No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KULWANT SINGH SANDHU,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

HEATHER E. WILLIAMS
Federal Defender
Eastern District of California
CAROLYN M. WIGGIN
Assistant Federal Defender
Counsel of Record
MIA CRAGER
Assistant Federal Defender
TIMOTHY ZINDEL
Assistant Federal Defender
801 I Street, 3rd Floor
Sacramento, California 95814
e-mail address: carolyn_wiggin@fd.org
Telephone: (916) 498-5700

Attorneys for Petitioner
KULWANT SINGH SANDHU

QUESTIONS PRESENTED FOR REVIEW

Petitioner Kulwant "Ken" Sandhu believed that Netflix, a subscription video service, fraudulently inflated its stock prices. He felt this fraud would destroy the United States economy. He reported his conclusions to two federal regulators, the Securities and Exchange Commission ("SEC") and the Financial Industry Regulatory Authority ("FINRA"), and requested they take action. When they did not, he repeatedly called both agencies to demand action, sometimes using rude or profane language, but always stressing the imminent financial catastrophe.

The United States prosecuted Mr. Sandhu for "mak[ing] or caus[ing] the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number." 47 U.S.C. § 223(a)(1)(D). The district court refused to give Mr. Sandhu's requested instructions that would have either ensured the jury understood that Mr. Sandhu's speech was not at issue or, in the alternative, that speech could be protected by the First Amendment in some circumstances. The Ninth Circuit upheld the conviction, failing to follow basic rules of statutory construction and problematically applying the First Amendment exception for "speech integral to criminal conduct."

The questions presented in this petition are:

(1) Does 47 U.S.C. subsection 223(a)(1)(D) prohibit only the harassment caused by repeatedly ringing a telephone or does it also prohibit repeated

verbal harassment, when repeated verbal harassment is specifically covered by section 47 U.S.C. subsection 223(a)(1)(E)?

(2) Does the First Amendment exception for "speech integral to criminal conduct" allow criminal punishment for speech about public policy matters that the speaker directs to federal agencies or officials?

TABLE OF CONTENTS

TABLE OF CONTENTS FOR APPENDIX

TABLE OF AUTHORITIES

Federal Statutes

State Cases

State Statutes

Other Authorities

I. Opinions Below

The order issued by the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing and Rehearing *En Banc* is unreported and is reproduced at Appendix A (Pet. App. 1a).

The citation for the unpublished Memorandum Disposition issued by the United States Court of Appeals for the Ninth Circuit affirming the district court judgment is: *United States v. Sandhu*, 740 Fed.Appx. 595, 2018 WL 5307724 (9th Cir. Oct. 25, 2018).

The judgment issued by the United States District Court for the Eastern District of California is unreported and is reproduced at Appendix C (Pet. App. 5a).

II. Basis for Jurisdiction

The Memorandum Disposition affirming the district court's judgment was issued by the United States Court of Appeals for the Ninth Circuit on October 25, 2018. Pet. App. 2a-4a. The Ninth Circuit denied Mr. Sandhu's Petition for Rehearing and Rehearing *En Banc* on January 7, 2019. Pet. App. 1a. This Court has jurisdiction to review the judgment on a writ of *certiorari* pursuant to 28 U.S.C. Section 1254(1).

III. Constitutional Provisions and Statutes Involved in the Case

A. The First Amendment to the United States Constitution

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

B. 47 United States Code Section 223(a)(1)(C)-(E)

47 United States Code Section 223(a)(1)(C)-(E) provides:

(a) Prohibited acts generally

Whoever--

(1) in interstate or foreign communications—

* * *

(C) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to abuse, threaten, or harass any specific person;

(D) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

(E) makes repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any specific person;

* * *

shall be fined under Title 18 or imprisoned not more than two years, or both.

IV. Statement of the Case

A. Statement of Facts

Mr. Sandhu believed that the company Netflix engaged in fraud that inflated its stock prices, a fraud large enough to harm the United States economy. He felt compelled to bring his concerns to two federal agencies responsible for regulating activities related to the stock market, the Securities and Exchange Commission ("SEC") and the Financial Industry Regulatory Authority ("FINRA"). Hoping to persuade the agencies to investigate, he called both offices repeatedly in 2014 and 2015, continuing to call after his inquiries were rebuffed.

Nobody disputed that Mr. Sandhu wanted agency employees to answer his calls so that he could converse with responsible staff members. An SEC receptionist testified she believed Mr. Sandhu called because he wanted to talk to her. D. Ct. Doc. 88 at 52. An SEC inspector said Mr. Sandhu "seemed to be making an attempt to reach me while he thought I could be in the office." D. Ct. Doc. 88 at 79. Mr. Sandhu always conversed with staff members when they answered their telephones. No one testified that Mr. Sandhu caused his or her telephone to repeatedly or continuously ring solely for the purpose of ringing it.

When Mr. Sandhu called agency employees, he spoke of his concern that government was not doing enough to investigate and stop fraud that he believed would have a major impact on the United States economy. D. Ct. Doc. 88 at 49,

55, 83, 134-35. He said he did not think officials were doing their jobs. D. Ct. Doc. 87 at 62-63. When speaking, he was often agitated and would use profanity, insults and violent imagery to express his frustration. Mr. Sandhu did not deny that his language and tone were often crude during calls.

B. Procedural History

The government charged Mr. Sandhu with two counts of "mak[ing] or caus[ing] the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number." 47 U.S.C. § 223(a)(1)(D). Mr. Sandhu pled not guilty and went to trial. The government could have charged him with violating a neighboring provision of section 223, namely subdivision (a)(1)(E), which prohibits "mak[ing] repeated telephone calls or repeatedly initiat[ing] communication with a telecommunications device, *during which conversation or communication ensues*, solely to harass any specific person" (emphasis added). It did not charge this provision, however, probably because it is clear that Mr. Sandhu's conversations, while annoying, were made with the purpose of trying to prompt an investigation rather than to harass.

Mr. Sandhu requested four defense-theory jury instructions. The first clarified that, to find him guilty, the jury had to find he intended to harass by

ringing the telephone, not by speaking on it.[1] The second told the jury that the criminal intent (*i.e.,* to harass) had to be tied to the criminal act (*i.e.*, causing a telephone to repeatedly ring),[2] a basic tenet of criminal law. The third and fourth proposed instructions, which were to be given only if the first two were not, explained that if the jury found that Mr. Sandhu's speech was "intended to convey a message" or was a petition to the government to redress a grievance, it was protected by the First Amendment. D. Ct. Doc. 62 at 7-8.

The district court refused to give any defense theory instructions. D. Ct. Doc. 81 at 44. It gave the jury the following instruction regarding the elements of both counts:

> (1) the defendant made or caused the telephone of [another person] to repeatedly ring;
>
> (2) the defendant did so with the intent to harass any person at the called number; and
>
> (3) the defendant did so in interstate communications.

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[1] D. Ct. Doc. 62 at 5 ("he intended to harass a person by causing his or her telephone to ring repeatedly. A different law governs calls during which conversation or communication ensues.").

[2] D. Ct. Doc. 62 at 6 ("The law requires that a defendant have the intent to harass at the time he makes the telephone repeatedly ring. If you find that defendant's intention at the time of calling was to harass by some means other than ringing the telephone, such as by speaking, then you must find him not guilty.")

(4) one acts with the intent to harass if he acts with a specific purpose of provoking an adverse emotional reaction in any person at the telephone number called.

D. Ct. Doc. 81 at 106-07. The jury was never instructed that it must find Mr. Sandhu intended to harass *by* ringing telephones, not by his speech, in order to be guilty under 47 U.S.C. § 223(a)(1)(D). The instructions also never cautioned the jury that, if it found Mr. Sandhu's speech amounted to "harassment," it must also consider whether his speech was protected by the First Amendment.

In the absence of defense theory instructions limiting subsection 223(a)(1)(D) to harassment by ringing or informing the jury of the First Amendment principles applying to speech, the prosecution in closing leaned hard on the content of Mr. Sandhu's speech in order to win a conviction. It told the jury that, "[i]n terms of intent to harass, intent is clear when you *listen* to what the defendant was *saying* over and over again, from witness, after witness." D. Ct. Doc. 81 at 57 (emphasis added). It urged the jury to consider that "the defendant was aggressive, abusive and ranting. His tone was angry. He would scream." D. Ct. Doc. 81 at 57. It argued that the language Mr. Sandhu used when he spoke to government employees "is *language* to provoke, to hurt. This is the kind of *language* to upset. This is the kind of *language* to provoke an adverse emotional response. This is the *language* of harassment." D. Ct. Doc. 81 at 57-58.

The prosecution also told the jury it could not consider whether Mr. Sandhu's speech was protected by the First Amendment. D. Ct. Doc. 81 at 94. In other words, having blocked an instruction informing jurors that subsection 223(a)(1)(D) was not directed at speech, it used Mr. Sandhu's speech to convict him without allowing a jury instruction regarding types of speech protected by the First Amendment.

His chance of a fair verdict having been stymied in two ways, the jury of course found Mr. Sandhu guilty of both counts. D. Ct. Doc. 74.

V. Reasons for Granting the Petition for a Writ of *Certiorari*.

A. This Court should grant the petition to resolve a circuit split and clarify that, properly construed, 47 United States Code subsection 223(a)(1)(D) covers harassment through ringing a telephone while the adjacent subsection 223(a)(1)(E) covers harassment through speaking on a telephone.

47 U.S.C. subsections 223(a)(1)(D) and 223(a)(1)(E) were enacted simultaneously and sit adjacent to each other within 47 U.S.C. § 223, the federal statute that addresses harassment arising from the use and abuse of telephones. The First Circuit,[3] as well as the United States District Court for the Eastern District of Pennsylvania,[4] have correctly recognized that in light of the legislative history of these subsections, and in light of their placement next to each other

[3] *United States v. Tobin*, 552 F.3d 29 (1st Cir. 2009).

[4] *United States v. Darsey*, 342 F. Supp. 311 (E.D. Pa. 1972).

within a single statute, the subsections cover distinct offense conduct. Subsection (a)(1)(D) covers harassment through causing a telephone to repeatedly ring whereas subsection (a)(1)(E) covers harassment through speech. The Ninth Circuit has both abandoned widely accepted rules of statutory construction and created circuit split with its poorly reasoned holding that a person can be charged with a violation of 47 U.S.C. § 223(a)(1)(D), which is directed at "mak[ing] or caus[ing] the telephone of another repeatedly or continuously to ring, with intent to harass," and yet convicted based on the conduct that is the focus of 47 U.S.C. § 223(a)(1)(E): "making repeated telephone calls or repeatedly initiating] communication with a telecommunications device, during which conversation or communication ensues, solely to harass any specific person."

The Ninth Circuit's flawed decision is not merely an affront to the basic rules of statutory construction; it has important First Amendment consequences for defendants such as Mr. Sandhu. Subsection (a)(1)(E), which covers harassment through "communication," has a built in mechanism to ensure it will not be applied to persons who communicate primarily to exercise a First Amendment right of expression. It only criminalizes telephonic conversations if they are intended "solely to harass." Thus by definition it does not cover speech that is primarily for the purpose of engaging in the core First Amendment activities of discussing public policy matters and petitioning the government for redress. By contrast,

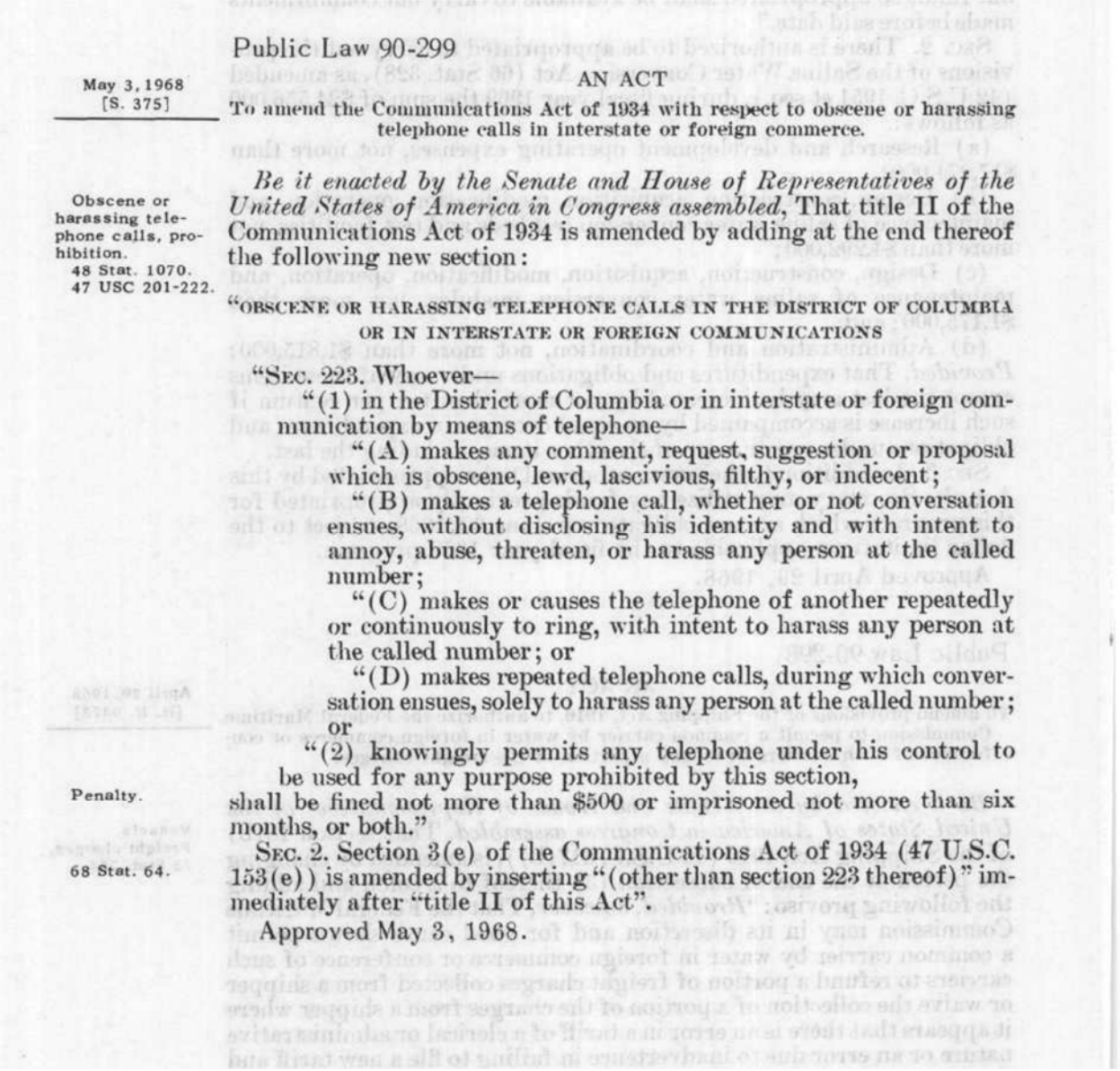
subsection (a)(1)(D) does *not* limit the offense conduct to that intended "solely to harass." As a result, if subsection (a)(1)(D) is used to prosecute individuals on the basis of their speech, as it was here, those individuals will not have the benefit of (a)(1)(E)'s language limiting the scope of the conduct punished to speech intended "solely to harass." As Mr. Sandhu argues below, in light of the legislative history of 47 U.S.C. 223 subsections (a)(1)(D) and (a)(1)(E), and in light of the rules of statutory construction, the First Circuit has correctly held that these two subsections are directed at distinct conduct and the Ninth Circuit's contrary decision should be reversed.

1. History of 47 United States Code Section 223(a)(1)(C)-(E)

47 U.S.C. Section 223 was written over 50 years ago when telephones were hard-wired in homes and offices and had bells that could be rung at the whim of the caller. When a receiver was returned to its cradle after a call was answered, a caller who intended to harass could ring the phone again. The person on the other end had no power to control the call except by yanking the phone off the wall or leaving the receiver off the hook.

In 1967, Congress enacted legislation to address several distinct problems related to telephone use. In describing the need for the legislation, the House of Representatives' Committee on Interstate and Foreign Commerce discussed the harms it wished to address: calls that contain "nothing but a tirade of threats,

curses, and obscenities," calls that contain "only heavy breathing," the practice of causing a person's telephone to "ring repeatedly at various times in the day and night only to have the calling party hang up when the phone is answered," and calls to the family of a military service member falsely reporting or mocking a casualty. H.R. No. 1109, Interstate and Foreign Commerce Committee, 1968 U.S. Code Cong. and Admin. News, 1915, 1916 (1968). Public Law 90-299, enacted in 1968, reflects these concerns by including distinct subsections addressing each of these harms:



Public Law 90-299

May 3, 1968
[S. 375]

AN ACT

To amend the Communications Act of 1934 with respect to obscene or harassing telephone calls in interstate or foreign commerce.

Obscene or harassing telephone calls, prohibition.
48 Stat. 1070.
47 USC 201-222.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title II of the Communications Act of 1934 is amended by adding at the end thereof the following new section:

"OBSCENE OR HARASSING TELEPHONE CALLS IN THE DISTRICT OF COLUMBIA OR IN INTERSTATE OR FOREIGN COMMUNICATIONS

"SEC. 223. Whoever—

"(1) in the District of Columbia or in interstate or foreign communication by means of telephone—

"(A) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent;

"(B) makes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number;

"(C) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

"(D) makes repeated telephone calls, during which conversation ensues, solely to harass any person at the called number; or

"(2) knowingly permits any telephone under his control to be used for any purpose prohibited by this section,

Penalty.

shall be fined not more than $500 or imprisoned not more than six months, or both."

SEC. 2. Section 3(e) of the Communications Act of 1934 (47 U.S.C. 153(e)) is amended by inserting "(other than section 223 thereof)" immediately after "title II of this Act".

68 Stat. 64.

Approved May 3, 1968.

Section 223 has been amended a number of times since 1968. The subsections that were originally 47 U.S.C. § 223(1)(B)-(D) are now 47 U.S.C. § 223(a)(1)(C)-(E). Mr. Sandhu was prosecuted and convicted under what was originally subdivision (1)(C) and is now subdivision (a)(1)(D). The subdivision

prohibits a person from "mak[ing] or caus[ing] the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number."

2. The Ninth Circuit ignored the rules of statutory construction when it failed to recognize that subsection 223(a)(1)(D) criminalizes harassment through telephone ringing and not through telephone conversation.

The Ninth Circuit held that Mr. Sandhu was not entitled to a defense theory instruction that subsection 223(a)(1)(D) applies to harassment through ringing the telephone, not through conversation. App. 3a. The Court held the following instruction sufficed:

> (5) the defendant made or caused the telephone of [another person] to repeatedly ring;
>
> (6) the defendant did so with the intent to harass any person at the called number; and
>
> (7) the defendant did so in interstate communications.
>
> (8) one acts with the intent to harass if he acts with a specific purpose of provoking an adverse emotional reaction in any person at the telephone number called.

D. Ct. Doc. 81 at 106-07. The instruction did not tell the jury that defendant must intentionally harass *through the ringing of the telephone* and not through his speech in order to be guilty of violating subsection 223(a)(1)(D). The Ninth

Circuit's ruling allowed a conviction based solely on speech by never explaining that for subsection 223(a)(1)(D), the offending conduct had to be harassment through causing a telephone to ring, not harassment through speech. The ruling stripped the statute of its relationship between criminal act and criminal intent. Moreover, it allowed the jury to convict using the act from subsection (a)(1)(E) (*i.e.*, harassing conversation) when only (a)(1)(D) was charged. As discussed above, subsection (a)(1(E) specifies that the conversation must be "solely to harass" whereas (a)(1)(D) contains no such limitation.

The Ninth Circuit's holding that subsection (a)(1)(D) can be violated with harassment through speech over the telephone, despite the fact that it is adjacent to subsection (a)(1)(E), which expressly prohibits harassment by speech over the telephone, fails to honor the rules of statutory construction. This Court has held, as a cardinal rule of statutory construction, that "statutory language must be read in context [since] a phrase gathers meaning from the words around it." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (internal quotations and citations omitted). Thus when a statute contains multiple subsections, each must be read so that, if possible, the subsections are harmonized and no subsection becomes superfluous. *Husted v. A. Philip Randolph Inst.*, __ U.S. __, 138 S. Ct. 1833, 1842-43 (2018); *see also Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990) ("in expounding a statute, we are not guided by a single sentence or member of a sentence, but look

to the provisions of the whole law, and to its object and policy.") (internal quotations and citations omitted); *Advocate Health Care Network v. Stapleton*, __ U.S. __; 137 S. Ct. 1652, 1659 (2017) (under the "surplusage canon," a federal court assumes that each word in a statute is "there for a reason" and must be given effect if possible).

Furthermore, under the canon of *generalia specialibus non derogant*, a precise and specific statutory provision is not overridden by another provision "covering a more generalized spectrum" of issues. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153–54 (1976). As this Court has recognized, "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Bloate v. United States*, 559 U.S. 196, 207-08 (2010). *See also Monte Vista Lodge v. Guardian Life Ins. Co. of America*, 384 F.2d 126, 129 (9th Cir. 1967) ("Fundamental maxims of statutory construction require that a specific statutory section qualifies a more general section and will govern, even though the general provisions, standing alone, would encompass the same subject").

Applying these principles to 47 U.S.C. § 223(a)(1)(C)-(E), the telephone harassment statute, it is clear that 47 U.S.C. § 223(a)(1)(D) is directed at persons who intend to harass by causing a person's telephone to repeatedly or continuously ring, and not with harassment by communication over the telephone. First, as

observed in *United States v. Darsey*, 342 F. Supp. 311 (E.D. Pa. 1972), "[t]he meaning of any one part of § 223 can only be properly understood in the context of the whole of § 223." *Darsey*, 342 F. Supp. at 312. The court described the various subsections and the offense conduct they address. With respect to what was then § 223(1)(C) and what is now § 223(a)(1)(D), the court observed that the subsection

> was directed at still another problem, the problem of those who ring another's telephone to harass them *with the ringing*. It appears that the simple intent standard of "intent to harass" was used in § 223(1)(C) rather than the broader standard used in § 223(1)(B) or the narrower standard used in § 223(1)(D) because nothing broader or narrower was called for in light of the behavior prohibited by § 223(1)(C). Repeated ringing can have only two intents-benign, attempting to get in touch in good faith, and harassing. Therefore, *since repeated ringing is so nearly content free*, it presents few problems in defining standards by which to judge the intent with which it is done.

Darsey, 342 F. Supp. at 313 (emphasis added). The *Darsey* court makes clear that what is now § 223(a)(1)(D) is directed at the "content-free" act of harassment by causing a phone to ring repeatedly with no intent of getting in touch with the person being called, and not with causing someone's telephone to ring in an effort to "get in touch."

In *United States v. Tobin*, 552 F.3d 29 (1st Cir. 2009), the First Circuit similarly observed that 47 U.S.C. § 223(a)(1)(D) was distinct from the other subsections within § 223(a)(1) because whereas subsection (a)(1)(E) dealt with "the counterpart problem where the phone is answered," subsection (a)(1)(D) dealt with the problem where the phone "is left to ring." *Tobin*, 552 F.3d at 34.

The *Darsey* and *Tobin* decisions are consistent with the rules of statutory construction described above. Subsection 223(a)(1)(D) is best understood when two subsections that were enacted at the same time to deal with related but distinct problems, subsections 223(a)(1)(C) and 223(a)(1)(E), are also considered. Just as subsection (a)(1)(C) is specifically directed to intentional abuse or harassment by anonymous calls and subsection (a)(1)(E) is specifically directed to repeated telephone calls during which conversation or communication ensues that is intended "solely to harass any specific person," subsection (a)(1)(D) is specifically directed to intentional harassment by causing a telephone to repeatedly or continuously ring.

In addition, under the rule against surplusage, subsection (a)(1)(D) must be construed to apply to intentional harassment by causing a telephone to repeatedly or continuously ring if subsection (a)(1)(E) is to have meaning and effect. Subsection (a)(1)(E) prohibits making repeated telephone calls in which conversation or communication ensues and the purpose of that conversation or communication is "solely to harass any specific person." Put simply, it covers telephone calls in which a conversation meant to harass the recipient of the call. If subsection (a)(1)(D) is construed to also cover telephone calls in which a conversation meant to harass takes place, then subsection (a)(1)(E) serves no purpose. In order for subsection (a)(1)(E) to have effect, (a)(1)(D) must be

construed to address the problem of harassment by causing repeated or continuous ringing, not by telephone calls which start with ringing (which all telephone calls do) and then lead to harassment by conversation—the object of subsection (a)(1)(E).

This Court should grant *certiorari* because the Ninth Circuit's decision not only ignores statutory construction rules, but also creates a circuit split between the First and the Ninth Circuits. The First Circuit has held that 47 U.S.C. § 223 subsection (a)(1)(E) deals with telephonic harassment "where the phone is answered" and conversation ensues while subsection (a)(1)(D) deals with harassment where the telephone "is left to ring." *Tobin*, 552 F.3d at 34. The Ninth Circuit, on the other hand rejected Mr. Sandhu's argument that he was entitled to defense theory instructions telling the jury that subsection (a)(1)(D) is directed to harassment through ringing, not conversation. In so holding, the Ninth Circuit held that subsection (a)(1)(D) is not limited to harassment through the ringing of a telephone, in direct contradiction to the First Circuit's decision in *Tobin*. In order to resolve this split between the circuits, uphold the rules of statutory construction, and prevent unfair prosecutions in which a defendant is charged under 47 U.S.C. § 223(a)(1)(D) on a theory that his speech is meant to harass, but not given the "solely to harass" limiting language of 47 U.S.C. § 223(a)(1)(E), this court should grant the petition.

B. This Court should grant the petition to clarify whether, under the "speech integral to criminal conduct" exception to the First Amendment, as long as a statute prohibits harassment and a defendant's speech is annoying or abusive, the jury need not even consider whether the speech is protected by the First Amendment.

Mr. Sandhu's conviction centers on application of an anti-harassment statute to speech about a public policy matter, conduct that is traditionally protected by the First Amendment. In today's federal and state courts, such prosecutions are not uncommon, and, as described below, federal and state courts are frankly in a state of disarray regarding the proper constitutional analysis for this type of case. In particular, there is inconsistency in state and federal courts' understanding of whether the "speech integral to criminal conduct" exception to the First Amendment means that as long as a statute prohibits harassment, and as long as harassment occurs through speech, there is no First Amendment concern even raised. Mr. Sandhu's case presents an ideal vehicle for this Court to bring clarity to this important area of law.

1. Mr. Sandhu was convicted on the ground that his speech constituted harassment.

As discussed above, by failing to give the requested defense theory instruction that clarifying that 47 U.S.C. § 223(a)(1)(D) is directed to harassment through the repeated ringing of a telephone, and not at harassment through speech that occurs during a telephone conversation, the Ninth Circuit allowed Mr. Sandhu

to be convicted because of the content of his speech. To recap the relevant facts, no government witness testified that Mr. Sandhu caused their telephone to ring and then, when they answered it, hung up the telephone. Mr. Sandhu always called to communicate with the agency staff member who answered the telephone. Government witnesses did testify as to the troubling and hurtful *content* of Mr. Sandhu's speech as he complained that the SEC and FINRA were not doing enough to investigate and stop fraud on the stock market. In its closing argument, the prosecutor told the jury to, "*listen to what the defendant was saying* over and over again, from witness, after witness." D. Ct. Doc. 81 at 57 (emphasis added). The prosecutor focused on the content of Mr. Sandhu's conversations: "the defendant was aggressive, abusive and ranting. His tone was angry. He would scream." D. Ct. Doc. 81 at 57. The government argued "[t]his is *language* to provoke, to hurt. This is kind of *language* to upset. This is the kind of *language* to provoke an adverse emotional response. This is the *language* of harassment." D. Ct. Doc. 81 at 57-58 (emphasis added).

After both sides rested and the jury was instructed on the applicable law, the district court refused requested defense theory instructions stating that if the jury found Mr. Sandhu's speech was "intended to convey a message other than harassment" or was a petition to the government to redress a grievance, it was protected by the First Amendment. D. Ct. Doc. 62 at 7-8. Not surprisingly,

because (a) there was evidence that Mr. Sandhu's language was hurtful and upsetting, (b) the prosecution argued hurtful language was harassment, (c) as far as the jury knew, harassment through language was prohibited by 47 U.S.C. § 223(a)(1)(D), and (d) the jury was given no instruction on how the First Amendment might protect Mr. Sandhu's speech, the jury returned verdicts of guilty on both counts. There can be no doubt that Mr. Sandhu was convicted because of his speech, and neither the judge nor jury ever even considered whether the First Amendment might protect Mr. Sandhu's speech.

2. The Ninth Circuit's decision in this case is part of a problematic trend toward the expansion of the First Amendment exception for "speech integral to criminal conduct."

The Ninth Circuit was not troubled at all by the fact that the prosecution was allowed to argue that Mr. Sandhu's speech constituted criminal conduct and, notwithstanding the fact that the speech was about public policy matters and was directed to federal agency officials, the jury was given no instruction regarding the First Amendment. It reasoned that the criminal conviction did not run afoul of the First Amendment because

> 47 U.S.C. § 223(a)(1)(D) regulates conduct and does not regulate speech. Any expressive aspects of Sandhu's conduct were "integral to criminal conduct" and thus not protected under the First Amendment. *See*, *e.g.*, *United States v. Osinger*, 753 F.3d 939, 947 (9th Cir. 2014).

App. p. 4a.

It should first be observed that to the extent the Ninth Circuit held Mr. Sandhu's speech was not the "conduct" for which he was punished, the Ninth Circuit broke sharply with this Court's precedent. When a conviction rests on the "asserted offensiveness" of the words a defendant uses, the "conduct" that is being punished is communication, which is "speech" for purposes of the First Amendment. *Cohen v. California*, 403 U.S. 15, 18 (1971) (criminal conviction for breach of the peace based on offensiveness of language displayed on defendant's jacket violated First and Fourteenth Amendments). Indeed, this Court has recognized that actions that may involve no words at all, such as marching in a parade, are First Amendment "speech" if they are done to "make a point" or "express a grievance" with the government. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 568 (1995).[5] Certainly Mr. Sandhu's telephone conversations with officials and staff at the SEC and FINRA were done to "make a point" and "express a grievance" with the government.

[5] *See also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1741–42 (2018) ("a person's conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. . . . Applying this principle, the Court has recognized a wide array of conduct that can qualify as expressive, including nude dancing, burning the American flag, flying an upside-down American flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag.") (internal quotations and citations omitted).

After deviating from well-established precedent by characterizing Mr. Sandhu's telephone conversations as "conduct" rather than speech, the Ninth Circuit hedged its bets and added that the "expressive" aspects of Mr. Sandhu's telephone conversations were "integral to criminal conduct." App. p. 4a. The Ninth Circuit's holding that Mr. Sandhu's verbal tirades to federal agency staff and officials about matters of public policy, hurtful and annoying as they may have been, do not enjoy any First Amendment protection is a disturbing expansion of the "speech integral to criminal conduct" concept.

By way of background, the exception from First Amendment protection for speech and expression that is "integral to criminal conduct" originated with this Court's opinion in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). In *Giboney* a union picketed an ice supplier demanding the supplier stop serving non-union ice peddlers. *Giboney*, 336 U.S. at 492. It would have violated state law for the supplier to stop selling ice to non-union customers. *Id*. at 492–93. This Court held that because the purpose of the picketing was to compel the supplier to break the law, the picketing was a "single and integrated course of conduct, which was in violation of Missouri's valid law." *Id*. at 498. Rejecting an argument that the picketing was protected by the First Amendment, this Court held that the First Amendment does not "extend[] its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Id*.

Notably, the "valid criminal statute" was Missouri's antitrade restraint law, which prohibited refusing to sell goods to certain customers; it was not a state law banning speech or expression. The *Giboney* Court simply held that the picketing was part of a violation of Missouri's antitrade restraint law. *Giboney* did *not* hold that a state could enact a law criminalizing a type of speech because of its content and then avoid the issues this would create under the First Amendment.

While the First Amendment exception for speech integral to criminal conduct allows for criminal prosecution of some conduct that is carried out through speech (*e.g.* solicitation, conspiracy, and fraud), in the years since *Giboney* was decided the "Court has regularly deemed it an abridgment of free speech to make a course of conduct illegal or tortious when the 'conduct' consists of speech that supposedly causes harm because of what it communicates." Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 1035 (2016). It can be argued that when a statute criminalizes harassment through speech, the "speech integral to criminal conduct" exception should be irrelevant because "[s]peech that is intended to annoy, offend, or distress does not help cause or threaten other crimes, the way solicitation or aiding or abetting does." Volokh, *supra*, at 1036.

Expansion of the "speech integral to criminal conduct" exception to communication that "harasses" by criticizing government or public officials using

crude and harsh terms, as happened here, is antithetical to the First Amendment. As recognized by the Third Circuit "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.). Speech "cannot be transformed into criminal conduct merely because it annoys, disturbs, or arouses contempt." *State v. Burkert*, 231 N.J. 257, 281, 174 A.3d 987, 1000 (2017). Because the federal and state legislatures have enacted numerous statutes criminalizing harassment, federal and state courts need guidance on the relationship between the First Amendment and these statutes. It is important not to allow the "speech integral to criminal conduct" concept to remove prosecution under these statutes entirely from First Amendment analysis. After all, "if the government criminalized any type of speech, then anyone engaging in that speech could be punished because the speech would automatically be integral to committing the offense. That interpretation would clearly be inconsistent with the First Amendment." *United States v. Matusiewicz*, 84 F. Supp. 3d 363, 369 (D. Del. 2015), *aff'd sub nom. United States v. Gonzalez*, 905 F.3d 165 (3d Cir. 2018).

Unfortunately, looking at both federal and state court opinions in this area, there is disarray in the understanding of the relationship between the First Amendment and the "speech integral to criminal conduct" exception in the context

of statutes banning harassment. In Mr. Sandhu's case, and in others,[6] courts have simply reasoned that a statute bans harassment, the defendant "harassed" someone, and therefore the "speech integral to criminal conduct" First Amendment exception means that there is no First Amendment issue to consider. Other courts, by contrast, recognize that when the "harassment" at issue involves speech, it can be protected by the First Amendment, at least in some circumstances.[7] Still other

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[6] *Com. v. Johnson*, 470 Mass. 300, 311, 21 N.E.3d 937, 947 (2014) (speech that is intended to harass falls within the "speech integral to criminal conduct" exception and therefore entitled to no First Amendment protection); *State v. Thorne*, 175 W. Va. 452, 454, 333 S.E.2d 817, 819 (1985) (where defendant called university and insulted university officials, and then was convicted for violating state law banning telephone calls made with intent to harass, conviction did not violate First Amendment because "[p]rohibiting harassment is not prohibiting speech, because harassment is not a protected speech. Harassment is not communication, although it may take the form of speech.").

[7] *Virgin Islands v. Vanterpool*, 767 F.3d 157, 160, 167 (3d Cir. 2014) (finding that defense counsel was likely ineffective for not raising a First Amendment challenge to a harassment statute because defendant's harassing written communications "fall within the category of protected speech."); *United States v. Popa*, 187 F.3d 672 (D.C. Cir. 1999) (statute barring telephonic harassment unconstitutional as applied to defendant who called government agency to crudely insult a politically-appointed public figure) (Ginsberg, J.); *United States v. Cassidy*, 814 F. Supp. 2d 574, 588 (D. Md. 2011) (conviction under federal statute prohibiting use of internet to post messages that cause substantial emotional distress unconstitutional where postings were criticism of a public figure); *Buchanan v. Crisler*, No. 337720, 2018 WL 7377259, at *13 (Mich. Ct. App. Feb. 22, 2018) ("[w]hile the government has an interest in preventing the harassment of private individuals in relation to private matters, MCL 750.411s may not be employed to prevent speech relating to public figures on matters of public concern."); *State v. Burkert*, 444 N.J. Super. 591, 601, 135 A.3d 150, 156 (App. Div. 2016), *aff'd*, 231 N.J. 257, 174 A.3d 987 (2017) (overturning criminal harassment conviction because "expressions remain protected even where the content hurts feelings, causes offense, or evokes

courts have suggested that the "speech integral to criminal conduct" exception applies when the offending speech is about private matters but have left open the possibility that it may not apply when the offending speech was about public policy or public figures.[8] This area of law, riddled with inconsistent holdings regarding whether and when speech that is "harassment" is protected by the First Amendment, cries out for clarification by this Court. Mr. Sandhu's case offers an ideal vehicle for this Court to delineate the limits of the "speech integral to

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resentment."); *People v. Marquan M.*, 24 N.Y.3d 1, 9-11, 19 N.E.3d 480, 486-87 (2014) (cyberbullying statute that criminalizes "any act of communicating . . . by mechanical or electronic means . . . with no legitimate . . . personal . . . purpose, with the intent to harass [or] annoy . . . another person" is overbroad under the First Amendment because "the First Amendment protects annoying and embarrassing speech"); *People v. Golb*, 23 N.Y.3d 455, 466–68, 15 N.E.3d 805, 813 (2014) (holding aggravated harassment statute overly vague and broad under the First Amendment where it prohibits communication meant to annoy or harass); *State v. Drahota*, 280 Neb. 627, 633-636 (2010) (finding defendant's abusive emails to former professor were protected speech).

[8] *E.g. United States v. Osinger*, 753 F.3d 939, 947 (9th Cir. 2014) (defendant's threatening text messages and creation of Facebook page containing nude photographs of ex-girlfriend were not protected by First Amendment because they were "integral to criminal conduct" and were about a private individual); *United States v. Petrovic*, 701 F.3d 849 (8th Cir. 2012) (where defendant was convicted under federal interstate stalking and threat statutes for creating website containing nude pictures and private information about ex-wife, and emailing threats to ex-wife, no First Amendment violation because communication was integral to carrying out criminal threats and the private and embarrassing information defendant revealed about his ex-wife was not about "matters of public interest") (*quoting Snyder v. Phelps*, 562 U.S. 443, 452 (2011)).

criminal conduct" exception to the First Amendment as it applies to prosecution under statutes banning harassment.

VI. Conclusion

For the foregoing reasons, this Court should grant the petition for a writ of *certiorari*.

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Respectfully submitted,

HEATHER E. WILLIAMS
Federal Defender

s/ Carolyn M. Wiggin
CAROLYN M. WIGGIN
Assistant Federal Defender

s/ Mia Crager
MIA CRAGER
Assistant Federal Defender

s/ Timothy Zindel
TIMOTHY ZINDEL
Assistant Federal Defender

Attorneys for Petitioner
KULWANT SINGH SANDHU