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, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the government-debt exception to the Telephone Consumer Protection Act's automated-call restriction violates the First Amendment, and whether the proper remedy for any constitutional violation is to sever the exception from the remainder of the statute.

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INTEREST OF *AMICUS CURIAE*[1]

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

This case concerns Cato because the amendment to the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), that lies at the heart of the question presented is a content-based preference for speech that inures to the government's benefit, over that of other private parties, and as such is antithetical to basic First Amendment principles.

BACKGROUND AND SUMMARY OF ARGUMENT

This Court has made it abundantly clear that the government does not get to put its thumb on the scale to favor speech that is more aligned with its interests. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565, 576-77 (2011). With the TCPA, Congress has done precisely that. Specifically, the TCPA provision at issue here restricts speech made using automated dialing and prerecorded calls. As originally enacted, the statute

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief. Respondents have filed a blanket permission for *amicus* briefs. A letter of consent from Petitioners accompanies this brief.

generally applied without regard to the reason(s) for a call, other than in narrow instances involving exigent circumstances or explicitly willing speakers and listeners. But with a 2015 amendment, Congress singled out calls to collect debts owed to or guaranteed by the government for a specific exemption. So while all other private speakers continue to be impeded by the TCPA, those calling for purposes redounding to the benefit of the government fisc gain privileged status. By preferring speech that benefits the government based on its content, the TCPA is fundamentally incompatible with basic First Amendment principles.

a. Among other things, the TCPA makes it unlawful for "any person" to "make any call (other than … for emergency purposes or [] with the prior express consent of the called party) using any auto[dialer] or [] artificial or prerecorded voice" to any lines for emergency services or medical/eldercare facilities, and to telephone numbers assigned to cellular, paging, and similar services for which called parties are charged for incoming calls. 47 U.S.C. § 227(b)(1)(A).[2] The Federal Communications Commission ("FCC") adopted rules mirroring these restrictions. *See* 47 C.F.R § 64.1200(a)(1)-(2). Restrictions on autodialing apply not only to commercial calls, but to those for political advocacy, campaigning and related purposes, those that are for fundraising and other nonprofit needs, and those that are purely informational.[3]

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[2] For ease of discussion, we refer to the restriction on autodialed and prerecorded calls as the "automated call ban," as did the decision below. *E.g.*, Cert. App. 2a.

[3] *See*, *e.g.*, *Telephone Consumer Protection Act Robocall & Text Rules; Biennial Reminder for Political Campaigns About*

The FCC has interpreted the statute and rules as allowing calls under the automated call ban's prior express consent exception, if a consumer knowingly releases their number to a caller, thus providing (absent instructions to the contrary) permission to be called at that number. *Rules & Regulations Implementing the Tel. Consumer Protection Act*, 7 FCC Rcd. 8752, 8769 (1992). The FCC has consistently reaffirmed this interpretation, and courts have relied upon it.[4] It later recognized this applies to automated debt-collection calls to cell phones (for creditors or those calling on their behalf), if the cell number is obtained from the debtor in connection with the debt. *Rules & Regulations Implementing the Tel. Consumer Protection Act*, 23 FCC Rcd. 559 (2012).

Calls from the government, however—for any purpose—have never been subject to these limits, Pet.

Robocall & Text Abuse, 31 FCC Rcd. 1940 (2016); *Rules & Regulations Implementing the Tel. Consumer Protection Act*, 31 FCC Rcd. 9074, 9134 (2016) ("*TCPA Government-Debt Rulemaking*") (O'Rielly, Comm'r, dissenting and discussing informational calls) (citing *Rules & Regulations Implementing the Tel. Consumer Protection Act*, 27 FCC Rcd. 1830 (2012)). *See also* 47 C.F.R. §§ 64.1200(a)(2) & (a)(3)(iv) (allowances from TCPA application for calls by or on behalf of tax-exempt nonprofit organizations).

[4] *See, e.g.*, *Rules & Regulations Implementing the Tel. Consumer Protection Act*, 17 FCC Rcd. 17459, 17480 n.131 (2002); *Rules & Regulations Implementing the Tel. Consumer Protection Act*, 30 FCC Rcd. 7961, 7990-91 (2015), *vacated in part on other grounds*, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018); *Latner v. Mt. Sinai Health Sys., Inc.*, 879 F.3d 52, 54 (2d Cir. 2018); *Blow v. Bijora, Inc.*, 855 F.3d 793, 803 (7th Cir. 2017).

Br. 5, 29, as the TCPA applies to "persons,"[5] which the Communications Act (of which the TCPA is a part) defines as excluding the government. *See* 47 U.S.C. § 153(39). The TCPA does not waive sovereign immunity. *See Rules & Regulations Implementing the Tel. Consumer Protection Act*, 31 FCC Rcd. 7394, 7398 (2016); Resp. Br. 18.

Nonetheless, Congress included in the Bipartisan Budget Act of 2015 a TCPA amendment that excepted from the autodialer ban all calls "solely to collect a debt owed to or guaranteed by the United States." Pub. L. No. 114-74 § 301 (amending 47 U.S.C. §§ 227(b)(1)(A)(iii) & (b)(1)(B)) (hereinafter the "government-debt exception"); *see also* Cert. App. 4a-5a. The net impact of the amendment is that, along with the government, private parties can place automated calls if the subject is collecting debt owed to or guaranteed by the United States, without regard to the debtor's consent,[6] while automated calls whose subject is collection of any other debts—or any other topic, for that matter—cannot be made without prior consent of the called party (or an extant emergency).

b. Invalidation of the government-debt exception under the First Amendment is clearly required by this Court's precedents. That the First Amendment bars the government from granting advantages to those

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[5] *See, e.g.*, 47 U.S.C. §§ 227(b)(1), (b)(4), (c)(3)(F)-(H), (e)(5); 47 C.F.R. §§ 64.1200(a)(1)-(3), (c)-(e).

[6] The FCC adopted rules that implement the government-debt exception, with a provision allowing debtors to request no further calls, *see* 47 C.F.R. § 64.1200(j)(1)(B), *as appended to TCPA Government-Debt Rulemaking*, 31 FCC Rcd. at 9103-04, but the rules are not in effect. *See* Pet. Br. 7 n.3; Resp. Br. 21.

whose expression inures to its benefit, while impeding expression by all others, has ramifications far beyond the autodialing and debt-collection that this case involves. Such self-dealing is antithetical to the First Amendment's free speech guarantee, and to the fundamental principle that the government lacks power to restrict expression because of its subject matter or content.

This Court's precedent holds content-based laws presumptively unconstitutional. The government concedes this premise but tries to avoid the common-sense meaning of "content-based." It recasts the government-debt exception as merely regulating the "economic relationship" between callers, call recipients, and the government, but this is pure sophistry and is refuted by the statute's plain text. The government's position is just another way of saying the automated call ban and its government-debt exception operate based on a call's function or purpose, which this Court has cited as a hallmark of content-based regulation.

Given the government-debt exception's content-based nature, its failure to satisfy strict scrutiny is clear. To start, there is no compelling government interest. Insofar as the government defends the law based on self-interest in protecting the federal fisc, the Court should confirm what *IMS Health* implied: that restricting most speakers but giving free rein to those whose speech serves government policy goals is an illegitimate state interest.

That aside, the government could already make calls itself to collect debts it is owed or has guaranteed (and its sovereign immunity that allows as much can

be extended to contractors), so the interest in unshackling private debt collectors to also do so does not rise to the level of compelling interest. And while the government also asserts interests based on protecting personal privacy, the government-debt exception *undermines* that interest. The government-debt exception also renders the automated-dialing ban under-inclusive, and not narrowly tailored, and bypasses a number of less-restrictive alternatives.

The Court should accordingly reinforce its recent pronouncement of what it means for a law to be content-based, and underscore that it applies with particular force where a law favors speech simply because it dovetails with government policy.

ARGUMENT

I. THE GOVERNMENT-DEBT EXCEPTION TO THE TCPA'S AUTOMATED CALL BAN IS CONTENT-BASED UNDER ANY "COMMONSENSE MEANING" OF THE TERM

The "commonsense meaning of the phrase 'content-based'" obviously applies where a law makes "facial distinctions based on [] message." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). In this regard, the government-debt exception to the TCPA's automated call ban is precisely the kind of law that operates by "defining regulated speech by particular subject matter." *Id.* Where the government expressly favors speech that inures to its own benefit while hamstringing all other speech, it is vital that the Court confirm that strict scrutiny applies and that such measures are presumed invalid. Only by doing so can the Court keep the "starch in our constitutional standards" in this area. *Ashcroft v. ACLU*, 542 U.S.

656, 670 (2004) (citation and internal quotation marks omitted).

A. Strict Scrutiny Is Required to Prevent the Government from Favoring Speech That Benefits Its Own Interests

The First Amendment operates on the "fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content." *National Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("*NIFLA*") (quoting *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (internal quotation marks omitted)). Content-based laws are the "essence of [] forbidden censorship," *Mosley*, 408 U.S. at 95-96, and so the Constitution demands that such restrictions be "presumed invalid … and that the Government bear the burden of showing their constitutionality." *United States v. Alvarez*, 567 U.S. 709, 716-17 (2012) (quoting *Ashcroft v. ACLU*, 542 U.S. at 660). Additionally, "government regulation may not favor one speaker over another." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

This is because "the First Amendment envisions the citizen shaping the government, not the reverse," by "'remov[ing] 'governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry[.]" *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 782-83 (1996) (Kennedy, J., concurring in part) (quoting *Cohen v. California,* 403 U.S. 15, 24

(1971)). To support this intent, this Court has required "the most exacting scrutiny [for] regulations that suppress, disadvantage, *or* impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 642 (1994) (emphasis added).

Here, the TCPA imposes "differential burdens" by favoring private parties collecting government-backed debt,[7] while largely denying the efficiencies of automated telephony to prospective callers who wish to discuss virtually all other topics. Those so disadvantaged include the Respondents, as "political … or polling organizations [seeking] to use an autodialer and prerecorded messages to convey and receive information." Cert. App. 29a; Resp. Br. 10-11, 24. *See also supra* note 3. The law also impedes any company seeking to convey information to its customers, even if doing so plays no role in marketing goods or services. And it extends to other business needs unrelated to selling goods or services by phone, such as customer-satisfaction follow-up, recall or warranty information, and collecting payment for goods or services already provided.

Notably, when Congress inserted a government-debt collection exception into the automated call ban, the FCC had already addressed debt-collection by construing prior express consent to exist if a creditor obtains a debtor's number in connection with a debt

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[7] Hereafter, we refer to "debt owed to or guaranteed by the United States" (or government) as stated in the automated call ban as "government-backed debts," as do Petitioners. *See*, *e.g.*, Pet. Br. 6, 10-11, 17, 19, 25-29, 32, 35-36, 39, 41.

that is the subject of the call.[8] This applies to debt-collection generally, including where the government is owed or has guaranteed the debt. The statutory exception at issue in this case thus favors speech by private parties placing calls that ultimately benefit the government, over all other callers. This means those collecting government-backed debt have the advantage—enjoyed by no other collector, or other caller—of being able to autodial regardless of how they obtain phone numbers, and even if the called party does not consent, or in fact objects, to the call.

This kind of government self-dealing cannot stand under the First Amendment. It is antithetical to the First Amendment's free speech guarantee to allow the government to confer advantages on those whose expression inures to its benefit (financial, as here, or otherwise), while impeding expression by all others.

The government's asserted interest underlying the TCPA's automated call ban has long been the protection of personal and residential privacy from intrusive calls. Cert. App. 16a. In *IMS Health*, this Court held the First Amendment does not allow protecting privacy "only on terms favorable to [] speech the State prefers." 564 U.S. at 574. As there is no doubt the TCPA restricts protected, noncommercial speech, *compare id.* at 571-72, the Court must reinforce here that, when a statute plays content-based favorites, strict scrutiny requires invalidation, and

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[8] *See supra* 3. *See also*, *e.g.*, *Hill v. Homeward Residential, Inc.*, 799 F.3d 544, 551-52 (6th Cir. 2015); *Williams v. Capital One Bank (USA), N.A.*, 682 F. App'x 467 (7th Cir. 2017); *Lawrence v. Bayview Loan Serv., LLC*, 666 F. App'x 875, 879-82 (11th Cir. 2016).

that that rule applies with particular force if a law favors speech *because* it benefits the government.

This Court has long made clear that the First Amendment bars the government from imposing discriminatory speech regulations that are divorced from the reasons the underlying speech may be regulated. The government's authority must be limited to the specific characteristics that make speech regulable in the first instance and cannot be expanded to become a general vehicle for discrimination. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-84 (1992). This is particularly true where such discrimination favors the government. Thus, in *R.A.V.*, this Court rejected the idea that a law could ban "legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government." *Id.* at 384. *See also id.* ("[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government."). The same anti-favoritism principle applies where the government's ostensible interest is to protect privacy.

B. The Government-Debt Exception to the TCPA's Automated Call Ban Favors Speech That Benefits the Government Based on Content

As the government concedes, "the First Amendment limits Congress's ability to enact content-based exceptions to … general ban[s]" like the automated-call restriction in the TCPA. Pet. Br. 15. However, its argument that the ban is not content-based as "a result of the government-debt exception," because it simply means the law "now distinguishes between automated calls that are part of a certain kind of

economic activity (collection of government-backed debts) and those that are not," *id.* 17, misconstrues this Court's jurisprudence. The Court should reject such wordplay and reinforce the straightforward rule articulated in *Reed—i.e.*, the "commonsense" notion that laws are content-based if they regulate based on the "communicative content" of speech. 135 S. Ct. at 2226. *See, e.g.*, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) ("In regulating the communication of prices rather than prices themselves, [the law] regulates speech.").

Properly applied, this rule requires courts to consider "whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed*, 135 S. Ct. at 2227. A law "is content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* This includes "defining regulated speech by particular subject matter," *or* "by its function or purpose." *Id.* If the law "singles out specific subject matter for differential treatment," it is content based and strict scrutiny applies. *Id.* at 2228-30.

This rule applies "regardless of" any "benign motive" that the government may assert, or "lack of animus toward the ideas contained in the regulated speech" *Id.* at 2222 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (internal quotation marks omitted)). An "innocuous justification cannot transform a facially content-based law

into one that is content neutral." *Id.* The Fourth Circuit properly applied these rules below. Cert. App. 10a-13a.[9]

The government-debt exception to the automated call ban facially distinguishes phone calls on the basis of their content. It applies only if a "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), 227(b)(1)(B); discuss anything else and the exception disappears. The same debt-collector could call the same debtor, and if the call is for any other purpose, such as to offer a loan product at a lower rate—even one resulting in government-issued or -guaranteed debt being paid off sooner—prior express consent (or prior express written consent, if there is marketing) is required. *See supra* 4. *See also* Resp. Br. 17. Similarly, a creditor (or a collector on its behalf) calling to pursue the same kind(s) of debt, but simply one not guaranteed

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[9] The Fourth Circuit is hardly an outlier in this regard. A number of courts assessing the constitutionality of the automated call ban's government-debt exception have concluded the statute is content-based, including the district court the Fourth Circuit reversed. Cert. App. 32a-35a. *See also*, *e.g.*, *Gallion v. United States*, 772 F. App'x 604, 605-06 (9th Cir. 2019), *reaffirming Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1153-54 (9th Cir. 2019), *pet. for cert. docketed sub nom. Charter Commc'ns, Inc. v. Gallion*, No. 19-575 (U.S. Nov. 1, 2019); *Rosenberg v. LoanDepot.com LLC*, --- F. Supp. 3d ---, 2020 WL 409634, at *6 (D. Mass. Jan. 24, 2020); *Doohan v. CTB Investors, LLC*, --- F. Supp. 3d ---, 2019 WL 6497433, at *11-12 (W.D. Mo. Dec. 3, 2019); *Perrong v. Liberty Power Corp.*, 411 F. Supp. 3d 258, 265-66 (D. Del. 2019); *Greenley v. Laborers' Int'l Union*, 271 F. Supp. 3d 1128, 1145-49 (D. Minn. 2017); *Mejia v. Time Warner Cable Inc.*, 2017 WL 3278926, at *14 (S.D.N.Y. Aug. 1, 2017); *Holt v. Facebook, Inc.*, 240 F. Supp. 3d 1021, 1032-33 (N.D. Cal. 2017), *appeal filed*, No. 17-80086 (9th Cir. May 12, 2017).

by the government, is impeded from autodialing. Pet. App. 13a.

The autodialed call ban thus operates like the ordinance invalidated in *Mosley*. As the Court described that ordinance, "picketing on the subject of a school's labor-management dispute [was] permitted, but all other peaceful picketing [was] prohibited." 408 U.S. at 95.[10] It thus restricted speech "because of its message, its ideas, its subject matter, or its content," contrary to First Amendment limits. *Id.* The same is true of the government-debt exception here, only automated and/or prerecorded calls to collect government-backed debt are permitted, while all other automated calling is prohibited.

The attempt to recast the TCPA's government-debt exception as mere recognition of the "economic relationship between the caller, the recipient, and the government," Pet. Br. 19, is pure sophistry. Petitioners claim "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," *id.*, but the statute's plain language refutes this spin.

If the creditor or collector of a government-backed loan broaches anything other than receiving payment of the debt, the exception will not apply, as it is not a

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[10] More precisely, picketing on subjects other than a school labor-management dispute was not "prohibited" *per se*, but rather simply was restricted to areas outside of 150 feet of any primary or secondary school building during school hours, *Mosley*, 408 U.S. at 92-93, much like how automated calling not involving government-debt is not banned outright, but can only occur with prior express consent of the called party.

"call … *made solely to collect* [the] debt." 47 U.S.C. §§ 227(b)(1)(A)(iii), 227(b)(1)(B) (emphasis added).[11] The *economic relationship* between the calling creditor, the call-recipient debtor, and the government remains the same, but by the statute's plain terms, the exception does not apply. *See* Resp. Br. 17. The FCC understood this when it defined "call … made 'solely to collect a debt owed to or guaranteed by the United States'" in terms of the call's "exclusive *subject*" and/or "entire *content*."[12]

There can be no doubt that the exemption applies based on the "topic discussed," *Reed*, 135 S. Ct. at 2227, while "singling out" all other "subject matter for differential treatment." *Id.* at 2229-30. The government's argument is just another way of saying the automated call ban and its government-debt exception operate based on the "function or purpose" of a call, which this Court identified as the hallmark of content-based regulation. *Id.* at 2227. It is thus a content-based regulation of speech that must be presumed invalid, unless the government can carry its burden of showing the statute satisfies strict scrutiny. *See supra* 7 (citing *Alvarez*, 567 U.S. at 716-17); *Reed*, 135 S. Ct. at 2227.[13]

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[11] The government itself, as noted, could make the call regardless of content—or, for that matter, regardless of its relationship with the called party—because the TCPA does not apply to the government. *See supra* 3-4.

[12] 47 C.F.R. § 64.1200(i)(A)(i)-(ii), *as appended to TCPA Government-Debt Rulemaking*, 31 FCC Rcd. at 9103-04 (emphases added). *See also* Resp. Br. 8, 16-17.

[13] For an example of an exception that truly rests on the relationship between the caller and recipient, the Court need

II. THE GOVERNMENT-DEBT EXCEPTION DOES NOT SATISFY STRICT FIRST AMENDMENT SCRUTINY

Once the content-based nature of the TCPA's government-debt exception is established, its failure to satisfy strict scrutiny is manifest. The Petitioners make no effort to show the call ban satisfies strict scrutiny, relying solely on their position that it is not content based. Pet. Br. § I. This is incorrect; the provision is presumptively invalid and can be held constitutional only if narrowly tailored to further a compelling governmental interest. *E.g.*, *Reed*, 135 S. Ct. at 2227. The statute flunks that standard.

A. There Is No Compelling Government Interest for the Government-Debt Exemption

Petitioners all but confess the lack of a legitimate interest to support the preferential autodialer ban. This Court has suggested that restraining speech by certain speakers while permitting expression that serves state policy goals can never be legitimate under First Amendment scrutiny. *IMS Health*, 564 U.S. at 574, 577. Yet here, Petitioners defend the government-debt exception based on naked self-interest—that of protecting the federal fisc. Pet. Br. 27; *see* Pet. App. 19a n.10. This, they claim, justifies restricting use of autodialing and prerecorded messages for all calls other than those solely to collect

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look no further than the automated-call ban's allowance for autodialed and/or prerecorded calls with prior express consent. Such calls are allowed no matter what a caller wishes to discuss (so long as it is within the scope of the consent); the only thing that matters is the consent relationship.

government-backed debt. In response, the Court should confirm what *IMS Health* made implicit: that hamstringing most speakers but giving free rein to those whose speech serves government policy objectives is an illegitimate state interest.

Even without such a pronouncement, there does not appear to be *any* compelling government interest here. First, if the government wished to directly make automated calls itself to collect government-backed debt, the TCPA allows it, as the law does not restrict the government's activity. *See supra* 4 (citing 47 U.S.C. §§ 153(3) & 227(b)); *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016). The need to enable *the government* to make these calls is nonexistent, and thus cannot be a governmental interest for the challenged provision, compelling or otherwise. *See* Pet. Br. 27.

So, the government-debt exception applies only to calls by *non*-governmental entities, where they seek to collect government-backed debts. Pet. Br. 26 n.4. There is already an FCC debt-collection allowance under the TCPA that operates to allow *all* creditors (or debt collectors on their behalf) to autodial debtors, however, if they obtained the cell number dialed in connection with the transaction that lead to the debt. *See supra* 3. The government-debt exception goes further to allow automated calls by private parties collecting government-backed debt, without regard to how a debtor's number is obtained, or whether there are any indicia of consent to being autodialed. *See* Pet. Br. 29 nn.6-7 & accompanying text. Granting private debt collectors such modest benefits cannot fairly be called a "compelling" interest. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120-21 (1991) ("In short, the

State has a compelling interest in compensating victims from the fruits of [] crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime.").

Meanwhile, the exception actually *undermines* the other governmental interest Petitioners cite, involving personal privacy. Pet. Br. 14, 15, 30-31. Cert. App. 16a-17a. *But see* Resp. Br. 25-26. As correctly held below, the additional freedom to auto-dial conferred by the government-debt exception has a substantial impact on borrowers' personal privacy. Cert. App. 17a-18a. *See* Resp. Br. 8.

B. Elevating Private Speech That Aids Government Policy Goals While Restricting All Other Speech Is Not Narrowly Tailored.

The court below correctly held the government-debt exception is not narrowly tailored because it is not "closely drawn" to achieve the government's aims, given its underinclusiveness. Cert. App. 15a-18a, 21a-22a. Where a regulation undermines its own objectives by being "wildly underinclusive" in this way, it fails strict scrutiny. *NIFLA*, 138 S. Ct. at 2375 (quoting *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011)). In this case, the Fourth Circuit correctly held, the automated call ban's government-debt exception is fatally underinclusive because it "authorizes a nearly 'unlimited proliferation' of disruptive and intrusive automated debt-collection efforts." Cert. App. 18a (quoting *Reed*, 135 S. Ct. at 2231).

The Court's reasoning in *IMS Health* applies here. In that case, the state allowed the use of prescriber-identifying information about pharmaceuticals but

maintained a targeted restriction applicable to detailers wishing to use the data for marketing. 564 U.S. at 564, 577. The Court held this was an impermissible way of advancing the government's stated interests in protecting medical privacy and improving public health. *Id.* at 572, 577-79. Here, the TCPA restricts general use of automated calls but maintains a targeted allowance for calls to collect government-backed debts. This is invalid for the same reason the law was struck down in *IMS Health*: "The distinction between laws burdening and laws banning speech is but a matter of degree," and "content-based burdens must satisfy the same rigorous scrutiny as … content-based bans." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000).

The government-debt exception to the TCPA's automated call ban is also not narrowly tailored because it bypasses less restrictive alternatives for facilitating collection of government-backed debt. Under strict scrutiny "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.* at 813. The Fourth Circuit alluded to this, but only as an aside, in the context of Petitioners' advancement of interests in protecting the public fisc, Cert. App. 19a n.10, which they make front-and-center here. *See* Pet. Br. 24-27. However, the availability of less restrictive alternatives applies regardless of whether the interest is collecting debt for the benefit of the government, or if it is protecting personal privacy.

One obvious less-restrictive alternative would be to require those calling to collect government-backed debt to follow the same rules as everyone else. Congress could have left the automated call ban intact and required private parties calling to collect such

debts to obtain prior express consent—including by simply getting the cell number from the debtor, as the FCC allows—and avoided the addition of content-based (or speaker-based) preferences. Congress also could have appropriated funds and otherwise taken steps to enable the government to place the debt-collection calls itself, as the TCPA (and more broadly, the Communications Act) already allowed by not displacing sovereign immunity. *See supra* 4, 16. Each of these places less burden on the First Amendment's guarantee of free expression than does a content-based preference for speech that inures to the government's benefit.

CONCLUSION

Reed controls the outcome here. Any "common-sense" reading of the TCPA's automated call ban makes clear that its government-debt exception cannot be applied without reference to the content of calls that it allows, and to the calls that the automated call ban bars. While strict scrutiny may not be "strict in theory but fatal in fact," *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015) (citation omitted), it must retain its characteristic "exacting standard of review." *Ashcroft v. ACLU*, 542 U.S. at 676 (Scalia, J., dissenting). *See also IMS Health*, 564 U.S. at 571 ("In the ordinary case it is all but dispositive to conclude that a law is content based …."). Because the effort here to defend the government-debt exception by citing the relationship that the government may have with certain debtors cannot withstand close examination, the holding below that the statute is unconstitutional should be affirmed.

Respectfully submitted,

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