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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

REPLY BRIEF FOR PETITIONER

Respondent has filed a merits brief. It contains no serious response to the acknowledged split in the lower courts; it fails to address almost every authority cited by Petitioner and the *Amici* States; and it offers demonstrably false hope for resolution of the split over the test for facial unconstitutionality.

Respondent's limited effort at opposing certiorari reflects the overwhelming case in favor of this Court's review. He does not dispute that lower courts have split five ways on the standard applicable to offense-based bail restrictions. Instead, Respondent offers merits arguments about Arizona's hearing process for determining whether "the proof is evident or the presumption great" that an arrestee committed a non-bailable offense. Ariz. Const. art. II, § 22(A). Respondent similarly offers just one argument against the split that divides lower courts—and, indeed, this Court's own precedent—over the standard for declaring a law facially unconstitutional. He asserts that *City of Los Angeles* v. *Patel*, 135 S. Ct. 2443 (2015), might someday resolve the issue. But the Petition already identifies at least three irreconcilable circuit court decisions entered after *Patel*. Those cases should come as no surprise because *Patel* did not purport to address, let alone settle, this open question. Certiorari is necessary to resolve division in the lower courts on both questions presented.

I. The Court Should Grant Review to Resolve the Split over Offense-Based Bail Restrictions.

A. Respondent Does Not Seriously Dispute the Split Among Lower Courts.

As shown in the Petition, four States and two federal courts of appeals have adopted five different standards for evaluating the permissibility of bail restrictions under the Due Process Clause. Pet. 16–20. Those standards range from rational-basis review to a categorical ban on offense-based restrictions. Respondent's efforts to explain away this split fall short.

First, the machinery for evaluating due process claims does not vary with the underlying offense, even if the individual's and State's interests vary. Thus it does not matter that the context of *New Hampshire* v. *Furgal*, 13 A.3d 272 (N.H. 2010), involved a person facing a life sentence while *Huihui* v. *Shimoda*, 644 P.2d 968, 970 (Haw. 1982), involved a person charged with committing a crime while already on bail. Br. in Opp. 16. Every case cited in the Petition required the court to identify its legal standard for evaluating pretrial bail restrictions. None of these cases suggested that the *standard* would change based on the underlying crime or range of possible sentences. Typifying this approach, this Court in *United States* v. *Salerno*, 481 U.S. 739, 749 (1987), evaluated the contested pretrial detention restrictions "in precisely the same manner" in which it had previously proceeded under a variety of different circumstances. Respondent's effort to distinguish cases on their facts misses the point: this case asks the Court to settle a split over the legal standard to be applied in cases challenging States' ability to restrict bail based on the offense (very likely) committed.

Second, the approaches in *Huihui* and *Parker* v. *Roth*, 278 N.W.2d 106 (Neb. 1979), remain relevant even though these cases were decided before *Salerno*. Br. in Opp. 16. 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).

Third, the decision in *Walker* v. *City of Calhoun*, 901 F.3d 1245, 1262 (11th Cir. 2018), addresses precisely the standard for pretrial detention at issue here and does so with reference to *Salerno*. Br. in Opp. 16. There, the Eleventh Circuit specifically rejected the argument that *Salerno* mandated "strict—or even intermediate—scrutiny" rather than traditional due process balancing. *Ibid.* This holding is in direct conflict with the decision below and the Ninth Circuit decision in *Lopez-Valenzuela* v. *Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014).

Fourth, contrary to Respondent's suggestion, Br. in Opp. 16, *Furgal* applied a balancing test, 13 A.3d at 279. It did not engage in any type of least-restrict-alternative analysis like the Arizona Supreme Court below. 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." *Ibid.* This is balancing.

Finally, as the *Amici* States demonstrate, Arizona's law is not an "aberration." Compare Br. of *Amici* States 4–10 with Br. in Opp. 15. Of course, it would not matter even if it were truly idiosyncratic. Novelty does not render a law unconstitutional. *Ewing* v. *California*, 538 U.S. 11, 24 (2003) ("Though three strikes

laws may be relatively new, our tradition of deferring to state legislatures in making and implementing such important policy decisions is longstanding."). "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington* v. *Texas*, 441 U.S. 418, 431 (1979). As it stands, however, numerous States have offense-based bail restrictions, and the courts evaluating them under the Due Process Clause have applied five different tests. This Court's review is needed to bring uniformity.

B. The Rule Announced Below Is Contrary to This Court's Precedent.

The Arizona Supreme Court's "heightened scrutiny" test effectively abolishes offense-based bail exclusions and imposes a "due process requirement that all determinations denying pretrial release must include an individualized determination." App. 32–33 (Gould, J., dissenting). To pass this test, the State must prove that (1) "a significant number," if not "most persons," charged with the offense would likely flee or commit another dangerous crime pending trial if released on bail" and (2) there is no alternative that "would serve the state's objective equally well at less cost to individual liberty." App. 13, 16.

Tellingly, Respondent does not mention the standard actually adopted by the Arizona Supreme Court, let alone attempt to defend it. To the contrary, and underscoring the need for review, Respondent acknowledges the court's analysis below was wrong. Br. in Opp. 17 ("Although [Respondent] does not agree with every step of the court's analysis, it reached the correct result.").

After all, Respondent admits that categorical bail exclusions are permissible for capital offenses and

crimes punishable with life imprisonment. Br. in Opp. 14–15; see also *Salerno*, 481 U.S. at 753 ("A court may, for example, refuse bail in capital cases."). But, contrary to *Salerno* and the judgment of 36 States with offense-based bail restrictions for capital crimes, see Br. of *Amici* States 4–10, restrictions for capital crimes cannot survive the Arizona Supreme Court's test. For example, the long-standing categorical exclusion for capital crimes is not based on evidence that "most" people arrested for such crimes flee or commit a dangerous crime before trial. Instead, it is based on the reasonable supposition that the accused would present a heightened flight risk. 4 William Blackstone, *Commentaries on the Laws of England* 293–97 (1769).

This Court has long upheld the ability of legislatures to make reasonable categorical judgments regarding pretrial detention. In *Carlson* v. *Landon*, the Court allowed the detention of resident aliens deportable based on proof of participation in Communist activities—with no finding of individual dangerousness—because of Congress's "understanding" of their threat to the community. 342 U.S. 524, 531–32, 541 (1952). In *Reno* v. *Flores*, the Court allowed the "use of reasonable presumptions and generic rules" in presuming the unsuitability of non-relatives in caring for detained juvenile aliens. 507 U.S. 292, 313 (1993). In *Demore* v. *Kim*, the Court allowed the detention of convicted aliens without an individualized assessment of flight risk pending deportation proceedings. 538 U.S. 510, 528 (2003). And, in *Smith* v. *Doe*, the Court upheld a State's sex-offender registry against an Ex Post Facto Clause challenge, even though it applied to "convicted sex offenders without regard to their future dangerousness." 538 U.S. 84, 103 (2003). Because of sex offenders' high recidivism rate and "dangerousness as a class," the State reasonably "could conclude that a

conviction for a sex offense provides evidence of substantial risk of recidivism." *Ibid.*

In fact, courts never have direct evidence of an arrestee's dangerousness or flight risk. In any bail proceeding, the court must draw an inference based on past conduct. Proposition 103 focuses this inquiry on the commission of a few enumerated crimes. The judgment of Arizona voters is that commission of these crimes—as established through the procedures described below—is sufficient to justify pretrial incarceration. There is nothing anomalous about that. Indeed, the same is true of arrestees facing capital sentences or life sentences: the court does not have direct evidence of whether an individual arrestee will flee, but even Respondent concedes that "bail may be denied to individuals faced with a death sentence or life imprisonment because they have an extraordinary incentive to flee." Br. in Opp. 6 (emphasis omitted). Respondent offers no explanation for why inferring flight risk from a potential sentence is permissible but inferring dangerousness from a probable crime is not.

For the same reason, it is disingenuous for Respondent to point out that not every person who likely committed a sexual assault "necessarily threaten[s] community safety." Br. in Opp. 21. That is not the question. Not every person who faces a life sentence will necessarily flee before facing trial. For that matter, not everyone whom a judge concludes based on past conduct and in-court statements is incapable of safe release under Arizona's generic bail provision, Ariz. Rev. Stat. § 13-3961, would necessarily harm the community if released. The issue in this case is whether 36 States have violated the Due Process Clause by adopting an admittedly imperfect proxy for future risk. The answer from *Salerno*, *Reno*, *Carlson*, and *Demore* is that they have not.

Even as an empirical matter, the 80% of Arizona voters who enacted Proposition 103 acted reasonably. Rape is a uniquely horrific crime, *Coker* v. *Georgia*, 433 U.S. 584, 597–98 (1977), it has a "frightening and high" rate of recidivism, *Smith*, 538 U.S. at 103, and there is no way to predict whether a particular person will reoffend. These risks encompass both the likelihood of re-offense and the magnitude of harm when it occurs. Proposition 103 also serves the State's interest in protecting victims from the trauma of knowing that their assailants are free and ensuring against flight. See Br. of Victims' Rights *Amici* 15–22. Heightened proof of sexual assault is therefore an entirely reasonable proxy for dangerousness pending trial.

The cases Respondent cites are not to the contrary. First, Respondent's argument (Br. in Opp. 7–9) that *Salerno* constitutionalized the procedures of the Bail Reform Act "conflates sufficient conditions with necessary ones." *Furgal*, 13 A.3d at 278. "Rather than setting a minimum threshold for all bail inquiries, the Court in *Salerno* was confronted with one specific bail scheme and decided only the narrow issue of whether that particular scheme could survive constitutional scrutiny." *Id.* at 279. Likewise, an individualized risk assessment is not required here simply because it is required for civil "detention of mentally ill or incompetent persons." Br. in Opp. 10–11. Because the Arizona Rules of Criminal Procedure limit the length of pretrial detention, Pet. 5., Respondent's cases involving indefinite civil commitment are inapposite. Cf. *Addington*, 441 U.S. at 420; *Jackson* v. *Indiana*, 406 U.S. 715, 730 (1972); *Greenwood* v. *United States*, 350 U.S. 366, 372 (1956); *Foucha* v. *Louisiana*, 504 U.S. 71, 82 (1992).

Lacking other grounds to justify the decision below, Respondent's merits argument turns to misstating Arizona law.[1]

Respondent accuses the State of treating a mere charging decision as itself establishing that the defendant is "presumptively too violent to be free prior to trial." Br. in Opp. 11. This is false. "Proposition 103 does not create an irrebuttable presumption that a person charged with a listed offense will be denied bail." *State ex rel. Romley* v. *Rayes*, 75 P.3d 148, 151 (Ariz. Ct. App. 2003). Instead, bail can only be denied if the State convinces a "judge, at a hearing . . . that the proof is evident or the presumption of guilt is great." *Ibid.*

Respondent also asserts that Arizona's proof-evident-presumption-great standard is "functionally the same as for probable cause." Br. in Opp. 3. This is also false. Arizona courts correctly read Proposition 103 to reject a probable cause standard in favor of a "robust" standard requiring a prompt and complete adversarial hearing with specific factual findings in which the State's burden is only met "if all of the evidence, fully considered by the court, makes it plain and clear to the understanding and dispassionate judgment of the court that the accused committed" the crime. *Simpson* v. *Miller*, 387 P.3d 1270, 1275 (2017) (alterations and quotes omitted); *Simpson* v. *Owens*, 85 P.3d 478, 488 (Ariz. Ct. App. 2004) ("rejecting a standard of probable cause").

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[1] Despite Respondent's repeated invocation of his presumption of innocence, *e.g.*, Br. in Opp. 5, this right has "no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Bell v. Wolfish*, 441 U.S. 520, 533 (1979).

Respondent's merits arguments are unconvincing and cannot distract from the entrenched split over the standard for due process challenges to offense-based bail restrictions. As urged by the dissenting justices below, that split calls out for this Court's review. App. 30–31 (Bolick, J., dissenting).

II. The Court Should Grant Review to Resolve the Split over the Standard for Facial Challenges.

Respondent is almost entirely silent in response to the need for this Court to select among dueling standards for claims of facial unconstitutionality.

As detailed in the Petition, this Court and courts across the country have noted the existence of two distinct tests, one requiring that a plaintiff show that "no set of circumstances exists under which the Act would be valid," *Salerno*, 481 U.S. at 745, and the other asking whether the statute's unconstitutional applications are "substantial when judged in relation to the statute's plainly legitimate sweep," *City of Chicago* v. *Morales*, 527 U.S. 41, 52 (1999) (opinion of Stevens, J.) (quotes omitted). Which standard applies outside the special context of the First Amendment "is a matter of dispute." *United States* v. *Stevens*, 559 U.S. 460, 472 (2010). Unsurprisingly, the lower courts have split in which test they apply. Pet. 25–32.

Respondent questions neither the Court's own characterization of its open "dispute" nor the lower courts' division. Instead, he wishfully suggests that the Court should decline to take this case because lower courts might not "continue to express confusion regarding facial challenges" in the wake of *City of Los Angeles* v. *Patel*, 135 S. Ct. 2443 (2015). Br. in Opp. 24–25. He further faults both Petitioner and the *Amici* Professors for failing to see this obvious solution to the split. *Ibid*.

Unfortunately for litigants, courts, and legislators across the country, *Patel* did not accomplish what Respondent suggests. Far from endorsing one test over the other, that case kicked the proverbial can, noting only that "[u]nder the most exacting standard the Court has prescribed for facial challenges, a plaintiff must establish that a 'law is unconstitutional in all of its applications.'" *Id.* at 2451 (quoting *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). This language is not an endorsement of the no-set-of-circumstances test and, if anything, simply notes the continued existence of multiple standards.

Nowhere is *Patel*'s lack of resolution more obvious than in the lower courts. One year after *Patel*, the Sixth Circuit applied the opposite standard, explaining that a facial challenge "fails where the statute has a 'plainly legitimate sweep.'" *Ne. Ohio Coal. for the Homeless* v. *Husted*, 837 F.3d 612, 632 (6th Cir. 2016); Pet. 28. Meanwhile, the D.C. Circuit noted "controversy" over "whether the *Salerno* standard universally applies." *Bahlul* v. *United States*, 840 F.3d 757, 799 n.1 (D.C. Cir. 2016); Pet. 25. And just this year, the Fifth Circuit endorsed the no-set-of-circumstances test. *City of El Cenzio, Tex.* v. *Texas*, 890 F.3d 164, 187 (5th Cir. 2018); Pet. 27. Each of these cases is cited in the Petition along with numerous others that show a persistent split in the lower courts—both before and after *Patel*.

Respondent's only other argument against certiorari on the second question presented is that "the choice of whether to entertain a 'facial' versus 'as-applied' challenge is a matter of judicial discretion." Br. in Opp. 25. This assertion is unaccompanied by any citation and contradicts the fact that plaintiffs rather than courts designate claims as facial or as-applied and must meet the corresponding burden to prevail. *E.g., Simpson*,

387 P.3d at 1273–74. More to the point, courts applying the U.S. Constitution, including the Arizona Supreme Court below, apply this Court's standards (or try to) for when they should declare a statute invalid in every application. Pet App. 7, 19–20. When the Arizona Supreme Court sought to apply this Court's precedent governing facial challenges, it was understandably confused.

Finally, Respondent argues on the merits that the no-set-of-circumstances test would "preclude facial relief" and result in duplicative litigation. Br. in Opp. 26 (quotation omitted). To the contrary, facial challenges will remain available for statutes that lack any constitutional application (*e.g.,* race-based classifications). Where a facial challenge is not possible, a finding of as-applied unconstitutionality can still have broad effects. As Justice Scalia explained in his *Patel* dissent, "the effect of a given case is a function not of the plaintiff's characterization of his challenge, but the narrowness or breadth of the ground that the Court relies upon in disposing of it." 135 S. Ct. at 2458 (Scalia, J., dissenting).

Respondent offers no salve for the split in this Court's precedent and suggests unconvincingly that *Patel* might end the division in the lower courts. Subsequent case law proves that his optimism is misplaced and that this Court's review is needed.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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