pet. 23. This Court, however, has already specifically held that heightened scrutiny is the proper test to determine whether statutes restricting bail comport with due process. *See Salerno*, 481 U.S. at 749-50. Having already addressed the precise question posed by Petitioner, it is unnecessary for this Court to grant certiorari to answer it again. Pet. 21.

In *Salerno*, as Petitioner points out, this Court expressly weighed "the government's interest" and the "defendant's liberty interest 'on the other side of the scale.'" Pet. 22 (quoting *Salerno*, 481 U.S. at 750). In particular, this Court recognized "the individual's strong interest in liberty," as well as the "fundamental nature of this right." *Salerno*, 481 U.S. at 750. At the same time, this Court recognized that the "government's interest in preventing crime by arrestees is both legitimate and compelling." *Id.* at 749. Accordingly, "[t]he Government's regulatory interest in

community safety can, in appropriate circumstances, outweigh an individual's liberty interest." *Id.* at 748.

Contrary to Petitioner's suggestion otherwise, Pet. 23, 25-26, the Arizona Supreme Court expressly recognized and gave considered weight to each of these factors in applying *Salerno* to judge the constitutionality of the Prop 103 Laws.[6] *See, e.g.*, Pet. App. 6 ("In this case, state interests of the highest order, advanced through [the Prop 103 Laws], collide with the fundamental due process right to be free from bodily restraint.").

But a general and impressionistic "balancing [of] competing interests" is not, and cannot be, the end of the due process analysis for bail restrictions, as Petitioner argues. Pet. 23. As in all due process analyses, it is necessary to identify a level of scrutiny to "provide[] [the] instructions for balancing" and "inform[] courts as to how to arrange the weights [of particular interests] on the constitutional scale in evaluating . . . laws." Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 6.5 (5th ed. 2015). Indeed, in *Salerno*, this Court provided such instruction.

In the same context as that which is presented here, this Court has already decided that, in light of

[6] Petitioner describes at length cases in which this Court has found that a regulatory interest outweighed an individual's liberty. Pet. 22-25 (describing, as examples, *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *Demore v. Kim*, 538 U.S. 510 (2003)). Mr. Martinez recognizes that such interests can, of course, outweigh an individual's liberty interest in certain circumstances. *Salerno*, 481 at 750. This, however, is not such a case.

"legitimate and compelling" government interests, an act can survive constitutional scrutiny where its provisions are "narrowly focuse[d]" and "carefully delineat[ed]." *Salerno*, 481 U.S. at 750-51. This is heightened scrutiny. *Cf. Richardson v. Belcher*, 404 U.S. 78, 84 (1971) (noting that a law survives rational basis review, the lowest level of scrutiny, where the government's goals are "legitimate" is "rationally related to the achievement of those goals").

Applying this analysis, the Arizona Supreme Court correctly recognized that "heightened scrutiny" applies to statutes restricting bail and requires that such statutes be "narrowly tailored." Pet. App. 13-14; *id.* at 14 (noting that *Salerno* applied "heightened scrutiny" because it "described the government's interest as 'both legitimate and compelling,' and the act's provisions as 'narrowly focuse[d] on a particularly acute problem.'" (alteration in original) (quoting *Salerno*, 481 U.S. at 739-40)).

Notably, Petitioner also mischaracterizes the Arizona Supreme Court's decision as holding "that laws that restrict [the right to be free from bodily restraint] violate due process if there is any 'alternative[] that would serve the state's objective equally well at less cost to individual liberty.'" Pet. 24 (2d alteration in original) (quoting Pet. App. 13, 17). Arizona's highest court said no such thing. Rather, the Arizona Supreme Court held the Prop 103 Laws in question here "are not narrowly focused *given* alternatives that would serve the state's objective equally well at less cost to individual liberty." Pet. App. 17 (emphasis added). And

contrary to Petitioner's suggestion otherwise, Pet. 24, the court expressly clarified that it was *not* "requiring the state to show the absence of less-restrictive alternatives to satisfy its objectives." Pet. App. 17. Accordingly, the Arizona Supreme Court in no way suggested that the constitutionality of pre-trial detention "hinge[s] on the State eliminating all conceivable alternatives." Pet. 24.

The Arizona Supreme Court was not required to apply the general balancing test invented and pressed by Petitioner. Pet. 23. The court instead correctly determined that statutes restricting bail are subject to heightened scrutiny and rightly struck down the Prop 103 Laws under that test.[7]

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[7] Furthermore, the Arizona Supreme Court was not required to defer to "the reasonable judgment of Arizona's Voters." Pet. 26. Whether due process requires an individualized hearing is not an " 'area[] fraught with medical and scientific uncertaint[y]' " such that any deference to popular belief might be appropriate. *See Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997) (quoting *Jones v. United States*, 463 U.S. 354, 370 (1983)). The fact that a law is popular does not mean it is constitutional. "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Colo. Gen. Assembly*, 377 U.S. 713, 736-37 (1964); *see also*, *e.g.*, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (invalidating unconstitutional law despite massive popular resistance). And it is not for voters (or the legislature), but rather "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see also Loving v. United States*, 517 U.S. 748, 756 (1996) ("Even before the birth of this country, separation of powers was known to be a defense against tyranny.").

IV. The Petition's Manufactured "Five-Way Split" on the Standard Applicable to Offense-Based Bail Exclusions Does Not Warrant Review.

Finally, pointing to four state supreme court decisions and one federal court of appeals decision, the Petitioner claims that "[c]ourts have divided on the permissibility of, and the standard applicable to, offense-based bail exclusions." Pet. 26. In straining to justify this Court's review, however, Petitioner exaggerates both the extent and importance of any conflicts within these decisions.

First, Petitioner is incorrect that inconsistencies with respect to "the due process standard applicable to offense-based bail exclusions," Pet. 21, merit this Court's review. Again, *Salerno* provides the controlling analysis for due process challenges to bail restrictions. And since 1987, when this Court held that heightened scrutiny applies to determine whether bail restrictions comport with substantive due process, *Salerno*, 481 U.S. at 749-50, each court to consider the issue has either expressly held, or its analysis has assumed, that heightened scrutiny applies to bail restrictions.

For instance, the Ninth Circuit expressly "appl[ied] *Salerno*'s heightened scrutiny" to another unconstitutional bail restriction in Arizona's constitution. *Lopez-Valenzuela*, 770 F.3d at 780. And the Arizona Supreme Court also applied heightened scrutiny in analyzing the constitutionality of the Prop 103 Laws. Pet. App. 14.

In *State v. Furgal*, the New Hampshire Supreme Court did not expressly articulate the level of scrutiny it applied to examine the constitutionality of the statute in that case, which denies bail for those persons charged with a crime punishable by life in prison. 13 A.3d 272, 274 (N.H. 2010). But, heightened scrutiny was implicit in its analysis, which ultimately upheld the challenged law because it only applied to a "narrow category" of serious cases. *See, e.g.*, *id.* at 279.

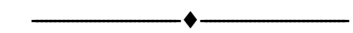
Even before *Salerno*, in *Huihui v. Shimoda*, the Hawaii Supreme Court appeared to subject a statute denying bail to heightened scrutiny. 644 P.2d 968, 978 (Haw. 1982). While the court did not expressly articulate a level of scrutiny, the court struck down as violative of due process a statute that categorically denied bail to individuals charged with a serious crime while on bail because it "exceed[ed] the bounds of reasonableness." *Id.* at 978.[8] In all events, because the Hawaii Supreme Court issued its decision prior to *Salerno*, its analysis would likely be different, and guided by *Salerno*, were the same issue to arise today.

Also before *Salerno*, and as Petitioner points out, in 1979 in *Parker v. Roth*, the Nebraska Supreme Court rejected a challenge to Nebraska's law denying bail for certain sex offenses on the grounds that it violated the

[8] Additionally, contrary to Petitioner's declaration without citation, the Hawaii court did not clearly hold that "offense-based bail exclusions for non-capital offenses are categorically barred." Pet. 29. It merely held that such an exclusion was not permissible on the facts and laws at issue in that case. *Huihui*, 644 P.2d at 978-79.

presumption of innocence protected by due process. 278 N.W. 2d 106, 109 (Neb. 1979); Pet. 26. The court disposed of the defendant's due process challenge in two short paragraphs, without expressly addressing the level of scrutiny it applied to the statute. *Id.* at 116-17. In rejecting the defendant's related equal protection challenge, however, the court applied deferential rational basis review. *Id.* at 116. To the extent *Parker* suggested that rational basis review applies to bail restrictions, as Petitioner claims, Pet. 29, such a holding cannot, and does not, survive after *Salerno*. *See Salerno*, 481 U.S. at 749-50 (applying heightened scrutiny); *see also Hunt v. Roth*, 648 F.2d 1148, 1165 (8th Cir. 1981) (holding the same provision violated the Eighth Amendment of the U.S. Constitution), *vacated as moot sub nom. Murphy v. Hunt*, 455 U.S. 478 (1982).

Finally, even if lower courts' applications of heightened scrutiny post-*Salerno* are somehow inconsistent, any conflicts exist only in the abstract. There is no indication that such conflicts have led to inconsistent results in cases with similar facts. Each of the bail-limiting statutes considered post-*Salerno* have been unique. And, while difficult to predict given the fact-bound nature of each case and statute, it is likely that at least some of these courts would have reached the same constitutional conclusions on the same facts.



CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted, this 14th day of August, 2017.

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