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 Arizona Supreme Court

REPLY BRIEF FOR PETITIONER

MARK BRNOVICH
Attorney General

MICHAEL G. BAILEY
Chief Deputy

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITY

REPLY BRIEF FOR PETITIONER

Arizona voters and legislators have judged that society should not bear the risk of recidivism by persons who very likely committed the crime of sexual conduct with a minor under age fifteen. Ariz. Rev. Stat. § 13-1405(B); Ariz. Const. art. II, § 22(A)(1) (the "Bail Provisions"). That policy judgment is now nullified as facially unconstitutional on grounds that it might be unconstitutional in one of its applications. App. 16. This holding contradicts *United States v. Salerno*, 481 U.S. 739, 745 (1987), which requires the party leveling a facial challenge to "establish that no set of circumstances exists under which the [law] would be valid." That such an outcome could occur proves the uncertainty noted by numerous circuit courts over whether *Salerno*'s no-set-of-circumstances test continues to control facial challenges. Respondent makes no attempt to reconcile lower courts' divisions on this point, *see infra* Part A, and misconstrues *Salerno* to deny a five-way split over the test for statutes denying bail on the basis of the crime committed, *see infra* Part B. Because the standard for facial challenges is a foundational issue for States across the country and because 34 States have categorical bail denials, this Court should grant certiorari.

A. The Arizona Supreme Court's Approach to Facial Unconstitutionality Typifies Lower Courts' Confusion.

1. Respondent's brief in opposition is remarkable for what is does not say. It does not contest that lower courts embrace divergent approaches to the oft-litigated question of when a law is facially

unconstitutional. Disputing this point would be impossible. This Court itself has noted that "[w]hich standard applies in a typical case is a matter of dispute," *United States v. Stevens*, 559 U.S. 460, 472 (2010), and the circuit courts range from those faithfully applying the no-set-of-circumstances test, *e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 698–99 (7th Cir. 2011), to those denying that *Salerno* announced any test at all, *e.g.*, *Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012); *Rothe Dev. Corp. v. Dep't of Def.*, 413 F.3d 1327, 1337–38 (Fed. Cir. 2005). Respondent does not so much as cite these cases, let alone refute the irrefutable: the lower courts are divided on an important principle of law, and this Court should settle the matter in the interest of national uniformity.

The closest Respondent comes to addressing the disarray in the lower courts is a footnote questioning which "aspect" of the lower-court division Arizona is "asking this Court to resolve." Br. in Opp. 12 n.5. The simple answer is that this case can resolve numerous "aspects" of lower courts' confusion: it would confirm that the rule in *Salerno* is not dicta, *cf. United States v. Rybicki*, 354 F.3d 124, 130 (2d Cir. 2003) (en banc), and that it is, in fact, a "test" to be applied to the exclusion of any competing tests, *cf. City of Albuquerque*, 667 F.3d at 1127. More fundamental, however, is Respondent's recognition that lower courts are not only divided but fractured along numerous lines over the standard for assessing claims of facial unconstitutionality. This is an admission that certiorari is needed.

But this Court need not take Respondent's—or Petitioner's—word for it. Courts around the country have voiced their uncertainty over *Salerno*'s no-set-of-circumstances test. *See, e.g.*, *Hightower v. City of Boston*, 693 F.3d 61, 77 n.13 (1st Cir. 2012) ("We do not resolve this issue here."); *City of Albuquerque*, 667 F.3d at 1127 ("'there has been some debate over the continued vitality of *Salerno*'") (quoting *United States v. Castillo*, 140 F.3d 874, 879 n.3 (10th Cir. 1998); *United States v. Skoien*, 614 F.3d 638, 645 (7th Cir. 2010) (en banc); *Rybicki*, 354 F.3d at 132 n.3 (noting "competing views in the Supreme Court"); *Gulf Power Co. v. United States*, 187 F.3d 1324, 1336 n.9 (11th Cir. 1999); *Whirlpool Props., Inc v. Dir., Div. of Taxation*, 26 A.3d 446, 467 (N.J. 2011) ("questions have arisen as to [*Salerno*'s] continued validity").

Whether a lower court ultimately insists that the party bringing a facial challenge must clear *Salerno*'s high threshold or selects instead the "legitimate sweep" test, *Stevens*, 559 U.S. at 472, the unmistakable image is a judiciary without guidance on an issue of recurring importance. Respondent has no explanation for how claims of facial unconstitutionality can require different showings in different parts of the country. The result—that laws in some jurisdictions can be nullified more easily than those in others—is incompatible with the notion of a Constitution that applies uniformly across the nation. This Court should grant the Petition to settle the law governing facial challenges, including a challenger's ability to rely on circumstances not presented by his own case.

2. The Arizona Supreme Court's decision is incompatible with *Salerno*, and Respondent's effort to obscure that incompatibility is unavailing.

The Arizona Supreme Court found the Bail Provisions facially unconstitutional because Respondent's crime—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. This reasoning inverts *Salerno* by allowing a single application to invalidate a statute in all applications. Making matters worse, the speculative case of consenting teenagers is a "hypothetical application . . . not before the Court." *National Endowment for the Arts v. Finley*, 524 U.S. 569, 584 (1998) (quotation omitted).

To make this reasoning appear more consistent with *Salerno*, Respondent's brief borrows elements from the Arizona Court of Appeals, which, for all of its flaws, was a more faithful application of the no-set-of-circumstances test. In particular, the latter court rejected the Bail Provisions' premise that bail can be denied without an individualized assessment of dangerousness. App. 30–31. The Arizona Supreme Court disagreed: "We do not read *Salerno* to hold that all statutory bail schemes must include an individualized inquiry into a defendant's dangerousness . . . ." App. 12 (quotation omitted).

This difference is crucial. Because the Arizona Supreme Court rejected the requirement of an individualized hearing in every case, its rationale for holding the law facially unconstitutional depends on the reasoning discussed above—*i.e.*, the Bail Provisions

are facially unconstitutional because they might be unconstitutional in one of their applications. App. 16. Contrary to Respondent's serial citations, the Arizona Supreme Court's reasoning was not like *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014). Br. in Opp. 7, 9, 10 n.4, 18. In fact, it expressly rejected that erroneous precedent from the Ninth Circuit, which held that *every* person covered by a categorical bail denial was entitled to a hearing, thus justifying a finding of facial unconstitutionality. App. 12.[1] Because the Arizona Supreme Court rejected *Lopez-Valenzuela*'s premise that every arrestee is entitled to a hearing, it is inaccurate to recast its finding of facial unconstitutionality as rooted in the right of "*all* defendants" to a hearing. *E.g.*, Br. in Opp. 9 (emphasis original). The decision below rests entirely on a hypothetical application of the Bail Provisions to circumstances not present here.

3. Finally, Respondent attempts to escape the incontrovertible need for this Court's review by suggesting that the current case would not resolve the division in the lower courts. The reason, he maintains, is that the Bail Provisions would fail under the competing "plainly legitimate sweep" test. Br. in Opp. 13 (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). That

---

[1] Three Justices of this Court would have granted certiorari in *Lopez-Valenzuela*, which only underscores the persistent nature of this problem and the need for review. *County of Maricopa v. Lopez-Valenzuela*, 135 S. Ct. 2046, 2047 (2015) (Thomas, J., dissenting) ("Our indifference to cases such as this one will only embolden the lower courts to reject state laws on questionable constitutional grounds.").

makes no sense. If Respondent's claim of facial unconstitutionally would succeed under a test he describes as "less stringent," *id.*, then the choice whether to apply the more stringent test is all the more central to this case. Indeed, this circumstance (assuming that Respondent is correct) is a powerful argument in favor of certiorari. If one of the reasons lower courts believe they are "not required to apply" *Salerno*'s no-set-of-circumstances test is that it was announced "in dicta," *Rybicki*, 354 F.3d at 130, then the present case is an ideal vehicle to dispel that doubt. As Respondent frames it, this case is not like *Washington State Grange*, in which the challenged law survived under either test. 552 U.S. at 449. Instead, Respondent maintains that the Bail Provisions would fail under the "legitimate sweep" test, meaning that if they survive, it can only be because the no-set-of-circumstances test means what its name implies.

Similarly, Respondent's assertion that "Petitioner has never before questioned that the *Salerno* standard applies in this case" is a red herring. Br. in Opp. 12. Petitioner has consistently demanded *Salerno*'s no-set-of-circumstances test, *e.g.*, App. 23–24 (court of appeals), but the Arizona Supreme Court's error—relying on the "Romeo and Juliet" hypothetical as the basis for finding facial unconstitutionality—did not occur before the case reached that court. When a party insists on a single standard throughout litigation and an error emerges only in the latter stages of an appeal, it constitutes neither waiver nor a "vehicle" problem. *Cf.* Br. in Opp. 12–13.

B. A Five-Way Split Exists Over the Due Process Standard for Offense-Based Bail Exclusions.

Respondent attempts to downplay the confusion in lower courts, claiming that (1) *Salerno* "specifically held that heightened scrutiny" is the due process standard governing "statutes restricting bail" and (2) since *Salerno*, courts have uniformly applied the heightened-scrutiny standard. Br. in Opp. 14, 18. Neither assertion is correct.

1. *Salerno* did not "specifically" prescribe heightened scrutiny. In fact, that term appears nowhere in *Salerno*. And this Court's decisions since *Salerno* have not once mentioned "statutes restricting bail" as one of the two areas where heightened scrutiny applies. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 628–29 (1996) (identifying "heightened equal protection scrutiny" for classifications based on sex, "illegitimacy," race, and ancestry); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) (heightened First Amendment scrutiny for content-neutral speech regulations).

Instead, *Salerno* identified ten cases in which the Court balanced the "Government's regulatory interest in community safety" against "an individual's liberty interest," and stated that it would evaluate due process challenges to pretrial detention based on community danger "in *precisely the same manner* that [it] evaluated the laws in the cases discussed above." 481 U.S. at 748–49 (emphasis added). Not one of those cases applied anything resembling heightened scrutiny.

For example, in *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Court approved extended pretrial detention

with a judicial finding of probable cause, even when the finding was not accompanied by adversarial protections. The Court explained that the "balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases, *including the detention of suspects pending trial*." *Id.* at 125 n.27 (emphasis added). Likewise, in *Addington v. Texas*, 441 U.S. 418, 431 (1979), the Court held that due process allows detention of dangerous individuals who are "mentally ill" under a "clear and convincing" evidence standard because it "strikes a fair balance between the rights of the individual and the legitimate concerns of the state." In the same way, *Bell v. Wolfish*, 441 U.S. 520, 531–32 (1979), rejected the argument that due process requires conditions of pretrial confinement to be justified by a "compelling necessity." Instead, the Court upheld the restrictions at issue because they "were reasonable responses . . . to legitimate security concerns." *Id.* at 561. And in *Schall v. Martin*, the Court held that pretrial detention of juveniles to prevent crime "serve[d] a legitimate regulatory purpose compatible with the 'fundamental fairness' demanded by the Due Process Clause" by "strik[ing] a balance" between the interests of society and those of arrestees. 467 U.S. 253, 263, 268 (1984). The other cases cited in *Salerno* follow a similar pattern. None of them purports to apply heightened scrutiny.

Thus the Court in *Salerno* did exactly what the Court had done for decades. Employing the metaphor of a "scale," it assessed the reasonableness of regulatory pretrial detention to prevent danger to the community by striking a balance between competing

societal and private interests. 481 U.S. at 750–51 (finding society's interest "sufficiently weighty" to overcome the individual's interest in bail). Further, consistent with *Bell*, the Court did not demand a "compelling necessity" but instead deferred to Congress's judgment that individuals detained under the Bail Reform Act were "far more likely to be responsible for dangerous acts in the community after arrest." *Id.* at 750. Finally, undermining any claim that heightened scrutiny applied, the Court specifically held that "the liberty right 'under the[] circumstances' of the Bail Reform Act was *not* fundamental." *Lopez-Valenzuela*, 770 F.3d at 799 (Tallman, J., dissenting) (quoting *Salerno*, 481 U.S. at 751).

A balancing test also makes sense because Respondent has chosen to litigate under the Due Process Clause rather than the Eighth Amendment's express regulation of bail. The Eighth Amendment "has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail." *See Carlson v. Landon*, 342 U.S. 524, 545 (1952). In the absence of an express constitutional provision creating a right, balancing tests are inappropriate. *Compare District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008) (rejecting a balancing test because of express right to bear arms in Second Amendment) *with id.* at 689 (Breyer, J., dissenting) (citing *Salerno* to advocate balancing test).

In balancing these interests, courts defer to legislative judgments in empirical matters. Pet. 25–26. Here, that deference requires respect for the legislative determination concerning the appropriate amount of

risk for society to bear once a judge finds clear proof that an adult has raped a child—a crime that is repugnant, presents serious flight risks, inflicts lifelong harms, and poses a frighteningly high risk of recidivism. *See generally* Br. of Victims' Rights *Amici*. Holding otherwise not only displaces the legislative role, *see Bell*, 441 U.S. at 562 ("[U]nder the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan."), but it would also effectively displace legislative judgments in 33 other States that, like Arizona, withhold bail based on proof of the offense. Br. of Victims' Rights *Amici* at 7 n.2.

Respondent's attempt to erase a division in the lower courts by maintaining that *Salerno* has settled the standard for bail restrictions in favor of heightened scrutiny is incorrect.

2. Petitioner also did not "manufacture" the division in lower courts. Br. in Opp. 18.

As an initial matter, *Salerno* did not address the permissibility of categorical bail exclusions for *noncapital* offenses. As the court in *Lopez-Valenzuela* acknowledged, this is an "open question." 770 F.3d at 785; *see also* App. 33 (noting the "open issue"). The cases cited in the Petition represent the five tests applied as lower courts have struggled with this "open question."

Second, the approaches in *Parker v. Roth*, 278 N.W.2d 106 (Neb. 1979) and *Huihui v. Shimoda*, 644 P.2d 968 (Haw. 1982) remain relevant, even though these cases were decided before *Salerno*. Both cases

continue to govern categorical bail exclusions in their jurisdictions and continue to be applied after *Salerno*. *See State v. Boppre*, 453 N.W.2d 406, 418 (Neb. 1990); *Witt v. Moran*, 572 A.2d 261, 266–67 (R.I. 1990) (citing *Huihui* approvingly).

Finally, the five decisions cited in the Petition speak for themselves in endorsing different approaches. They did not, as Respondent contends, all apply the same heightened-scrutiny test. Br. in Opp. 18.

- *Parker v. Roth* applied rational basis review. 278 N.W.2d at 868–69. Respondent acknowledges that the Nebraska Supreme Court "applied deferential rational basis review" to the equal protection claim. Br. in Opp. 20. The opinion does not indicate a different standard for the due process claim.

- *State v. Furgal* applied a balancing test. 13 A.3d 272, 279 (N.H. 2010). Consistently, it did not engage in any type of least-restrict-alternative analysis. Instead, citing the language from *Salerno* that "the Government's regulatory interest in community safety can . . . outweigh an individual's liberty interest," the court assessed whether the legislature had "made a reasoned determination" that the risk to the community was "significantly compelling." *Id.* This is balancing.

- The Arizona Supreme Court below applied a form of heightened scrutiny less restrictive than strict scrutiny. App. 17. Respondent does not dispute this point.

- *Lopez-Valenzuela* required the law at issue to be "narrowly tailored to serve a compelling state interest." 770 F.3d at 780. Although the Ninth Circuit

misidentified this test as "heightened scrutiny," *id.*, the court's misnomer does not transform the familiar strict scrutiny standard into Respondent's preferred test. Pet. 28 (citing *id.* at 799 (Tallman, J., dissenting)).

- Finally, Respondent claims that *Huihui v. Shimoda* did not set forth a categorical prohibition against offense-based bail exclusions. Br. in Opp. 19. n.8. That is not how other authorities have interpreted the case. *See, e.g.*, *Witt*, 572 A.2d at 266–67 (citing *Huihui* for the proposition that "[o]ther courts have found that similar statutes cannot constitutionally deny the trial justice an opportunity to exercise discretion"); Annotation, *Pretrial Preventive Detention by State Court*, 75 A.L.R.3d 956 (1977) (citing *Huihui* as holding that conclusively presuming dangerousness from the fact of a crime violates due process).

Thus, courts below have fractured five different ways on the standard applicable to offense-based bail exclusions. The Court should grant certiorari to resolve this confusion.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

MARK BRNOVICH
Attorney General

MICHAEL G. BAILEY
Chief Deputy

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