No. _____

IN THE

Supreme Court of the United States

CHRISTOPHER HASSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, to prevail on a facial void-for-vagueness challenge, a criminal defendant must show that the statute under which he is prosecuted is vague as applied to his own conduct.

RELATED PROCEEDINGS

United States v. Hasson, No. 8:19-cr-96-GJH, United States District Court for the District of Maryland. Judgment entered Feb. 6, 2020.

United States v. Hasson, No. 20-4126, United States Court of Appeals for the Fourth Circuit. Judgment entered Feb. 22, 2022.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

State Cases: **Page(s)**

Statutes: **Page(s)**

INTRODUCTION

Until 2015, this Court's cases endorsed two principles that limited the circumstances under which a litigant could demonstrate a statute was void for vagueness on its face. The first provided that a statute is facially vague only if it is "impermissibly vague in all of its applications." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). Call this the "all-its-applications principle." The second instructed that a party could not prevail on a facial challenge unless he first showed the statute was vague as applied to his own conduct. Call this the "own-conduct principle." *See Parker v. Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

Then, in *Johnson v. United States*, the Court definitively rejected the first of these principles, holding a statute does not survive a facial vagueness challenge "merely because there is some conduct that clearly falls within the provision's grasp." 576 U.S. 591, 602 (2015). But *Johnson*, and the Court's follow-on opinions in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *United States v. Davis*, 139 S. Ct. 2319 (2019), left the continuing vitality of the second principle—the own-conduct principle—in doubt. In those three cases, the Court invalidated statutes as facially vague without requiring the challengers to establish as-applied vagueness first. The *Johnson* and *Dimaya* dissenters argued that, because the statutes in those cases were not vague as applied to the challengers, the own-conduct principle foreclosed their facial attacks. But in neither case did the majority confront that argument head-on, explicitly repudiate the own-conduct principle in total, or announce a new exception to that principle.

Against this backdrop, petitioner Christopher Hasson brought a facial vagueness challenge to 18 U.S.C. § 922(g)(3), which prohibits firearm possession by anyone "who is an unlawful user of or addicted to any controlled substance." Notwithstanding the *Johnson-Dimaya-Davis* trilogy's apparent abandonment of the own-conduct principle, the district court and the court of appeals held Hasson's facial attack failed because he could not show § 922(g)(3) was vague as applied. The Fourth Circuit concluded those cases' "unique context sets them apart." App.19a. Specifically, the Fourth Circuit reasoned that the statutes in *Johnson*, *Dimaya*, and *Davis* called for the categorical approach, which required applying "imprecise qualitative standards to the judicially imagined 'ordinary case' of a crime," rather than considering "a defendant's real-world conduct." App.19a. Thus the Fourth Circuit determined, in effect, that the own-conduct principle remains valid, but subject to an exception—never articulated by this Court—for categorical-approach statutes.

The Fourth Circuit's ruling is representative of the disarray among lower courts trying to make sense of *Johnson*, *Dimaya*, and *Davis*. A number of courts have held the own-conduct principle still applies, seemingly in all contexts, notwithstanding that this Court's recent cases have not applied it. Others, like the Fourth Circuit, have concluded the principle applies but is now subject to a de facto exception for categorical-approach statutes. Still other courts have held, or at least assumed, that *Johnson-Dimaya-Davis* abrogated the own-conduct principle not just for categorical-approach statutes, but for all statutes. A few courts have hypothesized that the principle controls vagueness challenges based on an arbitrary-enforcement theory, but not a

lack-of-notice theory. Finally, several courts have said they simply don't know what the law is—that *Johnson-Dimaya-Davis* obscured the relevance of the own-conduct principle and left the legal landscape unsettled.

The confusion reigning in the lower courts is reason enough for this Court to grant certiorari. But the Court should take up Hasson's case for another reason as well: the own-conduct principle is theoretically unsound, and it places the void-for-vagueness doctrine in tension with other aspects of this Court's case law.

Until recently, this Court rooted the vagueness doctrine primarily in the Due Process Clause and attendant notions of fair notice and evenhanded enforcement. On that understanding, it may have made sense to hold that where a defendant surely knows a statute proscribes his own conduct, no constitutional violation occurs. More recent cases, however, have emphasized that the void-for-vagueness doctrine owes an "equal debt to the separation of powers." *Dimaya*, 138 S. Ct. at 1227 (Gorsuch, J., concurring). Conceptually, a vagueness challenge is no different from a non-delegation challenge; it alleges Congress has bestowed on police officers, prosecutors, judges, and juries the fundamentally legislative function of articulating the standard that divides criminal from non-criminal conduct. And this Court treats separation-of-powers/non-delegation claims as inherently facial claims that do not depend on the facts of a particular case. The Constitution either permits Congress to delegate certain power, or it does not. How a delegee uses that power in a particular instance is of no constitutional significance to whether the delegation was proper in the first place. Like a litigant who brings a non-delegation or other separation-of-powers claim, therefore, a litigant bringing a vagueness

claim should be able to prevail on a facial challenge without making an additional showing specific to his own case. Because the own-conduct principle is inconsistent with the separation-of-powers account of vagueness, the Court should grant certiorari, vacate the Fourth Circuit's judgment, and remand for consideration of whether § 922(g)(3) is vague on its face.

OPINIONS BELOW

The district court's order denying Hasson's motion to dismiss is at 2019 WL 4573424 (D. Md. Sept. 20, 2019) and is reproduced in the appendix. App.35a-54a. The Fourth Circuit's opinion is reported at 26 F.4th 610 (4th Cir. Feb. 22, 2022) and is reproduced in the appendix. App.1a-32a.

JURISDICTION

The court of appeals' decision issued on February 22, 2022. App.1a. On March 7, 2022, Hasson filed a petition for rehearing en banc, which the court of appeals denied on March 22, 2022. App.33a-34a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

18 U.S.C. § 922(g)(3) is set out in the appendix. App.55a.

STATEMENT OF THE CASE

The void-for-vagueness doctrine deems a law unconstitutional if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Though never entirely stable, the doctrine had until recently undergone no significant transformation in decades. Beginning with *Johnson*, however, and continuing through *Dimaya* and *Davis*, the Court's recent opinions have signaled a shift in how it approaches vagueness challenges. Hasson's vagueness claim below, and his petition to this Court, concern that shift.

I. *Johnson*, *Dimaya*, and *Davis* seemingly altered the rules applicable to facial vagueness challenges.

A. *Johnson*

Under the Armed Career Criminal Act (ACCA), a felon-in-possession defendant faces a mandatory-minimum fifteen-year prison sentence if he has three or more prior convictions for a "violent felony." 18 U.S.C. § 924(e)(1). The ACCA defines a violent felony to include any offense punishable by more than one year that "is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." *Id.* § 924(e)(2)(B)(ii). At issue in *Johnson* was the italicized portion of this definition, known as the "residual clause."

576 U.S. at 593-94. To determine whether a prior offense qualifies as a violent felony, courts apply the categorical approach, which "assesses whether a crime qualifies as a violent felony in terms of how the law defines the offense" in the abstract, "and not in terms of how an individual offender might have committed it on a particular occasion." *Id.* at 596. For the residual clause, the categorical approach required courts to imagine the "ordinary case" of a crime and then ask whether "that abstraction presents a serious potential risk of physical injury." *Id.*

The Court held "[t]wo features of the residual clause conspire[d] to make it unconstitutionally vague." *Id.* at 597. First, it "leaves grave uncertainty about how to estimate the risk posed by a crime." *Id.* The residual clause "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements," but it does not make clear how courts should "go about deciding what kind of conduct the 'ordinary case' of a crime involves." *Id.* Second, "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 598. While applying "an imprecise 'serious potential risk' standard to real-world facts" might be constitutionally tolerable, "apply[ing] it to a judge-imagined abstraction" is not. *Id.* Accordingly, the Court held the residual clause void for vagueness on its face: "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* The Court reached this holding without first concluding the residual clause was vague as applied to the petition-

er's prior conviction for possessing a short-barreled shotgun.

In dissent, Justice Alito criticized the majority for ignoring the all-its-applications principle, which instructs that this Court "will hold that a law is facially invalid 'only if the enactment is impermissibly vague in *all* of its applications.'" *Id.* at 636 (emphasis in original). The majority responded that, in fact, no such principle exists: "although 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." *Id.* at 602 (emphasis in original). After all, for just about any statute, including several this Court had facially invalidated, it is possible to imagine at least *some* conduct that is obviously proscribed. *See id.* at 602-03.

Justice Alito raised another objection as well, based on his view that the petitioner's prior conviction clearly qualified as a violent felony under the residual clause. *Id.* at 639-42. By sidestepping the question whether the residual clause was vague as applied, Justice Alito argued, the majority had "reject[ed]" this Court's "repeated statements that 'vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts . . . at hand,'" that is, "on an as-applied basis." *Id.* at 636, 638 (emphasis omitted) (quoting *United States v. Mazurie*, 419 U.S. 544, 550 (1975)). The majority did not respond to this portion of the dissent.

B. *Dimaya*

Three years later in *Dimaya*, the Court confronted a facial vagueness challenge to the residual clause in 18

U.S.C. § 16(b), which defines a "crime of violence" as any "offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 138 S. Ct. at 1211. That clause, like its ACCA counterpart, required courts to apply the categorical approach, asking "whether 'the ordinary case' of an offense poses the requisite risk." *Id.* The Court resolved the case through a "straightforward application" of *Johnson*, holding "§ 16's residual clause has the same two features as ACCA's, combined in the same constitutionally problematic way." *Id.* at 1213. First, § 16(b) "offered no reliable way to discern what the ordinary version of any offense looked like." *Id.* at 1214. And second, it left "uncertainty about the level of risk that makes a crime 'violent.'" *Id.* at 1215. As in *Johnson*, neither the plurality nor Justice Gorsuch, whose concurrence supplied the fifth vote for affirmance, addressed whether the residual clause was vague as applied to the respondent's prior conviction for California first-degree burglary.

Dissenting, Justice Thomas repeated both of the criticisms from Justice Alito's *Johnson* opinion. First, he maintained that a statute is facially vague only if it is vague "in *all* applications." *Id.* at 1250 (emphasis in original). And second, he insisted that, "outside the First Amendment context, a challenger must prove that the statute is vague as applied to him." *Id.* Because Justice Thomas concluded "§ 16(b) [wa]s not vague as applied to respondent," he would have reversed. *Id.* The majority responded with a footnote that squarely addressed the first of these contentions—and danced around the second:

> *Johnson* also anticipated and rejected a significant aspect of Justice THOMAS's dissent in this case. According to Justice THOMAS, a court may not invalidate a statute for vagueness if it is clear in any of its applications—as he thinks is true of completed burglary, *which is the offense Dimaya committed.* But . . . *Johnson* made clear that our decisions "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp."

Id. at 1214 n.3 (emphasis altered). Other than this footnote, the majority did not address the own-conduct principle or Justice Thomas' assertion that it precluded relief for the petitioner.

C. *Davis*

Davis considered a challenge to 18 U.S.C. § 924(c), which prohibits using a firearm during and in relation to a "crime of violence." 139 S. Ct. at 2324. The statute's residual clause defines that term to include a felony "'that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.'" *Id.* (quoting § 924(c)(3)(B)). Both parties agreed that, if § 924(c) required the same categorical-approach analysis as the ACCA and § 16(b) residual clauses, it would be facially void for vagueness for the reasons the Court articulated in *Johnson* and *Dimaya*. *Id.* at 2327. But the government argued the Court should instead apply a "case-specific approach," which would ask whether the defendant's real-world conduct, rather than the ordinary case of a crime, presented a sufficient risk of force.

Id. The Court rejected that position, holding as a matter of statutory interpretation that § 924(c)(3)(B) required the categorical approach. *Id.* at 2327-33. As a result, the § 924(c) residual clause was vague on its face. The Court so concluded without pausing to decide whether the residual clause was vague as applied to conspiracy to commit Hobbs Act robbery, the predicate crime of which the respondents had been convicted.

Justice Kavanaugh wrote a dissent, joined by three other justices, that focused entirely on the question whether § 924(c)(3)(B) requires the categorical approach or a case-specific approach. *Id.* at 2336-55. He did not argue the residual clause's application was clear as to conspiracy to commit Hobbs Act robbery, nor did he assert the own-conduct principle controlled the case.

II. The Fourth Circuit held Hasson could not challenge § 922(g)(3) on its face because the statute does not call for the categorical approach.

In February 2019, a grand jury indicted Hasson on one count of possessing a firearm while being "an unlawful user and addict of a controlled substance," under § 922(g)(3); one count of possessing an unregistered firearm silencer, under 26 U.S.C. § 5861(d); one count of possessing a firearm silencer unidentified by serial number, under 26 U.S.C. § 5861(i); and one count of possessing a Schedule IV controlled substance (Tramadol), under 21 U.S.C. § 844(a). J.A.69-72. Hasson filed a motion to dismiss the § 922(g)(3) count, arguing the terms "unlawful user" and "addict" rendered the statute void for vagueness on its face. J.A.221-36. He acknowledged that some of this Court's cases had embraced the own-conduct principle, i.e., the rule that a defendant "'who

engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" J.A.271 (quoting *Vill. of Hoffman Estates*, 455 U.S. at 495). But he argued that following *Johnson* and its progeny, that principle no longer applied, and so he could raise a facial vagueness challenge even if § 922(g)(3) was not vague as applied to him. J.A.271-74.

The district court denied Hasson's motion. App.35a-36a. It acknowledged that *Johnson* declared the ACCA residual clause "to be unconstitutionally vague without requiring the defendant to show that the ACCA was vague as applied to his particular conduct." App.48a. But it held *Johnson* "did not expand the universe of litigants who may attack statutes as facially vague." App.49a. According to the district court, *Johnson*'s analysis was "sui generis" because the residual clause required courts to assess "the degree of risk posed by an idealized 'typical' version of an offense," rather than "the risks posed by a set of actual, concrete facts." App.49a. Because § 922(g)(3) "does not call for the court to engage in any abstract analysis," the district court concluded the statute was subject to the own-conduct principle, unlike categorical-approach statutes. App.49a. Hasson therefore could not win a facial challenge absent a showing that § 922(g)(3) was vague as applied, which he did not assert. App.49a-51a.

Hasson pled guilty to all counts in the indictment pursuant to a plea agreement that preserved his right to appeal the district court's denial of his motion to dismiss. J.A.665-75. On appeal, Hasson renewed his argument that, in light of the *Johnson* line of cases, he could mount a facial vagueness challenge without first showing § 922(g)(3) was vague as applied. C.A. Def. Br. 22-34.

He explained that the district court's attempt to distinguish *Johnson*—which focused on the difficulty of applying the categorical approach to the residual clause—confused "[t]he threshold question of *who* can mount a facial challenge" with "the ultimate merits question of *whether* a statute is vague." C.A. Def. Reply Br. 8 n.1. That is, the fact that the ACCA residual clause required applying an imprecise standard to a judge-imagined abstraction explained why that clause was facially vague; it did not explain why the *Johnson* petitioner was excused from making an as-applied showing.

The Fourth Circuit affirmed. Like the district court, it concluded the statutes in *Johnson*, *Dimaya*, and *Davis* were "unique" because of "the peculiar double-indeterminacy posed by applying the residual clauses' imprecise qualitative standards to the judicially imagined 'ordinary case' of a crime required by the categorical approach." App.19a. Therefore, the Fourth Circuit concluded, courts still must conduct "a traditional as-applied vagueness analysis" whenever the statute in question applies to "a defendant's real-world conduct," as § 922(g)(3) does, rather than calling for the categorical approach. App.19a.

Hasson filed a petition for rehearing en banc, which the Fourth Circuit denied. App.33a-34a.

REASONS FOR GRANTING THE WRIT

In the years since *Johnson-Dimaya-Davis*, the lower courts have struggled to reconcile those cases with this Court's prior endorsement of the own-conduct principle, i.e., the rule that a litigant's facial vagueness challenge necessarily fails if the statute is not vague as applied to his own conduct. Lacking a clear statement

from this Court about the circumstances under which a facial challenger may bypass an as-applied vagueness claim, state and federal courts have fashioned a series of tentative and conflicting rules that have left the law in a state of uncertainty. That uncertainty calls out for clarification.

Lower courts' confusion aside, the own-conduct principle fits uncomfortably with other aspects of this Court's case law. Disavowing that principle would provide much-needed coherence to a doctrine that state and federal courts are regularly called on to apply.

Beginning with its first vagueness case in 1914, this Court for more than a century characterized the void-for-vagueness doctrine as being rooted in the Due Process Clause. On this account, the doctrine secured a litigant's personal, individual right to advance notice of what is prohibited and to principled, non-discriminatory enforcement of the law. But beginning in *Dimaya*, and then again in *Davis*, the Court recast the doctrine's foundations. The prohibition on vague laws, those cases explained, is grounded not only in due process, but also in the separation of powers. Under separation-of-powers principles, and in particular non-delegation principles, Congress may not confer on police officers, prosecutors, judges, or juries the power to define the line that separates lawful from unlawful conduct. A vague law therefore contravenes the separation of powers because it violates the structural limits that the Constitution places on Congress' authority.

This conception of the vagueness doctrine has consequences for the class of litigants entitled to mount facial challenges. As this Court's cases make clear, a separation-of-powers/non-delegation challenge is inherently a facial challenge. When the Court invalidates a statute

on separation-of-powers grounds, it holds the statute cannot validly be applied under any circumstances—not just that its application is improper as to a specific party. And if that's true, then a criminal defendant should be permitted, in every case, to bring a facial vagueness challenge to a statute under which he is prosecuted. A vague law violates the separation of powers regardless of whether any given litigant could know in advance that prosecutors or the courts would label his conduct criminal; whether Congress has improperly transferred core legislative authority does not depend on whether a particular defendant receives "fair notice." Renouncing the own-conduct principle, therefore, would conform the vagueness doctrine to general separation-of-powers principles and provide it an internal consistency it has long been missing.

I. The lower courts are badly fractured over the import of *Johnson*, *Dimaya*, and *Davis*.

This Court's pre-*Johnson* cases frequently recited the rule that a party "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *E.g.*, *United States v. Williams*, 553 U.S. 285, 304 (2008). The Court sometimes relied on this own-conduct principle to hold that a challenger's facial vagueness claim failed because he had not shown the statute was vague as applied. *E.g.*, *Vill. of Hoffman Estates*, 455 U.S. at 500 ("Under either the 'designed for use' or 'marketed for use' standard, we conclude that at least some of the items sold by Flipside are covered. Thus, Flipside's facial challenge is unavailing."). But in *Johnson*, *Dimaya*, and *Davis*, the Court ignored the own-conduct principle, striking down statutes as facially vague without de-

manding that the challengers demonstrate the statutes were vague as applied.

Despite protests from the dissenters in two of those cases, the Court gave no explanation for breaking from its past practice. The lower courts have filled this vacuum with clashing accounts of whether, and under what circumstances, a litigant is still required to show a statute is vague as applied in order to prevail on a facial challenge.

Some courts have continued applying pre-*Johnson* law as though the *Johnson-Dimaya-Davis* triad changed nothing. These courts still quote and apply the own-conduct principle, apparently unaware that this Court's recent cases have declined to apply it. *See, e.g.*, *United States v. KT Burgee*, 988 F.3d 1054, 1060 (8th Cir. 2021) ("When reviewing for vagueness, we first determine if a statute is vague as applied to the defendant's conduct, and only if it is will we consider whether a statute is facially unconstitutional."); *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1190 (10th Cir. 2021) (explaining that where "statutory terms are clear in their application to [a litigant's] conduct," a facial "vagueness challenge must fail"), *cert. granted on other grounds*, 142 S. Ct. 1106 (2022); *People v. Abbate*, 58 Cal. App. 5th 100, 109 (2020) (confirming that notwithstanding *Johnson*, "a defendant who engages in conduct clearly proscribed by a law cannot complain of the law's vagueness as applied to the conduct of others").

A second group of courts has, like the Fourth Circuit, concluded that the own-conduct principle remains valid in general, but not as to statutes requiring the categorical approach. In *United States v. Cook*, for example, the Seventh Circuit wrote that "so much of the Court's analysis in *Johnson* deals with a statute that is

in key respects *sui generis*." 970 F.3d 866, 874, 876 (7th Cir. 2020). The ACCA is different from most statutes, the Seventh Circuit believed, because the categorical approach "requir[es] courts to look not at the actual conduct underlying the defendant's prior conviction but rather at the archetypal version of the offense, and then to consider whether the risk of injury posed by that version was sufficient to render the crime violent." *Id.* Thus these courts have, in essence, fashioned an exception to the own-conduct principle for the categorical approach: if a statute calls for assessing "the degree of risk posed by an idealized 'typical' version of an offense," courts like the Fourth and Seventh Circuits will permit defendants to skip as-applied vagueness and proceed directly to a facial attack; otherwise, the own-conduct principle still applies. *Id.*; *accord State v. Tulley*, 428 P.3d 1005, 1017-18 (Utah 2018) (noting "the Supreme Court bypassed the traditional as-applied inquiry in *Johnson*," but concluding "the Court appeared to limit *Johnson* to statutes that require courts to employ the categorical approach"); *United States v. Hernandez-Lincona*, No. 3:18-CR-00268-WHO-1, 2019 WL 1767205, at *8 (N.D. Cal. Apr. 22, 2019) ("*Johnson* and *Dimaya* together establish that individuals facing deportation under a law that employs the categorical approach can bring facial challenges whether or not they would succeed on an as-applied basis."); *Bowling v. McDonough*, No. 2021-1945, 2022 WL 2309909, at *8-9 (Fed. Cir. June 28, 2022) (holding own-conduct principle applied where regulation at issue, "unlike the laws at issue in *Johnson* and *Dimaya*, d[id] not call for a categorical approach to interpretation").

Other courts have surmised that that while the own-conduct principle still applies to vagueness claims

based on lack of notice, it is inapplicable to arbitrary-enforcement claims. This view rests on the idea that the vagueness doctrine's arbitrary-enforcement prong is the "'more important'" of the two, and so this Court is "particularly sensitive to laws that are vague due to the lack of guiding standards or the potential for arbitrary enforcement." *United States v. Stupka*, 418 F. Supp. 3d 402, 409 (N.D. Iowa 2019) (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). Therefore, when a litigant makes an arbitrary-enforcement claim, "special consideration should be given to facial challenges . . . , regardless of whether the defendant could prevail on an as-applied challenge." *Id.*; *see also Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia*, 846 F.3d 391, 410 (D.C. Cir. 2017) ("[I]t is not apparent how the *Humanitarian Law Project* rule—barring a person to whom a legal provision clearly applies from challenging its facial failure to give sufficient notice to others—could apply to a claim that a law is so vague as to fail to guide the government's enforcement discretion."); *cf. State v. Harris*, 311 Kan. 816, 820 (2020) (appearing to conclude own-conduct principle has no bearing "in the context of an overbroad law that invites arbitrary enforcement").

On the other hand, some courts have read *Johnson-Dimaya-Davis* to abrogate the own-conduct principle entirely—not just for categorical-approach statutes, and not just for arbitrary-enforcement claims. In *United States v. Morales-Lopez*, for example, the court held that "*Johnson*, properly applied, . . . allows a defendant to bring a facial challenge without regard to the particular facts of his case." No. 2:20-CR-00027-JNP, 2022 WL 2355920, at *5 (D. Utah June 30, 2022). The court noted that the *Johnson* Court "allowed the defendant in that

case to mount a facial attack on the residual clause without any showing that it was unconstitutional as applied to him." *Id.* at *4. And it pointed out, correctly, that "[n]othing in *Johnson*—or the subsequently decided opinions in *Davis* or *Dimaya*—purported to limit *Johnson*'s holding to only statutes that require a 'categorical approach.'" *Id.* at *6. Indeed, *Johnson* relied on "previous cases in which the Supreme Court had declared facially vague statutes that required courts to look at real-world conduct," rather than a judge-imagined abstraction. *Id.* (citing *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921), cited in *Johnson*). While a categorical-approach statute "may require heightened scrutiny" when a court decides whether the statute is in fact vague, "neither *Davis* nor *Johnson* stated or implied that a statute is *immune from a facial challenge* merely because it may be applied to real-world conduct." *Id.* at *5 (emphasis altered). The *Morales-Lopez* court therefore held the statute at issue in that case—§ 922(g)(3), the same statute with which Hasson was charged—is facially void for vagueness regardless of its application to any given defendant. *Id.* at *12.

In a different case concerning the definition of "machinegun" under 26 U.S.C. § 5845(b), the government argued that "[i]n causes of action not involving the First Amendment, [courts do] not consider whether the statute is unconstitutional on its face, but whether it is impermissibly vague in the circumstances of the particular case." *United States v. Kuzma*, No. 18-10042, Dkt. #29 at 12 (9th Cir. Feb. 25, 2019). The Ninth Circuit rejected that argument, reasoning that "[t]he facial invalidations" in *Johnson*, *Dimaya*, and *Davis* "refute the Government's assertion that, outside the First Amendment context, only as-applied vagueness challenges may

be considered." *United States v. Kuzma*, 967 F.3d 959, 971 n.10 (9th Cir. 2020).[1] Likewise, at least two state courts have determined a facial challenger no longer needs to establish that a statute is vague as applied, even when the statute does not involve the categorical approach or an arbitrary-enforcement challenge. *See Commonwealth v. Curry*, 607 S.W.3d 618, 623-24 & n.24 (Ky. 2020) (citing cases that mentioned own-conduct principle, noting *Johnson* and *Dimaya* ignored this supposed rule, and proceeding to facial vagueness challenge without regard to "the facts of the underlying case"); *State v. Gutierrez*, 472 P.3d 1260, 1271-72 (N.M. Ct. App. 2020) (quoting own-conduct principle, adding "*But see*" citation to *Johnson*, and facially invalidating three statutory provisions after expressly declining to "consider an as-applied challenge").

Finally, one court has nominally adhered to the own-conduct principle, but in a way that differs from pre-*Johnson* case law. Less than a year after *Johnson*, the Fifth Circuit acknowledged that a defendant cannot raise a facial vagueness challenge "simply because some

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[1] A different Ninth Circuit panel took the position that the Fourth Circuit adopted in Hasson's case: that *Johnson-Dimaya-Davis* jettisoned the own-conduct principle only for categorical-approach statutes. *Kashem v. Barr*, 941 F.3d 358, 376-77 (9th Cir. 2019) (concluding that "to the extent *Johnson* and *Dimaya* bypassed as-applied challenges and proceeded directly to facial vagueness, that approach appears to have turned on the exceptional circumstances of the provisions at issue," even though this Court "did not say so explicitly"). Given this intra-court split, the Ninth Circuit currently treats the own-conduct principle's continuing validity as an open question. *See United States v. Hudson*, 986 F.3d 1206, 1214 n.3 (9th Cir. 2021) (noting conflict between *Kuzma* and *Kashem*, but finding it unnecessary to resolve the issue).

hypothetical *other* defendant's conduct might create a vague application of the statute." *United States v. Gonzalez-Longoria*, 813 F.3d 225, 229 (5th Cir. 2016) (emphasis in original). But the court added that "[t]his restriction ... does not mean that every defendant must first show that a statute is vague as applied to him as a predicate to any further argument of facial vagueness." *Id.* Instead, the Fifth Circuit, citing *Johnson*, concluded the own-conduct principle "is best taken as illustrating the high bar for facial vagueness challenges" on the merits. *Id.* The own-conduct principle still applies, in other words, but it does not actually make as-applied vagueness a prerequisite to a successful facial attack—even though that is exactly what this Court previously said the principle did.[2]

In short, *Johnson*, *Dimaya*, and *Davis* have engendered pervasive uncertainty about whether, and under what circumstances, a litigant bringing a facial vagueness challenge must demonstrate a statute is vague as applied. *See, e.g.*, *People v. Plemmons*, 490 P.3d 1112, 1117 (Colo. Ct. App. 2021) ("Turning to Plemmons's fa-

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[2] The Fifth Circuit later vacated the *Gonzalez-Longoria* panel opinion and, sitting en banc, reversed its conclusion that 18 U.S.C. § 16(b) is facially void for vagueness. *United States v. Gonzalez-Longoria*, 831 F.3d 670, 674-77 (5th Cir. 2016) (en banc). The en banc court, however, did not reject the panel's interpretation of the own-conduct principle. And, even though the en banc court concluded § 16(b) was not vague as applied, *id.* at 677-78, it entertained the defendant's facial claim. Nevertheless, subsequent Fifth Circuit opinions have recited the own-conduct principle, *e.g.*, *Echo Powerline, L.L.C. v. Occupational Safety & Health Rev. Comm'n*, 968 F.3d 471, 476 (5th Cir. 2020), rendering the court's post-*Johnson* vagueness case law internally inconsistent.

cial challenge, we note at the outset that the state of the law in this area is not entirely clear."); *Hale v. State*, 171 N.E.3d 141, 149 (Ind. Ct. App. 2021) ("[I]t is not clear whether and to what extent *Johnson* abrogated the old rule that a criminal statute must be unconstitutionally vague as applied to a particular defendant in order to confer standing on that defendant to raise a facial challenge."); *People v. Superior Ct. (J.C. Penney Corp.)*, 34 Cal. App. 5th 376, 403 (2019) ("To the extent *Johnson* declined to look first at the defendant's conduct, it created uncertainty regarding the high standard for a successful facial challenge."); *Cook*, 970 F.3d at 876 ("It is not clear how much *Johnson* [and *Dimaya*] actually expand the universe of litigants who may mount a facial challenge to a statute they believe is vague."); *United States v. Rupert*, No. 20-CR-104 (NEB/TNL), 2021 WL 1341632, at *19 (D. Minn. Jan. 6, 2021) ("The case law on the issue of when a facial void-for-vagueness challenge is allowed is limited and unclear.").[3]

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[3] Indeed, the confusion sewn by *Johnson-Dimaya-Davis* extends beyond the own-conduct principle. Notwithstanding those cases' unambiguous statements that a statute can be facially vague even if it is not vague in all applications, some courts, both federal and state, continue to apply the all-its-applications principle. *E.g.*, *United States v. Anderton*, 901 F.3d 278, 284 (5th Cir. 2018); *State v. Dalal*, 467 N.J. Super. 261, 281 (App. Div. 2021). Other courts still apply the rule, but with an exemption for categorical-approach statutes. *See, e.g.*, *United States v. Requena*, 980 F.3d 30, 39-40 (2d Cir. 2020); *Pizza di Joey, LLC v. Mayor of Baltimore*, 235 A.3d 873, 907 (Md. 2020). And still others appear uncertain whether the rule survived *Johnson-Dimaya-Davis*. *See, e.g.*, *State v. Francisco*, 466 P.3d 878, 880-81 (Ariz. Ct. App. 2020) (quoting all-its-applications principle with "*but see*" citation to *Johnson*); *United States Telecom Ass'n v. F.C.C.*, 825 F.3d 674, 735-36 (D.C. Cir. 2016) (quoting

The difficulty of harmonizing this Court's recent vagueness cases with the own-conduct principle is exacerbated by the uncertainty that prevailed even before *Johnson*. Despite reciting the own-conduct principle in the decades leading up to *Johnson*, this Court "regularly decide[d] due-process vagueness claims without regard to the facts of the case," even when the statutes in question did not implicate the First Amendment. *United States v. Jones*, 689 F.3d 696, 703 (7th Cir. 2012) (citing *Skilling v. United States*, 561 U.S. 358 (2010); *Morales*, 527 U.S. 41; and *L. Cohen Grocery Co.*, 255 U.S. 81); *see also, e.g.*, *Cline v. Frink Dairy Co.*, 274 U.S. 445, 453-65 (1927) (finding statute facially vague without addressing case's particular facts); *Champlin Ref. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 237-43 (1932) (same); *Lanzetta v. New Jersey*, 306 U.S. 451, 453-58 (1939) (same); *Colautti v. Franklin*, 439 U.S. 379, 390-97 (1979) (same); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 451-52 (1983) (same). These cases "are hard to reconcile" with the own-conduct principle. *Jones*, 689 F.3d at 703 & n.25; *see also Curry*, 607 S.W.3d at 623 (observing that this Court has not "consistently view[ed]" the own-conduct principle "as controlling," even with regard to "statutes unrelated to the First Amendment" (citing *Skilling*, *Morales*, and *Kolender*)). Thus it is unclear to what extent *Johnson-Dimaya-Davis* represent a break from, or instead a continuation of, this Court's prior case law.

In addition, courts have struggled to apply *Johnson-Dimaya-Davis* because those cases produce a puzz-

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rule but adding that *Johnson* "suggested some skepticism about that longstanding framework").

lingly counterintuitive result. As the Indiana Court of Appeals put it, "If a law need not be unconstitutionally vague in every circumstance," as *Johnson* and *Dimaya* held, then "a simultaneous requirement that a challenger first establish that the law is vague as applied to him exhibits logical inconsistencies and gaps." *Hale*, 171 N.E.3d at 149-50. Specifically, "[i]f a defendant is able to show that a law is unconstitutionally vague as applied," there "would be no need for that defendant to show, or a court to decide, that the law is unconstitutional on its face. But if a defendant could not show that the law is unconstitutional as applied, then he or she would always be prohibited from challenging a law as being void for vagueness on its face." *United States v. Ariza*, No. 8:21CR102, 2021 WL 3684555, at *2 n.1 (D. Neb. June 29, 2021); *see also Morales-Lopez*, 2022 WL 2355920, at *5 (noting "logical quandary" posed by Fourth Circuit's decision in this case: "If a court finds the statute unconstitutional as applied to the defendant's facts, the facial vagueness challenge becomes moot. And . . . if the defendant is unsuccessful in showing the statute is unconstitutional as applied to him, then he cannot mount a facial challenge."). The result is that, following *Johnson-Dimaya-Davis*, "it would seem that no defendant can claim that a criminal statute is unconstitutionally vague on its face." *Stupka*, 418 F. Supp. 3d at 407. But of course, those cases *did* declare statutes facially vague, and so this Court cannot have meant to render facial vagueness challenges functionally obsolete.

The meaning of *Johnson*, *Dimaya*, and *Davis* has bedeviled the lower courts for the better part of a decade. This Court should grant certiorari to provide them with much-needed guidance.

II. The own-conduct principle is at odds with this Court's recent account of the vagueness doctrine's underpinnings.

To the extent the own-conduct principle ever enjoyed theoretical support, it was grounded in a conception of the vagueness doctrine as safeguarding individuals' personal due process rights. But as this Court has recently recognized, the prohibition on vague laws is equally a corollary of the separation of powers. A law passed in violation of separation-of-powers principles is a law that Congress has no power to enact at all. It is void in every case. And if a statute is invalid in toto, then anyone prosecuted under that statute may ask a court to declare its invalidity. As the Court explained in *Davis*, "a vague law is no law at all," 139 S. Ct. at 2323, and a defendant cannot be prosecuted under something that is not a law, regardless of the facts of his own case. Accordingly, renouncing the own-conduct principle would supply the Court's vagueness doctrine a coherence it has been sorely missing.

1. The Court's modern void-for-vagueness doctrine traces its roots to *International Harvester Co. of America v. Kentucky*, where the Court for the first time held a statute violated the Fourteenth Amendment because it "offer[ed] no standard of conduct that it is possible to know." 234 U.S. 216, 221 (1914). Although *International Harvester* did not specify the portion of the Fourteenth Amendment at issue, the Court clarified less than a month later that a statute violates "due process of law" if it "compel[s] men, on peril of indictment, to guess what" conduct a statute proscribes. *Collins v. Commonwealth*, 234 U.S. 634, 638 (1914). Subsequent cases reaffirmed this understanding, explaining that "a statute which either forbids or requires the doing of an

act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Cline*, 274 U.S. at 459. The Court repeated this due process account of the vagueness doctrine in cases from both state, *see, e.g.*, *Musser v. Utah*, 333 U.S. 95, 97 (1948), and federal courts, *see, e.g.*, *United States v. Petrillo*, 332 U.S. 1, 5-6 (1947). As these cases conceived of it, the vagueness doctrine was intended to protect "the right to fair notice" of what conduct is criminal. *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964).

2. Sometime around the 1960s, this Court's cases began to expressly identify another vice of vague laws: they "leave[] judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966). The Court explained that a "vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The fear was one of "arbitrary and discriminatory enforcement," made possible by statutes so loosely worded that they could be manipulated at will. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972). Although some older cases had alluded to this fear, *see, e.g.*, *L. Cohen Grocery*, 255 U.S. at 89, it was not until the 1960s that arbitrary enforcement became a consistent and distinct "second prong" of the vagueness doctrine. *Chatin v. Coombe*, 186 F.3d 82, 90 (2d Cir. 1999).

Notwithstanding that these cases warned against "delegat[ing]" policy decisions to courts, prosecutors, and judges, the Court still framed the vagueness doctrine as an outgrowth of due process. *See, e.g.*, *Smith v.*

Goguen, 415 U.S. 566, 572-73 (1974). The impulse animating these cases was one of basic fairness to the individual: the Due Process Clause guarantees that no one should be punished under a statute that does not protect his own personal right to advance notice and evenhanded enforcement. *See F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns.").

3. In recent years, however, the Court has reconceptualized—or at least rebranded—the foundations of the vagueness doctrine. The *Dimaya* plurality wrote that the prohibition on vagueness in criminal statutes is not only "an essential of due process," but also "a corollary of the separation of powers." 138 S. Ct. at 1212. The vagueness doctrine, according to the plurality, reinforces the separation of powers by "requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Id.* In his concurrence, Justice Gorsuch agreed that while "today's vagueness doctrine owes much to the guarantee of fair notice embodied in the Due Process Clause, it would be a mistake to overlook the doctrine's equal debt to the separation of powers." *Id.* at 1227. He explained that because Article I of the Constitution vests "[a]ll legislative Powers" in Congress, "[i]t is for the people, through their elected representatives, to choose the rules that will govern their future conduct." *Id.* As a result, separation-of-powers principles prohibit Congress from "leaving to judges the power to decide the various crimes includable in a vague phrase," or from "transfer[ring] legislative power to police and prosecutors" so they can "shap[e] a vague statute's contours through their enforcement decisions." *Id.* at 1227-28. Although the Court had previously articulated this principle, *see,*

e.g., *United States v. Evans*, 333 U.S. 634, 636 (1948), *Dimaya* marked the first time the Court expressly categorized the void-for-vagueness doctrine as a byproduct of the "separation of powers."

The Court recommitted to this view in *Davis*, writing that the vagueness doctrine "rests on the twin constitutional pillars of due process and separation of powers." 139 S. Ct. at 2325. As the Court explained, "[o]nly the people's elected representatives in the legislature are authorized to make an act a crime," and vague statutes "threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Id.* The vagueness doctrine, in other words, embodies a structural limit on Congress' ability to alienate its lawmaking power. Congress alone has the "power" to write criminal laws, and the vagueness doctrine works to preserve this constitutional allocation of power. *Id.* at 2323.

In this regard, the vagueness doctrine is a close cousin of the non-delegation doctrine. The latter doctrine, which "is rooted in the principle of separation of powers that underlies our tripartite system of Government," forbids Congress to "delegate its legislative power to another branch of Government." *Touby v. United States*, 500 U.S. 160, 165 (1991). Nevertheless, because "Congress simply cannot do its job absent an ability to delegate power under broad general directives," this Court will uphold a statutory delegation "as long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). Whether a statute violates the non-delegation doctrine

turns on whether Congress has "made clear to the delegee the general policy he must pursue and the boundaries of his authority." *Id.* at 2129.

Like the vagueness doctrine, then, the non-delegation doctrine measures the clarity of the language Congress uses to endow a delegee with decision-making authority. For this reason, it is "easy to see ... how most any challenge to a legislative delegation can be reframed as a vagueness complaint: A statute that does not contain 'sufficiently definite and precise' standards 'to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed at once presents a delegation problem and provides impermissibly vague guidance to affected citizens." *Id.* at 2142 (Gorsuch, J., dissenting); *accord Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) (framing non-delegation inquiry as whether a "legislated standard" is "too vague to survive judicial scrutiny"); *Granados v. Garland*, 17 F.4th 475, 480 (4th Cir. 2021) ("[T]he nondelegation and void for vagueness doctrines may be two sides of the same coin.").

4. Formulating the vagueness doctrine in separation-of-powers/non-delegation terms exposes the error of the own-conduct principle that this Court's pre-*Johnson* vagueness cases (sometimes) applied. To the extent vagueness objections "rest on [a] lack of notice" to the individual, they "may be overcome in any specific case where reasonable persons would know that their conduct is at risk" of violating a statute. *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988). If the void-for-vagueness doctrine were concerned solely with protecting individuals' due process rights, therefore, it might make sense to hold that vagueness challenges generally must be "judged on an as-applied basis." *Id.* But as *Di-*

maya and *Davis* made clear, the vagueness doctrine is *not* concerned solely with individual rights; it is designed, in "equal" part, to safeguard the separation of powers by enforcing the structural limits that the Constitution imposes on Congress. *Dimaya*, 138 S. Ct. at 1227 (Gorsuch, J., concurring). Congress simply has no license to write a law so vague that prosecutors and judges must assume legislative responsibilities. And—crucially—this Court assesses separation-of-powers/non-delegation claims, unlike individual-rights claims, on their face.

The Court has twice struck down statutes under the non-delegation doctrine, and in both cases the Court conceived of its inquiry as whether a statutory delegation was facially unconstitutional. At issue in *Panama Refining Co. v. Ryan* was section 9(c) of the National Industrial Recovery Act (NIRA), which "authorized" the president, in his discretion, to prohibit the transportation of petroleum produced or withdrawn from storage in excess of the amounts prescribed by state law. 293 U.S. 388, 405-06 (1935). Because it did not expressly direct how, or even whether, the president should prohibit the transportation of "hot oil," this Court invalidated the statute under the non-delegation doctrine. *See id.* at 430. The Court's ruling was facial; it held Congress had "no constitutional authority" to effect such a sweeping delegation. *Id.* The Court did not simply conclude Congress could not authorize the president to promulgate the particular executive order he had adopted, as it applied to the particular petitioners who challenged the statute. Rather, the Court held the delegation of policy questions embodied in § 9(c) was "[in]valid" in toto, and therefore not "permitted by the Constitution" under any circumstances. *Id.* at 420, 430.

The constitutional problem was not how § 9(c)'s delegated authority was exercised on a particular occasion, but that it had been delegated at all.

The Court's holding in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), was to the same effect. There, the Court struck down a separate section of the NIRA, § 3, which authorized the president to adopt "codes of fair competition" for various industries. *Id.* at 521-22. That provision was unconstitutional because it "supplie[d] no standards for any trade, industry, or activity," and instead granted the president "unfettered discretion" to determine what practices to proscribe. *Id.* at 537, 542. The Court did not say merely that the particular code under which the petitioners were prosecuted, which governed New York City's poultry industry, was unconstitutional as applied. *Id.* at 523-24. Instead, it held Congress lacked "constitutional authority" to pass § 3 at all, since Congress is never "permitted to abdicate or to transfer to others the essential legislative functions with which it is . . . vested." *Id.* at 528-29. The initial delegation of § 3's power, not a particular exercise of that power, produced the constitutional violation.

Outside the non-delegation context, as well, this Court treats separation-of-powers claims as facial claims. When the Court struck down the Line Item Veto Act in *Clinton v. City of New York*, for example, it held not just that the president could not cancel the particular appropriations challenged in that case, but also that the president could *never* employ the line-item veto because doing so would "create" a law "whose text was not voted on by either House of Congress or presented to the President for signature." 524 U.S. 417, 448 (1998). Rather than simply holding, in *I.N.S. v. Chadha*, that

Congress could not reinstate *the petitioner's* removal, the Court determined Congress could not use the Immigration and Nationality Act's legislative veto to force the removal of *any immigrant*. 462 U.S. 919, 956 (1983). Similarly, the Court held in *Bowsher v. Synar* that the "automatic spending reduction provisions" in the Balanced Budget and Emergency Deficit Control Act of 1985 were unconstitutional not only as applied to the "cost-of-living benefit increases" at issue, but in every case, since an official over whom Congress has retained removal authority (the comptroller general) can *never* "be entrusted with executive powers." 478 U.S. 714, 732 (1986). And the Court, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, held the Sarbanes–Oxley Act's double for-cause removal protections were unconstitutional across the board, not just as applied to the accounting firm that brought suit in that case; those protections, the Court indicated, are *always* "incompatible with the Constitution's separation of powers." 561 U.S. 477, 498 (2010).

In short, separation-of-powers challenges are facial challenges. A law enacted in violation of the separation of powers is invalid altogether, in every application, because Congress has no power to enact such a law at all.

5. If void-for-vagueness challenges are separation-of-powers challenges, and if separation-of-powers challenges are inherently facial, it follows that a criminal defendant should be permitted to mount a facial vagueness attack against a statute under which he is prosecuted, regardless of whether its application to him is clear. Viewed through a separation-of-powers prism, the question in a vagueness challenge is whether Congress has provided language sufficiently definite that police officers, prosecutors, judges, and juries are not drawn into

the fundamentally legislative project of defining criminal liability. Answering that question does not require knowing the facts of a specific defendant's case; it is purely a matter of statutory interpretation. *See Gundy*, 139 S. Ct. at 2123 ("[A] nondelegation inquiry always begins (and often almost ends) with statutory interpretation."). A congressional delegation "is good or bad when it starts." *Cf. United States v. Di Re*, 332 U.S. 581, 505 (1948); *see United States v. Villafane-Lozada*, 973 F.3d 147, 151 (2d Cir. 2020) ("[A] delegation was either proper or not—and its propriety does not depend on how (or even whether) the [delegee] might later choose to wield the delegated power.").

While a defendant's knowledge of potential criminal liability may be relevant to the due process theory of vagueness, it is immaterial for separation-of-powers purposes. On the separation-of-powers account of vagueness, a statute is unconstitutional not because, in any given case, it fails to warn the defendant that his conduct could subject him to prosecution, but because it defies a structural constraint on Congress' power. "Seen in this light," the Seventh Circuit has explained, a "vagueness challenge does not depend on the particular facts of [a defendant's] case." *Jones*, 689 F.3d at 703. Whether a defendant received notice is beside the point.

Disavowing the own-conduct principle would therefore align the vagueness doctrine with general separation-of-powers principles. This Court has recognized that when a law "violat[es] a constitutional principle that allocates power within government"—i.e., when the law "transgress[es] separation-of-powers limitations"—an individual who thereby "sustain[s] discrete, justiciable injury" necessarily has "standing to object." *Bond v. United States*, 564 U.S. 211, 222 (2011). Or, put differ-

ently, "If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object." *Id.* at 223. There can be no doubt that someone convicted under a criminal statute suffers such an injury as a result. As *Bond* explained, an injury is "otherwise justiciable" as long as it satisfies Article III's injury-in-fact, traceability, and redressability requirements, *see id.* at 225, which a challenge to the validity of a criminal conviction always does, *see Spencer v. Kemna*, 523 U.S. 1, 7-8 (1998).

The own-conduct principle cannot be reconciled with the separation-of-powers account of vagueness. Rather than leaving the void-for-vagueness doctrine muddled and internally inconsistent, the Court should abandon that principle for good.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the Fourth Circuit's judgment, and remand for consideration of whether § 922(g)(3) is facially void for vagueness.

Respectfully submitted,

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