No. A-_____

IN THE SUPREME COURT OF THE UNITED STATES

FLOYD ROSE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

To the Honorable Ruth Bader Ginsburg, Circuit Justice for the Second Circuit:

Pursuant to this Court's Rules 13.5, 22, 30.1, 30.2, and 30.3, petitioner Floyd Rose respectfully requests a 30-day extension of time to petition for certiorari, until Thursday, September 27, 2018, or such earlier date as the Court may deem appropriate. The Second Circuit rendered its decision in this case (published at 891 F.3d 82) on May 30, 2018. *See* Slip op. (Tab A) at 1. Pursuant to this Court's Rule 13.3, Rose's time to petition for certiorari currently expires on August 28, 2018. This application is being filed at least 10 days before that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

This case presents an important question of criminal law with substantial constitutional underpinnings: whether the Hobbs Act, which makes it a federal crime to "obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery or extortion ….," 18 U.S.C. § 1951(a), extends to a stick-up in which an *individual* is forced to withdraw *his own money* from a bank

ATM. This Court has never before construed the Act's commerce element to extend to robberies of individuals, as opposed to businesses. *See, e.g.*, *Taylor v. United States*, 136 S. Ct. 2074, 2082 (2016) (holding that Act covers robbery of drug-dealing business, but expressly declining to resolve whether the Act extends to "some other type of business or victim"); *United States v. Culbert*, 435 U.S. 371, 372-74 (1978) (holding that Act covers attempted extortion of federally insured bank); *Stirone v. United States*, 361 U.S. 212, 215 (1960) (holding that Act covers attempted extortion of a concrete business that obtained supplies and materials from out of state). In the absence of this Court's guidance, the circuits have developed a welter of different tests to determine when the robbery of an individual satisfies the Hobbs Act's commerce element.

The Second Circuit held that the robbery of an individual in this case satisfied the Act's commerce element on the theory that the robbers "targeted" the bank. *See* Slip op. 9-10. But that approach drains the concept of "targeting" of all meaning—a robber cannot be said to have "targeted" a business without any evidence that he sought to rob the *business'* money. Here, the Second Circuit did not dispute that the money, once withdrawn from the ATM, was the victim's money, not the bank's money. In any event, it is far from clear why "targeting" should have any legal relevance under the Hobbs Act—whether a particular robbery "obstructs, delays, or affects" interstate commerce logically involves the crime's *effects* on commerce, not the defendant's *intent*.

The Second Circuit acknowledged, as it must, that its decision in this case cannot be reconciled with *United States v. Burton*, 425 F.3d 1008 (5th Cir. 2005), in

which the Fifth Circuit *reversed* the Hobbs Act conviction of a robber who forced an individual to withdraw money from a bank ATM. The Second Circuit declared that it was "unpersuaded" by *Burton*, and "decline[d] to follow [that decision] to the extent that it concluded that a forced ATM withdrawal, by itself, cannot support Hobbs Act jurisdiction," Slip op. 10-11—which is precisely what the Fifth Circuit did conclude, *see* 425 F.3d at 1012.

And this case has sweeping implications for the scope of federal criminal law. The Constitution "withhold[s] from Congress a plenary police power," *United States v. Lopez*, 514 U.S. 549, 566 (1995), including the general power to create federal crimes. Thus, traditionally federal crimes were limited to such conduct as counterfeiting federal currency, *see*, *e.g.*, Art. I. § 8, cl. 6, and piracy, *see id*. cl. 10. The past half-century, however, has witnessed an explosion of federal criminal law. *See, e.g.*, Task Force on the Federalization of Criminal Law, American Bar Ass'n, *The Federalization of Criminal Law* 7-9 (1998); *United States v. McLean*, 802 F.3d 1228, 1230 (11th Cir. 2015) ("Over recent generations the federal criminal code has burgeoned, leading some writers to characterize the trend as the federalization of crime."). Many of these federal criminal statutes, like the Hobbs Act, are based on Congress' power to regulate interstate commerce. See U.S. Const. Art. I, § 8, cl. 3.

The Second Circuit's expansive approach to the Hobbs Act's scope, and particularly its endorsement of an amorphous "targeting" theory, flouts the constitutional limits on Congress' commerce power. In our federal system, "[p]erhaps the clearest example of traditional state authority is the punishment of local criminal activity." *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014). The

Commerce Clause is not a blank check for Congress to usurp that traditional state role; to the contrary, this Court has emphasized that "'thus far in our Nation's history, our cases have upheld Commerce Clause regulation of intrastate activity *only* where that activity is economic in nature.'" *Taylor*, 136 S. Ct. at 2079-80 (emphasis added; quoting *United States v. Morrison*, 529 U.S. 598, 613 (2000)); *see also Lopez*, 514 U.S. at 564 (invalidating federal statute criminalizing firearm possession near a school). Given these federalism concerns, courts must not lightly assume that "'Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.'" *Bond*, 134 S. Ct. at 2089 (quoting *United States v. Bass*, 404 U.S. 335, 349 (1971)). Enforcing the limits on the Hobbs Act's scope ensures that the statute remains within constitutional bounds. *See, e.g.*, *Jones v. United States*, 529 U.S. 848, 856-59 (2000) (construing federal arson statute not to apply to arson of private dwelling not used for commercial purposes).

This case also presents an appropriate vehicle for addressing these weighty issues. As noted above, the Second Circuit acknowledged the conflict with the Fifth Circuit's decision in *Burton* on an identical fact pattern. *See* Slip op. 10-11. Although Rose advanced his Hobbs Act commerce argument for the first time on appeal, the Second Circuit went out of its way to hold that "the district court committed *no error*, let alone an error that was plain and affected Rose's substantial rights." Slip op. 7 (emphasis added); *see also id.* at 11 ("[T]he district court committed *no error* ….") (emphasis added). Similarly, the fact that Rose is seeking to withdraw a guilty plea does not alter the relevant legal analysis. Whether a

defendant is legally innocent of the crime to which he pleaded guilty is plainly relevant to whether he should be allowed to withdraw a guilty plea. *See* Fed. R. Crim. P. 11(d)(2)(B) (guilty plea may be withdrawn if "the defendant can show a fair and just reason for requesting the withdrawal"); *see generally United States v. Schmidt*, 373 F.3d 100, 102 (2d Cir. 2004) (*per curiam*) (court must consider claim of "legal innocence" in assessing motion to withdraw guilty plea); *United States v. Thompson-Riviere*, 561 F.3d 345, 356-57 (4th Cir. 2009) (directing district court to allow defendant to withdraw guilty plea where he was legally innocent of the crime).

Rose respectfully requests additional time to petition for certiorari because the undersigned counsel has been recently retained and, in light of the press of other matters, would benefit from additional time to refine the important issue in this case for clear and effective presentation.

Wherefore, petitioner respectfully requests an order extending the time for petitioning for certiorari by 30 days, to and including Thursday, September 27, 2018, or until such other time as the Court deems appropriate.

Respectfully submitted,

/s/ *Christopher Landau*
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