No. 22-6112

In the Supreme Court of the United States

AAKASH A. DALAL,

PETITIONER,

v.

STATE OF NEW JERSEY,

RESPONDENT.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the New Jersey intermediate appellate panel correctly determined that Petitioner's facial vagueness challenge to a New Jersey anti-terrorism statute was precluded by his inability to show that it was vague as applied to his conduct.

2. Whether the New Jersey intermediate appellate panel correctly applied precedent regarding the degree of vagueness necessary to prevail on a facial vagueness challenge.

3. Whether New Jersey's Anti-Terrorism Act, N.J. Stat. Ann. § 2C:38-2, is void for vagueness.

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The opinion of the Superior Court of New Jersey, Appellate Division (Pet. App. 1-37), is reported at 252 A.3d 204. The opinion of the trial court (Pet. App. 38-59) is not published.

JURISDICTION

The judgment of the Appellate Division was entered on April 15, 2021. The New Jersey Supreme Court denied certification on May 3, 2022 (Pet. App. 60). The New Jersey Supreme Court granted leave to file a motion for reconsideration as within time on July 25, 2022 (Pet. App. 61). The New Jersey Supreme Court denied reconsideration on October 4, 2022 (Pet. App. 62). The petition for a writ of certiorari was filed on November 14, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

INTRODUCTION

Petitioner Aakash Dalal was convicted of first-degree terrorism, N.J. Stat. Ann. § 2C:38-2, among other offenses, after helping plan the firebombing of three Jewish houses of worship or community centers and spray-painting swastikas on two synagogues. He takes no issue with the holding by the New Jersey intermediate appellate court that his own conduct clearly fell within the statute's prohibitions and that the statute

was not vague as applied to him. Instead, Petitioner argues that New Jersey's anti-terrorism law is vague on its face and that the state appellate court decided several questions in a way that conflicts with rulings by this Court or decisions of U.S. Courts of Appeals—specifically: (1) whether a challenger must show vagueness as applied to his case in order to prevail on a facial vagueness challenge; and (2) whether a statute must be vague in all applications to be unconstitutionally vague.

But the circuit splits Petitioner asserts are illusory, as evidenced by the Court's recent denials of petitions raising the same questions. See Pet. for Cert. at i, *United States v. Hasson*, No. 22-5119 (July 14, 2022) (denied Oct. 11, 2022); Pet. for Cert. at i, *Copeland v. Vance*, No. 18-918 (Jan. 14, 2019) (denied June 17, 2019). Indeed, every federal court of appeals follows this Court's rule that a litigant must generally show as-applied vagueness to prevail in a facial challenge. And while Petitioner cites superficial differences in how a few opinions described the degree of vagueness a facial challenger must show in the abstract, he has not identified any holdings that are in conflict on this question—nor was that issue at all determinative to the intermediate appellate panel's decision.

Finally, this case does not meet any other criterion for this Court's review. Terrorism charges under N.J. Stat. Ann. § 2C:38-2 are rare, and the plain text of the statute raises no vagueness concerns and does not implicate any split of authority. Even if this Court were inclined to review that infrequent, splitless, and fact-bound question, the New Jersey intermediate appellate court did not err.

STATEMENT OF THE CASE

During a one-month period, between December 2011 and January 2012, Petitioner Aakash Dalal and his co-conspirator, Anthony Graziano, engaged in a campaign to terrorize the Jewish community in the Bergen County, New Jersey, area by vandalizing and fire-bombing five synagogues. Pet. App. 18.

In December 2011, Petitioner and Graziano vandalized two synagogues by spray-painting swastikas and other graffiti, including the phrase "Jews did 9/11." Pet. App. 3. Less than one month later, Petitioner and Graziano escalated their attacks. Petitioner helped plan, and Graziano carried out, attempted firebombings of three Jewish houses of worship or community centers. On January 3, 2012, Graziano threw Molotov cocktails at a temple in Paramus, New Jersey. Four days later,

Graziano brought Molotov cocktails and bottles containing gasoline to a Jewish community center, abandoning his effort only after seeing a police car patrolling the area. *Id.*, at 4. And in the early morning hours of January 11, 2012, Graziano threw Molotov cocktails at another temple in Rutherford, New Jersey, where a rabbi and his family (who lived on the temple's upper floors) were currently sleeping. "The rabbi awoke to a bright orange light outside his window" and soon "heard glass breaking and saw fire spreading in his bedroom." *Id.*, at 4-5.

Although Petitioner was not present at the scene of the firebombings, online text messages sent before and after each incident revealed that he played the dominant role in the criminal conspiracy. Specifically, Petitioner intimated that he was a significant player in the anarchist movement, a portrayal that Graziano believed; played on Graziano's resentment of Jews; ridiculed Graziano's initial two failed arson attempts, while hailing the "triumphant" arson in Rutherford; incentivized Graziano's conduct; and gave Graziano explicit instructions as to how to deploy the Molotov cocktails in Rutherford. For example, Petitioner and Graziano had the following excerpted exchange on January 11, 2012, after the Rutherford attack:

DALAL: Wow / nice / I'm looking at the house now / Nice fucking throw

GRAZIANO: I'll be making a comeback / "ball of fire through my window"

DALAL: "terrorist attack"

GRAZIANO: dude that ADL jew is hilarious / he looks like he's about to roll over and cry

DALAL: "stalked out for weeks"

GRAZIANO: this is too funny / i can't laugh that hard though / my lungs are still recovering

…

DALAL: You are being honored in the underground

GRAZIANO: really?

DALAL: Yes / You have definitely proven yourself with this

GRAZIANO: i only have one thing i'm upset with / my lighter didn't function correctly / i would of killed them / if i had a torch lighter, they would of been dead / i like molotovs though / i'm going to use cork next time / instead of duck tape to cork the bottle

…

DALAL: Congratulations

GRAZIANO: they are concerned / it's everywhere / fox 5, cnn / cbs

DALAL: They are shaking in their fucking Jew boots

GRAZIANO: I know they are / just wait until I get a gun

DALAL: We should use different tactics for the next week or so

GRAZIANO: what tactics?

DALAL: Psychological warfare

GRAZIANO: ha / ah / destroy their moral / well just hand out fliers / and spread videos / this is insNW / insane

Id., at 17-18.

Petitioner was charged with 20 counts, including one count of first-degree terrorism in violation of N.J. Stat. Ann. § 2C:38-2. Pet. App. 38-39. Prior to trial, he moved to dismiss that charge, arguing that the law's definitions of "terror" and "terrorize" were facially void for vagueness and vague as applied to his conduct. The court rejected his argument, holding that the statute uses "plain language that a person of reasonable intelligence would understand." *Id.*, at 54.

After a jury trial, Petitioner was convicted of first-degree terrorism, N.J. Stat. Ann. § 2C:38-2(a); first-degree aggravated arson, N.J. Stat. Ann. § 2C:17-1(a)(2) and N.J. Stat. Ann. § 2C:2-6; first-degree conspiracy to commit arson, N.J. Stat. Ann. § 2C:17-1 and N.J. Stat. Ann. § 2C:5-2; and first-degree bias intimidation, N.J. Stat. Ann. § 2C:16-1(a)(l) and N.J. Stat. Ann. § 2C:2-6. Pet. App. 2.

On appeal, Petitioner again pressed facial and as-applied vagueness challenges. Pet. App. 19-20. New Jersey's intermediate appellate court—the Appellate Division—rejected Petitioner's challenge. Citing this Court's holding in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010), the Appellate Division observed that "a person challenging a statute must normally show that it is vague as applied to him or her." Pet. App. 23. It further rejected Petitioner's argument that this Court's decisions in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *Johnson v. United States*, 576 U.S. 591 (2015), displaced that standard requirement. Pet. App. 23-25.

The appellate court then rejected Petitioner's as-applied challenge. Citing Petitioner's online messages expressing a desire to leave the Bergen County Jewish community "shaking in their fucking Jew boots," to engage in "psychological warfare," and Petitioner's own acknowledgement that the firebombings were a "terrorist attack," the Appellate Division concluded that Petitioner's conduct fell within the heartland of the anti-terrorism statute. *Id.*, at 29-30. The court rejected Petitioner's facial challenge and his "hypothetical contentions concerning

how the Act might be applied," in light of that threshold failure. *Id.*, at 25.

Petitioner sought review from the New Jersey Supreme Court, which denied his application, *id.*, at 60, and denied reconsideration of that denial, *id.*, at 62. This petition for certiorari followed.

REASONS FOR DENYING THE PETITION

I. There Is No Circuit Split Regarding Whether Petitioner's Challenge Can Proceed If The Law Clearly Applies To His Conduct.[1]

Petitioner does not contest that New Jersey's anti-terrorism statute clearly prohibits his conduct and thus abandons any argument that the statute is vague as applied to him. He challenges, rather, the rule that to succeed on a vagueness challenge, a person must normally be able to show that the challenged law is vague as applied to the facts of his case. *See* Pet. 10-12, 16-18, 20-22. But no split exists on that question. Rather, every U.S. court of appeals recognizes that a defendant normally must be able to show as-applied vagueness to prevail on a facial challenge. The New Jersey appellate court followed that uniform rule, and this Court

[1] This discussion addresses Petitioner's first two questions presented, which as discussed *infra* at n.3, ultimately cannot support certiorari for the same reasons.

recently denied a petition raising the same question. See *United States v. Hasson*, 143 S. Ct. 310 (Oct. 11, 2022) (No. 22-5119).

Some context helps explain this uniform rule. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A criminal law may be unconstitutionally vague either because it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). As with many other challenges, a litigant may raise an as-applied challenge, a facial challenge, or both. See *City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015).

But different standards govern whether a litigant can *prevail* in such challenges. For decades, the Court has held that, at least outside the First Amendment context, "'[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Humanitarian Law Project*, 561 U.S., at 18-19 (quoting *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.,* 455 U.S. 489, 495 (1982)). Thus, in order to succeed in a facial vagueness

challenge, a challenger must be able to show that the law is vague as applied to him. See *Humanitarian Law Project*, 561 U.S., at 18-19; *Hoffman Ests.*, 455 U.S., at 495; *United States v. Mazurie*, 419 U.S. 544, 550 (1975); *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 30 (1963); *United States v. Raines*, 362 U.S. 17, 20-22 (1960).[2]

Contrary to Petitioner's theory, there is no split on whether this rule remains the law after *Johnson*, 576 U.S. 591, and *Dimaya*, 138 S.Ct. 1204. See *United States v. Hasson*, 26 F.4th 610, 620 (CA4 2022) (observing that "no court of appeals to consider the question has concluded that *Johnson* or *Dimaya* worked … a change" in the usual rule that a defendant must be able to show vagueness as applied in order to prevail in a facial vagueness challenge), *cert. denied*, 143 S. Ct. 310 (2022) (No. 22-5119). Nor could it be otherwise, since this Court itself reaffirmed the rule after *Johnson* that a plaintiff who could not show any vagueness as applied to him "cannot raise a successful vagueness claim."

[2] This Court has recognized an "exception to [the] normal rule regarding the standards for facial challenges" in First Amendment cases—known as the "overbreadth" doctrine. *Virginia v. Hicks*, 539 U.S. 113, 118 (2003). That exception is not implicated here, although expanding the overbreadth doctrine appears to be the upshot of Petitioner's argument.

Expressions Hair Design v. Schneiderman, 581 U.S. 37, 48-49 (2017) (citing *Humanitarian Law Project*, 561 U.S., at 20).

A review of the circuits confirms that uniformity. Petitioner acknowledges the Second, Fourth, Seventh, Eighth, Ninth, Tenth, and Federal circuits adhere to this rule. See Pet. 12 (collecting cases). But all the remaining circuits do too. See *Doe v. Hopkinton Pub. Sch.*, 19 F.4th 493, 510 (CA1 2021) (confirming "that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others"); *Moreno v. Att'y Gen.*, 887 F.3d 160, 165 (CA3 2018) (noting because "vagueness challenges are evaluated on a case by case basis," courts ask if "the statute is vague as applied to" the challenger); *United States v. Westbrooks*, 858 F.3d 317, 325 (CA5 2017) ("A person whose conduct is clearly proscribed by a statute cannot complain that the law is vague as applied to the conduct of others." (cleaned up)), *cert. granted, judgment vacated on other grounds*, 138 S.Ct. 1323 (2018); *United States v. Kettles*, 970 F.3d 637, 650 (CA6 2020) (agreeing that in a facial suit, the law still "must be unconstitutionally vague as applied to this particular case"); *BHC Nw. Psychiatric Hosp. v. Sec'y of Lab.*, 951 F.3d 558, 566 (CADC

2020) ("[E]ven if the scope of a general standard may not be clear in every application, where its terms are clear in their application to the conduct at issue, the vagueness challenge must fail.").

In asserting a split, Petitioner misconstrues the relevant cases. First, Petitioner claims that the D.C. Circuit has held there is no need to show vagueness as-applied to prevail on a facial challenge under an "arbitrary enforcement" theory of vagueness. Pet. 10 (citing *Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found, v. District of Columbia*, 846 F.3d 391, 409-10 (CADC), *cert. denied*, 138 S. Ct. 334 (2017) (No. 17-274)). But *Act Now* does not create a split for multiple reasons. For one, *Act Now* involved a regulation of speech (a sign-posting regulation), which this Court has long subjected to a distinct standard for purposes of facial challenges. See *supra* at 10 n.2. For another, the D.C. Circuit did not jettison the rule from *Humanitarian Law Project*, but just hypothesized that there may be some arbitrary-enforcement claims, "[a]t least in a pre-enforcement posture," where there may be no as-applied analysis to be had. See 846 F.3d, at 410. And in any event, though the court "proceed[ed] on the assumption" that an as-applied showing *might* be unnecessary in such a case (and on such a

posture), that assumption did not affect the outcome of the claim, because the panel ultimately upheld the challenged sign-posting rule as sufficiently clear. *Id.*, at 410-11. The New Jersey appellate court's opinion in Petitioner's post-enforcement, non-speech challenge to his terrorism conviction does not conflict with *Act Now* for any and all of these reasons.[3]

Nor are any of the other decisions Petitioner cites in conflict. Rather, as explained, the federal circuits that Petitioner cites follow the mainstream rule. See *supra* at 11-12. For its part, *Knick v. Twp. of Scott*, 862 F.3d 310 (CA3 2017), *vacated on other grounds*, 139 S. Ct. 2162 (2019), resolved a Fourth Amendment claim and said nothing about facial vagueness challenges. Nor did it hold that a litigant can prevail on a facial challenge without succeeding on an as-applied basis. See *id.*, at 320

[3] Further, *Act Now* predates *Expressions Hair Design*, which reaffirmed the usual rule for facial vagueness challenges in the process of rejecting an arbitrary-enforcement vagueness theory. See 581 U.S., at 48-49; see also, *e.g.*, *Parker v. Levy*, 417 U.S. 733, 752, 756 (1974) (taking the same approach, decades prior, to an arbitrary-enforcement vagueness theory). While Petitioner cites decisions by this Court upholding arbitrary-enforcement claims, Pet. 20-21, none did so after finding that the conduct at issue fell clearly within the challenged law—the problem plaguing his own theory. What Petitioner states as his second question presented, Pet. ii, therefore dovetails with his first. In any event, the second question presented runs into an additional vehicle problem: it was not addressed at all by the panel below.

("[E]ven if a litigant does not allege a violation as applied, the law in question must still typically be applied."). And in *Liberty Coins, LLC v. Goodman*, again a Fourth Amendment case, the Sixth Circuit acknowledged that a plaintiff may *bring* an as-applied challenge, a facial challenge, or both. 880 F.3d 274, 281 (CA6 2018). But that is consistent with the rule every court follows, which simply provides that, to ultimately *prevail* on such a vagueness challenge, a litigant must generally be able to show vagueness as applied. Finally, two other decisions that Petitioner cites were vacated on rehearing en banc and therefore cannot support his claim of a split. See *United States v. Gonzalez-Longoria*, 813 F.3d 225 (CA5), *reh'g en banc*, 831 F.3d 670 (2016); *United States v. Davila-Reyes*, 23 F.4th 153 (CA1), *reh'g en banc granted, opinion withdrawn*, 38 F.4th 288 (2022).

New Jersey's Appellate Division thus followed the standard rule that every federal circuit continues to follow with respect to facial vagueness challenges by challengers who cannot show vagueness as applied to their own conduct. It found that N.J. Stat. Ann. § 2C:38-2 clearly proscribed Petitioner's conduct, a conclusion he does not contest,

and thus rejected his vagueness challenges. Petitioner identifies no split on that score, and the question does not merit this Court's review.

II. The Appellate Division's Brief Reference To *Salerno* Does Not Implicate A Split, And This Case Is A Poor Vehicle For Addressing The Question.

Petitioner also urges review on the basis that, in a paragraph reciting general standards for vagueness challenges, the New Jersey intermediate court stated that "[a] law is facially vague if it is vague in all applications" and cited *United States v. Salerno*, 481 U.S. 739, 745 (1987). Pet. App. 22; see Pet. 13-15, 18, 23-24. Petitioner asserts that this single reference to *Salerno* conflicts with both *Johnson* and *Dimaya* and with several federal circuits. But the split Petitioner alleges is illusory. And importantly, this single citation was in no way outcome-determinative where (as Petitioner emphasizes in the first two questions he presents) the Appellate Division denied his claim for a separate reason: the fact that his conduct fell clearly within the statute's prohibitions, without reference to the *Salerno* framework. See Pet. App. 25. This Court recently denied a petition raising the same issue, see *Copeland v. Vance*, 139 S. Ct. 2714 (2019) (No. 18-918), and it should do the same here.

As a threshold matter, there is no split. Petitioner incorrectly claims that the decision below contributes to a split regarding the degree of vagueness necessary (at least outside the context of the First Amendment) for a statute to be vague. But he cites only superficial differences in how federal appellate decisions describe the degree of vagueness that a facial challenger must show, none of which were outcome-determinative.

For example, Petitioner claims the Second, Fifth, and Eleventh circuits continue to rely on the *Salerno* test for facial vagueness after *Johnson* and *Dimaya*. Pet. 15. But the cases Petitioner cites merely recited the *Salerno* test without considering whether *Johnson* and *Dimaya* undermined the test. See *Libertarian Party v. Cuomo*, 970 F.3d 106, 126 (CA2 2020); *United States v. McGinnis*, 956 F.3d 747, 759 (CA5 2020); *City of El Cenizo v. Texas*, 890 F.3d 164, 187 (CA5 2018); *SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga.*, 40 F.4th 1320, 1327-28 (CA11 2022). And in none of them was *Salerno*'s phrasing of the standard relevant to the result—that is, *none* of the cases upheld a law based on a single hypothetical situation in which application of the statute might be valid. Instead, each case found either

the statute was constitutional in a substantial number of cases or based on a separate test—meaning that none implicate Petitioner's concerns.

The Second Circuit, for instance, upheld a firearm permitting requirement against a facial vagueness challenge only once it identified "examples of several" common bases for denying an applicant a firearm permit that were clearly within "an ordinary person's comprehension" and noted that the challenged law had been applied "for decades, without mischief or misunderstanding." *Libertarian Party*, 970 F.3d, at 126-27. In *City of El Cenizo*, the Fifth Circuit upheld a statute requiring local law enforcement to comply with detainers against Fourth Amendment challenge because such detainers "[e]vidence probable cause of removability in every instance." 890 F.3d, at 187. And in *SisterSong*, the Eleventh Circuit explained that the definition of "a natural person" was sufficiently clear by "focusing on the text" rather than any sole specific application of the statute. 40 F.4th, at 1328. See also *McGinnis*, 956 F.3d, at 759 (holding federal firearm law "passes constitutional muster under our two-step … framework"). None of these cases, in short, held plaintiffs to the vague-in-all-applications standard and thus do not conflict with the cases that Petitioner claims abandoned the *Salerno* standard.

Nor do the other cases Petitioner cites suggest a split. While *Guerrero v. Whitaker*, 908 F.3d 541 (CA9 2018), reasoned that *Johnson* has displaced *Salerno*, it reaffirmed its pre-*Johnson* view that the language at issue ("particularly serious crime") was still not unconstitutionally vague, *id.*, at 544, meaning that its conclusion about *Salerno* was in no way decisive. And the discussions of *Salerno* in both *Hasson*, 26 F.4th 610, and *United States v. Cook*, 970 F.3d 866 (CA7 2020), also had no bearing on their results: they both independently rejected the facial vagueness theories because defendants in those cases failed to show vagueness as applied to them. See *Hasson*, 26 F.4th, at 619-21; *Cook*, 970 F.3d, at 876. (As explained, *infra*, the same is true here: the decision below cited *Salerno* in a single sentence setting out general standards for vagueness challenges but found no need to apply the test at all, because it found the statute was not vague as applied to Petitioner.) Petitioner has not identified *any* cases arriving at conflicting results based upon the alleged differences in the facial vagueness standard.

Most importantly, and for similar reasons, this is a poor vehicle in which to address the vitality of the *Salerno* standard because it was

plainly not outcome-determinative. As the instant Petition itself alleges, the intermediate appellate court rejected Petitioner's facial claim because the statute was simply not vague as applied to him, Pet. App. 23, 25, 31, and therefore he could not "complain of the vagueness of the law as applied to the conduct of others," *Humanitarian Law Project*, 561 U.S., at 18-19. In other words, the court did not pass on—and the court had no reason to pass on—whether it matters if the law was non-vague in one, some, or many applications. Rather, because the statute was not vague as applied to defendant himself, the panel just followed this Court's cases in declining to "address [any] hypothetical contentions concerning how the Act might be applied." Pet. App. 25. This case thus does not present any issue regarding the vitality of the standard as described by *Salerno*.[4]

[4] Relatedly, because the New Jersey appellate court did not apply the *Salerno* test at all, and the New Jersey Supreme Court declined review, the Court does not have the benefit of the state courts' analyses or any narrowing construction the courts might have given the New Jersey statute. See, *e.g.*, *Boos v. Barry*, 485 U.S. 312, 329-30 (1988) (finding narrow construction alleviated vagueness concerns). This statute is not vague for the reasons that follow in Section III, but even if there were a question, that missing piece would be particularly relevant because "the Court has held that a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

III. Petitioner's Claim That The New Jersey Anti-Terrorism Act Is Vague Again Implicates No Split, And Lacks Merit.

The final question presented is whether the N.J. Stat. Ann. § 2C:38-2 is unconstitutionally vague. Pet. 25-29. Here, Petitioner does not allege a split. Instead, Petitioner seeks only error correction on an infrequently arising question from the decision of an intermediate appellate court. Petitioner thus again fails to satisfy this Court's criteria for certiorari. But in any event, the Appellate Division did not err.

Even setting aside Petitioner's inability to raise a facial vagueness claim (given his failure to contest that the statute clearly applies to his conduct), the New Jersey statute is not vague. A court will not find a statute vague just because it may have uncertain applications at the margins, *Williams*, 553 U.S., at 306, or because reasonable jurists may disagree about where to draw the precise line in particular applications, see *Skilling v. United States*, 561 U.S. 358, 403 (2010). "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Williams*, 553 U.S., at 304. Instead, courts have found language vague if, *e.g.*, it requires "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Id.*, at 306.

New Jersey's anti-terrorism statute readily passes constitutional muster. As relevant here, it imposes criminal liability after a jury finds that a defendant purposefully committed an enumerated, predicate felony, with one of the enumerated purposes. See N.J. Stat. Ann. § 2C:38-2(a), (c). At the time of Petitioner's crimes, those four enumerated purposes were:

> (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.

N.J. Stat. Ann. § 2C:38-2(a) (2002); *see also* Pet. App. 27. The statute defines "[t]error" as "the menace or fear of death or serious bodily injury," and "terrorize" to mean "to convey the menace or fear of death or serious bodily injury by words or actions." N.J. Stat. Ann. § 2C:38-2(d).

Petitioner does not suggest that it is impossible for an ordinary person to divine whether he specifically intended to promote the fear of death or serious bodily injury. He instead argues that the law's definitions of "terror" and "terrorize" are simply too broad, claiming that

the terms will cover virtually every crime because "terror and fear are inherent components of many crimes." Pet. 26.

At the outset, it is worth noting that, in addition to not rendering the law *vague*, Petitioner's argument appears to conflate the fact that a number of other crimes *can* be committed with the specific purpose of causing "fear of death or serious bodily injury," with the fact that the anti-terrorism law singles out those who commit the enumerated crimes "with the purpose" to do so. See N.J. Stat. Ann. § 2C:38-2(a). It is hardly unusual (or vague) for laws to create gradations in liability that treat offenders whose specific *purpose* was to terrorize others more harshly than those who may have knowingly (or even recklessly) done so. Nor does it raise vagueness problems that a defendant could conceivably be guilty of more than one offense. One who unlawfully absconds with five children for the specific purpose of terrorizing them or their parents, for example, has fair notice that he is doing something that constitutes both kidnapping *and* terrorism under New Jersey law. Compare N.J. Stat. Ann. § 2C:38-2(a)(2), with N.J. Stat. Ann. § 2C:13-1(b).

Further, the element Petitioner challenges, Pet. 10 n.26, is a scienter requirement that *limits* the reach of the statute. "The Court has

made clear that scienter requirements alleviate vagueness concerns." *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007). And this Court has invoked that principle even when the language of the scienter requirement was itself being challenged as vague. See *McFadden v. United States*, 576 U.S. 186, 197 (2015). Here, the law does not ask defendants to predict the future; it simply warns defendants not to violate the statute's other elements with subjective intent to convey fear of death or serious bodily injury. In other words, one who does not possess one of the enumerated purposes has not violated the statute.

That is hardly an unusual, unfair, or unpredictable standard, and it is well above the line that precedent draws for vagueness. See *Williams*, 553 U.S., at 306. Indeed, federal criminal statutes frequently contain *mens rea* requirements similar to the one in N.J. Stat. Ann. § 2C:38-2. See, *e.g.*, 18 U.S.C. § 119 (criminalizing disclosure of personal information "with the intent to … intimidate"); *id.*, § 2261A (criminalizing activities that place a person under reasonable fear of serious bodily injury with the "intent to intimidate"); *id.*, § 970 (criminalizing occupation of government property "with intent to intimidate").

Petitioner's case illustrates the lack of vagueness. As the New Jersey appellate court found, Petitioner's intent to terrorize was evident in his many online messages, including his expressed desire to leave the Bergen County Jewish community "shaking in their fucking Jew boots" and to engage in "psychological warfare." Pet. App. 29. Petitioner himself celebrated "seeing the word 'firebomb' in the news" and emphasized that the bombings had been labeled a "terrorist attack." Pet. App. 29-30.

Petitioner's final argument that New Jersey's anti-terrorism statute must contain a political component to save it from vagueness lacks merit. He argues that "[t]he 'concept of terrorism has a unique meaning,'" that includes a political purpose. Pet. 28. But the test for vagueness does not require comparing a statute against some abstract conception of a crime. Instead, the standard is whether the elements, taken together, provide a person of ordinary intelligence "fair notice of what is prohibited." *Williams*, 553 U.S., at 304. New Jersey's law does so. And several federal definitions of terrorism are similar in that respect. See 18 U.S.C. § 1992(a)(7) (defining "terrorist attacks … against mass transportation systems" to mean acts against persons on mass transit with "intent to cause death or serious bodily injury" with no mention of

political purpose"); 8 U.S.C. § 1182(a)(3)(B)(iii) (defining "terrorist activity" as various acts "with intent to endanger, directly or indirectly, the safety of one or more individuals").

Finally, this issue arises infrequently. That is no surprise, as the statute requires that prosecutions under this law go through the Attorney General. See N.J. Stat. Ann. § 2C:38-2(e) (providing a prosecution under this law may be brought only "by the Attorney General, his assistants and deputies," or by a county prosecutor "expressly authorized in writing by the Attorney General").[5]

In short, Petitioner seeks review of a rarely arising question for which there is no error to correct.

[5] That regime is consistent with authority providing the New Jersey Attorney General power to oversee the work of law enforcement across the State. See N.J. Stat. Ann. § 52:17B-98 (discussing Attorney General's "general supervision of criminal justice … as chief law enforcement officer").

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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March 6, 2023