14-825

IN THE

Supreme Court of the United States

COUNTY OF MARICOPA; JOSEPH M. ARPAIO, Maricopa County Sheriff; WILLIAM G. MONTGOMERY, Maricopa County Attorney,

Petitioners,

—v.—

ANGEL LOPEZ-VALENZUELA; ISAAC CASTRO-ARMENTA,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly apply this Court's standard for pretrial detention statutes from *United States v. Salerno*, 481 U.S. 739 (1987), when it held that Proposition 100—an unprecedented and unique Arizona law categorically eliminating individualized bail hearings in most felony cases, based upon unlawful immigration status—violated the Due Process Clause?

2. Among other grounds for holding that Proposition 100 was excessive in relation to a compelling state interest, the Court of Appeals noted that the Arizona legislature had failed to point to *any* empirical evidence supporting the notion that criminal defendants who have "entered or remained in the United States illegally" categorically posed such a great flight risk that individualized bail hearings should be eliminated. Did the Court of Appeals correctly apply *Salerno* in holding that this supported a holding that Proposition 100 violated the Due Process Clause?

3. Does this case present a proper vehicle for reconsideration of the Court's precedents on the standard for facial challenges, when the Court of Appeals properly applied this Court's *Salerno* and *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008), standards, and when defendants charged with capital offenses would remain subject to a separate categorical prohibition on pretrial release under Arizona law, regardless of the outcome of this case?

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INTRODUCTION

Petitioners seek this Court's review of a 9-2 en banc decision of the Ninth Circuit that applied this Court's due process analysis in *United States v. Salerno*, 481 U.S. 739 (1987), to strike down Proposition 100, an Arizona law that mandates pretrial detention of criminal defendants who have "entered or remained in the United States illegally."[1] Proposition 100 is unique among all the bail laws of the 50 states and the United States in imposing a categorical prohibition on bail that applies to hundreds of charged felony offenses including nonviolent offenses that often result in noncustodial sentences.

This Court has already denied the Petitioners' application for a stay of the Ninth Circuit's judgment. *Maricopa County v. Lopez-Valenzuela*, 135 S. Ct. 428 (Nov. 13, 2014). The Petition does not set forth any new ground warranting a different outcome now. The decision below is a straightforward application of this Court's decision in *Salerno*.

Contrary to Petitioners' assertion, there is no conflict between the decision below and any controlling Arizona state court decision. The Arizona Supreme Court has promulgated a rule enforcing the Ninth Circuit's injunction against Proposition 100 throughout the Arizona state court system, effectively superseding the intermediate state appellate court decision on which Petitioners rely,

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[1] This Brief in Opposition uses the term "Proposition 100" to refer collectively to the state constitutional provision enacted by voter referendum, Ariz. Const. art. II, § 22(A)(4), and its implementing statute, Ariz. Rev. Stat. § 3961(A)(5).

Hernandez v. Lynch, 167 P.3d 1264 (Ariz. Ct. App. 2007). Moreover, the only two states that have enacted laws similar to Proposition 100 do not appear to be enforcing them, in recognition of their unconstitutionality.

While Petitioners attempt to manufacture a "conflict" between the decision below and numerous state bail provisions, the decision below was narrowly cabined to address Arizona's Proposition 100 based on the record in this case. Moreover, the Court of Appeals expressly "assume[d] without deciding" that a categorical denial of bail would be constitutional if, unlike Proposition 100, it were "adequately tailored." Pet. App. 26a n.8. Contrary to the Petitioners' assertion, the decision below does not reach a single bail law beyond Proposition 100.

The Petition raises only one new issue, which Petitioners have never raised before: that Respondents' facial challenge to Proposition 100 should fail because there may be some subset of offenses covered by Proposition 100—capital offenses or an ill-defined category of "extremely serious offenses"—that could constitutionally be subject to a categorical prohibition on bail. Based on that contention, Petitioners ask this Court to grant certiorari in order to resolve "confusion" in the lower courts about facial and as-applied challenges. This case is not an appropriate vehicle for doing so. First, the Court of Appeals applied *Salerno*'s due process standard for pretrial detention statutes, analyzing whether Proposition 100 is excessive in relation to the asserted purpose. Moreover, Petitioners themselves do not articulate any clear subset of cases to which Proposition 100 could constitutionally

apply, other than possibly capital cases. As for that category, this case is not an appropriate vehicle to resolve questions about the facial challenge standard because regardless of the outcome, capital defendants will remain subject to categorical pretrial detention under a separate and preexisting Arizona bail law.

The Court should deny the writ.

STATEMENT OF THE CASE

A. The Proposition 100 Laws

In 2006, the Arizona state constitution was amended by a voter referendum to provide that "[a]ll persons charged with crime shall be bailable by sufficient sureties, except: … [f]or serious felony offenses prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge." Ariz. Const. art. II, § 22(A)(4). The legislature separately defined "serious felony offense" as "any class 1, 2, 3 or 4 felony" or aggravated driving while under the influence. Ariz. Rev. Stat. § 13-3961(A)(5)(b). This definition of "serious felony offense" encompasses hundreds of offenses, including non-violent offenses such as unlawful copying of a sound recording and theft of property worth between $3,000 and $4,000. Pet. App. 23a.

Proposition 100 was enacted as part of a package of bills designed to deal with "illegal entry," "illegal trespassers," and "the illegal alien problem." *See* Excerpts of Record, *Lopez-Valenzuela v. Maricopa County*, No. 11-16487 (9th Cir., filed Oct.

26, 2011), Doc. 77 at 285-91, 293-94. During hearings on Proposition 100, legislators repeatedly expressed the intent to use pretrial detention to punish immigration violations. For example, the legislative sponsor, then-Senator Russell Pearce, stated:

> In fact, all illegal aliens in this country ought to be detained, debriefed, and deported …. [T]hey have no business being released if they commit no crime, no additional crime [be]cause they're already in this country illegally.

Pet. App. 43a. Another legislator, Senator Bill Brotherton, stated: "To that point, what part of illegal don't we understand? Illegal aliens shouldn't be able to get bond for anything let alone a Class 1, 2, or 3 felony…." *Id.* 45a. The official voter pamphlet also contained statements illustrating Proposition 100's improper purpose, addressing matters other than flight risk. A gubernatorial candidate submitted one of the official statements in favor of the measure:

> I commit to you that, as your Governor, I will apply all legal measures to protect and defend Arizonans from the illegal invasion. This Ballot Measure addresses one area that needs to be resolved in this fight to secure our borders and reduce the level of crime in our neighborhoods.

Id. 47a. Thus, both legislators and voters understood the purpose of Proposition 100's categorical prohibition on bail was to punish immigration violations and "to secure our borders."

The Arizona legislature sent Proposition 100 to voters without considering whether the state courts already had sufficient tools to ensure the appearance of defendants released on bail, or whether less extreme measures than a categorical prohibition on bail might suffice. *Id*. 28a-29a. In fact, Arizona law already required courts making pretrial custody decisions to weigh individualized factors going to flight risk—including "[w]hether the accused has entered or remained in the United States illegally," and "[w]hether the accused's residence is in this state, in another state or outside the United States." *Id*. 28a (citing Ariz. Rev. Stat. § 13-3967(B)(11)-(12)). Arizona law also permitted judges to impose bond requirements, monitoring, and reporting, as tools to ensure appearance. Ariz. Rev. Stat. § 13-3967(D).

Indeed, the legislature did not consider *any* evidence as to whether criminal defendants who are unlawfully present in the United States pose a greater flight risk than other defendants, much less whether such defendants categorically pose such an unmanageable flight risk that they should be deprived of an individualized bail hearing. Pet. App. 21a.

When Proposition 100 went into effect, many defendants who previously had been released and were reporting as directed were suddenly held nonbondable and jailed. Pet. App. 24a.

B. Procedural History

The Respondents, Angel Lopez-Valenzuela and Isaac Castro-Armenta, were both held nonbondable pursuant to Proposition 100. On April 4, 2008, they

brought a proposed class action lawsuit seeking declaratory and injunctive relief against Proposition 100, in order to obtain individualized bail hearings for themselves and others also held nonbondable. The class action complaint challenged Proposition 100 on due process and federal preemption grounds, and also raised other constitutional challenges to the Petitioners' policies and practices implementing Proposition 100.

On December 9, 2008, the district court granted Respondents' motion for class certification and also granted Petitioners' motion to dismiss the federal preemption claim against Proposition 100.

The parties filed cross-motions for summary judgment after extensive fact discovery on the remaining claims in the case. On March 29, 2011, the district court denied the Respondents' summary judgment motion and granted the Petitioners' summary judgment motion, ruling against Respondents on their due process and other claims.[2] Although the district court found that "[t]he voter materials contained some official statements reflecting a punitive purpose" and that "some statements by legislators relate to controlling illegal immigration," it concluded that Proposition 100 was not enacted with punitive intent. Pet. App. 140a-142a.

The district court also found that

> [n]o one came forward at the time [of the legislative hearings] with evidence

[2] Respondents later voluntarily dismissed one remaining claim on which they had not moved for summary judgment, thus concluding the district court litigation.

> to support [Senator Pearce's] claim that people who are unlawfully present in the United States are categorically more of a flight risk than people who are not unlawfully present, nor have Defendants in this matter presented evidence to that effect.

Id. 139a. Nonetheless, the district court concluded that Proposition 100 was not excessive in relation to the asserted purpose of addressing flight risk, opining that "[t]he Arizona legislature and Arizona voters made the logical assumption that a person who is unlawfully present in the United States may not appear for trial." *Id.* 142a.

Respondents appealed, and on June 18, 2013, the Court of Appeals issued a 2-1 decision holding that Proposition 100 did not violate the Due Process Clause. The majority held that "[t]o strike down Proposition 100 on the grounds that it violates substantive due process would require us to find that Proposition 100 'is not reasonably related to a legitimate goal' and is 'arbitrary and purposeless'…." *Id.* 94a. It distinguished *Salerno*, which emphasized individualized bail determinations, on the ground that the federal Bail Reform Act provision at issue in that case was aimed at dangerousness while Proposition 100 addresses flight risk. *Id.*

Respondents successfully petitioned for rehearing en banc. On October 15, 2014, the en banc panel of the Ninth Circuit applied heightened scrutiny in reviewing Proposition 100 in light of the fundamental liberty interest in an individualized bail hearing. *Id.* 15a. Pursuant to *Salerno*, the Court of Appeals held, by a 9-2 vote, that Proposition 100

violates due process because it is not narrowly tailored to any compelling state interest, and because it imposes punishment before trial because it is excessive in relation to the asserted purpose of addressing flight risk. *Id*. 38a-39a. The en banc court based its holding on several grounds:

First, the Court of Appeals held that the factual record did not support the Petitioners' assertion that Proposition 100 addressed a "particularly acute problem" necessitating the extreme measure of a categorical prohibition on bail. *Id*. 22a. While explicitly not requiring empirical evidence supporting an assertion of flight risk, the Court of Appeals noted that there was an "absence of *any* credible showing that the Proposition 100 laws addressed a particularly acute problem." *Id.* (emphasis added).

Second, the Court of Appeals noted that Proposition 100 is excessive because, unlike the federal bail statute at issue in *Salerno*, Proposition 100 was not limited to a "specific category of extremely serious offenses," and indeed encompassed relatively minor offenses such as unlawful copying of a sound recording and theft of property worth between $3,000 and $4,000. *Id*. 23a-24a.

Third, the Court of Appeals noted that the factual record actually demonstrated that Proposition 100 is excessive and that undocumented immigrants do not categorically pose an unmanageable flight risk, since there were people who were arrested prior to Proposition 100, were granted bail or released on their own recognizance, and appeared as directed by the state courts. *Id.* 24a. And yet, the Court of Appeals noted, even these

individuals were "needlessly remanded into state custody following Proposition 100's passage." *Id.*

In addition, the Court of Appeals held that Proposition 100 unconstitutionally imposes punishment before trial. *Id.* 37a. The Court of Appeals noted that, on the record presented, Proposition 100 purported to address a societal ill that had not been shown to exist, and employed a "profoundly overbroad irrebuttable presumption, rather than an individualized evaluation." *Id.* Because of the "*severe* lack of fit between the asserted non-punitive purpose and the actual operation of the law," the Court of Appeals held that Proposition 100 imposes punishment before trial. *Id.* (emphasis added).

Having struck down Proposition 100 on due process grounds, the Court of Appeals did not reach Respondents' other constitutional claims, including the claim that Proposition 100 is preempted by federal law. *Id.* 39a.

C. Current Status of Proposition 100

Petitioners assert that "to [their] knowledge, no Arizona Court has followed the Ninth Circuit's decision … and the fact that 'the Commissioner responsible for bail hearings' *in Maricopa County*—a named party directly subject to the Ninth Circuit's order—has scheduled bail hearings in compliance with the Ninth Circuit's judgment says nothing about how the conflict will play out elsewhere in the state." Pet. 16 n.3 (italics in original). Petitioners appear to be ignorant of a key development in the Arizona law. After the en banc decision below and before Petitioners filed their certiorari petition, the Arizona Supreme Court promulgated an amendment

to the Arizona Rules of Criminal Procedure eliminating Proposition 100's language. *See* p. 15-16, *infra.*

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW REPRESENTS A STRAIGHTFORWARD APPLICATION OF SETTLED DUE PROCESS PRECEDENTS, WHICH DOES NOT WARRANT PLENARY REVIEW.

A. The Decision Below Correctly Applies *Salerno.*

Petitioners argue that the Court of Appeals "misread" *United States v. Salerno*. In fact, the Court of Appeals properly applied the central holding of *Salerno*, which is that pretrial detention cannot impose punishment before trial, *Salerno*, 481 U.S. at 746-47, and that a pretrial detention law cannot be excessive, *id.* at 747, but must instead be "narrowly focuse[d] on a particularly acute problem in which the Government interests are overwhelming," *id.* at 750. It is Petitioners who are misreading the decision below.

First, Petitioners mischaracterize the decision below as holding that individualized bail hearings are "all but required" in non-capital cases. Pet. 9. To the contrary, the Court of Appeals explicitly limited its opinion to Proposition 100 and the record in this case, and it "assum[ed] without deciding that [a categorical denial of bail for non-capital offenses] would be constitutional were it adequately tailored." Pet. App. 26a n.8.

Second, Petitioners mischaracterize the decision below as holding that heightened scrutiny applies because there is a fundamental right to be released before trial. Pet. 9. To the contrary, the Court of Appeals explicitly noted that the issue is not whether there is a fundamental right to bail, but rather that heightened scrutiny applies because there is a fundamental liberty interest at stake. Pet. App. 15a. This should be uncontroversial. As the Court of Appeals noted, this Court has confirmed in subsequent cases that *Salerno* involved a fundamental liberty interest and therefore applied heightened scrutiny. *Id.* 15a-16a (citing *Salerno*, 481 U.S. at 750; *Reno v. Flores*, 507 U.S. 292, 301-02 (1993); *Foucha v. Louisiana*, 504 U.S. 71, 80-83 (1992); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)).

Third, Petitioners mischaracterize the decision below by implying that the Court of Appeals held that a pretrial detention law passes muster only if it includes all of the procedural safeguards in the federal Bail Reform Act provision that was at issue in *Salerno*. Pet. 9-10. In fact, the Court of Appeals merely noted those procedural protections this Court cited with approval in *Salerno*, and contrasted those features of the federal bail law with Proposition 100's imposition of an "overbroad, irrebuttable presumption" of flight risk. Pet. App. 23a. The Court of Appeals also rested its conclusion on the fact that Proposition 100 is "not narrowly focused on those arrestees who actually pose the greatest flight risk" (*id.* at 24a) and specifically referred to record evidence that individuals who had been released prior to Proposition 100, and who had appeared in court as directed, "were needlessly

remanded into state custody following Proposition 100's passage." *Id.*

In short, the Court of Appeals carried out a straightforward application of this Court's *Salerno* analysis for pretrial detention laws and concluded on the record before it that Proposition 100 violates the Due Process Clause.

B. The Court of Appeals Properly Rejected Petitioner's Post Hoc Reliance on Empirical Data Discussed in *Demore v. Kim*.

Petitioners also argue that the writ should issue because the decision below is "incompatible with" *Demore v. Kim*, 538 U.S. 510 (2003), Pet. 9, which upheld a federal statute providing for detention of non-citizens pending removal proceedings, 8 U.S.C. § 1226(c). This argument fails on the merits and, in any event, raises a fact-bound issue that is particular to this case and does not warrant this Court's review.

The Court of Appeals correctly rejected the Petitioners' efforts to shoehorn the data at issue in *Demore* into the analysis of Proposition 100. In *Demore*, this Court considered a federal immigration detention statute, 8 U.S.C. § 1226(c), that provides for the detention of non-citizens pending removal proceedings, generally based upon prior criminal convictions, such as an aggravated felony (as defined in 8 U.S.C. § 1101(a)(43)), or crimes involving moral turpitude. In upholding 8 U.S.C. § 1226(c), *Demore* specifically relied on the legislative history, which included empirical data about failure-to-appear rates for non-citizens with prior criminal convictions in

removal proceedings and evidence that existing measures to address flight risk had failed. 538 U.S. at 519-21 (setting forth evidence considered by Congress). Indeed, this Court rejected the detainee's argument in *Demore* that there was no showing that individualized bond hearings would be ineffective specifically because "Congress had before it evidence" demonstrating the flight risk problem. *Id.* at 528.

Contrary to Petitioners' assertion, *Demore* does not broadly approve any conceivable law that subjects alleged undocumented immigrants to categorical detention.[3] *Demore* approved a narrow federal immigration detention statute that applies to non-citizens in removal proceedings, who are alleged to be deportable based upon prior criminal convictions. Non-citizens in that category often are ineligible for relief based upon the same criminal conviction ground, and therefore face a higher likelihood of removal. *See*, *e.g.*, 8 U.S.C. §§ 1158(b)(2)(A)(ii) and (B)(i) (non-citizen convicted of an aggravated felony is ineligible for asylum);

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[3] Petitioners also argue that the decision below conflicts with *Diop v. Imm. & Customs Enforcement*, 656 F.3d 221 (3d Cir. 2011). Pet. 35. This argument fails on two counts. First, while *Diop* did note that *Demore* overruled a previous Third Circuit decision holding that 8 U.S.C. § 1226(c) was unconstitutional unless it provided for individualized bond hearings, 656 F.3d at 233 n.11, *Diop* actually held that *Demore* did not authorize detention without a hearing in all circumstances, and construed 8 U.S.C. § 1226(c) to require individualized bond hearings when detention becomes unreasonably prolonged. *Id.* at 231-33, 235. Second, because *Diop* and *Demore* concern the same federal immigration detention statute, which poses different flight risk calculations from those at issue with Proposition 100, neither case "conflicts" with the decision below, for the reasons set forth above.

8 U.S.C. § 1182(h)(2) (certain lawful permanent residents convicted of aggravated felonies are ineligible for waiver of inadmissibility); 8 U.S.C. § 1229b(a)(3) (non-citizen convicted of aggravated felony is ineligible for cancellation of removal). Moreover, this Court noted that the detainee challenging 8 U.S.C. § 1226(c) in *Demore* had conceded deportability. 538 U.S. at 531. In contrast, Proposition 100 prohibits pretrial release for persons who are merely charged with crimes, may not have any criminal history, may have defenses to the charge and, in many cases, have minimal sentencing exposure.

Petitioners' assertion that "*mere* removal" (Pet. 28) is of less consequence than the penalties that might be assessed for a Class 1 through 4 felony in Arizona is at odds with this Court's longstanding recognition that deportation is "'a drastic measure and at times the equivalent of banishment or exile,'" *Galvan v. Press*, 347 U.S. 522, 530 (1954) (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)), potentially entailing the loss of "'all that makes life worth living,'" *id.* (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)). In contrast, the record in this case demonstrated that the charges triggering Proposition 100 can lead to noncustodial sentences. *See* Excerpts of Record, *Lopez-Valenzuela v. Maricopa County*, No. 11-16487 (9th Cir., filed Oct. 26, 2011), Doc. 77 at 312:4-25; 355:10-13.

The Court of Appeals rightly determined that Proposition 100 and the federal detention law at issue in *Demore* implicate different flight risk calculations. And in any event, whether the Court of Appeals was correct in its rejection of Petitioners'

efforts to borrow data from a different context is a fact-bound question that does not warrant review by this Court.

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION BY THE ARIZONA SUPREME COURT OR THE NEW HAMPSHIRE SUPREME COURT.

A. There Is No Binding Arizona State Decision in Conflict with the Ninth Circuit.

Petitioners' contention that there is a conflict between the decision below and an Arizona court decision ignores the fact that the Arizona Supreme Court has put into effect a rule striking the Proposition 100 language from the Arizona Rules of Criminal Procedure. *See* Order, Arizona Supreme Court, Dec. 16, 2014, at 1 (granting on an expedited basis a petition to amend Ariz. R. Crim. P. 7.2(b) and Form 4(a) to conform with the decision below, effective as of December 16, 2014, and opening matter for public comment through May 20, 2015), available at http://www.azcourts.gov/Portals/20/2014%20December%20Rules%20Agenda/R140030.pdf (last visited Mar. 11, 2015) (signed copy on file with the Clerk of the Arizona Supreme Court). *See also* Petition to Amend Rule 7.2, Rules of Criminal Procedure filed by the Administrative Director, Administrative Office of the Courts, available at http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1123534922054.pdf (last visited Mar. 11, 2015) (signed copy on file with the Clerk of the Arizona Supreme Court). Thus, contrary to Petitioners'

assertion, there is currently no conflict between the Ninth Circuit opinion and current Arizona court practices.

Petitioners rely on the existence of a conflict between the decision below and an earlier state intermediate appellate court decision, *Hernandez v. Lynch*, 167 P.3d 1264 (Ariz. Ct. App. 2007). As set forth above, *Hernandez* has been superseded by a rule promulgated by the Arizona Supreme Court, which follows the U.S. Court of Appeals. Moreover, even if the highest state court had not resolved the issue by rulemaking, there would be no reason to grant certiorari. This Court has taken cases to resolve a conflict on a federal question between a federal court of appeals and the *highest* court of a state, *see*, *e.g.*, *Johnson v. California*, 545 U.S. 162, 164 (2005); *Florida v. White*, 526 U.S. 559, 562-63 (1999), but *Hernandez* is only a decision by one division of Arizona's intermediate appellate court.

Under Arizona state law, even if the Arizona Supreme Court had not promulgated a rule implementing the Ninth Circuit's decision below, *Hernandez* would not bind other state intermediate appellate courts. *See Castillo v. Indus. Comm'n*, 520 P.2d 1142, 1148 (Ariz. Ct. App. 1974). For example, in *State Farm Mut. Auto Ins. Co. v. Wilson*, Division 1 of the Arizona Court of Appeals held that it was "not precluded … from determining that Division 2's opinion was based on erroneous principles," since the "fact that the Arizona Supreme Court denied review in [the Division 2 case] was not controlling." 782 P.2d 723, 726 (Ariz. Ct. App. 1989) ("It is clear from *Hagen* that denial of review by the supreme court does not *necessarily* attest its approval of the

results.") (emphasis added) (citing *Hagen v. U.S. Fid. & Guar. Ins. Co.*, 675 P.2d 1310 (Ariz. 1984); *Calvert v. Farmers Ins. Co. of Ariz.*, 697 P.2d 684, 690 n.5 (Ariz. 1985)).

Petitioners attempt to manufacture a conflict where none exists, on the insupportable theory that by denying discretionary review of *Hernandez*, the Arizona Supreme Court effectively adopted the lower court's decision and established a conflict with the decision in this case. Yet, as Petitioners concede, under Arizona law the "denial of a petition for review has no precedential value." Pet. 14 n.2 (quoting *Calvert*, 697 P.2d at 690 n.5); *see also Morgan v. Carillon Investments, Inc.*, 88 P.3d 1159, 1162 n.1 (Ariz. Ct. App. 2004) (Arizona Supreme Court's denial of review of a prior appellate decision did not create binding precedent); *State v. Benenati*, 52 P.3d 804, 807 n.2 (Ariz. Ct. App. 2002) ("Our supreme court's denial of review … affects neither our analysis nor our decision."). Indeed, in *Calvert*, the Arizona Supreme Court had twice previously denied review in cases presenting an issue, but finally granted review and rejected the reasoning of the state courts of appeals, noting that its previous denial of review had no precedential value. 697 P.2d at 690 n.5.

The case cited by Petitioners, *Hagen*, 675 P.2d 1310, actually contradicts their argument. In *Hagen*, the Arizona Supreme Court issued a written opinion adopting and affirming the decision of the court of appeals. In doing so, the Arizona Supreme Court noted that "while denial of review usually attests our approval of the result reached by the court of appeals, it does not necessarily indicate our approval

of the legal analysis contained in the opinion." *Id.* Recognizing that denial of review would not be a ruling on the merits, the court in *Hagen* specifically chose not to deny review, but instead to issue an opinion affirming the lower court in order to set a binding precedent. *Id.* In the *Hernandez* case, the Arizona Supreme Court took no such steps, but simply denied review without an opinion. 167 P.3d at 1264.

Petitioners also cite *Am. R.R. Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923), Pet. 15, but that case provides only that a decision by a state intermediate court may be reviewed on certiorari by this Court when the highest state court has declined to review it. In this case, however, Petitioners do not seek review of an intermediate state appellate court decision pursuant to 28 U.S.C. § 1257, but of a decision by a federal circuit court. Petitioners cite no precedent for a grant of certiorari of a federal court of appeals decision merely because it conflicts with an earlier decision by an intermediate state appellate court, particularly when that decision has been superseded by a rule promulgated by the state supreme court.

B. The Decision Below Does Not Conflict with the New Hampshire Supreme Court's Decision in *Furgal*.

As in their stay application, Petitioners assert a conflict between the decision below and the New Hampshire Supreme Court's decision in *State v. Furgal*, 161 N.H. 206 (2010). There is no such conflict. *Furgal* addressed an entirely different bail law, which provided that if a defendant has been charged with an offense punishable by life

imprisonment and if "the proof is evident or the presumption great" that the defendant will be convicted, then he must be held without bail pending trial. *Id.* at 210. Petitioners' contention—that *Furgal* conflicts with the decision below on the question of whether *Salerno* requires individualized hearings on dangerousness in all cases, Pet. 17—rests on a false premise. As already explained, the Court of Appeals did not hold that *Salerno* requires individualized bail hearings in all circumstances. Pet. App. 26a n.8. The Court of Appeals issued a narrow ruling striking down Arizona's Proposition 100 because, among other reasons, there was *no* evidence that the Arizona law addressed an actual problem of unmanageable flight risk, *id.* at 21a, and because of the "severe lack of fit" between the asserted purpose and the regulation, *id.* at 37a. Nothing in *Furgal* is to the contrary.

III. THE DECISION BELOW DOES NOT ADDRESS ANY LAW OTHER THAN PROPOSITION 100 AND THERE IS NO CONFLICT TO RESOLVE.

Petitioners argue that the Court should grant certiorari because, by their count, the decision below casts doubt on 40 state laws that impose "some form" of categorical prohibition on bail.[4] Like their attempt

[4] In fact, at least some of the state bail laws they cite do not actually impose a categorical prohibition. *See*, *e.g.*, S.C. Const. art. I, § 15 (providing that bail "*may be* denied to persons charged with" certain offenses) (emphasis added); Okla. Const. art. II, § 8 (same). Further, some of these laws have been construed by those states' courts to permit individualized determinations in order to avoid the constitutional problem that would arise from a categorical prohibition. *See*, *e.g.*, *State v.*

to manufacture a conflict with the New Hampshire Supreme Court, this argument fails because the Court of Appeals reached a narrow conclusion that is carefully limited to Proposition 100 and based upon the record in this case. Specifically, the Court of Appeals held that Proposition 100 violates the Due Process Clause because: there was *no* evidence indicating that undocumented immigrants categorically pose a greater flight risk than other defendants, much less an unmanageable flight risk necessitating a categorical prohibition, Pet. App. 21a; Proposition 100 is not limited in application to individuals charged with particularly serious offenses and to the contrary, "encompass[es] an exceedingly broad range of offenses, including not only serious offenses but also relatively minor ones," *id.* at 23a; and Proposition 100 is not narrowly focused on arrestees who pose the greatest flight risk, but in fact caused the detention of individuals who demonstrably did *not* pose a flight risk since they had been appearing as directed before the law went into effect, *id.* at 24a.

The Court of Appeals' analysis in striking down Proposition 100 could be at most applied to two other similar state laws imposing pretrial detention on undocumented immigrants. As even Petitioners acknowledge, one of those state laws, § 31-13-18(b) of the Alabama Code, is not in effect because the state has stipulated in litigation that under the Alabama Constitution it cannot categorically deny bail for non-

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Arthur, 390 So. 2d 717, 717-18 (Fla. 1980); *In re West*, 88 N.W. 88, 89-90 (N.D. 1901).

capital offenses.[5] *See* Pet. 21 n.5. And, as Petitioners also acknowledge, at least one Missouri state court has held that the Missouri law, Mo. Ann. Stat. § 544.470(2), is unconstitutional under both the Missouri Constitution and the U.S. Constitution. Pet. 20.

In short, the decision below reaches Proposition 100 and no other bail statute, and there is no reason to grant the writ to address the constitutionality of any other categorical restrictions on bail.

IV. THE COURT OF APPEALS DID NOT IMPOSE ANY "NOVEL AND BURDENSOME" REQUIREMENT ON STATE LEGISLATURES.

Petitioners assert that the Court of Appeals imposed a "novel and burdensome" requirement on state legislatures to advance empirical evidence to demonstrate a compelling state interest. Pet. 22. This argument fails because the Court of Appeals did not do so. The Ninth Circuit explicitly did not "hold Proposition 100 'void … for want of evidence.'" Pet. App. 22a (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 291 (2000)). Rather, the Court of Appeals applied *Salerno* and other due process precedents, which ask whether a pretrial detention law "'narrowly focuses on a particularly acute problem.'" *Id.* (quoting *Salerno*, 481 U.S. at 750 and citing *Foucha*, 504 U.S. 81). The Court of Appeals pointed to the lack of *any* evidence that

[5] Defendants charged with capital offenses are subject to a separate nonbondability provision under Alabama law. Ala. Const. art. I, § 16.

undocumented immigrants categorically pose an unmanageable flight risk (or even a greater flight risk than other defendants), in concluding that Proposition 100 failed that settled due process test. Pet. App. 19a-21a (citing *Salerno*, 481 U.S. at 742, 747, 750; *Demore*, 538 U.S. at 518-21, 528). *See also Kansas v. Hendricks*, 521 U.S. 346, 351 (1997) (noting state legislature's numerous factual findings to justify civil commitment statute); *Foucha v. Louisiana*, 504 U.S. 71, 82, 86 (1992) (striking down detention law applying to insanity acquitees who are not mentally ill and noting state's failure to explain why less restrictive measures were insufficient to address asserted governmental interest and failure to advance "a particularly convincing reason" to justify the measure).

Petitioners' argument that the Court of Appeals should have credited Arizona's asserted "concerns," "anecdotal evidence," and "logical assumptions" is not supported by any authority. Pet. 22. This Court has not held that a state legislature could meet its burden under the Due Process Clause with such bald and unsupported assertions. It would be particularly troubling and illogical to excuse a legislature from pointing to *any* facts going to flight risk on categorical basis, when it is enacting an irrebuttable presumption and eliminating hearings at which *individualized* evidence of flight risk could be presented. Such a rule would also be contrary to the Fourteenth Amendment's purpose of protecting politically unpopular classes.

Moreover, the Court of Appeals explained why it is not in fact "logical" to assume that undocumented immigrants categorically pose an

unmanageable flight risk. First, the record evidence showed that prior to Proposition 100, undocumented immigrants were released on bail by Arizona state courts and appeared as directed. Pet. App. 24a. Second, the Court of Appeals dispelled the "logical assumption" urged by the Petitioners, pointing out the fallacy of their speculation that undocumented immigrants categorically lack strong ties to the community and have a "home" in a foreign country. *Id.* 27a. Indeed, as the Court of Appeals pointed out, this Court has noted that many undocumented immigrants have native-born U.S.-citizen children and "long ties to the community." Pet. App. 27a (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012)). And for the reasons already set forth above at Part I.B., Petitioners' continued post hoc reliance on the data considered in *Demore* is misplaced.

V. THE COURT OF APPEALS PROPERLY APPLIED THE *SALERNO* STANDARD TO HOLD PROPOSITION 100 FACIALLY UNCONSTITUTIONAL.

Finally, the Petition raises a new legal issue for the first time in this litigation, arguing that the Court of Appeals improperly applied a First Amendment overbreadth analysis and pointing out that "there is a great deal of confusion" about *Salerno*'s facial challenge standard. The former is simply untrue and the latter, while perhaps true, has nothing to do with this case.

First, the Court of Appeals did not apply an overbreadth analysis, as Petitioners contend. Pet. 29. Rather, as set forth above, its opinion is a

straightforward application of *Salerno* and this Court's other due process precedents in the civil detention context. In short, the Court of Appeals held that Proposition 100's categorical prohibition on bail—covering a broad range of charged offenses, and without any evidence to show that its targets posed a greater flight risk than other defendants—was excessive and imposed punishment before trial. In such a context, the categorical deprivation of an individualized hearing is unconstitutional on its face, under *Salerno*'s clear instruction that such laws must address a "particularly acute problem" and be "narrowly tailored to serve a compelling interest." Pet. App. 38a (quoting *Salerno*, 481 U.S. at 750). Further, such categorical detention is impermissibly punitive under *Salerno* if it is excessive in relation to the asserted purpose. 481 U.S. at 746-47 (citing *Bell v. Wolfish*, 441 U.S. 520, 537 (1979); *Schall v. Martin*, 467 U.S. 253, 269 (1984); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

Petitioners argue that the Court of Appeals should have upheld Proposition 100 because it acknowledged that "individuals 'could be detained consistent with due process under a different categorical statute.'" Pet. 29 (quoting Pet. App. 32a). But the quoted sentence did not acknowledge that *a subset* of individuals could be lawfully detained *under Proposition 100*; to the contrary, the Court of Appeals clarified that even if an individual could be constitutionally held nonbondable under some other theoretical categorical statute, that individual could nevertheless successfully challenge Proposition 100.

Petitioners also argue that Proposition 100 has a "plainly legitimate sweep" and therefore the facial challenge should have failed under *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). Pet. 30. But Petitioners provide no authority to undermine the Court of Appeals' conclusion that Proposition 100 was facially unconstitutional under the *Washington State Grange* test because it "encompasses an exceedingly broad range of offenses" and deploys a "scattershot attempt" at addressing any purported flight risk.[6] Pet. App. 23a-24a, 38a. As the Court of Appeals pointed out, Petitioners "have not suggested any 'reasonable' or 'readily apparent' narrowing construction" that would make Proposition 100 constitutional. Pet. App. 34a (quoting *Stenburg v. Carhart*, 530 U.S. 914, 944 (2000)). The Court of Appeals correctly declined to rewrite Proposition 100 by imposing its own constitutional line-drawing among the hundreds of felonies that the Arizona legislature defined as "serious" for purposes of applying Proposition 100's categorical prohibition on bail. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988) (courts "will not rewrite a state law to conform it to constitutional requirements").

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[6] This Court has applied the same analysis to hold another detention statute facially unconstitutional. In *Foucha v. Louisiana*, this Court invalidated *in toto* a statute that permitted the continued commitment of individuals to a mental institution until the individual can demonstrate he is not dangerous, regardless of whether he still suffers from any mental illness. 504 U.S. 71 (1992). This Court held that the statute did not survive *Salerno* scrutiny because it was excessive and not carefully limited, even though there could presumably be valid applications of the statute for individuals who are both dangerous *and* mentally ill. *See id*. at 81-82.

Finally, Petitioners mischaracterize the Court of Appeals' facial challenge analysis as resting entirely on a law review article,[7] and then Petitioners themselves rely on the same article to point to a "state of disarray" among the lower courts on "facial, as-applied, and overbreadth challenges." Pet. 32-36 (internal quotation marks omitted). As noted above, the Court of Appeals applied a straightforward facial challenge analysis from *Salerno* to strike down an excessive pretrial detention law. Petitioners quote at length from the law review article, which lists several cases addressing facial and as-applied challenges in various contexts, but they do not explain how the decision below conflicts with any of them. Pet. App. 32a-34a. Nor do Petitioners explain how this Court should clarify any questions about the facial challenge standard in this case.

Petitioners point to the Court of Appeals' implicit acknowledgment that a categorical prohibition on bail in capital cases might be constitutional, *see* Pet. App. 25a ("Whether a categorical denial of bail for noncapital offenses could ever withstanding heightened scrutiny is an open question."), to argue that Proposition 100 should survive a facial challenge.[8] To the extent Petitioners

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[7] In fact, the Ninth Circuit's discussion of the facial challenge standard rests on *Washington State Grange*, 552 U.S. at 449; *Foucha*, 504 U.S. at 80-83 (citing *Salerno*, 481 U.S. at 747-51); and *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 376 (2010) (Roberts, C.J., concurring). *See* Pet. App. 32a-33a.

[8] Petitioners also theorize that Proposition 100 could constitutionally apply to the same "extremely serious offenses" that were covered by the federal bail statute upheld in *Salerno*. Pet. 29. But this argument ignores the obvious fact that

argue that the Court should grant certiorari in order to clarify whether the Court of Appeals should have upheld Proposition 100 as it applied to capital cases under the proper facial challenge standard, this case presents a poor vehicle. A grant for that purpose would waste this Court's resources as, regardless of the outcome, capital defendants were already nonbondable, and will remain nonbondable, under a separate Arizona state constitutional provision that predates Proposition 100. *See* Ariz. Const. art. II, § 22(A)(1); Ariz. Rev. Stat. § 13-3961(A)(1).[9]

As a last resort, Petitioners request that the Court grant certiorari in this case in order to clear up confusion about facial challenges among numerous lower court decisions in various contexts. Pet. 32-36. This case simply does not present those issues and the Court should deny the Petition. *See Conway v. Calif. Adult Auth.*, 396 U.S. 107, 110 (1969) ("Were we to pass upon the purely artificial and hypothetical issue tendered by the petition for certiorari we would

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Salerno did not uphold a categorical prohibition on bail at all; rather, it upheld the denial of bail—after a "full-blown adversarial hearing"—based on an individualized finding that a defendant poses such a danger that no conditions or bond would suffice to protect the community. 481 U.S. at 750.

[9] Arizona also has categorical prohibitions on bail for defendants charged with sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age when the proof is evident or the presumption great, *id.*, and for felony offenses committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge, Ariz. Const. art. II, § 22(A)(2). None of these provisions is affected by the Ninth Circuit's decision.

not only in effect be rendering an advisory opinion but also lending ourselves to an unjustifiable intrusion upon the time of this Court.").

CONCLUSION

The Petition should be denied.

Respectfully Submitted,

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