No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT STAHLNECKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does 47 U.S.C. § 223(a)(1)(C) violate the First Amendment when applied to political speech, as it was in this case?

STATEMENT OF RELATED CASES

United States v. Robert Stahlnecker, No. 5:19-cr-00394-SVW, U.S. District Court for the Central District of California. Judgment entered June 22, 2020.

United States v. Robert Stahlnecker, No. 20-50173, U.S. Court of Appeals for the Ninth Circuit. Judgment entered November 5, 2021.

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OPINION BELOW

The Ninth Circuit's decision can be found at *United States v. Stahlnecker*, 2021 WL 5150046 (9th Cir. 2021).

JURISDICTION

The court of appeals filed its decision on November 5, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I:

> 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.

47 U.S.C. § 223(a)(1)(C):

> Prohibited Acts Generally
>
> Whoever—in interstate or foreign communications—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[.]

STATEMENT OF THE CASE

Petitioner Robert Stahlnecker is a former Marine who honorably served our country and sustained a painful ankle injury while on active duty. He subsequently faced a protracted, years-long bureaucratic battle to receive proper medical

diagnosis and treatment. Petitioner couldn't walk, run, or sleep. By the time the Department of Veteran Affairs ("VA") finally authorized diagnosis and surgery—delayed more than a decade after his injury—he had lost 100% range of motion of his ankle. He is now 70% disabled for life, according to VA calculations. In short, Petitioner possessed legitimate grounds for addressing the VA's deficiencies in providing medical care for our country's disabled and injured veterans.

In the fall of 2019, Petitioner anonymously contacted the offices of members of Congress around the country to address veterans' issues, but his complaints fell on deaf ears. Certain calls escalated into outbursts of anger, insults, and profanity, leading to his arrest and prosecution. A jury found him guilty of violating 47 U.S.C. § 223(a)(1)(C), the telecommunications harassment statute underlying his convictions on Counts Four through Eight, which criminalizes any anonymous phone call made with the intent to abuse, threaten, or harass.

Petitioner appealed the conviction, and a panel of the Ninth Circuit affirmed in a memorandum disposition. *See* Pet. Appx. 1. In so doing, the panel turned aside Petitioner's challenge to the constitutionality of section 223(a)(1)(C), as applied to political speech, because it determined "[n]o Supreme Court or Ninth Circuit precedent has clearly established the alleged unconstitutionality of § 223 when applied in this context." Pet. Appx. 7.

The Court should grant this petition because the panel's decision chills the free exercise of political speech in the Ninth Circuit, contravening Supreme Court precedent and the law of every circuit to address the constitutionality of section 223(a)(1)(C), as applied to political speech.

REASONS FOR GRANTING THE PETITION

A. The panel decided an important federal question in a way that conflicts with relevant decisions of this Court.

Regarding the specific issue Petitioner raises here—the constitutionality of section 223(a)(1)(C), as applied to political speech—the panel disposed of this challenge on the basis of two grounds.[1] First:

> No Supreme Court of Ninth Circuit precedent has clearly established the alleged unconstitutionality of § 223 when applied in this context, so a conviction under the statute does not constitute a clear and obvious error that would justify reversal under plain error review.

Pet. Appx. 7. And second:

> The most factually analogous case in our circuit seems to support the constitutionality of § 223 as it upheld a Washington state law that resembles § 223 against a First Amendment challenge by a veteran who was convicted for repeated anonymous harassing phone calls to a

[1] The panel's analysis mixed Petitioner's two separate claims: (1) a facial constitutional challenge and (2) as-applied constitutional challenge. The other reasons the panel stated in its decision apply to the facial challenge, which Petitioner does not raise here. *See* Pet. Appx. 7-8.

> Veterans Affairs Medical Center. *See United States v. Waggy*, 936 F.3d 1014, 1015 (9th Cir. 2019).

Id. at n.7.

Both grounds fall short. The panel chose not to address *any* of Petitioner's citations to multiple Supreme Court precedents. These cases clearly establish application of the First Amendment to laws that burden protected speech—especially political speech. "Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 340 (2010). *See also Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (same). "For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United,* 558 U.S. at 340.

Without regard to this Court's precedents, the panel instead cited its own opinion in *United States v. Waggy*, 936 F.3d 1014 (9th Cir. 2019), calling it the "most factually analogous case in our circuit." Pet. Appx. 7 n. 7. In *Waggy*, a veteran was convicted for repeated anonymous harassing phone calls to a VA Medical Center under a similar (though distinguishable) Washington state law. There, the Ninth Circuit held that the state telecommunications harassment law regulated *conduct* and not *speech*; therefore, the First Amendment did not apply at all. 936 F.3d at 1020. But *Waggy* did not concern the *same* constitutional

challenge, as applied to political speech. *Waggy,* 936 F.3d at 1018-19 ("political speech," such as "complaints about the actions of a government official," "is not the situation here.")

Unlike the defendant in *Waggy*, Petitioner called Congressional offices around the country to address efforts they made toward veterans' issues, including the Choice Act legislation (veterans' health care), H.R. 2191 (veterans' access to medical marijuana), and VA hospitals. 3-ER-301–05 & 311–13. By any metric, this communication constituted political speech. The fact that Petitioner used abusive language and profanity when he became frustrated, didn't transmute Petitioner's political speech into unprotected speech. This Court has long recognized: "The language of the political arena" is "often vituperative, abusive, and inexact." *Watts v. United States*, 394 U.S. 705, 708 (1969). *See also Cohen v. California*, 403 U.S. 15, 26 (1971) ("four-letter expletive" to communicate a message is protected speech); *Lewis v. City of New Orleans,* 415 U.S. 130, 134 (1974) ("opprobrious language" is protected speech); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 746 (1978) ("even the most offensive words are unquestionably protected"); *Hess v. Indiana*, 414 U.S. 105, 107 (1973) (same).

Even where the statute on its face regulates "conduct," this Court has clearly established the rule by which the First Amendment nevertheless applies. Where "[t]he conviction quite clearly rests upon the asserted offensiveness of the words,"

First Amendment strict scrutiny review applies. *Cohen,* 403 U.S. at 18. Likewise, in *Humanitarian Law Project,* this Court reiterated this principle: where the "conduct" triggering prosecution was the content of the speech communicated, a heightened standard of review applies.

> The law here may be described as directed at conduct, as the law in *Cohen* was directed at breaches of the peace, but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message. As we explained in *Texas v. Johnson*: "If the [Government's] regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien's* test, and we must [apply] a more demanding standard." 491 U.S., at 403, 109 S.Ct. 2533 (citation omitted).

Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010). Here, Petitioner was prosecuted for the offensiveness of the words he spoke. The jury instructions confirm that conviction hinged on speech: Petitioner was to be found guilty if, in the course of the anonymous interstate phone call, "the defendant intended to use *shockingly or inappropriately harsh, coarse language* against the called parties." 1-ER-27–28 (emphasis added). In other words, the conviction quite clearly rested upon protected speech. *See supra, Cohen; Humanitarian Law Project; Watts; Lewis; Pacifica;* and *Hess.* Likewise, the prosecution confessed this state of affairs in summation:

> Having to hear these words, having to listen to this profanity, it is harsh. It is coarse. It is shocking, and it is abusive and the defendant is guilty of this offense.

4-ER-422. So too, the panel, at oral argument, recognized that "this was speech." [2]

The panel's decision claims a lack of clear controlling authority and instead extends *Waggy* to support the constitutionality of section 223(a)(1)(C), even where the "conduct" triggering prosecution was the content of the *political speech* communicated. As a result, the panel's decision chills the free exercise of political speech in the Ninth Circuit and conflicts with a long line of relevant Supreme Court decisions: *Cohen; Humanitarian Law Project; Citizens United*; *Wisconsin Right to Life*; and *Watts*, *supra.*

B. This case presents a worthy vehicle to answer the question presented.

Every other circuit to have considered an as-applied challenge to the constitutionality of section 223(a)(1)(C) has held (or at least acknowledged) that the Government may not use the federal telecommunications statute to punish political speech. *See United States v. Popa*, 187 F.3d 672, 675-78 (D.C. Cir. 1999)

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[2] Judge Nelson asked Counsel for the United States: "Why did the Government stick so closely to *this was conduct and not speech*? Am I right about that? Or did the Government somewhere recognize that *this was speech*? It just was a little strange given the precedents that they stuck so—hewed so closely to that argument." United States Courts for the Ninth Circuit, Archived Audio and Video, Oct. 19, 2021, https://www.ca9.uscourts.gov/media/video/?20211019/20-50173/ at 34:14.

(holding that section 223(a)(1)(C) violates the First Amendment, as applied to political speech); *United States v. Bowker*, 372 F.3d 365, 379-80 (6th Cir. 2004) (recognizing *Popa* and distinguishing its facts: "For example, if Bowker had been charged with placing anonymous telephone calls to a public official with the intent to annoy him or her about a political issue, the telephone harassment statute might have been unconstitutional as applied to him"); *United States v. Eckhardt*, 466 F.3d 938, 943-44 (11th Cir. 2006) (also recognizing *Popa* and distinguishing its facts: "the instant case does not involve a government official"). Granting this petition will maintain uniformity and safeguard the free exercise of political speech among all the circuits.

CONCLUSION

For these reasons, the Court should grant the petition and consider this case.

Respectfully submitted,

DATED: February 1, 2022

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