No. 19-575

In the Supreme Court of the United States

CHARTER COMMUNICATIONS, INC. AND SPECTRUM MANAGEMENT HOLDING COMPANY, LLC,
Petitioners,

v.

STEVE GALLION, ET AL.,
Respondents.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RICHARD P. BRESS
Counsel of Record
MATTHEW A. BRILL
ANDREW D. PRINS
NICHOLAS L. SCHLOSSMAN
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
rick.bress@lw.com

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

ARGUMENT

The Question Presented in this case is substantively the same as the one presented by the Government in *Barr v. American Ass'n of Political Consultants (AAPC)*, No. 19-631 (U.S. filed Nov. 14, 2019). It encompasses two interrelated questions of law: whether the Telephone Consumer Protection Act's (TCPA) broad restriction on automated calls violates the First Amendment *and*, if it does, what the appropriate constitutional remedy is. As the Government has explained, addressing severability now "ensures that, if the Court grants review and affirms" that the TCPA is unconstitutional, "it can decide the remedial issue and thereby obviate the need for further (and potentially extensive) lower-court litigation of that question." AAPC Pet. 14-15. This Court routinely grants review of questions addressing the appropriate remedy in the event a federal statute is invalidated on constitutional grounds. *See, e.g.*, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, ___ S. Ct. ____, No. 19-7, 2019 WL 5281290, at *1 (U.S. 2019) (granting certiorari); *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 (2017).

Furthermore, as the Government has also explained, addressing severability is particularly important here because it "ensure[s] that [all parties] retain a concrete stake in the outcome of the proceedings." AAPC Pet. 15. If the Court were to grant only as to the constitutional question, there would be a lack of true adversity because Charter, Facebook, *see Facebook, Inc. v. Duguid*, No. 19-511 (filed Oct. 17, 2019), and AAPC, *see AAPC*, No. 19-631 (AAPC Response Br. filed Dec. 4, 2019), would be

unable to obtain any relief irrespective of the Court's decision.

Respondent does not even attempt to address these points. Instead, the brief in opposition focuses almost entirely on whether the severability question *in isolation* warrants this Court's review. As petitioners have explained, the severability ruling is exceptionally important and creates an independent conflict with this Court's precedent and among the Courts of Appeals. But, even if that were not so, review should be granted for the reasons that the Government states and respondent largely ignores.

The only remaining question is whether this Court should grant review in this case, or hold it pending resolution of *AAPC* or *Duguid*. Granting review in this case in addition to *AAPC* and/or *Duguid* would materially benefit the Court's review. Each case presents a somewhat different factual and procedural posture, and granting review in all three cases would best ensure that no threshold complications obstruct the Court's consideration of important issues.

The only reason the Government proffers for holding rather than granting this petition is that the decision below is unpublished. But this Court routinely grants review of unpublished decisions—and, here, the distinction is particularly meaningless because the decision below incorporates in full the reasoning in *Duguid*. Unlike *Duguid*, however, this case presents solely the constitutional question, addresses all the relevant exceptions to the statute, and also presents the subsidiary question of retroactivity—preserving the Court's ability to address those important issues if it wishes.

In short, the question presented warrants this Court's review and there is no downside to granting review in all three cases, and thus ensuring maximum flexibility to address the interrelated issues presented in these cases. The petition should be granted.

A. The Severability Question Warrants This Court's Review

1. Respondent concedes that it is this Court's "usual practice" to grant review "where a court of appeals has held a federal statute unconstitutional." Opp. 8. There are good reasons for that. When a federal law is enjoined in one or more circuits, application of that law is necessarily inconsistent across the nation in precisely the same way as with a circuit conflict. And only this Court can ultimately correct any error.

Moreover, uncertainty regarding a statute's lawful application is uniquely pernicious when that statute proscribes speech, because even the *threat* of potential punishment can have a "chilling effect" on potential speakers. *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965). That concern is amplified here because it is impossible for a caller to know *ex ante* where a call or text message to a mobile device might be received, giving the Ninth Circuit's decision automatic nationwide implications. And the impact of that uncertainty is heightened further still by the specter of retroactive liability for parties who have already availed themselves of the government-backed debt exception.

Despite all this, the brief in opposition suggests that adherence to the Court's "usual practice may not be warranted" because, respondent claims, the statute (1) "remains fully operational" and (2) "offers

important public protections." Opp. 8-9. But, as the Government's petition emphasizes, the statute is not "fully operational"—rather, it has been re-written in two circuits and is under a cloud of uncertainty in every other circuit. And respondent's assertion that the severed exception affects only a "small fraction" of calls (*id.* at 2 (citation omitted)) is simply false. For example, surveys indicate that over a quarter of all debt collection calls relate to student debt—over 90% of which is government backed. *See* Consumer Financial Protection Bureau, *Consumer Experiences with Debt Collection* 19 (Jan. 2017), https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf; MeasureOne, *The MeasureOne Private Student Loan Report* 5 (June 2019), https://cdn2.hubspot.net/hubfs/6171800/assets/downloads/MeasureOne_Private_Student_Loan_Report_Q1_2019_v4_20190610.pdf.

Nor is the fact that the statute, in respondent's view, "offers important public protections," Opp. 9, a reason to deny certiorari. Whether the statute is a valid source of "public protection[]" or an unconstitutional abridgment of speech is precisely the question at issue. And the asserted "importan[ce]" of the statute only underscores the need for this Court's review.

Respondent thus provides no reason for the Court to depart from its "usual practice" in this case.

2. As the Government explains, "if this Court determines that further review of the court of appeals' constitutional holding is warranted, it would be appropriate for the Court to consider the issue of the proper remedy for any First Amendment violation as part of that review." AAPC Pet. 14. Review of the severability question would both "obviate the need"

for "potentially extensive" "lower-court litigation" should the Court affirm that the statute is unconstitutional and ensure that adversity is maintained in this proceeding. *Id.* at 14-15. The brief in opposition fails to engage with those reasons for granting review of the remedial question, and they are alone sufficient grounds to grant the Question Presented as written.

But the remedial question is also exceptionally important in its own right. As discussed below, the Ninth Circuit's decision squarely conflicts with this Court's precedent and the Third Circuit's decision in *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994). *See infra* 6-9. And not only does the decision below directly implicate the almost four thousand TCPA cases filed each year, it will also unquestionably have far-reaching consequences for First Amendment doctrine in a wide variety of other contexts as well. Respondent does not dispute that content-based speech restrictions are ubiquitous across the nation and at every level of government; nor does he dispute that the Ninth Circuit's severability rule applies to constitutional challenges to *all* such laws. Furthermore, because severability clauses are commonplace in legislation, unconstitutional content-based speech restrictions will rarely be struck down under the severability framework that now governs within the Ninth Circuit. The decision below thus reflects a sea change in the law that requires this Court's review.

B. The Ninth Circuit's Severability Ruling Conflicts With This Court's Precedent And Decisions Of The Courts Of Appeals

1. Respondent ultimately does not dispute that in *every case* in which this Court has held that a statute discriminates based on content in violation of the First Amendment, the Court has struck down the restriction, not the exception. Indeed, respondent fails to identify a single instance where this Court has ever expanded a speech restriction by severing an exception from a content-based statute that violates the First Amendment.[1] That this Court has never even discussed the possibility of curing a First

---

[1] Respondent cites four cases (at 14) for the general proposition that severability "appl[ies] to First Amendment cases," but none of them has anything to do with content-based *exceptions* at all. In two of the cases, this Court held severable language that rendered overbroad an otherwise valid restriction on speech. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 859 (1997) (excising the world "indecent" from a statute regulating internet "communication which is obscene or indecent" (citation omitted)); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 505 (1985) (holding that a court "could have excised" the word "lust" from a "statutory definition of prurience"). In another, the Court deemed severable a provision giving the mayor "unfettered discretion to deny [or condition] permit application[s]" for newsracks. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988). And in the fourth case, the Court severed one of three generally related "statutory provisions [regulating] . . . sex-related material on cable television." *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 732 (1996). In none of these cases did the Court purport to cure the First Amendment problem with a content-based speech restriction by judicially expanding its scope. Quite the contrary: in each instance, the Court struck down the challenged *restriction*, preserving other regulations that did not offend the First Amendment.

Amendment violation by expanding the scope of a speech restriction demolishes respondent's assertion that severability should be the "normal rule" in such circumstances.

Respondent dismisses this long and unbroken line of precedent as simply a "grab-bag of cases" that do not prove "that severance is impermissible." Opp. 15. He tries to explain away their holdings in two ways, but neither is persuasive.

First, respondent asserts (at 16) that the cited cases involved many content-based exceptions, not merely "one or two." But that distinction is entirely manufactured. There is no indication in any of these cases that the Court undertook some *sub silentio* severability inquiry and came to the conclusion that the number of exceptions counseled against severance.[2] And, in fact, there have been numerous instances where this Court has struck down content-based restrictions on speech on the basis of a single exception—again without even hinting that severance of the exception would be an appropriate remedy. *See Carey v. Brown,* 447 U.S. 455, 470 (1980); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 102 (1972).

In any event, the speech ban here *does* contain more than "one or two" exceptions—it is shot through with exceptions, including those for calls made by governmental entities and the numerous content-

---

[2] In *Reed v. Town of Gilbert*, for example, the Court could easily have struck down all the Sign Code's exceptions and created a broader, content-neutral ban on speech. *See* 135 S. Ct. 2218 (2015). Respondent's implicit suggestion that it did not do so because it believed the Town of Gilbert council would have preferred the entire Code to be struck down is baseless.

based exceptions created by the FCC pursuant to the statute. Even under respondent's test, therefore, the restriction here should be invalidated.

Second, respondent argues that in some of the cited cases severance "would have been an issue of local law that this Court would have had no reason to address." Opp. 16. But that misses the point. State or local law may provide the standards for a severability inquiry, but whether there is to be a severability inquiry at all—*i.e.*, whether severability is a *permissible remedy in the first place*—is a question of federal constitutional law. If the Ninth Circuit's approach were correct, the remedy in each of the cited cases would have been to remand for a severability inquiry under the applicable state or local law. Instead, every time this Court held the speech restriction must be struck down in its entirety. The only explanation for these consistent holdings is that severing a speech-promoting exception is simply not a permissible First Amendment remedy.

2. Respondent likewise cannot identify any court of appeals decision outside of the context of the TCPA and similar state laws in which a court has "remedied" an impermissibly content-based speech restriction by severing an exception. Once again, the fact that courts virtually never apply (or even consider applying) respondent's ostensibly "normal rule" of severability in this context is clear indication that it is an inappropriate remedy.

Respondent also fails to meaningfully distinguish the Third Circuit's decision in *Rappa*. Respondent stresses that *Rappa* "recognized that severing an exception to a speech restriction to restore a statute's content neutrality would be appropriate where there was specific evidence that the legislature would prefer

that outcome." Opp. 11 (emphasis omitted). But respondent fails to appreciate that the *Rappa* court found that a virtually identical severability clause did *not* constitute the requisite "specific evidence." That makes the two decisions irreconcilable. And while petitioners do not themselves advocate *Rappa*'s "specific evidence" standard, that holding represents a third alternative (a strong presumption against severability) which is nonetheless in direct conflict with the decision below.

3. Turning to the merits, respondent paints the decision below as simply applying the "conventional principle[]" that "when a court has found a constitutional defect in a statute" it should "'sever[] any "problematic portions while leaving the remainder intact."'" Opp. 14 (citations omitted). But the problem with the Ninth Circuit's holding is that it did not sever the "problematic portion" of the statute—the speech *restriction*—but instead severed a speech-promoting exception that did not itself violate the First Amendment.

Indeed, respondent ultimately does not dispute that the Ninth Circuit engaged in the "wrong inquiry" by assessing "whether the government-backed debt collection exception, standing alone, was unconstitutional," rather than "focus[ing] on whether the exception indicated that the TCPA's restrictions. . . . do not genuinely serve their asserted purposes." *Id.* at 17 (citation omitted).

Respondent maintains that had the Ninth Circuit engaged in the correct inquiry it "would have concluded that the TCPA as a whole remained constitutional." *Id.* at 18. That is not so—the TCPA's sweeping restrictions on speech are plainly not narrowly tailored to a compelling government

interest. But, in any event, respondent's argument is no defense at all of the Ninth Circuit's *severability* holding. Having found the statute's content distinction unconstitutional, severing a speech-enhancing exception was not a "remedy" to the *abridgment* of speech; it simply obscured the evidence that the "the government is [not] in fact pursuing the interest it invokes." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011).

4. Finally, respondent argues (at 20) that petitioners "offer no support for [their] assertion" that a severability remedy cannot be imposed retroactively to punish violations of a statute that was concededly unconstitutional when the alleged violations occurred. But that is precisely what this Court recognized in *Grayned v. City of Rockford,* 408 U.S. 104 (1972) and *Morales-Santana*: in both instances, the Court stated that an individual cannot be punished under a statute that was unconstitutional at the time of the alleged misconduct, even if that statute is subsequently repaired by legislative or judicial action. *See Morales-Santana*, 137 S. Ct. at 1699 n.24; *Grayned*, 408 U.S. at 107. Respondent appears to suggest these cases should be limited to "criminal conviction[s]," but cites no authority and offers no rationale for distinguishing between criminal and civil penalties in this context.[3]

---

[3] Respondent notes (at 20) that "Charter raised the [retroactivity] argument for the first time in its reply brief, and thus the argument was deemed waived." But Charter's retroactivity argument was itself a *response* to the Government's proposal that the Ninth Circuit sever the exception if it found the statute unconstitutional. Petitioners' reply brief was thus the first opportunity for them to address retroactivity. *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 701 (7th

Equally important, the fact that respondent does not dispute that the decision below *does* create retroactive liability underscores its far-reaching consequences on settled expectations—and the urgent need for this Court's review.

C. This Court Should Grant Rather Than Hold This Petition

The Government urges the Court to hold rather than grant this petition. But it provides only a single reason to do so: that the decision below is unpublished. This Court routinely grants review of unpublished decisions. *See, e.g.*, *United States v. Gundy*, 139 S. Ct. 2116 (2019). And the published/unpublished distinction is particularly meaningless here, because this case was argued in tandem with *Duguid*, the decisions were issued only weeks apart, and the decision in this case explicitly incorporates all of the relevant reasoning in *Duguid* (while addressing additional issues *Duguid* did not—including additional statutory exceptions). Under the circumstances, it would be empty formalism to treat publication alone as a basis to hold rather than grant.

Instead, this is an appropriate context for the Court to grant multiple cases in tandem. Each case is in a somewhat different factual and procedural

---

Cir. 2003) (courts "do not require an appellant to anticipate and preemptively address all defenses that an appellee might raise."). Petitioners also squarely raised retroactivity in their petition for rehearing en banc, along with a full explanation why they had no reason to raise the issue until their reply brief. And, in any event, it is simply a further argument against the Ninth Circuit's severability ruling, not a new claim or defense, and therefore ripe for this Court's review. *See Yee v. Escondido*, 503 U.S. 519, 534 (1992).

posture—and this case both arises in a concrete factual context and presents no threshold question that may obstruct the Court's review.

Furthermore, this case is the only one whose facts present the important issue of whether a severability remedy is retroactive. If the Court were to hold that severance is appropriate, it would obviate extensive litigation in the lower courts for the Court also to address whether that remedy applies to alleged misconduct during the period when the statute was concededly unconstitutional. But this case is the only one where the facts present that question for the Court's review. In order to preserve maximum flexibility, granting the petitions in all three cases is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD P. BRESS
Counsel of Record
MATTHEW A. BRILL
ANDREW D. PRINS
NICHOLAS L. SCHLOSSMAN
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
rick.bress@lw.com

Counsel for Petitioners

December 20, 2019