No.

IN THE

Supreme Court of the United States

ANTONIO ULISES BARRERA MACORTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is Question No. 15 on the naturalization application (N-400), when considered in conjunction with 18 U.S.C. § 1425, void for vagueness and thus a violation of the Due Process Clause of the United States Constitution?

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Antonio Ulises Barrera Mackorty ("Petitioner") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming his conviction and revoking his naturalization.

I. OPINIONS BELOW

The memorandum disposition of the Ninth Circuit Court of Appeals is reproduced in the Appendix at Pet. App. 1-4 (CA 23-50031). The order revoking Petitioner's naturalization by the United States District Court for the Central District of California is reproduced in the Appendix at Pet. App. 5-6, and the Court's decision denying Petitioner's Motion to Dismiss is reproduced at Pet. App. 7-16. (2:19-CR-00404-DMG).

II. JURISDICTION

The Court of Appeals entered judgment on July 29, 2024. Pet. App. 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). A motion for an extension of time to file this Petition for a Writ of Certiorari was granted to December 26, 2024.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

The Fifth Amendment to the United States Constitution states as follows:

> 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 offense 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.

B. Statutory Provisions

18 USC § 1425 (a) states as follows:

> (a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship; or
>
> (b) Whoever, whether for himself or another person not entitled thereto, knowingly issues, procures or obtains or applies for or otherwise attempts to procure or obtain naturalization, or citizenship, or a declaration of intention to become a citizen, or a certificate of arrival or any certificate or evidence of nationalization or citizenship, documentary or otherwise, or duplicates or copies of any of the foregoing—
>
> Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

IV. STATEMENT OF THE CASE

Prior to trial, Petitioner filed several motions, including a motion to dismiss the indictment based on vagueness. The motion was filed on January 22, 2020, and Petitioner argued that 18 USC § 1425 (a) is void for vagueness on its face and as applied, when considered with Question No. 15 of the naturalization application (Form N-400). Specifically, Question 15 of the naturalization application states "Have you **ever** committed a crime or offense for which you were **not** arrested?" (Emphasis in original). The government opposed the motion and a hearing was held on May 24, 2022. On May 26, 2022, the Court ruled that Question No. 15 was not void for vagueness but rather seeks information about crimes for which the applicant had not been arrested. (Pet. App. 11-13).

Petitioner proceeded to a jury trial on June 21, 2022, and was convicted on June 24, 2022. On January 30, 2023, he was sentenced to 4 months in custody, to run concurrent to his state sentence. Because of the conviction in this matter, his United States citizenship was revoked and his certificate of naturalization was canceled. (Pet. App. 5-6).

Petitioner appealed his conviction and the 9th Circuit Court of Appeals found that 18 USC § 1425 (a) is not void for vagueness because a person of ordinary intelligence would know that providing an untruthful answer on Question No. 15 in an effort to obtain citizenship is against the law. (Pet. App. 3).

V. REASONS FOR GRANTING THE WRIT

A. 18 U.S.C. Section 1425(a) Is Void for Vagueness on its Face and as Applied to Petitioner

1. Question No. 15 is Void for Vagueness

The district court found that the statute and Question No. 15 were not void for vagueness, but just a way to determine if the applicant had committed offenses for which he or she had not been charged. (Pet. App. 11-13). The 9th Circuit Court of Appeals also determined that the statute and Question No. 15 together were not void for vagueness because a person of ordinary intelligence would know that providing an untruthful answer on Question No. 15 in an effort to obtain citizenship is against the law. (Pet. App. 3). However, the Fifth Amendment to the United States Constitution states that an accused will not "be deprived of life, liberty, or property, without due process of law." The prohibition against vague criminal statutes has been well-established, "consonant alike with ordinary notions of fair play and the settled rules of law". *Connally v. General Constr. Co.,* 269 U.S. 385, 391 (1926).

Here, Petitioner's constitutional rights were violated because the statute under which his indictment was procured is unconstitutionally vague. A person cannot be deprived of life or liberty based on conduct that he could not reasonably understand would constitute a violation of certain criminal statutes. *United States v. Harriss*, 347 U.S. 612, 617 (1954). This Court has clearly established that the Fourteenth Amendment's due process clause "requires that a penal statute define

the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 353, 357 (1983). "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). Statutes that involve criminal sanctions require enhanced clarity. *United States v. Kilbride*, 584 F.3d 1240, 1257 (9th Cir. 2009).

Although a statute can be unconstitutionally vague on its face or as applied to the facts of a specific case, *see Schwartzmiller v. Gardner*, 752 F.2d 1341, 1348 (9th Cir. 1984), "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Powell*, 423 U.S. 87, 92 (1975) (internal quotation marks omitted). This means that "[i]n determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." *United States v. Nat'l Dairy Prods Corp.*, 372 U.S. 29, 33 (1963); see *Kilbride*, 584 F.3d at 1256-57 ("A statute is unconstitutionally vague as applied if it failed to put a defendant on notice that his conduct was criminal."). This inquiry does not, however, look at what the particular defendant understood the statute to mean; rather, it looks at what a person of ordinary intelligence would reasonably understand the statute to prohibit. *United States v. Washam*, 312 F.3d 926, 930 (8th Cir. 2002) (*citing Nat'l Dairy Prods. Corp.*, 372 U.S. at 32-33); *see Colautti v. Franklin*, 439 U.S. 379, 390 (1979) (stating that a statute is void for vagueness if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute") (internal quotation marks omitted).

2. Section 1425(a), Taken Together with Form N-400, Fails to Provide Fair Notice of Prohibited Conduct

18 U.S.C. section 1425(a) states in relevant part, "(a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship . . . (b) . . . Shall be fined under this title or imprisoned . . .". 18 U.S.C. § 1425(a). The question at issue in the indictment, Question 15 in Part 10.D (Good Moral Character) of Form N-400, was "Have you **ever** committed a crime or offense for which you were **not** arrested?" (Emphasis in original). The statue, 18 U.S.C. §1425(a), and Question number 15 of Form N-400 are impermissibly vague and did not give Petitioner notice of whether he was committing a crime when answering the question. The statute does not elaborate about what conduct would be "contrary to law" and the word "crime" is not defined in Question 15, of Form N-400. Further, the omission of the word "knowingly" from Question 15 is not aligned with §1425(a), which also requires "knowingly" procuring citizenship contrary to law.

In order to survive a void for vagueness challenge, the statute must provide notice, understandable to persons of ordinary intelligence, of the characteristics making his response to Question 15 illegal. The variables that would make Petitioner's "no" response illegal are highly technical and would require a thorough explanation by a lawyer well-versed in immigration law, and particularly familiar with Form N-400.

There are several issues. Given the vagueness and complexity of Question 15, would a reasonable person know that they had to answer "yes" for any and all

crimes, including infractions, even if they did not know their prior conduct had been criminal? Given the vagueness of the statute and the question, would a reasonable person know that answering "no" in and of itself was criminal behavior that could lead to a future prosecution? Given the vagueness of the question, would a reasonable person know that they would not be required to list every incident that could be considered a crime even ones that occurred when they were a child – such as taking candy from a sibling?

Question 15, "Have you **ever** committed a crime or offense for which you were **not** arrested?" conflicts with the instructions in the Good Moral Character section. (emphasis in the original). It does not naturally follow from the introduction immediately preceding it which states:

> For the purposes of this application, you must answer "Yes" to the following questions, if applicable, even if your records were sealed or otherwise cleared or if anyone, including a judge, law enforcement officer, or attorney, told you that you no longer have a record.

The instructions imply that the "crime or offense" refers to conduct for which records at one time existed. This contradicts or nullifies Question 15 which asks whether there was a crime or offense for which the applicant was *not* arrested. Additionally, Form N-400 does not define the phrase "crime or offense" like Form N-445 does, so Petitioner was not put on notice of what a "crime or offense" is. Since Petitioner is

domiciled in California, California law is instructive. California Penal Code § 15 broadly defines criminal behavior - even infractions that result in a fine are considered a "crime or public offense." California Penal Code § 15.3. Thus, not wearing a seatbelt while driving in California (for which you were *not* arrested) would need to be reported. A failure to respond "yes" to a question that does not put a reasonable person on notice of what a "crime or offense" means cannot be criminal behavior, is a nullity and does not constitute a crime.

Further, Form N-400 does not specifically refer to 18 U.S.C. Section 1425(a) nor does the form provide a list of references to any crime an ordinary person would be committing if he answered the questions falsely except for perjury. Thus, a person of ordinary intelligence is not capable of determining whether his "no" response to Question 15 would be illegal. *United States v. Washam*, 312 F.3d at 930 (*citing Nat'l Dairy Prods. Corp.*, 372 U.S. at 32-33); *see Colautti v. Franklin*, 439 U.S. at 390. The statute, taken together with Form N-400 fails to provide fair notice of criminal conduct and is void for vagueness and as applied to Petitioner's case. As such, Petitioner's conviction and the revocation of his citizenship are unconstitutional.

VI. CONCLUSION

For the reasons stated above, Antonio Ulises Barrera Mackorty respectfully requests that the Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

DATED: December 26, 2024

By: *<u>/s/ Callie Glanton Steele</u>*
CALLIE GLANTON STEELE, Esq.

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Antonio Ulises Barrera
Mackorty

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the petition for writ of certiorari contains 2,133 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 26, 2024.

/s/ Callie Glanton Steele
Callie Glanton Steele, Esq.
Counsel of Record for Petition