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

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

The Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394, generally prohibits the use of any "automatic telephone dialing system or an artificial or prerecorded voice" to "make any call" to "any telephone number assigned to a * * * cellular telephone service." 47 U.S.C. 227(b)(1)(A)(iii) (Supp. V 2017). The TCPA excepts from that automated-call restriction any "call made for emergency purposes or made with the prior express consent of the called party." *Ibid.* In 2015, Congress amended the TCPA to create an additional exception for calls "made solely to collect a debt owed to or guaranteed by the United States." *Ibid.*

Respondents wish to use an automatic telephone dialing system or an artificial or prerecorded voice to make calls to the cell phones of potential or registered voters to solicit political donations and to advise on political and governmental issues. J.A. 32-34. The court of appeals held that the government-debt exception to the TCPA's automated-call restriction violates the First Amendment. The court further held that the proper remedy was to sever the government-debt exception, leaving the basic automated-call restriction in place. The question presented is as follows:

Whether the government-debt exception to the TCPA'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.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellees below) are William P. Barr, in his official capacity as the Attorney General of the United States; and the Federal Communications Commission.

Respondents (plaintiffs-appellants below) are the American Association of Political Consultants, Inc.; the Democratic Party of Oregon, Inc.; Public Policy Polling, LLC; and the Washington State Democratic Central Committee.[*]

[*] Tea Party Forward PAC was named as a plaintiff in the First Amended Complaint, but withdrew as a party while the case was pending in the district court. D. Ct. Doc. 38, at 1 (July 11, 2017). It was not a "part[y] to the proceeding in the court whose judgment is sought to be reviewed." Sup. Ct. R. 12.6.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 923 F.3d 159. The order of the district court granting the government's motion for summary judgment (Pet. App. 25a-42a) is reported at 323 F. Supp. 3d 737. The order of the district court denying the government's motion to dismiss (Pet. App. 43a-48a) is not published in the Federal Supplement but is available at 2017 WL 1025808.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2019. Petitions for rehearing were denied on June 21, 2019 (Pet. App. 49a). On September 9, 2019, the Chief Justice extended the time within which to file

a petition for a writ of certiorari to and including October 21, 2019. On October 15, 2019, the Chief Justice further extended the time to and including November 18, 2019, and the petition was filed on November 14, 2019. The petition for a writ of certiorari was granted on January 10, 2020. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law * * * abridging the freedom of speech."

Section 227(b)(1) of Title 47 of the United States Code provides in pertinent part:

> It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—
>
> (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—
>
> * * * * *
>
> (iii) to any telephone number assigned to a * * * cellular telephone service * * * , unless such 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) (Supp. V 2017).

Other pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

A. Statutory Background

1. By the 1990s, "use of the telephone to market goods and services" had become "pervasive." Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, § 2(1), 105 Stat. 2394. "More than 300,000 solicitors [were] call[ing] more than 18,000,000 Americans every day." § 2(3), 105 Stat. 2394. And in making those calls, a growing number of telemarketers were using equipment that could "automatically dial a telephone number and deliver to the called party an artificial or prerecorded voice message." S. Rep. No. 178, 102d Cong., 1st Sess. 2 (1991) (Senate Report); see H.R. Rep. No. 633, 101st Cong., 2d Sess. 3 (1990) (House Report) (describing the use of "automatic dialing systems" by "a growing number of telemarketers"). For telemarketers, the use of such equipment was a cost-effective way to call more consumers. House Report 3; see § 2(1), 105 Stat. 2394 (describing "the increased use of cost-effective telemarking techniques"). But many who received such calls found them "to be a nuisance and an invasion of privacy," "regardless of the content or the initiator of the message." § 2(10), 105 Stat. 2394.

To address those complaints, Congress enacted the TCPA as a new section of Title II of the Communications Act of 1934, ch. 652, 48 Stat. 1070 (47 U.S.C. 201 *et seq.*). The TCPA imposes various "restrictions on the use of automated telephone equipment." § 3(a), 105 Stat. 2395 (capitalization and emphasis omitted). One of those restrictions prohibits "any person within the United States" from "mak[ing] any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice" to

"any telephone number assigned to a * * * cellular telephone service." 47 U.S.C. 227(b)(1)(A)(iii) (Supp. V 2017); see TCPA § 3(a), 105 Stat. 2395-2396. That prohibition is referred to here as the "automated-call restriction."[1]

The TCPA contains numerous congressional findings concerning the abuses at which the statute was directed. Most of those findings refer specifically to the activities of telemarketers. See TCPA § 2(1), (2), (4), (5), (6), (7), (8), and (9), 105 Stat. 2394. Congress found, for example, that "[u]nrestricted telemarketing * * * can be an intrusive invasion of privacy," and that "[m]any consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers." TCPA § 2(5) and (6), 105 Stat. 2394. The automated-call restriction is not limited, however, to calls made to sell goods or services.

For purposes of the automated-call restriction, the term "automatic telephone dialing system" means "equipment which has the capacity * * * (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial

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[1] A neighboring provision of the TCPA prohibits "any person within the United States" from "initiat[ing] any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message." 47 U.S.C. 227(b)(1)(B) (Supp. V 2017). That ban is subject to exceptions similar to those that apply to the automated-call restriction, including, as amended in 2015, an exception for calls "made solely pursuant to the collection of a debt owed to or guaranteed by the United States." *Ibid.* The TCPA authorizes the Federal Communications Commission (FCC) to prescribe regulations exempting certain calls from that prohibition, including "such classes or categories of calls made for commercial purposes as the [FCC] determines * * * (I) will not adversely affect the privacy rights that [the TCPA] is intended to protect; and (II) do not include the transmission of any unsolicited advertisement." 47 U.S.C. 227(b)(2)(B).

such numbers." 47 U.S.C. 227(a)(1). The term "call"—as construed by the Federal Communications Commission (FCC or Commission), the agency charged with administering the TCPA, see 47 U.S.C. 154(i), 201(b); 47 U.S.C. 227(b)(2) (2012 & Supp. V 2017)—means a voice call or text message. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14,014, 14,115 (2003). And in accordance with the "presumption that 'person' does not include the sovereign," *Return Mail, Inc.* v. *United States Postal Serv.*, 139 S. Ct. 1853, 1861-1862 (2019) (citation omitted), the term "person" as used in the TCPA does not encompass the federal government or its agencies. See 47 U.S.C. 153(39) (defining the term "person" without referring to the government); *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663, 672 (2016) (noting the absence of any dispute that "[t]he United States and its agencies * * * are not subject to the TCPA's prohibitions").[2]

2. In 1992, Congress amended the TCPA to authorize the FCC to exempt from the automated-call restriction "calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the [FCC] may prescribe as necessary in the interest of the privacy rights [the TCPA] is intended to protect."

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[2] See also *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Broadnet Teleservices LLC Pet. for Declaratory Ruling*, 31 FCC Rcd 7394, 7398 (2016) (*Broadnet Declaratory Ruling*) (construing the term "person" in the TCPA to "not include the federal government or agents acting within the scope of their agency under common-law principles of agency"), petitions for recons. pending (filed July 26, 2016, and Aug. 4, 2016).

47 U.S.C. 227(b)(2)(C); see Telephone Disclosure and Dispute Resolution Act, Pub. L. No. 102-556, Tit. IV, § 402, 106 Stat. 4194-4195.

3. In 2015, the President included as part of his fiscal year 2016 budget "four proposals" to "increase collections of delinquent debt." Office of Mgmt. & Budget (OMB), Exec. Office of the President, *Fiscal Year 2016: Analytical Perspectives of the U.S. Government* 128 (2015) (OMB Report), https://go.usa.gov/xUtw2. One of those proposals was to permit the use of automated telephone equipment when calling cell phones to collect government-backed debts. *Ibid.* The President's budget explained that, "[i]n this time of fiscal constraint, the Administration believes that the Federal Government should ensure that all debt owed to the United States is collected as quickly and efficiently as possible." *Ibid.* That budget estimated that, if enacted, the proposal would result in "savings of $120 million over 10 years." *Ibid.*; see *id.* at 127 Tbl. 11-3.

Congress passed and the President signed the Bipartisan Budget Act of 2015 (Budget Act), Pub. L. No. 114-74, 129 Stat. 584, enacting into law the President's proposal as an amendment to the TCPA. The amendment, entitled "debt collection improvements," added an exception to the automated-call restriction for calls "made solely to collect a debt owed to or guaranteed by the United States." Tit. III, § 301(a)(1)(A), 129 Stat. 588 (capitalization and emphasis omitted); see 47 U.S.C. 227(b)(1)(A)(iii) (Supp. V 2017). That exception is referred to here as the "government-debt exception."

The amendment also authorized the FCC to prescribe regulations "restrict[ing] or limit[ing] the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a

debt owed to or guaranteed by the United States." 47 U.S.C. 227(b)(2)(H) (Supp. V 2017); see Budget Act § 301(a)(2)(C), 129 Stat. 588. Thus, although such calls would be excepted from the automated-call restriction, the FCC could "implement rules to protect consumers from being harassed and contacted unreasonably." OMB Report 128.

4. Under the interpretation adopted by the FCC, whether a call falls within the government-debt exception depends not on the "subjective" intent of the caller, but on the "objective characteristics of the call." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 31 FCC Rcd 9074, 9079 (2016) (*TCPA Government-Debt Order*), petition for recons. pending (filed Dec. 16, 2016).[3] A call is not one "solely to collect a debt" unless the caller has authority to accept payment and the recipient has responsibility for paying. The FCC thus has interpreted the exception to apply only to calls that are made by owners of debt or their contractors, *id.* at 9086, to debtors or others who are legally responsible for payment, *id.* at 9083. The FCC likewise has construed the exception to

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[3] The *TCPA Government-Debt Order* promulgated rules implementing the 2015 Budget Act amendment to the TCPA, including rules to "restrict or limit the number and duration" of calls covered by the government-debt exception. 47 U.S.C. 227(b)(2)(H) (Supp. V 2017); see *TCPA Government-Debt Order* 9074-9075. Those rules have not gone into effect because OMB has not approved them as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The interpretations of the government-debt exception set forth in the *TCPA Government-Debt Order*, however, remain the most recent expression of the official position of the agency. See *TCPA Government-Debt Order* 9101 (declaring that the order "is adopted") (capitalization and emphasis omitted).

apply only when a debt is delinquent (or at least at imminent risk of delinquency). *Id.* at 9080. And because the exception refers only to debts "owed to or guaranteed by the United States," it applies only when "the United States is currently the owner or guarantor of the debt." *Id.* at 9082 (footnote omitted).

5. The TCPA authorizes private plaintiffs to sue to enjoin violations of the automated-call restriction and to recover their "actual monetary loss" or $500 for each violation, "whichever is greater." 47 U.S.C. 227(b)(3)(A)-(B). The TCPA also "authorizes States to bring civil actions to enjoin prohibited practices and to recover damages on their residents' behalf." *Mims* v. *Arrow Fin. Servs., LLC*, 565 U.S. 368, 371 (2012); see 47 U.S.C. 227(g)(1). The FCC "must be notified of such suits and may intervene in them." *Mims*, 565 U.S. at 371; see 47 U.S.C. 227(g)(3).

B. Facts And Procedural History

1. Respondents are various political organizations and an association of political consultants, fundraisers, and pollsters. J.A. 32-34. The organizations and the members of the association wish to call voters on their cell phones using automatic telephone dialing systems or artificial or prerecorded voices, in order to solicit political donations and to advise on political and governmental issues. *Ibid.*

In 2016, respondents sued the Attorney General and the FCC in the Eastern District of North Carolina, alleging that the government-debt exception effects an impermissible form of content-based discrimination, in violation of the Free Speech Clause of the First Amendment. J.A. 34-35, 40-46. Respondents sought a declaratory judgment that the automated-call restriction is

unconstitutional on its face, an injunction barring enforcement of the restriction, and nominal damages. J.A. 47.

The district court granted summary judgment to the government, rejecting respondents' claim that the TCPA violates the First Amendment. Pet. App. 25a-42a. Although the court determined that the government-debt exception "makes content distinctions on its face," *id.* at 33a (citation omitted), it held that the TCPA survives strict scrutiny, *id.* at 35a-42a. The court concluded that "protecting the well-being, tranquility, and privacy of the individual's residence is a compelling state interest," and that the automated-call restriction is "narrowly tailored" to further that interest. *Id.* at 36a. Rejecting respondents' contention that the government-debt exception renders the automated-call restriction fatally underinclusive, the court explained that the exception "furthers a compelling interest"—namely, the "'federal government's interest in collecting debts owed to it'"—and "'does not do appreciable damage to the privacy interests underlying the TCPA.'" *Id.* at 37a-38a (citations omitted).

2. The court of appeals vacated the judgment of the district court and remanded the case for further proceedings. Pet. App. 1a-24a.

The court of appeals agreed with the district court that the government-debt exception "facially distinguishes between phone calls on the basis of their content" and therefore is subject to strict scrutiny. Pet. App. 12a. Unlike the district court, however, the court of appeals held that the government-debt exception "fails strict scrutiny review." *Id.* at 16a. The court concluded that the exception renders the automated-call restriction "fatally underinclusive" "by authorizing

many of the intrusive calls that the automated call ban was enacted to prohibit," *ibid.*, and by "imped[ing] the privacy interests of the automated call ban," *id.* at 21a. The court further held that the government-debt exception is "not narrowly tailored" to "protect[ing] the public fisc" because the federal government has other ways to collect government-backed debts "without running afoul of the automated call ban." *Id.* at 19a n.10. The court therefore held that the government-debt exception "violates the Free Speech Clause." *Id.* at 22a.

The court of appeals directed that the government-debt exception be severed from the rest of the TCPA, leaving the automated-call restriction intact. Pet. App. 24a. The court explained that its choice of severance as the appropriate "remedy" was supported both by the "general rule" favoring "'partial'" invalidation and by the severability provision set forth in the Communications Act, of which the TCPA is a part. *Id.* at 23a (citation omitted); see 47 U.S.C. 608. The court also emphasized that the automated-call restriction had been "fully operative" for more than two decades before Congress enacted the government-debt exception. Pet. App. 24a (citation omitted).

The court of appeals denied rehearing en banc. Pet. App. 49a.

SUMMARY OF ARGUMENT

I. The government-debt exception does not violate the First Amendment. In concluding otherwise, the court of appeals determined that the exception is content-based on its face. The exception, however, does not target calls based on their content. Rather, it targets calls that are part of a certain kind of economic activity (the collection of government-backed debts). Regardless of the content of a particular call, the exception

will not apply if, for example, the debt at issue is not owed to or guaranteed by the government, the caller has no authority to collect the debt, or the debt is not delinquent. The question whether the exception applies to a particular call therefore cannot be resolved solely by reference to the call's content.

To be sure, the words used in a particular call sometimes may shed light on whether the caller was engaged in the collection of a government-backed debt. But the consideration of a call's content as evidence of the type of activity involved is not the sort of consideration of content that triggers strict scrutiny. If it were, many federal laws that likewise regulate communications made as part of particular economic activities would be presumptively unconstitutional. Yet those laws have not heretofore been viewed as content-based or subject to strict scrutiny.

Because the government-debt exception is not content-based, it should be upheld so long as it satisfies intermediate scrutiny. Congress's decision to treat government-debt calls differently satisfies such scrutiny. Unlike other automated calls, calls to collect government-backed debts serve a significant public and governmental interest in protecting the federal fisc. By allowing such calls to be made more cost-effectively, the government-debt exception directly advances that interest. It does so, moreover, without seriously impairing the privacy interests that Congress enacted the TCPA to protect. The exception subjects only a narrow range of potential recipients to a narrow range of potential calls, and the calls that it authorizes are communications for which the recipients have a significantly re-

duced expectation of privacy. The government-debt exception therefore is narrowly tailored to further a significant governmental interest.

II. If the Court holds that the government-debt exception violates the First Amendment, the Court should sever that provision from the rest of the TCPA, leaving the automated-call restriction intact. Severability is a question of legislative intent, and the Communications Act contains a severability provision directing that, if one provision of the Act is held to be invalid, "the remainder of the [Act] * * * shall not be affected." 47 U.S.C. 608. If this Court agrees with the court of appeals that the government-debt exception is unconstitutional, the severability provision unambiguously specifies the appropriate remedy, requiring that the exception be severed and that the rest of the statute (including the automated-call restriction) remain in effect.

The history of the TCPA confirms that Congress would have wanted the automated-call restriction to remain in effect independently of the government-debt exception. Congress enacted the automated-call restriction in 1991, and the restriction stood until 2015 without any exception for calls to collect government-backed debts. That history shows that, for 24 years, Congress preferred an automated-call restriction without the exception over no automated-call restriction at all. There is no indication that, if Congress had known that the automated-call restriction and the government-debt exception could not constitutionally coexist, it would have wanted to return to the pre-TCPA regime, exposing all Americans to millions of unwanted automated calls to their cell phones every day.

The Court therefore should conclude that the government-debt exception is severable from the remainder of the TCPA. That conclusion is consistent with this Court's resolution of similar issues involving the severability of exceptions to statutory rules. Respondents contend that the automated-call restriction, rather than the government-debt exception, is the focus of their First Amendment challenge. But while respondents seek to escape the prohibition that the automated-call restriction imposes, their claim of unconstitutional content discrimination depends entirely on the existence of the government-debt exception. Severing the exception would eliminate that disparity in a manner consistent both with the First Amendment and with Congress's intent.

ARGUMENT

The First Amendment provides that "Congress shall make no law * * * abridging the freedom of speech." U.S. Const. Amend. I. The TCPA's basic automated-call restriction does not abridge that freedom. "[T]he First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places." *Members of the City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 812 (1984). The automated-call restriction is simply a high-tech analogue to traditional restrictions on the time, place, or manner of speech.

The court of appeals accepted the constitutionality of the underlying automated-call restriction. It held, however, that the government-debt exception impermissibly discriminates based on the content of speech and therefore violates the First Amendment. Pet. App. 11a-22a. The court then severed that exception from the

rest of the TCPA, leaving the basic automated-call restriction intact. *Id.* at 22a-24a.

The court of appeals erred in holding that the government-debt exception violates the First Amendment. Contrary to the court's view, that exception is not content-based, but instead encompasses a class of calls that serve a specific economic and governmental interest. The judgment of the court of appeals therefore should be reversed. But if this Court concludes that the exception violates the First Amendment, it should affirm the court of appeals' decision to sever that exception from the rest of the TCPA.

I. THE GOVERNMENT-DEBT EXCEPTION DOES NOT VIOLATE THE FIRST AMENDMENT

For nearly 30 years, the TCPA has generally prohibited the use of an automatic telephone dialing system or an artificial or prerecorded voice to call a cell phone. 47 U.S.C. 227(b)(1)(A)(iii) (Supp. V 2017). That basic automated-call restriction is clearly constitutional. It regulates the manner of speech, not the content of it. See Senate Report 4 (describing the TCPA as "an example of a reasonable time, place, and manner restriction on speech"). And it does so in furtherance of a significant—indeed, compelling—government interest: the protection of individual privacy from intrusive and disruptive calls. TCPA § 2(12), 105 Stat. 2394-2395. Every court that has considered the question has upheld the basic automated-call restriction against First Amendment challenge. See, *e.g.*, *Gomez* v. *Campbell-Ewald Co.*, 768 F.3d 871, 876-877 (9th Cir. 2014), aff'd on other grounds, 136 S. Ct. 663 (2016); *Moser* v. *FCC*, 46 F.3d 970, 975 (9th Cir.), cert. denied, 515 U.S. 1161 (1995); *Wreyford* v. *Citizens for Transp. Mobility, Inc.*,

957 F. Supp. 2d 1378, 1380-1382 (N.D. Ga. 2013); cf. *Patriotic Veterans, Inc.* v. *Zoeller*, 845 F.3d 303, 306 (7th Cir.) (upholding Indiana's anti-robocall statute on the ground that "[p]reventing automated messages to persons who don't want their peace and quiet disturbed is a valid time, place, and manner restriction"), cert. denied, 137 S. Ct. 2321 (2017).

The question presented in this case is whether the government-debt exception that Congress enacted in 2015 rendered the TCPA unconstitutional. The answer is no. The exception does not target speech based on its content, and Congress's decision to treat government-debt calls differently from other calls comports with the First Amendment.

A. The Government-Debt Exception Is Not Content-Based

"[T]he power to proscribe particular speech on the basis of a noncontent element (*e.g.*, noise) does not entail the power to proscribe the same speech on the basis of a content element." *R. A. V.* v. *City of St. Paul*, 505 U.S. 377, 386 (1992). Thus, while the TCPA's automated-call restriction is a valid, content-neutral regulation of communications that threaten individual privacy, the First Amendment limits Congress's ability to enact content-based exceptions to that general ban. The court of appeals viewed the government-debt exception as inconsistent with that limitation. Pet. App. 11a-22a. That holding is incorrect.

1. The applicability of the government-debt exception turns on the economic activity in which the caller is engaged

"Deciding whether a particular regulation is content based or content neutral is not always a simple task." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642

(1994). This Court has explained, however, that "[c]ontent-based regulations 'target speech based on its communicative content.'" *National Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2371 (2018) (citation omitted). And it has identified two categories of laws that "will be considered content-based": (1) laws "that are content based on their face," and (2) laws that, "though facially content neutral," "cannot be justified without reference to the content of the regulated speech," or "were adopted by the government because of disagreement with the message the speech conveys." *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (brackets, citations, and internal quotation marks omitted). The government-debt exception does not fall within either of those categories.

a. By its terms, the government-debt exception applies to calls "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. 227(b)(1)(A)(iii) (Supp. V 2017). If that exception were facially content-based, the determination whether it applied to a particular call could be resolved solely by reference to the call's content. But the exception cannot be applied in that manner.

Suppose, for example, that a private collection agency used an automatic telephone dialing system to call various debtors with the following message: "Your account is overdue. Please promptly submit this month's payment." The determination whether one of those calls fell within the government-debt exception would not depend on the content of the message, which would be the same for all the calls. Rather, the applicability of the exception to a particular call would turn on circumstances such as whether the debt was "owed to

or guaranteed by the United States," whether the collection agency had authority to collect the debt, and whether the debt was in fact delinquent (or at imminent risk of becoming delinquent). 47 U.S.C. 227(b)(1)(A)(iii) (Supp. V 2017); see pp. 7-8, *supra* (discussing FCC interpretation).

As a result of the government-debt exception, the TCPA now distinguishes between automated calls that are part of a certain kind of economic activity (the collection of government-backed debts) and those that are not. For most calls that are subject to the basic automated-call restriction, a court could determine that the government-debt exception does not apply without examining the content of the call. This case illustrates the point. Respondents are various political organizations and an association of political consultants, fundraisers, and pollsters. J.A. 32-34. They "are not government-debt collectors," Br. in Support 18, and no respondent is authorized "to collect" a government-backed debt. 47 U.S.C. 227(b)(1)(A)(iii) (Supp. V 2017); see *TCPA Government-Debt Order* 9086 (construing the exception to apply only to calls made by "the owner of the debt or its contractor"). That absence of authority would provide a sufficient ground for finding the government-debt exception inapplicable to respondents' conduct, without examining the content of their calls.

b. The government-debt exception is "justified without reference to the content of the regulated speech." *Reed*, 135 S. Ct. at 2227 (citation omitted). The President proposed and Congress enacted the exception to "ensure that all debt owed to the United States is collected as quickly and efficiently as possible." OMB Report 128. The President and Congress thus identified a particular economic activity and authorized it to be

conducted more cost-effectively through the use of automated telephone equipment. See *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 567 (2011) (recognizing that "restrictions on protected expression are distinct from restrictions on economic activity"). Because the government-debt exception does not "target [calls] based on [their] communicative content," *Reed*, 135 S. Ct. at 2226—much less "raise the specter that the Government may effectively drive certain ideas or view-points from the marketplace," *Turner Broad. Sys.*, 512 U.S. at 641 (brackets and citation omitted)—the exception is content-neutral.

2. Acceptance of the court of appeals' approach would cast doubt on many laws that regulate discrete spheres of economic activity

The contrary reasoning of respondents and the court of appeals does not withstand scrutiny. Adopting their rationales would threaten the constitutionality of many other federal laws that have not previously been thought to raise First Amendment concerns.

a. The court of appeals relied on a hypothetical to illustrate what it believed to be the "content-based nature" of the government-debt exception. Pet. App. 13a. The court observed that "a private debt collector could make two nearly identical automated calls to the same cell phone using prohibited technology, with the sole distinction being that the first call relates to a loan guaranteed by the federal government, while the second call concerns a commercial loan with no government guarantee." *Ibid.* The court concluded that, because the government-debt exception would apply to the first call but not the second, the exception is content-based on its face. *Ibid.*

That conclusion does not follow. As the court's own hypothetical illustrates, the government-debt exception distinguishes between lawful and unlawful conduct based on the economic activity in which the caller is engaged. The 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. Indeed, as explained above, it is easy to imagine pairs of identical calls where one call is covered and the other is not, depending on the economic relationship between the caller, the recipient, and the government.

To be sure, the words used in a particular call sometimes may shed light on whether the caller was engaged in the exempt activity or in one that is covered by the automated-call restriction (*e.g.*, collecting a private debt, selling goods or services, or soliciting donations). But the consideration of a call's content as evidence of the type of activity involved is not the sort of consideration that triggers strict scrutiny. Cf. *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993) ("The First Amendment * * * does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."). The exception is still directed at the economic activity itself—not the words incident to it. Cf. *National Inst. of Family & Life Advocates*, 138 S. Ct. at 2373 ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.") (citation omitted; brackets in original).

In this respect, the government-debt exception is no different from other TCPA provisions that are directed at particular types of economic activity. Pursuant to the TCPA, for example, the FCC has prescribed rules to

protect residential telephone subscribers from "telephone solicitations to which they object." 47 U.S.C. 227(c)(1); see 47 C.F.R. 64.1200(c)-(d). The TCPA generally defines a "telephone solicitation" as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services." 47 U.S.C. 227(a)(4). The content of a call might provide evidence of such an economic purpose. Yet that consideration of content has not been thought to render the agency's telephone-solicitation rules content-based—presumably because those rules have been understood to be directed at a particular type of economic activity, namely telemarketing. See 47 C.F.R. 64.1200(f)(12) (defining "telemarketing" as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person") (emphasis omitted); see also 15 U.S.C. 6102(a)(1) (authorizing the Federal Trade Commission to prescribe rules prohibiting "deceptive" and "other abusive" "telemarketing acts or practices"); 16 C.F.R. Pt. 310 (prescribing such rules).

A variety of other laws would likewise be put at risk if laws targeting particular economic activities were deemed content-based regulations of speech. The Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, for example, imposes a variety of time, place, and manner restrictions on communications made by debt collectors in the course of collecting debts. Among other things, the FDCPA makes it unlawful for a debt collector to communicate with a consumer "at any unusual time or place," 15 U.S.C. 1692c(a)(1); to communicate directly with a consumer who the debt collector knows is represented by counsel, 15 U.S.C. 1692c(a)(2); to communicate

with a consumer at the consumer's place of employment if the debt collector "knows or has reason to know that the consumer's employer prohibits" such workplace communications, 15 U.S.C. 1692c(a)(3); and to communicate with the consumer by postcard, 15 U.S.C. 1692f(7).

Those time, place, and manner restrictions do not apply to communications that are made for purposes other than debt collection. Indeed, in language similar to the TCPA's government-debt exception, a number of the FDCPA's restrictions apply only to communications made "in connection with the collection of any debt." 15 U.S.C. 1692c(a). In determining whether a particular FDCPA defendant acted with the relevant debt-collection purpose, a court would surely examine the content of the communications that were alleged to violate the statute. Yet no court has struck down those FDCPA provisions as content-based restrictions on speech. If a focus on debt-collection communications were treated as a form of content discrimination, however, the FDCPA would be subject to a potential First Amendment challenge. See D. Ct. Doc. No. 22-1, at 32, *Shadow* v. *Midland Credit Mgmt., Inc.*, No. 17-cv-2277 (S.D. Cal. June 6, 2019) (debt collector's motion for summary judgment asserting that the FDCPA discriminates based on viewpoint because it "regulate[s] the speech of debt collectors—speech attempting to collect a debt—but not the speech of debtors—speech *not* seeking to collect a debt").

Other federal statutes likewise regulate communications within discrete spheres of economic activity, yet they have not heretofore been viewed as content-based or subjected to strict scrutiny. The Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, for instance,

"imposes a host of requirements concerning the creation and use of consumer reports." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1545 (2016). Among other things, FCRA limits the circumstances in which "[a] consumer reporting agency may furnish a consumer report for employment purposes." 15 U.S.C. 1681b(b)(1). The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, "subjects debt relief agencies to a number of restrictions and requirements," *Milavetz, Gallop & Milavetz, P. A.* v. *United States*, 559 U.S. 229, 233 (2010), including the restriction that they shall not "advise an assisted person * * * to incur more debt in contemplation of" bankruptcy, 11 U.S.C. 526(a)(4). And the securities laws prohibit particular companies from transmitting "any advertisement, pamphlet, circular, form letter, or other sales literature" to prospective investors "in connection with a public offering of any security of which such company is the issuer," unless copies of the communication are filed with the Securities and Exchange Commission. 15 U.S.C. 80a-24(b).

Although those statutes regulate communications, they are directed at the economic activity of the persons involved. The fact that those laws are targeted at particular classes of economic actors and activities has not led courts to treat them as content-based speech restrictions that warrant strict scrutiny. Because the government-debt exception likewise turns on the nature of the economic activity that a particular call furthers, not on the content of speech, strict scrutiny is inappropriate here as well.

b. Respondents contend that the government-debt exception is content-based under this Court's decision in *Reed*, *supra*. Br. in Support 16. They cite (*ibid.*) the

Court's observation that "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Reed*, 135 S. Ct. at 2227. Respondents construe that passage to mean that the government-debt exception is content-based because the exception turns on a call's economic purpose. Br. in Support 16. That argument reflects a misreading of the Court's decision.

It is of course true that some "facial distinctions based on a message * * * defin[e] regulated speech by its function or purpose." *Reed*, 135 S. Ct. at 2227. For example, the statute at issue in *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984), prohibited publishing illustrations of U.S. currency except for "educational" or "newsworthy purposes." *Id.* at 644 (plurality opinion) (citation omitted). That "purpose requirement" was content-based on its face, because determining whether it had been satisfied would necessarily require examination of a publication's content. *Id.* at 648.

It does not follow, however, that statutes defining classes of "regulated speech" by reference to their "function or purpose" are *always* "facial distinctions based on a message." *Reed*, 135 S. Ct. at 2227. Many statutes, including the TCPA, distinguish between covered and non-covered activities based on their economic purpose, such as collecting debt or telemarketing. See pp. 19-22, *supra*. Thus, although some content-based laws reference purpose, not all references to purpose render a law content-based. If it were otherwise, many statutes that heretofore have not raised constitutional doubts would be "presumptively unconstitutional." *Reed*, 135 S. Ct. at 2226.

B. The Government-Debt Exception Satisfies First Amendment Scrutiny

Because the government-debt exception is content-neutral, it should be upheld so long as it satisfies intermediate scrutiny. See *Reed*, 135 S. Ct. at 2232 ("Laws that are *content neutral* are * * * subject to lesser scrutiny."). The exception survives appropriate First Amendment scrutiny because it is "narrowly tailored to serve a significant government interest." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted); see *Reed*, 135 S. Ct. at 2231 (applying the applicable level of scrutiny to the Sign Code's "differentiation" between "types of signs").

1. *The calls that are covered by the government-debt exception serve the important interest in protecting the federal fisc, and they place less significant burdens on consumer privacy than do most calls subject to the automated-call restriction*

When Congress enacted the basic automated-call restriction in 1991, its statutory findings reflected particular concern about abusive practices in "telemarketing"—the "use of the telephone to market goods and services." TCPA § 2(1), 105 Stat. 2394; see p. 4, *supra*. Telemarketers were calling potential consumers out of the blue, in the absence of any prior business relationship. See Senate Report 3 (noting the "unsolicited" nature of the calls). By using automated telephone equipment, telemarketers were making millions of unsolicited calls every day, with the goal not of reaching any particular person, but of contacting as many potential consumers as possible. § 2(3), 105 Stat. 2394; see House Report 3 (noting telemarketers' use of automatic telephone dialing systems "to increase their number of customer contacts"). Although the automated-call restriction is not

limited to telemarketing calls, such calls were paradigmatic examples of the activities that Congress sought to regulate.

When Congress enacted the government-debt exception 24 years later, it determined that calls made solely to collect government-backed debts warranted different treatment. That determination was justified. Such calls differ from other automated calls in two important ways.

a. Calls made to collect government-backed debt serve the significant public and governmental interest in protecting the federal fisc. The amount of delinquent debt owed to the United States totals in the hundreds of billions of dollars. See U.S. Dep't of the Treasury, *Fiscal Year 2018 Report to the Congress: U.S. Government Receivables and Debt Collection Activities of Federal Agencies* 1 (2019) (Treasury Report) ("At the end of FY 2018, delinquent non-tax debt owed to the United States totaled $203.0 billion."); Internal Revenue Service, *Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2011-2013*, at 1 (rev. 9-2019) (IRS Report) (estimating that the "amount of true tax liability that [wa]s not paid voluntarily and timely" for tax years 2011 to 2013 was $441 billion). That amount includes unpaid direct loans, defaulted guaranteed loans, unpaid tax liabilities, and unpaid fines. See Treasury Report 9, 27 n.8; IRS Report 1.

Congress enacted the government-debt exception to "ensure that all debt owed to the United States is collected as quickly and efficiently as possible." OMB Report 128. The President's budget estimated that the exception would result in "savings of $120 million over 10 years." *Ibid.* Thus, unlike the mine run of communications that fall within the automated-call restriction, the

calls covered by the exception offer a significant benefit to the federal fisc.[4]

The court of appeals in *Duguid* v. *Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019), petition for cert. pending, No. 19-511 (filed Oct. 17, 2019), acknowledged the government's interest in "protecting the public fisc." *Id.* at 1156. The court stated, however, that Congress "could have accomplished the same goal" without raising any risk of content discrimination "by basing the exception on the called party's preexisting relationship with the federal government." *Ibid.* (citation and internal quotation marks omitted). It is true that, if Congress had excepted from the automated-call restriction *all* calls made to persons with debts owed to or guaranteed by the federal government, rather than simply calls made solely to collect those debts, the exception could not plausibly be viewed as content-discriminatory. An exception of that sort, however, would be far broader than the one Congress enacted, because it would deprive persons who owe government-backed debts of the TCPA's protection even from automated calls that are unrelated to those debts and thus unrelated to the protection of the federal fisc. As applied to such calls, the exception would sacrifice consumer privacy without furthering the countervailing interest that prompted Congress to enact the exception. There is no sound reason to fashion

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[4] Because the government-debt exception encompasses calls made to collect debts that are owed to private parties but are "guaranteed by" the federal government, 47 U.S.C. 227(b)(1)(A)(iii) (Supp. V 2017), it also authorizes the private owners of those debts (and their contractors) to use automated telephone equipment when collecting those debts. Those debt-collection efforts likewise serve the government's financial interests, however, by decreasing the likelihood that the government will ultimately be required to make good on its guarantee.

a First Amendment jurisprudence that would encourage Congress to regulate in that manner.

The court of appeals in this case likewise acknowledged the government's interest in protecting the federal fisc. Pet. App. 19a n.10. Yet it concluded that the government-debt exception is "not narrowly tailored to that end" because the government has other avenues at its disposal for collecting government-backed debts: (1) it "could secure consent from the debtors to make debt-collection calls," or (2) "it could place the calls itself, [because] the federal government is not subject to the automated call ban." *Ibid.* In enacting the 2015 Budget Act amendment, however, Congress sought to make "debt collection improvements," § 301, 129 Stat. 588 (capitalization and emphasis omitted), to "ensure that all debt owed to the United States is collected as quickly and efficiently as possible," OMB Report 128. Although the pre-existing collection measures the court identified remain available to the government, Congress determined that an additional mechanism—use of automated telephone equipment by private entities that help to collect government-backed debts but are otherwise subject to the automated-call restriction—should be available as well.

b. In addition to furthering the countervailing interest in protection of the federal fisc, the government-debt exception subjects only a narrow range of potential recipients to a narrow range of potential calls. The calls that it authorizes, moreover, are communications for which the recipients have a significantly reduced expectation of privacy.

For purposes of the government-debt exception, a call is made "solely to collect" a government-backed

debt only if the recipient is responsible for making payment on the debt. See *TCPA Government-Debt Order* 9083; pp. 7-8, *supra*. A person who has taken on that responsibility—and then has let the debt go unpaid—can reasonably expect to receive a call. See, *e.g.*, Gannett Co., Comments on Proposed Rules and Regulations Implementing the TCPA 4 (May 26, 1992), https://ecfsapi.fcc.gov/file/1025350001.pdf (explaining that when a "customer assumes responsibility for prompt payment," "the customer can and should expect" to be "contact[ed]" "regarding a past due account"). Unlike a call from a telemarketer, a call to collect a government-backed debt does not come out of the blue, and it is premised on the recipient's breach of an existing legal obligation. Those who owe government-backed debts therefore have a diminished expectation of privacy when it comes to calls made to collect those debts. See, *e.g.*, Coalition of Higher Education Assistance Organizations, Comment Letter on Proposed Rules and Regulations Implementing the TCPA 1 (May 21, 1992), https://ecfsapi.fcc.gov/file/1024330001.pdf ("[Debt collection] calls, though commercial in nature, do not present an invasion of privacy because they do not involve solicitations.").[5]

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[5] To be sure, calls to collect purely private delinquent debts likewise intrude less severely on recipients' reasonable expectations of privacy than do calls from telemarketers. Congress might have elected on that basis to exempt all debt-collection calls from the TCPA's automated-call restriction. But Congress's decision to confine the exception to the subset of debt-collection calls that serve the distinct interest in protecting the federal fisc was also reasonable and consistent with the First Amendment.

That expectation of privacy is further diminished by the fact that the TCPA has never prohibited federal employees from using automated telephone equipment to make calls to collect government-backed debts. The federal government and its agencies are not "person[s]" subject to the automated-call restriction. 47 U.S.C. 227(b)(1) (2012 & Supp. V 2017); see p. 5, *supra*. This Court has also suggested, without squarely holding, that a private contractor who performs services for the government in a manner consistent with the government's instructions may have derivative immunity from TCPA liability. *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663, 672-674 (2016).[6] Thus, even before Congress enacted the government-debt exception, those who owed debts to the government could reasonably expect to receive automated calls to collect those debts.

The government-debt exception expands somewhat the universe of persons who can lawfully use automated telephone equipment to make substantially the same category of calls. But as compared to the state of affairs that prevailed before the TCPA was enacted, its effect on consumer privacy is very modest.[7] Calls covered by

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[6] See *Broadnet Declaratory Ruling* 7402 (concluding that a government contractor may invoke the government-debt exception "when the contractor has been validly authorized to act as the government's agent and is acting within the scope of its contractual relationship with the government, and the government has delegated to the contractor its prerogative to make autodialed or prerecorded- or artificial-voice calls to communicate with its citizens").

[7] Congress provided the FCC a way to minimize even further that very modest effect. The amendment that created the government-debt exception also authorized the FCC to prescribe regulations "restrict[ing] or limit[ing] the number and duration of calls" that fall within the exception. 47 U.S.C. 227(b)(2)(H) (Supp. V 2017).

the exception can be made only *to* persons who are legally responsible for the payment of delinquent debts that are owed to or guaranteed by the federal government, and only *by* persons who have legal authority to collect those debts. Before the TCPA's enactment, by contrast, *all* consumers were subject to a profusion of automated calls from a limitless array of telemarketers and others to whom they had no prior connection.[8]

Excepting calls made solely to collect government-backed debts from the automated-call restriction thus "does not do appreciable damage to the privacy interests underlying the TCPA." Pet. App. 38a (citation omitted). Indeed, the FCC reached a similar conclusion regarding debt-collection calls generally in a 1992 order that promulgated the agency's first set of regulations implementing the TCPA. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8771-8773 (1992) (*1992 TCPA Order*). That order exempted certain categories of calls from the TCPA's similar ban on calls "to any residential telephone line using an artificial or prerecorded voice," 47 U.S.C. 227(b)(1)(B) (Supp. V 2017).

As explained, the TCPA authorizes the FCC to exempt from that general ban "calls made for commercial

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[8] The FDCPA further mitigates any privacy concerns regarding the collection of many government-backed debts. The FDCPA applies to "debt collector[s]" generally, including persons who collect government-backed debts. 15 U.S.C. 1692a(6). It covers debts incurred primarily for "personal, family, or household purposes," including federal student loans. 15 U.S.C. 1692a(5); see *Carrigan* v. *Central Adjustment Bureau, Inc.*, 494 F. Supp. 824, 826 (N.D. Ga. 1980) (holding that a federal student loan is a "debt" covered by the FDCPA). And Congress has extended the FDCPA's provisions to cover private collection agencies that have contracted with the government to collect certain unpaid taxes. 26 U.S.C. 6306(g).

purposes" that the Commission determines "will not adversely affect the privacy rights that this section is intended to protect" and "do not include the transmission of any unsolicited advertisement," 47 U.S.C. 227(b)(2)(B)(ii). See *1992 TCPA Order* 8768, 8791; p. 4 n.1, *supra*. Although the FCC declined to create "an express exemption from the TCPA's prohibitions for debt collection calls," the agency explained that it had deemed such an express exemption "unnecessary" because debt-collection calls "would be exempt" under the exemptions it *was* adopting. *1992 TCPA Order* 8773. The FCC thus regarded debt-collection calls as "commercial calls which do not adversely affect privacy rights"—and which therefore could be exempted from Section 227(b)(1)(B) without undermining the TCPA. *Ibid.*

2. *The government-debt exception satisfies intermediate scrutiny*

The court of appeals concluded that the government-debt exception "erodes the privacy protections that the automated call ban was intended to further" by exposing "millions of debtors" to calls that would be "otherwise prohibited." Pet. App. 18a. That conclusion assumes, however, that calls to collect government-backed debts are just as "intrusive" as the "calls that the automated call ban was enacted to prohibit." *Id.* at 16a. As explained above, such calls do not implicate the same privacy concerns as the telemarketing calls that were the subject of extensive statutory findings when Congress enacted the TCPA in 1991. See pp. 27-31, *supra*. And while millions of persons owe government-backed debts, the calls that fall within the exception are only a small fraction of the calls that are subject to the underlying automated-call restriction.

In concluding that the government-debt exception could not be justified, the court of appeals also found the exception to be "an outlier among the statutory exemptions." Pet. App. 21a. The TCPA exceptions for calls "made for emergency purposes" and calls "made with the prior express consent of the called party," 47 U.S.C. 227(b)(1)(A) (2012 & Supp. V 2017), likely reflect Congress's determination that such calls are often welcomed by the recipients and therefore do not raise the same consumer-privacy concerns that automated calls generally present. By contrast, the principal rationale for exempting calls made to collect government-backed debt is that such calls serve a countervailing public and governmental interest in protection of the federal fisc.

Even if calls made to collect government-backed debts raised the same privacy concerns as the telemarketing calls that lie at the TCPA's core, Congress could permissibly determine that the "countervailing interest" (*Vincent*, 466 U.S. at 811) in protecting the federal fisc warranted different treatment of the two. And in any event, while calls made to collect government-backed debts are unlikely to be welcome, they trench less severely on consumer privacy than do telemarketing calls. Calls covered by the TCPA exemption at issue here can be made only to persons who owe government-backed debts that are delinquent (or at imminent risk of becoming delinquent), and only by persons with legal authority to collect the debts.

Given the differences between government-debt calls and most other calls, Congress was justified in treating the two categories differently under the TCPA. By allowing government-backed debts to be collected "as quickly and efficiently as possible," OMB Report 128, the exception helps to protect the federal fisc. The

interest the exception furthers is "significant," and the exception is "narrowly tailored to serve" that interest. *Ward*, 491 U.S. at 791 (citation omitted). And because the exception covers a comparatively small class of calls that do not implicate the same privacy interests as do most other automated calls, the exception "raises no fatal underinclusivity concerns." *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1668 (2015). The automated-call restriction continues to protect individual privacy and to prohibit the abusive telemarketing calls that were the principal focus of Congress's findings when it first enacted the automated-call restriction.

II. IF THE COURT HOLDS THAT THE GOVERNMENT-DEBT EXCEPTION VIOLATES THE FIRST AMENDMENT, THE COURT SHOULD SEVER THAT PROVISION FROM THE REST OF THE TCPA

After holding that the government-debt exception violates the First Amendment, the court below concluded that the appropriate remedy was to sever that exception from the rest of the TCPA, leaving the automated-call restriction in place. See Pet. App. 22a-24a. The Ninth Circuit has reached the same conclusion. See *Duguid*, 926 F.3d at 1156-1157. If the Court agrees with those courts of appeals that the current statutory scheme is unconstitutional, it likewise should sever the government-debt exception and leave the automated-call restriction intact.

A. The Government-Debt Exception Is Severable From The Remainder Of The TCPA

Severability "is a question of legislative intent." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 683 n.5 (1987); see *United States* v. *Booker*, 543 U.S. 220, 246

(2005) (Court in deciding severability asks "what 'Congress would have intended' in light of the Court's constitutional holding") (citation omitted). In conducting that inquiry, the Court has applied a "presumption * * * in favor of severability." *Regan*, 468 U.S. at 653 (plurality opinion); see *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) ("'Generally speaking, 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.'") (citation omitted). Thus, "the invalid portions of a statute are to be severed unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *INS* v. *Chadha*, 462 U.S. 919, 931-932 (1983) (brackets, citation, and internal quotation marks omitted).

1. Section 708 of the Communications Act of 1934, of which the TCPA is a part, provides: "If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." § 608, 48 Stat. 1105 (47 U.S.C. 608); see Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 6(a), 98 Stat. 2804 (renumbering former Section 608 of the Communications Act of 1934 as Section 708). The court of appeals concluded that "the [TCPA's] debt-collection exemption fails to satisfy strict scrutiny, constitutes an impermissible content-based restriction on speech, and therefore violates the Free Speech Clause." Pet. App. 21a-22a. If this Court agrees with the court of appeals that the government-debt exception is unconstitutional,

then the severability provision unambiguously specifies the appropriate remedy, making clear Congress's intent that only the invalid exception should be excised and that "the remainder of the [Act] * * * shall not be affected." 47 U.S.C. 608.

2. The history of the TCPA confirms that Congress would have wanted the automated-call restriction to remain in effect independently of the government-debt exception. In 1991, Congress enacted the TCPA, including the automated-call restriction, § 3, 105 Stat. 2395-2402, and those provisions remained in place for the next 24 years without any exception for calls made to collect government-backed debts. That history shows that "the balance of the legislation is []capable of functioning independently" of the government-debt exception. *Alaska Airlines*, 480 U.S. at 684; see *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1482 (2018) (asking "whether the law remains 'fully operative' without the invalid provisions") (citation omitted). It also demonstrates that the rest of the statute "will function in a manner consistent with the intent of Congress," *Alaska Airlines*, 480 U.S. at 685 (emphasis omitted), since the automated-call restriction will continue "to protect privacy interests" in the same way it did from 1991-2015. Pet. App. 17a; see TCPA § 2(5), 105 Stat. 2394. Indeed, if this Court agrees with the court below that the government-debt exception "impedes" the achievement of that objective, Pet. App. 21a, then severing the exception would simply make the automated-call restriction less "underinclusive" in that respect, *id.* at 16a.

Most importantly, that history shows that, for 24 years, Congress preferred an automated-call restriction without the government-debt exception over

no automated-call restriction at all. Congress's 2015 enactment of the government-debt exception provides no reason to believe that its preference between those alternatives has changed. To be sure, the amendment makes clear that Congress's *first* choice was to have *both* the automated-call restriction *and* the government-debt exception, thus treating collectors of government-backed debts more favorably than other users of automated telephone equipment. But if the Court holds that this differential treatment violates the First Amendment, nothing in the text or history of the 2015 amendment suggests that Congress viewed the loosening of restrictions on collecting government-backed debt as a matter of such overriding importance as to warrant a return to the pre-TCPA regime, exposing all Americans to millions of unwanted automated calls to their cell phones every day.

3. The court of appeals' severability holding is consistent with this Court's resolution of similar issues involving the severability of exceptions to statutory rules.

a. Like this case, *Frost* v. *Corporation Commission of Oklahoma*, 278 U.S. 515 (1929), involved a "general provision" that was later amended to include a "proviso." *Id.* at 526. The general provision was an Oklahoma statute enacted in 1915 that required "a satisfactory showing of public necessity" to obtain a license to operate a cotton gin. *Id.* at 517. Ten years later, the state legislature enacted a proviso that amended the statute to except certain businesses from that requirement. *Ibid.* This Court held that the proviso violated the Equal Protection Clause. *Id.* at 521-525, 528.

The Court then addressed a question of severability: "Are the proviso and the substantive provisions which it qualifies separable, so that the latter may stand

although the former has fallen?" *Frost*, 278 U.S. at 525. The Court stated that, if the statute "*as originally passed* had contained the proviso," then the Court would have applied "the rule that where the excepting proviso is found unconstitutional the substantive provisions which it qualifies cannot stand." *Ibid.* The Court explained, however, that "the proviso here in question was not in the original section," but rather "was added by way of amendment many years after the original section was enacted." *Id.* at 526. The Court further explained that "the statute, before the amendment, was entirely valid," *ibid.*, and that the unconstitutional amendment was "a nullity and, therefore, powerless to work any change in the existing statute," which "must stand as the only valid expression of the legislative intent," *id.* at 526-527; see *Davis* v. *Wallace*, 257 U.S. 478, 484-485 (1922) (recognizing that an "excepting provision" that "was in the statute when it was enacted" presents a "different" question of severability than does an "excepting provision" that was "embodied in a subsequent amendatory act"); *Truax* v. *Corrigan*, 257 U.S. 312, 341-342 (1921) (holding an "exception introduced by amendment" "invalid" under the Equal Protection Clause and then severing that exception from "the original law").

As in *Frost*, the exception at issue here was "added by way of amendment many years after the original section was enacted." 278 U.S. at 526. And like the 1915 Oklahoma statute, the TCPA, "before the amendment, was entirely valid." *Ibid.* *Frost* thus reinforces the conclusion that, if the Court finds the post-2015 statutory scheme unconstitutional, the proper remedy is to sever the government-debt exception.

b. The Court's decision in *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678 (2017), further supports that conclusion. That case involved a federal statute "governing acquisition of U.S. citizenship by a child born abroad, when one parent is a U.S. citizen, the other, a citizen of another nation." *Id.* at 1686. Enacted in 1940, the statute set forth a "main rule" requiring a certain "period of physical presence in the United States for the U.S.-citizen parent," with an "exception" for "unwed U.S.-citizen mothers." *Ibid.*; see *id.* at 1690-1692; Nationality Act of 1940, ch. 876, Tit. II, §§ 201(g), 205, 54 Stat. 1139-1140. The Court held that "the gender line Congress drew" violated the equal-protection component of the Fifth Amendment. *Morales-Santana*, 137 S. Ct. at 1686.

The Court then considered "the appropriate remedy," *Morales-Santana*, 137 S. Ct. at 1698 (citation omitted), which it described as a question of "the legislature's intent," *id.* at 1699. The Court explained that it "has looked to Justice Harlan's concurring opinion" in *Welsh* v. *United States*, 398 U.S. 333, 361-367 (1970), "in considering whether the legislature would have struck an exception and applied the general rule equally to all, or instead, would have broadened the exception to cure the equal protection violation." *Morales-Santana*, 137 S. Ct. at 1699-1700. The Court further explained that, in accordance with Justice Harlan's opinion, "a court should measure the intensity of commitment to the residual policy—the main rule, not the exception—and consider the degree of potential disruption of the statutory scheme that would occur by extension [of the exception] as opposed to abrogation [of it]." *Id.* at 1700 (citation and internal quotation marks omitted). Applying that mode of analysis to the statute before it, the

Court concluded that, "[p]ut to the choice, Congress * * * would have abrogated [the statute's] exception, preferring preservation of the general rule." *Ibid.* *Morales-Santana* makes clear that, even when the main rule and a statutory exception are enacted at the same time, severance of the exception may be the appropriate remedy for a constitutional violation if the Court concludes that this would have been Congress's preferred course.

The factors the *Morales-Santana* Court identified point in the same direction here. Congress has demonstrated an "intensity of commitment" to the automated-call restriction by applying it to a vast range of unwanted calls and leaving it in place for nearly 30 years. 137 S. Ct. at 1700 (citation omitted). And abrogation of that longstanding safeguard for consumer-privacy interests would entail far greater "disruption of the statutory scheme" than would severance of the government-debt exception. *Ibid.* (citation omitted).

B. Respondents' Contrary Arguments Lack Merit

1. Respondents observe that severance of the government-debt exception is not the outcome they sought, and that their complaint "challenged the TCPA's *restriction* on automated calls," not "the government-debt *exception*." Br. in Support 18. But while respondents assert that the restriction rather than the exception is the subject of their constitutional challenge, the existence of the exception is integral to respondents' First Amendment theory. Respondents argue that the TCPA in its current form violates their First Amendment rights by subjecting them to greater restrictions than the law imposes on collectors of government-backed debts. That challenge could not

have been brought until 2015, when Congress's enactment of the government-debt exception introduced into the TCPA the disparity of which respondents now complain.

If this Court agrees that the disparate treatment described above violates the First Amendment, the determination of which aspect of the TCPA should be preserved "turns on what the legislature would have willed," and "'[t]he relief the complaining party requests does not circumscribe th[e] inquiry.'" *Morales-Santana*, 137 S. Ct. at 1701 n.29 (citation omitted). As explained above, 47 U.S.C. 608 makes clear that questions of severability under the TCPA should be resolved by excising only the provision that is found to be invalid, thereby minimizing disruption to the statutory scheme. And the history of the TCPA confirms that, if Congress had been forced to choose between proscribing both classes of automated calls and leaving both unregulated, it would have elected the former course. Severing the government-debt exception would also accord with this Court's decisions in prior cases where a later-enacted amendment introduced a constitutional infirmity by causing a previously neutral law to discriminate on an improper basis. See pp. 36-37, *supra*.

2. Respondents also contend (Br. in Support 19) that severance of the government-debt exception would be "perverse" because it would result in "mak[ing] *more* speech unlawful than Congress ever intended." Severing the exception, however, would simply restore the automated-call restriction to its pre-2015 state, so that the law would prohibit the same range of calls as it did before the exception was enacted.

Of course, severing the exception while leaving the restriction intact would cause the TCPA to prohibit

more automated calls than it does with the exception in place. But respondents have not contended that their use of automated telephone equipment is beyond Congress's power to regulate. Rather, the constitutional violation that respondents alleged, and that the court of appeals found, was content-based *discrimination* among speakers, *i.e.*, that Congress had acted impermissibly by treating respondents less favorably than persons who use similar technology to collect government-backed debts. See J.A. 40-46; Pet. App. 13a, 15a, 21a-22a. In this respect, the case is similar to equal-protection cases like *Frost* and *Truax*, where the Court found that later-enacted provisos had introduced unconstitutional disparities among regulated parties, and where the Court cured those disparities by striking down the provisos.

Indeed, respondents' contention that severing the government-debt exception would be "perverse" (Br. in Support 19) or inconsistent with the First Amendment's text (*id.* at 18) flies in the face of their basic First Amendment theory. Respondents do not dispute that, if the automated-call restriction applied to *all* calls made with the specified technology, the restriction would be a valid, content-neutral regulation of a particularly intrusive *means* of communication. Respondents argue, however, that the government-debt exception rendered the statutory scheme impermissibly content-discriminatory, even though the exception reduced the TCPA's overall burden on speech by expanding the range of automated calls that can lawfully be made.

In pursuing that argument, respondents have relied on the established First Amendment principle that a broader, content-neutral prohibition on an entire category of communications is often less constitutionally

problematic than a prohibition that is narrower but discriminates based on content. See, *e.g.*, *R. A. V.*, 505 U.S. at 383-387. That constitutional principle, however, applies equally to the Court's choice of remedy for an adjudged First Amendment violation. If the Court agrees with respondents that the TCPA in its current form "abridg[es] the freedom of speech" (U.S. Const. Amend. I), even though the pre-2015 statute did not, severance of the amendment that introduced the constitutional infirmity would be a natural rather than a "perverse" means of curing that violation.

3. Finally, respondents contend (Br. in Support 19) that the court of appeals' severability holding "squarely conflicts with this Court's consistent rulings in analogous First Amendment cases." In none of the decisions that petitioner cites (*id.* at 19-21), however, did this Court conduct any severability analysis. The Court has cautioned that decisions invalidating statutes in their "entirety" without performing such analysis should not be read to preclude "relief more finely drawn" in cases where, as here, such relief is requested. *Ayotte* v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320, 331 (2006).

In any event, severability "is a question of legislative intent." *Alaska Airlines*, 480 U.S. at 683 n.5. Whatever the legislature's intent may have been in other cases, the statutory text and history make clear that Congress would have wished the automated-call restriction to remain in effect independently of the government-debt exception.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 47 U.S.C. 227(a)-(b) (2012 & Supp. V 2017) provides:

Restrictions on use of telephone equipment

(a) Definitions

As used in this section—

(1) The term "automatic telephone dialing system" means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i) of this section, shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that—

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)).[1]

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[1] So in original. Second closing parenthesis probably should not appear.

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior ex-

press consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States, or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through—

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before July 9, 2005; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service 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 this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes—

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice

to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d);

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements;

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted

in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005; and

(H) may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

2. 47 U.S.C. 608 provides:

Separability

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby.