No. 16-1198

In The Supreme Court of the United States

PATRIOTIC VETERANS, INC.,

Petitioner,

V.

CURTIS HILL, ATTORNEY GENERAL OF INDIANA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* VICTOR GRESHAM AND CONQUEST COMMUNICATIONS GROUP, LLC IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*[1]

Victor Gresham ("Gresham") and Conquest Communications Group, LLC ("Conquest") are parties to litigation challenging speech restrictions in multiple jurisdictions. As a result of this litigation, Gresham and Conquest have successfully obtained an injunction against the enforcement of a content-based robocall restriction in the State of Arkansas. Gresham and Conquest are also challenging content- and speaker-based robocall restrictions in both the States of Minnesota and California, and are appealing decisions by federal district courts with the Courts of Appeals of the Eighth and Ninth Circuits.

Gresham and Conquest engage in political communications, including through the use of, and originated by, automated telephone systems, on behalf of political clients. Gresham and Conquest have engaged in political speech in the State of Indiana and in other states across the country, and

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, nor made a monetary contribution specifically for the preparation or submission of this brief. The Legacy Foundation, a 501(c)(3) charitable corporation incorporated in Iowa, paid for this brief. *Amicus curiae* files this brief with the written consent of all parties, copies of which are on file in the Clerk's Office. All parties received timely notice of *amicus curiae's* intention to file this brief.

wish to conduct political speech in the future, including by making communications originated by automated telephone systems, such as automated telephone survey polls, "telephone town hall" automated telephone calls, and other telephone calls in connection with a political campaign.

SUMMARY OF ARGUMENT

The Seventh Circuit's decision in *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303 (7th Cir. 2017), upheld a troubling decision, which burdens the rights of individuals and groups to exercise core First Amendment rights. That decision is at odds with the precedent of this Court, and conflicts with holdings in sister circuits. The decision has had a detrimental and chilling effect on other speakers who wish to exercise their protected First Amendment rights, but who are not favored by the State of Indiana. Similarly, this Court has the ability to resolve a growing circuit split in the treatment of cases restricting—and in some instances like Indiana, criminalizing—the means of core political speech, by clarifying to the various Courts of Appeals that its holdings in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), and *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), must be taken at their word.

The petitioner is a grassroots advocacy group which sought to distribute communications regarding public policy issues important to veterans through automated calls. Indiana's law, however, prohibited the petitioner from doing so, while allowing certain state favored speakers to distribute identical messages through automated calls.

Amicus curiae urges this Court to grant *certiorari* to consider whether the Seventh Circuit's analysis is consistent with this Court's holdings in *Citizens United* and *Reed*, or if the Seventh Circuit's decision failed to recognize that content- and speaker-based restrictions on First Amendment speech offend the protections guaranteed by the First Amendment and deserve strict scrutiny by the judiciary. Moreover, the value in avoiding a circuit split is consequential not only for Petitioner but also for the myriad groups and candidates who, each election cycle, seek to influence public opinion by engaging in methods and types of speech similar to Petitioner. This is also a critical issue for those individuals whose livelihoods are based on facilitating speech, as a lack of certainty in the law prevents reasonable planning, growth and business investment.

ARGUMENT

I. The Court Should Grant *certiorari* to Prevent Further Misapplication of this Court's Holdings That Would Permit Governments to Discriminate Based on Disfavored Speakers and Viewpoints.

By failing to apply the unambiguous precedent established by this Court and followed by most federal courts across the country as a fundamental change in First Amendment analysis, the Seventh Circuit cleared a path for state and local governments to enact speaker and viewpoint restrictions on speech without being narrowly tailored to serve a compelling state interest. The Court should grant *certiorari* to ensure that

distinctions based on the identity of the speaker, as well as facially content-based restrictions on speech, are properly analyzed by lower courts so as to not chill core protected speech.

A. Indiana's Automatic Dialing-Announcing Device (ADAD) Ban Imposes Speaker and Identity Based Restrictions on Speech and is Therefore Subject to Strict Scrutiny.

Patriotic Veterans both mischaracterizes the nature of Indiana's speech limitations and rests on an improperly narrow conception of what constitutes a content-based speech restriction. As Petitioners described, in *Patriotic Veterans*, the Seventh Circuit upheld Indiana's prohibition on the use of an "automatic dialing-announcing device" that carves out exceptions for a variety of state-favored speakers and messages ("Selective ADAD Ban"), including: (1) to those with whom the caller has a "current business or personal relationship;" (2) school districts to students, parents, or employees; (3) advising employees of work schedules; or (4) a message immediately preceded by a live operator who obtains express consent to play the message. *See* Ind. Code § 24-5-14-5. Failure to comply with the Selective ADAD Ban is a class C misdemeanor, resulting in the criminalization of speakers and speech disfavored by the State of Indiana. *See* Ind. Code § 24-5-14-10.

The Seventh Circuit held that Indiana's law was not a content-based speech restriction because the "statute determines who may be called, not what

message may be conveyed." *Patriotic Veterans*, 845 F.3d at 306. This is only partly correct. By identifying "who may be called," who may do the calling, and emphasizing the nature of the relationship between these persons, the Selective ADAD Ban in fact creates favored and disfavored content classifications. As *Reed* and *Citizens United* made clear, "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Reed*, 135 S. Ct. at 2230; *Citizens United*, 558 U.S. at 340.

The First Amendment prohibits any state, including Indiana, from making and enforcing a law that "restrict[s] expression because of its message, its ideas, its subject matter, or its content." *See Police Dept. of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). "The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978).

Because "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution[,]" laws that restrict speech must be subject to strict scrutiny. *See Citizens United*, 558 U.S. at 340 (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)). The need for strict scrutiny review is further supported because the First Amendment is "[p]remised on mistrust of governmental power," especially the government's use of legislative power to "disfavor certain subjects or viewpoints." *See id.* at 340. Allowing speech by some speakers but not others is offensive to the First

Amendment. *See Reed*, 135 S. Ct. at 2230; *Citizens United*, 558 U.S. at 340; *see also Citizens United*, 558 U.S. at 341 ("The First Amendment protects speech and speaker, and the ideas that flow from each."). Yet Indiana's Selective ADAD Ban restricts speech based both on the identity of the speaker, and the content of the message.

1. Indiana's Selective ADAD Ban, Which Imposes Restrictions on Speech Differently Based upon the Identity of the Speaker, is Subject to a Strict Scrutiny Analysis.

In *Citizens United* and *Reed*, the Court made clear that statutes that create different rules based on the identity of the speaker violate the First Amendment. *See Citizens United*, 558 U.S. at 340 ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others."). *Reed* reiterated the holding in *Citizens United*, which concluded that if a statute discriminates against certain speakers then strict scrutiny review is warranted. *See Reed*, 135 S. Ct. at 2230-31 ("Characterizing a distinction as speaker based is only the beginning—not the end—of the inquiry."). *Citizens United* also relied on the underlying foundational premise that the First Amendment prohibits statutes that ration speech on the basis of the speaker's identity. *See Citizens United,* 558 U.S. at 350; *see also id.* at 394 (Stevens, J., dissenting) ("The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity . . . ."). This premise is hardly new.

See, e.g., *Bellotti*, 435 U.S. at 777; *see also* Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 Fla. St. U. L. Rev. 765, 766 (2015).

Indiana's Selective ADAD Ban does just what these cases prohibit: it identifies a group of state-favored speakers and permits these speakers to communicate freely through their chosen medium. Indiana's law specifies that certain favored speakers may speak on certain favored topics using ADAD technology, while leaving all others subject to an outright ban. By not subjecting Indiana's Selective ADAD Ban to a rigorous strict scrutiny analysis, *Patriotic Veterans* ignores this Court's clear precedent.

Under this Court's precedent, the Seventh Circuit improperly classified the Selective ADAD Ban as a content-neutral, time, place, and manner restriction. *Patriotic Veterans*, 845 F.3d at 306. The Seventh Circuit's decision asserts that Indiana's Selective ADAD Ban regulates only "who" may be called, and ignores the statute's plain content-based distinctions focusing first on the identity of the caller. *Patriotic Veterans*, 845 F.3d at 305.

The Seventh Circuit rewrites Indiana's statute to create the fiction that the statute's exemptions are premised on "a form of implied consent" based upon "implicit relationships." *See Patriotic Veterans*, 845 F.3d at 305. The amount of discretion given to state officials here to determine what speech is permitted based on supposed "implicit relationships" is immense. Elected officials representing constituents are not permitted to make automated calls to the people they represent.

Political parties are not permitted to make calls to their members. A non-profit cannot call someone who has expressed support for the group's mission. But a business relationship—like buying a ham sandwich from a vendor—entitles that vendor to place robocalls. This statute permits the state to discriminate on the basis of the identity of the speaker, which is closely related to the content of speech.

The Seventh Circuit has permitted the Indiana legislature to restrict the fundamental speech rights of disfavored persons. The Court should grant Petitioner's request for *certiorari* to prevent these types of unconstitutional restraints from proliferating.

2. Indiana's Selective ADAD Ban Makes Distinctions Based on the Content of the Speech, and Therefore Under *Reed* Must be Considered Under a Strict Scrutiny Analysis.

Indiana's Selective ADAD Ban makes facial distinctions based on the content of speech. For example, the statute includes an exemption for employers to contact employees about work schedules. *See Patriotic Veterans*, 845 F.3d at 305. Explicitly exempting a type of message based on content renders it impossible for the Selective ADAD Ban to be content neutral on its face. This alone should have obligated the Seventh Circuit to analyze the statute under a strict scrutiny analysis. *Reed* followed the holding of *Citizens United* by stating that the first step in analyzing whether a statute can

withstand First Amendment scrutiny is "whether the law is content neutral on its face." *Reed*, 135 S. Ct. at 2228. The Court stated that the commonsense meaning of content-based speech restrictions "requires a court to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys." *Id.* at 2227 (internal quotation marks and citation omitted). Thus, a statute is content-based "[i]f a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* If the law is applied thus, regardless of an otherwise benign motive or justification, it must be able to withstand a strict scrutiny analysis. *See id.* at 2229-30. Therefore, even if the Seventh Circuit had failed to identify *any other type* of speech distinctions within the Selective ADAD Ban, it should have applied a strict scrutiny analysis of the entire statute based solely on the employer content-based speech exception.

Even if *arguendo* the Seventh Circuit's holding that the Selective ADAD Ban is content neutral was correct, it should still be classified as a content-based speech regulation. As this Court recognized in *Reed*, there is a "separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be 'justified without reference to the content of the regulated speech.'" *Reed*, 135 S. Ct. at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). It is evident that Indiana's Selective ADAD Ban is premised on the content of the underlying speech. The exceptions exist because Indiana's legislature

presumed that the excepted messages from certain preferred speakers were those that its citizens *wanted* or *needed* to hear. It may be the case that Hoosiers want or need to receive communications about school matters, work matters, or matters arising in personal and business relationships. Whether these types of communications are less "bothersome" than others does not change the fact that the law creates speaker- and content-based distinctions, which by definition must be subjected to a rigorous strict scrutiny analysis. *Reed* makes clear that the state's purpose is not relevant to the determination of whether the law creates content-based distinctions. *Reed*, 135 S. Ct. at 2227-28. Simply put, the state may not dictate who may speak, and on what subjects, and by what means.

In *Patriotic Veterans,* the Seventh Circuit's failure to apply this Court's holdings in *Citizens United* and *Reed* harmfully skews the First Amendment analysis in a way that chills core protected speech. "As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part). The Court should grant *certiorari* to ensure that the holdings in *Citizens United* and *Reed* are faithfully applied by the lower courts.

B. Indiana's Selective ADAD Ban Identifies no Compelling Interest it Wishes to Address, Nor is it Narrowly Tailored to Ameliorate any State Interest.

With the enforcement threat of Indiana's ADAD Ban, Indiana's state government is stepping into the shoes of its citizens to decide which speakers they may hear on any variety of matters, including political and policy matters. Rather than preventing unwanted robocalls, the Selective ADAD Ban's exceptions based on state preferred speakers justified here as state blessed relationships, which the Seventh Circuit claims imply a recipient's consent to be called, result in an unexpected patchwork of impermissible political speech. Despite the Seventh Circuit's claims that the statute operates on implied consent, this will encourage the very type of activity the Selective ADAD Ban attempts to guard against.[2]

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[2] As an additional matter, the relationship-based characterization is obsolete as applicable to *commercial* calls under federal law. *See* 47 C.F.R. § 64.1200(a)(3)(ii).

1. The State's Interest in Protecting "Residential Privacy" is Not Compelling for the Purpose of Restricting Core Protected Speech Based on the Identity of the Speaker and the Content of the Message.

Even if Indiana recognized an interest it wished to protect in enacting its restrictions on speech and their exceptions, such an interest is not compelling to justify its speaker Selective ADAD Ban. Under a strict scrutiny analysis, the State bears the burden of proving that the statute's restriction on speech (1) advances a compelling state interest; and (2) is narrowly tailored to serve that interest. *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665-66 (2015). Although not beyond restraint, strict scrutiny is applied to any regulation that would curtail it. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). It is the "rare case in which a speech restriction withstands strict scrutiny." *Reed*, 135 S. Ct. at 2236 (Kagan, J., concurring) (internal quotation marks and citation omitted); *U.S. v. Playboy Entm't Grp.*, 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible.").

The Seventh Circuit indeed recognized the state's goal of "[p]reventing the phone . . . from frequently ringing with unwanted calls." *Patriotic Veterans*, 845 F.3d at 305. It further stated that "[m]ost members of the public want to limit calls . . . to family and acquaintances, and to get their political information (not to mention their

advertisements) in other ways" while deriding the messages of those speakers not favored by the state as "recorded spiels."[3] *Patriotic Veterans*, 845 F.3d at 306. It is well beyond the scope of the First Amendment to permit the government to decide how consumers wish to receive information, determine the content of desired messages, and to criticize non-favored speakers.

Assuming *arguendo* that protecting residential privacy was the State's legitimate intention in criminalizing speech, rather than a *post hoc* justification for its actions, this Court has never found that "residential privacy" is a compelling interest. *See Kirkeby v. Furness*, 92 F.3d 655, 659 (8th Cir. 1996) ("Although the interest asserted by Fargo (protecting residential privacy and tranquility) is a 'substantial' one," *Frisby v. Schultz*, 487 U.S. 474, 488 (1988), the Supreme Court has never held that it is a compelling interest, *see Carey v. Brown*, 447 U.S. 455, 465 (1980), and we do not think that it is.")); *see also Gresham v. Rutledge*, 198 F. Supp. 3d 965, 970 (E.D. Ark. 2016). Based on the clear precedent of this Court, a residential privacy interest cannot be a sufficient justification for a speech restriction subject to strict scrutiny.

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[3] The Seventh Circuit's omitted reference in each of these quotes to Indiana's effort to protect consumers from a phone ringing with unwanted calls "in one's pocket" is misplaced due to a broad federal ban on robocalls to mobile telephones in the absence of express consent. 47 U.S.C. § 227(b)(1)(A)(iii).

2. Indiana's Selective ADAD Ban Encourages the Activity it Claims to Guard Against, Thereby Undermining Any Privacy Interest of the State.

Despite its Selective ADAD Ban, Indiana leaves unrestricted many unwanted intrusions into residential privacy. For a rationale to be considered compelling, Indiana must have enacted other legislation "to restrict other conduct producing substantial harm or alleged harm of the same sort." *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993). Indiana's Selective ADAD Ban, however, only finds the residential privacy interest of its citizens worthy of protection if the speaker's identity does not match that of its identified favored speakers. For instance, a compelled membership organization, such as a labor union, enjoys a "favored" status as that speaker has a "current business or personal relationship" with its union members who pay mandatory dues or agency fees and is therefore free to use automated dialing equipment to disseminate *any message it wants*. *See* Ind. Code § 24-5-14-5(a)(2).

Using this "implied consent" exception, a labor union may contact its members to expressly advocate for the defeat of a political opponent, and in doing so trigger limitless robocalls into a member's home encouraging that person to get out and vote for a specified candidate. A political opponent, without similar support from a state-favored speaker but rather the support of groups such as Patriotic Veterans, cannot respond through the same medium by delivering its messages using automated

equipment. Freed with the confidence that its political opponents cannot respond through the same medium without facing prosecution, political operatives for the labor unions may be inclined to lean heavily on political robocalls as their primary means of delivering inexpensive and timely messages to voters with whom it can claim a "business or personal relationship."

Indiana grants labor unions, and certain other organizations, a preferred speaker status while withholding those rights from other, similarly situated, speakers. However, the weight of the research on this matter indicates that not only do labor unions *not* speak for their members, but that the recent voting patterns of their members are largely at odds with the political speech and activities of those labor unions. During the 2016 and 2012 presidential election cycles, based on national exit polling, voters in houses with a union member voted for the Democratic nominee for president 51 percent and 58 percent of the time, respectively. *2016 National Election Exit Poll*, CNN, http://www.cnn.com/election/results/exit-polls (Nov. 23, 2016); *2012 National Election Exit Poll*, CNN, http://www.cnn.com/election/2012/results/race/president/ (Dec. 10, 2012). Despite that narrow margin, the vast majority—as much as 95 percent—of labor union political spending favors the Democratic party. *See, e.g.*, Justin Cohen, *Factcheck.org: AFL-CIO*, Annenberg Public Policy Center, http://www.factcheck.org/2014/03/afl-cio-3/ (last visited May 2, 2017). Arguably then, nearly half of union members, who may have received political robocalls otherwise permissible due to Indiana's

speech carveout, may have found them to be unwanted intrusions into their residential privacy.

Additionally, based on research publicly offered by labor unions, the political spending of individual union officers and union PACs are vastly different than their members' politics. For instance, while 93 percent of donations made in the 2016 election cycle by the officers and PAC of the National Education Association went to benefit Democrat candidates and officeholders, only 41 percent of public school teachers identify themselves as Democrats. National Education Association, *Status of the American Public School Teacher 2005-06, p. 12* (Mar. 2010), http://files.eric.ed.gov/fulltext/ED521866.pdf; *Opensecrets.org: National Education Assn*, Center for Responsive Politics, https://www.opensecrets.org/orgs/summary.php?id=d000000064 (last visited Apr. 25, 2017).

Therefore, despite the ability of a labor union to claim a membership base able to receive its political calls due to the state's carveout for permissible speech, those calls are often reaching an unreceptive audience. Such a result undermines the stated interest in protecting the privacy of a user's home and telephone line by encouraging calls by unwanted callers. Moreover, the misalignment of the message to a group of unreceptive recipients demonstrates the failure of the state's "implied consent" rationale for the exemptions in the Selective ADAD Ban.

Allowing calls from these types of compelled membership organizations to their members, on any topic whatsoever and with limitless frequency,

undermines Indiana's ostensible "compelling interest" in residential privacy. *See Fla. Star v. B. J. F.*, 491 U.S. 524, 541-542 (1989) (Scalia, J., concurring) ("[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.") (internal quotation marks and citations omitted). Therefore, while Indiana's Selective ADAD Ban would otherwise permit a group like a labor union to deliver political robocalls to its members, in support of candidates with whom those members frequently disagree—and in the process, undermining the state's interest in residential privacy—a group like Patriotic Veterans would be silenced, even if it narrowly targets its message to individuals likely to support its views.

II. The Growing Circuit Split in the Application of *Reed* – and the Failure to Properly Apply *Citizens United* – Leaves a Patchwork of Restrictions on First Amendment Speech that Chills Core Protected Speech.

The Seventh Circuit must take this Court at its word when it stated that "[p]rohibited, too, are restrictions distinguishing among different speakers, allowing speech by some and not others." *See Citizens United*, 558 U.S. at 340-41. Once a statute makes content-based distinctions, strict scrutiny applies. *See Reed*, 135 S. Ct. at 2228. *See also Reed*, 135 S. Ct. at 2236 (Kagan, J., concurring) (noting that under Reed, content-based statutes face

"automatic" strict scrutiny review and even reasonable laws will be declared unconstitutional under *Reed*). Instead, the Seventh Circuit has inappropriately narrowed the holding to mean that since Indiana's exemptions were about "who" could be called, the rule was permissible, and that despite the statute containing content-based exemptions, it was a proper time, place and manner restraint. *Patriotic Veterans*, 845 F.3d at 305.

Courts in other circuits have held that prohibitions on robocalls by certain speakers, based on content distinctions, were subject to a strict scrutiny analysis. Upon such analysis, these laws were found to be unconstitutional restrictions on free speech as underinclusive solutions to solve the State's purported interest. The Fourth Circuit, in *Cahaly v. Larosa*, 796 F.3d 399, 402 (4th Cir. 2015), held that, when two broad types of automated calls are prohibited, and distinctions among permissible speech were expressly drawn based on the content of those calls, the continued proliferation of the permissible types of calls under the statute failed to protect any stated interest in residential privacy. As a result, the statute was fatally underinclusive.

Similarly, in *Gresham v. Rutledge*, where a statute prohibited robocalls containing certain speech and not others, the court held that a prohibition on core political speech "cannot be justified by saying that the ban is needed" as a remedy to protect "residential privacy and public safety when no limit is placed on other types of . . . calls that also may intrude on residential privacy or seize telephone lines." *Gresham*, 198 F. Supp. 3d at 972.

In particular, *Gresham* found that a number of less-restrictive alternatives to outright bans on core protected speech could achieve the state's interests in residential privacy and public safety. "When a plausible, less restrictive alternative is offered to a content-based speech restriction it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Id.* (quoting *Playboy Entm't Grp.*, 529 U.S. at 816). The court found that, across the country, sixteen states implemented time-of-day restrictions on automated calls, fifteen states and the District of Columbia had requirements that the automated telephone dialing system be disconnected within a certain number of seconds of the call's termination, and eight states enacted prohibitions on calls to emergency lines. *Gresham*, 198 F. Supp. 3d at 972-73, n.17-19.

Many other Circuit Courts of Appeals have rapidly adopted the strict scrutiny analysis required for content-based distinctions on speech similar to *Reed* as part of the basic inquiry in First Amendment jurisprudence. For instance, in August 2016, the D.C. Circuit recognized the abrogation of a previous panel decision based on the Supreme Court's holding in *Reed*, holding that where a federal regulation drew distinctions based on the message conveyed, it was "content-based discrimination pure and simple." *Pursuing America's Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 509 (D.C. Cir. 2016) (abrogating the method of analysis used in *Republican Nat'l Comm. v. Fed. Election Comm'n*, 76 F.3d 400 (D.C. Cir. 1996)). In doing so, the Court explained:

> [S]ince our decision in *Republican National Committee*, the Supreme Court has articulated a more limited view of the role purpose should play in our analysis. In *Reed*, the Court instructed that we should look to purpose only if the text of the law is not content based. If a law, by its terms, discriminates based on content, we apply strict scrutiny "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." According to *Reed*, *Ward* "had nothing to say about facially content-based restrictions." To the extent our decision in *Republican National Committee* looked to the purpose of a law that regulated content on its face, *Reed* forbids us from following *Republican National Committee's* course here. Because the plain terms of [the regulation] prohibit speech based on the message conveyed, the regulation is content based regardless of its purpose.

Pursuing America's Greatness, 831 F.3d at 509 (internal citations omitted).

The paradigm shift signaled by this Court in *Reed* has been further recognized and applied by a number of other decisions by federal courts across the country. *See True the Vote, Inc. v. Internal Revenue Serv.*, 831 F.3d 551, 560 (D.C. Cir. 2016) ("'[T]he government 'has no power to restrict

expression because of its message, its ideas, its subject matter, or its content.'") (quoting *Reed*, 135 S. Ct. at 2226); *Free Speech Coal., Inc. v. Attorney Gen. United States of America*, 825 F.3d 149, 160 n.7 (3d Cir. 2016) (overruling previous panel decision that statute was content neutral and determining under *Reed* that the same statute was content-based, declaring it unconstitutional, and noting that "[o]ur sister circuits have also noted that *Reed* represents a drastic change in First Amendment jurisprudence."); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016) (noting that *Reed* clarified the level of scrutiny given to speech prohibitions and provided a test to determine whether a statute is content-based); *United States v. Swisher*, 811 F.3d 299, 313 (9th Cir. 2016) (explaining that *Reed* "provided authoritative direction for differentiating between content-neutral and content-based enactments."); *Dana's R.R. Supply v. Attorney General*, 807 F.3d 1235, 1246 (11th Cir. 2015) (using *Reed* to distinguish between content based and content neutral statutes); *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015) ("*Reed* effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification."); *Cahaly*, 796 F.3d at 405 (*Reed*'s "formulation conflicts with, and therefore abrogates, our previous descriptions of content neutrality in [previous circuit] cases"). The Seventh Circuit's decision is inconsistent with the clear weight of the Circuits' interpretation of *Reed*, and clouds the clear application of the precedent established by this Court.

This Court recently revisited commercial speech restrictions based on content distinctions, and reaffirmed that First Amendment speech protections extend to whether a merchant may impose a surcharge for a customer's payment with a credit card. In *Expressions Hair Design v. Schneiderman*, No. 15-1391, 2017 U.S. LEXIS 2186 (U.S. Mar. 29, 2017), this Court determined that the statute prohibiting such a surcharge regulates speech because it "regulat[es] the communication of prices rather than prices themselves." *Id.* at *15. This is analogous to Indiana's Selective ADAD Ban, which first regulates *who* can *communicate* using automated call technology without the intervention of a live operator. Then, based on the identity of the speaker, Indiana's Selective ADAD Ban regulates the content of the speaker's speech.

In considering this matter, the Court has the ability to prevent further distinctions among the circuits by providing clarity on its holding in *Reed* to inform at least two pending appeals regarding state prohibitions on ADAD use favoring some speakers and content but not others. In the Ninth Circuit, the Court of Appeals is planning to hear a challenge to California's similar robocall ban, in which it selects favored speakers, such as non-profits, which may freely speak on matters using robocalls while restricting other parties from doing the same. *Gresham v. Picker*, 2016 U.S. Dist. LEXIS 140057 (E.D. Cal. Oct. 6, 2016), *appeal docketed* No. 16-16829 (9th Cir. Oct. 12, 2016). Oral argument is being considered for July of 2017. In the Eighth Circuit, the Court of Appeals is preparing to hear a challenge to a Minnesota law that is similar to

Indiana's Selective ADAD Ban. *Gresham v. Swanson*, 2016 U.S. Dis. LEXIS 98656 (D. Minn. Jul. 27, 2016), *appeal docketed* No. 16-3219 (8th Cir. Jul. 28, 2016).

In short, no fewer than five states' laws creating restrictions on the use of robocalls based on the identity of the speaker or the content of the speech have been recently overturned or are in the process of being challenged. The clear holding of *Reed* has been applied by many Circuits in the two years since its decision. The Court should grant the writ of *certiorari* to provide clarity on its holding in *Reed*, read consistently with *Citizens United*, to resolve the Circuit split in the laws governing permissible restrictions on core protected political speech.

III. Without Consistency in the Application of First Amendment Rights, Small Businesses that Facilitate Speech Cannot Invest in Appropriate Infrastructure or Employees.

The Court should grant *certiorari* in order to provide certainty as to the state of the law to groups and businesses for proper planning and investment. The probable result of the emerging patchwork of speech laws is reduced investment in the infrastructure required for mass speech. Companies that specialize in automated dialing, particularly those that focus their efforts on political speech, generate a significant portion of their revenues during the period leading up to an election. With the lack of clarity as to what groups may participate in

fundamentally protected speech, these companies are unable to confidently make investments based on anticipated demand. Simply stated, businesses are frozen while waiting on the outcomes of court decisions that will determine whether statutes preventing speech are properly found in violation of the First Amendment.

It is unquestioned that many entities financially benefit from free and robust political discussion. However, given the unsteady state of these laws due to the unresolved circuit split, the small businesses that facilitate political speech are unable to sufficiently make business projections that would allow for growth, reinvestment in equipment, and new employee hiring. Legal certainty promotes business innovation and development by clarifying for firms what they can and cannot do, promotes efficient business operations, and incentivizes investment in permissible activities. Paul E. Loving, *The Justice of Certainty*, 73 Or. L. Rev. 743, 764 (1994). Nothing should be uncertain about the full exercise of any individual's or entity's First Amendment rights. The result of a government picking winning voices in the marketplace of ideas creates a cloud over political speech that stifles new developments and investments thereby harming small businesses across the country.

These are but a few of the potential adverse consequences of the Seventh Circuit's decision in *Patriotic Veterans*. *Amicus* respectfully submits that these consequences alone are sufficient to warrant review by this Court.

CONCLUSION

The Seventh Circuit's decision in *Patriotic Veterans*, upholding a content-based restriction on speech based on the identity of the speaker, and subjecting that restriction to only intermediate scrutiny, is an important issue with widespread chilling effects on those who wish to engage in core protected speech. The decision threatens to have a significant and detrimental effect on the nature of political discourse, and opens a path for states to implement new speech restrictions based on an "implied relationship" between the speaker and individual. This backdoor method of restricting disfavored content should not be allowed. The Seventh Circuit's decision directly conflicts with decisions from the Fourth Circuit and this Court, and cuts against the interpretation of *Reed* by the majority of Circuits. The patchwork of speech restrictions and the potential for criminal enforcement of political speech chills fundamentally protected speech by a potential speaker and limits investment by small businesses and individuals who facilitate making that speech. Accordingly, *amicus curiae* respectfully urges this Court to grant the petition for *certiorari*.

Respectfully submitted,

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