No. 19-

IN THE
Supreme Court of the United States

ROBERT M. WAGGY,
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

The federal government and 43 States have enacted laws that criminalize telephone harassment. Some of these statutes apply only to calls that lack any legitimate purpose or that contain speech traditionally outside the protection of the First Amendment, such as true threats or obscenity. But some telephone harassment statutes apply even when the caller is speaking to a government official on a matter of public concern, or criminalize speech where the caller uses particular "words" or "language" deemed offensive. *E.g.* Wash. Rev. Code § 9.61.230(1)(a). Circuits and state high courts are deeply divided, 10-8, on whether such broadly written or content-based telephone harassment laws comply with the First Amendment.

The question presented is:

Whether a statute that prohibits telephone harassment may, consistent with the First Amendment, prohibit speech on matters of public concern or impose content-based restrictions on speech.

PARTIES TO THE PROCEEDING

Robert M. Waggy, petitioner on review, was the defendant-appellant below.

The United States of America, respondent on review, was the plaintiff-appellee below.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit:

United States v. *Waggy*, No. 18-30171 (9th Cir.) (Sep. 5, 2019) (reported at 936 F.3d 1014)

United States v. *Waggy*, No. 18-30171 (9th Cir.) (Sep. 5, 2019) (per curiam) (unreported, available at 776 F. App'x 547)

U.S. District Court for the Eastern District of Washington:

United States v. *Waggy*, No. 2:17-cr-212-SAB-1 (E.D. Wash. Oct. 2, 2017) (unreported) (order denying motion for judgment of acquittal)

United States v. *Waggy*, No. 2:17-cr-212-SAB-1 (E.D. Wash. Nov. 16, 2017) (unreported) (judgment of conviction)

United States v. *Waggy*, No. 2:17-cr-212-SAB-1 (E.D. Wash. July 30, 2018) (unreported) (order affirming conviction)

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Robert M. Waggy respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit in this case.

INTRODUCTION

Robert Waggy is a disabled Marine Corps veteran who receives private medical care paid for by the Department of Veterans Affairs (VA). One day, Waggy called his local VA medical center to complain about its failure to reimburse him for $30,000 in medical bills. During the calls, Waggy became irate and used profanity. Waggy did not level true threats or incite violence; he merely petitioned—intemperately—for a redress of his grievances.

Nonetheless, the Government made a federal case out of it, successfully charging Waggy with "mak[ing] a telephone call," "with intent to harass *** or embarrass any other person," "using *** lewd, lascivious, [or] indecent language." Wash. Rev. Code § 9.61.230(1)(a). A divided panel of the Ninth Circuit affirmed Waggy's conviction, reasoning that it comported with the First Amendment because the statute punished Waggy solely for his "nonexpressive conduct" rather than for his speech. Pet. App. 10a.

That decision deepens an intractable split among the lower courts as to the constitutionality of telephone harassment statutes. The Ninth Circuit has now joined three other Circuits and six state high courts, as well as a bevy of intermediate state courts, that have upheld similar telephone harassment statutes against First Amendment challenges on the ground that they do not regulate protected speech at all. In contrast, two Circuits, six state high courts, and numerous state intermediate courts have subjected telephone harassment statutes to searching First Amendment scrutiny—and have deemed such laws unconstitutional as applied to speech, like Waggy's, that raises matters of public concern. This split is widely acknowledged, deepening, and manifestly incapable of resolution without this Court's intervention. The time has come for the Court to step in and resolve the split once and for all.

The need for this Court's intervention is especially acute because the position taken by the Ninth Circuit and the majority of lower courts is plainly inconsistent with this Court's precedents. Telephone harassment laws like the one used to prosecute

Waggy run afoul of two clear constitutional limits: They sweep in a great deal of speech on matters of public concern; and they impose content-based restrictions on speech, by barring speakers from using particular "words" or "language" the government deems offensive. Contrary to the perplexing position taken by many courts, these restrictions do not regulate "conduct" alone; they directly regulate speech itself. And, unlike with obscenity or true threats, "[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.).

This Court should not wait any longer to address this important issue. The federal government, 43 States, and numerous localities have enacted telephone harassment statutes, yet the lower courts have badly splintered as to their constitutionality—not only between jurisdictions, but between state and federal courts in the same jurisdiction. That division is intolerable both for States, which are entitled to clarity as to the scope of their authority to regulate harassment by telephone; and for individuals, whose freedom to engage in "uninhibited, robust, and wide-open" debate on a pervasive communicative medium is now subject to a pall of uncertainty. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

This issue has more than fully percolated. The Court will not encounter a cleaner vehicle to address it. And the majority of courts have answered the question incorrectly. The Court should grant the petition and reverse.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 936 F.3d 1014. Pet. App. 1a-17a. The district court's order denying a motion to dismiss the charges, its order denying a motion for judgment of acquittal, its judgment of conviction, and its order affirming the conviction are unreported. *Id.* at 22a-36a, 37a-45a, 46a-48a, 52a-66a.

JURISDICTION

The Ninth Circuit entered judgment on September 5, 2019. Pet. App. 1a-17a. On November 22, 2019, Justice Kagan granted Waggy's application for an extension of time to file a petition for a writ of certiorari until February 2, 2020. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides in pertinent part: "Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people * * * to petition the Government for a redress of grievances." U.S. Const. amend. I.

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law * * * ." U.S. Const. amend. XIV.

Section 9.61.230 of the Washington Revised Code provides in pertinent part:

> (1) Every person who, with intent to harass, intimidate, torment or embarrass any other person, shall make a telephone call to such other person:
>
> (a) Using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act; or
>
> (b) Anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues; or
>
> (c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household;
>
> is guilty of a gross misdemeanor * * * .

Wash. Rev. Code § 9.61.230(1).

STATEMENT

A. Factual Background

Robert Waggy is a Marine Corps veteran who survived three helicopter crashes while on active duty, leaving him with physical injuries, mental trauma, and a disability from post-traumatic stress disorder. Pet. App. 2a; C.A. ER 405-410. Waggy receives medical care from private doctors who are reimbursed by the VA. Pet. App. 2a, 23a; *see* C.A. ER 214-218. The VA acknowledges that it improperly failed to pay at least $30,000 of Waggy's medical bills, thereby subjecting Waggy to collections notice and forcing him to take out high-interest loans to cover the bills. C.A. ER 226, 413, 434-435; *see* Pet. App. 23a. Waggy claims that he is owed millions of

dollars by the VA and is entitled to certain VA property as recompense. Pet. App. 2a.

In April 2016, Waggy placed several calls to the Mann-Grandstaff Veterans Administration Medical Center (the "Center") in Spokane, Washington, to complain about the VA's failure to reimburse him for his medical expenses. *Id.* at 3a-5a, 23a-25a. During the first call, Waggy asked to speak to the director of the Center, and was transferred to Sandra Payne, a secretary in the director's office. *Id.* at 3a-4a. Waggy demanded that the VA provide him the money or property he was owed, and told Payne to "do [her] fucking job." *Id.* at 4a (alterations in original). When Payne asked that Waggy "be respectful and to keep the call professional," Waggy called her a "fucking cunt." Payne hung up the phone. *Id*.

Waggy immediately called back. He repeated that Payne should "do [her] fucking job," and asked her to "fucking listen." *Id.* at 5a. According to Payne, Waggy's tone was "[b]eyond elevated," and he used other unspecified "obscenities." *Id.* at 5a (alterations in original). Waggy then hung up on Payne. *Id.*

Waggy called back a third time. He reiterated his demand that the VA provide him the money or property he was owed. *Id*. When Payne said that she would "take a message and get it to the appropriate department," Waggy again called Payne a "fucking cunt." *Id*. Payne once more hung up on him. *Id.* Waggy placed four more calls to the Center, each of which went unanswered. *Id*.

B. Procedural History

1. Federal prosecutors charged Waggy with six counts of violating Washington Revised Code § 9.61.230(1), which applies to federal land through the Assimilative Crimes Act, 18 U.S.C. § 13. Pet. App. 1a-4a. Section 9.61.230(1), like many other statutes in various States, sets forth several circumstances in which it is unlawful for an individual to "make a telephone call" "with intent to harass, intimidate, torment or embarrass any other person." Wash. Rev. Code § 9.61.230(1). Subsection (a) provides that such calls are unlawful when the caller "[u]s[es] any lewd, lascivious, profane, indecent, or obscene words or language, or suggest[s] the commission of any lewd or lascivious act." *Id.* § 9.61.230(1)(a). Subsection (b) provides that such calls are unlawful when made "[a]nonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues." *Id.* § 9.61.230(1)(b). Subsection (c) makes calls unlawful when the caller "[t]hreaten[s] to inflict injury" on the person called or her family. *Id.* § 9.61.230(1)(c). In the two counts relevant here, the government charged Waggy with violating subsections (a) or (b) during his second and third calls to the VA medical center. Pet. App. 3a-5a.[1]

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[1] Before trial, the Government dismissed Count 1 and 6 of the complaint, which charged Waggy with making "threat[s]" in violation of § 9.61.230(1)(c). Pet. App. 3a-4a & n.2. Counts 2 and 5—which charged Waggy with violating subsection § 9.61.230(1)(a) during his first call, and violating subsection § 9.61.230(1)(b) by placing the four calls that went unan-

The parties consented to have the case tried by a jury before a magistrate judge. *Id.* at 4a n.3. Prior to trial, Waggy moved to dismiss the charges against him on the ground that they violated the First Amendment. The magistrate judge denied the motion, reasoning that because § 9.61.230(1) requires that speech be made with "intent to 'harass,'" it "punishes the conduct, not the words themselves." Pet. App. 55a-57a.

At trial, the focus of the Government's case was the "indecent" nature of the words that Waggy spoke to Payne while making his complaints to the VA. *See, e.g.*, *id.* at 4a-5a; C.A. ER 182, 342-345, 532. The court instructed the jury that, to convict, it would have to find that "Waggy used lewd, lascivious, indecent, or obscene words or language in the telephone call, *or* that Mr. Waggy called repeatedly." Pet. App. 26a (emphasis added). It further instructed that "indecent" means "not decent, such as: grossly improper or offensive, unseemly, inappropriate." *Id.* at 27a.

The jury returned a general verdict finding Waggy guilty of the two counts stemming from his second and third calls. Pet. App. 5a, 7a n.4. The magistrate judge then sentenced Waggy to five years' probation. *Id.* at 6a.

2. After trial, Waggy moved for a judgment of acquittal on First Amendment grounds. The magis-

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swered—were later dismissed and rejected by the jury, respectively. Pet. App. 4a-5a.

trate judge denied the motion, reasoning once again that "the statute does not punish speech *per se*, but rather *conduct* and *intentions*." *Id.* at 47a. Waggy appealed to the District Court, and it too denied the motion, agreeing that the statute "prohibits conduct, not speech." *Id.* at 29a. Waggy then appealed to the Ninth Circuit, where the State of Washington submitted an amicus brief defending its law and arguing that Waggy's conviction did not violate the First Amendment. *See* C.A. Dkt. No. 18.

3. A divided panel of the Ninth Circuit affirmed. Pet. App. 1a-17a.[2] The majority noted that, because "it is impossible to say whether the jury found [Waggy] guilty of subsection 9.61.230(1)(a) or (b) or both," "if subsection 9.61.230(1)(a) is unconstitutional, the conviction cannot be upheld." Pet. App. 7a-8a n.4 (citing *Hedgpeth* v. *Pulido*, 555 U.S. 57, 58 (2008) (per curiam); *Stromberg* v. *California*, 283 U.S. 359, 368 (1931)). But the majority concluded that Waggy's conviction was constitutional because, in its view, "section 9.61.230(1)(a) regulates nonexpressive conduct" rather than speech, and so "does not implicate First Amendment concerns." Pet. App. 10a.

The majority reached that conclusion by focusing on the statute's requirement of an "intent to harass." *Id.* at 9a. It reasoned that this requirement means that "the convictions are not for obscene speech, but rather for" the "conduct" of making calls "with the specific intent to harass." *Id*. The court acknowl-

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[2] In a separate unpublished disposition, the majority rejected Waggy's challenges to the jury instructions. Pet. App. 18a-21a.

edged that Waggy's calls "included some criticism of the government," but stated that this criticism did not "necessarily imbue his conduct with First Amendment protection" because Waggy was not "*merely* criticizing a government official"; he also "intended to harass [her]." *Id.* at 9a-10a (emphasis added). The court also drew support from decisions of "other circuits" and "many state courts" that have upheld similar telephone harassment statutes against First Amendment challenges. *Id.* at 11a-13a. The panel acknowledged that the D.C. Circuit had found a similar prosecution unconstitutional in *United States* v. *Popa*, 187 F.3d 672 (D.C. Cir. 1999), but asserted that Waggy's case is factually distinct because it involves less speech of public concern, and anyway dismissed *Popa* as "against the great weight of authority." Pet. App. 9a & n.5.

Judge Tashima dissented. He explained that Washington's "telephone harassment statute is unconstitutional as applied in this case because it criminalizes speech that is—despite its vulgarity and harassing nature—public or political discourse protected by the First Amendment." *Id.* at 14a. As Judge Tashima noted, "complaints about the actions of a government official were a significant component of Waggy's calls, which were all made to a government office during business hours at the VA." *Id.* at 16a. Judge Tashima further observed that *Popa* had reversed a conviction made under a "near-identical" statute "in strikingly similar circumstances." *Id.* at 14a-15a. Finding "*Popa*'s reasoning to be persuasive," Judge Tashima would have held "that

§ 9.61.230(1), as applied to Waggy, is unconstitutional and reverse[d] his conviction." *Id.* at 17a.

REASONS FOR GRANTING THE PETITION

I. LOWER COURTS ARE INTRACTABLY SPLIT ON THE CONSTITUTIONALITY OF TELEPHONE HARASSMENT STATUTES.

The federal government, 43 States, and numerous local governments have enacted laws criminalizing telephone harassment.[3] Some of those statutes prohibit harassing telephone calls only when they lack *any* legitimate purpose, or contain speech that is categorically outside the protection of the First Amendment, such as true threats or obscenity. *See, e.g.*, Cal. Penal Code § 653m(a); Or. Rev. Stat. § 166.090(1)(a). Other states, however, have enacted telephone harassment laws that proscribe a far broader range of speech. Some of these States provide that any telephone calls—and sometimes emails, letters, and other means of communication—are unlawful when made with the "intent to harass." *See, e.g.*, Conn. Gen. Stat. § 53a-183(a)(3); W. Va. Code § 61-8-16(a)(2). And these States often provide, as well, that harassing calls are unlawful if they use particular "words" or "language" deemed offensive, such as "lewd" or "lascivious" speech. *E.g.* Wash. Rev. Code § 9.61.230(1)(a); Mont. Code Ann. § 45-8-213(1)(a); 720 Ill. Comp. Stat. 5/26.5-2(a)(1).

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[3] *See* Office of Justice Programs, U.S. Dep't of Justice, NCJ186157, *Stalking and Domestic Violence*, at 17 (2001), *available at* https://www.ncjrs.gov/pdffiles1/ojp/186157.pdf.

Lower courts are intractably divided as to whether such telephone harassment laws are constitutional. Four Circuits, six state high courts, and numerous state intermediate courts hold that telephone harassment statutes are exempt from First Amendment scrutiny, and have upheld both state and federal telephone harassment statutes against First Amendment challenge. In contrast, two Circuits, six state high courts, and several state intermediate courts hold that telephone harassment statutes impinge on protected speech when they either sweep in speech on matters of public concern or impose content-based restrictions on speech—and have repeatedly found such laws unconstitutional, either facially or as applied to speech like Waggy's.

A. Four Circuits And Six State High Courts Hold That Telephone Harassment Statutes Do Not Regulate Speech Protected By The First Amendment.

On one side of the split, at least ten jurisdictions have held that telephone harassment statutes are exempt from First Amendment scrutiny. These courts have offered two sometimes-overlapping rationales for that conclusion. Some have held that calls made with the intent to harass are conduct, rather than speech. Others have held that "harassment" is a type of speech categorically exempt from First Amendment scrutiny. But both rationales lead to the same place: Each jurisdiction categorically deems statutes criminalizing telephone harassment constitutional.

The Second Circuit was among the first courts to adopt this approach. In *Gormley* v. *Director, Con-*

necticut State Department of Probation, it upheld the constitutionality of a Connecticut statute that made it unlawful to "'make[] a telephone call'" to another person "'with intent to harass, annoy or alarm another person.'" 632 F.2d 938, 940 & n.1 (2d Cir. 1980) (quoting Conn. Gen. Stat. § 53a-183(a)(3) (Rev. 1958, Supp. 1979)). The Second Circuit acknowledged that "courts of several states" had invalidated similar "telephone harassment statutes" as "unconstitutionally overbroad." *Id.* at 942 n.5 (citing cases). But the Second Circuit "decline[d]" to follow those holdings, reasoning that the statute "regulates *conduct*, not mere speech" because it merely prohibits "the making of a telephone call, with the requisite intent and in the specified manner." *Id.* at 941-942 & n.5. Judge Mansfield concurred "on the limited ground" that the statute would be constitutional if limited to "speechless calls or to obscene or threatening calls"; otherwise, he said, it would "clearly be void for overbreadth." *Id.* at 943-944 (Mansfield, J., concurring).

The Fourth Circuit upheld a telephone harassment statute for similar reasons in *Thorne* v. *Bailey*, 846 F.2d 241 (4th Cir. 1988). There, it considered the constitutionality of a West Virginia statute that bars a person from "'[m]ak[ing] repeated telephone calls, during which conversation ensues, with intent to harass any person at the called number.'" *Id.* at 242 & n.1 (quoting W. Va. Code § 61-8-16(a)(4) (1984)). The West Virginia Supreme Court of Appeals had previously upheld this statute by an equally divided vote, on the ground that "harassment is not a protected speech," but rather "conduct." *State* v. *Thorne*,

333 S.E.2d 817, 819-820 (W. Va. 1985) (plurality opinion) (citation omitted); *see id.* at 821 n.1, 824-825 (Miller, C.J., dissenting). The Fourth Circuit "agree[d]" with that logic, reasoning that the West Virginia statute "prohibits conduct and not protected speech." *Thorne*, 846 F.2d at 243. Judge Butzner dissented: Echoing Judge Mansfield's concurrence, he explained that the West Virginia statute is unconstitutionally overbroad because "[c]onversation is an essential element of the crime the statute punishes." *Id.* at 245-246 (citing *Gormley*, 632 F.2d at 944-945 (Mansfield, J, concurring)).

The Eleventh Circuit has also upheld a broad telephone harassment law, but on a different rationale. In *United States* v. *Eckhardt*, it considered whether a teamster could be prosecuted under the federal telephone harassment statute for making a series of calls to his local union. 466 F.3d 938, 942 (11th Cir. 2006). As relevant, that statute makes it a crime for a person to "make[ ] a telephone call or utilize[ ] 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." 47 U.S.C. § 223(a)(1)(C). The Eleventh Circuit upheld the defendant's prosecution on the ground that harassment, like "obscenity," is a "type of speech * * * not constitutionally protected." *Eckhardt*, 466 F.3d at 943-944 (citation omitted). And it held that was so even though the defendant sometimes (albeit "rarely") used his phone calls to complain of "alleged corruption" in the union and other "matters of public concern." *Id.* at 944.

The high courts of Pennsylvania, Texas, Kansas, Montana, South Carolina, and West Virginia have all upheld telephone harassment statutes on similar grounds. In *Commonwealth* v. *Hendrickson*, the Pennsylvania Supreme Court upheld Pennsylvania's telephone harassment statute—which prohibited telephone calls made "with intent to harass another" containing "any lewd, lascivious, or indecent words or language," 18 Pa. Cons. Stat. § 5504(a)(1)[4]—on the theory that it "seek[s] to regulate harassing conduct as opposed to pure speech," even where (as in that case) the defendant's calls "contained political speech." 724 A.2d 315, 317-318 (Pa. 1999) (citing *Thorne*, 846 F.2d at 243-244). So too in *Scott* v. *State*, the Texas Court of Criminal Appeals held that Texas' telephone harassment statute—which prohibits making "repeated telephone communications" "with intent to harass," Tex. Penal Code Ann. § 42.07(a)(4)—"does not implicate the free-speech guarantee of the First Amendment," because it regulates "conduct" rather than "communicative" speech. 322 S.W.3d 662, 669-670 (Tex. Crim. App. 2010), *abrogated in part on other grounds by Wilson* v. *State*, 448 S.W.3d 418 (Tex. Crim. App. 2014). Four other state high courts have reached a similar conclusion. *See State* v. *Thompson*, 701 P.2d 694, 697-699 (Kan. 1985) (holding that "obscene, threat-

[4] This statue was repealed in 2002, but a substantively identical prohibition was then added to Pennsylvania's more general harassment statute; that new regulation is even broader and reaches all communications, whether or not by telephone. *See* 18 Pa. Cons. Stat. § 2709(a)(4).

ening, or harassing phone calls * * * find no protection under the First Amendment"); *State* v. *Dugan*, 303 P.3d 755, 772 (Mont. 2013) (similar); *State* v. *Brown*, 266 S.E.2d 64, 65 (S.C. 1980) (similar); *State* v. *Calvert*, No. 15-0195, 2016 WL 3179968, at *5 (W. Va. June 3, 2016) (reaffirming the court's holding in *Thorne*, 333 S.E.2d at 819).

The intermediate courts of several states have issued similar rulings. *See, e.g.*, *State* v. *Camp*, 295 S.E.2d 766, 768 (N.C. Ct. App.) (upholding North Carolina telephone harassment statute on the ground that it "prohibits conduct rather than speech"), *appeal dismissed for want of substantial question*, 299 S.E.2d 216 (N.C. 1982); *State* v. *Hagen*, 558 P.2d 750, 753 (Ariz. Ct. App. 1976) (holding that harassing speech by telephone statute "find[s] no protection under the First Amendment"). Most pertinent here, the Washington Court of Appeals has held that Washington's telephone harassment statute is constitutional because it "regulates conduct with minimal impact on speech," and because "the implicated speech receives little or no constitutional protection." *State* v. *Dyson*, 872 P.2d 1115, 1120 (Wash. Ct. App.), *review denied*, 886 P.2d 1133 (Wash. 1994).

In the decision below, the Ninth Circuit expressly aligned itself with these courts. Washington's telephone harassment statute provides—in terms nearly indistinguishable from the laws upheld by other States and Circuits—that telephone calls are illegal if they are made "with intent to harass, intimidate, torment or embarrass" the recipient, and they contain "any lewd, lascivious, profane, indecent, or

obscene words or language." Wash. Rev. Code § 9.61.230(1)(a). Agreeing with the "other circuits" and the "many state courts" that have "uph[eld] telephone harassment statutes against First Amendment challenge," the panel majority reasoned that this statute "regulates nonexpressive conduct and does not implicate First Amendment concerns." Pet. App. 10a-13a. And that was so, the panel maintained, even though Waggy "included some criticism of the government" in his calls. *Id.* at 9a. In its view, Waggy "was convicted for his conduct, not for speech protected by the First Amendment." *Id.* at 13a.

B. Two Circuits And Six State High Courts Hold That Telephone Harassment Statutes Are Either Facially Invalid Or Unconstitutional As Applied To Speech On Matters Of Public Concern.

In sharp contrast, two Circuits, six state high courts, and a number of state intermediate courts hold that telephone harassment statutes regulate speech protected by the First Amendment. And, as a consequence, they have either invalidated such statutes as facially overbroad; held that they may not constitutionally be applied to speech, like Waggy's, that addresses matters of public concern; or adopted limiting constructions of those laws to avoid serious constitutional concerns.

The leading case on this side of the split is *United States* v. *Popa*, 187 F.3d 672 (D.C. Cir. 1999), which the panel below disagreed with and dismissed as inconsistent with the "great weight of authority," Pet. App. 9a n.5. In *Popa*, the defendant placed a

series of calls to the office of Eric Holder, then the U.S. Attorney for the District of Columbia, in which Popa mixed racial epithets with complaints that the office had "violated * * * [his] rights." 187 F.3d at 673-674. The Government prosecuted Popa under the federal telephone harassment statute, charging him with making calls "without disclosing [his] identity and with intent to annoy, abuse, threaten, or harass." *Id.* at 674 (quoting 47 U.S.C. § 223(a)(1)(C)).

The D.C. Circuit began by observing that that this statute "appears" to be content-based, because its "prohibition depend[s] upon the content of the call." *Id.* at 675. But the court found that it did not need to resolve that question, because the law regulates both "'speech' and 'nonspeech' elements," and so is subject to at least "intermediate scrutiny." *Id.* at 676 (citation omitted); *see also id.* at 679 (Randolph, J., concurring) (agreeing that "[t]o characterize anonymous telephone calls intended to annoy or harass as 'conduct' rather than speech is to confuse the analysis"). It concluded that application of the statute to Popa could "not survive even that less searching inquiry." *Id.* at 676 (majority opinion).

The principal problem, the D.C. Circuit explained, was that the statute extends to a broad swathe of "public or political discourse." *Id.* at 676-677. Among other things, the court noted that the law applies to calls in which "the caller has an intent to verbally 'abuse' a public official for voting a particular way on a public bill, 'annoy' him into changing a course of public action, or 'harass' him until he addresses problems previously left unaddressed." *Id.* Yet "the statute could have been drawn more nar-

rowly, without any loss of utility to the Government, by excluding from its scope those who intend to engage in public or political discourse." *Id.* at 677. For instance, while the Government may have a legitimate interest in preventing callers from "tying up someone's line with a flood of calls," "[p]unishment of those who use the telephone to communicate a political message is obviously not 'essential to the furtherance of that interest.'" *Id.* (quoting *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)). That meant that Popa's conviction could not stand: "complaints about the actions of a government official were a significant component of his calls," and so the statute was "unconstitutional as applied to his conduct." *Id.* at 677-678.[5]

The Third Circuit embraced similar reasoning in *Government of Virgin Islands* v. *Vanterpool*, 767 F.3d 157 (3d Cir. 2014). There, the Third Circuit considered the prosecution of Earl Vanterpool, who was convicted of violating the Virgin Islands' telephone harassment statute when he made harassing calls to

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[5] The Sixth Circuit has indicated that it shares this view: It "acknowledge[d]" that the federal telephone harassment statute "may have unconstitutional applications," such as where a person is "charged with placing anonymous telephone calls to a public official with the intent to annoy him or her about a political issue." *United States* v. *Bowker*, 372 F.3d 365, 379 (6th Cir. 2004) (citing *Popa*, 187 F.3d at 677-678), *vacated on other grounds*, 543 U.S. 1182 (2005). But the court determined that any such overbreadth "can be cured on a case-by-case basis" through as-applied challenges. *Id.* at 380 (citation omitted); *see People* v. *Taravella*, 350 N.W.2d 780, 784 (Mich. Ct. App. 1984) (similar).

an ex-girlfriend. *Id.* at 160; *see* V.I. Code Ann. tit. 14, § 706(1) (criminalizing the actions of anyone who "with intent to harass or alarm another person * * * communicates * * * by telephone * * * in a manner likely to harass or alarm"). The Third Circuit explained that Vanterpool's communications "are the kind of *communicative* speech that implicates the First Amendment," because they "do not fall into one of the defined categories of unprotected speech such as defamation, incitement, obscenity, or child pornography." *Vanterpool*, 767 F.3d at 167 (emphasis in original). Moreover, the court observed that the statute "is especially repugnant to the First Amendment" because "unpleasant discourse * * * still falls under the protection of the First Amendment" even if it is "annoy[ing]." *Id.* at 167-168. Accordingly, the court found that the statute had to be "carefully tailored to avoid constitutional vulnerability," and "would likely have been found unconstitutional" had Vanterpool's attorney raised the issue in the district court. *Id.* at 168. But because his attorney did not do so, the court remanded the case to determine whether that oversight constituted deficient performance. *Id.* at 169.[6]

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[6] The *Vanterpool* court distinguished an earlier Third Circuit precedent—*United States* v. *Lampley*, 573 F.2d 783 (3d Cir. 1978)—in part because the harassment statute the Third Circuit upheld in *Lampley* regulated "only conduct '*solely* intending to harass'" and hence did not sweep in as much protected speech as the statute at issue in *Vanterpool* or in this case. *Vanterpool*, 767 F.3d at 167 (emphasis added).

The New York Court of Appeals reached a similar conclusion in *People* v. *Golb*, 15 N.E.3d 805 (N.Y. 2014). It invalidated as unconstitutionally overbroad New York's telephone harassment statute, which prohibited communicating "'by telephone'" "with intent to harass, annoy, threaten or alarm another person * * * in a manner likely to cause annoyance or alarm." *Id.* at 813 (quoting N.Y. Penal Law § 240.30(1)(a)). The Court of Appeals explained that "any proscription of pure speech must be sharply limited to words which, by their utterance alone, inflict injury or tend naturally to evoke immediate violence." *Id.* (citation omitted). Because the law was not restricted to such speech, but instead barred "any communication that has the intent to annoy," the court concluded that it lacked "the constitutionally necessary limitations on its scope." *Id.* at 813-814 (citation omitted); *see People* v. *Marquan M.*, 19 N.E.3d 480, 487 (N.Y. 2014) (reaffirming that "the First Amendment protects annoying and embarrassing speech").

In *People* v. *Klick*, the Illinois Supreme Court applied similar logic to invalidate Illinois's telephone harassment statute. 362 N.E.2d 329, 330, 332 (Ill. 1977). That law made it a crime when someone, "[w]ith intent to annoy another, makes a telephone call." *Id.* at 330 (quoting Ill. Rev. Stat. ch. 38, par. 26-1(a)(2) (1973)). The court explained that this statute "sweeps too broadly," because there are "many instances when * * * one may communicate with another with the possible intention of causing a slight annoyance in order to emphasize an idea or opinion, or to prompt a desired course of action that

one is legitimately entitled to seek." *Id.* at 331. For instance, the court observed that a call may be "made * * * by an irate citizen, perturbed with the state of public affairs, who desires to express his opinion to a public official." *Id.* at 331-332. "First [A]mendment protection is not limited to amiable communications," the court concluded, and so Illinois' law was impermissibly overbroad. *Id.* at 332.[7]

The high courts of New Hampshire, Iowa, Colorado, and Missouri have all issued similar rulings. In *State* v. *Brobst*, the New Hampshire Supreme Court invalidated a statute "virtually identical" to the Illinois law struck down in *Klick*, explaining that it too "cover[ed] a substantial amount of protected First Amendment speech." 857 A.2d 1253, 1255-57 (N.H. 2004). In *State* v. *Fratzke*, the Iowa Supreme Court held Iowa's telephone harassment statute unconstitutional as applied to a communication complaining of a state trooper's conduct, on the ground that "no language short of 'fighting words' may serve to defeat or criminalize the sender's message" where it has a "legitimate purpose." 446 N.W.2d 781, 785 (Iowa 1989). So too in *Bolles* v. *People*, 541 P.2d 80, 82-83 (Colo. 1975) (striking down Colorado's telephone harassment statute as overbroad), and *State* v. *Vaughn*, 366 S.W.3d 513, 519-520 (Mo. 2012) (invalidating Missouri's telephone harassment statute on the basis that it could have a "chilling effect upon

[7] The Illinois Legislature subsequently narrowed the statute to apply only to true threats, and the Illinois Supreme Court upheld the revised statute against First Amendment challenge. *See People* v. *Parkins*, 396 N.E.2d 22 (Ill. 1979).

political speech as well as everyday communications").

Intermediate courts in several States have struck down telephone harassment statutes on similar grounds. *See, e.g.*, *State* v. *Peterson*, --- N.W.2d ---, 2019 WL 6691516, at *5-6 (Minn. Ct. App. Dec. 9, 2019) (invalidating Minnesota's telephone harassment statute as overbroad); *Provo City* v. *Whatcott*, 1 P.3d 1113, 1115 (Utah Ct. App. 2000) (same, with respect to Utah telephone harassment statute); *State* v. *Dronso*, 279 N.W.2d 710, 714 (Wis. Ct. App. 1979) (same, for Wisconsin's telephone harassment statute).

Finally, several jurisdictions have adopted limiting constructions of their telephone harassment statutes to avoid the same constitutional concerns identified by courts on the latter side of the split. Some states have construed their telephone harassment statutes as limited to "fighting words," "true threats," "obscenity," or other recognized categories of unprotected speech to avoid constitutional problems. *See, e.g.*, *State* v. *Moulton*, 78 A.3d 55, 71 (Conn. 2013). And others have construed their statutes as limited to calls whose purpose is *solely* to harass, so as to exclude calls that include some "legitimate purpose," such as making complaints to the government. *See, e.g.*, *Bachowski* v. *Salamone*, 407 N.W.2d 533, 539 (Wis. 1987); *McKillop* v. *State*, 857 P.2d 358, 364-365 (Alaska Ct. App. 1993); *Galloway* v. *State*, 781 A.2d 851, 878-880 (Md. 2001); *State* v. *Stephens*, 807 P.2d 241, 244 (N.M. Ct. App. 1991).

* * * *

In short, the lower courts are intractably divided over the constitutionality of telephone harassment statutes—both facially and as applied to individuals like Waggy. Rather than abating over time, moreover, that split has dramatically deepened. In recent years, *nine* jurisdictions have newly joined the fray, and split 4-5 in their views: the Ninth Circuit (2019), the Eleventh Circuit (2011), and the high courts of Texas (2010) and Pennsylvania (1999) have joined one side of the split; whereas the high courts of New York (2014), Missouri (2014), and New Hampshire (2004), and the Third Circuit (2014) and the D.C. Circuit (1999) have joined the other. Justice White identified the need for the Court to resolve this question in 1980, when the split was in its infancy and only "state appellate courts" had weighed in on the latter side of the split. *Gormley* v. *Dir., Conn. State Dep't of Adult Probation*, 449 U.S. 1023, 1024-25 (1980) (White, J., dissenting from denial of certiorari) (noting the "obvious tension between our prior cases and the judgment below"). In the intervening decades, that split has severely worsened, making clear that it has no prospect of resolving itself without this Court's intervention.

Furthermore, the split was outcome-determinative in this case. Washington's telephone harassment statute is materially indistinguishable from the statutes that the high courts of New York, Illinois, New Hampshire, and Colorado struck down as facially unconstitutional, and that the Third Circuit held was "likely" unconstitutional. *See supra* pp. 19-22. Yet whereas those courts found that this requirement rendered the laws unconstitutional, the

Ninth Circuit—like other courts on its side of the split—held that this "specific intent" requirement placed the statute outside the ambit of the First Amendment entirely. *See* Pet. App. 9a, 11a.

Courts on the other side of the split would also have found the Washington statute unconstitutional specifically as applied to Waggy. The D.C. Circuit and several state high courts have held that it is unconstitutional to apply telephone harassment statutes to calls in which individuals discuss matters of political or public concern, such as complaints about the conduct of a government official. *See, e.g.*, *Popa*, 187 F.3d at 677-678; *Fratzke*, 446 N.W.2d at 785. And, here, "despite its vulgarity and harassing nature," Waggy's calls entailed "complaints about the actions of a government official." Pet. App. 14a, 16a (Tashima, J., dissenting). In the calls that served as the basis for his conviction, Waggy demanded delivery of the "property" and "money" he believed he was owed by the VA in compensation for his unpaid medical bills, and asked an official at a VA center to "do [her] fucking job and to fucking listen." *Id.* at 4a-5a (majority opinion). That speech, while intemperate, addressed matters of public concern, and did so with greater clarity than the language several other courts have found protected. *See, e.g.*, *Popa*, 187 F.3d at 673-674 (describing "the most nearly lucid passage" in which the caller expressed his grievance using racial epithets); *see also Brobst*, 857 A.2d at 1255-57; *Klick*, 362 N.E.2d at 331; *Bolles*, 541 P.2d at 82-83.

Nor would Waggy's speech fall within any of the limiting constructions that courts on the other side of

the split have placed on telephone harassment statutes to avoid First Amendment problems. It did not involve fighting words or true threats, as illustrated by the prosecution's voluntary dismissal of two counts that would have charged him with threatening speech. *See supra* p. 7 n.1. And as even the majority acknowledged, Waggy's speech was not made *solely* for the purpose of harassment. Pet. App. 9a (admitting that Waggy "included some criticism of the government" in his calls). Had Waggy's case arisen in any of at least eight other jurisdictions, his conviction would have been struck down as unconstitutional. This Court should grant certiorari and ensure that regional differences in courts' understanding of the First Amendment do not subject some individuals to prosecution for speech that other courts would deem constitutionally protected.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S FIRST AMENDMENT PRECEDENTS.

This Court should also grant certiorari because the decision below, and the numerous decisions that have applied similar logic to uphold telephone harassment statutes, are flatly irreconcilable with this Court's precedents.

1. The First Amendment guarantees a marketplace of ideas that is "uninhibited, robust, and wide-open." *New York Times Co.*, 376 U.S. at 270. To safeguard that protection, this Court has time and again held that governments may not demand that individuals speak in a way that is "palatable" to their listeners. *Cohen* v. *California*, 403 U.S. 15, 25 (1971). Ideas—

even powerful ideas—may be expressed through language that is "vehement, caustic, and sometimes unpleasantly sharp," *New York Times Co.*, 376 U.S. at 270, or in ways that are "upsetting or arouse[] contempt," *Snyder* v. *Phelps*, 562 U.S. 443, 458 (2011). That such language may shock or annoy does not remove it from First Amendment protection. On the contrary, this Court has consistently overturned prosecutions for intemperate or offensive speech: It has invalidated the prosecution of a man who wore a jacket reading "Fuck the Draft," *Cohen*, 403 U.S. at 16; vacated a damages award against protestors who picketed a military funeral with signs stating "God Hates Fags," *Snyder*, 562 U.S. at 448, and struck down an ordinance that barred any speech "annoying to persons passing by," *Coates* v. *City of Cincinnati*, 402 U.S. 611, 611-612 (1971). "One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Baumgartner* v. *United States*, 322 U.S. 665, 673-674 (1944).

Washington's telephone harassment statute—like the similarly broad statutes enacted by several other states—contravenes these bedrock principles. Indeed, the law runs afoul of at least two separate strands of this Court's First Amendment doctrine.

First, Washington's statute restricts speech on "matters of public concern." *Snyder*, 562 U.S. at 451-452 (citation omitted). As the D.C. Circuit observed of a closely similar statute, this law bars "calls to public officials where * * * the caller has an intent to

verbally '[embarrass]' a public official for voting a particular way on a public bill * * * or 'harass' him until he addresses problems previously left unaddressed." *Popa*, 187 F.3d at 676-677. That is precisely how the statute was applied here: Waggy was prosecuted for calling his local VA office to express his severe dissatisfaction that the government had not reimbursed his medical care or responded appropriately to his complaints. Pet. App. 2a, 4a-5a. These complaints about the conduct and responsiveness of the government, made to a government official at a government office, are core political speech. *Id.* at 14a, 16a-17a (Tashima, J., dissenting); *see, e.g.*, *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972). They are accordingly entitled to "special protection" under the First Amendment. *Snyder*, 562 U.S. at 452 (quoting *Connick* v. *Myers*, 461 U.S. 138, 145 (1983)).

Second, Washington's telephone harassment law is impermissibly content-based. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States* v. *Stevens*, 559 U.S. 460, 468 (2010) (citation omitted); *see also Brown* v. *Entm't Merchs. Ass'n,* 564 U.S. 786, 790-791 (2011); *Ashcroft* v. *ACLU*, 535 U.S. 564, 573 (2002). Yet the Washington statute expressly prohibits speech based on the speaker's "words" and "language": It states that harassing telephone calls are unlawful where they are made "[u]sing any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act." Wash. Rev.

Code § 9.61.230(1)(a). Thus, a person who places a harassing telephone call and uses "lewd" language is guilty of a gross misdemeanor, whereas a person who makes an otherwise identical call but sticks to the Queen's English is not. That is a textbook content-based restriction. *See, e.g.*, *FCC* v. *Pacifica Found.*, 438 U.S. 726, 744 (1978) (deeming it "clear" that a restriction on "indecent language" is "based in part on its content"); *Cohen*, 403 U.S. at 26 (the government cannot "forbid particular words without also running a substantial risk of suppressing ideas in the process"); *cf. Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2297 (2019) (invalidating prohibition on "disparag[ing]" trademarks).

Because of its dual constitutional defects, Wash. Rev. Code § 9.61.230(1)(a) cannot constitutionally be applied to Waggy unless it "satisf[ies] strict scrutiny"—that is, it "must be narrowly tailored to serve a compelling government interest." *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 469 (2009). But Washington's statute cannot survive heighted judicial scrutiny of any kind. Pet. App. 17a (Tashima, J., dissenting). Even if the aims that the law seeks to advance—avoiding unwanted calls and preventing harassment—are considered compelling, the Ninth Circuit and the Government have offered no reason why its impositions on protected speech are "narrowly tailored" to achieve those aims. Many states have limited their telephone harassment statutes to unprotected categories of speech, like threats and obscenity, without evident harm to their effectiveness. *See supra* p. 23. Other states have drafted or construed their statutes so that they prohibit only

those calls that have *no* legitimate purpose, thereby excluding public speech entirely from their scope. *See id*. And still others—including Washington, in a separate subsection of the same statute—have enacted time, place, and manner restrictions that appear to achieve most if not all of the law's aims. *See, e.g.*, Wash. Rev. Code § 9.61.230(1)(b).[8] That these narrower measures were available to Washington, and have in fact been enacted by many jurisdictions, defeats any contention that Washington needed to engage in content discrimination or censor political speech to achieve its aims.

2. The Ninth Circuit and other lower courts have offered several rationales why telephone harassment statutes like Washington's—and their application to individuals like Waggy in particular—are exempt from First Amendment scrutiny. None passes muster.

Several lower courts, including the Ninth Circuit, have reasoned that telephone harassment laws like Washington's are exempt from First Amendment scrutiny because, by barring only those communications with an "intent to harass," these laws restrict "nonexpressive conduct" rather than speech. Pet. App. 10a-13a (citing cases). That is a puzzling characterization. The fact that speech is uttered with a particular intent does not transform it into

[8] Notably, the jury found Waggy not guilty of the only charge based entirely on Wash. Rev. Code § 9.61.230(1)(b), which stemmed from Waggy's unanswered calls. Pet. App. 3a, 5a, 51a.

unprotected conduct; a political protest made for vindictive reasons is no less protected than one made for lofty reasons. *See FEC* v. *Wisconsin Right To Life, Inc.*, 551 U.S. 449, 468 (2007) (lead op.) (A "speaker's motivation is entirely irrelevant to the question of constitutional protection." (citation omitted)). Further, telephone harassment laws sweep into their prohibition speech that is plainly communication—namely, the calls themselves, and the ideas and thoughts the caller wishes to express through them. *See Cohen*, 403 U.S. at 18 (holding that a conviction that punishes "the fact of communication" is a restriction "upon 'speech' " (citation omitted)). That is particularly clear in the case of Washington's law, which expressly restricts the "words [and] language" a caller may utter. Wash. Rev. Code § 9.61.230(1)(a). If a restriction on the use of particular words is not a speech restriction, then nothing is. *See* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 1039 (2016).

In any event, even if a caller's harassing intent were conceived of as conduct separable from the speech itself, that would not exempt Washington's telephone harassment statute from First Amendment scrutiny. It would simply mean that the law regulates " 'speech' and 'nonspeech' elements [that] are combined in the same course of conduct," and so must satisfy intermediate rather than strict scrutiny. *O'Brien*, 391 U.S. at 376-377; *see Popa*, 187 F.3d at 676. As Judge Tashima explained below, the law cannot meet even that diminished standard. Pet.

App. 17a (Tashima, J., dissenting); *see supra* pp. 10-11.

Some lower courts have also suggested that "harassment" is a type of speech categorically outside the ambit of the First Amendment. *See, e.g.*, *Eckhardt*, 466 F.3d at 943-944. That too is wrong. "'From 1791 to the present' * * * the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,'" and harassment is not one of them. *Stevens*, 559 U.S. at 468 (listing obscenity, defamation, fraud, incitement, and speech integral to criminal conduct as traditionally proscribable categories). Nor is harassing speech "part of a long (if heretofore unrecognized) tradition of proscription." *Entm't Merchants*, 564 U.S. at 792. To the contrary, this Court has repeatedly held that the First Amendment protects speech that is "annoying," *Coates*, 402 U.S. at 615, or that is "offensive and embarrassing to those exposed to" it, *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 701 (1977); *see Street* v. *New York*, 394 U.S. 576, 592 (1969) ("[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."). Simply put, "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe*, 240 F.3d at 204 (Alito, J.).

Nor is there a categorical exclusion from the First Amendment for speech that is "lewd, lascivious, profane, [or] indecent." Wash. Rev. Stat. § 9.61.230(1)(a). Although "obscenity" falls outside the protection of the First Amendment, "indecency" does not. *See Reno* v. *ACLU*, 521 U.S. 844, 874 (1997). And the Washington courts have expressly

held that the Washington telephone harassment statute prohibits "'indecent' speech," as distinguished from obscenity. *Dyson*, 872 P.2d at 1119-20; *see* Pet. App. 27a (instructing Waggy's jury that the law prohibits "indecent" speech, and that "indecent" means "not decent, such as: grossly improper or offensive, unseemly, inappropriate").

Indeed, it was precisely because the First Amendment does protect indecent speech that a three-judge district court imposed a limiting construction on a federal telephone harassment statute much like Washington's. In *ApolloMedia Corp.* v. *Reno*, the district court was faced with a provision of the federal telephone harassment statute that, in terms nearly identical to Washington's law, prohibited calls made with "intent to * * * harass" that included "obscene, lewd, lascivious, filthy, or indecent" language. 19 F. Supp. 2d 1081, 1086 & n.7 (N.D. Cal. 1998) (quoting 47 U.S.C. § 223(a)(1)(A)(ii) (West Supp. 1997)). Recognizing that there would be "serious doubts as to the[] constitutionality" of this statute if it reached indecent speech, the court construed the law as limited to obscene speech. *Id.* at 1089-96 (citation omitted). This Court then summarily affirmed that judgment. 526 U.S. 1061 (1999).

Washington has not imposed a similar limiting construction on its statute. Like other state telephone harassment statutes, it thus cuts well into the category of protected speech and cannot survive the scrutiny the First Amendment requires.

III. THE QUESTION PRESENTED IS OF SUBSTANTIAL IMPORTANCE.

The question presented is in dire need of this Court's review. The large majority of states, as well as the federal government and many local jurisdictions, have enacted laws prohibiting telephone harassment. *See supra* p. 11. These laws directly regulate one of the principal means by which Americans communicate—over the phone—to combat a form of misconduct that, by one estimate, affects over a million individuals each year.[9] In this fraught area, it is of paramount importance that the law strikes a constitutionally permissible balance between the right to speak and the right to be free from harassment.

Lower courts, however, have demonstrably failed in that task. As the pervasive and intractable division in the lower courts makes clear, they cannot even agree as to whether telephone harassment statutes are subject to First Amendment scrutiny in the first place. And many courts have upheld these statutes on deeply spurious grounds—reclassifying speech as conduct, for instance, or inventing a new categorical exclusion from the First Amendment for harassment.

One consequence of this division is that governments' authority to criminalize telephone harassment now varies substantially by jurisdiction. Illinois's high court struck down as incompatible

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[9] *See* Office of Justice Programs, U.S. Dep't of Justice, NCJ 224527, *Stalking Victims in the United States – Revised*, at 3-4 (Sept. 2012), https://www.bjs.gov/content/pub/pdf/svus_rev.pdf.

with the First Amendment a statute materially indistinguishable from one that Pennsylvania's high court upheld. *Compare Klick*, 362 N.E.2d at 330, *with Hendrickson*, 724 A.2d at 318. The D.C. Circuit found unconstitutional a prosecution that cannot be "meaningfully distinguished" from the prosecution upheld by the Ninth Circuit in this case. Pet. App. 17a (Tashima, J., dissenting). Regardless of which outcome is correct, it is unacceptable for the First Amendment to impose different limitations on state regulatory authority in one State as opposed to another.

Even more problematically, this division has led to different outcomes among federal and state courts within the same circuit. In *Gormley*, the Second Circuit upheld a telephone harassment statute on the same grounds that the New York Court of Appeals rejected in striking down its own State's telephone harassment law in *Golb*. Conversely, in *Vanterpool*, the Third Circuit found a telephone harassment law "likely unconstitutional" for reasons that the Pennsylvania Supreme Court dismissed in *Hendrickson*. As a result, whether a person may constitutionally be prosecuted for telephone harassment in New York and Pennsylvania now depends on whether a federal or a state prosecutor brings the charges. In our federal system, that is intolerable.

This pervasive division also casts a pall over the First Amendment rights of countless Americans. Every day, individuals use the phone to reconnect with family members, conduct business, or order take-out food—as well as to report crimes, register opposition to pending legislation, or complain, some-

times intemperately, to government officials. If prosecutors may charge individuals for "annoying," "embarrassing," or "lewd" and "lascivious" utterances they make on those calls, those prosecutors have the power to chill a wide swathe of speech. The "very existence" of such prosecutions is pernicious, as it "may cause others not before the court to refrain from constitutionally protected speech or expression." *Members of City Council of L.A.* v. *Taxpayers for Vincent*, 466 U.S. 789, 798-799 (1984) (citation omitted); *see also Virginia* v. *Hicks*, 539 U.S. 113, 119 (2003) (explaining that the mere "threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech"). And the principal victims of that sweeping prosecutorial power will inevitably be the marginal and the powerless—including persons like Robert Waggy, a disabled Marine Corp veteran irate at the VA's failure to pay its bills, who expressed his justified frustration with profane language.

This case presents an ideal vehicle for the Court to at last resolve this question. Washington's telephone harassment statute is representative of telephone harassment statutes throughout the country: It contains *mens rea* and *actus reus* requirements similar to the laws in many other statutes, and presents both constitutional problems—overbreadth and a content-based restriction on speech—that afflict many other statutes. Furthermore, it has been definitively construed by Washington courts, *see* Pet. App. 7a-9a, and was specifically defended by the State of Washington as *amicus* below, ensuring that this Court's review will benefit from the views of

both the State and Federal Government and will not be stymied by disputes over the meaning of state law.

What is more, the facts and procedural history of this case cleanly present the relevant issues for this Court's review. Waggy's speech unquestionably involved "some criticism of the government," *id.* at 9a, meaning that the Court will have the option to consider the constitutionality of the law both on its face and as applied to Waggy's statements. And Waggy preserved his First Amendment objections at every stage of the proceedings below, culminating in a published opinion that drew a well-reasoned dissent.

Further, the constitutionality of the statute is dispositive to Waggy's appeal. As the Ninth Circuit explained, the jury returned a general verdict that found Waggy "guilty of subsection 9.61.230(1)(a) or (b) or both." Pet. App. 7a n.4. "Thus, if subsection 9.61.230(1)(a) is unconstitutional, the conviction cannot be upheld." *Id.* This case accordingly presents the perfect opportunity to, at last, bring certainty to the rights of Waggy and other individuals, and to clarify the extent of States' power to criminalize speech over the telephone.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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