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 FOR STUDENT LOAN SERVICING ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST[1]

The Student Loan Servicing Alliance (SLSA) is a nonprofit trade association that focuses exclusively on student loan servicing issues. The current value of outstanding student loans that are owned or guaranteed by the federal government is more than $1.5 trillion. SLSA's members work under contract with the federal government to service non-defaulted federal loans; collectively, SLSA's members service more than 95% of all federal student loans, as well as the vast majority of private student loans. For student loans owned by the federal government, the federal government pays servicers—on a per-borrower basis based on the borrower's status—to maintain account records; send statements and account notices; process payments and paperwork; and help borrowers avoid default, access their repayment options, and pay their loans on time. Among other things, since 2013, federal student loan servicers have increased enrollment in income-driven repayment plans by nearly 400%. Nearly one-third of borrowers and half of loan balances are now enrolled in an income-driven repayment plan.[2]

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for party, or person other than amici curiae or counsel made any monetary contribution intended to fund the preparation or submission of this brief. Respondents filed a notice of blanket consent with the Clerk. Petitioners have consented to the filing of this brief.

[2] *See* SLSA, Federal Student Loan Servicing Facts at a Glance at 2 ("SLSA Fact Sheet"), *available at* https://slsa.net/wp-

The federal student-loan program makes higher education possible for millions of students by providing access to loans and other financial aid based on need rather than a credit check, offering below-market rates, and providing flexible repayment plans. Student-loan servicers facilitate that program by helping borrowers understand their statutory repayment obligations and options. Doing so requires contact between the loan servicer and the loan holder—particularly when a loan has become delinquent but is not yet in default. SLSA's members know firsthand that in the vast majority of cases, if they have a live conversation with a borrower, they can resolve a loan delinquency; in contrast, most federal loans that go into default are ones where the servicer was not able to have a live conversation with the borrower.

The decision below invalidated the exception to the Telephone Consumer Protection Act of 1991 ("TCPA") allowing contact "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). Because live contact with borrowers is critical to avoiding loans going into default, this exception is particularly important to SLSA's members—and to ensuring that the federal student loan program in this country continues to secure access to education in a fiscally responsible manner. When a borrower has taken out a federal student loan, it comes with set terms and repayment options, as established by the Department of Education. Contact with the borrower by the servicer to

content/uploads/2019/06/SLSA-Federal-Student-Loan-Fact-Sheet_FINAL.pdf (last visited Mar. 2, 2020).

which the Department of Education assigns the loan helps prevent delinquency and defaults, thereby safeguarding the public fisc, and ensures that borrowers can access the protections that Congress and the Department of Education have built into the federal student loan program. This contact is targeted, purposeful, and does not erode the TCPA's core privacy protections. The decision below paid short shrift to these meaningful distinctions and erred in holding unconstitutional the government-debt exception in the TCPA. It should be reversed.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment restrains the government from "abridging the freedom of speech." U.S. Const. amend. I. In keeping with that foundational proscription, it is "counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech." *Williams-Yulee* v. *Florida Bar*, 575 U.S. 433, 448 (2015). Yet that is just the argument that the Fourth Circuit endorsed here. The TCPA restricts speech in the name of privacy, by prohibiting nuisance autodialed calls to cell phones. *See* 47 U.S.C. § 227(b)(1)(A)(iii). But the Act contains the limited, speech-expanding exception at issue here: It *allows* calls "made solely to collect a debt owed to or guaranteed by the United States." *Id.*

The Fourth Circuit invalidated that exception: It held that "the debt-collection exemption is a content-based restriction on speech" that fails to satisfy strict scrutiny. Pet. App. 15a. Its remedy was to excise the exception. In the name of the First Amendment, then, the Fourth Circuit put in place a law that prohibits *more* speech than the law the Congress actually passed. The Fourth Circuit arrived at that counterintuitive destination after two wrong turns.

First, "the debt-collection exemption" is *not* "a content-based *restriction* on speech" for the simple reason that it is not a "restriction" at all: It is an exception that allows for *more* speech. Its relevance to the constitutional analysis, then, is not that it must satisfy strict scrutiny in its own right. Rather, the debt-collection exception informs whether the TCPA as a whole permissibly pursues the government's interest in consumer privacy, or whether, instead, the exception is so broad as to undermine that interest. Put another way, "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Williams-Yulee*, 575 U.S. at 449 (quoting *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 387 (1992)). Underinclusiveness poses a problem only when it signals (1) that the "law does not actually advance a compelling interest" or (2) that the lawmakers are covertly discriminating against a specific class of speakers or viewpoints rather than serving the broader interest they purport to address. *Id.* at 448–449. Viewed through that proper lens, the TCPA as amended plainly passes muster.

Second, whether the debt-collection exception applies depends on whether there is an underlying economic relationship between the federal government and the recipient. Where that relationship exists, the exception is laser focused on furthering the government's interests: protecting the public fisc and helping borrowers stay out of default. And that relationship legitimately reduces the borrowers' expectation of privacy—they have incurred a legal obligation to the federal government and can expect to receive a call related to that obligation.

The experience of SLSA and its members with both the nature and importance of calls made pursuant to the government-debt exception testifies to the Fourth Circuit's errors. The speech that the exception allows—communications with borrowers holding federal debt—is different in kind from the speech the rest of the TCPA was designed to prohibit—abusive, unsolicited, and random autodialed calls. And, because the government-debt exception is focused on maintaining contact with persons legally responsible for paying federal debts, by persons with legal authority to service and collect those debts on the government's behalf, it is poised to have only a "modest" effect, if any, on consumer privacy overall. Pet'rs Br. 29–30. The government-debt exception therefore does not undercut the privacy protections the TCPA was intended to further.

Nor does the government-debt exception suggest any hostility on the government's part towards particular speakers or viewpoints; it merely advances distinct—and compelling—government interests in protecting the public fisc and ensuring that borrowers have every opportunity to avoid default. Those interests are particularly vital in the student-loan context, which accounts for nearly 80% of all outstanding non-tax federal debt. *See* U.S. Dep't of Treasury, Fiscal Year 2018 Report to the Congress: U.S. Government Receivables and Debt Collection Activities of Federal Agencies 4 (Aug. 2019) ("2018

Fiscal Report").[3] Federal student loans are often made to individuals with little or no credit, based solely on need and not ability to repay. When a borrower defaults, it is the U.S. taxpayer that pays the price, and unlike secured debt, an education cannot serve as collateral. Equally important, federal student loan borrowers cannot take advantage of the dozens of repayment, deferment, and forbearance options that Congress and the Department of Education have implemented if they are unaware that they exist.

The decision below would essentially force the government to choose between compelling interests: The government could either protect consumers' privacy by banning *all* automated communications or it could improve student loan servicing and debt collection, but not both. Nothing in the First Amendment puts the government to that Hobson's choice.

## ARGUMENT

### I. THE GOVERNMENT-DEBT EXCEPTION DOES NOT RENDER THE TCPA'S AUTODIALING BAN UNCONSTITUTIONAL.

"A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Williams-Yulee*, 575 U.S. at 449. This Court has "accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests." *Id*. (collecting cases). The

[3] *Available at* https://fiscal.treasury.gov/files/dms/debt18.pdf.

government-debt exception in the TCPA precisely targets calls that are meaningfully distinct from the intrusive autodialed calls the TCPA was designed to curb. It is therefore permissible to exclude such calls from the autodialing prohibition (thereby allowing additional speech) without running afoul of the First Amendment.

### A. The Underinclusiveness Inquiry Does Not Compel The Government To Treat Unlike Things Alike.

As the Court recently explained, underinclusiveness may "create[] a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*." *Williams-Yulee*, 575 U.S. at 451. But when regulated speech imposes "a categorically different and more severe risk" than does excepted speech, underinclusiveness will not invalidate the law. *Id.* at 449. In *Williams-Yulee* itself, the Court upheld Florida's ban on campaign funds solicitation by judicial candidates even where the law allowed the same solicitations to be made by a candidate's campaign committee. "However similar the two solicitations may be in substance, a State may conclude that they present markedly different appearances to the public," making the distinction a permissible one for the legislature to draw. *Id.* at 450.

The ordinance at issue in *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015)—decided just over one month after *Williams-Yulee*—was a different matter. To promote its interests in aesthetics and traffic safety, the Town of Gilbert passed a comprehensive code regulating outdoor signs. The code imposed more stringent restrictions on temporary directional signs than on ideological or political ones. But that distinction posed a comparability problem: Whether directional, ideological, or political, all signs harmed the Town's aesthetic interests in the same way. *Id.* at 2231 ("The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create *the same problem*." (emphasis added)). Similarly, the Town "offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs." *Id.* at 2232.

Underinclusiveness in *Reed*, then, revealed that the ordinance "d[id] not actually advance a compelling interest," and the Court invalidated it accordingly. *Williams-Yulee*, 575 U.S. at 448–449; *see also City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 418 (1993) (an ordinance restricting news racks for commercial handbills, but not news racks for traditional newspapers, did not "fit" the safety and aesthetics rationales advanced by the City). But the same plainly cannot be said about the purported "underinclusiveness" problem here.

### B. Random, Unsolicited Calls Banned By The TCPA Pose A Categorically Different Risk To Privacy Than Communications Solely To Collect Federal Debt.

Government-debt communications are different in kind from the calls the TCPA was designed to weed out, and exempting them thus "does not do appreciable damage to the privacy interests underlying the TCPA." Pet. App. 38a (quoting *Gallion* v. *Charter*

*Commc'ns Inc.*, 287 F. Supp. 3d 920, 930 (C.D. Cal. 2018)). The TCPA was enacted primarily to curb abusive telemarketing calls. S. Rep. No. 102-178, at 2 (1991); H.R. Rep. No. 102-317, at 2 (1991); *see also* 137 Cong. Rec. 36068, 36301 (Nov. 27, 1991) (noting consumer "outcry over the explosion of unsolicited telephone advertising" and "unwanted telephone solicitations"). "[I]ndividuals are not required to welcome" such "unwanted speech into their own homes." *Frisby* v. *Schultz*, 487 U.S. 474, 484–485 (1988).

The same cannot be said of individuals who have taken on government debt and have let that debt go unpaid. Those individuals have a diminished expectation of privacy—they can expect to receive a call about the debt. *See* Pet'rs Br. 29. Further reducing that expectation of privacy is the fact that the TCPA has always allowed federal employees to use automated calls to collect government debt.[4] The exception merely extends that option to entities acting on behalf of the government to place the same calls.

Indeed, the FCC found that "consumers may benefit from calls that can prevent them from falling into potentially devastating debt." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 31 FCC Rcd. 9074, 9075 (2016). By design, the government has implemented numerous tools and repayment options for avoiding delinquency and

[4] The federal government is not a "person" subject to the automated-call restriction. 47 U.S.C. § 227(b)(1); *see* Pet'rs Br. 29 (explaining the same); *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663, 672 (2016) ("The United States and its agencies, it is undisputed, are not subject to the TCPA's prohibitions * * *.").

default, which it makes available to individuals who have taken out federal student loans. Once the borrower defaults, the penalties are swift, harsh, and long-lasting. Indeed, the federal government has debt-collection remedies far surpassing those available to private creditors, benefiting from exceptions to or special provisions under federal laws. In most circumstances, the balance of the loan becomes due in full and defaulting borrowers are subjected to significant additional fees, 31 U.S.C. § 3717, garnishment of wages without the need for a court order, 31 U.S.C. § 3720D, offset of federal tax refunds, 31 U.S.C. § 3720A, and loss of eligibility for federal financial assistance, 31 U.S.C. § 3720B. Further, bankruptcy relief from federal student loan debt can be extremely difficult to obtain. 11 U.S.C. § 523(a)(8) (prohibiting discharge of student loans unless the debt "would impose an undue hardship on the debtor and the debtor's dependents"). The TCPA exception is intended to help these borrowers. Without contact, borrowers may be unaware of these consequences or the tools the government has made available to avoid them. Loan servicers are tasked with bridging that information gap and helping individuals who have taken on federal loan debt know their options and avoid further delinquency and default.

These problems are particularly acute for federal student-loan borrowers, who hold nearly 80% of the government's total outstanding non-tax debt. 2018 Fiscal Report, *supra*, at 4. Federal loan holders have access to more than 55 repayment, deferment, forbearance, and forgiveness options, some of which are income-based and may involve no monthly payments.[5] Navigating the options that the government itself has made available often requires some assistance. One servicer reports, for instance, that more than half of its borrowers required assistance signing up for income-driven repayment, and one in five required support to renew that option.[6] Loan servicers provide invaluable assistance to borrowers by describing the options that the government makes available to federal student-loan holders.[7]

In short, Respondents "offer[] no basis to conclude" that targeted calls designed to help individuals

[5] *An Examination of State Efforts to Oversee the $1.5 Trillion Student Loan Servicing Market: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 116th Congress at 55:15–50 (2019), *available at* https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=403828.

[6] Reply Comments of Navient Corporation at 17, *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, No. CG 02-278 (F.C.C. June 21, 2016) ("Navient Reply Comments"), *available at* https://www.fcc.gov/ecfs/filing/106220194929186.

[7] Comments submitted to the FCC in various proceedings document as much. *See, e.g.*, Consolidated Reply of Great Lakes Higher Education Corp. et al., at Exhibit 1, 3, *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, No. CG 02-278 (F.C.C. Feb. 13, 2017) ("Consolidated Reply"), *available at* https://www.fcc.gov/ecfs/filing/102140178630457 (quoting borrower's statement that she was "crying from relief and joy thanks to the lovely @Navient rep that just helped [her] get on the correct repayment plan" and another borrower's statements that Great Lakes "is an incredibly helpful and cooperative loan servicer" and that she is "always grateful after dealing with them, no matter the medium").

remedy a delinquency or avoid default on a student loan implicate the privacy concerns behind the TCPA. *Williams-Yulee*, 575 U.S. at 451. Instead, Congress's decision to enact the government-debt exception simply follows this Court's prescription that the government may tailor legislation to prohibit only speech that "most directly" implicates the pertinent privacy interests. *Id.* at 450. That choice warrants respect. *Id.* at 449–450 (deferring to the government when it "reasonably concluded" that prohibited speech caused "a categorically different and more severe risk" than excepted speech); *accord Wagner* v. *Fed. Election Comm'n*, 793 F.3d 1, 31 (D.C. Cir. 2015) (en banc) (rejecting an underinclusiveness challenge because "Congress could reasonably have thought that the difference in status of the two kinds of workers warrants this difference in treatment").

### C. Random, Unsolicited Calls Pose A More Significant Risk To Privacy Than Government-Debt Communications.

The contact prohibited by the TCPA poses "a more severe risk" to privacy than government-debt communications. *Williams-Yulee*, 575 U.S. at 449–450; *see* Clay Calvert, *Underinclusivity and the First Amendment: The Legislative Right to Nibble at Problems After* Williams-Yulee, 48 Ariz. St. L.J. 525, 560 (2016). Loan servicers and debt collection agencies contracted by the federal government are not telemarketers, and they are not in the business of cold-calling random telephone numbers. Due to the unique economic relationship they have with borrowers, they make targeted communications at the federal government's direction to borrowers in need.

The Fourth Circuit below concluded that the government-debt exception undercuts the TCPA's privacy protections because it allows loan servicers to reach "millions of debtors" who owe debts to the federal government. Pet. App. 18a. The basis for the court's conclusion appears to be a 2016 FCC report explaining that "more than 41 million borrowers owed over one trillion dollars in federal student loans," which is only "one category of debt" guaranteed by or owed to the federal government. *Id.* at 17a–18a.

The facts do not support this conclusion. For one thing, any contact that the federal government makes directly is not and has never been covered by the TCPA. *Supra* p. 9 & note 4 (explaining that the federal government is not a "person" subject to the TCPA restrictions). And the effect of the exception is smaller still because the TCPA also has an exception for calls made with the borrower's consent.[8] The government's interest in passing the exception is to ensure that, when needed, a loan servicer or debt collector to which the government assigns a government-backed loan can contact the borrower to further the goals of the loan program and protect the federal fisc in the same way as if the government itself placed the calls. The government's interest in ex-

[8] *See, e.g.*, Comments of Navient Corp. at v, *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, No. CG 02-278 (F.C.C. June 6, 2016) ("Navient Comments"), *available at* https://ecfsapi.fcc.gov/file/60002098245.pdf (explaining that Navient, which represents 25% of the student-loan servicing market, has consent to autodial nine out of ten student-loan borrowers whose loans it services); Navient Reply Comments, *supra* note 6, at 10.

cepting contact with those individuals who hold federally owned or guaranteed loans does not vitiate the TCPA's purpose. The proper test remains one of comparability: The statute continues to prohibit the (vastly) "more severe" intrusion caused by unsolicited and random autodialed calls. *Williams-Yulee*, 575 U.S. at 449–450.

The relationship between student loan servicers and borrowers is distinct in another way from other callers affected by the TCPA. The government pays loan servicers per borrower account they service, and the rate is higher for borrowers whose loans are "current"—not delinquent or in default. *See* SLSA Fact Sheet, *supra* note 1 (documenting the per-borrower rate for each borrower status from in-school to current to delinquent). Loans are considered current even when no monthly payments are being made if the borrower is below a certain income threshold. Thus, far from being antagonistic, student loan servicers have every incentive to work with borrowers who are behind on payments to find a collaborative solution that keeps the borrower from delinquency or default, and to do so with as few calls as possible.

## II. THE DECISION BELOW THREATENS COMPELLING GOVERNMENT INTERESTS.

While "underinclusiveness" may sometimes signal that the real motivation behind a speech restriction is to favor a particular viewpoint, there is absolutely no indication of such a pretextual motivation here. No one doubts that there is a genuine, compelling interest in securing privacy underlying the TCPA. Pet. App. 18a. The government also has a "compelling" interest in protecting the public fisc, and in helping borrowers of taxpayer-funded, government-backed debt stay out of default. *Id.* at 37a. Congress's narrow government-debt TCPA exception balances those interests. The decision below cited to no authority that would force the government to abandon its broader interest because it also has an interest in protecting the public fisc and ensuring those involved in federal loan programs know their repayment options. "The First Amendment does not put [the government] to that all-or-nothing choice." *Williams-Yulee*, 575 U.S. at 452.

### A. The Government-Debt Exception Does Not Reflect Hostility Towards Particular Speakers Or Viewpoints.

In *Williams-Yulee*, this Court noted that underinclusiveness can give rise to a particular concern: "doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Williams-Yulee*, 575 U.S. at 448 (quoting *Brown* v. *Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011)). Consistent with that concern, the Court has held unconstitutional statutes that are so "riddled with exceptions" that they betray the government's discriminatory motive. *Id.* at 449; *see Brown*, 564 U.S. at 802 ("California has singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movie producers—and has given no persuasive reason why."); *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97, 104–105 (1979) (the statute did "not accomplish its stated purpose" of protecting the anonymity of juvenile offenders where it prohibited newspapers, but not other types of publication, from printing names of youths charged in juvenile proceedings).

Here, there is no question that the government's interest in safeguarding consumers' privacy is a genuine one. Courts that have considered the TCPA—whether before or after the addition of the government-debt exception—have recognized as much. *See supra* pp. 8–9; Pet. App. 18a (acknowledging "the compelling governmental interest of protecting privacy"); *Duguid* v. *Facebook, Inc.*, 926 F.3d 1146, 1149 (9th Cir. 2019) (dubbing the TCPA a "longstanding" and "constitutional guardian of consumer privacy"). In the absence of any "pretextual motive," there is simply no reason to "punish [the government] for leaving open more, rather than fewer, avenues of expression," *Williams-Yulee*, 575 U.S. at 452—especially when the calls can already be made by the federal government itself. "In this kind of case, a defensive, overprotective approach seems inappropriate: we should treat subject matter restrictions harshly only when they pose real dangers of distorting effects or impermissible motive." Elena Kagan, *The Changing Faces of First Amendment Neutrality:* R.A.V. *v.* St. Paul*,* Rust *v.* Sullivan*, and the Problem of Content-Based Underinclusion*, 1992 Sup. Ct. Rev. 29, 72 (1992).

### B. The Government Has A Compelling Interest In Protecting The Public Fisc And Helping Borrowers Stay Out Of Default.

On the other side of the coin, the government "has a good reason" to exempt debt-collection calls. *Williams-Yulee*, 575 U.S. at 451; *cf. Reed*, 135 S. Ct. at 2232 (concluding that the Town of Gilbert "has offered no reason" for placing fewer restrictions upon ideological or political signs as compared to temporary directional signs). Indeed, the government has an especially "compelling" reason—safeguarding the public fisc. Pet. App. 37a. Timely and efficient "collection of delinquent debts helps fund government operations, maintain key programs, and reduce the Federal deficit." 2018 Fiscal Report, *supra*, at i.

And debt collection is no easy task. In the 2018 fiscal year, the federal government held or guaranteed more than $1.6 trillion in non-tax receivables, of which $203 billion worth was delinquent—an increase of $18 billion from the 2017 fiscal year. *Id.* at 1. The Department of Education was by far the largest creditor agency, holding $1.28 trillion (nearly 80%) of all non-tax receivables and $166.5 billion (or 82%) of the non-tax delinquent debt. *Id.* at 4, 8. At the end of fiscal year 2019, nearly 20 million borrowers were "in repayment" of federally-managed student loans and over 7 million borrowers were in default. Dep't of Educ., Office of Fed. Student Aid, Portfolio by Loan Status.[9] And the total value of federal student loans in default grew to $161.3 billion. *Id.*

Further, the government's concern is not only the public fisc. In the student loan context in particular, it also has a compelling interest in affording borrowers every opportunity to avoid the harsh consequences of default. *See supra* pp. 9–10 (identifying signifi-

[9] *Available at* https://studentaid.gov/sites/default/files/fsawg/datacenter/library/PortfoliobyLoanStatus.xls (last visited Mar. 2, 2020).

cant additional fees, garnishment of wages, offset of federal tax refunds, and loss of eligibility for federal financial assistance as among the consequences of defaulting on federal loans). The challenges to repaying government loans are particularly acute for federal student-loan borrowers. One survey found that 72% of 2016 college graduates were worried about paying off college-related debt, and 42% believed their debt would negatively affect their credit scores. Edelman Intelligence & Experian Info. Sols., Experian College Graduate Survey Report 17–18 (Apr. 2016).[10] Another survey, focused on Texas borrowers, concluded that only 22% of borrowers never missed or paused payments. PEW Charitable Trusts, Student Loan System Presents Repayment Challenges 2 (Nov. 2019) ("PEW Report").[11] To assist those who have federal student loans, the government has implemented more than 55 repayment, deferment, forbearance, and forgiveness options. *See supra* pp. 10–11 & note 5. The entitlement to access these options comes from holding federal student loan debt, and is often effectuated through servicers communicating these options to borrowers. *See supra* pp. 9–11; Memorandum on Helping Struggling Federal Student Loan Borrowers Manage Their Debt, 2014 Daily Comp. Pres. Doc. 440 (June 9, 2014) (observing that "too many struggling borrowers are still unaware of the options available to them to help responsibly manage their debt" and directing the

[10] *Available at* https://www.slideshare.net/Experian_US/ecs-college-graduate-survey-report-final.

[11] *Available at* https://www.pewtrusts.org/-/media/assets/2019 /11/ psbs_report.pdf.

Secretary of Education to investigate and implement measures to improve communication with several categories of vulnerable borrowers).[12]

Live conversations are demonstrably the best way to help student-loan borrowers get out of delinquency and avoid default.[13] One loan servicer—Nelnet—observed that 98% of the time, live contact helped resolve delinquencies within just two days, compared to 2.1% of the time for voicemails. Consolidated Reply, *supra* note 7, at 4. Data from another loan servicer—Navient—indicates that "[m]ore than 90 percent of the time that [it] has a live conversation with a federal loan borrower, it is able to resolve a loan delinquency." Navient Comments, *supra* note 8, at 9–10. "Conversely, 90 percent of borrowers who default on their federal student loans do not have a live telephone conversation with [Navient]." *Id.*; *see also* Education Finance Council, Comment Letter on Petition for Reconsideration at 2, *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, No. CG 02-278 (F.C.C. Feb. 1, 2017), *available at* https://ecfsapi.fcc.gov/file/10201671501022/efc_petition_support_ltr_final.pdf (finding that live contact with a student-loan borrower led to the

[12] *Available at* https://www.whitehouse.gov/the-pressoffice/2014/06/09/presidential-memorandum-federal-student-loan-repayments.

[13] National Council of Higher Education Resources, Comment Letter on Proposed Rules and Regulations Implementing the TCPA at 11–13, *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, No. CG 02-278 (F.C.C. June 6, 2016), *available at* https://ecfsapi.fcc.gov/file/60002094523.pdf ("[C]all attempts lead to live contacts, and live contacts lead to successful resolutions.").

resolution of delinquency between 63% and 98% of the time, depending on the servicer); Consolidated Reply, *supra* note 7, at 3 n.15 (finding that "attempting up to 10 calls per month yields a 415% increase in delinquency resolution[]" for Nelnet's student-loan borrowers).

Multiple government agencies have likewise consistently emphasized the importance for federal loan holders in having live conversations to discuss repayment options. The Department of Treasury, for instance, found that actually "speaking with a call center agent is critical to identifying and enrolling in a repayment option" and that repeated contact is necessary because response rates to outbound calls have been "extremely low," averaging less than two percent. U.S. Dep't of Treasury, Report on Initial Observations from the Fiscal-Federal Student Aid Pilot for Servicing Defaulted Student Loan Debt 3, 5 (July 2016).[14] And the Consumer Financial Protection Bureau (CFPB) noted its concern that more outreach is needed to ensure that federal loan borrowers can navigate to an income-driven plan. CFPB, Annual Report of the CFPB Student Loan Ombudsman 53–54 (Oct. 2017);[15] *see also* U.S. Gov't Accountability Office, GAO-15-663, Federal Student Loans: Education Could Do More to Help Ensure Borrowers Are Aware of Repayment and Forgiveness Options, at 36 (Aug. 2015) (recommending that the Department of Education and student-loan servicers

[14] *Available at* https://www.treasury.gov/connect/blog/Documents/student-loan-pilot-report-july-2016.pdf.

[15] *Available at* https://files.consumerfinance.gov/f/documents/cfpb_annual-report_student-loan-ombudsman_2017.pdf.

"consistently and regularly notify all borrowers who have entered repayment of income-driven repayment plan options").[16]

Indeed, several government entities *require* servicers to make a certain number of attempts at live conversations with federal loan holders. *See, e.g.*, 34 C.F.R. § 682.411(d)(1) (Department of Education requires a minimum of "four diligent efforts" to contact certain delinquent borrowers by phone); 38 C.F.R. § 36.4278(g)(1)(ii) (Department of Veterans Affairs requires an attempt to establish live contact by the twentieth day of delinquency).

Live conversations rarely happen on the first call attempt. Data from SLSA members shows servicers often reach student-loan borrowers only after a number of attempted but unanswered calls.[17] Once a loan is delinquent, servicers will continue to attempt to reach the loan holder before the loan goes into default. *See, e.g.*, Press Release, Navient, Navient

[16] *Available at* https://www.gao.gov/assets/680/672136.pdf.

[17] *Ex Parte* Letter from Mark W. Brennan, Counsel to Navient Corp. to Marlene H. Dortch, Secretary, FCC, at 2–3, *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, No. CG 02-278 (F.C.C. Mar. 11, 2016), *available at* https://ecfsapi.fcc.gov/file/60001531215.pdf; Comments of Nelnet, Inc. to Notice of Proposed Rulemaking at 14, *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, No. CG 02-278 (F.C.C. June 6, 2016), *available at* https://ecfsapi.fcc.gov/file/60002096593.pdf. SLSA recommends 10–13 monthly calls. Comments of the Student Loan Servicing Alliance (SLSA) at 26, *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, No. CG 02-278 (F.C.C. June 6, 2016), *available at* https://ecfsapi.fcc.gov/file/60002097224.pdf.

CEO Shares Student Loan Borrower Stories, Advocates for Policy Ideas to Address Student Debt (May 26, 2016);[18] Navient Comments, *supra* note 8, at 42–43 (finding that 25% of delinquent federal student loan borrowers require 40 or more call attempts to establish live contact).

The sheer rise in student-loan borrowers—from 28.3 million in 2007 to 42.9 million at the end of 2019[19]—and the accompanying rise in income-driven-repayment enrollments[20] has made it more important that student-loan servicers be able to use all means at their disposal to initiate live contact. *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 31 FCC Rcd. at 9136 (O'Rielly, Comm'r, dissenting); *see also* PEW Report, *supra*, at 22 (finding that reaching "high-risk borrowers before they spend extended time in delinquency can require a significant investment of staff time and generate other costs for the servicer" and recommending that the federal government "provide servicers with additional resources").

[18] *Available at* http://news.navient.com/releasedetail.cfm?ReleaseID=973049.

[19] Dep't of Educ., Office of Fed. Student Aid, Federal Student Aid Portfolio Summary, *available at* https://studentaid.ed.gov/sa/about/data-center/student/portfolio (last visited Mar. 2, 2020).

[20] The Department of Education, for example has seen a 400% increase in income-driven repayment enrollments between 2013 and 2019. SLSA Fact Sheet, *supra* note 2, at 2. Income-driven repayment plan borrowers require closer monitoring than regular borrowers. *See* Navient Reply Comments, *supra* note 6, at 17.

These communications help the government collect debts it is owed and help borrowers access the benefits to which they are entitled under the federal program. The government-debt exception was predicted to save the federal government $120 million over ten years. *See* Office of Mgmt. & Budget, Exec. Office of the President, Fiscal Year 2016: Analytical Perspectives of the U.S. Government, at 127 tbl. 11-3, 128 (2015).[21] It also ensures that federal-loan debtors receive full "due process" and every "opportunity to repay debt in accordance with their financial ability to pay." 2018 Fiscal Report, *supra*, at i. The government chose a permissible means to achieve those interests. Its choice should be upheld. *Williams-Yulee*, 575 U.S. at 450.

[21] *Available at* https://go.usa.gov/xUtw2.

## CONCLUSION

For these reasons and the reasons set forth in the Petitioners' brief, the judgment of the Fourth Circuit should be reversed.

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