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In The
SUPREME COURT OF THE UNITED STATES
October Term 2023

Kathryn Dana Papp,
Appellant/Petitioner,

v.

Commonwealth of Pennsylvania,
Appellee/Respondent.

Application for an Extension of Time in Which to File a Petition for a Writ of Certiorari to the Superior Court of Pennsylvania

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APPLICATION TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE, AS CIRCUIT JUSTICE

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June 17, 2024

APPLICATION FOR EXTENSION OF TIME

Under this Court's Rule 13.5, Applicant Kathryn Papp requests a 60-day extension of time within which to file a petition for a writ of certiorari, up to and including August 30, 2024.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is from the Superior Court of Pennsylvania's decision affirming petitioner's conviction. *See Commonwealth* v. *Papp*, 305 A.3d 62 (Pa. Super. Ct. 2023). A copy of that decision is attached as Exhibit A. The Pennsylvania Supreme Court denied Applicant allowance of appeal on April 2, 2024. *See Commonwealth* v. *Papp*, No. 611 MAL 2023, 2024 WL 1400084 (Pa. Apr. 2, 2024) (Table). A copy of that denial is attached as Exhibit B.

JURISDICTION

This Court will have jurisdiction over a timely filed petition under 28 U.S.C. § 1257(a).

REASONS JUSTIFYING AN EXTENSION OF TIME

Petitioner respectfully requests a 60-day extension of time within which to file a petition for a writ of certiorari in this case, up to and including August 30, 2024. Under this Court's Rules 13.1, 13.3, and 30.1, the petition is currently due by July 1, 2024. In accordance with Rule 13.5, Dr. Papp has filed this application more than 10 days in advance of that due date. No prior application for an extension has been made in this case.

1. This case concerns whether the First Amendment permits a person to be convicted for communicating with another with intent to harass, annoy, or alarm,

so long as the speech is deemed to lack "intent of legitimate communication." *Papp*, 305 A.3d at 71 (quoting 18 Pa. Cons. Stat. § 2709(a)(4)–(7), (f)). Petitioner's conviction raises significant questions about when a statute targets mere conduct as opposed to expression, when a restriction is based on the speech's content, and the role of the listener's captivity—or lack thereof—in assessing the government's justification for its restriction. At bottom, the Superior Court adopted a "harassment exception" to the First Amendment, which the Third Circuit explicitly rejected in *Saxe* v. *State College Area School District*, 240 F.3d 200, 204 (3d Cir. 2001).

2. An extension is warranted because of the importance of these issues, the disagreement of lower courts, and the seriousness of the errors in the decision below. The Pennsylvania Superior Court ignored the plain language of the statute and treated the relevant provision as one that "'seeks to regulate conduct' and 'is not directed at the content of speech [or] the suppression of free expression.'" *Papp*, 305 A.3d at 75 (quoting *Commonwealth* v. *Hendrickson*, 724 A.2d 315 (Pa. 1999)). The court also found that Pennsylvania's statute is content-neutral rather than content-based, *see, e.g.*, *id.* at 78, and held that the statute need not withstand strict scrutiny analysis, *id.* at 77–78. For that reason, the court did not consider how the ease with which a listener could avoid the communications at issue affects the First Amendment analysis. *See id.*

3. Lower courts have struggled to apply this Court's First Amendment jurisprudence to statutes like Pennsylvania's that criminalize annoying, offensive, or alarming communications, particularly when those communications take place

through digital means. Some courts, like the courts below, have upheld such laws on the ground that they regulate conduct rather than speech. *See, e.g.*, *Ex Parte Barton*, 662 S.W.3d 876, 881, 884 (Tex. Crim. App. 2022) (upholding a statute criminalizing repeated communications made "with intent to harass, annoy, alarm, abuse, torment, or embarrass another" because "the conduct regulated . . . is non-speech conduct that does not implicate the First Amendment"), *cert. denied sub nom. Barton* v. *Texas*, 143 S. Ct. 774 (2023); *Gormley* v. *Dir., Ct. State Dep't of Prob.*, 632 F.2d 938, 941–42 (2d Cir. 1980) (holding that a statute criminalizing phone calls made with the intent to harass, annoy, or alarm "regulates conduct, not mere speech," and is thus constitutional). Others have done so on the theory that, by purportedly focusing on harassing conduct rather than protected speech, these statutes regulate in a content-neutral manner or do not restrict enough protected speech to be facially unconstitutional. *See, e.g.*, *Dugan* v. *State*, 451 P.3d 731, 736–39 (Wyo. 2019) (upholding a statute criminalizing communications made with intent to harass because the statute regulated "conduct without a significant impact on protected speech" and was "not … a content-based regulation on speech"); *State* v. *Lamoureux*, 485 P.3d 192, 199–200 (Mont. 2021) (upholding a statute criminalizing communications made "with the purpose to terrify, intimidate, threaten, harass, annoy, or offend" because the statute was not "a content-based regulation on speech" but rather a "regulation of conduct").

But other courts have disagreed and invalidated laws criminalizing annoying or offensive communications. *See People* v. *Relerford*, 104 N.E.3d 341, 349–51 (Ill.

2017) (invalidating as an impermissible content-based speech restriction a portion of a statute that criminalized knowingly "communicat[ing] to or about" a person in a manner that would cause a reasonable person to suffer distress); *People* v. *Marquan M.*, 19 N.E.3d 480, 484, 487 (N.Y. 2014) (invalidating a statute criminalizing certain communications made "with the intent to harass" or "annoy" because the law "impose[d] a restriction on the content of protected speech" and did not survive strict scrutiny (citation omitted)); *State* v. *Bishop*, 787 S.E.2d 814, 817–21 (N.C. 2016) (invalidating a statute that criminalized posting personal information about a minor online "with the intent to intimidate or torment" because it "applie[d] to speech and not solely, or even predominantly, to nonexpressive conduct" and was content-based); *State* v. *Brobst*, 857 A.2d 1253, 1256 (N.H. 2004) ("[T]he prohibition of all telephone calls placed with the intent to alarm encompasses too large an area of protected speech."). As the Third Circuit explained, "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe*, 240 F.3d at 204 (Alito, J.).

4. This case is an ideal vehicle to clarify how the First Amendment applies to these statutes. Petitioner has argued that her communications were protected speech, that Pennsylvania's statute regulates speech on the basis of its content, and that her conviction violates the First Amendment because the listener was in no way a captive audience. *Cf. Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 117, 127–31 (1989) (invalidating a "ban on indecent commercial telephone communications" and noting that recipients of "private commercial telephone communications" are not

"captive audience[s]"). Guidance on these issues is particularly critical in the digital age, where so much communication occurs through the screens of phones and computers.

Pennsylvania's harassment statute, moreover, presents the relevant issues cleanly because of its breathtaking scope: a person violates the law if he "communicates repeatedly" with "intent to harass, annoy or alarm another" while lacking the "intent of legitimate communication"—whatever the government may determine that to mean. 18 Pa. Cons. Stat. § 2709(a)(7), (f). Petitioner's conviction shows just how broadly this statute sweeps. Criminalized communications could also include, for example, repeated "call[s] from a neighbor warning of an approaching tornado or a dangerous animal that escaped from the zoo." *Brobst*, 857 A.2d at 1256. And if Pennsylvania's response is that those communications would be conveyed with the "intent of legitimate communication," *see* § 2709(f), that simply shows the statute's true colors as a regulation that "cannot be justified without reference to the content of the regulated speech." *Reed* v. *Town of Gilbert*, 576 U.S. 155, 164 (2015) (internal quotation marks and citation omitted). Such a law does not leave the "breathing space" that "First Amendment freedoms need … to survive." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). This case, then, presents a much-needed opportunity to clarify that "[t]he First Amendment is made of sterner stuff," *Bolles* v. *People*, 541 P.2d 80, 83 (Colo. 1975) (en banc), particularly in a world of constant social media communication. Much of that communication has the ability and intent

to annoy or harass, but the First Amendment surely protects the vast majority of that speech.

5. Petitioner recently engaged specialized and experienced Supreme Court counsel to represent her following the Pennsylvania Supreme Court's denial of her petition for allowance of appeal. Undersigned counsel, however, was not previously involved in this case. Petitioner thus respectfully requests a 60-day extension of time within which to file a petition for certiorari, which would provide her new counsel the necessary time to analyze the issues that her conviction presents and to prepare the petition for certiorari. Petitioner's counsel, moreover, is attending to several other matters that will interfere with his ability to timely and effectively prepare the petition by the current deadline of July 1, 2024.

Accordingly, petitioner respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari to August 30, 2024.

June 17, 2024

Respectfully submitted,

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