No. 22-_____

In the Supreme Court of the United States

ERIC MATTHEW RAY,

Petitioner,

v.

STATE OF UTAH,

Respondent.

On Petition for a Writ of Certiorari to
the Utah Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States* v. *Salerno*, this Court observed, arguably in dicta, that a successful facial challenge to a statute must generally show that "no set of circumstances exists under which the Act would be valid." 481 U.S. 739, 746 (1987). But this Court's precedents do not *always* require facial vagueness challenges to meet the exceedingly permissive standard articulated in *Salerno*. For example, *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, held that facial vagueness challenges subject laws to a "more stringent vagueness test"—one that requires "explicit standards for those who apply" the law—when the law imposes criminal penalties and "threatens to inhibit the exercise of constitutionally protected rights." 455 U.S. 489, 498–99 (1982) (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 108–09 (1972). And more recently, *Johnson* v. *U.S.*, 576 U.S. 591 (2015), held that a statute need not be "vague in all applications" to be void. *Id.* at 603. Yet, in the thirty-five years since *Salerno*, many state courts of last resort and federal circuit courts have invoked—and continue to invoke—its language as the definitive standard for assessing facial vagueness challenges. They have thereby created a split with other courts that, fairly following this Court's precedents, have adopted a more stringent standard for criminal statutes implicating constitutional rights.

The question presented is:

Whether *Salerno's* "no set of circumstances" test, the *Hoffman*/*Grayned* "more stringent vagueness test," or some other test, should govern judicial review of vagueness challenges to statutes that criminalize First Amendment-protected speech.

PARTIES TO THE PROCEEDING

Petitioner Eric Matthew Ray was the defendant and appellant below. Respondent is the State of Utah, appellee below.

RELATED PROCEEDINGS

This case arises from the following proceedings:

Fourth Judicial District Court of Utah:

State v. *Ray*, No. 101401511 (Sep. 28, 2012) (jury verdict, convicting on one out of four counts).

Utah Court of Appeals:

State v. *Ray*, No. 20121040-CA, 397 P.3d 817 (May 4, 2017) (opinion reversing the trial court, holding that trial counsel's ineffectiveness prejudiced Ray) (hereinafter "*Ray I*").

State v. *Ray*, No. 20121040-CA, 516 P.3d 329 (Jul. 29, 2022) (opinion affirming conviction, holding the statute was not facially vague) (hereinafter "*Ray III*").

Utah Supreme Court:

State v. *Ray*, No. 20170524-SC, 2020 UT 12 (Mar. 9, 2020) (opinion reversing appellate court decision that trial counsel was constitutionally deficient, remanding to consider remaining claims) (hereinafter "*Ray II*").

State v. *Ray*, No. 20220861-SC (Dec. 2, 2022) (order denying petition for a writ of certiorari).

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INTRODUCTION

This case gives this Court a much-needed opportunity to resolve almost four decades of widespread confusion—and sharp conflicts—on the proper legal standard for assessing First Amendment vagueness challenges to laws regulating speech. This Court has long held that First Amendment and due process principles require voiding certain laws as unconstitutionally vague for three main reasons. First, "[v]ague laws may trap the innocent by not providing fair warning." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). Second, laws that do not provide "explicit standards for those who apply them" facilitate "arbitrary and discriminatory enforcement." *Id.* Third, vague laws intruding upon sensitive First Amendment freedoms may have a chilling effect on the exercise of those rights. *Id.* at 109.

This case squarely implicates all of these concerns. Petitioner Eric Matthew Ray was convicted of a sex offence requiring the non-consent of its teenage participant—even though, in Mr. Ray's case, the teenager admitted the conduct was consensual. To overcome that factual hurdle, the prosecution pushed an aggressively expansive definition of "enticement," an ill-defined statutory provision that, under Utah law, negated the witness's factual consent. Most disturbingly, the State relied upon Mr. Ray's discussions of religion and politics with the complaining witness to establish "enticement." Thus, the unconstitutionally vague provision facilitated arbitrary application of the law and criminalized Mr. Ray's religious and political speech with the complaining witness—constitutionally protected speech that Mr. Ray could not have known was illegal.

The decision below correctly concluded that application of the enticement provision implicated Mr. Ray's First Amendment rights. *State* v. *Ray ("Ray III")*, 516 P.3d 329, 338 (Utah Ct. App. 2022). Yet the Utah Court of Appeals applied *United States* v. *Salerno* to Mr. Ray's facial vagueness challenge. *Id.* at 337 (citing *Salerno*, 481 U.S. 739, 745 (1987)). *Salerno* says that a facial challenge generally can only succeed if the challenger can establish that "no set of circumstances exists under which the statute would be valid." 481 U.S. at 745. The Court of Appeals held that, even though *Salerno* recognizes a First Amendment exception to its general test, that exception only applies to overbreadth challenges, not vagueness challenges. See *Ray III*, 516 P.3d at 337 n.13. A few other jurisdictions, including the federal First, Third and Tenth Circuits, have misread this Court's precedents in adhering to this supposed limitation. But several other jurisdictions, including the Fourth, Seventh, Eighth, and Eleventh Circuits, have correctly followed those precedents to apply a constitutional exception for facial vagueness as well as overbreadth challenges. There is a similar conflict among state courts of last resort.

This split on an important Due Process and First Amendment issue is ripe for resolution by this Court, and this case is an excellent vehicle.

OPINIONS BELOW

The opinion of the Utah Court of Appeals is published at 516 P.3d 329. It is reprinted at Appendix A. The order of the Utah Supreme Court denying certiorari is unpublished. It is reprinted at Appendix B.

JURISDICTION

The Fourth District Court for the State of Utah entered its final judgment of conviction on November 7, 2012. The Utah Court of Appeals entered its final judgment affirming Mr. Ray's conviction on July 29, 2022. The Utah Supreme Court denied a petition for writ of certiorari on December 2, 2022. On February 22, 2023, Justice Gorsuch extended the time to file a petition for a writ of certiorari to April 2, 2023, making this petition due on Monday, April 3, 2023. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech ***.

Utah Code § 76-5-404(1) (2010) provides:

> A person commits forcible sexual abuse if the victim is 14 years of age or older and, under circumstances not amounting to rape, object rape, sodomy, or attempted rape or sodomy, the actor touches the anus, buttocks, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indecent liberties with another, or causes another to take indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other, regardless of the sex of any participant.

Utah Code § 76-5-406(11) (2003) provides:

> An act of sexual intercourse, rape, attempted rape, rape of a child, attempted rape of a child, object rape, attempted object rape, object rape of a child, attempted object rape of a child, sodomy, attempted sodomy, forcible sodomy, attempted forcible sodomy, sodomy upon a child, attempted sodomy upon a child, forcible sexual abuse, attempted forcible sexual abuse, sexual abuse of a child, attempted sexual abuse of a child, aggravated sexual abuse of a child, attempted aggravated sexual abuse of a child, or simple sexual abuse is without consent of the victim under any of the following circumstances: . . . the victim is 14 years of age or older, but younger than 18 years of age, and the actor is more than three years older than the victim and entices or coerces the victim to submit or participate, under circumstances not amounting to the force or threat required under Subsection (2) or (4) [. . .].

STATEMENT

A. Legal Background

In *Grayned* v. *City of Rockford,* this Court articulated the now-familiar legal framework for evaluating vagueness challenges to statutes or other government actions:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. *** Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

408 U.S. 104, 108–109 (1972) (footnotes omitted).

This Court built upon *Grayned's* framework in *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, which articulated a facial challenge framework by which courts must first determine whether the challenged enactment "reaches a substantial amount of constitutionally protected conduct" and is thus overbroad. 455 U.S. 489, 494 (1982). If the overbreadth challenge fails, then courts should look to vagueness. A facial vagueness challenge to an enactment that "implicates no constitutionally protected conduct" succeeds "only if the enactment is impermissibly vague in all its applications." *Id.* at 494–95. But, implicit in that formulation is the recognition–culled from *Grayned* and other prior precedents—that a challenge that *does* implicate constitutional protections, including the First Amendment, need not meet that heightened standard. In so holding, the Court reiterated *Grayned*'s

observation that a law implicating constitutional protections "must provide explicit standards for those who apply" the law. *Id.* at 498 (quoting *Grayned*, 408 U.S. at 108).

The next year, in *Kolender* v. *Lawson*, the Court confirmed the implication in *Hoffman* that a law impacting constitutional rights can be unconstitutionally vague even when it is not invalid "in all its applications." The Court did so when it expressly rejected the dissent's argument that the heightened "all applications" standard should apply to the First Amendment facial challenge raised in that case. 461 U.S. 352, 358 n.8 (1983).

Later, in *Salerno*, this Court recast *Hoffman*'s "all applications" standard by requiring the facial challenger there to "establish that no set of circumstances exists under which the [challenged] Act would be valid," 481 U.S. at 745. The Court observed that some unconstitutional application of the act challenged in that case could not render it wholly invalid because "we have not recognized an *overbreadth* doctrine outside the limited context of the First Amendment." *Id.* (emphasis added; internal quotations omitted). Because *Salerno* identified First Amendment overbreadth as an exception to its general test, some courts have misread *Salerno* to mean that such overbreadth challenges are the *only* exception to the "no set of circumstances" standard.

Twelve years after *Salerno*, this Court in *City of Chicago* v. *Morales* drew from previous precedents to acknowledge that unconstitutional vagueness arises if a law either "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or "it…authorize[s] and even encourage[s]

arbitrary and discriminatory enforcement." 527 U.S. 41, 56 (1999) (plurality opinion) (citation omitted). In the plurality opinion, this Court went even further in declaring that *Salerno* was dicta, "ha[d] never been the decisive factor in any decision of the [Supreme Court]" and that it was "incorrect as a matter of law" to assume that state courts must apply it. *Id.* at 55 n.22.

And more recently, in *Johnson* v. *U.S.*, this Court clarified that, notwithstanding some language in its prior vagueness opinions, its holdings "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." 576 U.S. 591, 602 (2015). That holding, reiterated in *Sessions* v. *Dimaya*, calls into question the validity of the "all applications" standard and, equivalently, the "no set of circumstances" standard, as a general test for facial challenges. See 138 S. Ct. 1204, 1214 n.3 (2018).

B. Factual and Procedural Background

From late 2008 until 2010, Eric Ray was a married, adult law student living in Illinois. During that period, he made what he acknowledges was a colossal mistake: He engaged in what became a romantic online relationship with R.M., who was then a teenager living in Utah—a relationship that was voluntary on both sides, and that (ultimately) involved a visit to Utah where the alleged sexual activity short of intercourse occurred. Besides the prosecution at issue in this case, and although it is not in the record, that relationship ultimately cost Ray his marriage, his membership in his church, his ability to work as a lawyer, five years spent in prison and now over five several additional years on parole.

After being charged with four felony offenses, Mr. Ray was convicted of a single count of forcible sexual abuse—a Utah criminal offense committed either by touching specific areas of another's body or by "otherwise tak[ing] indecent liberties with another" without consent.[1] *State* v. *Ray* ("*Ray I*"), 397 P.3d 817, 821 (Utah Ct. App. 2017), (quoting Utah Code § 76-5-404(1) (2010)). The necessity of proving non-consent arises from a recognition that, as a matter of Utah law, "[c]onsensual sexual relations can, and do, occur between adults and juveniles, and may be legal in certain limited circumstances." *State* v. *Gibson*, 908 P.2d 352, 355 (Utah Ct. App. 1995). Under Utah law, an act of "forcible" sexual abuse is deemed "nonconsensual" if the actor "entices *** the victim to submit or participate." *Ray III*, 516 P.3d at 337 (emphasis omitted) (quoting Utah Code § 76-5-406(2)(k) (2020))[2]. The statute does not explain what conduct or conditions would satisfy the term "entices," although by its terms it could be construed—as it was in this case—to be broad enough to include political and religious speech that might be of interest to the victim.

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[1] Fuller recitations of the facts can be found in the three Utah appellate opinions in this case. See *State v. Ray* ("*Ray I*"), 397 P.3d 817, 818–20 (Utah Ct. App. 2017); *State v. Ray* ("*Ray II*"), 469 P.3d 871, 872–74 (Utah 2020); *State v. Ray* ("*Ray III*"), 516 P.3d 329 (Utah Ct. App. 2022). As noted by both the Utah Supreme Court and the Utah Court of Appeals, those facts are recited in the "light most favorable to the verdict," *Ray III*, 516 P.3d at 332 n.1 (quoting *Ray II*, 469 P.3d at 872 n.2). Nevertheless, as the Utah Court of Appeals lamented in *Ray I*, the jury's "obvious skepticism towards [R.M]'s testimony," when coupled with the inherent vagueness of the term "indecent liberties" as an alternative basis for forcible sexual abuse, rendered the court unable to determine which allegations the jury credited or discredited in convicting Mr. Ray of that lone offense. 397 P.3d at 823.

[2] Although the Utah Legislature has re-numbered this statute, there has been no substantive change to the enticement provision applicable in 2010 and the current version of the code.

That provision also contains no scienter requirement. Instead, the Utah criminal code addresses offenses which lack specific scienter requirements by providing a general culpable mental state of "intent, knowledge, or recklessness." Utah Code § 76-2-102 (1983). Because recklessness was an option for the jury in this case, the enticement theory under which Mr. Ray was convicted did not even require him to intentionally or knowingly entice a minor. App. G at R.209:25-26; App. E at R.164-65.

Even worse, although the court below denied it, Utah courts have repeatedly tried and failed to "craft a principled and objective standard" defining enticement. *Johnson,* 576 U.S. at 598. Rather, each time Utah courts have been confronted with the term, they have employed a new definition and analysis. See *State* v. *Scieszka*, 897 P.2d 1224, 1227 (Utah Ct. App. 1995) (importing totality-of-circumstances test from "indecent liberties" analysis and considering five specific factors); *Gibson*, 908 P.2d at 356–57, 356 n.3, (Utah App. 1995) (applying *Scieszka*'s five-factor test while also citing several dictionary and judicial definitions of enticement); *id.* at 357–58 (Orme, J., concurring) (stressing that *Gibson* opinion went "well beyond" *Scieska* framework in favor of an interpretation under which enticement occurs any time an adult "instigates a sexual encounter" with a teenager); *State* v. *Bryant*, 290 P.3d 33, 42 n.7 (Utah Ct. App. 2012) (reducing *Gibson* test to mean that that enticement occurs "when the adult uses psychological manipulation to instill improper sexual desires which would not otherwise have occurred"). With no fixed statutory or judicial definition, it was left to individual decision-makers to determine whether

"enticement" was limited to one-night seduction or wrongful solicitation, or if it also included mere attraction or even, as here, discussion of political or religious subjects throughout the relationship. Utah Code § 76-4-401 (11); App. F at R.149.

Despite the absence of a meaningful scienter requirement, the trial court found Mr. Ray had enticed R.M., the complaining witness, by holding that "enticement" could arise from speech falling far below seduction or wrongful solicitation. The trial court then relied on page after page of conversations between Mr. Ray and R.M. about religion, politics, education and life, as well as "sex, love, and marriage," to satisfy the enticement element of the felony offense. *State* v. *Ray ("Ray II")*, 469 P.3d 871, 872 (Utah 2020); see also App. G at R.209:15–16, 42–43. The State conceded that the alleged conduct between Mr. Ray and R.M. "happened with her consent" but propped up its case for enticement by relying on the "totality" of their interactions, including many discussions of religion and politics, occurring over a "whole year and a half." App. H at R.212:30–33.

Relying on the Utah Supreme Court's prior holding that, without more clarification, the term "indecent liberties" was unconstitutionally vague, see *State in Interest of J.L.S.*, 610 P.2d 1294, 1296 (Utah 1980), the Utah Court of Appeals initially held that Mr. 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 Mr. Ray because the complaining witness had significant credibility issues that resulted in the jury's acquitting Mr. 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 Mr. Ray's sole conviction was "based on moral condemnation and social disapprobation rather than the narrow terms of the law," with the court concluding that it "c[ould]not know how the jury decided given the evidence before it and the obvious skepticism with which it apparently viewed [R.M]'s testimony." *Id.* at 823.

Disagreeing as to the deficiency prong of inadequate representation, on the theory that the "indecent liberties" error was not sufficiently important to correct, the Utah Supreme Court reversed the lower court's decision and remanded for consideration of Mr. Ray's remaining claims. *Ray II*, 469 P.3d at 878.

On remand, Ray argued the undefined enticement provision of the non-consent statute was unconstitutionally vague on its face.[3] *Ray III*, 516 P.3d at 337. While agreeing that the enticement provision implicated First Amendment rights, *id.* at 338 n.15, the Utah Court of Appeals still analyzed Mr. Ray's facial challenge under the highly deferential *Salerno* standard, requiring him "to establish that no set of circumstances exists under which the statute would be valid." *Id.* at 337 (quoting *Salerno*, 481 U.S. at 745). The court expressly rejected Ray's contention that his First Amendment challenge fell within the First Amendment exception to *Salerno*, *Ray III*, 516 P.3d at 337 n.13, and on that premise held that the enticement provision was not unconstitutionally vague on its face, *id.* at 341. In so doing, the Utah Court of Appeals rejected Ray's contention that a proper vagueness analysis in these circumstances

[3] Although Mr. Ray also attempted to challenge the enticement provision for overbreadth, the court expressly declined to address that argument, and Ray does not raise it here. *Ray III*, 516 P.3d at 336 n.10.

would simply follow well-recognized tests of inadequate notice and arbitrary enforcement—particularly the *Hoffman*/*Grayned* requirement of "explicit standards."

Ray petitioned for certiorari review in the Utah Supreme Court, which was denied.

REASONS FOR GRANTING THE PETITION

I. There is a deep federal circuit split, and long-brewing, widespread confusion in state courts of last resort, over the legal standard governing facial First Amendment vagueness challenges.

Because of state and lower federal courts' confusion in construing both the language and holdings of this Court's precedents, as explained in detail below, there are at least two competing standards for assessing facial vagueness challenges in First Amendment cases. First, the general standard, articulated by *Salerno* and adopted by the Utah Court of Appeals in this case, will uphold a statute against a facial vagueness challenge, even one implicating the First Amendment, unless the challenger can "establish that no set of circumstances exists under which the [law] would be valid." *Salerno*, 481 U.S. at 745. Courts sometimes articulate this standard in reference to *Hoffman*'s "all applications" test rather than *Salerno*'s "no set of circumstances" language, but both are invoked as stating the default test for facial challenges. By contrast, the second standard follows this Court's reasoning in *Grayned, Hoffman*, *Kolender*, and other precedents to group vagueness challenges together with overbreadth challenges as First Amendment exceptions to the general "no set of circumstances" standard. Challenged statutes are vague if they either (1) "fail[] to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," *or* (2) "if [the law] authorizes or even

encourages arbitrary and discriminatory enforcement." *Hill* v. *Colorado*, 530 U.S. 703, 732 (2000) (citing *Morales*, 527 U.S. at 56–57). And statutes that impose criminal liability—especially those without a knowledge or intent scienter requirement—while threatening to infringe the exercise of constitutionally protected conduct like free speech, are subject to an even more stringent vagueness test requiring a high degree of detail to survive a facial challenge. *Grayned*'s requirement of "explicit standards" is one way of formulating that test. See 408 U.S. at 108–109.

1. Not only has the First Amendment exception to facial vagueness been interpreted in incompatible ways by different courts, but several courts have also called for this Court's clarification of the standard or simply pointed out that the standard is uncertain. Many courts identify this Court's split decision in *City of Chicago* v. *Morales* as a principal source of confusion because the three-justice plurality there expressly rejected the *Salerno* standard. That plurality stated that, "[t]o the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself." 527 U.S. at 55 n.22. In response, some courts have noted that the *Morales* plurality has cast the "no set of circumstances" requirement into doubt. See, *e.g.*, *Hotel & Motel Ass'n of Oakland* v. *City of Oakland*, 344 F.3d 959, 971 (9th Cir. 2003) (citing *Morales*, 527 U.S. at 55 n.22). Indeed, then-Judge Sotomayor made that very point in *Farrell* v. *Burke*, 449 F.3d 470, 495 n.12 (2d Cir. 2006) (Sotomayor, J.) (noting that the appropriate standard for facial challenges is unclear).

Several other courts, including both federal circuits and state courts of last resort, have also pointed out confusion and inconsistency in the application of the *Salerno* test. See, *e.g., U.S.* v. *Frandsen*, 212 F.3d 1231, 1235 n.3 (11th Cir. 2000) (collecting cases highlighting this Court's inconsistency in applying "the *Salerno* rule"); see also *Whirlpool Props., 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 (Cal. Ct. App. 2013) (noting "lack of clarity" in facial vagueness precedents) (opinion superseded *sub nom Parker* v. *State*, 317 P.3d 1184 (Cal. 2014)); *Smallwood* v. *State*, 851 S.E.2d 595, 599 n.4 (Ga. 2020) (noting federal circuit split in post-*Johnson* facial challenges).

2. Despite or perhaps because of the acknowledged confusion and conflicts, the First, Third, and Tenth federal circuits continue to adhere to a misreading of *Salerno* that excludes facial vagueness challenges from the First Amendment exception to the general facial standard.

Third Circuit. For example, in relegating Mr. Ray's facial First Amendment vagueness challenge to the general standard, the Utah Court of Appeals, followed the Third Circuit's misreading of *Salerno*, see *Ray III*, 516 P.3d at 799–800, codifying a false dichotomy between the general "no set of circumstances" standard and a narrow exception for facial First Amendment overbreadth challenges. *U.S.* v. *Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010). Under that imprecise framing, a challenge that does not demonstrate overbreadth must necessarily demonstrate that "no set of circumstances exists under which the [law] would be valid." *Id.* (quoting *Salerno*, 481 U.S. at 745).

The Third Circuit recently reaffirmed that framing, though outside a vagueness challenge. *Mazo* v. *New Jersey Sec. of State*, 54 F.4th 124, 134 (3d Cir. 2022).

First Circuit. Like the court below, the First Circuit has also rejected a facial First Amendment vagueness challenge by explicitly applying to such a claim the general "no set of circumstances" standard from *Salerno*. *Frese* v. *Formella*, 53 F.4th 1, 7 (1st Cir. 2022). However, the First Circuit's analysis only cited to *Salerno* by way of *Dutil* v. *Murphy*, a federal habeas case implicating neither the First Amendment nor vagueness nor overbreadth. 550 F.3d 154, 160 (1st Cir. 2008). Thus, *Frese* did not even acknowledge the well-established First Amendment exception to *Salerno*, much less analyze whether that exception should have covered the First Amendment vagueness challenge presented in that case.

Tenth Circuit. Similarly, in a recent facial vagueness case, the Tenth Circuit expressly stated that, "[t]o win in the First Amendment context," a facial challenger outside the overbreadth analysis must "establish that "no set of circumstances exists" under which [the regulation] would be valid." *Harmon* v. *City of Norman, Okl.*, 61 F.4th 779, 795 (10th Cir. 2023) (internal quotations omitted). Although *Harmon* quoted the Eighth Circuit for that restrictive formulation, that prior case only concerned a facial overbreadth challenge, and so did not analyze the appropriate standard for facial First Amendment vagueness. See *Missourians for Fiscal Resp.* v. *Klahr*, 892 F.3d 944, 948 (8th Cir. 2018). And, as noted below, the Eighth Circuit has elsewhere analyzed a facial First Amendment vagueness challenge without any reference to the "no set of circumstances" test.

3. In contrast to the minority position, several other federal circuits have followed this Court's precedents in rejecting application of *Salerno's* "no set of circumstances" test to some facial vagueness challenges. See *Morales*, 527 U.S. at 55 n.22 (calling *Salerno* dicta and noting that its test "has never been the decisive factor in any decision of th[e] Court"); see also *Johnson*, 576 U.S. at 603 (rejecting that a vagueness challenge needs to be "vague in all applications."). Instead, these jurisdictions have recognized a constitutional-rights exception to *Salerno* for both overbreadth *and* vagueness facial challenges. See *Morales*, 527 U.S. at 55 (recognizing facial vagueness review when a statute infringes constitutionally protected rights); see also *Parker* v. *Levy*, 417 U.S. 733, 759 (1974) (recognizing the First Amendment as an exception to traditional rule against facial attacks); *Hoffman*, 455 U.S. at 499 (holding that, if a law were to "interfere[] with the right of free speech or of association, a more stringent vagueness test should apply"). Specifically, relying on *Grayned, Hoffman, Johnson, Parker,* and other decisions of this Court, four federal circuits—the Fourth, Seventh, Eighth, and Eleventh—have applied a constitutional and/or First Amendment exception to the *Salerno* principle for facial vagueness challenges.

Fourth Circuit. The Fourth Circuit has squarely held that, where criminal laws implicate First Amendment rights, a correct reading of the facial vagueness framework articulated in *Grayned, Hoffman*, *Johnson*, and *Dimaya* subjects such laws to a higher standard of certainty that permits facial invalidation without satisfying the "all applications" test. *Carolina Youth Action Project, et al.* v. *Wilson*,

60 F.4th 770, 781–82 (4th Cir. 2023). *Wilson* involved a facial vagueness challenge to laws criminalizing "disturbing" or "disorderly" conduct in South Carolina schools. *Id.* at 776.

Similar to the Utah Court of Appeals in this case, the Fourth Circuit concluded that such vagueness challenges implicated the First Amendment. *Id.* at 782. But unlike the Utah court, the Fourth Circuit correctly followed *Grayned, Hoffman* and *Johnson* to reject the applicability of both the "all applications" and "no set of circumstances" tests, *id.* at 781–82, instead striking the criminal laws down under *Hoffman*'s "stricter standard," *id.* at 781—that is, because it failed to provide explicit standards to those charged with applying the statute. Had the Utah Court of Appeals followed the Fourth Circuit instead of the Third Circuit, it would have subjected Utah's criminal enticement provision to that much stricter analysis. And, without the benefit of *Salerno*'s excessive deference, the Utah court likely would have concluded that the enticement statute failed the proper, more rigorous test—given the inherent breadth of "enticement" and the absence of any statutory or judicial narrowing of that term. .

Seventh Circuit. Although not in the context of the First Amendment, the Seventh Circuit has held that, when a law threatens to inhibit constitutionally protected conduct, "the Constitution demands that courts apply a more stringent vagueness test" which may invalidate a statute "even if that statute is not impermissibly vague in all of its applications." *Karlin* v. *Foust*, 188 F.3d 446, 458 & n.7 (7th Cir. 1999). Elsewhere, in dicta, the Seventh Circuit has grouped vagueness

and overbreadth together under the same First Amendment exception to *Salerno*. See *Ben's Bar, Inc.* v. *Vill.,* 316 F.3d 702, 708 n.11 (7th Cir. 2003) (observing that if a challenger does not argue a "regulation is vague or overbroad," he or she can only prevail under the *Salerno* standard).

A comparison of *Karlin* with this case demonstrates the flat conflict between that decision and the Utah Court of Appeals' decision in this case. Inasmuch as *Karlin* concerned abortion regulations, it concerned regulations on the exercise of what, at the time, were recognized constitutional rights. *Karlin*, 188 F.3d at 453. But, unlike the Utah Court of Appeals, the Seventh Circuit followed *Kolender* and *Hoffman* to recognize that courts could invalidate such laws without regard to any variation of the general, "all applications" standard. *Id.* at 458 n.7. And it invalidated the regulations there because they didn't provide a sufficient "degree of clarity" to those who would enforce it. *Id.* at 458. Had the Utah court followed this analysis, it would have concluded that Utah's enticement provision, by threatening to inhibit First Amendment rights, should have been held to a higher "degree of clarity" under the more stringent facial vagueness test.

Eighth Circuit. Similarly, after concluding that a school prohibition on gang symbols "swe[pt] within its parameters constitutionally protected speech," the Eighth Circuit in *Stephenson* v. *Davenport Community. School District*, analyzed the plaintiff's facial vagueness challenge without any reference to *Salerno* or either of the "no set of circumstances" or "all applications" standards." 110 F.3d 1303, 1308 (8th Cir. 1997) (quoting *Hoffman*, 455 U.S. at 499). To the contrary, consistent with

Grayned, Hoffman, and other decisions of this Court. the Eighth Circuit properly recognized that the facial vagueness analysis demands a "greater degree of specificity" and detail when the scope of the challenged regulation is capable of reaching protected First Amendment-protected expression and imposes criminal sanctions. *Id.* (quoting *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974)).

Here again, a comparison between *Stephenson* and this case illustrates the conflict. Unlike the Utah Court of Appeals, the Eighth Circuit correctly followed this Court's precedents to entirely bypass the default facial standards, instead applying a "proportionately greater level of scrutiny" to a regulation "reach[ing] the exercise of free speech." 110 F.3d at 1309. Under that more demanding inquiry, *Stephenson* concluded that the school district's "gang symbols" regulation "fail[ed] to provide adequate notice regarding unacceptable conduct and fail[ed] to offer clear guidance for those who apply it," and was thus unconstitutionally vague. *Id.* at 1311. Had the Utah court followed the Eighth Circuit in employing the more stringent analysis, it likely would have reached a similar conclusion in striking down Utah's decision to criminalize factually consensual behavior on the basis of undefined "enticement."

Eleventh Circuit. Similarly, in *Wollschlaeger* v. *Governor of Florida*, a majority of the Eleventh Circuit *en banc* sustained a facial challenge by striking down a statute implicating the First Amendment as unconstitutionally vague without any reference to *Salerno* or either of the "no set of circumstances" or "all applications" standards. Compare *Wollschlaeger*, 848 F.3d 1293, 1323 (11th Cir. 2017) (Marcus, J., writing separate opinion for majority) (striking down "unnecessary harassment"

statute for First Amendment vagueness); with *id.* at 1330 n.2 (Tjoflat, J., dissenting) (noting plaintiffs' facial challenge to the statute). Instead, the court applied an appropriately demanding vagueness analysis in recognition that "[s]tandards of permissible statutory vagueness are strict in the area of free expression." *Wollschlaeger*, 848 F.3d at 1320 (quoting *NAACP* v. *Button*, 371 U.S. 415, 432 (1963)). Invalidating a statute prohibiting "unnecessary harassment," he court held that, when the First Amendment is involved, "rigorous adherence to th[e] [notice and enforcement] requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.* (quoting *F.C.C.* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012)).

A comparison between *Wollschlaeger* and this case once again demonstrates the conflict between the decision below and the Eleventh Circuit's approach. Whereas the Utah Court of Appeals employed the most deferential standard in assessing Mr. Ray's First Amendment facial challenge, the Eleventh Circuit relied on this Court's facial vagueness precedents to strike down the "unnecessary harassment" law for failing to satisfy the appropriately "strict" standard necessary to protect free expression—that is, for failing to provide clear guidance (through explicit standards or otherwise) to those charged with applying the law. Had the Utah court employed

the strict rather than deferential test, it likely would have invalidated Utah's undefined "enticement" provision. [4]

4. Looking outside the federal judiciary reveals an even greater disharmony of approaches to facial challenges. First, at least five state courts of last

[4] Four additional federal circuits—the Second, Fifth, Sixth, and Ninth—have joined this side of the split in dicta. For example, the Second Circuit has repeatedly emphasized, in extensive but non-dispositive analyses, that this Court's precedents contemplate that a statute "not necessarily vague in all applications may nonetheless be void for vagueness on its face" if it "implicates rights protected by the First Amendment." *United States* v. *Requena*, 980 F.3d 30, 39 (2d Cir. 2020). Accord *Farrell* v. *Burke*, 449 F.3d 470, 495 n.12 (2d Cir. 2006) (Sotomayor, J.).

Likewise, the Fifth Circuit has at least twice followed *Hoffman* to recognize that facial vagueness challenges are subjected to a general heightened standard only if the challenged enactment implicates no constitutionally protected conduct, but in those cases the court held that no such protected conduct was implicated. See *Roark & Hardee LP* v. *City of Austin*, 522 F.3d 533, 551 (5th Cir. 2008) (applying general "all applications" standard only after concluding that the challenged ordinance "does not threaten to inhibit constitutionally protected conduct"); *U.S.* v. *Clark*, 582 F.3d 607, 612–13 (5th Cir. 2009) (applying "all applications" standard after concluding that challenged statute "does not infringe on any constitutional rights").

Going further, the Sixth Circuit in *Belle Maer Harbor* v. *Charter Tp. Of Harrison* acknowledged *Hoffman*'s exception to the "all applications" test for statutes affecting constitutionally protected conduct including "First Amendment freedoms." Moreover, even though the Sixth Circuit concluded that no such freedoms were implicated in that case, it still required the challenged statute to meet a "high level of definiteness" because it imposed criminal sanctions. 170 F.3d 553, 557 (6th Cir. 1999).

Similarly, in *Monarch Content Mgmt. LLC* v. *Ariz. Dept. of Gaming*, the Ninth Circuit relied on *Hoffman* to indicate that, had a challenged law regulated speech, the court would not have applied the "all applications" test in rejecting a facial vagueness challenge. 971 F.3d 1021, 1030 (9th Cir. 2020). Likewise, in *Hotel & Motel Ass'n of Oakland* v. *City of Oakland*, the Ninth Circuit stated in dicta that the "no set of circumstances" and "all applications" standards only apply "outside the context of the First Amendment," a right not implicated in that case. 344 F.3d 959, 971–72 (9th Cir. 2003).

resort[5] have joined the majority of federal circuits in analyzing facial vagueness challenges without regard to *Salerno*, the "no set of circumstances" standard, or the "all applications" standard.[6]

Nevada. For example, in *City of Las Vegas* v. *Eighth Judicial District Court*, the Supreme Court of Nevada struck down a criminal statute as facially vague. 59 P.3d 477 (Nev. 2002). The defendant in that case challenged a statute imposing criminal liability for "annoy[ing]" a minor. *Id.* at 479. Relying on *Kolender* and the *Morales* plurality, the Nevada court concluded that a facial challenge could succeed, "even where no substantial First Amendment concerns are implicated," merely on a showing that the penal statute failed to enable "persons of ordinary intelligence notice [to] understand what conduct is prohibited" and "authorizes or encourages

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[5] Excluded from that number is the Supreme Court of Indiana's decision in *Brown* v. *State*, which struck down an undefined enticement provision as unconstitutionally vague for reasons very similar to those Ray has articulated throughout his own challenge. 868 N.E.2d 464 (Ind. 2007). The State in that case urged the court to uphold the statute as applied to the criminal defendant, but the court did not ultimately clarify whether it was applying a facial or as-applied analysis, nor did it acknowledge the First Amendment implications of such a prohibition on enticement. *Id.* at 467. But, to the extent *Brown* may be construed as upholding a facial First Amendment vagueness challenge, it joins the majority of jurisdictions employing a facial vagueness analysis without reference to the deferential, default standard.

[6] Besides those directly conflicting holdings, some state courts of last resort have gone even further, albeit in dicta, to directly oppose or express doubts about the validity of applying *Salerno*'s approach in any circumstances. For example, in *Commonwealth* v. *Ickes*, the Supreme Court of Pennsylvania rejected the *Salerno* test as "*dicta* [that] is not controlling for state courts," 873 A.2d 698, 702 (Pa. 2005), but struck down the challenged statute for facial overbreadth rather than vagueness, *id.* at 703. See also *State* v. *Konrath*, 577 N.W.2d 601, 608 n.15 (Wis. 1998) (noting that *Salerno* standard "has not [been] consistently applied").

arbitrary and discriminatory enforcement." *Id.* at 479–80. Under that rubric, the undefined term "annoys" was unconstitutionally vague.

City of Las Vegas represents an even more pointed conflict with this case. As in this case, the Nevada "annoys" provision imposed criminal liability without defining what conduct would satisfy that prohibition. But whereas in this case the Utah Court of Appeals doomed Mr. Ray's facial vagueness challenge by subjecting it to the *Salerno* test, the Nevada court's analysis would have foregone that deferential standard even without the acknowledgement, present here, that the criminal statute also infringed on First Amendment rights. Had the Utah Court followed the Nevada analysis, it likely would have struck down the undefined term "entices" just as the Nevada court struck down the undefined term "annoys."

Tennessee. Similarly, in *City of Knoxville* v. *Entertainment Resources, LLC*, the Supreme Court of Tennessee invalidated a city ordinance regulating the location of "adult bookstores" as facially vague. 166 S.W.3d 650, 652 (Tenn. 2005). Concluding that the ordinance implicated First Amendment expression, *id.* at 656, the Tennessee court subjected it to the "more stringent standard" applicable to laws that threaten to chill protected speech, *id.* at 655. Tellingly, *Salerno*'s "no set of circumstances" test was only mentioned in a concurrence. See *id.* at 660–61 (Drowota, J., concurring in results).

The Tennessee majority's analysis, thrown into sharp relief by the concurrence, clearly conflicts with the decision below. Whereas the Utah Court of Appeals deliberately applied *Salerno* to what it recognized was a First Amendment facial

vagueness challenge, the Tennessee court deliberately rejected *Salerno* upon recognizing the First Amendment implications of the facial vagueness challenge before it. Applying that more stringent standard, the Tennessee court struck down the term "adult bookstore," finding that, even with a lengthy statutory definition, the phrase did not provide sufficient clarity, either to the public or those who would apply the statute. See *id.* at 652, 656–58. Had the Utah court followed Tennessee's analysis, it very likely would have found Utah's *un*defined enticement provision to be unconstitutionally vague.

Vermont. Likewise, in *State* v. *Green Mountain Future*, the Supreme Court of Vermont considered a facial vagueness challenge to a statute that regulated expenditures made for the purpose of "influencing an election." 86 A.3d 981, 996 (Vt. 2013). Recognizing the First Amendment implications of such a regulation, the Vermont court applied the "more stringent vagueness test." *Id.* at 995 (quotation omitted). Under that more demanding test, the court concluded that the term "influence," without more context, was uncertain enough that it would force persons of average intelligence to guess at its meaning and application, and thus was unconstitutionally vague. *Id.* at 996. Nowhere in the court's analysis did it refer to *Salerno* or either articulation of the general facial challenge standard.

Green Mountain Future provides yet another conflict with the decision below. Both the Vermont court and the Utah Court of Appeals acknowledged that their facial challenge implicated important First Amendment rights. Both facial challenges considered an undefined verb without additional clarifying context. But whereas the

Utah court upheld its criminal statute under the deferential default standard, the Vermont court struck down a non-criminal statute under the stricter exception. Given that this Court's precedents also employ a stricter vagueness standard for statutes imposing criminal penalties, it is highly likely that, had the Utah court followed the Vermont court in employing the appropriately strict standard, it would have invalidated Utah's enticement provision.

Washington. Finally, in *State* v. *Halstien*, a criminal defendant challenged a Washington statute that permitted the inclusion of "sexual motivation" as an aggravating factor in otherwise non-sexual crimes. 857 P.2d 270, 274–75 (Wash. 1993). Accepting the defendant's argument that such a statute infringed constitutionally protected speech and thought, the Washington Supreme Court analyzed his facial vagueness challenge without any mention of *Salerno*, the "no set of circumstances" test, or the "all applications" test. *Id.* at 275–76. Instead, the court simply evaluated whether the statute met the dual requirements of providing sufficient notice and protecting against arbitrary enforcement, and concluded that the statute was not sufficiently clear. *Id.*

Halstien thus conflicts with the decision in this case. Whereas the Utah Court of Appeals analyzed Mr. Ray's facial First Amendment vagueness challenge under the highly deferential *Salerno* standard, the Washington court gave no such

advantage to the speech regulation facially challenged there, and invalidated it on vagueness grounds.[7]

On the other hand, at least one state court of last resort, Virginia, has expanded the minority side of the split by continuing to adhere to some version of the general, default facial standard, even for First Amendment vagueness challenges. See *Stolz* v. *Commonwealth*, 831 S.E.2d 164, 169 (Va. 2019) (applying "no set of circumstances" test to uphold criminal statute against facial First Amendment vagueness challenge).[8]

It is thus evident that a lack of clarity in this Court's facial vagueness precedents has engendered confusion, disarray, and outright conflicts among state

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[7] A Florida Supreme Court decision also conflicts with the decision below. In *State* v. *Brake*, the Supreme Court of Florida considered a defendant's vagueness challenge to a statute that made it unlawful to "intentionally lure or entice" a child into a structure or dwelling "other than for a lawful purpose." 796 So.2d 522, 525–26 (Fla. 2001). Reasoning that the statute could arguably "infringe upon constitutionally protected First Amendment freedoms of expression and association," the Florida court analyzed the defendant's facial challenge on the basis of well-recognized notice and enforcement enquiries, without any reference to *Salerno*, the "no set of circumstances" test, or the "all applications" test. *Id.* at 527–28. Although the Florida court ultimately concluded that its respective enticement statute was not vague, it did so in recognition that the meaning of "lawful," when read together with the statute's explicit intent requirement, provided adequate notice that it prohibited enticement "with intent to violate Florida law." *Id.* at 529. Had the Utah Court of Appeals followed the logic of the *Brake* decision, it likely would have found that Utah's enticement statute, which does not require an intent either to entice or to break the law, provides inadequate notice and thus is unconstitutionally vague.

[8] In *State* v. *Doe*, the Supreme Court of Idaho similarly misreading *Hoffman* to uphold a criminal statute under the "all applications" test even though the defendant alleged that regulation interfered with free speech. 231 P.3d 1016, 1021–22, 1027–30 (Ida. 2010). However, the Idaho court appeared not to credit the defendant's claims of First Amendment infringement, making that analysis dicta with respect to the appropriate facial First Amendment vagueness standard. *Id.* at 1027.

courts of last resort as well as federal circuits.[9] This Court should take the opportunity to clarify that, although vagueness and overbreadth are distinct doctrines, facial First Amendment challenges can be brought under both doctrines, and that the "all applications" and "no set of circumstances" standard do not apply to facial First Amendment challenges under *either* doctrine.

II. The Utah Court of Appeals improperly applied the *Salerno* framework.

Had the Utah Court of Appeals applied the correct standard instead of *Salerno's* "impossible burden," *In re Termination of Parental Rights 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 deliberate manipulation and wrongful solicitation but also to reckless attraction or persuasion—is an unconstitutionally vague standard for policing the crucial boundary between truly consensual and criminally nonconsensual behavior. See *Ray III*, 516 P.3d at 339–41.

Despite the non-consent statute's allowing a recklessness mens rea, the court found Mr. Ray had enticed R.M. based on an interpretation of the "enticement" provision that extends well beyond a knowing seduction or wrongful solicitation. In so doing, the trial court relied for its finding of enticement on myriad conversations

[9] Besides the doctrinal divergence described above, at least one other state court of last resort has refused to analyze a facial First Amendment vagueness challenge except in relation to the challenger's own conduct. See *People* v. *Austin*, 155 N.E.3d 439, 472–73 (Ill. 2019). That position likewise conflicts with this Court's precedents excepting First Amendment facial vagueness challenges from such a challenger-specific approach. See *United States* v. *Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 33, 36 (1963).

between Mr. Ray and R.M. about politics, religion and education, as well as life, sex and love. *See Ray II*, 469 P.3d at 872. The State conceded that "all this happened with her consent," App. H at R.212:30–33. But, like the trial court itself, it overcame that factual consent by aggressively expanding the scope of criminal enticing behavior, sweeping the entirety of the pair's year and a half of interactions—including extensive interactions on politics and religion—into an elastic rubric of "enticement." *Id*. at R.212:30–33.

This history illustrates the critical problem with the Utah statute's failure to include a meaningful scienter requirement. A statute that requires intent or knowledge alleviates vagueness concerns by "narrowing] the scope of [an a]ct's prohibition and limiting prosecutorial discretion." *Gonzales* v. *Carhart*, 550 U.S. 124, 149–50 (2007). However, without the crucial limitations of intentional or knowing scienter, and without a statutory or court-created, objective definition, the bald term "entices" is unconstitutionally vague—more so when used to criminalize conduct falling well within First Amendment protections of free speech and religion. Nevertheless, because the word "entices" surely encompasses some wrongful and unprotected conduct, the Utah Court of Appeals doomed Mr. Ray's facial challenge when it held him to *Salerno*'s "no set of circumstances" test instead of the more stringent standard this Court demands of criminally punitive regulations of speech and conduct protected by the First Amendment.

To be sure, the Utah Court of Appeals went on to hold that the term "enticement" "is not unconstitutionally vague on its face," because, in the court's view,

"it is a word that is both commonly used and clearly defined." *Ray III*, 516 P.3d at 339 (quotations omitted). As already noted, however, this discussion was premised on the court's prior conclusion that the vagueness inquiry was governed by *Salerno's* "no set of circumstances" test. And under that test, the fact that a word is "common" enough to give adequate notice of what is prohibited in *some* circumstances obviously does not mean that is true in all cases, or in less than a "substantial" percentage of cases. One simply cannot tell from the Utah Court of Appeals' opinion how it would assess vagueness if it were to apply the heightened standard called for by decisions such as *Grayned* and *Hoffman*, for example, under the requirement that the State (either through statute or judicial opinion) provide "explicit standards" for determining what kinds of conduct constitutes "enticement," and what does not. Presumably mere discussions of politics and religion, even if they are of interest to the putative victim, would fall well outside any acceptable definition.

By granting Mr. Ray's petition, this Court can give all lower courts the doctrinal clarity necessary to weigh such regulations with appropriate constitutional rigor.

III. This case is an excellent vehicle to address the question presented.

The long-brewing legal uncertainty over which standard applies to facial First Amendment vagueness challenges only amplifies the effect of vague criminal legislation in both criminalizing, and chilling, protected expression. This case presents this Court with an ideal opportunity to resolve this pervasive dissonance by clarifying whether the exception laid out in precedents like *Parker*, *Hoffman*, *Kolender*, and *Morales* properly governs First Amendment vagueness challenges.

First, because the Utah Court of Appeals expressly declined to consider Mr. Ray's overbreadth challenge, see *Ray III*, 516 P.3d at 336 n.10, and because that decision is not challenged here, this case presents a rare and ideal vehicle for this Court to clarify its framework for facial First Amendment vagueness challenges while neatly distinguishing that framework from overbreadth if it so chooses.

Further, although Ray's First Amendment vagueness claims was brought as a facial challenge, the prosecution's unsettling theory of enticement in this case amply demonstrates the stakes underlying an unduly deferential vagueness standard. By incorrectly applying the effectively impossible *Salerno* standard to Mr. Ray's First Amendment vagueness challenge, the Utah Court of Appeals criminalized Mr. Ray's exercise of his constitutional rights to free speech, chilling speech not just for him but for all within the vague statute's reach. While the undefined word "entices" surely would include deliberate manipulation and seduction and thus fail *Salerno*'s "no set of circumstances" test—as illustrated by the Utah Court of Appeals' analysis—that term just as surely evokes a range of other meanings without any connotation of wrongful behavior. And, to be clear, the Utah non-consent statute, for which the term "entices" plays a pivotal role, applies not just to Mr. Ray's own conviction, but to a spate of other sex offenses whose criminality can easily hinge on a defendant's unintentional and unknowing persuasion of an otherwise consenting party. Viewed in that broader light, a statute imposing criminal punishment for "reckless" enticement provides a wholly inadequate standard for either private citizens or law

enforcement to police the crucial boundary between factually consensual and illegally nonconsensual behavior.

In this case, the fact that the prosecution weaponized the term's inherent vagueness to convict Mr. Ray largely on the basis of social, religious, and political discussions tellingly illustrates how such vagueness enables discriminatory enforcement without adequate notice to the public, chilling protected expression. In so doing, the facts of this case illustrate exactly why *Salerno*'s "no set of circumstances" standard should *not* apply to vagueness challenges based on infringement of First Amendment rights.

Moreover, as this Court has long held, "[f]reedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause." *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 780 (1978) (citation omitted). These First Amendment protections do not just extend to public speech. At times, they also cover the exchange of private plans and beliefs. See, *e.g.*, *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022) (affirming that the First Amendment protects "the right to harbor religious beliefs inwardly and secretly).

In Mr. Ray's case, because of the vague and undefined nature of the term "entices," Mr. Ray's private, protected speech over a roughly 18-month period turned factually consensual behavior into a nonconsensual felony. See *Ray III*, 516 P.3d at 332. The right to free speech should not be so easily discarded.

CONCLUSION

The decision below illustrates how the lawmaking branches of government may curtail the fundamental freedoms of speech and expression, particularly religious and political speech, with vague, manipulable criminal prohibitions. This petition presents an excellent vehicle for this Court to resolve the current conflicts amongst federal circuit courts and state courts of last resort when addressing First Amendment vagueness challenges.

The petition should be granted.

Respectfully submitted,

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