No. _____

IN THE

Supreme Court of the United States

MALIK HOLLOWAY,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEVEN Y. YUROWITZ
COUNSEL OF RECORD

NEWMAN & GREENBERG LLP
950 THIRD AVENUE – 31ST FLOOR
NEW YORK, NEW YORK 10022
TELEPHONE: 212-308-7900
ATTORNEYS FOR PETITIONER

QUESTION PRESENTED

Petitioner was convicted of violating his conditions of supervised release based on his commission of a federal crime, i.e., a violation of 18 U.S.C. §930(e)(1) (prohibiting the possession of a "dangerous weapon" in a federal court facility). Section 930(g)(2) defines a "dangerous weapon" as a "device, instrument, material, or substance, animate or inanimate, that . . . is readily capable of, causing death or serious bodily injury," but contains no *mens rea* requirement that the possessor of the device or instrument do so with an intent to use it to cause death or serious bodily injury. As a result, the statute invites wholly arbitrary enforcement since practically *any* device is readily capable of causing death or serious bodily injury. *See, e.g., United States v. Tolbert*, 668 F.3d 798, 802–03 (6th Cir.2012). (plastic water pitcher used to strike a deputy marshal was a "dangerous weapon").

This petition raises the following question:

Isn't 18 U.S.C. §930(e)(1) which criminalizes the mere possession in a federal courthouse of practically any item unconstitutionally vague?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES – cont'd

Page

Statutes

Other Authorities

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit affirming petitioner's judgment of conviction is reported as *United States v. Holloway,* 2022 WL 453370 (2d Cir. 2022), a copy of which is annexed hereto as Appendix A.

The unreported order of the United States Court of Appeals for the Second Circuit, dated April 21, 2022, denying petitioner's petition for rehearing with a suggestion for rehearing *en banc* is annexed hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals sought to be reviewed was entered on February 15, 2022, and the order of that court denying petitioner's petition for rehearing was entered on April 21, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

18 U.S.C. §930

(a) Except as provided in subsection (d), whoever knowingly possesses or causes to be present a firearm or other dangerous weapon in a Federal facility (other than a Federal court facility), or attempts to do so, shall be fined under this title or imprisoned not more than 1 year, or both.

(b) Whoever, with intent that a firearm or other dangerous weapon be used in the commission of a crime, knowingly possesses or causes to be present such firearm or dangerous weapon in a Federal facility, or attempts to do so, shall be fined under this title or imprisoned not more than 5 years, or both.

(c) A person who kills any person in the course of a violation of subsection (a) or (b), or in the course of an attack on a Federal facility involving the use of a firearm or other dangerous weapon, or attempts or conspires to do such an act, shall be punished as provided in sections 1111, 1112, 1113, and 1117.

(d) Subsection (a) shall not apply to—
  (1) the lawful performance of official duties by an officer, agent, or employee of the United States, a State, or a political subdivision thereof, who is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of law;
  (2) the possession of a firearm or other dangerous weapon by a Federal official or a member of the Armed Forces if such possession is authorized by law; or
  (3) the lawful carrying of firearms or other dangerous weapons in a Federal facility incident to hunting or other lawful purposes.

(e) (1) Except as provided in paragraph (2), whoever knowingly possesses or causes to be present a firearm or other dangerous weapon in a Federal court facility, or attempts to do so, shall

be fined under this title, imprisoned not more than 2 years, or both.

(2) Paragraph (1) shall not apply to conduct which is described in paragraph (1) or (2) of subsection (d).

(f) Nothing in this section limits the power of a court of the United States to punish for contempt or to promulgate rules or orders regulating, restricting, or prohibiting the possession of weapons within any building housing such court or any of its proceedings, or upon any grounds appurtenant to such building.

(g) As used in this section:

(1) The term "Federal facility" means a building or part thereof owned or leased by the Federal Government, where Federal employees are regularly present for the purpose of performing their official duties.

(2) The term "dangerous weapon" means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2½ inches in length.

(3) The term "Federal court facility" means the courtroom, judges' chambers, witness rooms, jury deliberation rooms, attorney conference rooms, prisoner holding cells, offices of the court clerks, the United States attorney, and the United States marshal, probation and parole offices, and adjoining corridors of any court of the United States.

(h) Notice of the provisions of subsections (a) and (b) shall be posted conspicuously at each public entrance to each Federal facility, and notice of subsection (e) shall be posted conspicuously at each public entrance to each Federal court facility, and no person shall be convicted of an offense under subsection (a) or (e) with respect to a Federal facility if such notice is not so posted at such facility, unless such person had actual notice of subsection (a) or (e), as the case may be.

STATEMENT

Petitioner pled guilty to a specified charge of violating his supervised release conditions when, having been remanded for an earlier supervised release violation, it was discovered that he was in possession of, *inter alia*, a scalpel in his rectal cavity. Possession of the scalpel was alleged to violate the standard condition of petitioner's release that he may not commit another federal, state or local offense. Inasmuch as petitioner possessed the scalpel while in the courthouse, he was alleged to have violated 18 U.S.C. §930(e)(1) (prohibiting the possession of a "dangerous weapon" in a federal court facility).

Petitioner appealed arguing that the definition of a "dangerous weapon" (*see* §930(g)(2)) was unconstitutionally vague inasmuch as nearly every common and household item could be a "device, instrument, material, or substance, animate or inanimate, that . . . is readily capable of, causing death or serious bodily injury," and therefore the statute invited arbitrary enforcement.

In rejecting petitioner's challenge on appeal, the Court of Appeals reasoned that "[n]either the Supreme Court nor our Court has definitely resolved whether facial vagueness challenges not based on the First

Amendment may proceed against statutes that can constitutionally be applied to the challenger's own conduct." *Holloway,* 2022 WL 453370 at *2. Based on what is at best an outdated standard for vagueness challenges, the Panel then rejected petitioner's challenge. The Court of Appeals also denied petitioner's rehearing petition.

REASONS FOR GRANTING THE WRIT

18 U.S.C. §930(e)(1) makes it a crime to possess a "dangerous weapon" in a federal court facility. The statute defines a "dangerous weapon" as a "device, instrument, material, or substance, animate or inanimate, that . . . is readily capable of, causing death or serious bodily injury." 18 U.S.C. §930(g)(1). The statute contains no requirement that the prospective defendant possess the purported "weapon" with an intent to use it against another or to otherwise cause death or serious bodily injury.

As one treatise noted in connection with a state statute defining a "dangerous instrument" in a manner similar to §930(g)(1), i.e., a "instrument, article or substance . . . readily capable of causing death or other serious injury": "Almost any item or substance can be deemed either deadly or dangerous . . . including . . . a belt . . . [and] [s]ome of the

less obvious items . . . include[ing] "a shoe, a door, a pen or pencil, a beer bottle, a telephone receiver, a milk crate, a Playstation console, and even a handkerchief." Greenberg, Marcus, New York Criminal Law (West 4th Ed.) at 33:9, pp. 707-708. Unlike §930(e)(1), however, New York's statute contains a *mens rea* requirement that the user possesses the device with the "intent to use the same unlawfully against another." N.Y. Penal Law §265.01(2), and in defining a "dangerous instrument" includes the requirement that "*under the circumstances in which it is used or threatened to be used*, is readily capable of causing death or other serious physical injury." N.Y. Penal Law §10.00(13) (emphasis added). Section 930(e)(1) has no similar provision. Thus, a court officer can on a whim charge arrest a courthouse visitor for their possession of a pen, pencil or handkerchief all of which are capable of causing serious injury, or an EMT found in the courthouse who may be carrying a scalpel in his medical bag.

In rejecting petitioner's vagueness challenge, the Second Circuit cited its earlier decision in *United States v. Requena*, 980 F.3d 30, 40 (2d Cir. 2020) which held that when evaluating a vagueness challenge to statutes not threatening First Amendment interests it "typically" does so

"in light of the facts of the case at hand, i.e., only on an as-applied basis." *Holloway,* 2022 WL 453370 at *2. The Court of Appeals reasoned that such a requirement stems from the fact that "to succeed in a facial challenge, 'the challenger must establish that no set of circumstances exists under which the [challenged statute] would be valid.'" *Id.* (*quoting Requena*).

According to the Court of Appeals, "[n]either the Supreme Court nor our Court has definitely resolved whether facial vagueness challenges not based on the First Amendment may proceed against statutes that can constitutionally be applied to the challenger's own conduct." *Id.*

The Court of Appeals was only able to reach its conclusions by ignoring this Court's decisions in *Johnson v. United States*, 576 U.S. 591 (2015); *Sessions v. Dimaya*, —— U.S. ——, 138 S. Ct. 1204 (2018); and *United States v. Davis*, —— U.S. ——, 139 S. Ct. 2319 (2019). All of which struck down criminal statutes as facially unconstitutional even though it recognized the certain applications of the statute were not vague.

For example, in *Johnson v. United States*, 576 U.S. 591 (2015), this Court rejected the government's attempt to save the ACCA's residual

clause based on reasoning adopted by the Court of Appeals below, i.e., that there were certainly applications of the statute that were not vague or ambiguous. In response, this Court held that

> 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. For instance, we have deemed a law prohibiting grocers from charging an "unjust or unreasonable rate" void for vagueness—even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable. [*United States v.*] *L. Cohen Grocery Co.*, 255 U. S. [81, 89 (1921)]. We have similarly deemed void for vagueness a law prohibiting people on sidewalks from "conduct[ing] themselves in a manner annoying to persons passing by"—even though spitting in someone's face would surely be annoying. *Coates v. Cincinnati*, 402 U. S. 611 (1971). These decisions refute any suggestion that the existence of *some* obviously risky crimes establishes the residual clause's constitutionality.

576 U.S. at 602-03. The *Johnson* majority also rejected the dissent's position, one that equates with the Court of Appeal's decision here, that "a statute is void for vagueness only if it is vague in all its applications." 576 U.S. at 603. Instead, *Johnson* reasoned that: "[i]t seems to us that the dissent's supposed requirement of vagueness in all applications is not a requirement at all, but a tautology: If we hold a statute to be vague, it

is vague in all its applications (and never mind the reality). If the existence of some clearly unreasonable rates would not save the law in *L. Cohen Grocery*, why should the existence of some clearly risky crimes save the residual clause?" 576 U.S. at 603. *See also Dimaya*, 138 S.Ct. at 1214 n. 3 (noting that *Johnson* "anticipated and rejected a significant aspect of Justice Thomas's dissent," specifically his assertion that "a court may not invalidate a statute for vagueness if it is clear in any of its applications").

In other words, *Johnson* and *Dimaya* have squarely rejected the Second Circuit's holding that to launch a valid facial vagueness challenge "the challenger must establish that no set of circumstances exists under which the [challenged statute] would be valid." The Ninth Circuit has similarly concluded that *Johnson* and *Dimaya* have called into question the perceived rule that before a defendant can raise a vagueness challenge he must demonstrate that the statute is vague as to his own charged conduct. *Henry v. Spearman*, 899 F.3d 703 (9th Cir. 2018).[1]

[1] In *Spearman,* the Ninth Circuit permitted a defendant convicted of felony discharge of a firearm at an inhabited dwelling and second-degree murder to challenge in a successive 2254 petition California's second-degree felony-murder rule which imputes the requisite malice from the commission of a felony that, viewed in the abstract, is "inherently dangerous." *Spearman* rejected the State's argument that a vagueness challenge was improper since defendant's conduct was "clearly proscribed" already a

Other lower federal and state courts have reached similar conclusions. *See, e.g., United States v. Morales-Lopez*, 2022 WL 2355920 (D. Ut. June 30, 2022) (holding that in light of *Johnson* a defendant need not "first show that the statute is vague as applied to the facts of her case before she may mount a facial challenge" and vacating defendant's conviction under 18 U.S.C. § 922(g)(3) based on its finding that the statute is void for vagueness); *State v. Doyal*, 589 S.W.3d 136, 144 (Tex. Crim. App. 2019) (invalidating Texas statute as unconstitutionally vague and reasoning that *Johnson* called into question this Court's holding in *Holder v. Humanitarian Law Project,* 561 U.S. 1, 21 (2010) that because the statute was not vague "as applied" it could be upheld).

Any ambiguity concerning the meaning of *Johnson* was removed by Justice Thomas's concurrence in *Borden v. United States,* 141 S.Ct. 1817 (2021). Justice Thomas advocated the overturning of *Johnson* because in his view, it "deviated from the usual legal standard" that a plaintiff must "establish that no set of circumstances exists under which the Act would

---

year before his offense was committed when the California Supreme Court concluded that such conduct was "inherently dangerous," and that even without the decision "any reasonable person would know that shooting at an inhabited dwelling is inherently dangerous." In the view of *Spearman*, the cases relied on by the state prohibiting a facial challenge to a statute fails to "reflect the current state of the law" after *Johnson*.

be valid." *Borden,* 141 S. Ct. at 1836 (Thomas, J., concurring). In the view of Justice Thomas, by invalidating the ACCA's residual clause as facially unconstitutional, *Johnson* contravened the general rule that courts "have authority to provide only those 'remedies that are tailored to redress the plaintiff's particular injury.'" *Id.* (citation and alteration omitted). Regardless of whether this Court ultimately adopts Justice Thomas's view and invalidates *Johnson*, at present it represents the current state of the law.

In *Requena*, the Second Circuit sought to justify *Johnson*'s holding that a facial challenge can be mounted even by a defendant whose conduct squarely falls within the statute as an "exceptional circumstance," and one that did not displace the supposed general rule. The purported "exceptional circumstance" in *Johnson* and its progeny was the fact that the statutes at issue required application of the "categorical approach" an approach that requires a court "to estimate the degree of risk posed by the imagined 'idealized ordinary case' of a criminal offense, abstracted from the defendant's actual conduct." But this Court made clear in *Johnson* that the standard it was applying was not some exceptional rule. Thus, *Johnson* cited *L. Cohen Grocery Co.*,

255 U.S. at 89 and *Coates*, 402 U.S. 611 as support for its rule, neither of which involved the categorical approach. In other words, *Johnson* and its progeny represent the norm. The Court of Appeal's decision relegating those decisions as outliers only applicable in limited circumscribed instances was error.[2]

Moreover, the Court of Appeal's analysis ignored the second and "the more important" of the two vagueness inquiries (*Arriaga v. Mukasey*, 521 F.3d 219, 228 (2d Cir. 2008)), i.e., whether the "statutory language is of such a standardless sweep that it allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* In *City of Chicago v. Morales*, 527 U.S. 41, 60-61 (1999), this Court recognized that a statute is impermissibly vague if it reaches "a substantial amount of innocent conduct" thereby conferring "an impermissible degree of discretion on law enforcement authorities to determine who is subject to the law." *Morales* imposed no requirement that the challenger demonstrate that the statute at issue has in the past been arbitrarily enforced. Instead, *Morales* found

[2] Other circuits have followed the Second Circuit's lead and tried to limit *Johnson* to its unique circumstances. *See, e.g., United States v. Hasson*, 26 F.4th 610 (4th Cir. 2022). Justice Thomas's concurrence in *Borden* confirms that *Johnson* was not so limited.

it significant that the ordinance cast a wide net on innocent conduct with no scienter requirement that could reign it in.

In contrast to the statute at issue in *Arriaga* where, the "statutory terms do not reach any 'innocent conduct'" (521 F.3d at 228), §930(e)(1) suffers from the same deficiencies noted in *Morales*. Thus, §930(e)(1) reaches a host of "innocent conduct" since courts have recognized that items carried by most individuals on a daily basis can, if desired, be "readily capable" of causing serious bodily injury. Moreover, as in *Morales,* §930(e)(1) fails to include a scienter requirement, i.e., an intent to use the device at issue to cause "serious bodily injury." Instead, Section §930(e)(1) merely requires the possession of something "readily capable" of causing such injury, a standard that covers virtually any object. This is precisely the type of standardless statute that the Constitution prohibits.

The conflict between the Second Circuit's decision and *Johnson* and its progeny, as well as *Morales* renders this case worthy of certiorari. Rule 10(c), Rules of the Supreme Court (in determining whether to grant certiorari this Court considers, *inter alia*, whether "a United States court

of appeals has . . . decided an important federal question in a way that conflicts with relevant decisions of this Court").

Particularly in the present turbulent environment when protestors seek to harass and attack members of the judiciary whose views diverge from their own, forcing even this Court to close its door to members of the public, it is understandable that Courts would want statutes that protect their safety to the maximum extent possible. But it is precisely for that reason that this Court should demand a statute that is above reproach in its ability to prosecute would-be wrongdoers and not one that is subject to arbitrary and selective enforcement. Congress can certainly enact a statute that would pass constitutional muster (*see, e.g.,* N.Y. Penal Law 265.01(2) (prohibiting the possession of a "dangerous or deadly instrument or weapon" where the possession is accompanied by an intent to use the weapon unlawfully against another"), but it failed to do so here.

This Court should grant certiorari to address this important and timely issue.

CONCLUSION

Because the decision of the Second Circuit conflicts with decisions of this Court, petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED

STEVEN Y. YUROWITZ, ESQ.
950 Third Avenue – 31st Floor
New York, New York 10022
Tel: (212) 308-7900
Fax: (212) 826-3273

Attorney for Petitioner
Malik Holloway