No. 19-7544

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

Robert Waggy called the Department of Veterans Affairs (VA) to complain about its failure to pay benefits that the VA later admitted it owed him. For engaging in that speech, and because of the specific words he used, Waggy was prosecuted for telephone harassment. Similar prosecutions are all too common: Dozens of States regularly try and convict people for harassment because they petitioned intemperately for a redress of their grievances. Amicus Br. of Nat'l Coalition Against Censorship ("NCAC") 14-20. And the Circuits and States are intractably divided over whether such convictions are constitutional. Pet. 11-26.

The Government fails to muster any viable argument why the Court should nonetheless deny review. It does not dispute that Circuits and state high courts are deeply split—10-8 at last count—over the constitutionality of telephone-harassment laws that impose content-based limits or restrict speech of public concern. It does not defend any of the rationales the Ninth Circuit and other courts have offered to uphold those laws. Nor does it contest that the question presented is important and incapable of resolution absent this Court's intervention.

The Government instead rests its opposition on a series of vehicle objections, all of which dissolve under scrutiny. The Government claims that other courts would not "necessarily" find Waggy's conviction unconstitutional; but eight jurisdictions have specifically stated that harassment laws are unconstitutional as applied to calls like Waggy's. The Government also claims that Waggy's calls involved "true threats"; yet the District Court dismissed the Government's threat charges against Waggy, the jury did not convict Waggy of making threats, and the Government abandoned any threat argument on appeal. Waggy's conviction therefore cannot be upheld on that basis. Finally, the Government claims that this case presents a "fact-bound" dispute about whether Waggy's calls addressed matters of public concern. There is no dispute: The Ninth Circuit found that Waggy's calls included "some" speech of public concern, Pet. App. 9a, and Waggy's conviction would be unconstitutional regardless.

In short, the lower courts are divided on an important question of First Amendment law; the Ninth

Circuit's resolution of that question is manifestly indefensible; and this case presents a clean vehicle to resolve the issue. The Court should grant certiorari and reverse.

ARGUMENT

I. THIS CASE IMPLICATES A DEEP AND INTRACTABLE SPLIT.

The lower courts are divided 10-8 over the constitutionality of telephone-harassment statutes like Wash. Rev. Code § 9.61.230(1)(a). The Government largely concedes the existence of this split: It acknowledges that at least six Circuits and state high courts have deemed telephone-harassment statues unconstitutional, either facially or as-applied. Opp. 18-19, 21. And it does not dispute that courts in ten jurisdictions—including the court below—have come out the other way. Pet. 12-17.

The Government nonetheless claims the split is not implicated here because other courts would not "necessarily" deem harassment laws unconstitutional as applied to Waggy's calls. Opp. 18. That is incorrect: All eight jurisdictions on the short side of the split have made clear they would find Waggy's conviction invalid under the First Amendment.

1. Three jurisdictions have sustained as-applied challenges to harassment statutes on grounds that would require reversal of Waggy's conviction.

a. In *United States* v. *Popa*, 187 F.3d 672 (D.C. Cir. 1999), the D.C. Circuit held that the federal telephone-harassment statute was unconstitutional as applied to a defendant who called the government to complain that the U.S. Attorney was "a whore, born

by a negro whore," who "ma[d]e a violent crime against me." *Id.* at 673-674 (citation omitted). The court explained that these calls were constitutionally protected because they included "complaints about the actions of a government official." *Id.* at 677. Waggy's calls included comparable (and considerably more lucid) complaints; by the D.C. Circuit's logic, they were constitutionally protected, as well. *See* Pet. App. 14a (Tashima, J., dissenting) (noting that *Popa* involved "strikingly similar circumstances").

The Government attempts to distinguish *Popa* on the ground that the defendant there complained that the U.S. Attorney "violat[ed] the rights in court of the white people." Opp. 18 (quoting *Popa*, 187 F.3d at 674). But the D.C. Circuit did not rely on that comment in finding Popa's speech protected. It relied solely on his "complain[ts] about having been assaulted by police officers and * * * about the prosecutor's conduct of a case against him." *Popa*, 187 F.3d at 677. Those claims of individualized mistreatment were no more "public or political" than Waggy's complaints. Opp. 18-19.

b. In *Government of Virgin Islands* v. *Vanterpool*, 767 F.3d 157 (3d Cir. 2014), the Third Circuit likewise held that the defendant engaged in "protected speech" when he sent harassing letters to an ex-girlfriend. *Id.* at 167. The court found this speech constitutionally protected because it did not "fall into one of the defined categories of unprotected speech," and because the government may not proscribe speech merely because it is "offensive." *Id.* (citation omitted). So too here, the jury never found (nor was

asked to find) that Waggy's speech fell within a category of unprotected speech. *See infra* pp. 10-11.

The Government notes that the Third Circuit adjudicated the constitutionality of Vanterpool's conviction in the context of a claim of ineffective assistance of counsel. Opp. 19-20. True enough, but the Third Circuit stated unequivocally that Vanterpool's letters "f[e]ll within the category of protected speech" and that the application of the harassment statute against him was "repugnant to the First Amendment." *Vanterpool*, 767 F.3d at 167. It thus left no doubt that it would invalidate a similar conviction if it came before the court.

c. The Iowa Supreme Court has also made clear that it would overturn Waggy's conviction. In *State* v. *Fratzke*, 446 N.W.2d 781 (Iowa 1989), the court held that prosecutors could not, consistent with "the first amendment's guarantee of free expression," enforce a harassment statute against a defendant who wrote a letter complaining that a state trooper "just enjoys stealing people's money so he can show everyone what a red-necked m*th*r-f*ck*r he is." *Id.* at 782, 785. The court explained that this speech could not be "criminalize[d]" because it did not constitute "fighting words." *Id.* at 784-785. Waggy was not charged with fighting words, or any other category of unprotected speech. His speech therefore could not be "criminalize[d]," either.

2. Five state high courts have also made clear that they would overturn Waggy's conviction, by striking down statutes as overbroad *because* they extended to speech like Waggy's.

In *People* v. *Klick*, 362 N.E.2d 329 (Ill. 1977), the Illinois Supreme Court found that Illinois' telephone-harassment statute unconstitutionally proscribed "protected speech" because it prohibited calls made "to emphasize an idea or opinion, or to prompt a desired course of action." *Id.* at 331. As an example, the court noted that the statute would prohibit a call "by an irate citizen * * * who desires to express his opinion to a public official." *Id.* at 331-332. The court found that the possibility of this intrusion on "first amendment freedoms" rendered the law facially overbroad. *Id.* If the mere *possibility* of applying the law against an "irate citizen" complaining to the government rendered the law facially unconstitutional, then plainly the *actual* application of the law to Waggy's complaints would be invalid.

The high courts of Missouri, New Hampshire, Colorado, and New York have all struck down harassment laws on similar grounds. Each court held that complaints to government officials or calls that fall outside a category of unprotected speech are constitutionally protected, and that harassment statutes were facially overbroad because they prohibited such speech. *See State* v. *Vaughn*, 366 S.W.3d 513, 519 (Mo. 2012) (statute overbroad for prohibiting calls "urging an elected official to change his or her position"); *Bolles* v. *People*, 541 P.2d 80, 82-83 (Colo. 1975) (similar); *State* v. *Brobst*, 857 A.2d 1253, 1255-57 (N.H. 2004) ("agree[ing]" with *Klick* and invalidating statute on same basis)[1]; *People* v. *Golb*, 15

[1] Although the New Hampshire Supreme Court issued this ruling under its state constitution, *see* Opp. 21, it relied exclu-

N.E.3d 805, 813-814 (N.Y. 2014) (statute overbroad because not limited to categories of unprotected speech). The intermediate courts of Minnesota, Utah, and Wisconsin have done the same. Pet. 23.

The Government argues that, because these courts adjudicated overbreadth challenges, it is uncertain whether they would find harassment statutes "unconstitutional as applied in the particular circumstances here." Opp. 21-22. The reverse is true: These courts found their statutes facially overbroad *because* they might be applied to calls like Waggy's, leaving no doubt they would find the actual application of the statutes to Waggy's calls unconstitutional.

II. THE GOVERNMENT OFFERS NO VIABLE DEFENSE OF THE DECISION BELOW.

In addition to failing to refute the split, the Government makes no attempt to defend the opinion below. The Ninth Circuit upheld Waggy's conviction on the theory that Waggy's calls were "conduct" rather than "speech" because they were made with "intent to harass." Pet. App. 9a, 13a. The Government pressed that same argument in the courts below. Here, however, the Government has abandoned that argument: Nowhere in its opposition does it argue that Waggy's calls were anything but "speech." And rightly so. The suggestion that a speaker's intent can convert speech into conduct is

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sively on First Amendment cases and found the statute unconstitutional because it prohibited "protected First Amendment speech." *Brobst*, 857 A.2d at 1255-57.

meritless. Pet. 30-31; Amicus Br. of Eugene Volokh et al. 5-6.

The Government attempts to resuscitate the Ninth Circuit's judgment by offering a few brand-new justifications. None holds water.

1. The Government claims that Washington's statute is not content-based because it "does not prohibit the expression of any 'particular idea.'" Opp. 17 (citation omitted). But that is not the standard for content discrimination. A law "regulates speech on the basis of its content" whenever it penalizes individuals based "on what they say." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 27 (2010). Punishing a person for "wearing a jacket bearing an epithet" is thus a paradigmatic form of content discrimination. *Id.* at 28 (citing *Cohen* v. *California*, 403 U.S. 15, 16, 18 (1971)). There is no meaningful daylight between that law and one that punishes a defendant for *making a telephone call* containing an epithet. *See* Volokh Br. 6-7.

The Government quotes a snippet from *R.A.V.* v. *City of St. Paul* in which this Court described fighting words as a "particularly intolerable * * * *mode* of expressi[on]." Opp. 17 (quoting 505 U.S. 377, 393 (1992)). That statement, however, was describing one of the "well-defined and narrowly limited classes of speech" exempt from constitutional protection. *United States* v. *Stevens*, 559 U.S. 460, 468-469 (2010) (citation omitted). It was not establishing "a free-floating test for First Amendment coverage," *id.* at 470—let alone suggesting that offensive words are categorically outside the First Amendment. On the contrary, this Court has time

and again made clear that offensive speech is entitled to full First Amendment protection. *See* Pet. 26-27. Further, *R.A.V.* made clear that, even within a category of unprotected speech, the government may not make content-based distinctions—meaning that Section 9.61.230(1)(a)'s proscription of "indecent * * * language" would be unconstitutional regardless of whether Waggy's speech was otherwise protected. 505 U.S. at 393-394.

2. The Government also contends that because Waggy was complaining about the Government's failure to reimburse him, his speech is not "of public concern." Opp. 13-15. As an initial matter, Waggy's speech need not be of public concern to merit First Amendment protection: Although speech of public concern is entitled to "*special* protection," *Snyder* v. *Phelps*, 562 U.S. 443, 452 (2011) (citation omitted), all speech—public or private—is protected by the First Amendment unless it falls within a traditionally unprotected category. *See Connick* v. *Myers*, 461 U.S. 138, 147 (1983); *Borough of Duryea* v. *Guarnieri*, 564 U.S. 379, 393-394 (2011). Because the application of Washington's law to Waggy's speech cannot satisfy any level of scrutiny, it would be unconstitutional even if Waggy's speech were wholly private. *See* Pet. 31-32.

In any event, Waggy's speech did include matters of public concern. As the Government acknowledges—and the Ninth Circuit expressly found—in at least some of his calls Waggy complained about the government's failure to reimburse his medical care. Opp. 14-15; *see* Pet. App. 9a (Waggy's calls "included some criticism of the government"). Surely it is not

the United States' position that the public has no interest in whether the VA wrongly refuses to reimburse a veteran for tens of thousands of dollars in medical bills. *See* NCAC Br. 8-9 (noting that the Government has set up a hotline to report such errors). And this Court has repeatedly found comparable speech of public concern. *E.g.*, *Harris* v. *Quinn*, 573 U.S. 616, 654 (2014) ("state spending for employee benefits" is "a matter of great public concern."); *Lane* v. *Franks*, 573 U.S. 228, 241 (2014) (individual employee's "misuse of state funds * * * obviously involves a matter of significant public concern").

3. As a last-ditch effort, the Government claims that Waggy cannot challenge his conviction because his calls constituted "true threats." Opp. 15-16. The Government acknowledges that it did not submit threat charges to the jury. Opp. 7-9. The jury made no finding that Waggy engaged in threats. *See* Pet. App. 3a-4a & n.2. And the Government did not argue below that Waggy's speech constituted true threats. Nonetheless, the Government now suggests that Waggy's speech is "unprotected" because evidence presented at trial *could* have supported a finding that he made threats. Opp. 15-16.

That is not how it works. A conviction may be upheld only based on conduct actually found by the jury. *Hedgpeth* v. *Pulido*, 555 U.S. 57, 58 (2008) (per curiam). And courts may not deem speech unprotected based on factual predicates the jury never found, let alone based on an argument that the Government waived below. *Gregory* v. *City of Chicago*, 394 U.S. 111, 112-113 (1969). The Government had its opportunity to prove and argue that Waggy

made threats, and failed to do so. It cannot now—in a bid to avoid certiorari—revive dismissed charges to insulate Waggy's conviction from review.[2]

Nor does the fact that Waggy brought an "as-applied" challenge support the Government's late-breaking argument. Opp. 15. In any constitutional challenge—as-applied or facial—a court must examine whether the defendant was convicted "pursuant to a constitutionally valid rule of law." Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1331 (2000); *see Bond* v. *United States*, 564 U.S. 211, 226 (2011) (Ginsburg, J., concurring). Waggy was convicted of making calls containing "lewd, lascivious, [or] indecent" speech "with intent to harass." Wash. Rev. Code § 9.61.230(1)(a). To adjudicate Waggy's claim, the Court must determine whether that was a constitutionally valid basis for punishment. Whether Waggy could have been convicted on some other ground is irrelevant. *See Gregory*, 394 U.S. at 112; Fallon, *supra*, at 1332.

III. THE QUESTION PRESENTED IS IMPORTANT AND THIS CASE IS A SUITABLE VEHICLE.

The question presented is of undeniable importance. The application of harassment statutes to

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[2] The Government's argument is particularly unsound because the language it argues included threats occurred well before the events charged in this case or during Waggy's *first* call to the VA Center. *See* Opp. 15-16. But Waggy was only convicted for his *second and third* calls, which contained no threats of any kind. *See* Pet. App. 4a-5a.

persons like Waggy infringes core speech, divides the lower courts, and recurs with considerable frequency. Pet. 24-26, 34-36. As amici point out, capacious speech restrictions like Washington's are especially ripe for abuse against critics of government officials. *See* NCAC Br. 18-20. The Government makes no argument to the contrary.

Nor does the Government identify any valid vehicle problem. It suggests that Waggy has forfeited a facial challenge to Wash. Rev. Code § 9.61.230(1)(a). Opp. 16. But a party cannot waive a facial challenge, which merely "goes to the breadth of the remedy" rather than the substance of the litigant's claims. *Citizens United* v. *FEC*, 558 U.S. 310, 331-332 (2010). And claims of facial overbreadth are a "disfavored" exception to the normal rules of constitutional adjudication. *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 450 (2008). It is a feature, not a bug, that Waggy challenges the application of the law to himself rather than to other persons.

The Government is also incorrect that the question presented turns on "a fact-bound premise that the court below rejected." Opp. 22. The Ninth Circuit *agreed* that Waggy's calls contained "some" speech of public concern; it merely disputed whether that was a "significant" portion of his calls. Pet. App. 9a (citation omitted). But nothing in Waggy's claims turns on that "significan[ce]" question, which was merely part of the Ninth Circuit's misguided inquiry into whether Waggy's calls could be reclassified as "conduct." *Id.* And Waggy's conviction would be

unconstitutional even if his calls contained no speech of public concern. *See supra* p. 9.

Finally, the Government is wrong that Washington courts have not "authoritatively interpreted the state statute." Opp. 23. The Washington courts have issued an extensive body of case law interpreting Wash. Rev. Code § 9.61.230(1)(a), and have repeatedly upheld this law and comparable harassment statutes against First Amendment challenge. *See City of Seattle* v. *Huff*, 767 P.2d 572, 573-575 (Wash. 1989); *State* v. *Dyson*, 872 P.2d 1115, 1119 (Wash. Ct. App.), *review denied*, 886 P.2d 1133 (Wash. 1994); *State* v. *Alexander*, 888 P.2d 175, 177-181 (Wash. Ct. App.), *review denied*, 898 P.2d 307 (Wash. 1995); *State* v. *Lilyblad*, 177 P.3d 686, 688-691 (Wash. 2008); *State* v. *Alphonse*, 197 P.3d 1211, 1214-1218 (Wash. Ct. App. 2008), *review denied*, 210 P.3d 1018 (Wash. 2009); Pet. App. 8a-11a. The Washington Attorney General also appeared below to defend the statute's constitutionality. There is no prospect that the Washington courts will impose a "limiting construction[]" on a statute they have upheld for decades. Opp. 23. And any such holding would merely transform the split from 10-8 to 9-9, only prolonging an intractable split long overdue for this Court's resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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