No. _____

In the Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

GUY JAMES GOODMAN,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Arizona Supreme Court err in holding that *United States* v. *Salerno*, 481 U.S. 739 (1987), prohibits a State from denying bail to an arrestee when a judge, after a full adversarial hearing, finds clear proof that the arrestee committed sexual assault?

2. Did the Arizona Supreme Court err in joining a growing number of jurisdictions that hold a statute facially unconstitutional even if it is capable of constitutional application in some circumstances?

PARTIES TO THE PROCEEDING

Petitioner is the State of Arizona.

Respondent, who was a defendant in the criminal proceeding below, is Guy James Goodman.

The other party in the proceedings below, who is not a party here, is: The Honorable Kevin B. Wein, Commissioner of the Superior Court of the State of Arizona, in and for the County of Maricopa.[*]

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[*] Commissioner Wein was named as a nominal party in the appeal below because the State sought interlocutory review of Commissioner Wein's order granting bail. *See* Ariz. R. Proc. for Special Actions 2.

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PETITION FOR WRIT OF CERTIORARI

Arizona voters enacted Proposition 103 to protect themselves from persons who very likely committed one of several heinous crimes. As relevant to the current case, Proposition 103 removes the possibility of bail when a judge finds "the proof is evident or the presumption great" that an arrestee has committed sexual assault. Ariz. Const. art. II, § 22(A)(1); Ariz. Rev. Stat. § 13-3961(A)(2).

Respondent meets the conditions for pretrial detention under Proposition 103. DNA evidence and his own pretrial admission constitute "evident" proof of sexual assault, as the trial court recognized. On appeal, a divided Arizona Supreme Court invalidated Proposition 103 as facially unconstitutional under the Due Process Clause. In doing so, it came down on the wrong side of two legal questions that have divided courts around the country: the substantive standard for offense-based bail exclusions and the threshold for facial unconstitutionality.

On the first question, the Arizona court rejected the due process balancing mandated by this Court in *United States* v. *Salerno*, 481 U.S. 739 (1987), in favor of "heightened scrutiny." App. 7. It did so on the theory that Proposition 103 limits a fundamental right to freedom from bodily restraint. *Ibid*. This standard is one of five different tests that State supreme courts and federal courts of appeals have applied to offense-based bail exclusions. Those standards vary from rational basis on one end of the spectrum to a categorical ban on the other. Such disparate interpretations of the Due Process Clause are inconsistent with a common national charter.

Second, this case asks the Court to clarify the standard for facial challenges in the same context that gave rise to the leading—but by no means universal—expression of what a facial challenge must show. That standard, announced in *Salerno*, requires that "no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745. This Court has recognized, however, that subsequent opinions have cast doubt on the no-set-of-circumstances test, with the result that now the standard "is a matter of dispute." *United States* v. *Stevens*, 559 U.S. 460, 472 (2010). Lower courts around the nation have noted the lack of clarity. *E.g., Bahlul* v. *United States*, 840 F.3d 757, 799 n.1 (D.C. Cir. 2018) (describing "controversy in recent years about whether the *Salerno* standard universally applies"). These different standards for facial unconstitutionality mean that applications that would survive in one jurisdiction are prohibited in another—all in the name of the same provision of the federal Constitution. This Court has noted the problem and should now provide needed clarity to the lower courts.

OPINIONS BELOW

The opinion of the Supreme Court of Arizona is reported at 417 P.3d 787. App. 1–33. Justices Gould and Lopez in dissent incorporated their earlier partial dissent in *Morreno* v. *Brickner*, 416 P.3d 807 (Ariz. 2018). App. 34–73. The opinion of the Arizona Court of Appeals is reported at 395 P.3d 1111. App. 74–81. The decision of the Maricopa County Superior Court is unreported. App. 82–85.

JURISDICTION

The Supreme Court of Arizona issued its opinion on May 25, 2018. On August 8, 2018, the Chief Justice extended the time for filing a petition for certiorari until September 24, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend XIV. The relevant Arizona constitutional and statutory provisions regarding bail for persons charged with sexual assault appear in Appendix F. App. 89–98. Ariz. Const. art. II, § 22(A)(1); Ariz. Rev. Stat. §§ 13-3961(A)(2), 13-1401, 13-1406.

STATEMENT OF THE CASE

A. Statutory Background

In Arizona, a person commits the crime of sexual assault "by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person." Ariz. Rev. Stat. § 13-1406(A); see also Ariz. Rev. Stat. § 13-1401 (defining terms). In 2002, eighty percent of Arizona's voters approved Proposition 103, which amended the Arizona Constitution to eliminate the possibility of bail when "the proof is evident or the presumption great" that a person committed one of several crimes, including sexual assault. Ariz. Const. art. II, § 22(A); *Arizona ex rel. Romley* v. *Rayes*, 75 P.3d 148, 152 (Ariz.

Ct. App. 2003). Arizona's Legislature also amended Ariz. Rev. Stat. § 13-3961 upon approval of Proposition 103 to conform to the new rule. This Petition refers to these constitutional and statutory provisions collectively as "Proposition 103."

Proposition 103 does not "abolish bail" for a person charged with sexual assault or "create an irrebuttable presumption" that bail should be denied. *Rayes*, 75 P.3d at 151. Instead, to show that the "proof is evident or the presumption great," the State has the burden to prove that "all of the evidence, fully considered by the court, makes it plain and clear to the understanding, and satisfactory and apparent to the well-guarded, dispassionate judgment of the court that the accused committed" the crime of sexual assault. *Simpson* v. *Owens*, 85 P.3d 478, 491 (Ariz. Ct. App. 2004). In sum, proof of the offense "must be substantial." *Ibid*.

Not only does Arizona law require heightened proof of the offense, but it also safeguards this determination with procedural protections:

- The court must hold a full adversarial hearing where the defendant has legal counsel and a right to be heard, to examine witnesses, and to review in advance witnesses' prior statements. *Id.* at 487, 492–493.
- The court must not treat prosecutorial assertions as proof, and must only admit material evidence. *Id.* at 492–494.
- The court must set forth its analysis and findings on the record. *Id.* at 493.

- The hearing must "take place as soon as is practicable." *Id.* at 495.
- The length of pretrial detention is generally limited to 150 days under Rule 8.2(a)(1) of the Arizona Rules of Criminal Procedure, which "grants even stricter speedy trial rights than those provided by the United States Constitution." *Arizona* v. *Spreitz*, 945 P.2d 1260, 1267 (Ariz. 1997).
- Arrestees can later move for reexamination of the conditions of release. Ariz. R. Crim. P. 7.4(c).

B. Charges Against Goodman and Trial Court History

On November 5, 2010, three women went out for drinks in downtown Tempe, where they met Respondent Guy James Goodman. After returning to one woman's apartment, the other two women and Goodman asked to spend the night because they had all been drinking. App. 86.

The apartment's owner allowed her guests to sleep on a couch located on the first floor of the apartment while she went to her own bedroom on the second floor. *Ibid*. She awoke to find that Goodman had come into her room, climbed into bed with her, pulled down her underwear, and penetrated her vagina with his fingers. *Ibid*. The victim screamed at Goodman and immediately ran to her neighbor's apartment where she told a friend that Goodman had sexually assaulted her. *Id.* at 87. After the friend confronted Goodman, he denied committing a crime but nevertheless fled in his van. *Ibid.*

After reporting the sexual assault to police the following day, the victim received a medical forensic exam. *Ibid*. A witness also identified Goodman in a photographic line-up. *Ibid*. Several weeks later, a detective in the Special Victim's Unit of the Tempe Police Department conducted an interview with Goodman. Goodman admitted that he had slept on the victim's bed but denied committing a sexual crime against her. *Ibid*. The detective obtained cheek swabs of Goodman's DNA and submitted them along with the medical forensic kit to the Arizona Department of Public Safety Crime Lab. The lab later confirmed that the DNA profile from the victim's genital swabs matched the DNA profile from Goodman. *Ibid.*

On February 22, 2017, Goodman was arrested for one count of sexual assault. After being advised of his *Miranda* rights, Goodman initially stuck to his original story that he did not sexually assault the victim. However, when confronted with the DNA results, Goodman admitted that the victim had been asleep when he placed his fingers in her vagina. He also acknowledged that the sexual act was without her consent. *Id.* at 88. Five days later, Goodman was charged with one count of sexual assault, a class 2 felony.

C. Offense-Based Bail Proceedings

Goodman's charge coincided with the first in a trio of cases—this being the third—through which the Arizona Supreme Court invalidated Proposition 103. See *Simpson* v. *Miller*, 387 P.3d 1270 (Ariz. 2017), *cert. denied sub nom. Arizona* v. *Martinez*, 138 S. Ct. 146 (2017). In *Simpson*, the court struck down an offense-based bail exclusion for the crime of sexual conduct

with a minor under fifteen years of age. Ariz. Const. art. II, § 22(a)(1). *Simpson* held that persons charged with this crime—even after a neutral judge finds rigorous proof of the offense—possess a "fundamental" right "to be free from bodily restraint." *Simpson*, 387 P.3d at 1276. As such, the court followed the Ninth Circuit and concluded that bail restrictions are subject to "heightened scrutiny," which requires the offense-based exclusion to serve as a "convincing proxy for unmanageable flight risk or dangerousness." *Id.* at 1277 (citing *Lopez-Valenzuela* v. *Arpaio*, 770 F.3d 772 (9th Cir. 2014)).

Applying the heightened scrutiny standard, the *Simpson* court concluded that heightened proof of sexual assault of a child was insufficient. Turning the standard for a facial challenge on its head, the court held that the underlying crime was not a proxy for dangerousness because the child's consent was not an available defense, and, as such, sexual conduct with a minor could potentially "sweep[] in situations where teenagers engage in consensual sex." *Id.* at 1278.[1] Because of the hypothetical impact on teenagers, the court held that the crime of sexual conduct with a minor under age fifteen could not serve as "a proxy for dangerousness." *Ibid.* The court further pronounced that an individualized assessment of dangerousness in which the State bears the burden of proof would serve

[1] In fact, Arizona provides a statutory defense for teenagers who engage in consensual sex, Ariz. Rev. Stat. § 13-1407(F), but this defense was unavailable to the defendant in *Simpson* because he was an adult charged with having sexual contact with multiple young children.

the State's interest "equally well" compared to the offense-based rule in Proposition 103. *Ibid*.

For Goodman, the decision in *Simpson* came at just the right time. Although *Simpson* concerned a different crime, the trial court immediately applied its holding to all offense-based restrictions on bail. App. 77. As such, the trial court concluded that the State could deny bail to Goodman only if it provided heightened proof of the offense and proved by clear and convincing evidence that "no condition or combination of conditions of release may be imposed that will reasonably assure the safety of the [victim] or the community." Ariz. Rev. Stat. § 13-3961(D). While the court found that prosecutors had met the standard under Proposition 103, it held that Goodman was entitled to bail because the State had not provided clear and convincing proof of his dangerousness pending trial. App. 77 (citing *Simpson*).

The court of appeals reversed on the straightforward reasoning that sexual assault can never occur in a non-dangerous manner because lack of consent is an element of the crime. App. 80 (citing Ariz. Rev. Stat. § 13-1406).

Despite this "understandable" logic, App. 18, the Arizona Supreme Court reversed and struck down Proposition 103 as facially unconstitutional in a 4-3 decision. In so doing, the court made the "heightened scrutiny" test for offense-based bail exclusions even more difficult, holding that a crime's inherent dangerousness is not enough. App. 17. Instead, an offense-based bail restriction can survive only if the State proves "that most persons charged with sexual assault" or a "significant number" will "likely commit

another sexual assault or otherwise dangerous crime pending trial if released on bail." App. 13. Not only that, the State must also prove that no other alternative exists "that would serve the state's objective equally well at less cost to individual liberty." App. 16.

Justice Bolick, who authored the *Simpson* decision, dissented with two other justices. He pointed out that the majority, by concluding that the "nature of the crime is irrelevant to the risk of future dangerousness," ignores that "sexual assault is by definition a uniquely horrific act." App. 24. That fact, combined with the "frightening and high" risk of sex offender recidivism, *Smith* v. *Doe*, 538 U.S. 84, 103 (2003), prompted this Court to "establish that a state may categorically regulate sex offenders as a class for public safety purposes." App. 24–27. The dissent then concluded with an uncommon plea for this Court to review the case:

> [W]e urge the Supreme Court to review this decision. If we are correct that its precedents allow Arizona to deny pretrial release to those who by proof evident or presumption great have committed sexual assault, this Court has unnecessarily invalidated a part of our organic law. As a matter of comity and federalism, we urge the Supreme Court to correct the error if this Court has misread its precedents.

App. 30–31.

Justice Gould, joined by Justice Lopez, filed a separate dissent, incorporating their partial dissent in *Morreno* v. *Brickner*, 416 P.3d 807 (Ariz. 2018), decided less than a month before the current case. App. 31.

Justice Gould argued that the Arizona Supreme Court's decision in *Simpson* was wrongly decided because it turned the facial challenge test from *Salerno* "on its head." App. 32. The analysis in *Simpson*, adopted again in *Morreno* and the current case, allows facial invalidation of a statute based on a single hypothetical unconstitutional application, rather than requiring the defendant to show that the law was unconstitutional in *all* its applications. As such, the majority decision below continued the streak of error by "abandon[ing] the facial standard set forth in *Salerno*," and replacing that test with an "impossible" overbreadth standard. App 31–33.

REASONS FOR GRANTING THE PETITION

The Arizona Supreme Court's rejection of offense-based bail restrictions reflects two areas of division and confusion in the lower courts. First, two circuits and four State high courts apply different levels of scrutiny to bail limitations of this type. That division proves that this Court's ruling in *Salerno* has not resolved the issue and requires further development. Second, the lower courts split along lines that this Court has itself acknowledged regarding the correct burden of proof for a litigant seeking to invalidate a statute as facially unconstitutional. Again, *Salerno* should announce the controlling rule, but uncertainty remains. The Court should grant certiorari to resolve these simmering divisions on important issues concerning the interaction of State bail regulation and the federal Constitution.

I. Most States Have Offense-Based Bail Restrictions, but the Standard for Due Process Review is Unclear.

A. The Decision Below is Contrary to Precedent from this Court.

The Eighth Amendment, which specifically addresses the right to bail, allows the States to "defin[e] the classes of cases in which bail shall be allowed in this country." *Carlson* v. *Landon*, 342 U.S. 524, 545 (1952). Because the Eighth Amendment does not "accord a right to bail in all cases," *ibid.,* Respondent and the court below turn to the Due Process Clause to find a constitutional impediment to offense-based bail exclusions. Substantive due process prevents governments from engaging in conduct that "shocks the conscience, or interferes with rights implicit in the concept of ordered liberty." *Salerno*, 481 U.S. at 746 (citations and quotations omitted). But under this Court's precedent, Arizona's policy of denying bail after the State has proved that an arrestee likely committed sexual assault passes this test.

This Court has "repeatedly" recognized that "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." *Id.* at 748. In *Salerno*, the Court upheld the Bail Reform Act, which authorizes pretrial detention without bail for certain serious offenses when the government demonstrates (1) probable cause that the accused committed the offense, and (2) clear and convincing evidence, after a full adversarial hearing, that the accused poses an unmanageable risk to others. *Id.* at 750.

Permeating the reasoning in *Salerno* is the balancing of public and private interests. In rejecting the argument that due process lays down a "categorical imperative" against detention to prevent public danger, the Court identified ten cases where it had balanced the "Government's regulatory interest in community safety" against "an individual's liberty interest" and stated that it would evaluate due process challenges to pretrial detention based on community danger "in precisely the same manner" that it had previously done. *Salerno*, 481 U.S. at 748–749. Not one of those cases applied anything resembling heightened scrutiny.

For example, in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), the Court approved extended pretrial detention with only a judicial finding of probable cause, even when the finding was not accompanied by adversarial protections. The Court explained that the "balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases, *including the detention of suspects pending trial*." *Id.* at 125 n.27 (emphasis added). Likewise, in *Addington* v. *Texas*, 441 U.S. 418, 431 (1979), the Court held that due process allows detention of dangerous individuals who are mentally unstable under a "clear and convincing" evidence standard because it "strikes a fair balance between the rights of the individual and the legitimate concerns of the state." Consistently, the Court in *Bell* v. *Wolfish*, 441 U.S. 520, 531–532 (1979), specifically rejected the argument that due process requires conditions of pretrial confinement to be justified by a "compelling necessity." Instead, the Court upheld the restrictions at issue because they "were reasonable responses . . . to legitimate security

concerns." *Id.* at 561; see also *Carlson*, 342 U.S. at 537–542 (deferring to Congress' policy of detaining potentially dangerous aliens facing deportation without an individualized determination). As a final example, in *Schall* v. *Martin*, 467 U.S. 253, 263, 268 (1984), the Court held that pretrial detention of juveniles to prevent crime "serve[d] a legitimate regulatory purpose compatible with the 'fundamental fairness' demanded by the Due Process Clause" by "strik[ing] a balance" between the interests of society and juveniles.

By relying on these cases, the Court in *Salerno* did exactly what the Court had done for decades: employing the metaphor of a scale, it assessed the reasonableness of regulatory pretrial detention by striking a balance between the community's interest in safety and the individual's interest in release. 481 U.S. at 750–751. As in *Bell*, the government was not required to justify pretrial detention under a "compelling necessity" standard. Rather, the Court deferred to Congress's judgment that individuals detained under the Bail Reform Act were "far more likely to be responsible for dangerous acts in the community after arrest." *Id.* at 750. Finally, undermining any claim that heightened scrutiny applied in *Salerno*, the Court specifically held that denying bail "under the[] circumstances" of the Bail Reform Act did not offend a fundamental right. *Id.* at 751.

The Arizona Supreme Court has departed from this precedent in several ways. First, in spite of *Salerno*'s holding that an arrestee's right to go free is not "ranked as fundamental," *ibid.*, the Arizona Supreme Court has announced a "fundamental" right to "freedom from

bodily restraint." App. 7; *Simpson*, 387 P.3d at 1276. Second, the Arizona court has struck down two offense-based bail restrictions that require *greater* confidence in the arrestee's guilt than the law upheld in *Salerno*. Proposition 103 denies bail only after a full adversarial hearing in which a judge finds "the proof is evident or presumption great" that the person committed the crime. *Simpson*, 387 P.3d at 1275. This standard exceeds the probable cause standard upheld in *Salerno* and *Gerstein*. Finally, *Simpson* held that an offense-based bail restriction cannot stand if there is any "alternative[] that would serve the state's objective equally well at less cost to individual liberty." *Id.* at 1278. But in the identical context, this Court has repeatedly held that due process does not require a legislature "to employ the least burdensome means to accomplish its goal," *Demore* v. *Kim*, 538 U.S. 510, 528 (2003); see also *Bell*, 441 U.S. at 533 (holding that the Due Process Clause "provides no basis for application of a compelling-necessity standard to conditions of pretrial confinement").

In the decision below, the Arizona Supreme Court drifted farther from the substantive holding of *Salerno*. Rather than balancing societal and private interests as *Salerno* requires, the Arizona Supreme Court insisted that the State prove that "a significant number" or even "*most* persons" charged with sexual assault would "likely commit another sexual assault or otherwise dangerous crime pending trial if released on bail." App. 13 (emphasis added). Going even farther astray, the court also held that due process requires the State to prove that there is no other alternative that "would serve the state's objective equally well at less cost to individual liberty." App. 16.

As one of the dissents recognized, this standard strays so far from *Salerno* that it effectively abolishes offense-based bail exclusions. App. 33 (Gould, J., dissenting). It is doubtful that the rule below would even tolerate *Salerno*'s acknowledged exception for bail in capital cases or *Demore*'s exception for aliens facing deportation. 481 U.S. at 753; *Demore*, 538 U.S. at 530. After all, neither *Salerno* nor *Demore* established that half—or some similar "significant number"—of the persons charged with the crimes at issue would reoffend during pretrial release. Such analysis was unnecessary because this Court recognizes the States' prerogative to "mak[e] reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith*, 538 U.S. at 103. This Court's precedents doom the decision below. It is impossible that the Arizona Supreme Court could have been following *Salerno*, *Demore*, and *Smith* while announcing a legal standard absent from all of them and incompatible with each.

In faulting the State for not showing that "most persons charged with sexual assault" will reoffend before trial, App. 13, the lower court installed itself as "a legislature charged with formulating public policy." *Schall*, 467 U.S. at 281 (upholding pretrial detention of juveniles to prevent new offenses). It did so in declaring that the State's interest would be served "equally well" by a standard under which it must prove individual dangerousness by clear and convincing evidence. App. 16. This Court's precedent tells a different story. The rate of recidivism among sex offenders is "frightening and high." *Smith*, 538 U.S. at 103. Unfortunately, there is no way to predict with confidence when or whether a particular sex offender

will reoffend. *Doe* v. *Miller*, 405 F.3d 700, 716 (8th Cir. 2005). This Court has long recognized that, "in areas fraught with medical and scientific uncertainties," courts are "cautious not to rewrite legislation" and instead afford legislatures "the widest latitude." *Kansas* v. *Hendricks*, 521 U.S. 346, 360 n.3 (1997) (upholding civil commitment of sexually violent predators). Judged by this standard, the decision of 80% of Arizona voters to withhold bail on a class-wide basis is both reasonable and entitled to deference. The Arizona Supreme Court's contrary determination that the public is protected "equally well" by other means is simply a legislative disagreement.

This Court's precedent has long mandated a balancing of interests under the Due Process Clause rather than heightened scrutiny. The Court has likewise refused to enshrine a generic but fundamental right to freedom from bodily restraint. And this Court does not require States to show least restrictive means or 50% recidivism rates before imposing offense-based regulatory measures. In each of these particulars, the Arizona Supreme Court departed from this Court's precedent, and certiorari is necessary to correct the error.

B. Federal Circuit Courts and State Supreme Courts Have Endorsed Five Different Tests for Pre-Trial Bail Restrictions.

Courts are divided on the permissibility of, and the standard applicable to, pretrial bail restrictions. In fact, the courts that have addressed the question of offense-based bail restrictions have adopted five different standards for scrutiny under the Due Process Clause. Review is necessary to resolve this confusion.

The Nebraska Supreme Court applies rational basis review. *Parker* v. *Roth*, 278 N.W.2d 106, 114 (Neb. 1979); *Nebraska* v. *Boppre*, 453 N.W.2d 406, 418 (Neb. 1990) (applying *Parker*). The provision at issue in *Parker* mirrored Arizona's law, prohibiting bail if the "proof was evident or the presumption great" that a person committed a sexual offense "involving penetration by force or against the will of the victim." Neb. Const. art. I, § 9. The Nebraska court held that "the right to bail is not a fundamental right guaranteed under the [United States] Constitution." *Parker*, 278 N.W.2d at 114. The court also found that the law passed rational basis review, observing that "[r]ape is one of the ugliest of crimes" and recognizing the "real possibility of repeated acts and further victims pending trial." *Id.* at 116. Nebraska's rational basis standard represents the greatest degree of deference to the judgment of the political branches.

In New Hampshire, the courts apply a balancing test, consistent with what Petitioner asks this Court to establish as the law of the land. In *New Hampshire* v. *Furgal*, 13 A.3d 272 (N.H. 2010), the New Hampshire Supreme Court considered a categorical bail exclusion that, like Nebraska's law in *Parker*, established a process similar to Arizona's. The statute at issue provided that "[a]ny person arrested for an offense punishable by up to life in prison, where the proof is evident or the presumption great, shall not be allowed bail." N.H. Rev. Stat. § 597:1-c. As in *Parker*, the court in *Furgal* recited the "long history of bail" that permits courts to "focus exclusively upon the evidence of the defendant's guilt" to deny bail when the person is accused of a serious crime. 13 A.3d at 279. Citing the balancing test from *Salerno*, the court concluded that

the State legislature had made a "reasoned determination" that, after heightened proof of a very serious crime, "the risk to the community becomes significantly compelling" and justifies the denial of bail. *Ibid.* The Arizona Supreme Court rejected this type of balancing in favor of heightened scrutiny, but New Hampshire's approach is consistent with *Salerno* and *Demore* and reflects appropriate deference to legislative judgments surrounding the allocation of risk.

Just last month, the Eleventh Circuit in *Walker* v. *City of Calhoun*, No. 17-13139, — F.3d —, 2018 WL 4000252 (11th Cir. Aug. 22, 2018), employed the same approach as the New Hampshire Supreme Court in *Furgal*. In assessing what process the Constitution requires in setting bail for indigent arrestees, the Eleventh Circuit rejected the argument that *Salerno* recognized a "fundamental right to pretrial liberty" that would require heightened scrutiny. *Id.* at *10. That is, the court rejected both the legal standard and the justification offered by the Arizona Supreme Court. Instead, the Eleventh Circuit observed that *Salerno* "employed a general due process balancing test between the State's interest and the detainee's" that was "a far cry from strict—or even intermediate—scrutiny." *Ibid.*

On the other end of the spectrum, the Ninth Circuit sitting en banc in *Lopez-Valenzuela* v. *Arpaio*, 770 F.3d 772 (9th Cir. 2014), struck down an Arizona law that denied bail when the proof was evident or the presumption great that an undocumented immigrant committed a serious felony offense. Even though the Court in *Salerno* expressly stated that pretrial detention under the Bail Reform Act did *not* offend

"some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," 481 U.S. at 751, the Ninth Circuit cited *Salerno* to hold that the categorical bail denial infringed upon a "fundamental right." *Lopez-Valenzuela*, 770 F.3d at 780. It then applied the familiar strict scrutiny standard, even though it did not use that term: "[T]he [challenged provisions] will satisfy substantive due process only if they are narrowly tailored to serve a compelling state interest." *Id.* at 781 (quotes omitted). *Cf. id.* at 799 (Tallman, J., dissenting) ("This is strict scrutiny."); *Simpson*, 387 P.3d at 1277 ("[T]he standard the Ninth Circuit ultimately applied . . . reflects strict scrutiny, the most exacting constitutional review standard.") (citation omitted). Employing the strict scrutiny test, the Ninth Circuit concluded that the bail regulations were not narrowly tailored and, therefore, violated due process.

In *Simpson* and again here, the Arizona Supreme Court "agree[d] with the Ninth Circuit" in misreading *Salerno* as "appl[ying] 'heightened scrutiny'" because of a fundamental right to be free from bodily restraint, but it rejected the Ninth Circuit's strict scrutiny in favor of the heightened scrutiny at issue in this appeal. *Simpson*, 387 P.3d at 1276–1277; App. 8.

Going even further than the Ninth Circuit, the Supreme Court of Hawaii categorically prohibits offense-based bail restrictions and mandates individualized determinations of dangerousness in which the State bears the burden of proof. In *Huihui* v. *Shimoda*, 644 P.2d 968, 970 (Haw. 1982), that court held that offense-based bail exclusions for non-capital offenses violate the Due Process Clause of the

Fourteenth Amendment. The court conceded that "the interpretation most strongly supported by history" favored upholding a statute that categorically denied bail when the proof was evident and the presumption great that a defendant committed a serious crime while free on bail for a felony charge. *Id.* at 975. Nevertheless, the court concluded that this history "conflict[ed] with logic and a sound regard for the purpose of the excessive bail clause." *Ibid.* (quotes omitted). It held that the exclusion was unconstitutional because it did not "allow bail based on other factors which may be directly relevant to a determination of the likelihood of the defendant's committing other crimes while free pending trial." *Id.* at 978–979.

In sum, four States and two federal courts of appeals have adopted five different standards for determining whether offense-based bail exclusions are permissible under the Due Process Clause: the Nebraska Supreme Court applies rational basis review; the New Hampshire Supreme Court and the Eleventh Circuit apply a balancing test; the Arizona Supreme Court applies "heightened scrutiny;" the Ninth Circuit applies strict scrutiny; and the Hawaii Supreme Court holds that, except for capital crimes, offense-based bail exclusions are always barred. As three justices urged below, the Court should grant certiorari to resolve this confusion. App. 30–31 (Bolick, J., dissenting).

II. As this Court Has Acknowledged, Lower Courts Are Confused and Divided over the Standard for Claims of Facial Unconstitutionality.

In addition to the substantive question whether due process requires an individualized determination of dangerousness for each arrestee who likely committed sexual assault, this case invites the Court to clarify the long-disputed burden for litigants aiming to declare a law facially unconstitutional. Fittingly, the most-cited precedent on this point is *Salerno*. There, the Court explained that the party challenging a law "must establish that no set of circumstances exists under which the [law] would be valid." *Salerno*, 481 U.S. at 745. The competing standard, imported from First Amendment overbreadth cases, asks whether a law's unconstitutional applications are "substantial when judged in relation to the statute's plainly legitimate sweep." *City of Chicago* v. *Morales*, 527 U.S. 41, 52 (1999) (opinion of Stevens, J.) (quotes omitted).

From these competing standards has followed acknowledged confusion among the lower courts. This Court itself recognized that the standard for a facial challenge "in a typical case is a matter of dispute." *United States* v. *Stevens*, 559 U.S. 460, 472 (2010). But where previous cases did not require resolution of this festering issue, *ibid.,* the holding below survives only if the no-set-of-circumstances test does not apply. This Court should take the opportunity to confirm that courts should not invalidate applications of duly enacted statutes that do not offend the Constitution.

A. By Its Own Acknowledgement, this Court's Precedent Is Unclear.

Facial unconstitutionality is "strong medicine" to be used "only as a last resort." *Broadrick* v. *Okla.*, 413 U.S. 601, 613 (1973). When a court pronounces a duly enacted law facially unconstitutional, its negation of the legislative process is total. Thus this Court has explained that facial challenges are disfavored because they "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 451 (2008); see also *id.* at 450 ("Facial challenges also run contrary to the fundamental principle of judicial restraint . . . .").

As consequential as a holding of facial unconstitutionality is, the standard governing such claims is unsettled. Two competing tests have emerged in recent decades.[2] The first, identified with *Salerno*, requires the party seeking facial invalidation to establish that "no set of circumstances exists under which the [law] would be valid." 481 U.S. at 745. This test's roots extend to pre-*Salerno* cases, including other pretrial detention cases like *Schall* v. *Martin*, 467 U.S. 253 (1984). There, the Court observed that "in some circumstances" the contested provision might "not pass

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[2] In two contexts, a different standard applies. Challenges to prior restraints on speech or to regulations of abortion require less than the no-set-of-circumstances showing. *E.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757–58 (1988); *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992). Neither context is at issue in this case.

constitutional muster" but refused to declare the law "invalid 'on its face'" because it was capable of constitutional application in at least some cases. *Id.* at 273. Similar reasoning prevailed in other cases outside the context of pretrial detention. See *Anderson* v. *Edwards*, 514 U.S. 143, 155 n.6 (1995) (citing *Salerno* to reject facial challenge under public assistance statute); *Cal. Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 594 (1987) (rejecting facial claim of preemption but expressly reserving judgment on "any future application of the Coastal Commission permit requirement that in fact conflicts with federal law").

The competing test for facial unconstitutionality emerged more recently through separate opinions by Justice Stevens but has now fought its predecessor to a draw. In *Washington* v. *Glucksburg*, 521 U.S. 702 (1997), Justice Stevens argued in a concurring opinion that the Court has never "actually applied" the no-set-of-circumstances standard, even in *Salerno* itself. *Id.* at 740 (Stevens, J., concurring). He instead applied the alternative test for First Amendment overbreadth, concluding that "Washington's statute prohibiting assisted suicide has a 'plainly legitimate sweep,'" which "provides a sufficient justification for rejecting respondents' facial challenge." *Id.* at 740 n.7. This reasoning could hardly be a more direct departure from *Salerno*, which stated that "we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." 481 U.S. at 745.

Two years later, Justice Stevens continued the campaign against *Salerno* in *City of Chicago* v. *Morales*, 527 U.S. 41 (1999). There, a three-justice plurality rejected the no-set-of-circumstances test, only

to draw a three-justice dissent demanding *Salerno*'s application. Compare 527 U.S. at 55 n.22 (Stevens, J., joined by Souter and Ginsburg, JJ.) with *id.* at 78–83, (Scalia, J., dissenting) and *id.* at 111, (Thomas, J., joined by Rehnquist, C.J. and Scalia, J., dissenting). Later cases have likewise noted the ongoing disagreement. *E.g., United States* v. *Booker*, 543 U.S. 220, 274–75 (2005) (Stevens, J., dissenting).

Rather than leaving the "legitimate sweep" test to concurring (or dissenting) opinions, the Court has now acknowledged this standard on equal footing with the no-set-of-circumstances test. "To succeed in a typical facial attack," the Court explained recently, a plaintiff must "establish that no set of circumstances exists under which [the law] would be valid, *or* that the statute lacks any plainly legitimate sweep." *Stevens*, 559 U.S. at 472 (emphasis added; quotations and citations omitted). Before proceeding to the special standard for First Amendment cases, the Court noted that "[w]hich standard applies in a typical case is a matter of dispute." *Ibid.* On this point at least, the Court is united. Justice Stevens also recognized that "[t]he appropriate standard to be applied in cases making facial challenges to state statutes has been the subject of debate within this Court." *Glucksburg*, 521 U.S. at 739 (Stevens, J., concurring); see also *Booker*, 543 U.S. at 275 n.1.

By the Court's own admission, the question how to determine whether a State law is facially unconstitutional remains unresolved. Yet, declaring a law unconstitutional in all of its applications is among the most drastic measures a court can take. The Court should grant certiorari to shed light on what a litigant

must show to invalidate a State law in all of its applications.

B. The Lower Courts Are Divided over the Correct Standard for Facial Challenges.

Given the uncertainty in this Court's case law, federal courts of appeals and State supreme courts have divided on the standard for facial challenges. As the Sixth Circuit summarized the problem, "precedent regarding facial challenges" outside the context of the First Amendment, is "inconsistent." *Simon* v. *Cook*, 261 F. App'x 873, 883 (6th Cir. 2008). The California Supreme Court expressed the same view: "the standard governing facial challenges has been a matter of some debate." *In re Guardianship of Ann S.*, 202 P.3d 1089, 1099 (Cal. 2009). In the same vein, the Ninth Circuit observed that this Court has "cast some doubt on the no set of circumstances requirement." *Hotel & Motel Ass'n of Oakland* v. *City of Oakland*, 344 F.3d 959, 971 (9th Cir. 2003) (quotation omitted). And the D.C. Circuit noted the "controversy in recent years about whether the *Salerno* standard universally applies." *Bahlul* v. *United States*, 840 F.3d 757, 799 n.1 (D.C. Cir. 2018). These statements reflect an untenable discord over a type of claim that occurs in every circuit and every State in the nation. Our common Constitution should not invalidate statutory applications in one jurisdiction while permitting them in another. The Court should grant certiorari to bring clarity to this long-simmering divide.

In addition to the four courts above that have noted the uncertainty over facial challenges, many more have lined up on different sides of a split over *Salerno*'s continuing vitality.

1. On one side of the divide, numerous State supreme courts and federal courts of appeals follow the no-set-of-circumstances test. For example, the Seventh Circuit explained its allegiance to *Salerno* based on the remedy that follows from a finding of facial unconstitutionality: "a successful facial attack means the statute is wholly invalid and cannot be applied *to anyone*." *Ezell* v. *City of Chicago*, 651 F.3d 684, 698 (7th Cir. 2011). Due to the severity of the outcome when a law is facially invalidated, the Seventh Circuit applies the no-set-of-circumstances standard to ensure that "[a] person to whom a statute properly applies can't obtain relief based on arguments that a differently situated person might present." *Ibid.* (quoting *United States* v. *Skoien*, 614 F.3d 638, 645 (7th Cir. 2010) (en banc)). Unlike in Arizona, the existence of some constitutional applications is sufficient to defeat a facial challenge in the Seventh Circuit.

The Second, Fourth, Fifth, and Eighth Circuits as well as the District of Columbia Court of Appeals have likewise faithfully applied *Salerno*. The Fourth Circuit applied the no-set-of-circumstances test in a facial challenge to Virginia's procedure for removing children from dangerous domestic environments, under which "as many as three days may pass before judicial review." *Jordan by Jordan* v. *Jackson*, 15 F.3d 333, 344 (4th Cir. 1994). Because such an extended delay could occur only in the rare case that "judicial review is not possible prior to the emergency removal" combined with "an intervening back-to-back weekend and holiday," the Fourth Circuit refused to allow this exceptional possibility to foreclose the law's application in other, more conventional circumstances. *Ibid.* This approach is antipodal to that of the Arizona Supreme

Court. Had the Fourth Circuit in *Jordan* proceeded as the Arizona Supreme Court did in this case and in *Simpson*, it would have focused on the holiday weekend hypothetical and determined the law's facial constitutionality on the basis of that single potential application.

The Fifth Circuit likewise recently affirmed its adherence to the no-set-of-circumstances test for facial unconstitutionality. In *City of El Cenzio, Tex.* v. *Texas*, 890 F.3d 164, 187 (5th Cir. 2018), the court reasoned that, for "a facial challenge, it is not enough" that the contested provision will "often" violate the Fourth Amendment. *Ibid.* Instead, if any such violations occur, "the proper mechanism is an as-applied, not a facial challenge." *Id.* at 190. The same reasoning controls in the Eighth Circuit. *Barrett* v. *Claycomb*, 705 F.3d 315, 321 (8th Cir. 2013) (reasoning that if a challenged statute "could conceivably be implemented in such a way as to comply with the Fourth Amendment," the "facial challenge must fail") (quotation omitted). And the Second Circuit also generally applies the no-set-of-circumstances test, though it has described *Salerno*'s prescription as "dicta," suggesting that it feels free to switch to the other side of the split in a future case. *United States* v. *Rybicki*, 354 F.3d 124, 130 (2d Cir. 2003) (en banc).

Of course, courts applying *Salerno* do not always uphold legislation. For example, the District of Columbia Court of Appeals—that jurisdiction's highest court—struck down a firearm regulation because the challenger "carried his burden of showing that every application of [the law] is unconstitutional." *Conley* v. *United States*, 79 A.3d 270, 277 (D.C. 2013). The same

result followed in the Eleventh Circuit, which found no set of circumstances in which Florida's involuntary commitment statute could be constitutionally applied. *J.R.* v. *Hansen*, 803 F.3d 1315, 1320 (11th Cir. 2015). Courts' insistence on the high standard in *Salerno* does not determine a lawsuit's outcome. It does, however, assure that the judiciary does not nullify the elected branches' lawful work based on a subset of unlawful applications.

2. On the other side of the division in the lower courts are jurisdictions favoring some form of the "legitimate sweep" test imported from the First Amendment context. Without so much as mentioning *Salerno* or the no-set-of-circumstances test, the Sixth Circuit recently held that a facial challenge "fails where the statute has a 'plainly legitimate sweep.'" *Ne. Ohio Coal. for the Homeless* v. *Husted*, 837 F.3d 612, 632 (6th Cir. 2016). As authority for this test, the court cited *Washington State Grange* and its reference to *Glucksburg* as announcing one of two tests from which a litigant could choose. *Ibid.* (citing *Wash. State Grange*, 552 U.S. at 449 (quoting *Glucksberg*, 521 U.S. at 740 n.7)).

The Tenth and Federal Circuits sidestep the no-set-of-circumstances rule by insisting that *Salerno* was not "setting forth a *test* for facial challenges, but rather . . . describing the *result* of a facial challenge." *Doe* v. *City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012); see also *Rothe Dev. Corp.* v. *Dep't of Defense*, 413 F.3d 1327, 1337–1338 (Fed. Cir. 2005) ("*Salerno* is of limited relevance here, at most describing a conclusion that could result from the application of the strict scrutiny test."). This approach is irreconcilable with the

language of *Salerno* itself: "the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745. Announcing what the challenger "must" do is not merely a description of a possible outcome. The Tenth and Federal Circuits' approach is therefore incompatible with the circuits that read *Salerno*'s language in its natural way—as announcing a requirement.

State supreme courts have seized on a different reason to repudiate the no-set-of-circumstances test. The *Morales* plurality attempted to distinguish *Salerno* "because this case comes to us from a state—not a federal—court." 527 U.S. at 55 n.22. In Pennsylvania, the State's high court has eschewed the no-set-of-circumstances standard as "based on dicta" and "not controlling for state courts." *Pennsylvania* v. *Ickes*, 873 A.2d 698, 702 (Pa. 2005). To justify this departure, the court cited *Morales* before importing the First Amendment overbreadth test in a case brought under the Fourth Amendment. *Ibid*. Whatever latitude States enjoy in contracting or expanding their own constitutions,[3] Pennsylvania's approach to the federal Constitution undermines that document's uniform applicability across the nation. The application of a law that would be permissible in another State would fail in Pennsylvania because the latter jurisdiction more readily strikes down statutes *in toto*. This incongruity is especially troubling in cases like the

[3] In Utah, for example, the supreme court has rejected the no-set-of-circumstances standard in a challenge brought solely under the takings clause of the Utah Constitution. *Utah Pub. Empls. Ass'n* v. *Utah*, 131 P.3d 208, 215 (Utah 2006).

present one that implicate parallel statutes in different States. See *Lopez-Valenzuela*, 770 F.3d at 788 nn.10–11 (identifying States with offense-based bail denials).

In addition, at least three State supreme courts decline to apply the no-set-of-circumstances test on the basis of *Kraft General Foods Inc.* v. *Iowa Dep't of Revenue & Fin.*, 505 U.S. 71 (1992). Unlike the cases in which Justice Stevens expressly criticized *Salerno*, his opinion in *Kraft* earned the support of a majority of the Court. Without citing *Salerno* at all, *Kraft* struck down, under the Foreign Commerce Clause, a State tax law that treated dividends from a domestic subsidiary more favorably than those from a foreign subsidiary. *Id.* at 82. The dissenting justices would have refused the facial challenge because the contested taxing scheme did not impermissibly burden foreign commerce in every instance—some foreign subsidiaries might "engage in little or even zero foreign activity." 505 U.S. at 84 (Rhenquist, C.J., dissenting). Without identifying the test it was applying, the *Kraft* Court reached a holding incompatible with *Salerno* and thereby spawned numerous State supreme court decisions refusing to apply the no-set-of-circumstances test in tax cases. *See Caterpillar, Inc.* v. *Comm'r of Internal Rev.*, 568 N.W.2d 695, 700 n.8 (Minn. 1997); *Conoco, Inc.* v. *Taxation & Revenue Dept. of State of N.M.*, 931 P.2d 730, 743 (N.M. 1996); *In re Morton Thiokol, Inc.*, 864 P.2d 1175 (Kan. 1993). Lest it appear that a consensus has formed in this substantive area of law (akin to First Amendment cases), courts do not uniformly follow *Kraft*. Among those is the New Jersey Supreme Court, which considered *Kraft* but concluded that *Salerno* would remain the standard in New Jersey, even for tax

cases. *Whirlpool Properties, Inc.* v. *Director, Div. of Taxation*, 26 A.3d 446, 467–468 (N.J. 2011) (discussing dueling opinions from this Court and noting "uncertainty over the use of *Salerno*").

3. Underscoring the lower courts' confusion in this area are courts that vacillate between the two competing standards. Just as this Court in *Stevens* described the "typical analysis" with reference to *Salerno* "or" *Glucksburg*, 559 U.S. at 472, so too several State high courts decline to make a decision. California admittedly entertains two standards. *Guardianship*, 202 P.3d at 1099. The more rigorous option resembles no-set-of-circumstances, while the looser alternative invalidates statutes that are unconstitutional "in the generality or great majority of cases." *San Remo Hotel L.P.* v. *City & Cty of San Francisco*, 41 P.3d 87, 107 (Cal. 2002) (emphasis omitted).

The District of Columbia Circuit appears to have adopted a similar either/or approach in the wake of *Stevens*. *Jawad* v. *Gates*, 832 F.3d 364 (D.C. Cir. 2016). The plaintiff in *Jawad* asserted that a statutory provision authorizing military tribunals to dispose of certain claims related to enemy combatants was facially unconstitutional for violating Article III. *Id.* at 370. To prevail, the D.C. Circuit explained, "Jawad must show 'that no set of circumstances exists under which [the law] would be valid, *or* that the statute lacks any plainly legitimate sweep.'" *Ibid.* (quoting *Stevens*, 559 U.S. at 472; emphasis added). The court then resolved the dispute without endorsing either test but instead noting that the disputed provision "can constitutionally be applied" to non-habeas, detention-

related claims. *Ibid.* It remains unclear whether the court viewed those applications as exceptions that foreclose a no-set-of-circumstances showing or as a sufficiently broad "legitimate sweep" of the statute.

* * *

The judicial machinery for testing State laws against the United States Constitution should not function differently in some jurisdictions than in others. Yet a survey of decisions in this area reveals an unsettled rift in this Court's precedent and lower courts that blur content-specific exceptions and treat the test in *Salerno* as one of several options from which they can choose or as a mere "description" of what happens when courts find facial unconstitutionality. This Court should grant certiorari to clarify that *Salerno*'s no-set-of-circumstances standard is the rule for facial challenges. The current case allows the Court to begin the process of clarification in the context of bail restrictions—the same context in which the no-set-of-circumstances test most recently garnered the support of a majority of the Court.

C. This Case Illustrates the Risk of Deviating from the No-Set-of-Circumstances Test.

The *Salerno* majority was correct to require a party asserting facial unconstitutionality to show "that no set of circumstances exists under which the [law] would be valid." 481 U.S. at 745 *accord Wash. State Grange*, 552 U.S. at 449 (*Salerno* requires that the challenged "law is unconstitutional in all of its applications."). This demanding standard makes sense in light of the upheaval a finding of facial unconstitutionality works among the branches of government, and none of the

countervailing interests that apply in the First Amendment context have ever been read to apply as a general matter. *Salerno*, *Washington State Grange*, and the hundreds of cases following them reflect the judicial humility to invalidate only those applications necessary to obtain compliance with the Constitution while leaving in place as much of the legislature's work as possible.

The Arizona Supreme Court has made a practice of doing the opposite. The wellspring of Arizona's error is *Simpson*. There, the Arizona Supreme Court considered a sister provision to the one at issue in this case. The central paragraph in *Simpson* invalidates the law as facially unconstitutional because it "sweeps in situations where teenagers engage in consensual sex. In such instances, evident proof or presumption great that the defendant committed the crime would suggest little or nothing about the defendant's danger to anyone." *Id.* at 349. But "such instances" were not before the court; the case at bar concerned a grown man who serially raped multiple children. As Justices Gould and Lopez explained in their *Morreno* dissent several months later, *Simpson* "stands the test for a facial challenge on its head." App. 67 (Gould, J., dissenting).

The same error persists in the current case. App. 31–33 (Gould, J., dissenting). As both dissents below emphasize, the elements of sexual assault imply an inherent risk to the community, which this Court has noted. App. 25–26 (Bolick, J., dissenting); App. 32–33 (Gould, J., dissenting) (citing *Smith*, 538 U.S. at 103, *McKune* v. *Lile*, 536 U.S. 24, 32–33 (2002)). To identify a counterexample that could do the work of the

hypothetical love-struck teenagers in *Simpson*, Respondent posited a sexual assault committed by someone who "intentionally deceiv[ed] the other person to believe that they are legally married" and thus into having non-consensual sex with him. Goodman Supp. Br. at 13. Although frivolous, Respondent's argument typifies the Arizona Supreme Court's logic in these cases: as long as a challenger can identify one circumstance in which a law might deny due process, then the law is facially unconstitutional.

Under *Salerno*, a facial challenge must fail if the contested provisions are appropriate for "'at least some persons charged with crimes' . . . whether or not they might be insufficient in some [other] particular circumstances." 481 U.S. at 751 (quoting *Schall*, 467 U.S. at 264). Whatever constitutional concerns might surround application of Proposition 103 to consenting teenagers or faux spouses, they are immaterial to facial challenges where the law can be applied constitutionally to persons—like the defendants in both *Simpson* and the present case—who do not fit the hypothetical. Indeed, the Arizona court's approach runs headlong into this Court's rejection of a facial challenge seeking "to invalidate legislation on the basis of its hypothetical application to situations not before the Court." *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 584 (1998) (quotation omitted); *see also Wash. State Grange*, 552 U.S. at 450. The facts of the current case give no reason to think that Respondent's case presents an application of Proposition 103 that offends due process.

Even assuming for the sake of argument that there exist actions constituting sexual assault that do not

implicate a sufficient community interest to overcome an arrestee's interest in obtaining bail, those few circumstances are no basis for invalidating a statute *in toto*. The Constitution is not so blunt an instrument. If anything, it calls for judicial restraint in invalidating the work of the legislative branch or, as here, the people acting through direct democracy.

Finally, due process is a natural context in which to affirm the no-set-of-circumstances standard because due process does not implicate the "chilling" concerns underlying the overbreadth analysis that is properly confined to First Amendment cases. Where a statute restricting speech is concerned, the Court has indulged a "prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612. This concern with the chilling effect of regulation does not apply to areas of criminal procedure where, unlike speech, the underlying conduct is not something the Court wishes to protect. While the "strong medicine" of facial unconstitutionality might more readily be dispensed in speech cases, *id.* at 613, *Salerno* correctly prescribed the no-set-of-circumstances standard as the general rule.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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