No. 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 Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

In opposing the petition for writ of certiorari, Respondents find themselves on the horns of a dilemma. Either the Ninth Circuit viewed Proposition 100 as problematic because it does not allow for individualized hearings to determine flight risk, or individualized hearings are not required for at least the same felonies reached by Proposition 100 that are covered by categorical bail denials in other States—including the very felonies with which Respondents in this case were charged, *compare* Pet.App. 81a-82a *with* R.I. Const. art. I, §9; S.C. Const. art. I, §15; S.C. Code Ann. §16-1-60. If the first is true, then the decision below conflicts with decisions of this Court and a state supreme court, and calls into question the constitutionality of a large number of state statutes. If the second is true, then Proposition 100 has a "plainly legitimate sweep," rendering it immune from Respondents' facial attack under the interpretation of *United States v. Salerno*, 481 U.S. 739 (1987), followed by other circuits, but now rejected by the Ninth Circuit.

Either way, certiorari is warranted.

I. Respondents' Claimed Lack Of Conflict Is Based On A Footnote That Does Not Square With The Ninth Circuit's Actual Holding.

Respondents take issue with our assertion that the Ninth Circuit's decision "all but require[s]" individualized bail hearings in non-capital cases. BIO, at 10. Understandably so, for as Respondents apparently recognize, *e.g.*, BIO at 2, 13, such a ruling would be at odds with *Demore v. Kim*, 538 U.S. 510 (2003), and

Diop v. ICE/Homeland Sec., 656 F.3d 221 (3d Cir. 2011). It would conflict with *State v. Furgal*, 13 A.3d 272 (N.H. 2010). And it would "bring[ ] into question the constitutionality" of statutes in force in a large number of States. *New York v. O'Neill*, 359 U.S. 1, 3 (1959). Any one of those conflicts counsel in favor of granting certiorari; the existence of all three make the case for certiorari compelling.

To support their position, Respondents rely on footnote 8 of the decision below, in which the court, responding to the same assertion made by Judge Tallman in dissent that we make in our petition, claims to have "assum[ed] without deciding that [a categorical denial of bail for non-capital offenses] would be constitutional were it adequately tailored." BIO, at 10 (quoting Pet.App. 26a n.8). The footnote, and Respondents' reliance on it, is a semantic sleight-of-hand.

The key to understanding why footnote 8 does not do the work Respondents claim lies in the meaning of the phrase, "adequately tailored." At the beginning of the section of the opinion in which footnote 8 appears, the Ninth Circuit made clear its meaning. "Proposition 100 plainly is not *carefully limited*"—that is, not adequately tailored—"*because* it employs an overbroad, irrebuttable presumption rather than an individualized hearing to determine whether a particular arrestee poses an unmanageable flight risk." Pet.App. 23a (emphasis added).

The Ninth Circuit's assertion in footnote 8 that it had assumed without deciding that "a categorical denial of bail … would be constitutional were it ade-

quately tailored," Pet.App. 26a, is therefore self-contradictory. One cannot have a "categorical" ban on bail that is "adequately tailored" if "adequately tailored" means the availability of individualized hearings.

But once that semantic sleight-of-hand is removed, the full import of the Ninth Circuit's actual holding becomes clear, and it is exactly what Judge Tallman claimed it to be in his dissent—a holding that "effectively preclud[es] the use of irrebuttable presumptions in the bail context." Pet.App. 62a. That holding is at odds with *Demore*, which upheld categorical denials of bail in the context of removal proceedings. It directly calls into question the constitutionality of other Arizona statutes that impose "*categorical* prohibitions on bail for defendants charged with" certain sex crimes felonies committed by someone alrady out on bail. BIO at 27 n.9 (emphasis added) (citing Ariz. Const. art. II, §22(A)(1), (2); Ariz. Rev. Stat. §13-3961(A)(1).[1] And it directly calls into question the categorical denials of bail in non-capital cases that exist in two other states in the Ninth Circuit. *See* Nev. Const. art. 1, §7 (murder); Ore. Const. art. I, §14 (murder and treason).

The Ninth Circuit's *holding* – as opposed to its footnote – also indirectly calls into question the constitutionality of categorical denials of bail in non-cap-

[1] Respondents assert that "[n]one of these provisions is affected by the Ninth Circuit's decision." BIO, at 27 n.9. While technically true—none of them were challenged—Respondents offer no explanation as to why the holding would not apply to these other provisions as well.

ital cases that exist in thirteen additional states outside the Ninth Circuit, as we noted in our petition. *See* Pet'n 19. It also calls into question, on *federal* constitutional grounds, the nearly identical statutes in Alabama and Missouri that, because of restrictive language in the Alabama and Missouri *state* constitutions limiting categorical denials of bail to capital offenses, are not currently in force. *See* Pet'n at 20, n. 4 and 21 n.5.

This understanding of the Ninth Circuit's *actual* holding is bolstered by Respondents' own complaint in the case, in which they repeatedly claim that Proposition 100 is unconstitutional because it "deprived [them] of their freedom without individualized judicial determinations" as to flight risk or dangerousness. Complaint (DCt. Dkt. #1), p.1, line 10-11; *see also, e.g.*, *id.*, ¶ 3 ("Through this action, Plaintiffs seek an individualized bail hearing at which they may be considered for release").

It is also bolstered by language elsewhere in the opinion below. The Ninth Circuit doubted "[w]hether a categorical denial of bail for noncapital offenses could *ever* withstand heightened scrutiny," for example. Pet.App. 25a (emphasis added). Although the Ninth Circuit described that as "an open question," it clearly indicated its agreement with the proposition by quoting the following language in a prior Ninth Circuit decision: "*Salerno* . . . upheld the constitutionality of a bail system where pretrial defendants could be detained *only* if the need to detain them was demonstrated on an individualized basis. Pet.App. 25a (quoting *United States v. Scott*, 450 F.3d 863, 8743 (9th Cir. 2006) (emphasis added); *see also* . Pet.App. 26a-27a n.8 (citing approvingly *Hunt v.*

Roth, 648 F.2d 1148 (8th Cir. 1981), which invalidated (until the decision was later vacated as moot) Nebraska's categorical denial of bail for persons charged with certain sexual offenses "*because,*" as the Ninth Circuit described, "it employed an irrebuttable presumption rather than requiring an individualized determination of flight risk." (emphasis added)).

In sum, the Ninth Circuit's holding is straightforward, with broad implications. "Proposition 100 plainly is not carefully limited [and is therefore unconstitutional, in its view] *because* it employs an overbroad, irrebuttable presumption rather than an individualized hearing to determine whether a particular arrestee poses an unmanageable flight risk." Pet.App. 23a (emphasis added).

II. Contrary to Respondents' Assertion, the Conflicts Identified in the Petition Are Both Real and Significant.

When one considers the Ninth Circuit's actual holding, the conflicts presented by the Ninth Circuit's decision are manifest.

A. *Demore* upheld a categorical denial of bail; the Ninth Circuit invalidated Arizona's Proposition 100 "because" it precluded individualized hearings.

Petitioners do not claim, as Respondents erroneously assert, that *Demore* "broadly approv[ed] *any conceivable law* that subjects alleged undocumented immigrations to categorical detention." BIO, at 13 (emphasis added). Rather, after noting that *Salerno* "did not foreclose the possibility that a denial of bail for *certain categories of crimes* and *certain categories*

of high-flight-risk individuals" could also be constitutional, Petitioners merely pointed out that *Demore* "confronted the issue of categorical denials of bail … and expressly upheld the detention of deportable aliens prior to their removal without individualized hearings to assess flight risk." Pet'n 10-11 (emphasis added). In other words, *Demore* demonstrates that *Salerno* cannot be read to require individualized hearings.

The Ninth Circuit's holding, purportedly relying on *Salerno*, that Arizona's pretrial detention law is unconstitutional "because" it does not provide for "an individualized hearing," Pet.App. 23a-25a, is therefore incompatible with *Demore*. Indeed, *Demore* necessarily rejected such a reading of *Salerno*, over the dissent's contentions to the contrary. *See, e.g., Demore*, 538 U.S., at 551 (Souter, J., dissenting) ("cases [such as *Salerno*] yield a simple distillate that should govern the result here. Due process calls for an individual determination before someone is locked away.").

Indeed, *Demore* involved a lawful permanent resident, not someone, as here, for whom there has already been a probable cause determination of unlawful presence in the United States. That a *lawful permanent resident* can categorically be denied bail while awaiting a mere *removal proceeding* because of flight risk concerns necessarily supports the proposition that an *illegal alien* can categorically be denied bail pending *trial* for serious felonies, conviction for which can carry a lengthy prison sentence and triggers removal proceedings. The flight risk concern in the latter context must be at least as great as in the former.

This is confirmed by a study by the Vera Institute relied on by this Court in *Demore*. 538 U.S., at 520. Although Respondents attempt to debunk Petitioners' reliance on *Demore* as "pos[ing] different flight risk calculations" for the criminal aliens at issue there compared to persons "merely charged with crimes" at issue here, BIO 12-14, the "different flight risk calculations" actually demonstrate that Arizona has a greater reason to be concerned. The Vera Institute study assessed flight risk of both criminal aliens and "undocumented workers apprehended at work sites." The former had an appearance rate of about 75%, while the latter had an appearance rate of only 59% (i.e., a failure to appear rate of 41%). Vera Institute of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program*, pp. ii, 4 (2000).[2] In other words, the Vera Institute Study, relied upon by this Court in *Demore* and cited by Respondents in their own complaint at ¶ 30, fully supports the testimonial evidence considered by the Arizona legislature and available to the electorate, such as the testimony that illegal immigrants are "a much greater flight risk" than individuals who are in this country legally. Pet'n at 23-24 (citing, inter alia, legislative testimony and ballot statements).

By refusing to credit *any* of that evidence and, as Judge Tallman correctly claimed, "effectively precluding the use of irrebuttable presumptions in the bail context" that *Demore* specifically allowed, the Ninth

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[2] Available at http://www.vera.org/sites/default/files/resources/downloads/INS_finalreport.pdf.

Circuit has thus "decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c).

B. The Ninth Circuit's holding rejecting Arizona's categorical rule also conflicts with State Supreme Court decisions and calls into question the validity of numerous laws in other States.

The correct characterization of the Ninth Circuit's actual holding, set out in Part I, also makes manifest the conflict with decisions by state supreme courts[3] and "bring[ ] into question the constitutionality" of statutes in force in a large number of States, *O'Neill*, 359 U.S., at 3.

In our Petition, we highlighted *State v. Furgal*, 13 A.3d 272 (N.H. 2010), in which the New Hampshire Supreme Court upheld New Hampshire's categorical denial of bail for individuals charged with certain

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[3] We agree with Respondents' contention that the conflict we asserted with the Arizona state courts no longer exists, at last at present. Although unnecessary, *see Weatherford ex rel. Michael L. v. State*, 81 P.3d 320, 324 (Az. 2003) ("state courts are not bound by decisions of federal circuit courts"), the Arizona Supreme Court's order shortly before the Christmas holiday (which we missed) granting a petition to amend state court rules in order "to promote uniform implementation … throughout the state" of the change in law mandated in Maricopa County by the Ninth Circuit's injunction, Pet'n to Amend Rule 7.2, No. R-14-0030 (Dec. 3, 2014), available at http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1123534922054.pdf, should be viewed simply as a function of comity. Indeed, the Arizona Court has allowed public comment on the rule change until May 20, 2015, demonstrating that the rule change is an interim one. Order, No. R-14-0030, at 1 (Az. Dec. 16, 2014).

non-capital crimes.[4] The decision below reached the opposite result, invalidating Arizona's categorical denial of bail to illegal immigrants charged with certain non-capital crimes (albeit a larger number of them).

In asserting that there is "no conflict" between the two cases, Respondents claim: 1) that the conflict we assert on the question of the Ninth Circuit's treatment of *Salerno* "rests on a false premise"; 2) that Arizona had "*no* evidence" of "an actual problem of unmanageable flight risk"; and 3) that, contrary to Proposition 100's "severe lack of fit," *Furgal* "addressed an entirely different bail law." None of those make this conflict less certworthy.

First, as already discussed above, Respondents' claim of "false premise" rests on the footnote 8 sematic sleight-of-hand. The Ninth Circuit expressly stated that *Salerno* "upheld the constitutionality of a bail system where pretrial defendants could be detained *only if* the need to detain them was demonstrated on an individualized basis." Pet.App. 25a (quoting *Scott*, 45 F.3d, at 874, emphasis added). In contrast, the *Furgal* court declined to "read *Salerno* to hold that all statutory bail schemes must include an individualized hearing," rejecting Furgal's claim to the contrary as "conflate[ing] sufficient conditions with necessary ones." *Furgal*, 13 A.3d, at 278-79.

Second, the lack of *empirical* evidence (there was testimonial evidence) of flight risk in the legislative record does not distinguish this case from *Furgal*,

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[4] We could also have pointed to *Parker v. Roth*, 278 N.W.2d 106 (1979), in which the Nebraska Supreme Court upheld Nebraska's categorical denial of bail for certain sex assault crimes.

which cited no evidence, empirical or otherwise, but rather simply noted that "from the beginning of the bail system, an exception to the rule favoring bail was made for persons accused of serious crimes that focused the inquiry"—just as Arizona's Proposition 100 does—"solely on the evidence of the defendant's guilt." *Id*.

Third, the fact that New Hampshire's law categorically denies bail to a smaller set of serious, but still non-capital, felonies makes it different in degree, not in kind, from Arizona's Proposition 100. As the *Furgal* court itself acknowledged, the right to bail has historically allowed for exceptions, not just in "Crimes Capital" but in "Contempts in open Court, and in such cases where some expresse act of Court doth allow it." *Furgal*, 13 A.3d, at 277. The reason for bail is "to ensure the defendant's presence at trial." *Id*., at 279. But "where the probabilities of flight are overwhelming, there should be no bail." *Id*.

Given the "overwhelming," 41% failure-to-appear rate of illegal immigrant workers discussed above, and the testimony recited in the petition to similar effect, Pet'n 23-25, Arizona's Proposition 100 qualifies for *Furgal* rule that "there should be no bail." As do the categorical bans on bail in non-capital cases that exist in seventeen other states. Because the Ninth Circuit's decision invalidating Proposition is therefore in conflict with New Hampshire, and calls into question the bail prohibitions in those other states, review by this Court is warranted.

III. The Ninth Circuit's Invalidation of Proposition 100 Despite Its Plainly Legitimate Sweep Demonstrates the Need for Clarification of this Court's Standard for Assessing Facial Challenges.

Alternatively, *if* Proposition 100's reach beyond the life imprisonment crimes at issue in *Furgal*, or the sex crimes at issue in *Parker*, or the murder, treason, weapon, drug, violence, recidivist, and escapee crimes on the books in several other states, *see* Pet'n 19, serves to distinguish Proposition 100 from all those other statutes, as Respondents claim, and *if* (contrary to Part I above) the Ninth Circuit really did not hold that *Salerno* requires an individualized hearing, then Respondents have simply moved from the "conflict" horn of their dilemma to the *Salerno* facial challenge horn. That, too, is a certworthy issue.

As *Salerno* noted, a challenger bringing a facial attack "must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S., at 745. Even those who have disagreed with that strict standard recognize that a law survives a facial challenge if it has a "plainly legitimate sweep." *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring in judgment). But there is no dispute here that Proposition 100 denies bail to those charged with many of the same crimes for which bail is categorically (and constitutionally, if the Ninth Circuit's decision does not call them into question) denied in other states. By invalidating

Proposition 100 in its entirety, the Ninth Circuit accepted Respondents' facial challenge despite Proposition 100's "plainly legitimate sweep."[5]

The Ninth Circuit's rejection of that straightforward application of the *Salerno* facial challenge in favor of a more convoluted test distorted Chief Justice Robert's concurring opinion in *Citizens United*,[6] is contrary to decisions in several other circuits, *e.g.*, *United States v. Comstock*, 627 F.3d 513, 518-19 (4th Cir. 2010) (upholding civil commitment statute against facial challenge because it had "a plainly legitimate sweep"); and demonstrates, just as we asserted, that the lower courts remain "hopelessly befuddled" about the test for facial challenges.

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[5] *Foucha v. Louisiana*, 504 U.S. 71 (1992), is not to the contrary. The opinion does not even mention "facial challenge," but dealt with the particular application of Louisiana's statute at issue, namely, the "detention of insanity acquittees who are no longer mentally ill." *Id.* at 81. Only that application was invalidated, with the Court specifically noting that "[t]he State may also confine a mentally ill person if it shows 'by clear and convincing evidence that the individual is mentally ill and dangerous.'" *Id.*, at 80.

[6] Chief Justice Roberts did not "explai[n] that facial invalidation is appropriate when … any other [plaintiff] raising the same challenge would also win,'" as the Ninth Circuit claimed. Pet.App. 33a. Rather, he said: "Given the nature of that claim and defense, it makes no difference of any substance whether this case is resolved by invalidating the statute on its face or only as applied to Citizens United." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 376 (2010) (Roberts, C.J., concurring).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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