No. 19-631

In the Supreme Court of the United States

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

v.

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

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

REPLY BRIEF FOR THE PETITIONERS

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The Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394, prohibits most automated calls to cell phones, while excepting from that prohibition calls made to collect debts owed to or guaranteed by the federal government. The court of appeals viewed the government-debt exception as an unconstitutional content-based deviation from an otherwise-sound statutory scheme, and it severed the exception from the TCPA. Respondents do not defend that reasoning, but instead argue (*e.g.*, Br. 13) that the automated-call restriction itself violates the First Amendment.

Neither critique of the TCPA's automated-call regime has merit. Rather, both the underlying automated-call restriction and the government-debt exception are

content-neutral and constitutional. But if this Court concludes that the statutory scheme violates the First Amendment, the Court should sever the exception from the rest of the TCPA, leaving the automated-call restriction in place.

I. THE TCPA DOES NOT VIOLATE THE FIRST AMENDMENT

A. The TCPA's Scheme For Regulating Automated Calls To Cell Phones Is Not Content-Based

Respondents contend that, by distinguishing between calls made to collect government-backed debts and calls made for other purposes, the TCPA discriminates based on content. See, *e.g.*, Resp. Br. 17. That argument lacks merit.

1. The government-debt exception is limited to calls made to conduct a particular economic activity

a. The TCPA exception at issue here encompasses calls "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. 227(b)(1)(A)(iii). The exception applies only if (1) the caller has authority to collect a debt, (2) the recipient has responsibility for paying the debt, (3) the debt is delinquent (or at imminent risk of becoming so), and (4) the debt is owed to or guaranteed by the United States. See Gov't Br. 7-8. The applicability of the exception thus turns on the economic conduct in which the caller is engaged.

Respondents contend (Br. 21-22) that the first three of the four requirements described above are inconsistent with the TCPA's text. But the statutory term "call * * * made solely to collect a debt" is naturally understood as limited to communications made to induce compliance with a current legal obligation to pay, by a person who either is the creditor or is authorized

to act on the creditor's behalf. And even if the applicability of the exception depended on the caller's subjective intent (*e.g.*, if it encompassed calls concerning debts that the caller believed to be delinquent but in fact were not, or calls that were intended for delinquent debtors but were made to wrong numbers), the exception would still turn on the nature of the economic activity in which the caller was seeking to engage. In any event, the government's interpretation is at least sufficiently reasonable that the Court should adopt it if a different construction would raise constitutional doubts. *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2301 (2019).

b. Respondents contend (Br. 22-23) that, even under the government's interpretation of the government-debt exception, the TCPA's automated-call restriction is content-based. Respondents attribute to the government the view that a statute regulating speech cannot be content-based if its applicability depends in any way on non-content-based criteria. See Resp. Br. 22. The government's theory here, however, is not that the TCPA provisions that regulate automated calls to cell phones include non-content-based *as well as* content-based elements. Rather, it is that no part of the relevant statutory text—neither the underlying automated-call restriction, nor the phrase "made solely to collect a debt," nor the phrase "owed to or guaranteed by the United States"—"focuses *only* on the content of the speech." *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811 (2000) (citation omitted). The TCPA provisions at issue here thus differ substantially from respondents' hypothetical statute, one element of which establishes a criterion (*i.e.*, whether particular calls "endorse President Trump's re-election," Resp. Br. 22) that is solely content-based.

c. Respondents' contention (Br. 18) that the TCPA's automated-call regime is *viewpoint*-based is particularly ill-conceived. The government-debt exception does not apply to calls that *either* oppose the payment of government-backed debts *or* argue in general terms that persons who owe such debts should satisfy their obligations. Rather, as amended to include the exception, the TCPA distinguishes between callers who are and are not engaged in a particular economic activity.

2. The government-debt exception is not constitutionally distinguishable from many other statutes that regulate communications made in the course of particular economic activities

As our opening brief explains (at 19-22), many other statutes, such as the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, regulate communications made as part of particular economic activities. Respondents acknowledge (Br. 24) that those other statutes are content-neutral and should be "subject (at most) to intermediate scrutiny."

Respondents offer no principled reason for treating the TCPA differently. They observe (Br. 24) that, while the FDCPA *regulates* various debt-collection activities, the TCPA *excepts* one such activity from the generally applicable automated-call restriction. For present purposes, however, the salient point is that both statutes treat certain debt-collection communications differently from communications made for other purposes. If that differential treatment is not content-based for FDCPA purposes, it is not content-based under the TCPA.[1]

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[1] Respondents observe (Br. 24) that a statute "outlawing 'all political speech in public parks' is obviously subject to strict scrutiny,"

Respondents correctly observe (Br. 17, 23 n.9) that the words used in a particular call may shed light on whether the government-debt exception applies. See Gov't Br. 19; *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 31 FCC Rcd 9074, 9087 (2016). But the words used in a communication to a debtor may serve a similar function under the FDCPA, by providing evidence that the communication was made "in connection with the collection of [a] debt." 15 U.S.C. 1692c(a); see, *e.g.*, *Gburek* v. *Litton Loan Servicing LP*, 614 F.3d 380, 384-386 (7th Cir. 2010). That consideration of content has not led any court to subject the FDCPA to strict scrutiny, let alone to invalidate it as a content-based regulation of speech. Strict scrutiny is unwarranted here as well.[2]

3. The other TCPA provisions that respondents invoke are not content-based

Respondents argue (Br. 18) that two other aspects of the TCPA are content-based. First, they contend that

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even if it includes an exception for certain commercial activity. In that hypothetical, however, the underlying restriction is content-based, even in the absence of any exception. That is not the case here. Gov't Br. 14. The TCPA's automated-call restriction is additionally distinguishable because it does not implicate the distinct concerns that would be raised by a restriction on speech in a traditional public forum.

[2] Under the TCPA, a call's content might have similar evidentiary value in determining whether the call was made with the recipient's "prior express consent." 47 U.S.C. 227(b)(1)(A). A consumer might consent, for example, to receive automated calls about an existing transaction or account, but not to receive automated calls proposing new transactions. A call's content would be relevant to determining whether the prior consent encompassed the new communication. The potential for such evidentiary use, however, does not render the TCPA's consent exception content-based.

the TCPA's automated-call restriction is content-based because it applies to "person[s]," 47 U.S.C. 227(b)(1), and the term "person" presumptively excludes sovereign entities. See Gov't Br. 5, 29 (noting that interpretive canon and explaining that the TCPA's automated-call restriction does not apply to federal personnel). That contention lacks merit. The term "person" specifies who is subject to the restriction, without saying anything "about the content of their communication." *Smith* v. *Truman Rd. Dev., LLC*, 414 F. Supp. 3d 1205, 1232 (W.D. Mo. 2019). And although speaker-based distinctions warrant strict scrutiny when they "reflect[] a content preference," *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 658 (1994), respondents cite no decision applying that principle to an exclusion of sovereign actors from a statutory restriction. Cf. *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech * * * is exempt from First Amendment scrutiny.").

Second, respondents contend (Br. 19-20) that the FCC has introduced a constitutional infirmity into the statutory scheme by promulgating several exemptions to the automated-call restriction. The Commission promulgated those exemptions pursuant to 47 U.S.C. 227(b)(2)(C), which authorizes it to exempt calls "that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights [the TCPA] is intended to protect." Respondents previously "disclaimed" any challenge to the exemptions themselves, Pet. App. 10a n.7, and any such challenge would be barred by the Hobbs Act, 28 U.S.C. 2342; see Pet. App. 8a n.6, 38a-39a.

To the extent respondents rely on the regulatory exemptions to contend (Br. 20 n.7) "that the underlying

statutory cellphone-call restriction" is unconstitutional, they "waived" that contention below, Pet. App. 10a n.7. In any event, Section 227(b)(2)(C) is not content-based and does not compel the FCC to create any exemptions. *Id.* at 39a. The TCPA provision that authorizes the FCC to promulgate exemptions states that the agency, in exercising that authority, may impose "such conditions as" it deems "necessary in the interest of the privacy rights [the TCPA] is intended to protect," 47 U.S.C. 227(b)(2)(C). The exemption provision itself thus confirms Congress's commitment to the statute's privacy-protection goals.

Respondents could petition the FCC to adopt a regulatory exemption covering respondents' own communications, 47 U.S.C. 227(b)(2)(C); 47 C.F.R. 1.2, 1.401, and they could seek judicial review if the agency denied that request, 28 U.S.C. 2342(1), 2344; 47 U.S.C. 402(a). In support of such a petition, respondents could argue that there is no permissible basis for distinguishing between their own calls and the types of calls that the Commission has previously exempted. But even if respondents could make that showing, it would suggest only that the Commission must act to eliminate the disparity, not that the TCPA restriction on automated calls to cell phones violates the First Amendment.[3]

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[3] Respondents emphasize (*e.g.*, Br. 1, 5) that, although their noncommercial automated calls may not lawfully be made to cell phones, they may lawfully be made to residential phone lines. That difference in treatment is not dictated by the TCPA, but instead results from the FCC's exercise of its authority to promulgate exemptions. See Resp. Br. 5. If respondents view that differential treatment as arbitrary or constitutionally impermissible, they may urge the FCC to promulgate a similar exemption for calls to cell phones to the extent the TCPA permits (the Commission is not authorized to exempt calls to cell phones for which the recipient is charged, see

B. The Government-Debt Exception Does Not Violate The First Amendment

1. The government-debt exception to the TCPA's automated-call restriction satisfies intermediate scrutiny

The court of appeals held that "the debt-collection exemption is a content-based restriction on speech" and therefore can "only pass constitutional muster if it satisfies a strict scrutiny review." Pet. App. 15a. The court concluded that "the debt-collection exemption fails strict scrutiny review" because it "subverts the privacy protections underlying the [automated-call] ban" and "is an outlier among the other statutory exemptions." *Id.* at 16a.

Because the government-debt exception is not content-based, the court of appeals erred in applying strict, rather than intermediate, scrutiny. *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015). And as our opening brief explains (at 24-33), Congress's decision to except government-debt calls from the underlying TCPA restriction satisfies intermediate scrutiny. Unlike most other automated calls, government-debt calls serve a significant federal interest in protecting the federal fisc. Gov't Br. 25-27. The exception does not seriously impair the privacy interests that underlie the automated-call restriction, both because the calls the exception covers constitute a small fraction of the calls subject to the underlying restriction, and because those calls do not implicate the same privacy concerns as most other automated calls. *Id.* at 27-31.

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47 U.S.C. 227(b)(2)(C)), and they may seek judicial review if the agency denies that request.

2. The court of appeals' focus on the constitutionality of the government-debt exception followed logically from its rationale for finding a First Amendment violation

Respondents contend (Br. 32) that, for purposes of the First Amendment inquiry, "focus[ing] on the [government-debt] exception" rather than on the underlying automated-call restriction is "erroneous[]." Our opening brief's focus on the constitutionality of the exception reflects the court of appeals' own holding and analysis. Pet. App. 15a-22a. And while respondents disclaim any First Amendment attack on the government-debt exception itself, that exception is integral to their constitutional challenge, since respondents do not contend that a *categorical* ban on automated calls to cell phones would violate the First Amendment.

In any event, the Fourth Circuit's focus on the constitutionality of the government-debt exception followed logically from the court's rationale for finding a First Amendment violation. This Court has identified "two analytically distinct grounds for challenging the constitutionality" of a content-based speech regulation under the First Amendment. *City of Ladue* v. *Gilleo*, 512 U.S. 43, 50 (1994); see *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 762-763 (1988) (similarly identifying two "radically different [First Amendment] harms"). "One is that the measure in effect restricts too little speech because its exemptions discriminate on the basis of [content]." *Ladue*, 512 U.S. at 50-51. That type of challenge focuses on the danger that "an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage'" or "to select the 'permissible subjects for public debate.'" *Id.* at 51 (citations omitted). "Alternatively, such

provisions are subject to attack on the ground that they simply prohibit too much protected speech." *Ibid.* In that type of challenge, exemptions "may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place." *Id.* at 52.

In finding a First Amendment violation here, the court of appeals relied only on the first of those two rationales. After explaining that "[a]n 'underinclusive' restriction is one that covers too little speech," Pet. App. 15a, the court concluded that "the debt-collection exemption * * * is fatally underinclusive" because it "subverts the privacy protections underlying the [automated-call] ban" and "is an outlier among the other statutory exemptions," *id.* at 16a. The court did not suggest that the government-debt exception, either alone or in combination with other TCPA exemptions, "diminish[es] the credibility of the government's rationale for restricting speech in the first place." *Ladue*, 512 U.S. at 52. As explained above and in our opening brief, the court of appeals erred in finding the government-debt exception to be unconstitutional. But given the nature of the First Amendment defect that the court found to exist, the court logically described that exception, rather than the automated-call restriction, as the constitutionally infirm provision.

C. The TCPA's Automated-Call Restriction Does Not Violate The First Amendment

1. The TCPA's automated-call restriction satisfies intermediate scrutiny

Respondents contend (Br. 36) that the automated-call restriction was "promulgated without valid justification in the first place." That argument lacks merit.

As enacted in 1991, the TCPA's generally applicable ban on automated calls to cellular phones was a content-neutral time, place, or manner restriction. In any First Amendment challenge, the underlying automated-call restriction as originally enacted therefore would have been subject to, and would easily have satisfied, intermediate scrutiny. Protecting individual privacy is a significant governmental interest. TCPA § 2(10), 105 Stat. 2394. And the restriction is narrowly tailored to serve that interest because it prohibits those calls consumers find particularly intrusive—calls made using automated telephone equipment. § 2(11)-(12), 105 Stat. 2394-2395. As our opening brief observes (at 14-15), every court that has considered the issue has upheld the underlying restriction against First Amendment challenge.

2. Respondents' contrary arguments lack merit

Respondents contend that the government-debt exception, combined with the TCPA's inapplicability to calls made by sovereign actors and its authorization for the FCC to promulgate additional exceptions, "diminish[es] the credibility of the government's rationale for restricting speech." Resp. Br. 28 (citation omitted). That argument lacks merit.

When Congress enacted the TCPA in 1991, it made extensive findings concerning the deleterious effects of automated calls on consumer privacy. See § 2, 105 Stat.

2394-2395; Gov't Br. 4. The only exceptions the 1991 statute established to the restriction at issue here were for emergency calls and calls made with the recipient's prior express consent. TCPA § 3(a), 105 Stat. 2395-2396. Respondents do not suggest that either of those exceptions casts doubt on Congress's commitment to privacy. While respondents argue that the automated-call restriction's limitation to "person[s]" is a form of content discrimination, they cite no decision suggesting that Congress's failure to apply a speech restriction to sovereign actors can create a First Amendment defect. See p. 6, *supra*. And because the government-debt exception was not enacted until 24 years later, it has no bearing on the constitutionality of the TCPA as enacted in 1991.

The enactment of the government-debt exception likewise does not cast doubt on the 2015 Congress's *continuing* commitment to the TCPA's original objectives. That exception covers a narrow category of calls that both serve an important federal interest and raise diminished privacy concerns. The decision to permit that set of automated calls does not suggest that Congress's commitment to the TCPA's original objectives has waned.

Respondents rely on a statutory provision that was enacted in 1992 and authorizes the FCC to exempt calls "that are not charged to the called party" from the basic restriction on automated calls to cell phones. 47 U.S.C. 227(b)(2)(C). Respondents observe (Br. 29) that "per-call charges are not typically imposed under modern phone plans." Respondents view (see Br. 29-30) the 1992 amendment as evidence that protection of cell-

phone users from unwanted charges, rather than protection of consumer privacy, was the principal purpose of the automated-call restriction at issue here.

The TCPA's text makes clear, however, that Congress viewed the restriction on automated calls to cell phones as serving consumer-privacy interests. The automated-call restriction covers calls made "to any telephone number assigned to" *either* a "cellular telephone service" *or* a "service for which the called party is charged for the call." 47 U.S.C. 227(b)(1)(A)(iii). The specific reference to cell phones would have been unnecessary if Congress's sole concern was with calls for which the recipient is charged. And in the 1992 amendment, Congress dealt specifically with uncharged calls, not by exempting them entirely from the TCPA's automated-call restriction, but by authorizing the FCC to exempt such calls, "subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect." 47 U.S.C. 227(b)(2)(C). That language reflects Congress's concern with the potential impacts on privacy even of calls for which the recipient is not charged.

While per-call charges to recipients may be less prevalent now than when the TCPA was enacted, cell phones are now far more ubiquitous, and far more integral to the typical individual's daily life, than they were in 1991. Unwanted automated calls to cell phones can distract recipients both at home and elsewhere. The privacy interests that such calls implicate therefore are substantially greater now than in 1991, even if the associated financial costs are lower.

Respondents contend (Br. 27) that, if calls made to collect government-backed debts implicate reduced privacy interests, then non-telemarketing calls like their

own "political" calls do not implicate substantial consumer-privacy interests either. But the *reason* that calls made to collect government-backed debts implicate reduced privacy interests—*i.e.*, that a delinquent debtor should *expect* to be contacted by the creditor or a person acting on his behalf, see Gov't Br. 27-28—does not apply to the calls that respondents wish to make. An unwanted automated call that solicits a political donation or opines on a political issue can be just as disruptive and intrusive as an unwanted telemarketing call. And whereas the government-debt exception subjects delinquent debtors to automated calls only from persons with legal authority to collect, an exemption for all non-telemarketing calls would allow automated calls to every cell phone from a limitless variety of sources.

3. Even if strict scrutiny applies, the automated-call restriction satisfies it

Even if strict scrutiny applies, the automated-call restriction is constitutional, because the interest in protecting consumer privacy is not just significant but compelling. Contrary to respondents' contention (Br. 25), the government has not abandoned that argument. Although our opening brief does not contend that the *government-debt exception* satisfies strict scrutiny, it does argue (at 14) that the automated-call *restriction* serves a "compelling" governmental interest in protecting "individual privacy from intrusive and disruptive calls." Because the court of appeals accepted the constitutionality of the restriction, and held only that the government-debt exception violates the First Amendment, our opening brief does not further address the question whether the restriction satisfies strict scrutiny. But the automated-call restriction is narrowly tailored to achieve its purpose for the reasons stated

above, and it leaves open ample alternative means for respondents to convey their political messages.[4]

II. IF THIS COURT CONCLUDES THAT THE CURRENT STATUTORY SCHEME VIOLATES THE FIRST AMENDMENT, SEVERING THE GOVERNMENT-DEBT EXCEPTION IS THE APPROPRIATE REMEDY

A. Severing The Government-Debt Exception Would Fully Remedy The First Amendment Violation The Court Of Appeals Found

1. When unlawful discrimination is the source of a constitutional violation, "the appropriate remedy is a mandate of equal treatment." *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1698 (2017) (citations omitted). Here, equal treatment can be achieved either by severing the government-debt exception or by invalidating the automated-call restriction. See *ibid.* As in any other case where one aspect of a statutory scheme is held to be invalid, the choice between those alternatives turns on which remedy Congress would have preferred. See *Denver Area Educ. Telecomms. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 767-768 (1996) (plurality opinion); *Regan* v. *Time, Inc.*, 468 U.S. 641, 652-655 (1984) (plurality opinion).

Section 708 of the Communications Act of 1934, of which the TCPA is a part, specifies that when any Communications Act provision is "held invalid," "the remainder" of the statute "shall not be affected." 47 U.S.C. 608. Here, the court of appeals held that "the debt-collection exemption fails strict scrutiny review." Pet. App. 16a;

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[4] Respondents briefly assert (Br. 30) that there are less restrictive means of protecting privacy. But as the district court explained, the alternatives respondents identify would not be as effective. Pet. App. 40a-42a.

see *id.* at 21a-22a. The court's identification of the government-debt exception as the unconstitutional provision followed logically from the court's rationale for finding a First Amendment violation. See pp. 9-10, *supra*. Given the Fourth Circuit's merits holding and analysis, 47 U.S.C. 608 unambiguously specifies severance of the government-debt exception as the appropriate remedy. See Gov't Br. 34-35.

2. Respondents contend (Br. 33-52) that the proper remedy here is to invalidate the automated-call restriction rather than to sever the government-debt exception. Respondents advance three principal arguments in support of that approach. None has merit.

a. Respondents assert that invalidation of the automated-call restriction "follows directly from the constitutional text" because it is the restriction, not the exception, that "'abridg[es] the freedom of speech.'" Resp. Br. 35 (citation omitted). That argument is inconsistent with the First Amendment analysis that underlies the court of appeals' merits holding. The court did not suggest that the government-debt exception casts doubt on Congress's continued commitment to the protection of consumer privacy. Rather, it viewed the exception as "subvert[ing] the privacy protections underlying the [automated-call] ban," and as "an outlier among the other statutory exemptions." Pet. App. 16a.

The Fourth Circuit's merits holding thus depends on the established rule that an unjustified exception to a speech restriction can effect a First Amendment violation even when a more sweeping restriction would not. If Congress agreed with the court of appeals that the preferential treatment of government-debt calls violates the First Amendment, Congress could cure the violation by "simply repealing" the exception and leaving

the underlying restriction in place. *Ladue*, 512 U.S. at 53. If that would be a permissible curative action for Congress, and if the Court's remedial task is to assess what course Congress would have taken, the Court can likewise cure any First Amendment violation by severing the government-debt exception.

Respondents acknowledge (Br. 36) that "invalidating an exception to a speech restriction *can* eliminate content-based distinctions." They contend (*ibid.*), however, that "while that remedy might solve an equal protection problem, it does nothing to address the distinct First Amendment harm inflicted by [an] unjustified speech restriction." But as explained above, the First Amendment protects not only against laws that "prohibit too much protected speech," but also against laws that "in effect restrict[] too little speech because [their] exemptions discriminate on the basis of [content]." *Ladue*, 512 U.S. at 50-51; see *Lakewood*, 486 U.S. at 762-763 (similar); *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1680 (2015) (Scalia, J., dissenting) ("Among its other functions, the First Amendment is a kind of Equal Protection Clause for ideas."). In cases (like this one) where a court invokes the latter rationale to find a First Amendment violation, severing the exception is the most natural way to remedy the discrimination.

b. For substantially the same reasons, respondents are wrong in arguing (Br. 47) that, for purposes of severability analysis under 47 U.S.C. 608, the TCPA "provision that must be 'held invalid' is the [automated-call] restriction." That argument might have force if the court of appeals had held that the government-debt exception, alone or in combination with other TCPA exemptions, "diminish[ed] the credibility of the government's rationale for restricting speech in the first

place," *Ladue*, 512 U.S. at 52. But the decision below was not based on that rationale, and respondents' arguments to that effect lack merit. See pp. 9-15, *supra*.

c. Respondents contend that, when this Court has found that prior laws violated the First Amendment, it has "uniformly invalidate[d] speech restrictions, not exceptions." Resp. Br. 39 (capitalization and emphasis omitted). But in none of the decisions they cite (Br. 39-43) did the Court conduct any severability analysis—let alone hold that severing an exception can never be an appropriate remedy for a First Amendment violation.

In *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987), the only court that conducted a severability analysis was the Arkansas Supreme Court. *Id.* at 226. That case involved a challenge under the First and Fourteenth Amendments to an Arkansas law that imposed a general sales tax, but exempted sales of newspapers and certain magazines. *Id.* at 224-225. The appellant was the publisher of a magazine that was not exempted. *Id.* at 224, 226. The Arkansas Supreme Court rejected the appellant's claims of discriminatory treatment on the ground that, even if the exemption were "invalid," "it is the exemption that would fall, not the tax against the [appellant's publication]." *Id.* at 226 (citation omitted).

In this Court, the State argued that, given the Arkansas Supreme Court's conclusion that the appellant would be subject to the tax in any event, the appellant lacked Article III standing to bring its claims. *Ragland*, 481 U.S. at 227. The appellant responded that, "[r]egardless of whether the remedy is a revocation of the exemptions or their extension to Appellant, Appellant has standing" because either approach "would remedy the unequal treatment." Appellant's

Reply Br. at 4, 7, *Ragland*, *supra* (No. 85-1370). This Court agreed, see *Ragland*, 481 U.S. at 227, relying on its holding in *Orr* v. *Orr*, 440 U.S. 268 (1979), that a party has standing to assert an equal-protection claim, regardless of "how the State" would ultimately remedy the alleged discrimination, *id.* at 272.

Thus, contrary to respondents' contention (Br. 40), this Court in *Ragland* did not "reject[]" the Arkansas Supreme Court's severability analysis. Rather, the Court held that, even if severing the exemption were the proper remedy under state law, the appellant had standing to challenge the discriminatory treatment. *Ragland*, 481 U.S. at 227. Indeed, the appellant in *Ragland* acknowledged that "delet[ing] the exemption * * * would end the discrimination" and produce "a constitutional result." Tr. of Oral Arg. at 7, *Ragland*, *supra* (No. 85-1370). The Court's decision thus does not foreclose such a remedy under the First Amendment.

Respondents' reliance (Br. 41) on *Reed*, *supra*, is likewise misplaced. *Reed* involved a First Amendment challenge to a town Sign Code that "prohibit[ed] the display of outdoor signs * * * without a permit," while "exempt[ing] 23 categories of signs from that requirement," to varying degrees. 135 S. Ct. at 2224. The Court framed the question presented as whether "the Code's differentiation between [categories] further[ed] a compelling governmental interest and [was] narrowly tailored to that end." *Id.* at 2231. After concluding that the disparities reflected in the Sign Code were unjustified, *id.* at 2231-2232, the Court engaged in no "remedial analys[i]s," Resp. Br. 41. The question of remedy arose only at oral argument, and the plaintiffs stated that they were seeking "merely equal treatment under the First

Amendment." Tr. of Oral Arg. at 4, *Reed*, *supra* (No. 13-502).[5]

The remaining decisions respondents cite (Br. 42, 49-50) are also inapposite. In each of those cases, the Court rejected the proffered justification for a speech restriction—the second of the "two analytically distinct grounds" discussed above. *Ladue*, 512 U.S. at 50; see *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 190 (1999) (concluding that the applicable scheme was "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it"); *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 572 (2011) (concluding that the State's "asserted justifications" for the restriction did not "withstand[] scrutiny"); *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 430 (1993) (similar); *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 593 (1983) (similar); *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 795 (1978) (similar). And in any event, this Court did not address severability in any of those cases. That is unsurprising given that, in all but one, severability was "a question of state law" and therefore "best resolved below." *Lakewood*, 486 U.S. at 772.

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[5] When *Reed* was remanded to the district court, the parties jointly proposed, and the district court entered, an order that enjoined the defendants from enforcing Section 4.402(P) of the Town's Sign Code, the exemption for temporary directional signs. See D. Ct. Docs. 136 and 137, *Reed*, *supra*, No. 07-cv-522 (Dec. 29 and 30, 2015); 135 S. Ct. at 2225. The apparent purpose of the injunction was to loosen the restrictions on the plaintiffs' directional signs, so that those signs would be subject to the (more favorable) conditions the Town imposed on political or ideological signs, while otherwise leaving the Sign Code in place.

B. Additional Considerations Support The Court Of Appeals' Choice Of Remedy For The Constitutional Violation It Found

1. The TCPA's history confirms the correctness of the court of appeals' remedial holding. Severing the government-debt exception would restore the legal regime that existed from 1991 to 2015, when the exception was enacted. Respondents contend (Br. 49) that it "is all speculation" whether Congress would prefer that regime to one in which automated calls to cell phones are unregulated under the TCPA. But respondents identify nothing in the text or history of the 2015 amendment suggesting that Congress viewed the ability of government-debt collectors to make automated calls to cell phones as a matter of greater policy importance than protection of American consumers from all other such calls.

2. When determining the appropriate remedy for unconstitutional discriminatory treatment, this Court has considered "the intensity of [Congress's] commitment" to the general rule, *Morales-Santana*, 137 S. Ct. at 1700 (citations omitted), and whether an exception was "added by way of amendment many years after the original section was enacted," *Frost* v. *Corporation Comm'n*, 278 U.S. 515, 526 (1929). As our opening brief explains (at 36-39), those considerations favor severing the government-debt exception here. Respondents dismiss those decisions (Br. 45-46) as equal-protection cases. But if a constitutional violation can be cured either by severing an exception or by invalidating the general rule, the inquiry as to which remedy Congress would have preferred is substantially the same, regardless of whether the case involves the Equal Protection Clause or the First Amendment. The considerations

identified in *Morales-Santana* and *Frost* are thus equally applicable here.

The fact that the government-debt exception was "added by way of amendment," *Frost*, 278 U.S. at 526, also sheds light on the proper application of the Communications Act's severability provision. The later-enacted government-debt exception provides no basis for concluding that the automated-call restriction was unconstitutional when it was enacted in 1991. If any infirmity exists in the current statutory scheme, it was introduced in 2015 by the Public Law that contained the government-debt exception. That fact reinforces the conclusion that, for purposes of 47 U.S.C. 608, the exception rather than the automated-call restriction is the "provision" that has been "held invalid."

C. Severing The Government-Debt Exception Is Consistent With Other Constitutional Values

1. Respondents argue (Br. 37) that severing the exception would "undermine free speech by dissuading challenges to unconstitutional prohibitions." In circumstances like these, plaintiffs who are injured by an underlying restriction have standing to argue, as respondents have here, that Congress would have preferred to invalidate the underlying restriction rather than to sever the exception. See *Ragland*, 481 U.S. at 227. But if a court applies established interpretive principles and concludes that severance of an exception is the remedy Congress would have preferred, the court cannot appropriately disregard that preference simply to incentivize future First Amendment litigation. And in circumstances where the fact of unequal treatment is itself a source of meaningful harm to the challenger, severing the exception will eliminate the disparity and thereby

redress that harm. Cf. *Heckler* v. *Mathews*, 465 U.S. 728, 739-740 (1984).

In a different respect, moreover, this Court's adoption of respondents' preferred remedial approach would create substantial untoward incentives. That approach could well lead Congress to draft future speech restrictions as categorically as possible, even when Congress believes that particular subsets of the regulated speech will not cause the harms at which a restriction is directed, lest a court's finding that a particular exception is unjustified trigger invalidation of the restriction itself. Thus, while adoption of respondents' proposed remedy would allow greater use of automated calls to cell phones, the long-term incentives it would create would encourage unnecessarily broad speech regulation and thereby disserve First Amendment values.

2. Respondents assert (Br. 38) that severing the government-debt exception would be inconsistent with "the proper judicial role." Their view appears to be that, in a First Amendment case, the court should always choose the remedy that will allow more speech. But if either severing the exception or invalidating the underlying restriction would produce a constitutional version of the TCPA, a court respects appropriate limits on judicial power by looking for indicia of what remedy Congress would have preferred, rather than indulging its own view as to the wiser policy choice. See *Ayotte* v. *Planned Parenthood*, 546 U.S. 320, 329-330 (2006) (articulating the principles of judicial restraint that underlie the Court's severability analysis).

3. Respondents argue (Br. 39) that severing the exception would raise "questions of retroactive liability" for government-debt collectors who made automated calls before the decision below. Such questions may

arise in the equal-protection context as well, however, and they provide no reason to disregard the remedy Congress would have preferred. It is doubtful that a person who made automated calls to collect government-backed debts before the exception was held invalid could be said to have violated the TCPA. But because no question of retroactive liability is presented here, those issues may be reserved for a future case.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

APRIL 2020