

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA, *Applicant-Petitioner*

v.

GUY JAMES GOODMAN, *Respondent*

APPLICATION TO HON. ANTHONY M. KENNEDY FOR AN EXTENSION
OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARIZONA

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Pursuant to Supreme Court Rule 13(5), Petitioner State of Arizona respectfully requests an extension of time of 32 days, to and including Monday, September 24, 2018, for the filing of a petition for writ of certiorari to review the decision of the Arizona Supreme Court in *State v. Wein*, 417 P.3d 787, dated May 25, 2018 (Exhibit 1). The jurisdiction of this Court is based on 28 U.S.C. § 1257(a).

1. The date within which a petition for writ of certiorari would be due, if not extended, is August 23, 2018. The State is filing this Application at least ten days before that date. See S. Ct. R. 13(5).

2. This case presents substantial issues of law, picking up where the Court left off over thirty years ago in *United States v. Salerno*, 481 U.S. 739 (1987). In *Salerno*, the Court rejected a facial challenge to the Bail Reform Act, which allows a defendant to be held without bail for certain serious offenses when the State has probable cause and clear and convincing evidence that the defendant poses an unmanageable risk. *Id.* at 755. This case presents the question of whether bail may be denied without an individualized determination of risk when a judge, after a full adversarial hearing, finds substantial evidence—more than just probable cause—that a defendant committed sexual assault. Ariz. Const. art. 2, § 22(A)(1); Ariz. Rev. Stat. § 13-3961(A)(2).

3. In a sharply divided opinion, four justices of the Arizona Supreme Court held that this bail provision in the Arizona Constitution was unconstitutional on its face under the Due Process Clause of the Fourteenth Amendment. *Wein*, 417 P.3d at 796. Three justices dissented and made a rare request for this Court to review the decision below:

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

Id. at 800.

4. Not only is review appropriate as a matter of comity and federalism, this case will allow the Court to clarify the standard for facial challenges announced in *Salerno*—an issue about which the Supreme Court has acknowledged confusion. *United States v. Stevens*, 559 U.S. 460, 472 (2010) (“[w]hich [facial] standard applies in a typical case is a matter of dispute”); *Boumediene v. Bush*, 553 U.S. 723, 821 (2008) (C.J., Roberts, dissenting) (“The Court today invents a sort of reverse facial challenge and applies it with gusto: If there is any scenario in which the statute might be constitutionally infirm, the law must be struck down.”); *United States v. Booker*, 543 U.S. 220, 318 (2005) (Thomas, J., dissenting) (“the majority, by facially invalidating the statute, also

invalidates these unobjectionable applications of the statute and thereby ignores the longstanding distinction between as-applied and facial challenges”).

5. This case also presents the question about the standard governing categorical bail exclusions—an issue about which federal and state courts have divided. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 799 (9th Cir. 2014) (Tallman, J., dissenting) (criticizing *en banc* court for applying strict scrutiny to a categorical bail exclusion); *Simpson v. Miller*, 387 P.3d 1270, 1277 (Ariz. 2017) (rejecting strict scrutiny test applied by the Ninth Circuit in *Lopez-Valenzuela*); *State v. Furgal*, 13 A.3d 272, 279 (N.H. 2010) (upholding categorical bail exclusion under a balancing-type test); *Parker v. Roth*, 278 N.W.2d 106, 114 (Neb. 1979) (applying rational basis review in upholding categorical bail exclusion).

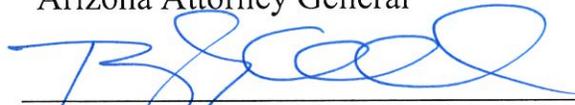
6. Counsel for Arizona requests an extension due to the press of other litigation deadlines and the need to spend the time necessary to draft the petition and receive appropriate input. Among other things, the Arizona Solicitor General’s Office is handling a number of expedited and time-sensitive election cases. *E.g.*, *Democratic National Committee v. Reagan*, No. 18-15845 (9th Cir.); *Hoffman v. Reagan*, No. CV-18-0187-AP/EL (Ariz.). Counsel’s other briefing obligations during the coming months include numerous cases pending in the state and federal courts of appeals.

7. Because the Arizona Supreme Court held the provisions at issue unconstitutional, these provisions are no longer an impediment to Respondent being released on bail pending trial. Accordingly, an extension of time will not prejudice Respondent. Counsel for the State has conferred with counsel for Respondent about this extension request. Counsel for Respondent does not oppose the State's request for an extension.

For the foregoing reasons, the State of Arizona hereby requests than an extension of time to and including September 24, 2018, be granted within which the State may file a petition for writ of certiorari.

Respectfully submitted this 26th day of July, 2018.

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