No. 23A_____

IN THE

Supreme Court of the United States

MICHAEL CAREY,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Pursuant to this Court's Rule 13.5, Applicant Michael Carey respectfully requests a 30-day extension of time, to and including Friday, September 15, 2023, in which to file a petition for a writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit entered its judgment affirming the district court on March 9, 2023. *United States* v. *Carey*, No. 18-50393, 2023 WL 2423338 (9th Cir. Mar. 9, 2023) (*Carey II*) (attached as Exhibit A). On May 18, 2023, the Ninth Circuit denied Carey's timely petition for rehearing en banc. Order, *Carey II*, No. 18-50393 (9th Cir. May 18, 2023) (attached as Exhibit B). Unless extended, the time in which to file a petition for a writ of certiorari will expire on August 16, 2023. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. This case involves an important, recurring issue about the proper interpretation of a foundational criminal-procedure statute, the Wiretap Act—whether the Ninth Circuit's creation of a "plain hearing" exception to the Act's suppression provision is inconsistent with the Act's plain text. *United States* v. *Carey*, 836 F.3d 1092, 1093–94 (9th Cir. 2016) (*Carey I*) (attached as Exhibit C).

2. The Wiretap Act categorically mandates that "no part" of any communication intercepted in violation of the Act and "no evidence derived therefrom" "may be received in evidence." 18 U.S.C. § 2515. But the Ninth Circuit has crafted an exception to this mandatory rule, so that evidence obtained in violation of the Act before officers "knew or should have known" that "they [we]re listening to

conversations outside the scope of the wiretap order" need not be suppressed. *Carey I*, 836 F.3d at 1098. The Ninth Circuit made no attempt to ground its plain-hearing exception in any provision of the Act. Instead, it fashioned the exception "by analogy" to the Fourth Amendment's plain-view doctrine. *Id.* at 1097.

3. The Ninth Circuit's plain-hearing exception warrants this Court's review because it is unmoored from statutory text, in conflict with the Sixth Circuit's refusal to create judge-made exceptions to the Wiretap Act's suppression provision, and has profound implications regarding a foundational criminal-procedure statute.

First, the Ninth Circuit's "plain hearing" exception defies the Act's plain text. That text is unequivocal: if the government "unlawfully intercept[s]" communications, or if interception is "not made in conformity with" the wiretap order, the communications—and all evidence derived from them—must be suppressed. 18 U.S.C. §§ 2515, 2518(10)(a)(i), (iii). What's more, because "Congress provide[d] exceptions" in other parts of the Act, but *not* to the suppression provision, "[t]he proper inference" is that Congress "limited the statute to the [exceptions] set forth." *United States* v. *Johnson*, 529 U.S. 53, 58 (2000). If Congress "intended to provide additional exceptions, it would have done so in clear language." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012) (internal quotation marks omitted).

In search of a justification for its statutory rewrite, the Ninth Circuit pointed to the Fourth Amendment's plain-view exception. *Carey I*, 836 F.3d at 1093, 1097. But the textual differences between the Fourth Amendment and the Wiretap Act only

confirm the Ninth Circuit's error. The Fourth Amendment prohibits only "*unreasonable* searches and seizures." U.S. Const. amend. IV (emphasis added). So its "warrant requirement" permits "certain reasonable exceptions," *Kentucky* v. *King*, 563 U.S. 452, 459 (2011), including the "plain-view" exception, see, e.g., *Coolidge* v. *New Hampshire*, 403 U.S. 443, 464–65 (1971) (plurality). The text of the Wiretap Act by contrast, admits of no exceptions—for reasonableness or otherwise. See *United States* v. *Giordano*, 416 U.S. 505, 524 (1974) (distinguishing the Wiretap Act from the Fourth Amendment).

Second, the Ninth Circuit's decision creates a conflict with the Sixth Circuit, which declined to engraft the good-faith exception to the Fourth Amendment's exclusionary rule onto the Wiretap Act's suppression provision. *United States* v. *Rice*, 478 F.3d 704, 711 (6th Cir. 2007). Because the Wiretap Act "is clear on its face and does not provide for any exception," the Sixth Circuit held that "[c]ourts must suppress illegally obtained wire communications"—full stop. *Id.* at 712. In the Wiretap Act, "Congress has already balanced the social costs and benefits and has provided that suppression is the sole remedy for violations of the statute." *Id.* at 713. So "[t]he rationale behind judicial modification of the exclusionary rule is * * * absent with respect to warrants obtained under [the Wiretap Act's] statutory scheme." *Ibid.* The Ninth Circuit's decision in this case is irreconcilable with the Sixth Circuit's in *Rice*.

Third, the Ninth Circuit's decision has profound practical implications. Contrary to the principles animating the rule of lenity, the Ninth Circuit's judicially

created exception tilts the playing field against criminal defendants by undermining their procedural rights under a foundational criminal-procedure statute. So the Ninth Circuit's ruling will have exceptionally serious consequences for hundreds of criminal defendants. See U.S. Courts, Wiretap Report 2022 (Dec. 31, 2022), https://www.uscourts.gov/statistics-reports/wiretap-report-2022 (federal courts issued 1,274 wiretaps in 2022—a 16 percent increase from 2021).

4. Additional time is warranted to allow counsel sufficient time to prepare and file a petition for a writ of certiorari that would be helpful to the Court. Counsel for Applicant have significant professional responsibilities in other pending matters, including *Truck Insurance Exchange* v. *Kaiser Gypsum Company*, No. 22-1079 (U.S.); *Talarico* v. *Johnson*, No. 23-20176 (5th Cir.); *In re Meta Platforms, Inc.*, No. 23-0454 (Tex.); *Public Utility Commission* v. *Luminant Energy Company*, No. 23-0231 (Tex.); *M.D. ex rel. Stukenberg* v. *Abbott*, No. 2:11-cv-84 (S.D. Tex.); and *S.M.A.* v. *Salesforce, Inc.*, No. 3:23-cv-915 (N.D. Tex.). Applicant isn't aware of any party that would be prejudiced by a 30-day extension.

Accordingly, Applicant respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari by 30 days, to and including Friday, September 15, 2023.

Respectfully submitted.

/s/ Allyson N. Ho

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