No. 19-631

IN THE

Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL, *et al.*,

Petitioners,

v.

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS, INC., *et al.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTERESTS OF *AMICI CURIAE*[1]

Amici are not-for-profit organizations whose missions are to advance the interests of cities, counties, and other local governments. They file this brief to protect several dimensions of the marketplace of ideas in their communities.

First, the marketplace of ideas is essential to the ability of local governments to operate effectively. Elected and appointed officials need to hear from their constituents and other important stakeholders. Unreasonable barriers to the flow of such information undermine the ability of local governments to function.

Second, elected and appointed officials are active participants in many marketplaces of ideas. They have a strong personal and professional interest in the ability to communicate undeterred by the risk of censorship or retaliation.

Third, local governments play an essential role in mediating, through regulations, the competing interests that arise in a marketplace of ideas. They have a common interest in retaining their authority to adopt and enforce even-handed limitations on conduct, even if that conduct includes an expressive component.

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Working in

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[1] Pursuant to Supreme Court Rule 37.6, these amici affirm that no counsel for a party authored this brief in whole or in part, and that no such counsel or party, other than amici or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners have consented in writing to the filing of this brief, and respondents have filed a blanket consent to the filing of *amicus curiae* briefs.

partnership with forty-nine state municipal leagues, NLC is the voice of more than 19,000 American cities, towns, and villages, representing collectively more than 200 million people. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions.

The National Association of Counties ("NACo") is the only national association that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's 3,069 counties through advocacy, education, and research.

The U.S. Conference of Mayors ("USCM") is the official nonpartisan organization of all U.S. cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 12,000 appointed chief executives and assistants, serving cities, counties, towns, and regional entities. ICMA's mission is to advance professional local government through leadership, management, innovation, and ethics.

The International Municipal Lawyers Association ("IMLA") is a non-profit, nonpartisan, professional organization consisting of more than 2,500 members. Membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments

around the country on legal issues before state and federal appellate courts.

SUMMARY OF ARGUMENT

"'It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail[.]'" *FCC v. League of Women Voters of Cal.,* 468 U.S. 394, 377 (1984) (quoting *Red Lion Broad. Co. v. FCC,* 395 U. S. 367, 390 (1969)) (brackets omitted).

There is always a danger that the particular methodology the Court selects to further that central purpose can, in practice, have the opposite of the desired effect—that is, *diminishing* protections for speech rather than preserving "an uninhibited marketplace of ideas." Broadening the meaning of "content discrimination" in *Reed v. Town of Gilbert,* 135 S. Ct. 2218 (2015), has sometimes produced that effect. Cases (including the instant one) that, before *Reed,* would have ended at the first stage of analysis, are instead misdirected to a "strict scrutiny" stage, where too many judges have diluted strict scrutiny to avoid striking down a common-sense law.

The best solution is not the one the district court chose (that is, reaching the extraordinary conclusion that strict scrutiny is satisfied in the relatively ordinary circumstances here). Nor is it the one the appellate court chose here (that is, using an extraordinary form of severance to leave a general prohibition in place while making activity Congress chose to legalize illegal by judicial fiat). The best solution is to cabin *Reed* by recognizing that purpose or function discrimination is not always content discrimination.

ARGUMENT

I. EXPERIENCE HAS DEMONSTRATED THAT *REED V. TOWN OF GILBERT* SET TOO STRICT OF A STANDARD FOR CONTENT NEUTRALITY.

Writing constitutional laws that regulate expressive conduct is a great, sometimes insurmountable, challenge. Lawmakers must simultaneously avoid:

- Discriminating on the basis of the content of speech;
- Reserving undue discretion, either implicitly (through undue vagueness) or explicitly; and
- Creating restrictions not narrowly tailored to substantially advance a significant interest, including restrictions that are substantially overinclusive (those that greatly exceed the scope of the justification) or substantially underinclusive (those that are so narrow or exception-ridden that they do little or nothing to further the asserted interest).

Trying too hard to satisfy one of these requirements is often the reason that laws are ultimately found to have violated another of the requirements. Revisors fine-tune laws to reduce or remove vagueness or overinclusivity, only to have the fine-tuning itself deemed content-based, particularly when content discrimination is defined broadly. Revisors remove exceptions and limitations to avoid the risks of content discrimination, only to fail intermediate scrutiny because the law's higher level of generality now exceeds the scope of its justification. And as this Court raises the legal standards for content neutrality and justification, these kinds of tensions only increase.

A. In many commonplace settings, lawmakers cannot satisfy *Reed*'s full description of content neutrality.

"*Reed* represents a drastic change in First Amendment jurisprudence." *Free Speech Coal., Inc. v. Attorney General of United States,* 825 F.3d 149, 160 n.7 (3d Cir. 2016) (striking down recordkeeping, labeling, and inspection requirements in the Child Protection and Obscenity Enforcement Act—which the Third, Sixth, and D.C. Circuits had upheld before *Reed*—because under *Reed*, the requirements must be deemed content-based).

Reed was a dispute about whether "temporary directional signs relating to a qualifying event" must receive the same treatment as political or ideological signs, notwithstanding *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). As this Court recognized, the Town of Gilbert's sign code "depend[ed] entirely on the communicative content of the sign." *Reed,* 135 S. Ct. at 2227. It explained:

> [The Code] defines "Temporary Directional Signs" on the basis of whether a sign conveys the message of directing the public to church or some other "qualifying event." It defines "Political Signs" on the basis of whether a sign's message is "designed to influence the outcome of an election." And it defines "Ideological Signs" on the basis of whether a sign "communicat[es] a message or ideas" that do not fit within the Code's other categories. It then subjects each of these categories to different restrictions.

Id. (record citations omitted). This Court held that the sign code imposed different restrictions on the plaintiffs' noncommercial speech based on whether

their signs displayed certain messages. *Id.* Yet this Court's opinion included the following dicta, which at a minimum suggested that distinguishing between function or purpose, by itself, is also content discrimination:

> Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, **defining regulated speech by its function or purpose**. **Both** are distinctions drawn based on the message a speaker conveys, and, therefore, **are subject to strict scrutiny.**

Id. (emphasis added).[2] However gratuitous this comment was in a case about different restrictions arising from different noncommercial messages, the Sixth and Eleventh Circuits and other courts have now treated whether a law defines regulated speech based on its function or purpose as a component of the current content-neutrality test. *See, e.g.*, *Wagner v. City of Garfield Heights*, 675 F. App'x 599, 607 (6th Cir. 2017); *O'Boyle v. Town of Gulf Stream,* 667 F. App'x 767, 768 (11th Cir. 2016) (per curiam); *Hyman v. City of Salem*,

[2] If the Court's holding and dicta in *Reed* are viewed in isolation from Justice Alito's concurrence, there are now as many as six kinds of content discrimination. They include (1) distinguishing based on "the topic discussed or the idea or message expressed"; (2) targeting speech based on its communicative content; (3) distinguishing facially based on message; or (4) "defining regulated speech by its function or purpose." 135 S. Ct. at 2226–27, 2231. In addition, what was, until *Reed*, considered in most circuits an alternative test for content neutrality under *Ward*, became avenues five and six for proving content discrimination either by showing (5) that the law "'cannot be justified without reference to the content of the regulated speech,'" or (6) that it was "adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id.* at 2227 (quoting *Ward*, 491 U.S. at 791).

396 F. Supp. 3d 666, 675 (N.D. W. Va. 2019); *Libertarian Nat'l Comm., Inc. v. Fed. Election Comm'n*, 317 F. Supp. 3d 202, 217 (D.D.C. 2018), *certified question answered*, 924 F.3d 533 (D.C. Cir. 2019), *judgment entered*, 771 F. App'x 8 (D.C. Cir. 2019), *and cert. denied*, No. 19-234, 2019 WL 6257523 (U.S. Nov. 25, 2019); *Int'l Outdoor, Inc. v. City of Troy,* No. 17-10335, 2017 WL 2831702, at *2 (E.D. Mich. June 30, 2017); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 233 (D. Mass. 2015); *State v. Bishop*, 787 S.E.2d 814, 819 n.2 (N.C. 2016).

The case here, unlike *Reed,* arises from a purpose-based or function-based distinction. The distinction in question is located in the Telephone Consumer Protection Act of 1991 ("the TCPA"). That statute generally prohibits autodialed calls ("robocalls"), but a 2015 exception to that general prohibition allows robocalls that are "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. 227(b)(1)(A)(iii); *see also* Pub. L. No. 114-74, Title III, § 301(a)(1)(A), 129 Stat. 584, 588 (2015).

As phrased, the scope of the exception turns on the purpose for which a call is made. Notably, *Reed*'s syllogism about function and purpose was stated as a tautology, because it labeled *all* laws that define regulated speech by its function or purpose as laws making facial distinctions based on the message a speaker conveys. Put another way, a literal reading of the *Reed* passage rests on a conclusive presumption that any law that differentiates based on the function or purpose of expressive conduct must, in fact, be drawing the distinction "based on the message a speaker conveys." *Reed,* 135 S. Ct. at 2227.

It is possible to imagine laws for which that leap in logic would be true. For example, if city council

members wanted to ban their challengers' signs while allowing their own signs, that city would commit the same mischief by phrasing the law by reference to purpose rather than to words, by allowing only those yard signs that serve the *purpose* of re-electing incumbents (or that further that *function*).

But it is just as easy to imagine laws for which distinctions based on function or purpose are unrelated to the speaker's message. If a county allows truck drivers to park in a certain place near a highway for the purpose of eating a meal or using a restroom, but not for the purpose of advertising whatever is written on the side of their truck, that purpose-based distinction is not at all based on the message the speaker conveys. Requiring strict scrutiny of such a regulation does nothing to cause regulations of expression to be even-handed or to discourage biased enforcement.

Indeed, if distinctions between speech based on function or purpose are automatically deemed a species of content discrimination, then very basic forms of local regulation would be impossible to perform without satisfying strict scrutiny. For example, any decent sign code includes a definition of the word "sign." Such a definition is necessary to prevent undue discretion, and to prevent the code from being mindlessly overinclusive or underinclusive. A meaningful definition of "sign" enables a sign code to avoid unintentionally regulating T-shirts or architecturally designed buildings. But it is impossible to achieve those goals without, in some way, differentiating based on function or purpose. For example, under the Dallas Code of Ordinances, "SIGN means any device, flag, light, figure, picture, letter, word, message, symbol, plaque, poster, display, design, painting, drawing, billboard, wind device, or other thing visible from outside the

premise on which it is located *and that is designed, intended, or used to* inform or advertise to persons not on that premise." Dallas, Tex., Code of Ordinances § 51A-7.102(32) (2020) (emphasis added), *available at* http://dallas-tx.elaws.us/code/coor_appsid838427_ch51a_artvii_d51a-7.100_sec51a-7.102. If strict scrutiny is triggered by any law that defines regulated speech by its function or purpose, *Reed,* 135 S. Ct. at 2227, this Court will have made it unconstitutional for towns, cities, and counties constitutionally to continue to regulate signage.

Reed's purpose/function passage has been misused by lower courts. Last year, the Northern District of West Virginia enjoined a city under the First Amendment from rejecting a ballot initiative to decriminalize marijuana possession, and ordered the city to "immediately restore Plaintiffs' initiative" to the ballot. *Hyman,* 396 F. Supp. 3d at 675. Quoting *Reed*'s description of content neutrality, including the "function or purpose" sentence, *id.* at 673, the court found that the plaintiffs had "demonstrated a likelihood of success on the merits of" their claims, *id.* at 674.

Other efforts—thus far unsuccessful—are underway to use *Reed*'s "function or purpose" sentence to take the First Amendment in troubling new directions. First, such efforts can be seen in the context of challenges to anti-harassment laws. For example, defendants charged with criminal harassment have invoked *Reed*'s "function or purpose" sentence*,* asserting (in one such case) that prohibitions on repeated and intentionally harassing conduct were content-based because they bear on the function and purpose of the message. *Ex parte Ogle,* Nos. 03-18-00207, 03-18-00208, 2018 WL 3637385, at *5 (Tex. Ct. App. Aug. 1, 2018), *petition for discretionary review refused*, 563 S.W.3d 912 (Tex.

Crim. App. 2018), *and cert. denied*, 140 S. Ct. 118 (2019). In another case, a defendant argued, based on *Reed,* that the Texas online-harassment statute was content-based because the statute "defines the regulated speech by its function or purpose, which Hall contends is 'the intent to harm, defraud, intimidate, or threaten any person.'" *Ex parte Hall,* No. 03-18-00731-CR, 2019 WL 1925902, at *4 (Tex. Ct. App. May 1, 2019), *petition for discretionary review refused* (Tex. Ct. App. July 3, 2019). Although neither argument was accepted, the appellate courts gave no specific reason for rejecting the "function or purpose" argument.

Second, such efforts can be seen in a challenge to political-contribution limits. A minor political party has "essentially ask[ed the D.C. Circuit] to conclude that *Reed*'s application of strict scrutiny to laws that 'defin[e] regulated speech by particular subject matter, . . . function[,] or purpose,' 135 S. Ct. at 2227, overruled, by implication alone, [the] application of closely drawn scrutiny" to the contribution limits of the Federal Election Campaign Act ("FECA") in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). *See Libertarian Nat'l Comm., Inc.*, 924 F.3d at 549. Although the D.C. Circuit declined to do so because *McConnell,* not *Reed,* directly controlled, *id.,* it noted that "if the Supreme Court had intended to shake the constitutional foundation of FECA's contribution-limit architecture, then it is the Supreme Court's province to say so." *Id.*

In these circumstances, the Court should take the opportunity presented here to strictly cabin the "function or purpose" sentence in *Reed,* so that laws that differentiate based on purpose or function are not categorically classified as content discrimination.

Other lower court decisions since *Reed* illustrate that the loftier language in this Court's decision is being taken in surprising directions.

Quoting *Reed* four times, a court in the Southern District of Indiana struck down a statute prohibiting the taking "a digital image or photograph of the voter's ballot while the voter is in a polling place." *Ind. Civil Liberties Union Found. Inc. v. Ind. Sec'y of State,* No. 1:15-cv-01356, 2015 WL 12030168, at *3 (S.D. Ind. Oct. 19, 2015) (emphasis omitted), *appeal dismissed,* No. 17-1356 (7th Cir. Apr. 25, 2017). The law was deemed content-based under *Reed* because "[n]ot until after [a voter's] photographs are examined as to their content will the government know whether she has committed" the offense. *Id.*

And a court in the Central District of California enjoined a city ordinance allowing an additional flag—regardless of content—to be displayed for three days before and after Memorial Day, Independence Day, and Veterans Day. *www.RicardoPacheco.com v. City of Baldwin Park,* No. 2:16-cv-09167, 2017 WL 2962772, at *7 (C.D. Cal. July 10, 2017). Relying heavily on *Reed,* the court explained that the choice of the time periods may reflect a content preference for speech concerning those holidays. *Id.* Using the same construction of *Reed,* the court also enjoined a facially neutral provision allowing more signs 45 days before and 14 days after an election, because it may reflect "a content preference for speech concerning matters related to electoral politics." *Id.* at *8.

B. To compensate for *Reed*'s overly strict standard, lower courts have softened protections needed to protect speech that lies at the heart of the First Amendment.

Nearly five years of judicial experience applying *Reed*'s harsher test for content neutrality shows that the test has turned up the pressure on courts to reach the extraordinary conclusion that a law *survives* First Amendment strict scrutiny—or to find other dubious ways to avoid invalidating common-sense regulations. Because the safeguards that are relaxed in that setting are those vital to "preserv[ing] an uninhibited marketplace of ideas in which truth will ultimately prevail," *League of Women Voters,* 468 U.S. at 377, serious harm to First Amendment values results. This is a further reason for the Court to cabin *Reed*'s unreasonably harsh standard for content neutrality.

1. *Reed* has caused courts to make "strict scrutiny" less protective.

As the heightened standard for content neutrality in *Reed* leaves few if any options for defending many laws except by surviving strict scrutiny, more laws are surviving strict scrutiny. Close examination of such decisions shows that more laws are surviving strict scrutiny because, in substance, after *Reed,* strict scrutiny under the First Amendment is becoming less strict in practice. *See, e.g., In re Subpoena 2018R00776,* 947 F.3d 148, 151 (3d Cir. 2020) (upholding, after strict scrutiny, a prior restraint—a grand jury's nondisclosure order—against a subpoena recipient forbidding it from notifying anyone of the existence of its data request); *In re Nat'l Sec. Letter*, 863 F.3d 1110, 1127 (9th Cir. 2017) (same); *Wolfson v. Concannon*, 811 F.3d 1176, 1186 (9th Cir. 2016) (en banc) (upholding restrictions

on judicial candidate fundraising after applying strict scrutiny).[3] The dilution of First Amendment strict scrutiny is a compelling reason for this Court to cabin *Reed.*

As journalist Adam Liptak noted in his article about *Reed* several weeks after its issuance, "[s]trict scrutiny, like a Civil War stomach wound, is generally fatal." *Court's Free-Speech Expansion has Far-Reaching Consequences,* N.Y. Times, Aug. 17, 2015 at A15. One of the most dangerous things a court can do in a First Amendment or Fourteenth Amendment case is to make strict scrutiny less strict. That is because the very rigor of strict scrutiny protects speech at the core of the First Amendment. Strict scrutiny provides such a high degree of certainty as to the outcome of a challenge to speech that speakers can rely on it and speak freely, instead of curtailing their speech.

This Court has allowed only two laws to survive First Amendment strict scrutiny in the modern era. *See Williams-Yulee v. Fla. Bar,* 575 U.S. 433, 437 (2015) (partial five-justice majority opinion and four-justice plurality opinion); *Burson v. Freeman,* 504 U.S. 191, 211 (1992) (plurality opinion of an eight-justice Court, with Justice Scalia concurring only in the result). Each may deserve an asterisk, because in these two rare examples there was no clear and complete majority opinion for the Court. The two decisions reflect that no more than four justices of this Court could agree on

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[3] *See also Free Speech Coal., Inc. v. Sessions*, 314 F. Supp. 3d 678, 705–15 (E.D. Pa. 2018) (holding, on remand from Third Circuit's post-*Reed* reversal of its pre-*Reed* holding, that the Child Protection and Obscenity Enforcement Act is content-based, but concluding that one, but not all, of the challenged parts of the Act survived strict scrutiny).

the reasons why a law challenged under the First Amendment should survive strict scrutiny.

Yet after *Reed*, finding strict scrutiny *satisfied* has become an increasingly popular end-run around *Reed*'s broader notion of content discrimination. At least five federal district courts in Circuits across the country have avoided invalidating the very statute challenged in this case (or a state counterpart) **by concluding that it survives strict scrutiny**. *See Gallion v. Charter Commc'ns Inc.,* 287 F. Supp. 3d 920, 931 (C.D. Cal. 2018), *aff'd on different grounds*, 772 F. App'x 604 (9th Cir. 2019), *cert. petition filed*, No. 19-575 (Nov. 1, 2019); *Mejia v. Time Warner Cable Inc.,* Nos. 15-CV-6445, 15-CV-6518, 2017 WL 3278926, at *17 (S.D.N.Y. Aug. 1, 2017); *Greenley v. Laborers' Int'l Union of N. Am.,* 271 F. Supp. 3d 1128, 1151 (D. Minn. 2017)*; Holt v. Facebook, Inc*., 240 F. Supp. 3d 1021, 1034 (N.D. Cal. 2017); *Brickman v. Facebook, Inc.,* 230 F. Supp. 3d 1036, 1049 (N.D. Cal. 2017) (on appeal, No. 17-80080 (May 9, 2017)); *cf. Victory Processing, LLC v. Fox,* 307 F. Supp. 3d 1109, 1121 (D. Mont. 2018) (Montana counterpart to TCPA), *reversed and remanded*, 937 F.3d 1218 (9th Cir. 2019). That so many courts would look at the TCPA's 2015 exception, which did not exist for the TCPA's first 23 years and was only added as a "debt collection improvement" in a budget bill,[4] and deem strict scrutiny satisfied, is a vivid reflection of how malleable First Amendment strict scrutiny has become.

Although the trend weakened in 2019 when the Fourth Circuit (in this case) and the Ninth Circuit concluded that the TCPA's 2015 exception fails strict scrutiny, *see Gallion v. United States*, 772 F. App'x

[4] Pub. L. No. 114-74, Title III, § 301, 129 Stat. at 588.

604, 605 (9th Cir. 2019) (affirming on different grounds), *cert. petition filed*, No. 19-575 (Nov. 1, 2019), *and Duguid v. Facebook, Inc.,* 926 F.3d 1146, 1149 (9th Cir. 2019),[5] those decisions did not change the final outcomes in *Greenley* or *Mejia,* which were not appealed.

2. Other courts have saved laws by adopting dubious reasons to disregard content-based exceptions.

When the constitutionality of the TCPA is challenged (based on the later-adopted 2015 exception to its general prohibition), some district courts have applied *Reed* only after disregarding the 2015 exception (thus focusing on whether the pre-amendment prohibition was content neutral). Courts' reasons for disregarding the 2015 exception vary. One court did so because the defendant's alleged violations occurred before the effective date of the 2015 exception, and equated consideration of the exception in its content-neutrality analysis with giving it retroactive effect. *Woods v. Santander Consumer USA Inc.,* No. 2:14-CV-02104, 2017 WL 1178003, at *3–5 (N.D. Ala. Mar. 30, 2017).

Another court has upheld the TCPA after effectively rewriting the 2015 exception, then applying the *Reed*

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[5] Once federal appellate courts began to hold that the TCPA's 2015 exception did not survive strict scrutiny, district courts began to draw the same conclusion. *See, e.g.*, *Katz v. Liberty Power Corp., LLC,* No. 18-CV-10506, 2019 WL 4645524, at *7 (D. Mass. Sept. 24, 2019), *certificate of appealability denied*, 2019 WL 6051442 (D. Mass. Nov. 15, 2019). In 2019 the Ninth Circuit also reversed the District of Montana's conclusion that Montana's robocall statute (which expressly "singl[ed] out only five topics of robocalling for regulation—including messages related to political campaigns") survived strict scrutiny. *Victory Processing, LLC*, 937 F.3d at 1229.

content-neutrality standard. *Mey v. Venture Data, LLC,* 245 F. Supp. 3d. 771, 792–93 (N.D. W. Va. 2017). After stating (by reference to a district court decision arising from a differently worded state statute) that all three of the TCPA's current exceptions "are based on the relationship of the speaker and recipient of the message rather than the content of the message," *id.* at 792, the court saw no need to focus on the aspects of the 2015 exception that, after *Reed,* caused so many other courts to conclude it was content-based. *Id.* at 792–93.

Last but not least, several federal courts, including the Fourth Circuit below, have applied the doctrine of severance broadly to avoid the usual consequences of their conclusions that the TCPA is content-based under *Reed* and that the 2015 exception does not survive strict scrutiny. Invoking the "Separability" clause in the Communications Act of 1934, 47 U.S.C. § 608, these courts have severed the 2015 exception to the TCPA's general prohibition from the statute. *American Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159, 170–72 (4th Cir. 2018), *cert. granted*, No. 19-631 (U.S. Jan. 10, 2020); *see also Duguid,* 926 F.3d at 1156–57; *cf. Gresham v. Swanson,* 866 F.3d 853, 855 (8th Cir. 2017) (severing content-based exception to Minnesota anti-robocall statute to preserve general prohibition).

Severance of unconstitutional provisions is a perfectly acceptable judicial response to instances in which some but not all of a law exceeds a public entity's constitutional or statutory authority,[6] or in

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[6] *See NFIB v. Sebelius,* 567 U.S. 519, 587–88 (2012) (using severance to separate provisions falling within and outside the scope of Congress's authority under the Spending Clause, leaving in place those laws authorized by that Clause); *INS v. Chadha,*

which a government body adopts both constitutional and unconstitutional prohibitions.[7] Nothing that the Court does in this case should disturb or question the availability of severance in those settings.

But in this case, the courts below used severance to transform speech that Congress *legalized* into *illegal* speech.[8] In this respect, it used severance to go in a different direction than "enjoin[ing] only the unconstitutional applications of a statute while leaving other applications in force," as in *Ayotte v. Planned Parenthood of Northern New England,* 546 U.S. 320, 329 (2006), and *Legal Services Corp. v. Velazquez,* 531 U.S. 533, 549 (2001) (where the Court severed an unconstitutional restriction on representation by LSC funding recipients in efforts to challenge an existing

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462 U.S. 919, 931–35 (1983) (using severance to separate unauthorized legislative-veto provisions from authorized exercises of legislative authority); *see also Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684–87 (1987) (same).

[7] *See Regan v. Time, Inc,* 468 U.S. 641, 654–55, 658–59 (1984) (after finding a currency-protection statute's permissible-purpose requirement unconstitutional but its size and color limitations constitutional, severing the unconstitutional requirement and leaving in place the constitutional limitations); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* 561 U.S. 477, 508–09 (2010) (where "the existence of the Board does not violate the separation of powers, but the substantive removal restrictions [of the Sarbanes-Oxley Act] do," the latter would be severed from the former and would remain in effect).

[8] This consequence of severing the later exception sets this case apart from cases where the unconstitutional exception did not make certain otherwise-illegal conduct legal, but only entitled an applicant to have a license granted upon request, *Frost v. Corporation Commission,* 278 U.S. 515, 517 (1929), or made injunctive relief unavailable against specified kinds of activity, *Truax v. Corrigan,* 257 U.S. 312, 322 (1921).

welfare law, while sparing the remaining portions of the appropriations law).

Severance of a content-based permissive exception to a prohibition on expressive conduct was considered, and rejected, by the Third Circuit in *Rappa v. New Castle County,* 18 F.3d 1043, 1072–74 (3d Cir. 1994). There, the court had upheld some, but not all, exemptions to Delaware's prohibition on billboards. One of the unconstitutional exceptions allowed advertisements of local industries and meetings. Noting that "eliminating the offending exception would mean that we would be requiring the State to restrict *more* speech than it currently does," *id.* at 1072–73, Judge Becker stated (in an opinion joined by Judge Alito) that, "to our knowledge, no court has ever mandated issuance of an injunction such as that, and we decline to be the first." *Id.* at 1073.[9]

Were this form of severance accepted and available, these amici would have a strong interest in preserving it. But as the Third Circuit's *Rappa* decision reflects, it was generally unavailable (until it became used after *Reed* to salvage anti-robocall laws after they were declared content-based under *Reed*). Its emergence is

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[9] After *Rappa,* this Court severed a less-rigorous exception to a minimum physical-presence condition to citizenship as an interim remedy for a statutory distinction embodying unconstitutional gender-based discrimination. *Sessions v. Morales-Santana,* 137 S. Ct. 1678, 1700 (2017). But *Morales-Santana* did not transform conduct that Congress legalized into illegal activity. That is because the case involved extending a benefit (citizenship to the child of an unwed citizen parent) rather than proscribing conduct. *Id*. In addition, this Court recognized in *Morales-Santana* that "the preferred rule in the typical case is to extend favorable treatment[.]" *Id.* at 1701. *Morales-Santana* does not dispel the notion that the Fourth Circuit's approach to severance was extraordinary.

a further sign that *Reed* needs to be cabined to safeguard the integrity of other facets of First Amendment protection.

II. HOW THE COURT SHOULD CABIN *REED*.

Instead of diluting strict scrutiny or considering exotic late-stage remedies such as extraordinary uses of severance, the Court should prevent such cases from needing to reach this stage by disclaiming at least one of *Reed*'s grand pronouncements (that defines all purpose- and function-based distinctions as content-based distinctions).

As explained in part above, not all laws that differentiate based on the purpose (or function) of a communication warrant strict scrutiny. If a legislative body does attempt to suppress or burden disfavored messages by shifting references to the messages themselves to the rhetoric of purpose or function, the result will still run afoul of the doctrine in effect both before and after *Reed,* which deems content-based any law adopted "because of disagreement with the message [the speech] conveys." *Ward,* 491 U.S. at 791 (quoted with approval in *Reed,* 135 S. Ct. at 2227). Thus, a distinction based on function or purpose would continue to require strict scrutiny if it is a subterfuge for disfavoring some messages over others.

CONCLUSION

For the reasons set forth above, Amici Curiae the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, the International City/County Management Association, and the International Municipal Lawyers Association respectfully request that the Court reverse the Court of Appeals' decision in this matter.

Respectfully submitted,

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