App. No. ___

In the Supreme Court of the United States

ERIC MATTHEW RAY,

Applicant-Appellant,

v.

STATE OF UTAH,

Respondent-Appellee.

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Justice Neil Gorsuch, as Circuit Justice for the United States Court of Appeals for the Tenth Circuit:

Pursuant to Supreme Court Rules 13.5, 22, and 30, Applicant Eric Matthew Ray (Mr. Ray) respectfully requests a 60-day extension of time, to and including May 1, 2023, to file a petition for a writ of certiorari. After a remand from the Utah Supreme Court, see App. A, the Utah Court of Appeals affirmed Mr. Ray's conviction by amended opinion dated July 29, 2022, see App. B. The Utah Supreme Court then denied a timely petition for certiorari on December 2, 2022. See App. C. The petition for certiorari is presently due to this Court on March 2, 2023. This Court will have jurisdiction under 28 U.S.C. § 1257. Applicant is filing his first request for an extension to file a petition for certiorari at least 10 days before the current due date. S. Ct. R. 13.5.

This case involves a doubly vague criminal offense that failed to define either

the conduct punishable as "indecent liberties" or the "entice[ment]" that would negate otherwise consensual behavior. After absolving defense counsel's failure to object to the former, the Utah Supreme Court declined to correct the lower court's decision to reject Mr. Ray's facial vagueness challenge to the latter under *United States v. Salerno*'s general—and generally fatal—standard for facial challenges. But that decision ignored this Court's precedents prescribing standards more lenient to the challenger, and more demanding to the legislation, when a plaintiff brings a facial vagueness challenge against a criminal statute that implicates the First Amendment. Addressing the appropriate facial vagueness standard is an important question on which both state and federal courts are in vast disarray, and thus the forthcoming petition has a strong prospect of being granted by this Court. Mr. Ray added new Supreme Court counsel on January 27, 2023. A further extension is thus appropriate to allow new counsel to prepare a thorough petition addressing these issues and to accommodate counsel's additional professional demands and pre-existing work travel plans that have made it difficult as yet to devote the desired amount of time to this matter.

Background

Briefly, the relevant facts are as follows:

1. Mr. Ray was convicted of forcible sexual abuse, a Utah criminal offense committed either by touching specific areas of another's body or by "tak[ing] indecent liberties with another" without consent. *State v. Ray* ("*Ray I*"), 397 P.3d 817, 821 (Utah Ct. App. 2017), (quoting Utah Code § 76-5-404(1) (2010)). Another Utah statute

provides that an act of forcible sexual abuse is nonconsensual if the actor "entices … the victim to submit or participate." *State v. Ray* ("*Ray III*"), 516 P.3d 329, 337 (Utah Ct. App. 2022) (quoting Utah Code § 76-5-406(2)(k)).

2. Relying on the Utah Supreme Court's prior holding that absent further clarification the term "indecent liberties" was unconstitutionally vague, the Utah Court of Appeals held that Ray's trial counsel was constitutionally deficient for failing to object to jury instructions leaving that term undefined. *Ray I*, 397 P.3d at 822. This omission prejudiced Ray because the complaining witness had significant credibility issues that resulted in the jury acquitting Ray of another offense and failing to reach a verdict on the two remaining charges. *Id.* at 822–23. Thus, counsel's failure to cure the patently vague "indecent liberties" instruction made it much more likely that Ray's sole conviction was "based on moral condemnation and social disapprobation rather than the narrow terms of the law." *Id.* at 823.

3. Disagreeing as to the deficiency prong, the Utah Supreme Court reversed the lower court's decision and remanded for consideration of Ray's remaining claims. *State v. Ray* ("*Ray II*"), 469 P.3d 871, 878, (Utah 2020). On remand, Ray argued that the undefined enticement provision of the non-consent statute was unconstitutionally vague on its face. *Ray III*, 516 P.3d at 337. While agreeing that the enticement provision implicated the First Amendment, *id.* at 338 n.15, the Utah Court of Appeals still reviewed Ray's facial challenge under the demanding *Salerno* standard, thus requiring him "to establish that no set of circumstances exists under which the statute would be valid." *Id.* at 337 (quoting *United States v. Salerno*, 481 U.S. 739,

745 (1987)). The court expressly rejected Ray's contention that his First Amendment challenge fell within a First Amendment exception to *Salerno*, *Ray III*, 516 P.3d at 337 n.13, and held that the enticement provision was not unconstitutionally vague on its face, *id.* at 345. Ray petitioned for certiorari review, which the Utah Supreme Court denied.

Reasons for Granting an Extension of Time to File a Petition for a Writ of Certiorari

This Application for an extension of 60 days to file a Petition should be granted for several reasons:

1. The forthcoming Petition has a reasonable likelihood of being granted. The decision that the Petition will ask this Court to review ignores this Court's precedents grouping vagueness and overbreadth challenges together as First Amendment exceptions to the most exacting facial challenge standard. *E.g.*, *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 and n.6 (1982); see also *Johnson v. United States*, 576 U.S. 591, 636 n.2 (2015) (Alito, J., dissenting). It also ignores this Court's vagueness precedents which demand greater specificity in legislation imposing criminal penalties and inhibiting the exercise of constitutional rights like free speech. *E.g.*, *Hoffman Estates*, 455 U.S. at 498–499. And even had a general standard been applicable, the Utah decision still would have erred by ignoring the effect of *Johnson v. United States* in rejecting the requirement that a facially challenged statute be "vague in all applications." 576 U.S. at 603; see also *Sessions v. Dimaya*, 138 S. Ct. 1204, 1250 (Thomas, J., dissenting).

Had the Utah Court of Appeals applied the correct standards instead of *Salerno*'s "impossible burden," *In re Termination of Parental Rts. to Diana P.*, 694 N.W.2d 344, 361 (Wis. 2005), it would have concluded that the word "entice"—which could refer not just to seduction and wrongful solicitation but also to mere attraction or persuasion—is an unconstitutionally vague standard for policing the crucial boundary between consensual and criminally nonconsensual behavior, *Ray III*, 2022 UT App 95, ¶39.

The Utah court's mechanical invocation of *Salerno* failed to apply the much more contoured analysis required for First Amendment facial vagueness challenges and, in the process, it exacerbated the patchwork application of that analysis among state and federal courts. See, *e.g.*, *Ben's Bar, Inc. v. Vill. Of Somerset*, 316 F.3d 702, 708 n.11 (7th Cir. 2003) (grouping vagueness and overbreadth facial challenges under First Amendment exception to *Salerno*); *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010) (applying general *Salerno* standard to First Amendment facial vagueness challenge); *Stoltz v Commonwealth*, 831 S.E.2d 164, 168-70 (Va. 2019) (same); *People v. Austin*, 155 N.E.3d 439, 472-73 (Ill. 2019) (applying the "all applications" standard rejected in *Johnson*); *State v. Brake*, 796 So.2d 522 (Fla. 2001) (general *Salerno* standard not applied in facial vagueness challenge to enticement statute); *Smallwood v. State*, 851 S.E.2d 595, 599 (Ga. 2020) (questioning the "all applications" standard); see also *United States v. Frandsen*, 212 F.3d 1231, 1236 n.3 (11th Cir. 2000) (collecting cases showing Supreme Court inconsistency in applying *Salerno*); *Whirlpool Properties, Inc. v. Dir., Div. of Tax'n*, 26 A.3d 446, 468 (N.J. 2011)

(expressing "uncertainty" whether *Salerno* is "de facto standard for facial challenges"); *Parker v. California*, 164 Cal. Rptr. 3d 345, 355 (noting "lack of clarity" in facial vagueness precedents) (opinion superceded *sub nom Parker v. State*, 317 P.3d 1184 (Cal. 2014); *Smallwood*, 851 S.E.2d at 599 n.4 (noting federal circuit split in post-*Johnson* facial challenges). Because this long-brewing legal uncertainty amplifies the effect of vague criminal legislation in chilling protected expression, the Petition will ask this Court to resolve the pervasive dissonance in First Amendment facial vagueness challenges. S. Ct. R. 10.

2. An extension of time is also warranted to allow adequate time to prepare a Petition to this Court. Mr. Goodwin, Mr. Ray's new counsel, has numerous other professional obligations to meet. In addition to his private practice, he carries a full teaching load at the J. Reuben Clark Law School, where he is currently teaching two three-credit courses, directs an indigent criminal appeals clinic, advises three co-curricular programs, and coaches three moot court teams. Two of his clinic cases have reply briefs due to the Utah Court of Appeals on March 1, with corresponding oral arguments scheduled for March 27 and April 11. Mr. Goodwin is responsible for organizing and judging multiple practice moots for each clinic case and each moot court team. Furthermore, over the next six weeks he is scheduled to travel with all three of his moot court teams: February 23-26 (ABA National Appellate Advocacy Competition in Los Angeles, CA); March 8-12 (HNBA National Moot Court Competition in Phoenix, AZ); and March 23-27 (Kaufman Securities Law Moot Court Competition in New York, NY). Mr. Goodwin will have limited access to the internet

and other work facilities while traveling to and from those competitions and during the competitions themselves. He will also need to hold make-up classes for class time missed due to the competitions.

3. No apparent prejudice would arise from the extension for submitting a petition. Having prevailed below, respondent the State of Utah suffers no disability from an extension.

Conclusion

For the foregoing reasons, Applicant requests an extension of time to file a Petition for a Writ of Certiorari to and including May 1, 2023.

Respectfully submitted,

s/ Scott D. Goodwin
SCOTT D. GOODWIN
SCHAERR | JAFFE LLP
1717 K St. NW, Suite 900
Washington, DC 20006
sgoodwin@schaerr-jaffe.com

Counsel for Applicant

February 18, 2023