No. _____

In The

Supreme Court of the United States

JAY NYGARD AND KENDALL NYGARD,

Petitioners,

v.

CITY OF ORONO, A MINNESOTA MUNICIPALITY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners brought a pre-enforcement void-for-vagueness challenge to a city permitting ordinance that is criminally enforceable for every type of home repair. The Eighth Circuit opined that facial vagueness challenges are not permitted outside the First Amendment cases, citing *United States v. Orchard*, 332 F.3d 1133 (8th Cir. 2003). There exists a split in the circuits and Supreme Court precedent. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Under *Desertrain v. City of Los Angeles*, 754 F.3d 1147 (9th Cir. 2014), pre-enforcement actions challenging ordinances on vagueness grounds are allowed. The questions presented are:

1. Can a homeowner prevail on a *Papachristou*-based pre-enforcement challenge to a municipal permitting law?

2. Can a criminally enforceable city ordinance be challenged as unconstitutionally vague outside a First Amendment claim?

PARTIES TO THE PROCEEDING

Petitioners, Jay Nygard and Kendall Nygard, were the plaintiffs in the district court proceedings and appellants in the court of appeals proceedings. Respondent is the City of Orono, a Minnesota municipality. The City of Orono was the defendant in the district court proceedings and the appellee in the court of appeals proceedings.

RELATED PROCEEDINGS

- *Nygard v. City of Orono*, No. 21-CV-884, U.S. District Court for the District of Minnesota. Judgment entered August 12, 2021.
- *Nygard v. City of Orono*, No. 21-2941, U.S. Court of Appeals for the Eighth Circuit. Judgment entered July 5, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Jay Nygard and Kendall Nygard, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in *Nygard v. City of Orono*, 39 F.4th 514 (8th Cir. 2022).

OPINIONS BELOW

The Eighth Circuit's opinion affirming in part and reversing in part the district court's grant of Respondent's motion to dismiss is reported at *Nygard v. City of Orono*, 39 F.4th 514 (8th Cir. 2022), and reproduced at App. 1-17. The opinion of the District Court for the District of Minnesota granting Respondent's motion to dismiss is unreported, but is available at *Nygard v. City of Orono*, No. 21-CV-884 (NEB/JFD), 2021 WL 3552251 (D. Minn. Aug. 11, 2021), *aff'd in part, rev'd in part*, 39 F.4th 514 (8th Cir. 2022), and is reproduced at App. 20-39.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered final judgment on July 5, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case arises under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State 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.

U.S. Const. amend. XIV § 1 (emphasis added).

Petitioners challenge, on due process grounds—and, more specifically, on void-for-vagueness grounds—section 86-66 of the code of ordinances of Orono, Minnesota, which imposes a permitting requirement:

> (a) *Permits required*. It is unlawful for any person to erect, construct, enlarge, alter, repair, move, improve, remove, convert, or demolish any building or structure, or any part or portion, including but not limited to the general construction, plumbing, on-site sewage treatment system, wood stoves and fireplaces, ventilating, heating or air conditioning systems, or cause such work to be done, without first obtaining a separate building, sign, or general permit for each such building, structure or separate component from the city.

Exception: Seasonal docks, except for joint use facilities are exempt from this section. For the purposes of this section, seasonal docks are docks so designed and constructed that they may be removed from the lake on a seasonal basis. All components such as supports, decking, and footings must be capable of removal by manual means without use of power equipment, machines, or tools other than handheld power tools.

(b) *Zoning permit for land alteration*. A land alteration and hardcover plan shall be submitted with the site plan or certified site plan and incorporated as part of the building permit approval, including the name of the individual performing the work. If no building permit is necessary, a separate zoning permit application for hardcover and/or land alteration shall be submitted by the individual performing the work prior to conducting any land alteration or hardcover installations on a property, including grading, patios and retaining walls. The zoning permit shall be reviewed and approved by the city prior to issuance.

Orono, Minn., City Code § 86-66.

INTRODUCTION AND STATEMENT OF THE CASE

This petition seeks review of an Eighth Circuit opinion that interpreted the void-for-vagueness doctrine so narrowly as to effectively nullify it for those bringing a pre-enforcement challenge, one of several circuit court decisions to do so, despite this Court's long-standing insistence that laws give fair notice of what is prohibited or required. Furthermore, the Eighth Circuit's opinion never engaged the main thrust of Petitioners' void-for-vagueness challenge: that Orono, Minn., City Code (hereafter, Orono Code) § 86-66 imposes a permitting requirement so broad that, in practice, any Orono homeowner is going to violate its plain terms, and that the section, like the vagrancy ordinance in *Papachristou v. City of Jacksonville*, therefore fails to give fair notice of what is actually required and also fails to provide appropriate limits to law enforcement. 405 U.S. 156, 162-71 (1972).

The Eighth Circuit denied the possibility of bringing a facial vagueness challenge to a law, unless the challenger finds a way to invoke the First Amendment. And the Eighth Circuit, like the district court before it, refused to consider § 86-66's constitutionality as applied to the conduct that Petitioners said in their complaint that they were contemplating engaging in.

A. Background: the City of Orono, Minnesota has a permitting requirement so broad as to require a permit for any improvement or repair, no matter how comically trivial, to a building or structure.

Orono Code § 86-66 requires homeowners to obtain permits for virtually every repair—of any kind—for the house, and does so with limited or no definitions. The same is true for so-called "land alterations."

The ordinance provisions require a permit for many trivial repairs such as replacing a light switch—or even tightening a screw that holds a light-switch panel in place—that nobody is actually going to seek a permit for.

Orono Code § 86-37 makes it "unlawful" to "[d]o any work without first obtaining a required permit from the city" (among other things):

> It is unlawful for any person to:
>
> (1) Do any work without first obtaining a required permit from the city authorizing such work.
>
> (2) Do any work beyond or outside the scope of a permit issued by the city.
>
> (3) Do any work prior to obtaining a required inspection and approval from the city, including failure to request any required inspection.

(4) Fail to comply with the terms or conditions of a permit issued by the city, including failure to comply with all building or zoning requirements.

(5) Fail to comply with any correction orders lawfully issued by the city when any work done is found to be in violation of or noncompliance with permit requirements.

(6) Fail to stop or suspend work on any project or portion of a project in accordance with a lawfully issued stop work order.

(7) Fail to pay any permit fee, inspection fee or reinspection fee.

(8) Fail to comply with the terms and conditions of any building or zoning occupancy certificate.

Moreover, Orono Code § 86-42 makes it a misdemeanor to violate the Orono Code, and thus to violate § 86-66 (or § 86-37): "A violation of the Code is a misdemeanor (Minn. Stat. § 326B.082)." The word "Code," as used in § 86-42, means the Orono Code. *See* Orono Code § 1-2 ("The term 'Code' means the Orono, Minnesota, City Code, as designated in section 1-1."). A violation of § 86-66's permitting requirement is thus a crime.

B. The City of Orono attempts to enforce the permitting requirement against Petitioners because Mr. Nygard replaced his driveway.

Petitioners, Jay Nygard and Kendall Nygard, co-own a house that they bought as an investment in the City of Orono, Minnesota. Compl. ¶¶ 3, 6; App. 2, 22. In October 2019, Mr. Nygard began considering replacing the house's driveway with one with a smaller footprint. Compl. ¶ 6. Mr. Nygard investigated the possibility that he would need a city-issued permit to replace the driveway, and he concluded that he did not. Compl. ¶¶ 8-9; App. 22.

In October 2019, Mr. Nygard removed his house's old driveway and prepared the site to pour a new concrete driveway. Compl. ¶ 10; App. 2, 22.

On October 25, 2019, the day that Mr. Nygard was going to have the concrete for the new driveway poured, an inspector from the City of Orono showed up and told Mr. Nygard that he needed a city-issued permit to replace the driveway. Compl. ¶ 13; App. 2, 22. Mr. Nygard told the inspector that Mr. Nygard had not found anything on the city's website or in the Orono Code that specifically addressed the need for a permit to replace a residential driveway. Compl. ¶ 14. The inspector responded that although the city does not impose a special permit requirement for replacing a residential driveway, Mr. Nygard needed a general zoning permit to replace his driveway. Compl. ¶ 15; App. 2, 22.

Mr. Nygard then told the inspector that he would apply for the permit, and the inspector told Mr. Nygard that he would not stop Mr. Nygard from pouring the new driveway. Compl. ¶ 16; App. 2, 22.

The next day, October 26, 2019, Mr. Nygard applied for a City of Orono permit to replace his driveway. Compl. ¶ 22; App. 2, 22. He included in the application an aerial photo of the property and a reference to an existing permit application for a wind turbine footing. Compl. ¶ 24; App. 2, 22. He included the reference to the wind turbine footing for background information and because it might be relevant to some calculation regarding the total hardcover area on the property. Compl. ¶ 24; App. 2, 22-23. The application also showed the previous hardcover driveway, the boundaries of the reduced footprint of the replacement driveway, and the front door steps leading to the new driveway. Compl. ¶ 26.

Soon after, Mr. Nygard received from Orono a Builder Acknowledgement Form (BAF), which Orono demanded that he sign before the city would issue the permit. Compl. ¶ 28; App. 2, 23. The BAF included several conditions, including that the driveway be built 1 5/8 inches above the street where the driveway and street intersect (i.e., that the driveway have a lip), that the wind turbine footing was not permitted, and that the hardcover calculations include a sidewalk from the driveway to the front door. Compl. ¶¶ 28-30; App. 2-3, 23.

In an October 29, 2019 email, Mr. Nygard asked the city planning assistant to identify the city code provision governing driveway lips and noted that none of his neighbors had driveway lips. Compl. ¶ 33; App. 3. Mr. Nygard also explained why he identified the wind turbine footing as part of the site plan and explained that the driveway apron is the "sidewalk" to the front door. Compl. ¶ 33. In fact, the city code did not require driveway lips on the street on which the property was located. Compl. ¶¶ 36-38, 44-48, 64-68; App. 3.

Mr. Nygard crossed off several conditions that he rejected, including the condition that his driveway have a lip, initialed the form, and returned the initialed form to the city. Compl. ¶ 38; App. 3.

On October 31, 2019, the city planning assistant responded to Mr. Nygard's inquiry with an email telling him that the city would not issue the permit unless Mr. Nygard agreed to all of the conditions in the original BAF. App. 3-4.

For several weeks after this, Mr. Nygard exchanged emails with the city planning assistant in an effort, by Mr. Nygard, to resolve the city's arbitrary conditions for receiving a permit to replace his driveway. Compl. ¶¶ 57-58; App. 4.

On December 12, 2019, City of Orono Community Development Director Jeremy Barnhart emailed Mr. Nygard an ultimatum: if Mr. Nygard did not sign the BAF, including the lip requirement, by the end of the day, i.e., December 12, 2019, then "this matter w[ould] be turned over to the prosecuting attorney [the next

day] for possible legal action." Compl. ¶ 59; App. 4. Mr. Nygard did not agree to the conditions. App. 4.

The city made good on its threat and prosecuted the Nygards for violating Orono Code § 86-66(b), App. 4-5, a subsection which provides that "[i]f no building permit is necessary, a separate zoning permit application for hardcover and/or land alteration shall be submitted by the individual performing the work prior to conducting any land alteration or hardcover installations on a property, including grading, patios and retaining walls."

At the trial, the state judge who heard the case dismissed the charge against Ms. Nygard for lack of probable cause, ruling that a person cannot be guilty of violating § 86-66 merely as a result of being an owner of property on which unauthorized work is done. App. 5, 24-25. The judge found Mr. Nygard not guilty for two reasons:

1. The description of the driveway lip was really a "suggestion" rather than a "requirement"; and

2. Because the city never required that Mr. Nygard provide a hardcover calculation, Mr. Nygard was not actually required to comply with § 86-66(b).

Compl. ¶¶ 110-11; App. 5, 25.

C. The Nygards bring a pre-enforcement suit to challenge § 86-66 on void-for-vagueness grounds, and both the district court and the court of appeals fail to scrutinize the section's potential application to the Nygards' proposed future conduct.

The Nygards commenced this pre-enforcement section 1983 suit to challenge § 86-66's constitutionality. They brought two void-for-vagueness claims in their complaint: in count I, the Nygards attacked the section for failing to give fair notice of what is required or prohibited, Compl. ¶¶ 152-56; *see also* App. 26; in count II, the Nygards attacked the section for failing to properly limit law-enforcement discretion, Compl. ¶¶ 157-62; *see also* App. 26.

The Nygards explained that they want to make repairs and improvements to real estate that they own in Orono, but that § 86-66 fails in practice to give them fair notice of what activities will trigger another enforcement action. Compl. ¶¶ 115-45, 152-62. The Nygards provided examples of things that they would like to do, but that exposed them to a risk of prosecution under § 86-66's broad language. Compl. ¶¶ 122-45. The complaint also contains the allegations that § 86-66 is so broad that compliance is, in practice, impossible and that the section therefore fails to impart fair notice of what will actually trigger an enforcement action and fails to appropriately limit law-enforcement discretion. Compl. ¶¶ 154, 159.

The Nygards also brought a malicious-prosecution claim, Compl. ¶¶ 232-50, and other claims, *id*. ¶¶ 163-231.

The city moved to dismiss all claims presented in the complaint, and the district court granted the motion. App. 21, 38-39.

The district court analyzed the Nygards' void-for-vagueness claims as both facial challenges and as-applied challenges. App. 26-31. The district court acknowledged that a plurality of this Court found an ordinance facially unconstitutional in *City of Chicago v. Morales*, 527 U.S. 41 (1999) in part because "vagueness 'permeated the text'" of the law. App. 27 (quoting *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (plurality opinion)). But the district court held that even under post-*Morales* Eighth Circuit caselaw, facial void-for-vagueness challenges are not allowed, unless the challenged law threatens a First Amendment right. App. 27-28 (citing *Musser v. Mapes*, 718 F.3d 996, 1000 (8th Cir. 2013); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1015-16, 1021 (8th Cir. 2012)). The district court went on to say that, even under the *Morales* plurality opinion, § 86-66 is not facially unconstitutional because "[v]agueness does not permeate [its] text." App. 29.

The district court's as-applied analysis was, to put things mildly, strange. *See* App. 29-31. The court analyzed § 86-66's provision of notice to the Nygards and limits to law enforcement, only as the section applies to Mr. Nygard's *past* conduct in replacing his driveway

before obtaining a permit. App. 30-31. Indeed, the court actually analyzed the section as though Mr. Nygard were challenging a conviction on appeal by arguing that the law that he had been convicted of violating was vague. *See* App. 29-31. The court even implied that Mr. Nygard was, in fact, guilty of having violated § 86-66, *see* App. 30-31, even though he was acquitted at trial of exactly that charge. App. 25.

In short, the court's as-applied analysis failed even to show awareness that the suit before it was a *pre-enforcement* challenge. *See* App. 29-31. The court never even purported to review § 86-66's constitutionality as applied to the things that the Nygards said that they were contemplating doing in the future. Compl. ¶¶ 122-45.

The Eighth Circuit's opinion largely adopted the district court's reasoning regarding the Nygards' vagueness claims. *See* App. 7-10. The Eighth Circuit, relying on its own precedents, announced that facial vagueness challenges are not permitted outside of First Amendment cases. App. 7 (citing *United States v. Orchard*, 332 F.3d 1133, 1138 (8th Cir. 2003); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1015, 1021-22 (8th Cir. 2012)). The court of appeals, like the district court, brought as-applied scrutiny to bare on § 86-66, only regarding how the section applied to the past driveway resurfacing. App. 8-10. Like the district court, the court of appeals ignored that the vagueness claims that the Nygards brought challenged § 86-66 because of how Orono might seek to apply it to future conduct. *See id*.

In short, neither court ever examined, even superficially, the vagueness claims that the Nygards actually pleaded.

The Eighth Circuit reversed the district court's dismissal of Kendall Nygard's malicious-prosecution claim, but otherwise affirmed the district court's judgment. App. 16-17.

REASONS FOR GRANTING THE PETITION

In *Papachristou v. City of Jacksonville*, the Supreme Court struck down a city vagrancy ordinance for being unconstitutionally vague for two different but related Fifth Amendment due process reasons. 405 U.S. at 162-71. First, the ordinance was so broad—it could be interpreted to prohibit being temporarily unemployed, walking for pleasure, or recreating at a country club—that, in practice, it failed to impart fair notice of what would actually be considered a violation. *Id*. at 162-68. Second, because of its breadth, the ordinance conferred unlimited discretion on enforcement authorities, including police and prosecutors, to target whom they pleased; since almost everybody would do something that arguably violated the ordinance, the authorities could use the ordinance to torment anybody that they disliked, regardless of whether the person had broken any other law. *Id*. at 168-71.

Section 86-66 is unconstitutionally vague for the same two reasons. It is so broad that almost everybody who resides in Orono is going to violate it: residents

are not actually going to get a city permit before each time that they "alter, repair, move, improve, remove, convert, or demolish any building or structure, or any part or portion"—doing so would require getting a permit to open or close a door because, in opening or closing a door, a person "move[s] . . . [a] part" of a structure. Since an ordinary person reading the law would not believe that they really need a permit to open or close a door—or to replace a gasket in a kitchen sink faucet, replace a furnace air filter, or replace a lightbulb—an ordinary person would conclude that the section cannot really mean what its plain meaning implies and would thus be left without fair notice of what the section actually requires. And because the section is so broad that everybody will violate its literal terms, the section, like the ordinance in *Papachristou*, confers unlimited discretion on municipal authorities to target people that they dislike, even if those persons are complying with all provisions of the Orono Code whose reach is definite.

Neither the district court nor the court of appeals applied *Papachristou* to test § 86-66's constitutionality. Indeed, neither court even mentioned the case in their opinions.

Moreover, both courts deployed the distinction between facial and as-applied challenges so as to deny meaningful pre-enforcement review for the types of constitutional infirmities detected in *Papachristou*. Both courts denied the possibility of a successful facial vagueness challenge that is not somehow aided by the First Amendment. App. 7-8, 27-28. And both courts

gave as-applied scrutiny only to Mr. Nygard's past replacement of his driveway, not to actions that the Nygards said in their complaint that they want to take in the future. App. 9, 30-31. The courts thus deployed the distinction between facial and as-applied challenges in a way that denied the Nygards any meaningful review of their actual vagueness claim. *See* App. 7-9, 27-31.

Furthermore, the Eighth Circuit's refusal to consider facial validity on pure vagueness grounds conflicts with a Ninth Circuit precedent that did, in fact, sustain a pre-enforcement challenge by holding an ordinance facially unconstitutional on pure vagueness grounds—and did so by relying on *Papachristou*. *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1149, 1153 n.2, 1156-57 (9th Cir. 2014).

The questions presented reflect the conflict between the Eighth Circuit's and Ninth Circuit's reasoning and this Court regarding pre-enforcement vagueness challenges of city ordinances. The Eighth Circuit's decision departs from the concept of an ability to challenge the constitutionality of statutes that directly affect property interests. Because the Eighth Circuit's legal analysis should not stand, there is cause to grant the petition.

A. The Eighth Circuit's opinion erred by failing to apply the rule from *Papachristou* that a law's readily intelligible literal meaning can itself be a source of unconstitutional vagueness if that literal meaning casts a net so wide that nobody knows how to avoid it.

In *Papachristou*, this Court struck down, on void-for-vagueness grounds, a city ordinance so broad that few if any residents of Jacksonville, Florida would be able to avoid vulnerability to arrest for violating its literal terms. 405 U.S. at 162-71. Difficulty understanding what the ordinance literally meant was not the only or even the main problem: the main problem was the ordinance's scope according to its literal terms. *See id*. The ordinance did use some terms that might have failed to impart fair notice, such as the weirdly archaic "'common railers and brawlers,'" *id*. at 156 n.1, but some of the language that this Court relied on in overturning the petitioners' convictions posed a different problem:

> Persons 'neglecting all lawful business and habitually spending their time by frequenting . . . places where alcoholic beverages are sold or served' would literally embrace many members of golf clubs and city clubs.

405 U.S. at 164 (ellipsis in original quotation) (quoting the ordinance). In other words, the ordinance was not vague because of doubt about whether its language was broad enough to reach retirees who habitually drank at the country club bar—those people were, indeed, violating the ordinance under a plain-meaning

interpretation—but because of doubt about who the authorities would treat as violating the ordinance and thus about what, in practice, a person needed to do to avoid being punished for violating it. *See id*. at 164-71.

The implication is that the authorities were probably not going to target retirees drinking at the country club bar, but this awareness raised the question: who then will they target? The ordinance's plain language failed to answer that question precisely because, according to its readily understandable plain terms, it was so broad that it would include even the golf club members. *See id*. Paradoxically, the ordinance's notice of what it "literally embrace[d]" was the reason that the ordinance failed to give fair notice of what it required or prohibited. *Id*. at 164.

This Court also pointed to the ordinance's embrace of "'persons wandering or strolling around from place to place without any lawful purpose or object,'" *id*. at 156 n.1, despite "[t]he qualification 'without any lawful purpose or object,'" because anybody "wandering or strolling" is vulnerable to the accusation that the person is doing so "without any lawful purpose or object," *id*. at 164. This Court might have gone further and said explicitly that very few people are going to be able to avoid walking "from place to place."

The ordinance in *Papachristou* thus posed a vagueness problem different from laws that this Court has struck down because of doubt about the reach of particular vague terms. For example, in *United States v. L. Cohen Grocery Co.*, this Court invalidated a law

that prohibited charging an "'unjust or unreasonable'" price for groceries because of the vagueness of the expression "unjust or unreasonable." 255 U.S. 81, 89 (1921). In *Connally v. Gen. Const. Co.*, this Court held unconstitutionally vague a law that required public-works contractors to pay employees "'not less than the current rate of per diem wages in the locality where the work is performed'" because "the words 'current rate of wages' do not denote a specific or definite sum, but minimum, maximum, and intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done, the efficiency of the workmen, etc." 269 U.S. 385, 388, 393 (1926). And, in *Coates v. City of Cincinnati*, this Court struck down an ordinance that made it a crime for persons to "conduct themselves in a manner annoying to persons passing by" because of the vagueness of the term "annoying." 402 U.S. 611, 611-17 (1971).

Again, the clarity of the ordinance's broad reach in *Papachristou* was the source of the impermissible vagueness. 405 U.S. at 164-71. Fairly read, therefore, *Papachristou* stands for the proposition that due process prohibits any law that criminalizes a broad swath of the population subject to it for engaging in ordinary life activities, and due process does this, even if, or especially if, the law's literal applicability to activities that normal people regularly engage in is clear and explicit. *See id*. It follows therefore that it is no defense to a *Papachristou* void-for-vagueness challenge to say that the challenged law is linguistically definite. *See id*. Under *Papachristou*, a law can be easy for normal

or even subnormal people to understand literally and still be unconstitutionally vague. *See id*.

Petitioners acknowledge that this is a strong characterization of *Papachristou* with considerable potential to invalidate broad criminal laws, but Petitioners respectfully submit that it is also a fair reading that accurately characterizes what this Court said. *See id*.

The vagueness problem with § 86-66, as with the ordinance in *Papachristou*, is *not* the difficulty of determining what it literally means. In fact, Petitioners concede that, for an ordinance, § 86-66(a) is actually pretty easy to understand: you need a city-issued permit to make any repair or improvement, no matter how minor, slight, or trivial, to any building or structure. If you make a repair or improvement without first obtaining a permit, then you are guilty of a crime under § 86-42. The vagueness problem is that this easy-to-understand law casts a net so wide that it must capture everybody who owns a house in Orono, and many other people also.

This is a strong claim, but a few examples will illustrate it. For one thing, the section contains no emergency exception. If a homeowner's furnace fails in the Minnesota winter, the homeowner must wait to obtain a permit before replacing or repairing the furnace, even if the young children in the house freeze to death in the meantime. It is right there in the text: the section requires a permit to "repair . . . ventilating, heating or air conditioning systems," Orono Code § 86-66(a), and the term "ventilating, heating or air

conditioning systems" embraces furnaces. And, if as a result of the delay in the furnace repair, a pipe freezes and bursts, the homeowner must obtain a different permit to repair the pipe, even if the broken pipe starts flooding the house once it defrosts. It is right there in the text: the section requires a permit to "repair . . . plumbing," *id*., and the term "plumbing" embraces pipes.

More common than the need for emergency repairs, however, will be acts of routine maintenance, such as house painting, recaulking, replacing worn plumbing gaskets, replacing fuses or circuit breakers, replacing light bulbs, or adjusting threaded fasteners. According to the section's literal terms, all of these activities require a permit. Petitioners respectfully ask this Court to take the realist position that nobody, no matter how legalistic, is actually going to obtain a permit for all of them, let alone any activity that "improve[s] . . . any building or structure," a class of activities that literally includes vacuuming a building's floor.

Indeed, normal people would not believe that the section would actually be applied to these activities, but because the section's literal language embraces them, normal people are left without notice of what really does require a permit. And law enforcement can use the section to target almost anybody: all a city official has to do is catch a homeowner making a repair or improvement, no matter how slight, minor, routine, or trivial.

That these hypotheticals are not far-fetched is evidenced by the section's bizarre exception for the installation and removal of "seasonal docks," an exception that would be superfluous unless the section really can apply to things that a normal person would be surprised to learn require a permit. And the exception implies that other seasonally-occasioned alterations, such as putting up or removing storm windows, require a permit. Furthermore, the inclusion of this one exception, implies the absence of other exceptions, including for emergency repairs.

A crucial passage in the district court's opinion shows how far the court was from scrutinizing the law for *Papachristou*-type vagueness:

> The Nygards contend that the ordinance "confer[s] unlimited discretion on law enforcement authorities" because "almost everybody would do something that arguably violated the ordinance." Not so. An Orono resident only violates Section 86-66 if he or she fails to obtain a permit before doing one of the things enumerated in the ordinance. Further, the things one cannot do without a permit are clearly enumerated. One cannot "erect, construct, enlarge, alter, repair, move, improve, remove, convert, or demolish any building or structure," without a building permit, and one cannot alter land or install hardcover without a zoning permit.

App. 30-31 (citations omitted). But if an ordinance "clearly enumerate[s]" what is prohibited, then the ordinance in *Papachristou* should have been upheld: it

clearly applied to golf club drinkers. 405 U.S. at 164. In fact, this Court struck down the ordinance not because it failed to list what was prohibited, but because of how "all-inclusive and generalized" the ordinance's list of prohibitions was. *Id*. at 166. The main problem was not doubt about the terms' literal reach, but doubt about reach in practice created precisely because the literal reach was so broad. *See id*. at 164-71.

Neither the district court nor the court of appeals addressed the possibility that § 86-66 might present this kind of broad-net vagueness. The courts avoided the issue by avoiding analyzing how § 86-66 would apply to the things that the Nygards said that they wanted to do. Compl. ¶¶ 122-45. For example, the Nygards pleaded that they anticipated that they would need to make emergency repairs to their Orono property in the future. Compl. ¶ 141. The courts below flatout refused to address this concern.

B. The questions presented warrant this Court's review because the Eighth Circuit's manipulation of the distinction between facial and as-applied challenges effectively nullifies the void-for-vagueness doctrine in pre-enforcement challenges.

Petitioners ask this Court to grant this petition so that it can hold that, in a void-for-vagueness pre-enforcement challenge, the reviewing court must scrutinize the challenged law for *Papachristou*-type

vagueness, even if the court treats the challenge as an as-applied one.

As previously explained, both courts below rejected facial vagueness challenges outside the First Amendment context. App. 7-8, 27-28. Both courts below also gave as-applied scrutiny to only what Mr. Nygard had done in the past, not what the Nygards said that they wanted to do in the future in their complaint. App. 9, 30-31. The courts thus deployed the distinction between facial and as-applied challenges in a way that denied the Nygards any meaningful review of the ordinance as applied to their circumstances. *See* App. 7-9, 27-31.

That the courts below treated this case as being something like an appeal of a conviction—even though Mr. Nygard was acquitted—rather than a pre-enforcement challenge is itself reason enough for this Court to grant the petition.

But the Eighth Circuit's use of the distinction between facial and as-applied challenges warrants this Court's review for another reason. If "'[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness'" through a pre-enforcement challenge. App. 8 (quoting *Parker v. Levy*, 417 U.S. 733, 756 (1974)), then one is left without a way to succeed on a pre-enforcement challenge asserting *Papachristou*-type vagueness: as explained, that type of challenge is based on the *scope* of what the law "clearly" applies to, according to its literal terms. If a court responds to examples of a law's broad application by

saying "yes, the law does clearly apply to all of those things, so you have notice, and so you cannot prevail," then litigants will be left with no way to succeed on a scope-based vagueness attack on any law, no matter how broad. On the Eighth Circuit's reasoning, one could not successfully challenge a law that criminalizes eating: it would "clearly" apply to everybody who is not fasting or being fed through a tube.

The courts below avoided grappling with this reality by refusing to engage what the Nygards were actually saying: that they seek protection from enforcement for making repairs and improvements—including minor or emergency ones—in the future. Compl. ¶¶ 122-45.

But even if the Eighth Circuit were willing to strike down a law as applied to specific proposed courses of action under *Papachristou*, this might do little to help litigants bringing pre-enforcement challenges, precisely because the scope of activities to which a law might be applied can be so large that successful as-applied challenges will not cure the vagueness problem. If an Orono homeowner's furnace fails in winter, bringing a pre-enforcement challenge to § 86-66(a) as applied to furnace repair—and waiting to repair the furnace until the suit is resolved—is not a viable way to obtain a remedy, not even if § 86-66(a) will have already been held unconstitutionally vague as applied to repairing burst pipes, recaulking a bathtub, and replacing a lightbulb.

This discussion is not (merely) an attempt to be funny because a court of appeals has actually discussed the possibility of serial narrow as-applied pre-enforcement vagueness challenges as a way around the almost insurmountable obstacles to prevailing on a facial vagueness challenge. The Second Circuit has upheld New York's notorious gravity-knife law, which criminalizes possession of any knife that can be opened with a flick of the wrist, even if the knife is just an ordinary folding pocket knife. *Copeland v. Vance*, 893 F.3d 101, 107-09 (2d Cir. 2018). In that case, plaintiffs brought a pre-enforcement challenge, seeking to have the law declared unconstitutionally vague as applied to "common folding knives." *Id*. at 109. Ironically, because the law was in practice applied almost exclusively to common folding knives, rather than true gravity knives, *id*. at 109, the court treated the challenge as facial rather than as-applied, *id*. at 112, and upheld the law because the court determined that the law is not vague in all applications, *id*. at 121. The court said that "in principle" the plaintiffs might bring narrow pre-enforcement challenges to the law as applied to *particular* folding knives that they want to carry in the future. *Id*. at 112. The court did not discuss whether bringing such suits would be economical, even for MacGyver.

The Nygards respectfully ask this Court to grant this petition so that this Court can consider allowing pre-enforcement challenges that attack a law's overall scope rather than the elasticity of particular terms, even if doing so requires that this Court limit the reach

of some of its earlier decisions, *e.g.*, *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 494-95, 497 (1982). If this Court is unwilling to permit facial vagueness challenges that do not involve the First Amendment, then it can consider crafting some other doctrine to allow successful pre-enforcement scope-based vagueness challenges.

Hearing this case will thus give this Court an opportunity to address an issue of national importance: this Court's existing void-for-vagueness caselaw is subject to competing interpretations, some of them potentially narrowing the doctrine to the point of nullifying it, at least for pre-enforcement challenges of the kind brought by the Nygards. And these competing interpretations do not arise only, or even primarily, from the failure of the *Morales* plurality opinion's discussion of facial invalidity to gain majority approval. *See* 527 U.S. at 55 (plurality opinion).

For example, in *Flipside*, which was pre-enforcement challenge, this Court announced an almost impossibly high bar for a vagueness challenge not reinforced by some right other than due process: "A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications." 455 U.S. at 497; *see also id*. at 494-95.

Since this Court said that, this Court has hinted that it might want to narrow or qualify that pronouncement: "[A]lthough statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson v. U.S.*, 576 U.S. 591, 602 (2015). *Johnson* involved an appeal of a criminal sentence, *id*. at 594-95, not a pre-enforcement challenge, and so this Court could have declared the clause at issue unconstitutional only as applied to the defendant, but this Court's opinion can be read to imply that courts are not to apply the clause in future cases, *see id*. at 597, 606.

Interestingly, Justice Scalia wrote this Court's opinion in *Johnson*, even though, in his *Morales* dissent, Justice Scalia challenged the propriety of ever holding a law facially unconstitutional, *Morales*, 527 U.S. at 74-77 (Scalia, J., dissenting). And, in some of his other opinions, Justice Scalia suggested that some federal laws are universally invalid for vagueness because nobody knows what they mean, *see*, *e.g.*, *Skilling v. United States*, 561 U.S. 358, 416, 424 (2010) (Scalia, J., concurring); *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 256 (1989) (Scalia, J., concurring), even though, in one of those cases, Justice Scalia also reaffirmed his opposition to facial challenges, *Skilling*, 561 U.S. at 424 (Scalia, J., concurring) (citing *Morales*, 527 U.S. at 77 (Scalia, J., dissenting)).

Complicating things still more is a bit of history that is rarely discussed in vagueness caselaw: one the

first cases in which this Court discussed facial invalidity was, in fact, a vagueness case, in which this Court appeared to declare a law facially unconstitutional on pure due process vagueness grounds. *See Lanzetta v. State of N.J.*, 306 U.S. 451, 453 (1939). In *Lanzetta*, this Court struck down a law that provided that anybody who satisfied certain criteria was "'declared to be a gangster,'" and hence guilty of a crime. *Id*. at 452 (quoting the criminal law at issue). In explaining why the law failed to provide fair notice, this Court announced that what matters is the text of the law itself, not the specifics of how a defendant allegedly violated it:

> If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression.

Id. at 453 (citations omitted). Beyond quoting the boilerplate indictment, *id*. at 452, this Court did not even discuss what the defendants challenging their convictions under this law were accused of having done. *Lanzetta*, which has never been overruled, is thus in serious tension with this Court's direction in *Flipside* to uphold a law against a vagueness challenge as long as the court is satisfied that the challenger's conduct is within the law's scope. 455 U.S. at 495.

Despite these nuances and complications, the courts of appeals have been wielding *Flipside* or similar caselaw to make winning on a pre-enforcement

vagueness challenge almost impossible. *See*, *e.g.*, App. 5 (citing *Gallagher v. City of Clayton*, 699 F.3d 1013, 1015, 1021-22 (8th Cir. 2012); *United States v. Orchard*, 332 F.3d 1133, 1138 (8th Cir. 2003)); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1021 (8th Cir. 2012) (citing *United States v. Mazurie*, 419 U.S. 544, 550 (1975)); *Copeland*, 893 F.3d at 110-11 (citing *Flipside*, 455 U.S. at 495).

Few readers of this Court's opinion in *Papachristou* would conclude that this Court invalidated the ordinance at issue as applied only to the parties challenging their convictions and left the city free to enforce it against others in the future. Indeed, this Court's analysis of the ordinance relied hardly at all on the facts of the challengers' cases, and relied instead on hypotheticals, such as application to people drinking at a golf club, 405 U.S. at 164-71. If litigants are going to be able to successfully invoke that landmark case in the Eighth Circuit, they cannot because the court of appeals has erected well-nigh insurmountable barriers to prevailing on a scope-based vagueness challenge.

C. The Eighth Circuit's denial of the possibility of bringing a facial vagueness challenge outside the First Amendment context directly conflicts with Ninth Circuit caselaw.

Unsurprisingly given the complexities of this Court's vagueness jurisprudence, a circuit spilt exists on the permissibility of a pre-enforcement facial

challenge on pure vagueness grounds. Although the lower courts have generally been hostile to pre-enforcement vagueness challenges, the Ninth Circuit has been an outlier. In *Desertrain*, the Ninth Circuit, in a section 1983 pre-enforcement case, held facially unconstitutional on pure vagueness grounds a Los Angeles ordinance prohibiting living in an automobile. 754 F.3d at 1149, 1153 n.2, 1157 (9th Cir. 2014). Moreover, the Ninth Circuit reached this conclusion by holding that the law failed to give adequate notice under *Lanzetta, id*. at 1155 (citing *Lanzetta*, 306 U.S. at 453), and failed to properly limit law-enforcement discretion under *Papachristou, id*. at 1156-57 (citing *Papachristou*, 405 U.S. at 158, 162, 163, 170, 171). The Ninth Circuit's opinion is thus in direct and deep conflict with the Eighth Circuit's opinion in this case.

Thus, a direct conflict exists regarding the Eighth Circuit's analytical approach to pre-enforcement constitutional challenges to city ordinances affecting property interests. Granting this petition will allow this Court to clarify the law. Home owners throughout the nation are subject to permitting requirements in a variety of ways that affect their property interests. And when they allegedly run afoul of a city ordinance process, criminal prosecution is an enforcement mechanism available to cities against their citizens. Clarity in the law will result in helping home owners ensure their rights are not impeded by opaque criminally enforceable city ordinances.

CONCLUSION

To ensure the possibility of meaningful pre-enforcement challenges on vagueness grounds, and, more specifically, to ensure pre-enforcement scrutiny for *Papachristou*-type vagueness, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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