No. 19-631

In The
Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL,
FEDERAL COMMUNICATIONS COMMISSION,

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 THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit public-interest law firm committed to securing greater protection for individual liberty. Much of the Institute for Justice's free-speech practice involves challenges to unconstitutional laws and regulations that grant exemptions to favored classes while burdening the Institute's clients. The Fourth Circuit ruled below that the injury these sorts of laws impose on the regulated class can be "remedied" by deleting the exemptions and forcing the government to regulate individuals that the legislature had wished to remain free. That ruling is both wrong and dangerous—it misconceives the nature of the judicial role in constitutional litigation and creates serious due-process problems. The Institute for Justice has a substantial interest in this Court's resolution of that issue.[1]

SUMMARY OF ARGUMENT

When a person successfully challenges a statute as an unconstitutional restriction on their liberty, the usual, commonsense remedy is for a court to remove that restriction. The Fourth Circuit did not do that with the TCPA. Instead, following the maxim that

[1] Petitioners and Respondents have both granted blanket consent for the filing of amicus briefs in this case. No counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

misery loves company, the court expanded the TCPA's scope so that it now sweeps in speakers whom Congress expressly exempted. As a result, Respondents (collectively "AAPC") remain restricted from speaking despite having proved that the TCPA violates the First Amendment. At the same time, collectors of government-backed debt have lost a right they previously enjoyed—a right Congress wanted them to have—without being given any opportunity to defend their interests.

The court below saw this "remedy" as an exercise in judicial modesty. But it is anything but modest: Instead, it has dire implications for the constitutional rights of individuals nationwide, all of whom could be deprived of a meaningful remedy for a myriad of constitutional violations.

The ruling below is also incorrect: It misconceives both the nature of the declaratory-judgment suit brought by plaintiffs here and the appropriate role for courts faced with unconstitutional statutes.

The analytic problem with the decision below is that it confuses the nature of AAPC's injury with the merits of the AAPC's claim. AAPC brought this lawsuit because it was concerned that it would be prosecuted under a statute that prohibited its speech and wanted a declaration that it would have a valid constitutional defense in any prosecution. The nature of that defense was that the TCPA was content-based: It unconstitutionally burdened AAPC's speech but did not burden speech on other subjects. But AAPC was not injured by

the fact that other people were speaking. It was injured by the prohibition on its speech. The remedy for that injury is an order allowing AAPC to speak, not an order eliminating the rights of third parties who received neither notice nor an opportunity to be heard.

And the remedy for that injury is exactly what AAPC sought: a declaration that its constitutional claims would defeat any future prosecution. The lower court withheld that remedy, though, finding that it was instead empowered to rewrite the statute and order the government to begin enforcing the law against individuals whose speech Congress did not choose to regulate. That is not how pre-enforcement declaratory judgments work. When a court finds that a statute is unconstitutional as applied to a particular plaintiff, what it is essentially doing is declaring that the plaintiff has a right *not* to have that statute enforced against them. If the government later tried to enforce the statute against that plaintiff, the plaintiff would be entitled to point to the declaratory judgment in their favor as an affirmative defense. But a litigant cannot demand an order that a court curtail the rights of others not before the court.

ARGUMENT

Section I explains that the Fourth Circuit's "leveling down" approach threatens the constitutional rights of Americans nationwide. Section II explains how the Fourth Circuit's "leveling down" approach to

AAPC's suit misunderstands the nature of AAPC's injury and poses serious due-process problems with respect to the rights of third parties not before the Court. Finally, Section III discusses how the ruling below fundamentally undermines the Declaratory Judgments Act.

I. The remedies question in this case has broad implications.

The remedial question in this case arises in the context of a law that is underinclusive under the First Amendment, but it is a question that can and does arise in a myriad of constitutional contexts. Although this Court does not use the term "underinclusiveness" to describe its doctrines in many of these areas, there is little doubt that the same principle is at work. A law that violates the dormant Commerce Clause by discriminating against interstate commerce is underinclusive as to out-of-state entities. See generally *Tenn. Wine & Spirits Retailers Ass'n* v. *Thomas*, 139 S. Ct. 2449 (2019). A law that violates the Equal Protection Clause by discriminating against one business in favor of another is underinclusive because it does not include both businesses. See generally *Metro. Life Ins.* v. *Ward*, 470 U.S. 869 (1985). Even a so-called "class of one" claim that asserts the government violated the Equal Protection Clause out of malice against a single individual is really a claim that the government's policy was underinclusive in that it should have included everyone else. See generally *Willowbrook* v. *Olech*, 528 U.S. 562 (2000).

Plaintiffs in all of these contexts are entitled to the same thing: an order that vindicates their rights rather than an order that punishes third parties. Respondent suggests that these other contexts are irrelevant because "[t]he First Amendment is different." Br. for Resp. 46. But this is not quite right. To be sure, the First Amendment is different in many ways, but focusing on the First Amendment obscures the fact that the decision below is wrong in a more fundamental way.

Both parties overlook the broader implications of the ruling below because both err in their construction of this Court's equal protection jurisprudence. It is, of course, true that when dealing with the unequal distribution of government benefits, a court can either invalidate the underlying statute (and eliminate the benefit for everyone) or extend the coverage of the statute to include the aggrieved class. *Califano* v. *Westcott*, 443 U.S. 76, 89 (1979). And it is more generally true that anytime the government violates the Equal Protection Clause "it can cure the violation by either 'leveling up' or 'leveling down.'" *Comptroller of the Treasury* v. *Wynne*, 135 S. Ct. 1787, 1806 (2015). But that principle means what it says—that the *government* can choose whether to level up or level down. As can the government here: If Congress chooses to enact a content-neutral restriction on robocalls, it remains free to do so.

This principle does not mean, as both parties seem to assume, that (at least outside the context of the First Amendment) a *court* should be indifferent between a remedy that "levels up" or "levels down" when faced

with a statute that seeks to prohibit or punish private conduct. In those circumstances, courts must answer the question presented—whether the party before it can be lawfully punished—not the legislative question of what the underlying statute ought to have said.

Wynne is a perfect example. In that case, Maryland had assessed a tax deficiency against Brian and Karen Wynne, but the Maryland Court of Appeals held that the underlying tax scheme unconstitutionally discriminated against interstate commerce. 135 S. Ct. at 1793. The parties' submissions in this case seem to assume that a court in that case would be equally justified in choosing to "leveling up" (and holding that the Wynnes could not be assessed a deficiency) or "leveling down" (and holding that the other Marylanders who had filed their taxes based on existing law should be assessed a deficiency as well). But that is obviously wrong. The government in that case sought to impose a financial liability on the Wynnes, and a reviewing court would therefore be limited to determining whether or not the government was allowed to impose that liability. The alternative would be to issue an order imposing liability on the Wynnes *and also* to reopen untold prior years of tax returns for other Marylanders not before the court who had benefited from the disputed tax credits. To state the alternative is to reject it.

The only modern decision of this Court that levels down rather than leveling up is *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 198 L. Ed. 2d 150 (2017). And the analysis in that case only proves the general

rule stated above in two different ways. First, the remedial question in that case was deeply unusual: The Court acknowledged that the "preferred rule in the typical case is to extend favorable treatment"—that is, to level up rather than level down. *Id.* at 175. But in that case, leveling up would have resulted in unwed parents receiving systematically more favorable treatment than married parents: a result so absurd that the Court suggested it would be unconstitutional. *Id.* at 174.

Second, that case involved the extension of a benefit—citizenship—and the Court's analysis expressly focused on the choice between "withdrawal of benefits from the favored class" and "extension of benefits to the excluded class." *Id.* at 173 (quotation marks excluded). The analysis is very different, as the Court expressly recognized, when the government seeks to impose a *penalty or prohibition* on an unequal basis; there, "a defendant convicted under a law classifying on an impermissible basis may assail his conviction without regard to the manner in which the legislature might subsequently cure the infirmity." *Id.* at 173 n.24. That is because, as explained more fully below, a court should not—indeed, cannot—rectify an unconstitutional restriction on individual liberty by commanding the government to punish more people.

II. The Fourth Circuit's remedial approach both misunderstands the nature of the AAPC's injury and creates serious due-process problems.

The AAPC wishes to make us of automated phone calls, but the TCPA prohibits it from doing so. AAPC's injury is clear: They wish to speak in a certain way but will be punished if they do so. Believing this threat of punishment to be unconstitutional, the AAPC filed a federal First Amendment lawsuit, challenging the TCPA as a content-based restriction on speech.

Relevant to AAPC's challenge is that the TCPA does not treat all speakers equally: Although AAPC is prohibited from making use of so-called robocalls, collectors of government-backed debt are not prohibited from doing so.

The Fourth Circuit agreed that this disparate treatment of otherwise similarly situated speakers was unconstitutional. But the court misunderstood the significance of this disparate treatment. In particular, the court treated the disparate treatment itself as AAPC's injury. Thus, the court viewed its role as evaluating the constitutionality of the statutory exemption that created favored treatment of debt collectors.

This view misconceives AAPC's injury. Although the TCPA's disparate treatment of debt collectors is relevant to resolving AAPC's claims, it is not AAPC's injury. Rather, AAPC's injury is that their speech has been curtailed unconstitutionally. The remedy for that injury is to stop curtailing their speech.

Crucially, this remedy does not turn on *why* the restriction failed First Amendment scrutiny. Whether a law fails because it lacks a compelling government interest or because it is not narrowly tailored (whether overbroad or underinclusive), the injury to the speaker is the same: They want to talk, and they're not allowed to.

This is confirmed by the way this Court talks about underinclusiveness in the context of narrow tailoring. The problem with underinclusive speech restrictions isn't that they restrict too little speech. "[T]he First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Williams-Yulee* v. *Florida Bar*, 575 U.S. 433, 449 (2015). Rather, underinclusiveness is *evidence* that either 1) the government doesn't actually have a compelling interest or 2) the law isn't actually advancing the government's interest. *Id.* 448-49.

Here, there are reasons to believe that the government doesn't actually have a compelling interest in regulating calls by AAPC members. After all, calls from debt collectors are probably the most intrusive and bothersome robocalls one can receive; if Congress is comfortable permitting such calls, it is not at all clear what compelling interest it has in restricting the use of robocalls by get-out-the-vote drives and other political speakers.

Understood this way, it's clear why the Fourth Circuit's remedy is no remedy at all. Severing the exemption for debt collectors cannot remedy AAPC's injury,

because the exemption is not the cause of the injury. Nobody is injured by the fact that the TCPA declines to punish speech by debt collectors. Rather, AAPC is injured by the substantive restriction on its own speech, and the underinclusiveness of the statute is evidence that this injury is being imposed without sufficient reason.

Apart from leaving AAPC in the same position it was in before it "won" below, the Fourth Circuit's remedy raises other constitutional problems. Most notably, by sweeping in speakers whom the government intentionally left out of its regulatory scheme, the Fourth Circuit's remedy creates serious due-process concerns. The day before the Fourth Circuit issued its ruling, certain debt collectors could make robocalls. The day after, they couldn't. Yet these debt collectors—whose rights were adjudicated in a way that would ordinarily require their joinder[2]—were given no notice or opportunity to be heard.

Unsurprisingly, other courts that have considered similar remedial issues have properly refused to "cure" First Amendment violations by severing content-based exemptions in order to sweep in more speech. The Third Circuit's ruling in *Rappa* v. *New Castle County*, 18 F.3d 1043 (3d Cir. 1994), is illustrative. There, the Third Circuit considered the constitutionality of an

[2] See Fed. R. Civ. P. 19(a)(i) (requiring the joinder, when feasible, of any person who "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest").

advertising restriction that exempted advertising regarding local industries and meetings. *Id.* at 1072. Finding that the exemption rendered the law unconstitutional, the court turned to the question of remedy, noting that its "severability inquiry here [had] a constitutional dimension" because "[e]liminating the offending exception would mean that we would be requiring the State to restrict more speech than it currently does." 18 F.3d at 1072-73. The court refused to do so, saying that "[t]o our knowledge, no court has ever mandated issuance of an injunction such as that [in a free-speech case], and we decline to be the first." *Id.* at 1073.

The Third Circuit's reasoning applies with equal force here: Courts should not rewrite statutes in order to prohibit conduct that the legislature wanted to be permitted. If Congress wants to restrict individual liberty, Congress must make that judgment in the first instance.

III. The ruling below undermines the Declaratory Judgments Act.

Finally, the ruling below misunderstands the operation of the Declaratory Judgments Act as it applies in pre-enforcement challenges like this. The Declaratory Judgments Act allows courts to "declare the rights and other legal relations of any interested party." 28 U.S.C. § 2201(a). And this Court has long held that in certain circumstances parties subject to a law may seek a pre-enforcement declaration of their rights rather than

subject themselves to arrest. See generally *Steffel* v. *Thompson*, 415 U.S. 452 (1974).

But the upshot of the Fourth Circuit's opinion is that parties subject to certain laws simply cannot do this. As noted above, this Court has been perfectly clear that a defendant subject to an unconstitutionally underinclusive law can raise that underinclusiveness as a constitutional defense without regard to severability. If that much is true, it has to follow that a plaintiff in a declaratory-judgment action can do the same. After all, the question posed by a pre-enforcement challenge is simply "If the plaintiff raised this argument in defense of a prosecution, would that argument succeed?" And a plaintiff who has standing should be entitled to get an answer to that question.

Perversely, even as the ruling below takes away the Declaratory Judgments Act's role as a shield for those regulated by a statute, it may also transform it into a sword third parties who want to see their competitors subject to greater regulatory burdens. Up to now, federal courts have rightly rejected claims where a plaintiff sought to impose higher burdens on third parties because they correctly understand the nature of pre-enforcement declaratory-judgment suits like this. In *Beales* v. *City of Plymouth*, 392 Fed.Appx. 497 (7th Cir. 2010), for example, the Seventh Circuit, in a per curiam opinion, rejected a Fourteenth Amendment lawsuit by a tavern owner alleging that alcohol regulations were not being enforced stringently enough against a competing tavern owned by a former police officer. As the court correctly noted, those were

arguments that the tavern could raise in its own defense if the law were selectively enforced against it, but that fact did not entitle the plaintiff to demand the criminal prosecution of his business rival. *Id.* at 498-99.

The ruling below, however, abandons that understanding of pre-enforcement challenges; instead of pre-adjudicating an enforcement action, the court simply engaged in severability analysis as if "leveling up" and "leveling down" were equally valid options. If that is the case, then there seems no barrier to any interested party running to federal court to ask that a statute be rewritten in the way they see fit.

But that is not the case. The Declaratory Judgments Act authorizes the courts to declare the rights of the parties themselves. The gravamen of the complaint in this case was that the government would violate AAPC's rights if it tried to enforce the TCPA against it. And the Fourth Circuit found that it would. Its responsibility at that point was simply to declare as much and end the case there.

CONCLUSION

The Fourth Circuit's misguided attempt to save the TCPA by rewriting it leaves everyone regulated by it worse off. Political consultants remain restricted from speaking despite having proved that the TCPA violates the First Amendment. At the same time, debt collectors have lost a right they previously enjoyed

without any opportunity to defend their interests. And Congress has been deprived of its prerogative to decide whether private behavior should be outlawed in the first instance. This Court should hold that the TCPA unconstitutionally restricts Petitioners' speech, and that the appropriate remedy for that violation is that the TCPA may not be enforced against Petitioners.

Respectfully submitted,

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