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 RESPONDENTS

WILLIAM E. RANEY
KELLIE MITCHELL BUBECK
COPILEVITZ, LAM &
RANEY, P.C.
310 W. 20th Street
Suite 300
Kansas City, MO 64108
(816) 472-9000

ROMAN MARTINEZ
Counsel of Record
ANDREW B. CLUBOK
SUSAN E. ENGEL
TYCE R. WALTERS
SAMIR DEGER-SEN
GREGORY B. IN DEN BERKEN
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
roman.martinez@lw.com

Counsel for Respondents

QUESTION PRESENTED

The Telephone Consumer Protection Act (TCPA) imposes liability of up to $1,500 for any call or text message made or sent without prior express consent to a cellphone using an automatic telephone dialing system or an artificial or prerecorded voice. That broad prohibition on speech, however, is subject to a host of exceptions, including for calls made "to collect a debt owed to or guaranteed by the United States," calls by the government itself, and calls advancing various government-approved messages.

In the decision below, the Fourth Circuit recognized that the TCPA's restriction on speech is content-based and not narrowly tailored to any compelling government interest. Accordingly, the court held that the statute violates the First Amendment. But instead of invalidating the TCPA's ban on speech, the court took the extraordinary step of rewriting the statute to prohibit *more* speech. Specifically, the Fourth Circuit purported to fix the constitutional defect by striking the government-debt exception from the statute, while leaving all of the statute's unconstitutional speech restrictions—and all of its other exceptions—intact.

The question presented is:

Whether the TCPA's cellphone-call prohibition is an unconstitutional content-based restriction of speech, and if so whether the Fourth Circuit erred in addressing the constitutional violation by broadening the prohibition to abridge more speech.

RULE 29.6 STATEMENT

Respondent Public Policy Polling, LLC has no parent corporation, and no publicly held company owns 10 percent or more of its stock. The remaining respondents are nonprofit organizations.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. Statutory and Regulatory Background 3

B. Factual and Procedural Background 10

SUMMARY OF THE ARGUMENT 13

ARGUMENT 16

I. THE TCPA'S CELLPHONE-CALL BAN VIOLATES THE FIRST AMENDMENT 16

A. The Cellphone-Call Ban Is Content-Based .. 16

B. The Cellphone-Call Ban Fails Strict Scrutiny 25

C. The Cellphone-Call Ban Would Also Fail Intermediate Scrutiny 30

II. THE CELLPHONE-CALL BAN MUST BE STRUCK DOWN 33

A. Unconstitutional Speech Restrictions Must Be Invalidated 34

1. Striking Down Exceptions Does Not Remedy The First Amendment Injury 34

2. Striking Down Exceptions Undermines Core Constitutional Values 37

TABLE OF CONTENTS—Continued

Page

3. This Court Uniformly Invalidates Speech Restrictions, Not Exceptions..... 39

4. The Government's Contrary Arguments Lack Merit..... 43

B. As Rewritten By The Fourth Circuit, The Cellphone-Call Ban Still Violates The First Amendment 51

CONCLUSION..... 53

TABLE OF AUTHORITIES

Page(s)

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996).....31, 32

Arkansas Writers' Project, Inc. v. Ragland,
481 U.S. 221 (1987).....23, 37, 40, 50

Brown v. Entertainment Merchants Association,
564 U.S. 786 (2011).....26, 36

Carey v. Brown,
447 U.S. 455 (1980).....46

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,
447 U.S. 557 (1980).....24

City of Cincinnati v. Discovery Network, Inc.,
507 U.S. 410 (1993).....33, 42

City of Ladue v. Gilleo,
512 U.S. 43 (1994).....16, 28, 32, 36, 52

Comptroller of the Treasury of Maryland v. Wynne,
135 S. Ct. 1787 (2015).....45

Edenfield v. Fane,
507 U.S. 761 (1993).....31

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978).....42

TABLE OF AUTHORITIES—Continued

Page(s)

Florida. v. Jardines,
569 U.S. 1 (2013).....27

Free Enterprise Fund v. Public Co. Accounting Oversight Board,
561 U.S. 477 (2010).....34, 35, 44

Frost v. Corp. Commissionn of Oklahoma,
278 U.S. 515 (1929).....45

Glasser v. Hilton Grand Vacations Co.,
948 F.3d 1301 (11th Cir. 2020).....29

Greater New Orleans Broadcasting Association v. United States,
527 U.S. 173 (1999).....42, 49, 50

INS v. Chadha,
462 U.S. 919 (1983).....34, 44

Kirkeby v. Furness,
92 F.3d 655 (8th Cir. 1996).....26

Lambert v. Seminole County School Board,
No. 6:15-cv-78-Orl-18DAB, 2016 WL
9453806 (M.D. Fla. Jan. 21, 2016) 4

Lucia v. SEC,
138 S. Ct. 2044 (2018).....38

Marks v. Crunch San Diego, LLC,
904 F.3d 1041 (9th Cir. 2018).....29

TABLE OF AUTHORITIES—Continued

Page(s)

Martin v. City of Struthers,
319 U.S. 141 (1943).....26

McCullen v. Coakley,
573 U.S. 464 (2014).....26

Metromedia, Inc. v. City of San Diego,
453 U.S. 490 (1981).....31, 36

Minnesota Star & Tribune Co. v. Minnesota Commissioner of Revenue,
460 U.S. 575 (1983).....42

Morse v. Frederick,
551 U.S. 393 (2007).....10

Murphy v. National Collegiate Athletic Association,
138 S. Ct. 1461 (2018).....38

Police Deparment of Chicago v. Mosley,
408 U.S. 92 (1972).....46

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992).....16, 35, 36

Rappa v. New Castle County,
18 F.3d 1043 (3d Cir. 1994) 37, 47, 48

Reed v. Town of Gilbert,
135 S. Ct. 2218 (2015).....*passim*

Republican Party of Minnesota v. White,
536 U.S. 765 (2002).....28

TABLE OF AUTHORITIES—Continued

Page(s)

Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995).....32, 33

Sessions v. Morales-Santana,
137 S. Ct. 1678 (2017).....45

Sorrell v. IMS Health, Inc.,
564 U.S. 552 (2011).....26, 35, 42

Thomas v. Chicago Park District,
534 U.S. 316 (2002).....19

Turner Broadcasting Systems, Inc. v. FCC,
512 U.S. 622 (1994).....19, 51

United States v. Playboy Entertainment Group, Inc.,
529 U.S. 803 (2000).....16, 25

United States v. Virginia,
518 U.S. 515 (1996).....31

Ward v. Rock Against Racism,
491 U.S. 781 (1989).....30

Williams-Yulee v. Florida Bar,
575 U.S. 433 (2015).....36

TABLE OF AUTHORITIES—Continued

Page(s)

ADMINISTRATIVE PROVISIONS

Cargo Airline Association Petition for Expedited Declaratory Building Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 29 FCC Rcd. 3432 (2014) 7

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd. 8752 (1992) 5, 7, 27, 52

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14,014 (2003) 5, 7, 28

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 23 FCC Rcd. 559 (2008). 6, 28

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 27 FCC Rcd. 1830 (2012) 6, 28

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961 (2015) 7, 10

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 31 FCC Rcd. 7394 (2016) 4, 19

TABLE OF AUTHORITIES—Continued

Page(s)

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 31 FCC Rcd. 9074 (2016) .....*passim*

Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, 7 FCC Rcd. 2736 (1992).....4, 5, 27

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

U.S. Const. amend. I 35, 46

2 U.S.C. § 1608 48

7 U.S.C. § 2626 48

15 U.S.C. § 715k 48

22 U.S.C. § 1644 48

42 U.S.C. § 1303 48

47 U.S.C. § 153(39).....4

47 U.S.C. § 227(a).....6

47 U.S.C. § 227(b).....*passim*

47 U.S.C. § 227(g).....9

47 U.S.C. § 608 .....47, 48, 50

TABLE OF AUTHORITIES—Continued

Page(s)

50 U.S.C. § 3076 48

Pub. L. No. 102-243, 105 Stat. 2394 (1991) 4, 5

Pub. L. No. 102-556, 106 Stat. 4181 (1992) 7

Pub. L. No. 116-105, 133 Stat. 3274 (2019) 49

47 C.F.R. § 64.1200(a)(3) 5

81 Fed. Reg. 80,603 (Nov. 16, 2016) 8

OTHER AUTHORITIES

Center for Microeconomic Data, Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit* (Nov. 2019), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc_2019q3.pdf 9

FCC, The FCC's Push to Combat Robocalls & Spoofing, https://www.fcc.gov/about-fcc/fcc-initiatives/fccs-push-combat-robocalls-spoofing (last visited Mar. 22, 2020) 49

Federal Student Aid, U.S. Dep't of Educ., Portfolio by Loan Status (DL, FFEL, ED-Held FFEL, ED-Owned), https://studentaid.gov/data-center/student/portfolio (last visited Mar. 22, 2020) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Justin (Gus) Hurwitz, *Telemarketing, Technology, and the Regulation of Private Speech: First Amendment Lessons from the FCC's TCPA Rules,* 84 Brook. L. Rev. 1 (2018) 8, 27, 29

Daniel Kling & Thomas Stratmann, *The Efficacy of Political Advertising: A Voter Participation Field Experiment with Multiple Robo Calls and Controls for Selection Effects*, GMU Working Paper in Economics No. 16-31 (Aug. 4, 2016), https://ssrn.com/abstract=2818182 11

Letter from Consumer Financial Protection Bureau to FCC (June 6, 2016), https://ecfsapi.fcc.gov/file/60002112663.pdf.....9

Letter from Sen. Edward J. Markey *et al.* to Ajit Pai (FCC Chairman) (June 15, 2018), https://www.markey.senate.gov/imo/media/doc/Letter%20--%20Federal%20Debt%20Collectors%206-15-18.pdf 21

S. Rep. No. 102-178 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968 .....4, 6

TABLE OF AUTHORITIES—Continued

Page(s)

U.S. Dep't of Treasury, Fiscal Year 2018 Report to the Congress: U.S. Government Receivables and Debt Collection Activities of Federal Agencies (Aug. 2019), https://fiscal.treasury.gov/files/dms/debt18.pdf.....8, 9

INTRODUCTION

Three fundamental legal principles resolve this case. First, a statute is content-based if it "target[s] speech based on its communicative content." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Second, a content-based speech restriction can survive constitutional scrutiny only if it is the least restrictive means of furthering a compelling interest. And third, a law that abridges speech in violation of the First Amendment—particularly core political speech—must be invalidated.

The TCPA imposes a ban on certain types of automated calls made to residential landlines and cellphones. But whereas the residential-call ban authorizes broad exemptions for all non-commercial and non-telemarketing calls, the cellphone-call ban does not incorporate those exemptions and instead bars any calls made using an automatic telephone dialing system or featuring artificial or prerecorded voices. 47 U.S.C. § 227(b)(1)(A)(iii) (the "cellphone-call restriction").

This sweeping restriction on cellphone calls is, however, subject to multiple content- and speaker-based exemptions created by Congress and the Federal Communications Commission (FCC). Most prominently, Congress exempted from the scope of the cellphone-call restriction all calls made "solely to collect a debt owed to or guaranteed by the United States." *Id.* (the "government-debt exception"). Under that exception, private debt collectors are free to make automated calls to the vast number of Americans with government-backed student loans, mortgages, farm loans, or veterans loans, so long as their discussion remains confined to a particular

topic—but are subject to ruinous financial penalties if the subject-matter of the call departs from that topic.

The TCPA also exempts calls made by government speakers (including federal, state, and local governments, and even federal contractors), and, by regulation, calls delivering drug-prescription notifications, package-delivery notices, and messages about money transfers. Once again, the scope of the statute's penalties turns on whether the subject-matter of the call is confined to the exempted topics.

Because the cellphone-call restriction is content- and speaker-based, it can survive only by satisfying strict scrutiny. The Government has wisely abandoned any argument that the restriction meets that test. And even if the cellphone-call ban were content-neutral—and thus subject only to intermediate scrutiny—it would still violate the First Amendment, because its sweeping restrictions are hopelessly ill-tailored to the Government's asserted interest in protecting privacy from unwanted communications. Indeed, Congress and the FCC have repeatedly indicated that the privacy interests protected by the TCPA do *not* justify restrictions on the kinds of non-commercial and non-telemarketing calls covered by the cellphone-call provision.

The Fourth Circuit thus rightly held that the cellphone-call restriction violates the First Amendment. Inexplicably, though, the court declined to follow this Court's standard practice and invalidate that restriction. Instead, it purported to "sever" the government-debt exception, judicially expanding the scope of the restriction and outlawing speech that Congress deliberately exempted from regulation.

That result runs counter to basic constitutional principles and would wreak havoc on First Amendment jurisprudence more broadly. When a content-based restriction on speech violates the First Amendment, the proper remedy is to invalidate that restriction—not a speech-promoting exception. That rule follows from the text of the First Amendment, which forbids only laws "abridging the freedom of speech"—not exceptions that freely *permit* speech. This Court has always struck down content-based speech restrictions that fail constitutional scrutiny, and has never struck down a speech-promoting exception or conducted the sort of "severability" analysis the Government proposes here. And even if such an analysis were permissible in First Amendment cases, severing the exception would nonetheless be inappropriate in this case, because the judicially-rewritten statute is *still* unconstitutional.

The Government offers no good reason to abandon settled First Amendment principles and create a brand-new "severability" doctrine that would encourage judges to expand unlawful speech restrictions. Automated calls may be unpopular, but so are many types of speech protected by the First Amendment. This Court should invalidate the cellphone-call ban and let Congress, the FCC, and the private sector address the challenges posed by automated calls in ways consistent with the Constitution.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. Congress enacted the TCPA in 1991 to respond to concerns arising from the advent of automatic-dialing technology. According to the FCC, the

statute's "overall intent" was "to protect consumers from unrestricted telemarketing." *Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking (*1992 NPRM*), 7 FCC Rcd. 2736, 2737 (1992); *see also* S. Rep. No. 102-178, at 1 (1991) (1991 Senate Report). Although automated calls were generally deemed "a nuisance and an invasion of privacy," Congress recognized that such calls also implicated the First Amendment and therefore need not be prohibited entirely. Pub. L. No. 102-243, § 2(13), 105 Stat. 2394, 2395 (1991).

The TCPA prohibits various types of calls to residential landlines, cellular phones, fax machines, and other specialized lines. *See* 47 U.S.C. § 227(b)(1). Those prohibitions apply generally to members of the public, but not to government entities, federal contractors, or state and local governments. *See id.* (applying restriction to "person[s]"); *id.* § 153(39) (defining "person"); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (TCPA Rules and Regulations)*, 31 FCC Rcd. 7394, 7395-96, 7398-99 (2016) (*June 2016 Order*) (federal contractors); *Lambert v. Seminole Cty. Sch. Bd.*, No. 6:15-cv-78-Orl-18DAB, 2016 WL 9453806, at *2 (M.D. Fla. Jan. 21, 2016); Gov't Br. 29.

a. The TCPA's flagship provision categorically bans calls made without prior consent to *residential* phones using an artificial or prerecorded voice. 47 U.S.C. § 227(b)(1)(B). But Congress believed that only a subset of those residential calls would so infringe personal privacy as to justify an absolute ban. It therefore authorized the FCC to exempt all "calls that are not made for a commercial purpose," as well as those "classes or categories" of commercial calls that "will not adversely affect" privacy rights and

"do not include the transmission of any unsolicited advertisement." *Id.* § 227(b)(2)(B); *see also* 105 Stat. at 2395 (FCC should have "flexibility to design different rules" for calls "not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment").

In 1992, the FCC exercised this authority by exempting residential calls "where the record demonstrates that the calls do not adversely affect the privacy interests of residential subscribers"—namely, "non-commercial calls, commercial calls not transmitting an unsolicited advertisement, . . . and calls from tax-exempt nonprofit organizations." *TCPA Rules and Regulations*, 7 FCC Rcd. 8752, 8782 (1992) (*1992 Order*); *see* 47 C.F.R. § 64.1200(a)(3). In doing so, the FCC affirmed that such non-telemarketing calls are "valuable" to consumers and "do not constitute a risk to public safety or an undue burden on privacy interests." *1992 NPRM* 2737. The FCC specifically highlighted the value of calls by "political campaigns" or involving "political contributions and elections," noting that they "fall outside of the types of commercial telemarketing activity the TCPA seeks to regulate." *Id.*; *see also 1992 Order* 8774 (stating that calls to residences by "market research or polling organizations" are "not invasive of residential privacy rights and were not intended to be prohibited by the TCPA").

Since then, the FCC has repeatedly reaffirmed that political and other non-commercial calls—as well non-telemarketing commercial calls—"do not tread heavily upon the consumer interests implicated by the TCPA," *TCPA Rules and Regulations*, 18 FCC Rcd. 14,014, 14,095 (2003) (*2003 Order*), and should

therefore remain categorically exempt from the residential call ban, *TCPA Rules and Regulations*, 27 FCC Rcd. 1830, 1841 (2012) (*2012 Order*); *TCPA Rules and Regulations*, 23 FCC Rcd. 559, 561 (2008) (*2008 Order*).

b. The TCPA also includes a ban on calls to *cellphones*—the restriction directly at issue in this case. That cellphone-call restriction makes it "unlawful for any person within the United States" to make any call to a cellphone without prior consent using "any automatic telephone dialing system [ATDS] or an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A)(iii).[1]

Congress made the cellphone-call ban significantly broader than the parallel residential-call ban. Most notably, the cellphone provision extends to calls using an ATDS device (not merely to artificial or prerecorded calls), and it does not specifically authorize exceptions for non-commercial or commercial, non-telemarketing calls.

These distinctions reflect the fact that at the time the TCPA became law, most cellular providers charged the *recipient* for calls made to cellphones. Because such calls "impose[d] a cost on the called party," 1991 Senate Report at 2, Congress chose to regulate such calls far more stringently than residential calls. *See* 47 U.S.C. § 227(b)(1)(A)(iii) (embedding cellphone-call restriction in provision banning calls to "any service for which the called

---

[1] The TCPA defines an automatic telephone dialing system as "equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator; and . . . to dial such numbers." 47 U.S.C. § 227(a)(1).

party is charged for the call"); *2003 Order* 14,092, 14,115 (noting that calls to cellphones are "costly" and "inappropriately shift marketing costs from sellers to consumers"). Indeed, the FCC explained that "the TCPA did not intend to prohibit autodialer or prerecorded message calls to cellular customers for which the called party is not charged." *1992 Order* 8775.

Consistent with its focus on calls charged to recipients, Congress amended the TCPA in 1992 to authorize the FCC to exempt from the cellphone-call restriction any calls "that are *not* charged to the called party." 47 U.S.C. § 227(b)(2)(C) (emphasis added); Pub. L. No. 102-556, § 402, 106 Stat. 4181, 4194-95 (1992). The FCC has exercised that authority and promulgated numerous content-based exceptions to the cellphone-call ban for various types of commercial speech. For instance, certain healthcare-related calls (such as medical appointment reminders and prescription notifications) are exempted, as are package-delivery notifications and calls about data-security breaches and money transfers.[2]

When creating these exceptions, the FCC has acknowledged that it is now technically feasible for callers to avoid making automated calls to cellular numbers that will be charged for the calls. *2015 Order* 8024, 8028, 8030; *2014 Order* 3435-36. Indeed, today—unlike when the TCPA was enacted in 1991—nearly all phone plans are based on an unlimited-call

---

[2] *See TCPA Rules and Regulations*, 30 FCC Rcd. 7961, 8024-28, 8031-32 (2015) (*2015 Order*); *Cargo Airline Association Petition for Expedited Declaratory Building Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 29 FCC Rcd. 3432, 3436-38 (2014) (*2014 Order*).

model, in which customers are not charged to receive calls or texts. *See* Justin (Gus) Hurwitz, *Telemarketing, Technology, and the Regulation of Private Speech: First Amendment Lessons from the FCC's TCPA Rules,* 84 Brook. L. Rev. 1, 29 (2018). Yet despite recognizing that non- telemarketing calls do not undercut the privacy interests that motivated the TCPA's enactment, the FCC has not exempted these types of calls to cellphones as it has for residential phones.

2. In 2015, Congress created a new exception to the cellphone-call restriction for calls "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). Under this government-debt exception, callers are allowed to make calls without consent using autodialing or prerecorded/artificial-voice technology so long as the call is for the collection of a private government-backed debt or a debt owed to the government itself. The FCC has interpreted the exception as turning on whether "the entire content of the call" is directed to collecting or resolving the debt. *TCPA Rules and Regulations*, 31 FCC Rcd. 9074, 9104 (2016) (*August 2016 Order*); *see also id.* at 9087, 9093, 9109; 81 Fed. Reg. 80,603, 80,604 (Nov. 16, 2016) (same).

The government-debt exception exposes a vast number of Americans to automated calls. Government-backed debts include privately issued student loans, mortgages, veterans' loans, and farm loans. At the end of 2018, the government's outstanding non-tax receivables totaled $1.6 trillion. U.S. Dep't of Treasury, Fiscal Year 2018 Report to the Congress: U.S. Government Receivables and Debt Collection Activities of Federal Agencies 1 (Aug. 2019) (FY 2018 Report), https://fiscal.treasury.gov/files/

dms/debt18.pdf. And private mortgages and student loans—largely guaranteed by the government—are the two largest categories of consumer debt.[3] For example, there is nearly $155 billion in private, federally guaranteed student loans through the Federal Family Education Loans program, affecting 7 million student borrowers.[4] Much of this government-backed debt is collected by private companies, often using autodialed and prerecorded calls to cellphones. *See* FY 2018 Report at 11.

Unsurprisingly, debtors do not always like receiving communications about their debts. The FCC has noted that the Federal Trade Commission (FTC) received "more than 900,000 consumer complaints in 2015 relating to debt collection—more than any other industry or practice." *August 2016 Order* 9077. Meanwhile, the Consumer Financial Protection Bureau reports that it "receives more complaints about debt collection than any other single industry."[5]

3. The TCPA is enforceable by the FCC and state attorneys general, and it also creates a private right of action that carries substantial penalties. 47 U.S.C. § 227(b)(3), (g)(1), (g)(3), (g)(7). A violation of the

---

[3] Center for Microeconomic Data, Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit* at 3 (Nov. 2019), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc_2019q3.pdf.

[4] Federal Student Aid, U.S. Dep't of Educ., Portfolio by Loan Status, https://studentaid.gov/data-center/student/portfolio (last visited Mar. 22, 2020) (follow "Portfolio by Loan Status" hyperlink).

[5] Letter from Consumer Financial Protection Bureau to FCC 4 (June 6, 2016), https://ecfsapi.fcc.gov/file/60002112663.pdf.

statute is automatically subject to a $500 penalty per call, with treble damages available "[i]f the court finds that the defendant willfully or knowingly" committed the violation. *Id.* § 227(b)(3).

Buoyed by this strict liability scheme, TCPA litigation has exploded over the last decade. Between 2009 and 2016, there was an almost 50-fold increase in the number of TCPA cases filed, from fewer than 100 in 2009 to 4,840 in 2016. *See* Resps. Cert. Br. 5. This "skyrocketing" docket has led FCC Chairman Ajit Pai to characterize the TCPA as the "poster child for lawsuit abuse." *2015 Order* 8073 (dissenting); *see generally* Retail Litigation Center Amicus Br. 13-18 (discussing abusive TCPA litigation).

TCPA plaintiffs do not merely go after for-profit companies. They have also set their sights on nonprofits, religious organizations, and political entities. Indeed, political campaigns are now routinely sued in TCPA class actions. *See* Resps. Cert. Br. 6 (citing cases against filed against Obama and Trump presidential campaigns). The TCPA thus directly targets non-government speech of virtually every type, including "[p]olitical speech" at "'the core of what the First Amendment is designed to protect.'" *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (citation omitted).

B. Factual and Procedural Background

1. Respondents are entities whose core purpose is to participate in the American political process, including by disseminating political speech in connection with federal, state, and local elections.

The American Association of Political Consultants, Inc. (AAPC) is a bipartisan trade association of political and public affairs

professionals; the Democratic Party of Oregon and Washington State Democratic Central Committee are political party organizations; and Public Policy Polling tracks public opinion on behalf of politicians and political organizations. JA32-34. Respondents and their members make calls to discuss candidates and issues, solicit candidate donations, conduct polls on political and policy issues, encourage voters to return their ballots, and organize "get out the vote" efforts. *Id.*; JA49-69.

Respondents believe that their political activities would be significantly more cost-efficient, and thus have greater impact, if they could make these calls using automated-dialing technology or with prerecorded voices. JA50, 55, 59, 63. Research supports this belief. For instance, one recent study found that automated calls can increase voter turnout by up to one percentage point. *See* Daniel Kling & Thomas Stratmann, *The Efficacy of Political Advertising: A Voter Participation Field Experiment with Multiple Robo Calls and Controls for Selection Effects*, GMU Working Paper in Economics No. 16-31 (Aug. 4, 2016), https://ssrn.com/abstract=2818182.

Respondents recognize, however, that many of their desired activities could run afoul of the cellphone-call ban and risk $1,500 in damages for each call or text message made or sent. For instance, without prior consent, respondents cannot make automated calls featuring a prerecorded voice message from former President Obama endorsing a Democratic House candidate, or send automatically dialed text messages to supporters of a Republican Senate candidate encouraging them to vote on election day.

2. In 2016, respondents filed this declaratory judgment action against the FCC and Attorney General. They asserted that the TCPA's cellphone-call ban violates the First Amendment and sought an injunction restraining the Government from enforcing the ban against them. *See, e.g.*, JA30-47. In explaining why the ban is unconstitutional, respondents pointed to the various exceptions—including the government-debt exception—directly undermining the Government's claim that the ban advances a compelling interest. *See, e.g.*, *id.* at 38-47, 74-87, 89-96, 98-103, 105-13.

The district court concluded that the TCPA's prohibition on speech is content-based and thus subject to strict scrutiny. Pet. App. 33a-35a. But it held that the statute survives strict scrutiny, because in its view the restriction is narrowly tailored to the Government's interest in "residential privacy." *Id.* at 35a-38a. The court therefore granted summary judgment to the Government. *Id.* at 42a.

3. The Fourth Circuit agreed with the district court and respondents that the TCPA's cellphone-call provision is content-based and thus triggers strict scrutiny. *Id.* at 12a. The court explained that the cellphone-call restriction "facially distinguishes between phone calls on the basis of their content." *Id.* Specifically, whereas calls made to cellphones "'solely to collect a debt owed to or guaranteed by the United States' do *not* violate the automated call ban," calls "that deal with other subjects—such as efforts to collect a debt neither owed to nor guaranteed by the United States—. . . *are* prohibited by the automated call ban." *Id.* (emphasis added) (quoting 47 U.S.C. § 227(b)(1)(A)(iii)).

The court next held that the provision "fails strict scrutiny" because "the debt-collection exemption does not further the purpose of the automated call ban in a narrowly tailored fashion." *Id.* at 16a-17a. It noted that the exception's "expansive reach" "subverts the privacy protections underlying the ban" insofar as it "authoriz[es] many of the intrusive calls that the automated call ban was enacted to prohibit." *Id.* at 16a, 18a; *see id.* at 16a (describing speech restriction as "fatally underinclusive").

The Fourth Circuit then turned to the question of remedy. Strangely, the court based its analysis on the erroneous premise that it was the government-debt *exception*, and not the underlying speech *prohibition*, that violates the First Amendment—even though (1) the exception itself does not abridge any speech, and (2) respondents clearly challenged the restriction, not the exception. *Id.* at 3a; JA105-06, 115-17. The Fourth Circuit then purported to remedy the First Amendment violation by "severing" and invalidating the government-debt exception, thereby *expanding* the TCPA's speech restriction to abridge speech that Congress specifically freed from regulation. Pet. App. 23a-24a.

SUMMARY OF THE ARGUMENT

I. The cellphone-call ban is a content-based restriction on speech that cannot survive strict scrutiny. As this Court has explained, "[c]ontent-based laws [are] those that target speech based on [its] communicative content." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Here, even the FCC has acknowledged that the cellphone-call ban proscribes speech based on the "content of the call." *August 2016 Order* 9104. If a caller discusses only the collection of

a government-backed debt, then he is not subject to any liability; but, if the subject-matter of the conversation changes to a different topic, it "transforms the call from one solely for the purpose of debt collection into a [prohibited] call." *Id.* at 9087. The prohibition on speech thus plainly turns on "the message a speaker conveys." *Reed*, 135 S. Ct. at 2227. And the statute's other content and speaker-based distinctions only confirm that the restriction is subject to strict scrutiny.

The Government does not even defend the cellphone-call ban under strict scrutiny, implicitly conceding that if its content-based argument is wrong, the statute is unconstitutional. The Government is correct. This Court has never held that protecting the public from unwanted communication is a "compelling" interest capable of satisfying strict scrutiny, and, even if were, the statute's sweeping prohibitions on speech are far from the least restrictive means of furthering that interest.

Moreover, the statute is so hopelessly ill-tailored to the Government's asserted privacy interest that it fails *any* level of scrutiny. Thus, even if the Government were correct that the speech restriction here were content-neutral, it must be struck down nonetheless.

II. The only appropriate remedy in this case is to invalidate the cellphone-call provision's *restriction* on speech. This Court's precedents uniformly hold that when a statute restricts speech based on content, it is the restriction—not a speech-promoting exception—that must be struck down. That result follows from the text of the First Amendment, standard remedial principles, and common sense.

Respondents have challenged and are injured by the TCPA's restriction on their own speech—it is no remedy to that First Amendment injury to extend the statute's reach to prohibit speech by third parties. While content-based distinctions undercut the government's asserted interests underlying a speech restriction and thus trigger more exacting review, they are only *evidence* of unconstitutionality, not the source. Removing the evidence does nothing to remedy the actual injury that respondents have suffered—nor does it make a judicially-rewritten ban on more speech compatible with the First Amendment.

Moreover, as a practical matter, the Government's theory would have serious harmful effects. Most importantly, no party would have any incentive to challenge content-based laws, since the result would simply be to extend the restriction to other parties, without offering the challengers any relief. Such a holding would fatally undercut this Court's review of content-based laws, and give legislators at every level of government free rein to enact self-serving speech restrictions.

Finally, even if severing an exception to a content-based speech restriction were ever a permissible remedy, it would be inappropriate here because the judicially-rewritten statute is *still* unconstitutional. Even without the government debt exception, the cellphone-call ban is content-based and far broader than necessary to advance the narrow privacy interests the Government asserts.

With or without the government-debt exception, therefore, the cellphone-call ban violates the First Amendment and must be struck down.

ARGUMENT

I. THE TCPA'S CELLPHONE-CALL BAN VIOLATES THE FIRST AMENDMENT

The First Amendment prohibits the government from "restrict[ing] expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (citation omitted). "Content-based regulations are presumptively invalid," and may only be justified if they are the least restrictive means of furthering a compelling government interest. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *see United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

Here, application of these principles is straightforward. The cellphone-call ban is a sweeping restriction on speech, imposing a draconian punishment on "an entire medium of expression." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994). The FCC has acknowledged that whether the ban applies depends on the "content of the call." *August 2016 Order* 9104. And the Government does not dispute that the provision cannot survive strict scrutiny. The cellphone-call ban thus violates the First Amendment.

A. The Cellphone-Call Ban Is Content-Based

1. "Content-based laws [are] those that target speech based on its communicative content . . . ." *Reed*, 135 S. Ct. at 2226. "Government regulation of speech" is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227.

This "commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation . . . draws distinctions based on the message a speaker conveys." *Id.* Thus, an "obvious" example of a content-based regulation is one that "'defin[es] regulated speech by particular subject matter." *Id.* And a law that "defin[es] regulated speech . . . by its *function or purpose*" is also "subject to strict scrutiny" when it leads to speech being proscribed "based on the message a speaker conveys." *Id.* (emphasis added).

The TCPA's cellphone-call restriction indisputably turns on the "communicative content" the speaker conveys. The statute defines prohibited speech by its purpose—whether or not it seeks to collect a government-backed debt. And it proscribes speech on the basis of whether the content of the speech seeks to accomplish that purpose.

Under the statute, a debt collector is barred from making an unconsented-to, autodialed call to a cellphone to discuss a loan owed to a bank not backed by the government. But the same caller—with the exact same relationship to the recipient—is permitted to make that call if he instead discusses collection of a government-backed student loan. The statute thus plainly "draws distinctions based on the message a speaker conveys." *Id.*

The FCC itself has acknowledged that the scope of the prohibition turns on the "content of the call." *August 2016 Order* 9104. Indeed, the FCC's position is that any "*content* that includes marketing, advertising, or selling products or services, and other irrelevant content . . . *transforms* the call from one solely for the purpose of debt collection into a [prohibited] call." *Id.* at 9087 (emphasis added); Gov't

Br. 7 n.3; *see supra* at 8. That explanation makes clear that the prohibition turns on the "communicative content" a speaker conveys, and thus is content-based under *Reed*.

The cellphone-call ban also discriminates on the basis of viewpoint, which is the most "blatant" and "egregious form of content discrimination." *Reed*, 135 S. Ct. at 2229-30 (citation omitted). The exemption does not apply to all calls that relate to government-backed debt; it applies only to those in which the caller advocates for the debt's "collect[ion]"—as opposed to, for example, the debt's consolidation or forgiveness. 47 U.S.C. § 227(b)(1)(A)(iii). The scope of liability therefore depends on the caller's point of view with respect to the covered "subject-matter." If he "solely" discusses content that is favorable to the government's interest (the "collection" of debt) he is exempt; but if he addresses other options, he is subject to serious financial penalties. *Id.* § 227(b)(1)(B).

2. Aside from the government-debt exception, two other features of the TCPA also independently render the cellphone-call ban content-based.

First, the statute broadly exempts from liability any call or text message sent by any federal, state, or local government entity. *See supra* at 4. That favored treatment also extends to contractors for the federal government (and perhaps state and local government contractors as well). *See id.*

Once again, the FCC's own commentary on the statute exposes the constitutional problem. As the FCC has admitted, because the government's own speech is not covered, a member of Congress may lawfully direct his staff to make automated cellphone

calls to organize a town hall meeting to present her views on a disputed issue of public concern. *See June 2016 Order* 7398-99 ("[W]e find that robocalls to organize tele-town halls, when made by federal legislators . . . are not subject to the TCPA's robocall consent requirement, as long as the robocalls are conducted in the legislators' official capacity."). But a political opponent organizing a competing town hall to express the opposite view is barred from making such calls.[6]

The call ban thus reflects Congress's view that what the government has to say is more valuable than the speech of ordinary citizens. That blatant speaker-based favoritism is antithetical to the First Amendment, and warrants strict scrutiny. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994) (observing that "speaker-based laws demand strict scrutiny" when, as here, "they reflect the Government's preference for the substance of what the favored speakers have to say"); s*ee also Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002*) (*"Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional.").

Second, the statute also gives the FCC the power to issue an unlimited number of additional content-based exceptions. *See* 47 U.S.C. § 227(b)(2)(C). Accordingly, the government has virtually unfettered power to distinguish between favored and disfavored speech on the basis of content. And the FCC has

---

[6] Similarly, the TCPA permits autodialed research-survey calls from contractors working on behalf of the National Institute of Health, *see June 2016 Order* 7398-99, but it prohibits such calls made by scientists at other institutions.

liberally exercised that power—exempting, for example, package-delivery notifications, calls about bank transfers, and healthcare-related calls. *See supra* at 7. The practical result is that various types of commercial speech from favored industries are protected at the government's choosing, while respondents' core political speech is broadly restricted. That result violates the First Amendment.[7]

3. The Government disputes that the cellphone-call ban is content-based by both re-writing the statutory text and misconstruing this Court's First Amendment precedent.

a. The Government first asserts—contrary to the text of the statute—that the cellphone-call ban turns "on circumstances such as [1] whether the debt was owed to or guaranteed by the United States, [2] whether the collection agency had authority to collect the debt, and [3] whether the debt was in fact delinquent." Gov't Br. 16-17 (citation omitted); *see also id.* at 7 n.3. Then, based on these additional manufactured requirements, the Government asserts

---

[7] The Fourth Circuit stated that respondents had, in the district court, "disclaimed any challenge to the regulatory exemptions." Pet. App. 10a n.7. It is true that respondents have not challenged the FCC exemptions as themselves unconstitutional. But—to be absolutely clear—respondents *do* believe the exemptions show that the underlying statutory cellphone-call restriction is content-based and fails strict scrutiny. And they have properly relied on the exemptions in that fashion throughout the case. *See* Resps. Cert. Br. 4-5, 14-15; JA38-40, 74-83, 90-92, 93-94, 98-100 (district court); *id.* at 105, 110-12, 117-18 (Fourth Circuit); *see also* E.D.N.C. ECF No. 16 at 6 (Government's motion to dismiss, acknowledging that respondents had invoked the exceptions "to argue that the TCPA writ large is unconstitutional").

that the statute's relevant distinction is between different "types of economic activity," not content. *Id.* at 19-20. In the Government's telling, therefore, "[t]he applicability of the exception turns on whether the requisite nexus to a government-backed debt exists, not on whether the caller alludes to that nexus" on the call. *Id.* at 19.

The Government's entire theory is grounded on three requirements for invoking the government-debt exception that do not appear in the statute and have no legal force whatsoever. The FCC invented those requirements in a regulation it proposed in 2016. But as the Government itself concedes, that regulation was never approved by the Office of Management and Budget (OMB) and thus "has not gone into effect." *Id.* at 7 n.3. The Government neglects to mention that the FCC unilaterally *withdrew* the proposed regulation before OMB had an opportunity formally to approve or disapprove it.[8] And, although the Government asserts (at 7 n.3) that the proposed rule still represents "the most recent expression of the official position of the agency," it cites no authority for why a withdrawn non-regulation is entitled to any weight.

More fundamentally, the additional elements that the Government seeks to read into the statute are contrary to its plain meaning. Section 227(b)(1)(A)(iii)'s text says *nothing* about whether a debt was actually owed by the called party, whether he was "in fact delinquent," or whether the caller had

---

[8] Letter from Sen. Edward J. Markey *et al.* to Ajit Pai (FCC Chairman) (June 15, 2018), https://www.markey.senate.gov/imo/media/doc/Letter%20--%20Federal%20Debt%20Collectors%206-15-18.pdf.

legal "authority to collect the debt." Gov't Br. 16-17. Instead, the statutory text has one—and only one—requirement: that the call is "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii).

And even if the statute included the additional limitations the Government seeks to graft on to it, the cellphone-call restriction would *still* qualify as content-based. A statute is "content based" if it "draws distinctions based on the message a speaker conveys," including by reference to the "function or purpose" of the proscribed speech. *Reed*, 135 S. Ct. at 2227. If a change in the content of a person's speech leads to a different penalty, the regulation is content-based, regardless of whether there are *additional* non-content elements that must be met for liability.

Without citing any case, the Government nonetheless argues that a regulation is content-based only if the regulation's applicability can "be resolved *solely* by reference to . . . content." Gov't Br. 11, 16 (emphasis added). Under that test, no regulation would be content-based if it contained at least one non-content element that could "resolve[]" liability without "reference to content."

The Government's approach defies common sense. Consider the following hypothetical statute:

> All automated calls are unlawful, except those that (1) endorse President Trump's re-election, (2) are authorized by the Trump campaign, and (3) are made to residential landlines.

This statute is obviously content-based and unconstitutional. And yet the Government's theory is that it is *not* content-based, because elements (2) and

(3) do not turn on content, and thus liability sometimes can be "resolved" without "reference to content."

The Government's theory cannot be correct. Statutes often require that some additional non-content element be met before a speaker is penalized—but that, of course, does not change the fact that the statute "draws distinctions based on the message the speaker conveys." *Reed*, 135 S. Ct. at 2227; *see also Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 224, 227-31 (1987) (invalidating a tax on magazines that turned on both their content and a non-content element—whether they were sold "through regular subscriptions" (citation omitted)). The First Amendment would be a dead letter if the Government could escape strict-scrutiny review of a facially content-based law simply by imposing an additional non-content element.[9]

b. The Government also argues (at 19-23) that the government-debt exception is akin to various other statutes, like the Fair Debt Collection Practices Act, that regulate communications in connection with commercial transactions. According to the Government, respondents' argument that the cellphone-call ban is a content-based speech restriction subject to strict scrutiny mandates the same treatment of those other statutes and thus

---

[9] The Government's example (at 16)—a message that "Your account is overdue. Please promptly submit this month's payment"—only serves to illustrate that the statute *is* content-based. If the same caller, with the same legal authority, called the same recipient, but left a message with *different content* (such as "Your account is overdue. Please promptly return this call to discuss forgiveness or consolidation options"), the call would be prohibited.

"threaten[s] the[ir] constitutionality" as well. *Id.* at 18.

The Government is mistaken. The statutes that the Government points to are limited restrictions on the manner in which a particular commercial practice—like debt collection or a public securities offering—is conducted. They are nothing like the TCPA's broad ban on virtually all speech on a commonly used—and often vitally necessary—medium of communication. To the extent the statutes the Government identifies can even be construed as content-based speech restrictions, they are limited to a narrow set of commercial activity, and thus subject (at most) to intermediate scrutiny. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 n.6 (1980).

The Government's confusion on this point appears to stem from its failure to appreciate that respondents are challenging the cellphone-call *restriction* on speech, not the *exception* to that restriction. While the government-debt exception may touch on the areas regulated in some of the statutes the Government identifies, the restriction is fundamentally different: It encompasses wide swaths of non-commercial speech that—like the political speech respondents wish to undertake—is at the heart of the First Amendment's protections. And the fact that an *exception* is limited to commercial speech cannot mean that the statute's prohibition (which applies to all other speech) receives lesser scrutiny. A content-based law outlawing "all political speech in public parks" is obviously subject to strict scrutiny, even if it includes an exception for "commercial advertisements of election-themed bumper stickers."

The Government's doomsday assertion (at 20) that "[a] variety of other laws would likewise be put at risk" is thus simply wrong. Invalidating the government's effort to favor self-serving commercial speech over protected political speech would not threaten other statutes that narrowly target certain commercial practices and can satisfy *Central Hudson*.

B. The Cellphone-Call Ban Fails Strict Scrutiny

Because the cellphone-call ban is content-based, it triggers strict scrutiny. Remarkably, though, the Government has abandoned the arguments it made below and declined to argue that the cellphone-call ban can survive strict scrutiny. *Compare* Gov't Br. 24-33, *with* Gov't C.A. Br. 19-24. Instead, the Government argues only that the provision survives the "lesser scrutiny" applicable to laws that are "content neutral." Gov't Br. 24 (citing intermediate-scrutiny standard).

The Government is right to concede it cannot win under strict scrutiny. Such scrutiny requires a speech ban to be "narrowly tailored" to a "compelling Government interest"—indeed, to the "least restrictive means" of achieving that interest. *Playboy*, 529 U.S. at 813, 827.

Here, the only interest the Government cites—in a single, drive-by sentence with no explanation—is "the protection of individual privacy from intrusive and disruptive calls." Gov't Br. 14. But this Court has *never* held that "privacy" is a compelling interest capable of satisfying strict scrutiny. Indeed, this Court "has never [even] held" that "*residential* privacy"—i.e. the right to be free from unwanted communications in the *home*—"is a compelling

interest," let alone "privacy" from calls to cellphones (which users can simply switch off or turn to silent mode). *Kirkeby v. Furness*, 92 F.3d 655, 659 (8th Cir. 1996) (emphasis added) (collecting cases where the Court has viewed privacy as a significant but not compelling interest).[10]

Moreover, even if a governmental interest is compelling in the abstract, when "First Amendment rights" are at issue, that interest "must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 805 (2011). The cellphone-call ban is both.

To the extent the Government is now asserting a broad privacy interest implicated by *all* calls made without prior consent, that is inconsistent with the position it has taken, for nearly three decades, with respect to the residential-call ban. In that context, Congress and the FCC have repeatedly made clear that the public's interest in privacy does not warrant elimination of *all* uninvited calls, but rather protection only from intrusive telemarketing calls. *See supra* at 4-6. That is why Congress expressly granted the FCC authority to create exceptions for non-commercial and other non-telemarketing calls to

---

[10] *See also Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 575 (2011) ("Personal privacy even in one's own home receives ample protection from the resident's unquestioned right to refuse to engage in conversation with unwelcome visitors." (citation omitted)); *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943) (striking down ordinance barring door-to-door solicitation); *McCullen v. Coakley*, 573 U.S. 464, 510 (2014) (Scalia, J., concurring in the judgment) ("[I]f protecting people from unwelcome communications . . . is a compelling state interest, the First Amendment is a dead letter." (citation omitted)).

residential lines—and why the FCC has consistently done so. *Id.*

If the government is willing to permit all non-telemarketing calls in the home, "where privacy expectations are most heightened," *Florida. v. Jardines*, 569 U.S. 1, 7 (2013), the privacy rationale cannot plausibly justify a restriction on a much broader range of calls to cellphones—where the privacy interest is much weaker. Cellphones, after all, can be more readily switched to silent mode (or turned off) to avoid unwanted intrusions, or set to block unwanted or unknown callers. *See* Hurwitz, *supra*, at 56-57.

Indeed, the Government fatally undercuts any argument that privacy demands a broad prohibition on calls such as respondents' political calls when it asserts that even debt-collection calls "'do not adversely affect privacy rights'" and thus "could be exempted from [the cellphone-call ban] *without undermining the TCPA*." Gov't Br. 31 (emphasis added) (quoting *1992 Order* 8773).

If that is so, the same must be true of respondents' core political speech, and other non-telemarketing calls prohibited by the cellphone-call ban. After all, the *1992 Order* on which the Government relies exempts *all* non-commercial and non-telemarketing calls from the residential-call ban because—in the FCC's judgment—they likewise "do not adversely affect the privacy interests of residential subscribers." *1992 Order* 8782. In proposing those exemptions, the FCC reiterated that such calls impose no "undue burden on privacy interests, "*1992 NPRM* 2737, and

it reaffirmed that judgment again in 2003, 2008, and 2012.[11]

Furthermore, any argument that "privacy" demands limiting all calls made to cellphones is undercut by the fact that the ban is drastically underinclusive to that purpose. As discussed, Congress has enacted sweeping exceptions to the ban for government-debt collectors, thereby showing that it does not view that privacy interest as particularly important. Contrary to the Government's unsupported assertion (at 31), the debt exception reflects far more than a "small fraction" of automated calls. Mortgages and student loans—largely guaranteed by the government—are the two largest categories of consumer debt, and debt-collection is the area the FTC receives the *single most* complaints about. *Supra* at 9. And the separate exception for all governmental entities—along with further FCC authority to except virtually anything it chooses—lead to a vast number of additional calls being permitted.

By any reasonable measure, these exceptions do "appreciable damage" to the asserted privacy interest. *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002). They thus greatly "diminish the credibility of the government's rationale for restricting speech"—i.e. that individual privacy demands that individuals be free from all nuisance calls. *Ladue*, 512 U.S. at 52; *see also Reed*, 135 S. Ct. at 2231 ("The Town cannot claim that placing strict limits on temporary

---

[11] *See 2003 Order* 14,095 (stating that such calls "do not tread heavily upon the consumer interests implicated by [the TCPA]"); *2008 Order* 561 ("d[o] not adversely affect consumers' privacy rights"); *2012 Order* 1841 (reaffirming exemptions).

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.").

If, on the other hand, the government's interest is simply in limiting the nuisance telemarketing calls identified in the FCC's *1992 Order*, then the cellphone-call ban is dramatically *over*inclusive. The ban covers all cellphone calls with an artificial and prerecorded voice and all calls made by any device with the "capacity" to function as an autodialer—which may, as one Court of Appeals has found, encompass even ordinary calls made from smartphones. *See Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018) (holding that cellphone ban extends to any text message placed by any device with "capacity" to "store" and "automatically" "dial" telephone numbers, even when that capacity is not used); *cf. Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1309–10 (11th Cir. 2020) (Sutton, J.) ("Would the First Amendment really allow Congress to punish every unsolicited call to a cell phone?").

Originally, the breadth of the cellphone-call ban may have been justified by the need to protect call recipients from unwanted charges. *See supra* at 6-7. But that rationale no longer applies, because per-call charges are not typically imposed under modern phone plans. *Hurwitz*, *supra*, at 29.[12] And although

---

[12] The FCC has itself repeatedly acknowledged that technology exists that allows callers to make automated calls *only* to recipients who will not be charged for them. *Supra* at 8. In addition, new technologies have made it increasingly possible for cellphone users to screen or prevent incoming nuisance calls on cellphones, thereby allowing the few users who still pay for calls or messages received to easily avoid those charges without

the statute does give the FCC authority to exempt calls for which a caller does not receive charges, that only confirms it was the avoidance of charges—*not* privacy—that principally motivated the cellphone-call ban in the first place.

In short, the cellphone-call ban is not "narrowly tailored" to promoting either a broad privacy interest in eliminating all automated calls, or a narrower privacy interest in reducing telemarketing calls. However the asserted privacy interest is defined, the cellphone-call ban is an ill-fitting means of furthering that interest. And it *certainly* is not the least restrictive means of doing so, given the availability of far less intrusive measures such as do-not-call lists, mandatory disclosure of caller identity, and reasonable restrictions on the timing or frequency of automated calls to cellphones. The cellphone-call ban plainly fails strict scrutiny.

C. The Cellphone-Call Ban Would Also Fail Intermediate Scrutiny

For the reasons noted above, the cellphone-call restriction is content-based and cannot satisfy strict scrutiny. But even if the ban were deemed a content-neutral time, place, or manner restriction, it would still fail intermediate scrutiny.

1. As this Court has explained, "a regulation of the time, place, or manner of protected speech must be narrowly tailored" to "'serve a significant governmental interest.'" *Ward v. Rock Against*

---

the aid of the TCPA's sweeping ban on speech. *Infra* at 56. Presumably for these reasons, the Government does not claim that the cellphone-call ban is tailored to advance a government interest in preventing charges to call recipients.

Racism, 491 U.S. 781, 791, 798 (1989) (citation omitted). Under that intermediate scrutiny standard, a reviewing court "must identify with care the interests the State itself asserts," and may not "supplant the precise interests put forward by the State with other suppositions." *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). Those interests are limited to the "actual state purposes" underpinning the challenged provision, and do not include new justifications developed "post hoc in response to litigation." *United States v. Virginia*, 518 U.S. 515, 535-36 (1996); *see also Metromedia, Inc. v. San Diego*, 453 U.S. 490, 510 (1981).

Once the actual interest is properly defined, the government bears the "heavy burden" of showing that the relevant speech restrictions "'directly advance'" those asserted interests and are not "'more extensive than necessary to serve [them].'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 494, 516 (1996) (citation omitted).

2. The Government purports to defend the TCPA under intermediate scrutiny. Gov't Br. 24-33. In doing so, however, it focuses entirely on the government-debt *exception*, asserting that the exception is narrowly tailored to the government's interest in promoting the "federal fisc." *Id.* at 25-27.

Whether the exception promotes the Government's fiscal interests is irrelevant: Respondents are challenging the *restriction* on their speech, not the exception allowing others to speak. The statute's (speech-promoting) exception is relevant only because it triggers strict scrutiny and casts doubt on the Government's asserted privacy rationale for restricting speech. *See infra* at 36-37.

The Government cites no precedent for subjecting a speech-promoting exception to constitutional scrutiny, and we are aware of none. Instead, this Court's precedents uniformly require a sufficient justification for restricting speech, not for allowing it. *See, e.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488-91 (1995); *Ladue*, 512 U.S. at 52-53. That is presumably why the Government defended the restriction (not the exception) in its various briefs below. Gov't C.A. Br. 15.

Because it erroneously focuses on the exception here, the Government provides virtually no defense of the cellphone-call restriction. The Government simply asserts, without elaboration, that the restriction furthers a "significant" interest in "individual privacy from intrusive and disruptive calls." Gov't Br. 14. That is the beginning and the end of its analysis. Such a cursory defense is nowhere near enough to carry the Government's "heavy burden" of showing the restriction is narrowly tailored to its privacy interests. *44 Liquormart*, 517 U.S. at 494, 516. That alone is grounds to hold the provision unconstitutional.

3. In any event, the cellphone-call ban is so hopelessly ill-tailored to promoting the privacy interests underlying the TCPA that it would be unsalvageable even if the Government had tried to muster a defense. As explained in connection with strict scrutiny, the ban is either wildly underinclusive or overinclusive, depending on how the privacy interest is characterized. *Supra* at 26-30.

The reality here is that Congress enacted the cellphone-call ban as an effort to prevent uninvited calls from inflicting charges on unwitting recipients. It was never intended as a mechanism for insulating

Americans from non-commercial, non-telemarketing calls that inflict *no* such charges. Yet that is precisely the speech the ban shuts down today.

Given the complete disconnect between the cellphone-call ban's expansive scope, its pro-government exceptions, and the privacy interests the TCPA was designed to protect, the ban cannot satisfy even intermediate scrutiny. *See, e.g.*, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13, (1993); *Rubin*, 514 U.S. at 491.

II. THE CELLPHONE-CALL BAN MUST BE STRUCK DOWN

For decades, in case after case, this Court has imposed the same, consistent remedy for statutes improperly restricting speech based on content: It has invalidated the restriction. Yet here the Fourth Circuit departed from this unbroken precedent and took the extraordinary step of invalidating only the government-debt exception, thereby penalizing *more* speech.

That approach is wrong for two independent reasons. *First*, when a speech restriction violates the First Amendment, the only proper remedy is to strike the restriction down. The Fourth Circuit's contrary decision to leave the restriction intact—but to sever and invalidate a speech-promoting *exception* to the restriction—turns constitutional law on its head. The First Amendment does not allow courts to rewrite laws to ban more speech.

Second, even if severing an exception to a speech restriction could be an available remedy in some cases, it is inappropriate here, where the judicially rewritten speech restriction is *still* unconstitutional. Even as rewritten by the Fourth Circuit, the

cellphone-call ban is far broader than necessary to advance the narrow privacy interests protected by the TCPA.

A. Unconstitutional Speech Restrictions Must Be Invalidated

A court cannot remedy a First Amendment violation by outlawing more speech. That approach conflicts with standard remedial principles, with the First Amendment's text and purpose, and with all of this Court's relevant precedent. It also eliminates incentives for litigants to challenge unconstitutional content-based speech restrictions in the first place, and raises a host of other constitutional concerns.

1. Striking Down Exceptions Does Not Remedy The First Amendment Injury

When a statutory provision violates the Constitution, this Court strikes it down. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508-09 (2010). Severability principles then govern whether *other* portions of the statute must also be invalidated because of their relationship to the unconstitutional provision. As the Court has explained, "'when confronting a constitutional flaw in a statute, we try to limit the solution to the problem,' severing any '*problematic portions* while leaving the remainder intact.'" *Id.* at 508 (emphasis added) (citation omitted). The general rule is that "the *invalid portions* are to be severed." *INS v. Chadha*, 462 U.S. 919, 931-32 (1983) (emphasis added)).

The core remedial inquiry in any constitutional case thus turns on a basic question: What is the "problematic" or "invalid" portion of the

unconstitutional statute that must be struck down? And when a speech restriction violates the First Amendment, the answer is simple: The unconstitutional *restriction* is the core problem, and at the very minimum the *restriction* must fall. *See, e.g., Reed*, 135 S. Ct. at 2226 (reaffirming that the First Amendment prevents government from "*restrict[ing]* expression because of its message . . . or its content." (emphasis added)).

This conclusion follows directly from the constitutional text. The First Amendment prohibits only those laws "abridging the freedom of speech." U.S. Const. amend. I. Its concern is thus with restrictions of speech. And under this Court's doctrine, the First Amendment is violated whenever a particular restriction cannot be justified under the applicable level of scrutiny. *See, e.g.*, *Sorrell,* 564 U.S. at 571-72; *R.A.V.*, 505 U.S. at 382 (1992).

For First Amendment purposes, then, an unconstitutional restriction on speech is—by definition—the "problematic portion" of the statute. *Free Enter.*, 561 U.S. at 508 (citation omitted). That restriction must therefore be set aside. *Id.*

Because the First Amendment protects against unjustified speech restrictions, a violation can never be remedied by invalidating exceptions to those restrictions. Such exceptions *promote* speech—they do not "abridg[e]" it. U.S. Const. amend. I. Invalidating an exception to a speech prohibition does nothing to cure the First Amendment injury inflicted by the prohibition: It does not lift the restriction, and it does not improve the government's justification for imposing it.

Of course, invalidating an exception to a speech restriction *can* eliminate content-based distinctions between banned and permissible speech. In doing so, it necessarily reduces disparate treatment of different speakers or messages. But while that remedy might solve an equal protection problem, it does nothing to address the distinct First Amendment harm inflicted by the unjustified speech restriction.[13]

Under the First Amendment, content-based distinctions matter not only because they inflict inequality, but because they reveal that a speech restriction has been promulgated without valid justification in the first place. As this Court has explained, "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015) (quoting *R.A.V.*, 505 U.S. at 387). Instead, the underinclusiveness inquiry addressing content-based distinctions is a judicial tool used to determine whether, in prohibiting particular speech, "the government is in fact pursuing the interest it invokes." *Brown*, 564 U.S. at 802; *see also Metromedia*, 453 U.S. at 520.

A content-based exception to a general speech prohibition is therefore not itself unconstitutional; rather, it is *evidence* that the statute's restriction on speech is insufficiently justified. It is obviously no remedy at all to "sever" this evidence while leaving the violation in place—indeed, to enlarge the scope of

---

[13] Parties are free to bring an equal protection challenge, rather than a First Amendment challenge, to a law that discriminates between types of speech. *See Ladue,* 512 U.S. at 51 n.9. Here, however, respondents pleaded a First Amendment claim only.

the speech-abridging prohibition. The only appropriate remedy for the First Amendment violation is to strike down the unjustified speech restriction itself.

2. Striking Down Exceptions Undermines Core Constitutional Values

Allowing courts to invalidate exceptions to unconstitutional speech restrictions would also cut strongly against important constitutional values.

First, it would undermine free speech by dissuading challenges to unconstitutional prohibitions. In the real world, First Amendment plaintiffs file suit because they want to lift prohibitions on their *own* speech—not expand prohibitions to others. Virtually no plaintiff will ever endure the effort and expense of challenging a content-based speech restriction if the remedy in such cases is to leave the restriction intact—and only to invalidate the exceptions. And of course, no *beneficiary* of a statutory exception will ever file suit either.

In practice, severing a speech-promoting exception (and leaving the restriction intact) thus means "individuals would lose much of their incentives to challenge [unconstitutional] statutes." *Rappa v. New Castle Cty.*, 18 F.3d 1043, 1073 (3d Cir. 1994) (Becker, J., joined by Alito, J.). The overall impact of the Fourth Circuit's misguided approach would thus be to "effectively insulate underinclusive statutes from constitutional challenge," *Arkansas Writers' Project,*

481 U.S. at 227, and thereby chill protected speech by law-abiding citizens.[14]

This Court's standard approach is to favor remedies that "create '[]incentive[s] to raise [constitutional] challenges.'" *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018) (last alterations added) (citation omitted). And it typically fashions First Amendment doctrines "'to protect speech,' not 'to restrict it.'" *Reed*, 135 S. Ct. at 2229 (citation omitted). Both practices require invalidating unconstitutional speech restrictions in the circumstances here.

Second, invalidating speech-permitting exceptions also presents significant separation-of-powers concerns. It is dicey enough when courts apply severability doctrine and rewrite statutes to fix a statute's constitutional flaws in other contexts. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1487 (2018) (Thomas, J., concurring) (noting that the Court's "modern severability precedents are in tension with longstanding limits on the judicial power"). But concerns about the proper judicial role are at their zenith in the First Amendment context presented here, where the Government invites courts to expand speech restrictions to ban communications

---

[14] The Government affirmatively embraces this result. In this case, as well as similar challenges to the TCPA in the Ninth Circuit, the Government actively urged the lower courts *not* to address the constitutional question precisely because the challengers could not obtain relief under its (erroneous) severability analysis. *See* C.A.J.A. 58-60; United States Petition for Panel Rehearing and Rehearing En Banc 7, *Duguid v. Facebook, Inc.*, No. 17-15320 (9th Cir. filed July 29, 2019), ECF No. 82-1; United States Petition for Panel Rehearing and Rehearing En Banc 6-9, *Gallion v. Charter Commc'ns, Inc.*, No. 18-55667 (9th Cir. filed Aug. 22, 2019), ECF No. 61.

that Congress expressly chose to protect. Judges are meant to protect constitutional liberties, not cut them back. If free speech is to be outlawed, that decision should be made—directly and expressly—by Congress.

Finally, the Government's remedial approach creates significant due process problems, both here and more generally. Invalidating the government-debt exception raises thorny questions of retroactive liability for any collector of government-backed debt who made automated calls before the Fourth Circuit's decision.

Penalizing those debt collectors for engaging in speech expressly protected by the government-debt exception would violate principles of fair notice. Those debt collectors quite reasonably relied on the exception while it was in effect—just as Congress wanted them to. Any such debt collector could justifiably complain if threatened with monetary penalties based on a judicial decision striking the exception. But exempting these individuals (and *only* them) from liability would resurrect the content-based distinction that the Government's misguided remedial analysis seeks to eliminate.

The way to avoid this Catch-22 is to apply standard remedial principles and hold that unconstitutional speech restrictions are necessarily invalid.

3. This Court Uniformly Invalidates Speech Restrictions, Not Exceptions

The foregoing principles explain why in every case in which this Court has found a content-based distinction unconstitutional it has invalidated the restriction on speech rather than any exceptions.

For example, in *Arkansas Writers' Project*, the Court squarely confronted the same remedial question at issue here and resolved it in favor of allowing *more* speech, not less. 481 U.S. at 227. The statute in that case imposed a sales tax on periodicals, with exemptions for newspapers and for "religious, professional, trade, or sports periodical[s]" sold by subscription. *Id.* at 226 (citation omitted). The publisher of a general-interest magazine not eligible for the exception challenged the statute under the First Amendment as an impermissible content-based restriction on speech. *Id.* at 224-26.

In this Court, the State asserted that the publisher lacked Article III standing, because its injury—being forced to pay the tax—would not be redressable even if it prevailed on the First Amendment question. *Arkansas Writers' Project* Appellee Br. 7, 1986 WL 727463. The State argued that even if the statute was discriminatory and unconstitutional, "*it is the exemption that must fall, not the tax*." *Id.* (emphasis added) (citation omitted).

This Court rejected that argument out of hand. It explained that the State's remedial approach "would effectively insulate underinclusive states from constitutional challenge," noting that the State's position had been "soundly rejected" and was "inconsistent with numerous decisions of this Court in which we have considered claims that others similarly situation were exempt from the operation of a state law adversely affecting the claimant." *Arkansas Writers' Project*, 481 U.S. at 227 (citing cases). The Court went on to hold that the State's "content-based" taxation of the disfavored magazine failed strict scrutiny. And it then imposed the appropriate remedy, declaring the tax—not the

exemptions—"unconstitutional and therefore *invalid*" under the First Amendment. *Id.* at 233 (emphasis added). The same result should obtain here.[15]

Also highly instructive is *Reed v. Town of Gilbert*. There, the Court addressed a township "Sign Code" with a basic structure similar to the TCPA. The statute contained a blanket "prohibit[ion]" on "the display of outdoor signs anywhere within the Town," but narrowed the prohibition with a series of "exemptions" based on "whether a sign convey[ed]" a "particular message." *Reed*, 135 S. Ct. at 2224, 2227, 2231. The Court made clear that its constitutional and remedial analyses were deeply intertwined—with both focused entirely on the statutory prohibitions on speech: It stated that because the code "imposes content-based restrictions on speech, *those provisions* can stand only if they survive strict scrutiny, 'which requires the Government to prove that the *restriction* furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id.* at 2231 (emphasis added) (citation omitted).

Applying strict scrutiny, the Court then held that the exceptions showed that the speech restriction was "hopelessly underinclusive" and thus unsupported by any compelling interest. *Id*. at 2231. And in line with the decision's focus on the challenged speech restrictions, it held those restrictions to be

---

[15] It makes no difference that the Court resolved the remedial issue in *Arkansas Writers' Project* in the context of Article III standing. The "redressability" inquiry turns on the same question as the remedial issue here—namely, whether to strike down the restriction or the exception. Indeed, as noted, the Government has previously framed its "severability" argument in *this case* (and in the related *Duguid* and Gallion cases) as a challenge to "standing." *See supra* at n.14.

unconstitutional. The Court nowhere suggested that the First Amendment problem could be cured by simply severing the code's exemptions and banning more speech.

Arkansas Writers' Project and *Reed* align with decades of this Court's First Amendment precedent, which invariably recognizes that the correct remedy for a content-based speech restriction that fails constitutional scrutiny is to invalidate the offending restriction—not its exceptions. In *Sorrell*, for instance, this Court struck down a Vermont statute that contained "content-and speaker-based restriction[s] on the sale, disclosure, and use of" information relating to drug prescriptions. 564 U.S. at 563-64. Because the statute "permit[ed] extensive use of [that] information" for other purposes and by other speakers, the statute "d[id] not advance the State's asserted interest," and was thus unconstitutional. *Id.* at 574. Once again, this Court did not hint that the proper remedy for the First Amendment violation might be to *broaden* the statute's restrictions so as to make sure that all speakers and uses of the information were equally burdened by the law. *See also Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190 (1999); *City of Cincinnati*, 507 U.S. at 430-31; *Minn. Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592-93 (1983); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 795 (1978).

If courts could cure First Amendment violations by invalidating speech-promoting exceptions, one would expect to find, somewhere, at least a single example of this Court ever doing so. But the Government fails to provide *any* such instance. Instead, the Government's primary response to this unbroken line

of cases is to assert that in those decisions "this Court [did not] conduct any severability analysis." Gov't Br. 42.

That is incorrect: *Arkansas Writer's Project* resolved essentially the same severability issue (albeit in the context of addressing standing). In any event, no lengthy severability analysis is needed to figure out that an unconstitutional speech restriction must be struck down.

The Government's implicit suggestion, of course, is that this Court has inadvertently *overlooked* the proper remedial analysis—over and over again, in case after case. That theory is as implausible as it sounds. This Court's standard remedial approach is absolutely correct, and it governs this case.

4. The Government's Contrary Arguments Lack Merit

The Government defends the Fourth Circuit's remedial analysis by invoking general severability principles and arguing that Congress would prefer severing the government-debt exception to invalidating the underlying speech restriction. Gov't Br. 33-42. But the Government thoroughly misapplies those principles. Its approach rests on a basic mischaracterization of respondents' constitutional challenge, and it relies exclusively on equal protection precedents that have no bearing on this First Amendment case.

a. The Government's "severability" analysis depends on its systematic mischaracterization of what this case is about. As the Government well knows, respondents have consistently challenged the TCPA's *restriction* on calls to cellphones. *See, e.g.*, JA31, 40-47, 74-77, 89, 105, 115-22; Resps. Cert. Br.

18. That restriction is what violates the First Amendment's prohibition on "abridging" speech, and is thus the "problematic" portion of the statute that must be struck down. *Free Enter.*, 561 U.S. at 508-09.

Virtually all of the Government's severability analysis turns on the false premise that this case is a challenge to the government-debt *exception*. *See, e.g.*, Gov't Br. I (framing question presented as whether "the government-debt exception . . . violates the First Amendment"); *id.* at 33-36, 41. The Government does not seriously dispute that if the *restriction* is unconstitutional, that is what must fall—indeed, the precedents on which the Government relies expressly require that result. *See id.* at 34 (citing *Free Enter.*, 561 U.S. at 508; *Chadha*, 462 U.S. at 931-32).

The Government's only attempt to address respondents' actual challenge comes in four sentences buried near the end of its brief. *Id.* at 40-41. The Government seems to say that the difference between challenging the exception and the restriction does not matter because "the existence of the exception is integral to respondents' First Amendment theory," and the government-debt exception "introduced into the TCPA the disparity of which respondents now complain." *Id.* at 40.

That argument misses the mark both factually and legally. As a factual matter, respondents have based their challenge not only on the government-debt exception, but also on the host of content-based and speaker-based exemptions from the cellphone-call restriction. Throughout the course of this litigation, respondents have expressly relied on the cellphone-call restriction's preference for government speakers and the FCC-created exemptions to demonstrate that the restriction is both content-based

and grossly underinclusive. *See, e.g.*, JA71 ("This case is a challenge to the cell phone call ban, only, based on the litany of content-based exemptions to it created by Congress and the FCC."); *id.* at 100, 110-11, 117-18.

Moreover, as a legal matter, the "disparity" created by the exception is *not* the core First Amendment problem about which respondents "complain," as the Government asserts (at 39-40). Rather, respondents' complaint is that their own speech is being suppressed, not that government-backed debt collectors are being treated more favorably. That is why they brought this claim under the First Amendment, not the Equal Protection Clause. If respondents prevail on their First Amendment challenge to the restriction, then the restriction itself must fall.

b. The Government's effort to shoehorn this case into an equal protection framework is evident in both of the lead authorities it relies upon. Notably, the Government is unable to cite a single First Amendment case adopting its severability approach. Instead, it relies almost exclusively on *Sessions v. Morales-Santana,* 137 S. Ct. 1678 (2017) and *Frost v. Corp. Commission of Oklahoma,* 278 U.S. 515 (1929)—both of which applied severability doctrine under the Equal Protection Clause.

In the equal protection context, the Court has made clear that a constitutional violation can be remedied *either* by severing the statute's exceptions (so that its benefits or restrictions apply equally to all), or by striking the statute down (so that its benefits or restrictions apply equally to no one). *See Morales-Santana*, 137 S. Ct. at 1698-99; *see also Comptroller of the Treasury of Md. v. Wynne,* 135 S.

Ct. 1787, 1806 (2015) (noting that Equal Protection violation can be cured by "leveling up" or "leveling down"). That is because the core function of the Equal Protection Clause is to outlaw discrimination—i.e., unequal treatment. For an equal protection claim, inequality is the problem, and it can solved by mandating equality in either direction.

The First Amendment is different. Its core concern is not to promote equality, but rather to protect against "abridg[ments of] the freedom of speech." U.S. Const. amend. I. In the First Amendment context, content discrimination is a red flag that triggers heightened scrutiny and demonstrates that Congress was not in fact serving a sufficiently important interest through a speech restriction. *See supra* at 28-29, 36-37. But the fundamental injury is caused by the restriction of speech, and a remedy that leaves that restriction intact is no remedy at all.[16]

c. The Government's reliance on the "separability" clause contained in the Communications Act of 1934, 47 U.S.C. § 608, is likewise misplaced. That clause states that if "any provision of this chapter . . . is held

---

[16] This Court's decisions have occasionally noted that both the First Amendment and Equal Protection Clause can be used to attack statutes that discriminate among speech on the basis of viewpoint or content. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 94-95 (1972); *Carey v. Brown*, 447 U.S. 455, 457, 461-71 (1980). In none of these cases, however, has the Court ever suggested that the Equal Protection Clause's level-up-or-down severability rule should apply in First Amendment cases. On the contrary, in *Mosley* and *Carey* the Court properly invalidated the speech restrictions—not the exceptions—after recognizing that they were unconstitutional under the Equal Protection Clause and also implicated First Amendment values.

invalid, the remainder of the chapter . . . shall not be affected thereby." *Id.*

Section 608 is fully consistent with the remedial principles set forth in *Free Enterprise* and *Chadha*, and it fully supports respondents. Here, the unconstitutional provision that must be "held invalid" is the cellphone-call restriction. The separability clause does not mandate that this restriction should survive; it merely states that "the remainder of the chapter . . . shall not be affected thereby." 47 U.S.C. § 608. Consistent with that clause, respondents seek invalidation only of § 227(b)(1)(A)(iii). They do not argue that the remainder of the TCPA (much less the remainder of Chapter 5 of Title 47), must fall.

d. For the reasons noted, the Government's remedial proposal is contrary to severability doctrine, precedent, and the text of the Communications Act. But even if the Government's equal-protection-style severability analysis applied here—and even if this case were only a challenge to the exception—this Court should not expand the TCPA's prohibition on speech based simply on a guess of what Congress would have wanted.

In *Rappa*, the Third Circuit refused to invalidate a speech-promoting exception to a content-based municipal sign ordinance. The court emphasized that the remedial question in these types of First Amendment cases has 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 held that "the proper remedy for content discrimination generally *cannot* be to sever the statute so that it restricts more speech than it did before." *Id.* at 1073 (emphasis added). The court

further explained that its "refus[al] to strike down the exception" was "in part because of the special status of speech in our constitutional scheme"—"a scheme which generally favors more speech." *Id.*

Nonetheless, *Rappa* left open the possibility that severing the exception *might* be acceptable—even though "no court ha[d] ever mandated" that remedy—if there was "*quite specific evidence* of a legislative preference for elimination of the exception." *Id.* (emphasis added).

Here, there is no such "quite specific evidence" that Congress would prefer to sever the government-debt exception. Section 608's separability clause is clearly not sufficient. That clause is nearly identical to severability clauses in a host of other federal statutes, and it was enacted in 1934, more than half a century before the cellphone-call restriction.[17] It does not begin to address whether Congress would have wanted judges to broaden a later-enacted speech prohibition and thereby outlaw speech that had been specifically exempted from regulation. Indeed, *Rappa* itself rejected reliance on a similarly general severability clause. *See* 18 F.3d at 1072.

It also makes no difference that the cellphone-call ban contained no government-debt exception until 2015. Congress's decision to add that exception reveals its willingness to sacrifice privacy in order to improve the collection of government-backed debts. The fact that Congress had previously struck a different balance is not "quite specific evidence" that it would choose to invalidate the exception—instead

---

[17] *Compare* 47 U.S.C. § 608, *with, e.g.*, 2 U.S.C. § 1608, *and* 7 U.S.C. § 2626; *see also* 15 U.S.C. § 715k; 22 U.S.C. § 1644; 42 U.S.C. § 1303; 50 U.S.C. § 3076.

of the restriction—if faced with that question today. *Id.* at 1073.

The only thing we know for certain from the statutory history is that Congress was no longer willing to live with a cellphone-call ban that hindered efforts to collect government-backed debt. Whether Congress would prefer to give up some federal revenue to return to the broad, pre-amendment ban—or instead would prefer that the cellphone-call restriction be invalidated and debt collectors continue to make automated calls to collect government-backed debt—is all speculation.

Indeed, Congress and the FCC are already in the process of implementing new, bipartisan solutions to automated calls. *See* TRACED Act, Pub. L. No. 116-105, 133 Stat. 3274 (2019). Especially in the current economic and budgetary climate, there is every reason to believe Congress would prefer that the government retain its flexibility to collect loan revenue, while fighting nuisance calls with more precise and tailored solutions like the TRACED Act, along with robust FCC enforcement of the myriad other anti-robocall measures at its disposal. *See generally* FCC, The FCC's Push to Combat Robocalls & Spoofing, https://www.fcc.gov/about-fcc/fcc-initiatives/fccs-push-combat-robocalls-spoofing (last visited Mar. 22, 2020).

Greater New Orleans Broadcasting Association further illustrates the error in the Government's position. That case concerned Section 1304 of the Communications Act of 1934, which prohibited radio and television stations from advertising for lotteries. 527 U.S. at 177. Decades after Section 1304 became law, "Congress dramatically narrowed the scope of the broadcast prohibition" by creating a series of

exemptions. *Id.* at 178. Applying *Central Hudson*'s intermediate scrutiny standard (because Section 1304 restricted only commercial speech), this Court invalidated the speech restriction because the statutory and regulatory scheme was "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *Id.* at 190.

This Court nowhere suggested that the constitutional violation could be cured by severing the exceptions and broadening the broadcast prohibition. But Section 1304, as part of the Communications Act, was subject to *precisely the same* "separability" clause that the Government invokes in this case, 47 U.S.C. § 608. If that clause made a difference to the proper constitutional remedy, this Court would have said so. Moreover, the exemptions that rendered Section 1304 unconstitutional were enacted decades *after* Congress passed the initial speech restriction—just like the government-debt exception here. *See Greater New Orleans*, 527 U.S. at 177-79. Yet, again, this Court never suggested that Section 1304's constitutional flaws could be fixed by invalidating the later-enacted exemptions and returning to the original, broader speech ban.[18]

The same result should obtain here. Under fundamental First Amendment and remedial principles, the TCPA's cellphone-call restriction must be struck down.

---

[18] Similarly in *Arkansas Writers' Project*, the exemptions to the unconstitutional tax were added six and fourteen years after the statute's original enactment. 481 U.S. 224 & nn.1-2. This Court did not consider that a reason to invalidate the exemptions, instead of the underlying tax.

B. As Rewritten By The Fourth Circuit, The Cellphone-Call Ban Still Violates The First Amendment

The Fourth Circuit's remedial holding is also wrong for an additional reason: Even *after* severing the government-debt exception, the statute remains unconstitutional. Although excising the government-debt exception eliminates one of the most glaring content-based features of the restriction, it does nothing to address the statute's other speaker- and content-based carve-outs. *See supra* at 18-20. Nor does it fix the cellphone-call restriction's other overinclusivity and underinclusivity problems, which doom it even under intermediate scrutiny. *Id.* at 30-33.

1. Even without the government-debt exception, the cellphone-call restriction still triggers strict scrutiny. For one thing, the statute continues to favor governmental speakers—at the federal, state, and local level—over private speakers. *See supra* at 18-21; *Turner Broad. Sys.*, 512 U.S. at 658. As the FCC has admitted, a member of Congress may thus direct his staff to make auto-dialed calls to organize a town hall meeting, whereas a political challenger organizing a competing town hall in the same manner will face monetary liability. *Supra* at 18-19.

The cellphone-call scheme also contains content-based and speaker-based exceptions for package-delivery notifications, health-care related calls, and money-transfer notifications, among others. *See supra* at 19-20. These content-based distinctions likewise trigger strict scrutiny. And as noted, the Government does not even try to defend the statute under that standard. *Id.* at 25.

In any event, even under intermediate scrutiny, the rewritten cellphone-call provision fails for virtually all the same reasons already discussed. *See supra* at 26-33. Excising the government-debt exception does nothing to strengthen the Government's asserted interest in protecting privacy. This Court has never recognized that interest as "compelling," and the authorized regulatory exceptions undermine any persuasive assertion that it is sufficiently important here. Moreover, severing the government debt-exception does not erase the fact that Congress enacted it in the first place. Congress's willingness to trade off privacy for government convenience still "diminish[es] the credibility of the government's rationale" for the cellphone-call restriction as a whole. *Ladue*, 512 U.S. at 52.

Nor does eliminating the exception improve the means/end fit between the broad cellphone-call restriction and the far narrower privacy interest that the TCPA actually seeks to advance. *See supra* at 26-29. That interest focuses on preventing telemarketing calls, and—according to the FCC—it is not "adversely affect[ed]" by the non-commercial and non-solicitation calls that remain subject to the cellphone-call restriction. *1992 Order* 8782; *see also supra* at 27-28.

With or without the government-debt exception, the cellphone-call ban is unconstitutional under the First Amendment. This Court should strike it down.

CONCLUSION

The judgment of the court of appeals holding the TCPA's cellphone-call restriction unconstitutional should be affirmed, and that restriction should be invalidated.

Respectfully submitted,

WILLIAM E. RANEY
KELLIE MITCHELL BUBECK
COPILEVITZ, LAM & RANEY, P.C.
310 W. 20th Street
Suite 300
Kansas City, MO 64108
(816) 472-9000

ROMAN MARTINEZ
Counsel of Record
ANDREW B. CLUBOK
SUSAN E. ENGEL
TYCE R. WALTERS
SAMIR DEGER-SEN
GREGORY B. IN DEN BERKEN
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
roman.martinez@lw.com

Counsel for Respondents

March 25, 2020