No. 18-918

IN THE

Supreme Court of the United States

JOHN R. COPELAND, *et al.*,
Petitioners,
v.
CYRUS R. VANCE, JR., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

MOTION BY CONSTITUTIONAL LAW SCHOLARS FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF OF CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF PETITIONERS

SARAH M. SHALF
Counsel of Record
Emory Law School
Supreme Court Advocacy Program
1301 Clifton Road
Atlanta, GA 30322
(404) 712-4652
sarah.shalf@emory.edu
Counsel for Amici Curiae

MOTION BY CONSTITUTIONAL LAW SCHOLARS TO FILE A BRIEF IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the constitutional law scholars listed below hereby move for leave to file the accompanying brief as *amicus curiae* in support of petitioner and in support of certiorari being granted.

Amici are law professors who specialize in constitutional law and who have previously published on, or have interest in, facial and as-applied challenges. Amici have no personal stake in the outcome of this case, but have an interest in the sound development of constitutional law.

Alex Kreit is a Professor and Co-Director of the Center for Criminal Law and Policy at Thomas Jefferson School of Law. His research interests include facial and as-applied challenges, with a particular focus on the use of facial challenges in the criminal law setting.

Cristina D. Lockwood is an Associate Professor of Law at Detroit Mercy School of Law and has co-authored books and published articles in various disciplines, including constitutional law. Her constitutional law articles concern the void for vagueness doctrine.

Eugene Volokh is Gary T. Schwartz Professor of Law at UCLA School of Law, where he writes and teaches about constitutional law.

The constitutional law scholars submit that the issues involved in this appeal are of fundamental importance in understanding what constitutes a facial challenge.

This motion is necessary because counsel for respondent the New York County District Attorney declined to take a position regarding consent to submit this brief.

Respectfully Submitted,

SARAH M. SHALF
Counsel of Record
Emory Law School
Supreme Court Advocacy Program
1301 Clifton Road
Atlanta, GA 30322
(404) 712-4652
sarah.shalf@emory.edu
Counsel for Amici Curiae

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[1] Pursuant to Supreme Court Rule 37.2, the Respondents and the Petitioners received at least ten days' notice of the intent to file this brief under the Rule. Consent has been obtained from counsel for petitioners and counsel for respondent City of New York. Counsel for respondent New York County District Attorney takes no position regarding consent, and a motion to file a brief as *amici curiae* in support of petitioners accompanies this brief.

Pursuant to Supreme Court Rule 37.6, amici curiae affirm that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief and no person other than amici curiae or their counsels made a monetary contribution to its preparation or submission.

Eugene Volokh is Gary T. Schwartz Professor of Law at UCLA School of Law, where he writes and teaches about constitutional law.

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

The distinction between a facial challenge and an as-applied challenge, and the test that should be applied to each type of challenge, is a question that has long vexed this Court and the courts of appeals. This case provides a unique opportunity for this Court to provide guidance on what test should apply to a facial challenge, and more fundamentally, to clarify the threshold question of what defines a facial challenge.

Courts and commentators have conventionally referred to "facial challenges" as those challenges that seek to "have a statute declared unconstitutional in all possible applications."[2] As-applied challenges are understood to be, simply, all challenges that are not facial challenges.[3] In this case, Petitioners brought a suit they characterized as an as-applied challenge to a gravity knife ban, seeking prospective relief against enforcement of the statute as to a *class* of knives—common folding knives—as to which the application of the statute was (they contended) unclear.[4] The Second Circuit (affirming the District Court) re-characterized

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[2] Richard H. Fallon, *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 923 (2011).
[3] *See Id.*
[4] Pet. App. 8.

this as a facial challenge, even though it did not challenge all possible applications of the law.[5] This case thus presents a situation in which the question of how to define this species of constitutional challenge was heavily disputed and creates an opportunity for discussing and clarifying the definition of a facial challenge.

The Second Circuit's re-characterization of the Petitioners' suit as a facial challenge turned out to be fatal to their case, given the test that the Second Circuit applied.[6] In *United States v. Salerno*,[7] this Court held that a facial challenge's success turns on showing that "no set of circumstances exist under which the Act would be valid."[8] More recently, however, this Court's decisions have called that test into question. In *Johnson*, for instance, the Court stated, "[O]ur *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp."[9]

Similarly, in this case, there is a class of knives that clearly fall within the definition of a gravity knife; Petitioners' challenge is about a different class of knives as to which the statute fails to give adequate notice of illegality. Under the *Salerno* test, any such challenge will necessarily fail, and the Second Circuit so held.[10] However, as *Johnson* recognizes, there can be many cases that fall into the grey area of a statute,

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[5] Pet. App. 16–17.
[6] Pet. App. 34.
[7] United States v. Salerno, 481 U.S. 739 (1987).
[8] *Salerno*, 481 U.S. at 745.
[9] Johnson v. United States, 135 S. Ct. 2551, 2561 (2015).
[10] Pet. App. 34.

even if there is a core of conduct that everyone agrees falls within the statute's terms.[11]

There are many ways in which the law surrounding facial and as-applied challenges has become inconsistent and difficult to apply. With this case, the Court can begin clarifying this area of the law with the most fundamental of questions: What is a facial challenge?

ARGUMENT

Petitioners, plaintiffs below, challenge a New York law that criminalizes "gravity knives," which are knives that can be opened with one hand through a "flick-of-the-wrist" test.[12] The plaintiffs are two individuals who had been prosecuted under the law for possession of a common folding knife that was deemed to meet the definition of a gravity knife, as well as a knife seller, Native Leather, who had been prosecuted for selling gravity knives and was required, under a deferred prosecution agreement, to test its knives going forward and not to sell any knife that responded to the wrist-flick test.[13] The plaintiffs sought prospective relief as to future enforcement of the gravity-knife law as applied only to a class of knives—common folding knives that may or may not respond to the wrist-flick test, depending on who was performing the test. They acknowledged that there was a core class of knives, including German paratrooper knives, as to which the law clearly

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[11] *See* Johnson, 135 S. Ct. at 2561.

[12] Petition for Writ of Certiorari at 6, Copeland v. Vance, No. 18-918.

[13] Pet. App. 6–7.

applied, but argued that it was not clear that common folding knives should be brought within its sweep, and that the wrist-flick test (which was not written into the law) did not provide adequate notice of which common folding knives fell within its scope.[14]

The Second Circuit re-characterized the plaintiffs' challenge to the statute as applied to a class of knives as a facial challenge, and then rejected the challenge under *Salerno's* rule, stating, "[A]t least one plaintiff did not show that the gravity knife law was unconstitutionally vague as applied to it in a prior proceeding. That alone requires us to reject plaintiffs' facial challenge."[15] Specifically, the court of appeals ruled that, because Native Leather had not attempted to test its knives using the wrist-flick test prior to its prosecution for violating the law, it could not complain of inadequate notice, and therefore its facial challenge failed.[16] The Second Circuit acknowledged that the wrist-flick test might not have provided adequate notice to any of the individual plaintiffs, but the failure as to one plaintiff was sufficient to deny the facial challenge as to all plaintiffs because, under *Salerno*, the prosecution of Native Leather disproved the argument that "no set of circumstances exist under which the Act would be valid."[17]

The Second Circuit's opinion exemplifies the confusion seen in the courts surrounding the definition of facial and as-applied challenges and the test applicable to facial challenges. The courts have lost sight of (or perhaps never had sight of) the

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[14] Pet. App. 8.
[15] Pet. App. 34.
[16] Pet. App. 27.
[17] United States v. Salerno, 481 U.S. 739, 745 (1987).

underlying policies behind the Court's division of constitutional challenges into the categories of facial and as-applied, and are accordingly confused about how to apply the Court's precedent to each category. This case, standing as it does on the boundary between facial and as-applied challenges, provides the Court with a chance to clarify its precedent.

I. FOLLOWING *SALERNO,* THE COURT'S JURISPRUDENCE ON FACIAL CONSTITUTIONAL CHALLENGES HAS POINTED IN DIFFERENT DIRECTIONS, AND NEEDS CLARIFICATION.

The watershed case regarding facial and as-applied challenges is *United States v. Salerno*.[18] The Court's majority opinion in *Salerno* has shaped the analysis of facial challenges.[19] The Court stated that "[a] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."[20] The Court also cast doubt on the viability of facial challenges outside of the overbreadth doctrine context, suggesting that even if a statute "might operate unconstitutionally under some conceivable set of circumstances," such a finding would be "insufficient to render it wholly invalid since [the Court] has not

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[18] 481 U.S. 739 (1987).
[19] Richard H. Fallon, *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 930 (2011).
[20] *Salerno*, 481 U.S. at 745.

recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."[21]

Though commentators have found that facial challenges can still be waged without being tied directly to the First Amendment overbreadth doctrine,[22] courts and scholars have typically assumed that "overbreadth facial challenges" are extremely rare outside of the First Amendment context.[23] Others insist, however, that such assumptions do not bear out in the Court's decisions and that facial challenges are, in fact, "not anomalous."[24]

A. Cases After *Salerno* and Before *Johnson* Suggest Facial Challenges Should Be Very Rare.

In *Sabri v. United States*,[25] the Court emphasized that facial challenges should be rare and that courts should be hesitant to grant them, especially when predicated on hypothetical situations:[26] "Facial adjudication carries too much promise of 'premature interpretatio[n] of statutes' on the basis of barebones records."[27] The Court also expressly discouraged facial challenges predicated on supposed unenforceability against third parties.[28] The Court suggested that there are "relatively few

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[21] *Id.* at 745.
[22] *See* Fallon, *supra* note 18, at 931.
[23] *Id.* at 931.
[24] *Id.* at 917–918.
[25] Sabri v. United States, 541 U.S. 600 (2004).
[26] *See* Fallon, *supra* note 18, at 932.
[27] *Sabri*, 541 U.S. at 609 (quoting *Raines*, 362 U.S. 17, 22 (1960)).
[28] *See* 541 U.S. at 609; *see also* Fallon, *supra* note 18, at 932.

settings" in which the Court recognizes facial challenges that allege overbreadth,[29] and the examples the Court pointed to mostly included issues that traditionally receive heightened constitutional protection.[30] Overall, the Court discouraged overbreadth claims except under limited circumstances.[31]

In *Ayotte v. Planned Parenthood of Northern New England*,[32] the Court turned again to a prior decision, *Brockett v. Spokane Arcades, Inc.*,[33] and constrained the limits of facial challenges.[34] The Court stated that "the normal rule" requires that partial invalidation come before facial invalidation—and indeed that "partial" invalidation "is the required course, such that a statute may be declared invalid to the extent it reaches too far, but otherwise left intact."[35] Here again, the Court looked to the specific facts of the case and found that the statute need not be subjected to complete facial invalidation.[36]

In *Gonzales v. Carhart*,[37] the Court looked to the factual underpinnings of a facial challenge to a state statute.[38] In that case, a statute banned an abortion procedure but did not include a provision

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[29] *See* 541 U.S. at 609–10; Fallon, *supra* note 18, at 932.
[30] *See* 541 U.S. at 610; Fallon, *supra* note 18, at 932.
[31] *See* 541 U.S. at 610; Fallon, *supra* note 18, at 932.
[32] *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006).
[33] Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985).
[34] *See Ayotte*, 546 U.S. at 329; Fallon, *supra* note 18, at 933.
[35] *Ayotte*, 546 U.S. at 329; Fallon, *supra* note 18, at 933.
[36] Richard H. Fallon, *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 934 (2011).
[37] Gonzales v. Carhart, 550 U.S. 124 (2007).
[38] *See Gonzales*, 550 U.S. at 161–68; Fallon *supra* note 34, at 934.

allowing for the procedure to be performed if necessary to protect the health of the mother.[39] Though presuming that the statute would be unconstitutional if it barred a procedure that was medically necessary for a mother's health, the Court found that the record did not indicate that this procedure would, in fact, ever be medically necessary.[40] The majority thus found that the record itself did not support a facial attack.[41] In addition to finding that the facial challenge would not be successful, the majority also stated that "as-applied challenges . . . are the basic building blocks of constitutional adjudication,"[42] thus reinforcing the understanding that as-applied challenges are conventionally construed as a "residual" category of constitutional challenges.[43]

B. *Johnson* and *Dimaya* Seem to Reject *Salerno* and Offer a Broader Rule.

In *Johnson v. United States*,[44] the Court considered the standard for determining that a law is facially invalid due to vagueness. In *Johnson*, the Court held that the residual clause of the Armed Career Criminal Act, which provides for enhanced sentencing for crimes that "present conduct that presents a serious potential risk of physical injury to

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[39] 550 U.S. at 140–42, 161–68; Fallon *supra* note 34, at 934.
[40] 550 U.S. at 161; Fallon, *supra* note 34, at 934.
[41] 550 U.S. at 163–67; Fallon, *supra* note 34, at 934.
[42] *Gonzales*, 550 U.S. at 168 (quoting Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, HARV. L. REV. 1321, 1328 (2000)).
[43] Fallon, *supra* note 34, at 919, 924.
[44] Johnson v. United States, 135 S.Ct 2551 (2015).

another", was unconstitutionally vague because, although some crimes clearly fell within its scope, the Court had struggled to characterize cases at the margins of the statute's definition. In *Johnson*, the Court cited two previous decisions[45] to explain that a statute could be unconstitutionally vague despite there being circumstances that would conceivably fit the language of the statute: "For instance, we have deemed a law prohibiting grocers from charging 'an unreasonable rate' void for vagueness—even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable."[46]

The Court echoed this point in its later decision in *Sessions v. Dimaya*.[47] Because the Court again stated that a single instance of constitutional application did not clear a statute from being considered unconstitutionally vague,[48] there is now a question as to whether the *Salerno* standard remains the standard to apply to void-for-vagueness challenges.

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[45] *See* Coates v. City of Cincinnati, 402 U.S. 611 (1971); United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921).

[46] *Johnson,* 135 S.Ct. at 2561.

[47] Sessions v. Dimaya, 138 S. Ct. 1204, 1222 n.7 (2018) ("But one simple application does not a clear statute make. As we put the point in *Johnson*: Our decisions 'squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provisions grasp.'") (citing Johnson v. United States, 135 S. Ct. 2551, 2561 (2015)).

[48] *See* 138 S. Ct. at 1222 n.7.

C. Courts Are Confused About When and How to Apply the *Salerno* Test.

The scope of *Salerno* itself is unclear, and the question of its continued viability after *Johnson* and *Dimaya* leaves courts uncertain whether to apply it at all. This Court should grant *certiorari* to resolve this confusion.

As an initial matter, the Justices do not agree whether the *Salerno* test is dicta, applicable in only some unspecified category of cases, or binding to all constitutional challenges except when the First Amendment overbreadth doctrine applies. *City of Chicago v. Morales*[49] illustrates the lack of a clear rule in the Court's precedent, even before *Johnson* and *Dimaya*. The opinions in the case merely reference the "rules governing facial challenges" without elucidating them.[50] Justice Scalia's dissent argues that the result did not meet *Salerno*'s "no set of circumstances" standard and that the majority further erred by "transpos[ing] the burden of proof" by requiring the city to show its ordinance was valid in all applications.[51] Justice Stevens held that the *Salerno* "test" was dicta and had never served as the decisive factor in any Supreme Court case.[52] Stevens further held that even if the test was not dicta, it is a prudential rather than binding doctrine.[53]

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[49] 527 U.S. 41 (1999).
[50] Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL OF RTS. J. 657 (2010).
[51] *Id.* at 668.
[52] *Id.* at 668–69.
[53] *Id.* at 669.

Justice Scalia then authored *Johnson*, in which (as discussed above) he pointed to cases that "refute any suggestion that the existence of *some* obviously risky crimes establishes the . . . clause's constitutionality," and rejected the application of the *Salerno* rule.[54] Similarly, here, there is a category of knives that obviously fit within the definition of gravity knives. But those are not the class of knives that the plaintiffs were concerned about. If the plaintiffs want to test the law as to the class of common folding knives, as to which the application of the law is uncertain and dependent on who is conducting the wrist-flick test, how can they go about doing it, and what test should apply?

The Second Circuit here treated *Salerno* as binding precedent (and expressly rejected application of *Johnson* and *Dimaya*, stating that those cases had the test backward). To the extent *Salerno* is binding at all, this Court should use this case as an opportunity to define its boundaries and state when it does or does not apply.

II. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE DEFINITION OF A FACIAL CHALLENGE, AS DISTINGUISHED FROM AN AS-APPLIED CHALLENGE.

Given the framework derived from *Salerno*, commentators have noted that the Supreme Court has established, and lower courts have followed, some

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[54] Johnson v. United States, 135 S.Ct. 2551, 2561 (2015).

prevailing assumptions: (1) facial and as-applied challenges are mutually exclusive categories,[55] and (2) facial challenges are, and should remain, rare, whereas as-applied challenges are much more common.[56] Whether these principles are, or should be, true depends on the underlying purpose of the distinction between facial and as-applied challenges. Yet, the definition of a facial challenge as distinguished from an as-applied challenge is unclear in both its functionality and as to foundation or purpose of the test.

First, the function of the distinction between facial and as-applied challenges is unclear. In *Ayotte*, this Court employed the distinction as a remedial consideration after finding a constitutional violation, whereas in *Carhart* the distinction established when and how a litigant could bring a constitutional challenge.[57] The Second Circuit used it here for the latter purpose: to define what kind of constitutional challenge the plaintiffs could bring – and ultimately, to find that there was no constitutional violation.

Further, and more fundamentally, legal scholars disagree whether the Court's distinction between facial and as-applied challenges is driven by the doctrine of severability, substantive constitutional doctrine, or a combination of the two.[58] The *Salerno* test employs a severability approach once a

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[55] Richard H. Fallon, *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 923 (2011).
[56] *Id.* at 917.
[57] Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL OF RTS. J. 657, 662 (2010).
[58] *Id.* at 664.

constitutional violation is found.[59] In the context of severability, "any invalidation of a provision or statute in whole is a "facial" challenge and anything else is an "as-applied" challenge."[60] But the facial/as-applied distinction does not answer questions surrounding the implementation of severability, such as how to balance the objectives of severability without dramatically altering a statute, or how to choose between multiple options in how to eliminate a statute's unconstitutional applications.[61]

And in practice, severability does not exclusively govern the use of facial challenges. The Court has not followed the *Salerno* test in at least three areas of constitutional law: the Equal Protection Clause, fundamental rights, and doctrines relying upon legislative purpose.[62] Professor Dorf observes that substantive constitutional law, institutional competence, and statutory interpretation rather than severability determines the use of facial challenges.[63] A rights-based approach examines the nature of the constitutional rights asserted before making a facial/as-applied distinction.[64] First Amendment violations encourage facial approaches because the right protects individuals from unconstitutional government rules (legislative-based view), whereas other rights examine more specific conduct thereby encouraging as-applied approaches (conduct-based

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[59] *Id.*
[60] *Id.* at 700.
[61] *Id.* at 685.
[62] *Id.* at 665.
[63] *Id.*
[64] *Id.* at 667.

view).[65] Courts typically employ these different understandings for different rights, and therefore a rights-based approach reconciles these differences in a manner that cannot be achieved by the severability-based approach.[66]

Here, the Second Circuit struggled to apply the facial/as-applied distinction in this case involving a vagueness challenge to a statute as applied prospectively to a category of cases. The Second Circuit relied solely on markers of facial challenges, such as reference to hypothetical situations, and discussion of categories of violations, without referencing an underlying purpose for the distinction that would help it decide how to categorize this challenge and what test to properly apply. Moreover, the Second Circuit categorized this as a facial challenge even though the plaintiffs did not attempt to argue the statute was unconstitutional in *all* of its applications. And yet, when the court analyzed the constitutionality of the statute, it applied the *Salerno* rule for facial challenges that requires that there be no set of circumstances in which the statute could be constitutionally applied.

Whatever definition the Court provides to distinguish facial from as-applied challenges, it should be congruent with the test used to analyze the facial challenge, and both the definition and the analytical test should align with the underlying purpose of the distinction between these two categories of challenges. Because this case expressly addresses – and illustrates confusion about – the proper

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[65] *Id.* at 664–65.
[66] *Id.* at 675–77.

characterization of facial versus as-applied challenges, it presents an opportunity for this Court to clarify the purposes of this distinction.

CONCLUSION

This Court should grant the Petition for Certiorari in this case to clarify the constitutional test that should be applied to a facial challenge, and to clarify the definition of a facial challenge as distinguished from an as-applied challenge.

Respectfully Submitted,

SARAH M. SHALF
Counsel of Record
Emory Law School
Supreme Court Advocacy Program
1301 Clifton Road
Atlanta, GA 30322
(404) 712-4652
sarah.shalf@emory.edu
Counsel for Amici Curiae