No. 22-6112

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

AAKASH DALAL,

Petitioner,

Vs.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

PETITION FOR WRIT OF CERTIORARI

Aakash Dalal
SBI #792652E
215 Burlington Road South
Bridgeton, NJ 08302
Petitioner, *pro se*

QUESTIONS PRESENTED FOR REVIEW

1. Whether litigants may bring facial constitutional challenges to laws without first successfully raising as-applied challenges?

2. Whether litigants may bring facial challenges under the arbitrary enforcement aspect of the void-for-vagueness doctrine without first successfully raising as-applied challenges?

3. Whether the Salerno "no set of circumstances" and "invalid in all applications" tests or substantive tests of constitutional validity govern facial constitutional challenges to laws after Johnson and Dimaya?

4. Whether the New Jersey September 11th, 2001 Anti-Terrorism Act is void-for-vagueness under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES IN THE COURT BELOW

Pursuant to Rule 14.1(b), Petitioner Aakash Dalal certifies that the names of all parties to this proceeding appear in the caption of this Petition for Writ of Certiorari.

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The April 15, 2021 opinion and judgment of the Superior Court of New Jersey, Appellate Division sought to be reviewed was published at State v. Dalal, 467 N.J. Super. 261, 252 A.3d 204 (App. Div. 2021) (Docket No. A-5556-16) and is appended as Appendix A.

The April 26, 2016 decision of the trial court, the Superior Court of New Jersey, Law Division (Indictment No. 13-03-00374) is appended as Appendix B.

The May 6, 2022 decision of the Supreme Court of New Jersey denying certification (Docket No. 085739) is appended as Appendix C.

The July 29, 2022 decision of the Supreme Court of New Jersey granting leave to file a motion for reconsideration as within time is appended as Appendix D.

The October 7, 2022 decision of the Supreme Court of New Jersey denying the motion for reconsideration is appended as Appendix E.

JURISDICTION OF THE SUPREME COURT

The Supreme Court of New Jersey, New Jersey's highest state court, denied Petitioner's petition for certification on May 6, 2022. A timely motion for reconsideration was denied on October 7, 2022. Copies of these orders appear at Appendix C, D, and E.

Petitioner challenges the validity of the New Jersey September 11th, 2001 Anti-Terrorism Act, N.J.S. 2C:38-2, on the ground of it being repugnant to the United States Constitution.

The jurisdiction of this Court is therefore invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

United States Constitution, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

The New Jersey September 11th, 2001 Anti-Terrorism Act, N.J.S. 2C:38-2:

a. A person is guilty of the crime of terrorism if he commits or attempts, conspires or threatens to commit any crime enumerated in subsection c. of this section with the purpose:

(1) to promote an act of terror; or

(2) to terrorize five or more persons; or

(3) to influence the policy or affect the conduct of government by terror; or

(4) to cause by an act of terror the impairment or interruption of public communications, public transportation, public or private buildings, common carriers, public utilities or other public services; or

(5) to influence or incite an act of terror against an individual or group of individuals based on their actual or perceived race, religion, color, national origin, affectional or sexual orientation, sex, gender identity or expression, disability, creed, or any other characteristic protected under the "Law Against Discrimination," P.L.1945, c.169 (C.10:5-1 et seq.), if the underlying crime is a crime of the first or second degree.

b. Terrorism is a crime of the first degree.

(1) Notwithstanding any other provision of law to the contrary, any person convicted under this section shall be sentenced to a term of 30 years, during which the person shall not be eligible for parole, or to a specific term of years which shall be between 30 years and life imprisonment, of which the person shall serve not less than 30 years before being eligible for parole.

c. The crimes encompassed by this section are: murder pursuant to N.J.S.2C:11-3; aggravated manslaughter or manslaughter pursuant to N.J.S.2C:11-4; vehicular homicide pursuant to N.J.S.2C:11-5; aggravated assault pursuant to subsection b. of N.J.S.2C:12-1; disarming a law enforcement officer pursuant to section 1 of P.L.1996, c.14 (C.2C:12-11); kidnapping pursuant to N.J.S.2C:13-1; criminal restraint pursuant to N.J.S.2C:13-2; robbery pursuant to N.J.S.2C:15-1; carjacking pursuant to section 1 of P.L.1993, c.221 (C.2C:15-2); aggravated arson or arson pursuant to N.J.S.2C:17-1; causing or risking widespread injury or damage pursuant to N.J.S.2C:17-2; damage to nuclear plant with the purpose to cause or threat to cause release of radiation pursuant to section 1 of P.L.1983, c.480 (C.2C:17-7); damage to nuclear plant resulting in death by radiation pursuant to section 2 of P.L.1983, c.480 (C.2C:17-8); damage to nuclear plant resulting in injury by radiation pursuant to section 3 of P.L.1983, c.480 (C.2C:17-9); burglary

pursuant to N.J.S.2C:18-2; producing or possessing chemical weapons, biological agents or nuclear or radiological devices pursuant to section 3 of P.L.2002, c.26 (C.2C:38-3); possession of prohibited weapons and devices pursuant to N.J.S.2C:39-3; possession of weapons for unlawful purposes pursuant to N.J.S.2C:39-4; unlawful possession of weapons pursuant to N.J.S.2C:39-5; weapons training for illegal activities pursuant to section 1 of P.L.1983, c.229 (C.2C:39-14); racketeering pursuant to N.J.S.2C:41-1 et seq.; and any other crime involving a risk of death or serious bodily injury to any person.

d. Definitions. For the purposes of this section:

"Government" means the United States, any state, county, municipality, or other political unit, or any department, agency or subdivision of any of the foregoing, or any corporation or other association carrying out the functions of government.

"Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

"Terror" means the menace or fear of death or serious bodily injury.

"Terrorize" means to convey the menace or fear of death or serious bodily injury by words or actions.

STATEMENT OF THE CASE

I. BACKGROUND

Petitioner Aakash Dalal ("Mr. Dalal") presented facial and as-applied challenges to the constitutionality of New Jersey's September 11th, 2001 Anti-Terrorism Act, N.J.S. 2C:38-2, ("the Anti-Terrorism Act") before New Jersey's courts. New Jersey prosecutors charged Mr. Dalal with violating sections (a)(1) and (2) of the Anti-Terrorism Act based on alleged incidents of vandalism and arson. Minor damage is alleged to have occurred. At the time of the crimes in New Jersey, Mr. Dalal was in New Hampshire working on a presidential primary campaign. Prosecutors alleged that Mr. Dalal encouraged the primary actor—the co-defendant—to commit these crimes. After a jury trial, Mr. Dalal was sentenced to a 35-year prison term with a mandatory minimum of 30-years of parole ineligibility, as required by the Anti-Terrorism Act. N.J.S. 2C:38-2(b).

Mr. Dalal argued that the Act was void-for-vagueness under the Fifth and Fourteenth Amendments because its vague language permitted arbitrary enforcement by law enforcement, judges, and juries. The Anti-Terrorism Act eschews the ordinary definition of "terrorism" by omitting the requirement of a political purpose and simply employing dictionary definitions of the words "terror" and "terrorize". On its face, the statute is a banana republic style terrorism law that is unmoored from the common understanding of the concept of terrorism. In New Jersey, any crime plus the inference of an intent to frighten constitutes terrorism.

The Superior Court of New Jersey, Appellate Division, New Jersey's court of last resort, broadly established the wrong legal standards for the evaluation of facial constitutional challenges. More specifically, the state court established the wrong legal

standard for the evaluation of facial challenges with respect to the arbitrary enforcement aspect of the vagueness doctrine. First, the Appellate Division refused to consider Mr. Dalal's facial challenge, stating, "for a court to consider a facial challenge, a challenger must be able to successfully bring an as-applied challenge." State v. Dalal, 457 N.J. Super. 261, 282 (App. Div. 2021). Next, to support this restrictive rule, the Appellate Division relied on the Salerno "invalid in all applications" test and attempted to distinguish this Court's decisions in Johnson and Dimaya. Id. As explained more fully below, this rule is in conflict with the Supreme Court's decisions and practice and the explicit holdings of the Third, Fifth, and D.C. Circuits. It is further in conflict with the practices of the First and Sixth Circuits. The Appellate Division's standard, however, is in line with the Second, Fourth, Seventh, Eighth, Ninth, Tenth, and Federal Circuits.

II. RULE 14.1(g)(i) – FEDERAL QUESTIONS RAISED IN STATE COURTS

Pursuant to Rule 14.1(g)(i), because review of a state-court judgment is sought, it is noted that the federal issues raised here were initially raised in the state trial court, the Superior Court of New Jersey, Law Division, and New Jersey's appellate court, the Superior Court of New Jersey, Appellate Division:

> "Defendant mounts both an 'as applied' and facial void for vagueness challenge to the statute at bar."
>
> Appendix B at 12.
>
> "Defendants separately appeal, challenging the constitutionality of the New Jersey Anti-Terrorism Act (Act), N.J.S.A. 2C:38-1 to -5. In this consolidated opinion we address a question of first impression: whether the Act is unconstitutionally vague. We hold it is not."
>
> Dalal, 252 A.3d at 207.

"Defendants appeal and argue that their terrorism convictions should be reversed because the Act is unconstitutional on its face and as applied to them. In connection with those arguments, defendants also assert that the Act impermissibly delegates a legislative function to the executive branch thereby allowing arbitrary and selective enforcement."

Id. at 214.

Both the trial and appellate courts rejected the federal questions raised by Petitioner:

"Defendants argue that two recent decisions by the United States Supreme Court allow facial vagueness challenges even if the statute is not vague as applied to their conduct. See Sessions v. Dimaya, U.S. , 138 S. Ct. 1204, 1214 n.3, 200 L. Ed. 2d 549 (2018); Johnson v. United States, 576 U.S. 591, 601-03, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015).

...

In neither Johnson nor Dimaya did the Court explicitly reject the concept that a person challenging a statute must normally show that it is vague as applied to him or her. Consequently, some federal and state appeals courts have concluded that neither Johnson nor Dimaya overruled the principle that, for a court to consider a facial challenge, a challenger must be able to successfully bring an as-applied challenge."

Dalal, 252 A.3d at 216-217.

"A law is facially vague if it is vague in all applications. United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)"

Id. at 216.

The Supreme Court of New Jersey denied certification and a motion for reconsideration on these same federal issues and questions. Appendix C, D, and E.

REASONS FOR GRANTING THE WRIT

As explained in Section I, New Jersey's Appellate Division decided three important federal questions in a way that is in direct conflict with several United States Courts of Appeals: (1) whether successful as-applied constitutional challenges are mandatory predicates to facial constitutional challenges; (2) whether a litigant may bring a facial void-for-vagueness challenge in the arbitrary enforcement aspect of the doctrine without first bringing a successful as-applied challenge; and (3) whether the purported Salerno "invalid in all application" test governs facial constitutional challenges. As further explained in Section II, these questions of federal law go to the heart of the judiciary's most fundamental duty in our republic: the review of laws to ensure that they comply with the Constitution[1]. Lower courts and scholars have expressed confusion with regard to facial versus as-applied constitutional challenges and lamented that the Supreme Court has not provided clear guidance with regard to these questions. Importantly, these questions affect how every state and federal court in this nation evaluates constitutional challenges because they concern the fundamental, analytical framework courts must apply.

In Section III, Mr. Dalal argues that the Third, Fifth, and D.C. Circuits have gotten the questions right by considering facial constitutional challenges, ignoring the Salerno test, and instead evaluating statutes through the lens of substantive tests specific to the constitutional right and doctrine at issue. In practice, the Supreme Court has

[1] Chief Justice John Marshall stated at the Constitutional Convention that, if Congress exceeded its authority in passing a law, "it would be considered by the Judges as an infringement of the Constitution which they are to guard," and they would "declare it void." Marshall Papers, Herbert A. Johnson, ed. Speech, June 20, 1788, pages 275-86. "[A]ll judges, by the Constitution are required to bind themselves by oath to support the Constitution of the United States ... and that they are bound in duty to declare acts of Congress or any of the states contrary to the Constitution void." Justice Samuel Chase to Chief Justice John Marshall, April 24, 1802, The Papers of John Marshal 6:109-116, Chapel Hill, The University of North Carolina Press, 1984.

followed the correct approach as well—routinely striking down laws on their face and spurning the Salerno test when doing so. Finally, in Section IV, Mr. Dalal argues that the proper standards, when applied to the Anti-Terrorism Act, compel the conclusion that it violates the Fifth and Fourteenth Amendments and is void-for-vagueness.

I. THE NEW JERSEY APPELLATE DIVISION AND THE FEDERAL CIRCUITS ARE IN CONFLICT AND SPLIT ON THE IMPORTANT QUESTIONS OF FEDERAL LAW PRESENTED

New Jersey's Appellate Division's ruling regarding these important federal questions is in direct conflict with the explicit holdings of the United States Courts of Appeals for the Third Circuit, the Fifth Circuit, and the D.C. Circuit. Rule 10 of the Supreme Court's Rules has therefore been satisfied, as New Jersey's court of last resort has decided important federal questions in a way that conflicts with the decisions of several United States Courts of Appeals. Rule 10(b). These conflicts require the Supreme Court's intervention and clarification to ensure the uniform interpretation of federal law throughout the United States. Because New Jersey's court of last resort has come to the opposite conclusion of the Third Circuit, certiorari should be granted. See, e.g., Gallardo v. Marstiller, 142 S.Ct. 1751, 1757 (2022) ("Because the Supreme Court of Florida came to the opposite conclusion of the Eleventh Circuit, we granted certiorari").

A. The New Jersey Appellate Division's rule requiring successful as-applied constitutional challenges as a predicate to facial challenges is in direct conflict with the holdings of several federal circuits.

Mr. Dalal challenged sections (a)(1) and (2) of the Anti-Terrorism Act as void-for-vagueness on their face because they allow and encourage arbitrary enforcement by law enforcement, judges, and juries. Relying on Humanitarian Law Project, the New Jersey Appellate Division rejected Mr. Dalal's facial vagueness challenge at the outset holding, "a person challenging a statute must normally show that it is vague as applied to him or her." Dalal, 467 N.J. Super. at 281 (citing Holder v. Humanitarian Law Project, 561 U.S. 1, 18-19 (2010)). Importantly, in rejecting Mr. Dalal's facial vagueness challenge, the Appellate Division distinguished the Supreme Court's decisions in Johnson and Dimaya, and ruled, "consequently … for a court to consider a facial challenge, a challenger must be able to successfully bring an as-applied challenge." Dalal, 467 N.J. Super. at 282.

By contrast, the D.C. Circuit has explicitly rejected this interpretation of Humanitarian Law Project. Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia, 846 F.3d 391, 409-10 (D.C. Cir. 2017), cert. denied, 138 S.Ct. 334 (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."). "We are aware of no decision that has applied Humanitarian Law Project to bar a facial

challenge like [the plaintiff]'s that a law is so vague as to subject the challenger itself to standardless enforcement discretion." Id.[2]

More broadly, the Third and Fifth Circuits have explicitly rejected the idea that a challenger cannot bring a facial constitutional challenge without first successfully bringing an as-applied challenge. "[T]here is no requirement that a facial challenge be accompanied by an as-applied challenge." Knick v. Twp. of Scott, 862 F.3d 310, 320 (3d Cir. 2017) (citing City of Los Angeles v. Patel, 576 U.S. 409 (2015))

> "If a litigant loses an as-applied challenge because the allegedly unconstitutional circumstances of enforcement are simply 'not supported by [the] record,' and the litigant otherwise has standing to challenge a law (such as a defendant in an enforcement action), then 'a court cannot simply refuse to address a facial challenge that offers a defendant her last chance to argue that the statute being enforced against her is constitutionally invalid.'"

Knick, 862 F.3d at 321 (quoting Richard H. Fallon, Jr., Fact and Fiction About Facial Challenges, 99 Cal. L. Rev. 915, 963 (2011) [3]) (emphasis added); United States v. Gonzalez-Longoria, 813 F.3d 225, 229 (5th Cir. 2016) ("The government correctly points out that a defendant cannot raise a vagueness challenge to a statute simply because some hypothetical other defendant's conduct might create a 'vague application' of the statute. This restriction, however, does not mean that every defendant must first show that a

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[2] Agnew v. Gov't of the Dist. of Columbia, 263 F. Supp. 3d 89, 95 (D.D.C. 2017) ("[T]he D.C. Circuit held that the guidance set forth in Humanitarian Law Project does not apply to a vagueness challenge to a statute premised on the argument that the statute encourages arbitrary and discriminatory enforcement."); United States v. Stupka, 418 F. Supp. 3d 402, 410 (N.D. Iowa 2019). ("[A] facial void-for-vagueness challenge may be permissible when a law presents concerns of standardless or arbitrary enforcement because the rule that permits only as-applied challenges bears little relation to the arbitrary enforcement prong.") Id. at 411.

[3] Professor Fallon stated, "A party against whom a statute is being enforced coercively is always entitled to argue that the statute is invalid. If an as-applied challenge fails, or if the record fails to support one, a court cannot simply refuse to address a facial challenge that offers a defendant her last chance to argue that the statute being enforced against her is constitutionally invalid." Fallon, Fact and Fiction at 963. The Third Circuit, as a matter of policy, considers facial constitutional challenges prior to considering as-applied challenges. See, e.g., Heffner v. Murphy, 745 F.3d 56, 65 n.7 (3d Cir. 2013).

statute is vague as applied to him as a predicate to any further argument of facial vagueness.")

The First and Sixth Circuits have implicitly rejected the notion that a challenger must first successfully raise an as-applied challenge in order to raise a facial challenge. United States v. Davila-Reyes, 23 F.4th 153, 2022 U.S. App. LEXIS 1638 * 77 n. 61 (1st Cir. 2022) (invalidating law on its face because of "constitutional flaw evident in the statutory terms themselves."); Liberty Coins, LLC v. Goodman, 880 F.3d 274, 281 (6th Cir. 2018) (striking down Ohio statute as facially unconstitutional and noting, "the Supreme Court recently clarified that these types of challenges 'are not categorically barred or especially disfavored.'")

The Second, Fourth, Seventh, Eighth Ninth, Tenth, and Federal Circuits, however, adhere to the view that a facial challenge can only be raised by a challenger who has successfully brought an as-applied challenge. United States v. Requena, 980 F.3d 29, 40-43 (2d Cir. 2020); United States v. Hasson, 26 F. 4th 610 (4th Cir. 2022); United States v. Cook, 970 F.3d 866, 872 (7th Cir. 2020) (noting, however, that the Supreme Court has entertained facial vagueness challenges where the challenged statute "lacks any ascertainable standard for inclusion and exclusion"); United States v. Bramer, 832 F.3d 908, 909-910 (8th Cir. 2016); Kashem v. Barr, 941 F.3d 358, 375-377 (9th Cir. 2019); 303 Creative LLC v. Elenis, 6 F.4th 1160, 1187 (10th Cir. 2021), cert. granted, 142 S. Ct. 1106 (2022); Bowling v. McDonough, 38 F.4th 1051, 2022 U.S. App. LEXIS 17731 *23-25 (Fed Cir. 2022)[4].

[4] The courts are also confused as to the basis of this rule. Several dissenting Justices and the Second Circuit explicitly link the as-applied as a predicate to facial challenges rule to the Salerno test. Compare Kolender, 461 U.S. at 369 (calling it a "correlative rule"); United States v. Requena, 980 F.3d 29, 40 (2d Cir. 2020) ("[W]e typically evaluate vagueness challenges to

B. New Jersey's Appellate Division's reliance on the Salerno test is in conflict with numerous federal circuits, which are also split on whether the Salerno standard continues to apply after Johnson and Dimaya.

Citing Salerno, the New Jersey Appellate Division held, "A law is facially vague if it is vague in all applications." Dalal, 467 N.J. Super. at 281 (citing Salerno, 481 U.S. at 745). The New Jersey Appellate Division's reliance on Salerno is in conflict with and an erroneous interpretation of the decisions of this Court in Johnson and Dimaya. Johnson v. United States, 135 S. Ct. 2551, 2560-61 (2015) ("[O]ur 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."). The Johnson Court eviscerated the illogical underpinning of the Salerno test, ruling the "supposed requirement of vagueness in all applications is not a requirement at all, but a tautology." Id. at 2561; Sessions v. Dimaya, 138 S. Ct. 1204, 1214 n. 3 (2018) ("[F]undamentally, 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.'")

In actual practice, the United States Supreme Court has never required that challengers successfully mount as-applied challenges before raising facial challenges and

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statutes . . . in light of the facts of the case at hand, i.e., only on an as-applied basis. ... This requirement is based on the general tenet 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." By contrast, the Fourth and Federal Circuits believe that the rule requiring successful as-applied challenges as a predicate to facial challenges is "independent of the substantive standard for judging a facial vagueness challenge", i.e., the Salerno test. Hasson, 2022 U.S. App. LEXIS 4741* 18-20; Bowling, 2022 U.S. App. LEXIS 17731 * 23 ("This principle is distinct from the Salerno principle: It links a facial challenge to an as-applied challenge, not to the universe of possible applications.")

has never applied the Salerno standard.[5] "To the extent we have consistently articulated a clear standard for facial challenges, it is not the Salerno formulation, which has never been the decisive factor in any decision of this Court, including Salerno itself (even though the defendants in that case did not claim that the statute was unconstitutional as applied to them, the Court nevertheless entertained their facial challenge)." Chicago v. Morales, 527 U.S. 41, 55-56 n.22 (1999).

The New Jersey Appellate Division's decision is further in conflict with the holdings of several federal circuit courts, including the Third, Fourth, Seventh, Ninth and Tenth Circuits. In rejecting the Salerno "invalid in all applications"/ "no set of circumstances" standard, the Third Circuit has noted that the Supreme Court "has often considered facial challenges simply by applying the relevant constitutional test to the challenged statute, without trying to dream up whether or not there exists some hypothetical situation in which application of the statute might be valid." Bruni v. City of Pittsburgh, 824 F.3d 353, 362-363 (3d Cir. 2015); United States v. Hasson, 26 F.4th 610 (4th Cir. 2022) ("[T]he [U.S. Supreme] Court reiterated that a statute need not be vague in all its applications to be unconstitutional."); United States v. Cook, 970 F.3d 866, 876 (7th Cir. 2020) ("It is true that Johnson puts to rest the notion-found in any number of pre-Johnson cases-that a litigant must show that the statute in question is vague in all of its applications in order to successfully mount a facial challenge."); Guerrero v. Whitaker, 908 F.3d 541, 544 (9th Cir. 2018) (rejecting the "no set of circumstances" standard and holding, "Johnson and Dimaya expressly rejected the notion that a statutory provision survives a facial vagueness challenge merely because some conduct clearly

[5] Richard H. Fallon, Jr., Fact and Fiction About Facial Challenges, 99 Cal. L. Rev. 915, 936-49 (2011) (examining empirical evidence and concluding that the Supreme Court regularly facially invalidates laws, and ignores the purported Salerno standard when it does)

falls within the statute's scope."); Doe v. City of Albuquerque, 667 F.3d 1111, 1123-1127 (10th Cir. 2012) ("The idea that the Supreme Court applies the 'no set of circumstances' test to every facial challenge is simply a fiction, readily dispelled by a plethora of Supreme Court authority.")

Other federal circuit courts, including the Second and Fifth Circuits, have however, continued to rely on the "no set of circumstances" and "vague in all applications" Salerno test to reject facial constitutional challenges. Libertarian Party v. Cuomo, 970 F.3d 106, 126 (2nd Cir. 2020); United States v. McGinnis, 956 F.3d 747, 752 (5th Cir. 2020); City of El Cenizo v. Texas, 890 F.3d 164, 187 (5th Cir. 2018) ("The [Supreme] Court did not overrule the Salerno standard but merely clarified that, under the unconstitutional-in-all-of-its-applications analysis, a court must 'consider[] only applications of the [challenged] statute in which it actually authorizes or prohibits conduct.'")

The Eleventh Circuit is internally conflicted with one panel rejecting the Salerno test in a published opinion eleven days after another panel relied on it. Compare Club Madonna, Inc. v. City of Miami Beach, 42 F.4th 1231, 2022 U.S. App. LEXIS 21160 * 48-51 (11th Cir. 2022) ("Salerno is correctly understood not as a separate test applicable to facial challenges, but a description of the outcome of a facial challenge in which a statute fails to satisfy the appropriate constitutional framework.") with SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga., 40 F.4th 1320 (11th Cir. 2022) ("[F]or a facial" void-for-vagueness challenge to succeed, "the challenger must establish that no set of circumstances exists under which the Act would be valid.")

II. THE LOWER COURTS ARE CONFUSED REGARDING THESE UNSETTLED FEDERAL QUESTIONS GOVERNING THE FUNDAMENTAL STANDARDS FOR THE JUDICIAL REVIEW OF CONSTITUTIONAL CHALLENGES

To vindicate the rights guaranteed by the Constitution, citizens must turn to the courts. The Federalist No. 80, Bantam Class ed. 1982 at 403 (A. Hamilton) ("[T]here ought always to be a constitutional method of giving efficacy to constitutional provisions. What for instance would avail restrictions on the authority of the [ ] legislatures, without some constitutional mode of enforcing the observation of them.") The questions presented are at the core of how this nation's courts evaluate constitutional challenges to state and federal laws. These standards by their nature impact the review of laws concerning every facet of life in this nation ranging from criminal statutes and election laws to municipal ordinances and administrative regulations. State and federal laws are challenged in this nation's courts on a daily basis. Without clear and uniform standards governing how those challenges should be evaluated, courts will produce erratic and inconsistent results. The Federalist No. 78, Bantam Classic ed. 1982 at 394 (A. Hamilton) ("[Constitutional] limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void.")

As the law presently stands (Section I), some courts consider facial constitutional challenges, while others outright reject them. Some courts rely on the restrictive, purported Salerno test, while others instead evaluate laws through the substantive tests specific to each constitutional doctrine. As shown below, many courts have recognized this disparate treatment of constitutional challenges and expressed confusion. This level of uncertainty is unacceptable when it comes to the bedrock principle of judicial review

and the primacy of the Constitution over legislation as established in this nation's earliest days. Marbury v. Madison, 5 U.S. 137 (1803).

Certiorari should be granted because the New Jersey Appellate Division decided these important questions of federal law that have not been, but should be settled by the Supreme Court. Rule 10(c). If any area of the law calls for uniform standards, it is the way in which courts' evaluate constitutional challenges. The Federalist No. 78, Bantam Classic Ed. at 399 (A. Hamilton) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.").

More specifically, the question of whether this nation's state and federal courts may consider facial vagueness challenges is particularly important because "[v]ague laws invite arbitrary power." Dimaya, 138 S. Ct. at 1223 (Gorsuch, J., concurring). The "void for vagueness doctrine, at least properly conceived, serves as a faithful expression of ancient due process and separation of powers principles the framers recognized as vital to ordered liberty under our Constitution." Id.[6] Furthermore, the potential for arbitrary enforcement of the laws always presents a clear threat to the liberty of society. "Although the [void-for-vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized that 'the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'"

[6] "It is impossible to dissent from the doctrine of Lord Coke, that acts of parliament ought to be plainly and clearly, and not cunningly and darkly penned, especially penal matter." F. Dwarris, A General Treatise on Statutes 652 (P. Potter ed. 1871); A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 151 (1962) (``A vague statute delegates to administrators, prosecutors, juries, and judges the authority of ad hoc decision, which is in its nature difficult if not impossible to hold to account, because of its narrow impact")

Kolender v. Lawson, 461 U.S. 285, 357-358 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974))[7].

The Supreme Court has an obligation to provide clear standards and must act when there is confusion among the lower courts—particularly where the confusion has been caused by the Court's decisions. Gee v. Planned Parenthood of Gulf Coast, Inc., 139 S. Ct. 408, 410 (2018) (Thomas, J., dissenting form denial of certiorari) ("We are responsible for the confusion among the lower courts, and it is our job to fix it.") Here, the lower courts have expressed confusion as to the law governing facial and as-applied constitutional challenges. United States v. Stupka, 418 F. Supp. 3d 402, 408 (N.D. Iowa 2019) ("When is a facial void-for vagueness challenge allowed? The case law on this issue is limited and unclear … [T]here is no definitive or binding authority on the issue.") Planned Parenthood Southeast, Inc. v. Strange, 172 F. Supp. 3d 1275, 1284 (M.D. Ala. 2016) ("To be candid, the law on facial versus as-applied relief is a mess."); Davis v. City of New York, 959 F. Supp. 2d 324, 343 n. 79 (S.D.N.Y. 2013) ("The distinction between facial and as-applied challenges is not always clear, and has been defined in various ways."); In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab., 674 F. Supp. 2d 494, 505 (S.D.N.Y. 2009) ("There are few areas of the law that are as confused and conflicted as the law governing facial challenges."); McCullen v. Coakley, 571 F.3d 167, 174 (1st Cir. 2009) ("Around the edges, the standards that apply in evaluating facial challenges to the constitutionality of statutes are not entirely clear."); United States v. Requena, 980 F.3d 29, 40 (2d Cir. 2020) ("Neither the Supreme Court nor our Court has definitively resolved whether facial vagueness challenges not based on the First Amendment may

[7] The New Jersey Appellate Division and some of the federal circuits have lumped together the arbitrary enforcement prong of the vagueness doctrine with the fair notice prong and broadly ruled that facial vagueness challenges are not permissible.

proceed against statutes that can constitutionally be applied to the challenger's own conduct.")

"[A]s many scholars note, the distinction, if any, between a facial and an as-applied challenge is difficult to explain because there is a disconnect between what the Supreme Court has outlined and what happens in actual practice." Hecox v. Little, 479 F. Supp. 3d 930, 968 n. 25 (D. Idaho 2020); Richard H. Fallon, Jr., Fact and Fiction About Facial Challenges, 99 Cal. L. Rev. 915, 936-49 (2011) (examining empirical evidence and concluding that the Supreme Court regularly facially invalidates laws, and ignores the purported Salerno standard when it does); Gillian E. Metzger, Facial and As-Applied Challenges Under the Roberts Court, 36 Fordham Urb. L.J. 773, 774 (2009) (noting that the Court is divided as to the appropriate general test for facial challenges and arguing that the Court "has made little effort to describe the contours of as-applied litigation") Standing--Facial Versus As Applied Challenges--City of Los Angeles v. Patel, 129 Harv. L. Rev. 241, 246 (2015); Gillian E. Metzger, Facial Challenges and Federalism, 105 Colum. L. Rev. 873, 882 (2005); Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 271-276 (1994)

As Professor Fallon has noted, "[t]he Justices have lectured not only the lower courts, but also each other, about when facial challenges are and are not appropriate." Fallon, Fact and Fiction at 917. This has resulted in the lower courts disparately evaluating constitutional challenges by guessing at what standards and tests to apply. The Court should not allow this confusion to persist. Certiorari should therefore be granted to settle the federal questions presented.

III. NEW JERSEY'S APPELLATE DIVISION'S AND SEVERAL FEDERAL CIRCUITS' RULES RESTRICTING FACIAL CONSTITUTIONAL CHALLENGES ARE IN CONFLICT WITH THE SUPREME COURT'S DECISIONS AND PRACTICE; THEY MUST BE REJECTED

The New Jersey Appellate Division has decided federal questions in a way that conflicts with relevant decisions of the Supreme Court, providing another compelling reason to grant certiorari. Rule 10(c). The approach taken by the Supreme Court in practice, and the Third, Fifth, and D.C. Circuits should be explicitly adopted. "[C]ontrary to the conventional wisdom, the Supreme Court does not routinely insist on ruling on as-applied challenges before deciding whether to hold a statute invalid on its face, nor should it almost always do so." Fallon, Fact and Fiction at 919. This Court should reject the rulings of the New Jersey Appellate Division and several federal circuit courts that a successful as-applied challenge is a mandatory predicate to a facial constitutional challenge. This erroneous rule creates an obvious logical quandary. If a litigant brings a successful as-applied challenge, then a facial challenge would become moot. Conversely, if a litigant's as-applied challenge fails, his facial challenge cannot be considered. Consequently, under this illogical rule, facial challenges can never be raised.

That cannot be the case, however, as the Supreme Court has long considered and upheld facial challenges in the arbitrary enforcement context of the void-for-vagueness doctrine. International Harvest Co. of America v. Kentucky, 234 U.S. 216 (1914); United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921); Connally v. General Construction Co., 269 U.S. 385 (1925); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Giacco v. Pennsylvania, 382 U.S. 399 (1966); Coates v. Cincinnati, 402 U.S. 611 (1971); Kolender v. Lawson, 461 U.S. 352 (1983); Morales, 527 U.S. at 51; Johnson, 135 S. Ct. at 2551;

Dimaya, 138 S. Ct. at 1204. "[F]acial challenges constitute the norm, not the anomaly, in constitutional litigation before the Supreme Court in which the validity of statutes and their applications is at issue." Fallon, Fact and Fiction at 920. In each of these cases, the Supreme Court has struck down statutes on their face using the vagueness doctrine without first considering as-applied challenges.

In Lanzetta, the Supreme Court stated, "[I]f 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." In Kolender, the dissent argued, "[t]he usual rule is that the alleged vagueness of a criminal statute must be judged in light of the conduct that is charged to be violative of the statute." Kolender, 461 U.S. at 369 (White, J., dissenting). The majority rejected the dissent's argument, stating, "[n]o authority cited by the dissent supports its argument about facial challenges in the arbitrary enforcement context." Id. at 358 n. 8. That is because arbitrary enforcement aspect of the vagueness doctrine and the similar non-delegation doctrine[8] have nothing to do with the conduct of the defendant, but rather, the language of the law, and whether the law itself delegates too much authority either to the Executive or the Judiciary. The rule prohibiting a litigant from bringing a facial vagueness challenge where his conduct is "clearly proscribed" may apply to the fair notice prong of the vagueness doctrine, Humanitarian Law Project, 561

[8] With respect to the non-delegation doctrine, the constitutional inquiry is very similar: whether Congress has improperly delegated its legislative function to the executive or judicial branches. Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) ("It's easy to see, too, how most any challenge to a legislative delegation can be reframed as a vagueness complaint ... And it seems little coincidence that our void-for-vagueness cases became much more common soon after the Court began relaxing its approach to legislative delegations."). The Court has long held that a non-delegation doctrine challenge is facial in nature. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935). Courts must "look to the statute to see whether Congress ... has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others." Id.

U.S. at 20, but is patently inapplicable to the arbitrary enforcement prong. "[W]hether conduct is clearly proscribed under the terms of the statute reveals little about whether the statutory language, or the process through which it is applied, has sufficiently clear standards to prevent arbitrary enforcement." Stupka, 418 F. Supp. 3d at 411; ANSWER, 846 F.3d at 409-410.

The New Jersey Appellate Division and several federal circuit courts have missed this point and improperly rejected facial vagueness challenges by conflating the fair notice aspect of the void-for-vagueness doctrine with its arbitrary enforcement aspect. They ignored that in Johnson and Dimaya, this Court invalided federal statutes because they encouraged arbitrary enforcement by judges. Johnson, 576 U.S. at 597. These courts further tried to distinguish Johnson and Dimaya by claiming they considered facial vagueness challenges because the statutes at issue were unique in that they required judges to consider imaginary and abstract scenarios, as opposed to real world conduct. Requena, 980 F.3d at 41 ("[T]he exceptional circumstances that justified Johnson's extraordinary facial invalidation"); Hasson, 2022 U.S. App. LEXIS 4741 *22 (Johnson's and Dimaya's "unique context sets them apart"). This conclusion was also erroneous as Johnson pointed to Supreme Court decisions invalidating statutes that applied to real world conduct. Johnson, 576 U.S. at 603 (citing L. Cohen Grocery Co., 255 U.S. at 89 and Coates, 402 U.S. at 611). As such, "[t]he Supreme Court's opinion in Johnson also supports the proposition that cases presenting substantial concerns about arbitrary enforcement and procedure warrant a facial void-for-vagueness review." Stupka, 418 F. Supp. 3d at 410.

The Court should further explicitly reject the Salerno test, which needlessly superimposes an "invalid in all applications" standard on the substantive test governing the constitutional right at issue[9]. Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 239-42 (1994) ("[T]he Salerno opinion cites no direct authority to support its truly draconian standard."). Courts should consider facial challenges on a doctrine-by-doctrine basis and evaluate challenges simply through the lens of the substantive test for the constitutional provision raised by a litigant. Fallon, As-Applied and Facial Challenges And Third-Party Standing, 113 Harv. L. Rev. 1321, 1324 (2000) ("[T]he availability of facial challenges varies on a doctrine-by-doctrine basis and is a function of the applicable substantive tests of constitutional validity.")

This is the appropriate method of evaluating facial constitutional challenge this Court and the Third and Tenth Circuits have practiced. The Supreme Court "has often considered facial challenges simply by applying the relevant constitutional test to the challenged statute[.]" Bruni, 824 F.3d at 363. "[W]here a statute fails the relevant constitution test (such as strict scrutiny, the Ward test, or reasonableness review), it can no longer be constitutionally applied to anyone – and thus there is 'no set of circumstances' in which the statute would be valid. The relevant constitutional test, however, remains the proper inquiry." Id. (quoting Doe, 667 F.3d at 1127). "Thus, Salerno is correctly understood not as a separate test applicable to facial challenges, but a description of the outcome of a facial challenge in which a statute fails to satisfy the appropriate constitutional framework." Doe, 667 F.3d at 1123. Simply put, "there is no

[9] Dimaya, 138 S. Ct. at 1229 (2018) (Gorsuch, J., concurring) ("[A]ny suggestion that criminal cases warrant a heightened standard of review does more to persuade me that the criminal standard should be set above our precedent's current threshold than to suggest the civil standard should be buried below it.")

one test that applies to all facial challenges … much less the Salerno formulation." Id. at 1124.

In evaluating facial challenges, the Supreme Court has simply applied the relevant, substantive constitutional test to the challenge statute. See, e.g., N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen, 142 S.Ct. 2111 (2022) (facially invalidating gun law by applying substantive Second Amendment test—whether "the regulation is consistent with this Nation's historical tradition of firearm regulation"); Carson v. Makin, 142 S. Ct. 1987 (2022) (striking down Maine statute on its face because it violated the First Amendment Free Exercise Clause test—whether a law "excludes religious observers from otherwise available public benefits"); Patel, 576 U.S. at 409 (holding that "facial challenges under the Fourth Amendment are not categorically barred or especially disfavored" and applying "reasonableness" test)

Any rule rejecting a challenger's facial challenge *ab initio* is questionable in light of this Court's holding that, "[t]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 331 (2010); Bucklew v. Precythe, 139 S. Ct. 1112, 1128 (2019) ("[C]lassifying a lawsuit as facial or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding ``breadth of the remedy," but it does not speak at all to the substantive rule of law necessary to establish a constitutional violation.'")

IV. NEW JERSEY'S ANTI-TERRORISM ACT IS VOID-FOR-VAGUENESS ON ITS FACE IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS

The September 11th, 2001 Anti-Terrorism Act is void for vagueness as the New Jersey Legislature's decision to frame the term terrorism using definitions of the words terror and terrorize leaves the law with no core at all.

> [A] criminal provision is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' Coates v City of Cincinnati, 402 US 611, 614 (1971). Such a provision simply has no core. This absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause. The deficiency is particularly objectionable in view of the unfettered latitude thereby accorded law enforcement officials and triers of fact. Until it is corrected either by amendment or judicial construction, it affects all who are prosecuted under the statutory language.
>
> Smith, 415 U.S. at 578.

A criminal statute is unconstitutionally vague when it "authorize[s] or even encourage[s] arbitrary enforcement." Morales, 527 U.S. at 56 (emphasis added). Any statute that gives prosecutors "the full discretion . . . to determine" whether a violation has occurred "entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat[,] . . . furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure[,] . . . and confers on police a virtually unrestrained power to arrest and charge persons with a violation." Kolender, 461 U.S. at 357-58 (emphasis added). A statute is void when its "standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections." Smith, 415 U.S. at 575 (emphasis added).

The statute provides that, "[a] person is guilty of the crime of terrorism if he commits or attempts, conspires or threatens to commit any crime enumerated in subsection c. of this section with the purpose: (1) to promote an act of terror; or (2) to terrorize five or more persons[.]" N.J.S. 2C:38-2[10]. The term "terror" is defined as "the menace or fear of death or serious bodily injury," and the term "terrorize" means "to convey the menace or fear of death or serious bodily injury by words or actions." N.J.S. 2C:38-2(d).

While the statute purports to criminalize terrorism, what it actually prohibits is the commission of an underlying crime with the intent to frighten. The Legislature used the most basic definitions of the words "terror" and "terrorize," which are merely synonyms of the words "fear" and "frighten," instead of the actual definition of terrorism. The problem with such a statute is that an intent to frighten could be gleaned from the commission of virtually any crime in and of itself. Furthermore the word "promote" in subsection (a)(1) is undefined. Given the lack of any limiting language, the word "promote ... [is] susceptible of multiple and wide-ranging meanings[.]" Williams, 553 U.S. at 294-95.

This amorphous definition of terrorism and the breadth of possible predicate crimes, N.J.S. 2C:38-2(c), leave it open to abuse. Any person who brandishes a switchblade or carries a stun gun in New Jersey could be subject to a mandatory minimum of 30-years in prison. A fistfight could be prosecuted as an act of terror, subjecting the participants to a lifetime in prison. Given that terror and fear are inherent components of many crimes, the possibilities are endless. Any robber or murderer could

[10] This scienter language does not protect the statute from invalidation, as it is the very language being challenged as unconstitutionally vague.

be charged as a terrorist. John M. Cannel, New Jersey Criminal Code Annotated, comment 3 to N.J.S. 2C:38-2 (2022)[11] ("[A]ny assault with a weapon could be an act of terror, and any robbery of a convenience store could terrorize five or more persons").

It remains unclear what additional fact must be proven to elevate an ordinary crime to terrorism. The U.S. Supreme Court's determination that "a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved" best sums up the problem with this statute. F.C.C. v. Fox TV Stations, Inc., 567 U.S. 239, 253 (2012). The promotion or conveyance of the "menace or fear of death or serious bodily injury" are the purpose or byproduct of most violent crimes and may even be perceived by victims of non-violent crimes. What additional fact transforms an ordinary armed robbery, which is meant to convey fear for the purpose of a theft, to terrorism in violation of N.J.S. 2C:38-2(a)(1) or (2)? What must a prosecutor prove and what must a suspect do to transform an assault with a weapon, which may convey the menace of fear to five or more bystanders, to terrorism?

By employing indefinite language, the Legislature has provided no apparent answers to these questions and given prosecutors, judges, and juries *carte blanche* to make them up. Whether a common criminal is to be designated a terrorist and condemned to life in prison with a 30-year parole disqualifier is left to the caprices of a county prosecutor and his boss, the Attorney General. With no clear guidance, New Jersey prosecutors are free to impose their own predilections on a case-by-case basis. What is

[11] Professor Cannel further noted: "The ordinary understanding of "terrorism" involves the planned use of violence or destruction to achieve political goals ... However, the purposes specified to elevate an ordinary crime to terrorism do not convey this common understanding clearly." Id.

clear, however, is that, whether influenced by personal motivations or external pressure, prosecutors have absolute discretion to label nearly anyone charged with a crime in New Jersey a terrorist.

A political purpose is the *sine qua non* of terrorism and is what separates it from ordinary crime. The absence of such an indispensable political element makes this statute susceptible to whims of prosecutors. The "concept of terrorism has a unique meaning," as the Court of Appeals of New York noted. People v. Morales, 982 N.E.2d 580, 586 (N.Y. 2012). In State v. Yocum, the Supreme Court of Appeals of West Virginia agreed that a political purpose is a "universal component" of terrorism:

> "Despite the variance in statutory enactments which address terrorism, there is a consensus that both violence and a political purpose are universal components included in this type of legislation. See Nicholas J. Perry, The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails, 30 J. Legis. 249, 251 (2004)(recognizing that "vast majority of definitions of terrorism contain some reference to the two most common components ... violence and a political purpose or motivation.")"

759 S.E.2d 182 (W.Va. 2014). This unique meaning is not adequately expressed by the most basic definitions of "terror" or "terrorize". The statute further excludes an element requiring the targeting of the civilian population—another requirement found in a small minority of definitions of "domestic terrorism." See, e.g., 18 U.S.C. § 2331(5)[12]; V.A. Code § 18.2-46.4 (defining "act of terrorism" as "an act of violence . . . committed with intent to (i) intimidate the civilian population at large . . . "). The New Jersey Appellate Division acknowledged the reality that the state's Anti-Terrorism Act stands alone in this respect. Dalal, 252 A.3d at 219-220 ("While the federal ATA, as well as

[12] It bears mention that the definition of "domestic terrorism" in 18 U.S.C. 2331(5) is merely one of many definitions of terrorism in the United States Code and does not have an enforcement mechanism. It is not a criminal statute and not a single person has been prosecuted much less convicted under the definition.

many other states' terrorism statutes, link terrorism to a political purpose, there is nothing unconstitutionally vague about New Jersey's Act.")

The nebulous language of the statute bolsters the inescapable conclusion that the legislature impermissible "set a net large enough to catch all possible offenders, [leaving] it to the courts to step inside and say who could be rightfully detained, and who should be set at large." United States v. Reese, 92 U.S. 214, 221 (1876); Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis.") Vesting law enforcement with such absolute discretion to decide whether a violation has occurred is the hallmark of a vague statute.

The danger against which the void for vagueness doctrine was meant guard is a statute that "allows" or "encourages" prosecutors to pursue such erratic prosecutions. The very fact that this anti-terrorism statute gives prosecutors such "full discretion" in the first place is sufficient to render it void for vagueness. By clearly proscribing nothing at all, the statute impermissibly allows prosecutors to charge just about everything as terrorism.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted:

Aakash Dalal

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