No. 18-391

IN THE

Supreme Court of the United States

STATE OF ARIZONA,
Petitioner,

v.

GUY JAMES GOODMAN,
Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* ON BEHALF OF MICHAEL C. DORF AND KEVIN C. WALSH IN SUPPORT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, *amici curiae* Michael C. Dorf and Kevin C. Walsh move this Court for leave to file the attached *amici curiae* brief in support of a grant of certiorari.

All parties were timely notified of the intent of these *amici curiae* to file the attached brief as required by Rule 37.2(a). Petitioner consented to the filing of this brief, but Respondent withheld consent.

Amici curiae are professors who teach and write about federal courts and constitutional law. As Petitioner has shown, there is confusion about the standard for a facial challenge resulting from *United States v. Salerno*, 481 U.S. 739, 745 (1987). *Amici curiae* take no position on how the Court should resolve the confusion. But *amici curiae* have a particular interest in having that standard clarified in some way, and they believe this brief will aid the Court by explaining the unique opportunity this case presents to resolve the question.

Accordingly, *amici curiae* hereby requests that this Court grant its Motion for Leave to File Brief of *Amici Curiae* and that the Court accept the attached proposed brief.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[*]

Amici curiae teach and write about federal courts and constitutional law. They have written extensively about facial and as-applied challenges and have an interest in the development of the law in this area.

INTRODUCTION

This case presents an excellent opportunity to resolve the confusion over the standard for facial challenges that has followed *United States v. Salerno*, 481 U.S. 739 (1987). Unlike other potential vehicles, this case involves a statute and facial constitutional challenge nearly identical to that in *Salerno*: a substantive due process challenge to a pretrial detention law. These similarities provide this Court the widest range of possible ways to clarify *Salerno*'s meaning. *Amici curiae* scholars have different views on the correct answer to that question but agree that this case presents an ideal vehicle in which to answer it.

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[*] All parties received timely notice of the intent to file this brief under Rule 37. Petitioner has consented to the filing of this brief. Respondent has not, and thus *amici curiae* have filed the foregoing motion for leave simultaneously with this brief. This brief was not authored in whole or in part by counsel for any party. A party or a party's counsel did not contribute money that was intended to fund preparing or submitting this brief. No person, other than *amici curiae* and their counsel, contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

I. In *Salerno*, this Court appeared to declare that a challenger bringing a facial constitutional challenge "must establish that no set of circumstances exists under which the Act would be valid." But it left many questions unanswered and much room for debate. As a result, "scholars remain hopelessly at odds over what the *Salerno* rule … even mean[s]." Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 Wm. & Mary Bill Rts. J. 657, 664 (2010). It has even been suggested that *Salerno* was never meant as a test for facial challenges, but rather merely as "a descriptive claim about a statute whose terms state an invalid rule of law." Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359, 396 (1998).

II. Because this case involves a similar constitutional challenge to that in *Salerno*, it is an excellent opportunity to revisit and clarify that decision. Though some possible answers to *Salerno* could be given in almost any case involving a facial challenge, returning to the original context in which *Salerno* was decided allows for the widest range of possible ways to clarify *Salerno*'s meaning. Moreover, the one critical difference between this case and *Salerno*—that this case involves a state rather than federal law—permits this Court to clarify whether any distinction exists between facial challenges to state and federal laws.

REASONS FOR GRANTING CERTIORARI

I. The Confusion Over the Standard for Facial Challenges Traces Back to *Salerno*.

With little elaboration, this Court appeared to set out in *United States v. Salerno* a test for all facial constitutional challenges to a statute, excepting only First Amendment cases. "A facial challenge to a legislative Act is," this Court explained, "the most difficult challenge to mount successfully." 481 U.S. at 745. "[O]utside the limited context of the First Amendment" and its "'overbreadth' doctrine," a challenger bringing a facial constitutional challenge "must establish that no set of circumstances exists under which the Act would be valid." *Ibid.* Thus, the law was upheld in *Salerno* because "[t]he fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances [wa]s insufficient to render it wholly invalid." *Ibid.*

But as the Petition shows, and many scholars have observed, "some of the most basic details regarding the characteristics of the facial and as-applied challenges … remain surprisingly unclear." Kreit, *supra*, at 664. That lack of clarity was perhaps most apparent in *City of Chicago v. Morales*, 527 U.S. 41 (1999), in which a plurality of the Court rejected outright the *Salerno* test as dictum, *id.* at 55 n.22 (Stevens, J., plurality op.), concluding instead that the vagueness of a statute may be enough to "subject [it] to facial attack," *id.* at 55. As one scholar has put it, "[t]he distinction between as-applied and

facial challenges may confuse more than it illuminates." Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 294 (1994).

That confusion follows directly from *Salerno* itself. The spare discussion in *Salerno* left many questions unanswered and much room for debate and interpretation. Most agree that the Court "laid down what appeared to be a general rule for the availability of facial challenges." David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 Iowa L. Rev. 41, 56 (2006). But there is widespread disagreement over how that test is or was meant to be applied, and whether it has been or should be followed at all. *See* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321 (2000). Disagreement over *Salern*o "has spread to a wide range of constitutional areas," and "dispute, confusion, and uncertainty regarding facial versus as-applied constitutional challenges are becoming ubiquitous." Edward A. Hartnett, *Modest Hopes for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 S.M.U L. Rev. 1735, 1749 (2006).

Over the years, many criticisms have been leveled at *Salerno*.

First, several justices of the Court and many scholars have argued that *Salerno*'s "no set of circumstances" language was mere dictum. The Court

announced the test but never actually applied it. These critics say the Court "[sh]ould have dismissed the defendants' facial challenge simply by postulating one set of circumstances in which the challenged statute could have been constitutionally applied." Isserles, *supra*, at 373. But instead, the Court "proceeded to evaluate the constitutionality of the Act against the requirements of the Due Process Clause and the Eighth Amendment." *Ibid.* According to one scholar, the "no set of circumstances" language is mere "rhetorical flourish," and there is "no apparent link between the Court's opening broadside decrying the facial challenge vehicle and the actual decision." Dorf, *supra*, at 240-41.

Second, critics say that *Salerno*'s test was "unsupported by citation or precedent," *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996) (Stevens, J., respecting denial of cert.), and a departure from "prior decisions of the Court invalidating statutes on their face," Isserles, *supra*, at 374. According to Professor Michael Dorf, the Court had not previously followed the *Salerno* test "in at least three areas of constitutional law: the Equal Protection Clause, fundamental rights, and doctrines that rely on legislative purpose." Kreit, *supra*, at 665; *see also* Gillian E. Metzger, *Facial Challenges and Federalism*, 105 Colum. L. Rev. 873, 882 (2005) ("*Salerno* uprooted the traditional orthodoxy.").

Third, some scholars have argued that the *Salerno* test would be "draconian" if faithfully applied, and doubt the Court intended such a test without further explanation. Isserles, *supra*, at 372. In their view, the *Salerno* test would "effectively … doom" all facial challenges. *Ibid.* These critics contend that the government or a court could almost always hypothesize one constitutional application against a hypothetical third party. *Id.* at 373. And conversely, any challenger would have to imagine each possible application and prove its constitutionality—an impossible burden. Stuart Buck, Salerno *vs.* Chevron*: What to Do About Statutory Challenges*, 55 Admin. L. Rev. 427, 439 (2003).

Fourth, some have questioned *Salerno*'s exception for First Amendment overbreadth challenges. The Court gave no explanation for its First Amendment carve-out, and some scholars argue that none exists. There is nothing inherent in the First Amendment that would allow facial challenges to succeed more readily, they say. For example, "rights found within the Fourteenth Amendment due process clause need to be safeguarded as well." John Christopher Ford, *The* Casey *Standard for Evaluating Facial Attacks on Abortion Statutes*, 95 Mich. L. Rev. 1443, 1460 (1997). Others argue that the primary reason for a separate "overbreadth" doctrine—fear of a chilling effect—"is present in at least certain doctrinal areas outside of the First Amendment." Isserles, *supra*, at 375. For example, restrictions on

voting may not directly implicate the First Amendment but may nevertheless chill a person's attempt to vote. Dorf, *supra*, at 267.

Fifth, scholars have argued that the availability of facial challenges is "fundamentally a debate about severability," but *Salerno* failed to acknowledge or address that issue. Metzger, *supra*, at 887. "Defining facial challenges *Salerno*-style as leading to total invalidation … obscures the crucial role played by severability doctrine." *Id.* at 883.

Sixth, some constitutional provisions inherently raise questions of facial validity and "simply do not work by looking at individual applications of a statute." Buck, *supra*, at 439. For example, "[t]he Equal Protection Clause offers several examples of facial invalidation occurring because of some discrimination on the face of the statute, as opposed to discrimination in any particular application." *Id.* at 453. If a law were based on animus against a particular group, how would the Court separate invalid from valid applications? *Ibid.* All applications would necessarily be infected.

Seventh, justices and scholars have argued that *Salerno* does not (or should not) apply to facial challenges to state law. *Salerno* itself involved only a challenge to a federal law and was, according to Justice Stevens, premised on principles of Article III justiciability. *Morales*, 527 U.S. at 55 n.22 (plurality op.). Moreover, Professor Dorf has argued that the severability of state laws is a question that should be

determined by state law and not dictated by the federal rule set forth in *Salerno*. Dorf, *supra*, at 239.

In response to these criticisms, one scholar has proposed that the Court did not mean the *Salerno* "test" as a test at all. Rather, "*Salerno*'s 'no set of circumstances' language is … a descriptive claim about a statute whose terms state an invalid rule of law." Isserles, *supra*, at 396. According to Isserles, *Salerno* does not command that courts assess every possible application of a statute in evaluating a facial challenge; it merely "directs a court to analyze the challenged statute under the applicable constitutional doctrine." *Id.* at 364.

II. This Case Is the Right Case to Revisit *Salerno.*

The unique facts of this case offer this Court a rare opportunity to clarify the confusion surrounding *Salerno*. The facial constitutional challenge in this case is nearly identical to that in *Salerno* with one exception—the bail reform law at issue is a state rather than federal law. Unlike with other potential vehicles, these circumstances present this Court the widest array of options to bring much needed clarity to *Salerno*'s intended legacy.

Some possible answers to *Salerno* could be given in almost any case involving a facial challenge. Should this Court decide that *Salerno* was wrongly decided and should *never* be followed, it could do so in resolving virtually any facial challenge, regardless

of the specific statute or alleged constitutional violation at issue. So, too, if the Court were to conclude that *Salerno* should be reaffirmed and applied in *all* contexts.

But returning to the original context in which *Salerno* was decided, as here, allows for a wide range of other, more nuanced approaches that a majority of this Court may wish to consider. *Salerno* involved a substantive due process challenge (and an Eighth Amendment challenge) to the Bail Reform Act of 1984. That federal statute denied bail to arrestees if the government demonstrated by clear and convincing evidence in an adversarial hearing that no release conditions "will reasonably assure … the safety of any other person and the community." *Salerno*, 481 U.S. at 741. This case is remarkably similar. It involves an arrestee's substantive due process challenge to Arizona's Proposition 103. That state law denies bail to arrestees when a judge finds "the proof is evident or the presumption great" that an arrestee has committed sexual assault. Ariz. Const. art. II, § 22(A)(1); Ariz. Rev. Stat. § 13-3961(A)(2).

The similarities between the two cases permit this Court to consider the full range of potential ways to bring clarity to *Salerno*.

For example, this Court could hold that the *Salerno* test applies only to the facts or constitutional provision that were at issue there (and here). Thus, the *Salerno* test could be limited to substantive due process claims or, even more narrowly, substantive

due process claims alleging impermissible punishment before trial by a bail statute. As some scholars have argued, perhaps "the proper mode of review" for facial challenges should be "a function of the applicable substantive doctrine." Franklin, *supra*, at 66. Abandoning the idea that there is a transsubstantive doctrine that governs a choice between two distinct kinds of challenge (i.e., facial and as-applied) would allow for "greater calibration of the output of constitutional adjudication to the underlying constitutional protection in any given case." Kevin C. Walsh, *Frames of Reference and the "Turn to Remedy" in Facial Challenge Doctrine*, 36 Hastings Const. L. Quarterly 667, 670 (2009); *see also* Richard H. Fallon, Jr., *Fact and Fiction about Facial Challenges*, 99 Cal. L. Rev. 915, 935 (2011) (criticizing the belief "that it is possible, in cases such as *Salerno*, to state generally applicable, transsubstantive rules specifying when facial challenges can and cannot succeed, without regard to the constitutional provision under which a challenge occurs or the character of the law whose enforcement is being challenged").

Alternatively, the Court could decide in this case that *Salerno* meant the "no set of circumstances" statement merely as "a descriptive claim about a statute whose terms state an invalid rule of law." Isserles, *supra*, at 364. In other words, the point was not to determine *whether* the Bail Reform Act could be applied constitutionally in any one hypothetical circumstance, but rather to note that *when* a law is

determined unconstitutional, it may be applied in no set of circumstances going forward. *Ibid.* If this Court determines that to be the correct reading of *Salerno*, this case provides the clearest way to correct course. This Court has an opportunity to essentially re-do *Salerno* with a more complete explanation spelled out with the benefit of decades of hindsight.

This case also permits this Court to clarify the distinction, if any, between facial challenges to state and federal laws. As many scholars have argued, the intersection between facial challenges and the doctrine of severability raises potential federalism concerns. Dorf, *supra*, at 239; *see also* Isserles, *supra*, at 367 (discussing the tension between state and federal courts' jurisdiction to construe the same state statute). Because this case involves a state bail reform statute, it gives this Court the opportunity not only to reset *Salerno* but also to settle whether facial challenges to state and federal laws must be treated differently.

The Court has long recognized the standard for facial challenges needs clarifying. *United States v. Stevens*, 559 U.S. 460, 472 (2010). This case presents an excellent opportunity to revisit the source of that confusion, and warrants this Court's review for that reason alone.

CONCLUSION

The Petition should be granted.

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