

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.

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT*

---

**REPLY BRIEF FOR THE PETITIONERS**

---

NOEL J. FRANCISCO  
*Solicitor General  
Counsel of Record  
Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217*

---

---

**In the Supreme Court of the United States**

---

No. 19-631

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

*v.*

AMERICAN ASSOCIATION OF POLITICAL  
CONSULTANTS, INC., ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT*

---

**REPLY BRIEF FOR THE PETITIONERS**

---

The court of appeals in this case held that the government-debt exception to the automated-call restriction of the Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394, violates the First Amendment. Pet. App. 9a-22a. It then held that the proper remedy was to sever the government-debt exception, leaving the basic automated-call restriction in place. *Id.* at 22a-24a.

Respondents agree that this Court should grant the petition for a writ of certiorari in this case to review both of those holdings. They acknowledge (Br. 12) that certiorari is “appropriate under this Court’s usual practice of reviewing any decision holding a federal statute unconstitutional.” And they contend (Br. 17) that re-

view of the court of appeals' severability holding is likewise warranted. Although the government does not regard the court of appeals' severability holding as independently certworthy, we agree that this Court's review should encompass that aspect of the court of appeals' decision. Pet. 14-15.

Respondents also agree that this case is a suitable vehicle for addressing both holdings. Although respondents contend (Br. 25-26) that the Court should likewise grant the petition for a writ of certiorari in *Facebook, Inc. v. Duguid*, No. 19-511 (filed Oct. 17, 2019), they do not dispute that resolution of the additional statutory-interpretation question presented in *Duguid* could render unnecessary any consideration of the First Amendment and severability issues in that case. Thus, to ensure that those issues are properly before this Court, the Court should grant the petition in this case, whether or not it also grants certiorari in *Duguid*.

Respondents' remaining arguments are primarily directed to the merits of the question presented. Respondents contend (Br. 16) that the government-debt exception cannot be content-neutral if its application depends on a call's economic purpose. But as our petition explains (Pet. 8-10), many federal statutes, including the Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.*, likewise regulate communications based on the economic activity of the persons involved. Respondents do not explain how the TCPA differs from those other statutes, which have not heretofore been thought to raise significant First Amendment concerns.

Respondents also observe (Br. 16) that the certiorari petition does not address whether the TCPA survives strict scrutiny. The government's position, however, is that strict scrutiny is unwarranted; because the TCPA

is content-neutral, “lesser scrutiny” applies, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015), and the TCPA survives that scrutiny. See Pet. 11-14. In any event, the question presented—which asks whether the government-debt exception “violates the First Amendment,” Pet. I—fairly encompasses the question whether the statute survives strict scrutiny.

Finally, respondents argue (Br. 17-25) that the court of appeals erred in severing the government-debt exception from the TCPA’s automated-call restriction. Severability, however, “is largely a question of legislative intent.” *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion). Respondents make no effort to explain why invalidation of the automated-call restriction would be consistent with legislative intent here.

As the court of appeals observed, the automated-call restriction stood on its own for more than two decades before Congress enacted the government-debt exception. Pet. App. 24a. Respondents do not argue, and the court below did not suggest, that the restriction was invalid before the government-debt exception was added to the statute. Given that history—and the severability provision set forth in the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, of which the TCPA is a part, Pet. App. 23a; see 47 U.S.C. 608—there is no reason to doubt Congress’s intent that the automated-call restriction would remain in place if the government-debt exception were held to have introduced a constitutional infirmity, Pet. App. 24a.

\* \* \* \* \*

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

NOEL J. FRANCISCO  
*Solicitor General*

DECEMBER 2019