No. 19-631

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF OF AMICI CURIAE PUBLIC CITIZEN AND PUBLIC CITIZEN FOUNDATION IN SUPPORT OF PETITIONERS

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amici Curiae

March 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other

INTEREST OF AMICI CURIAE[1]

Amici curiae Public Citizen and Public Citizen Foundation (jointly, Public Citizen) are nonprofit consumer-advocacy organizations. Public Citizen has a longstanding interest in First Amendment issues, including those posed by assertions that reasonable consumer-protection measures infringe freedom of speech. Public Citizen supports the interest of consumers in being free from the unwanted intrusions of telemarketers who use robocalling technology to besiege cell phones and home phones. Public Citizen's Litigation Group briefed and argued *Mims v. Arrow Financial Services, LLC*, 565 U.S. 368 (2012), this Court's leading precedent on the Telephone Consumer Protection Act (TCPA), and currently represents respondents to pending petitions for certiorari raising First Amendment challenges to the TCPA. Public Citizen submits this brief to address both the First Amendment and remedial issues posed by this case.

SUMMARY OF ARGUMENT

The TCPA restricts use of automated telephone equipment to place calls to cell phones. 47 U.S.C. § 227(b)(1)(A)(iii). That restriction regulates conduct, not speech. When conduct regulations burden protected speech, the First Amendment permits the regulations if they are content neutral and serve significant governmental interests. The TCPA robocalling restriction satisfies this standard because it serves an interest of the highest order: protecting individuals

---

[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae made a monetary contribution to preparation or submission of the brief. Counsel for all parties have consented in writing to its filing.

against unwanted and objectionable intrusions into personal privacy.

The recent amendment that created an exception to the robocalling restriction allowing use of automated telephone equipment to collect debts owed to or guaranteed by the United States did not transform § 227(b)(1)(A)(iii) from a neutral regulation of conduct into a content-based one. The exception is defined not by the content of speech, but by use of automated telephone equipment in a specific form of regulable commercial activity: debt-collection. Moreover, even if strict scrutiny applied, the TCPA's restrictions on robocalling would pass muster because they remain narrowly tailored to the compelling privacy-protection interest they serve.

The court of appeals agreed that restricting use of robocalling technology serves a compelling interest but found a First Amendment violation because it concluded that the government-debt exception is content based and that the exception lacks a compelling justification. If that reasoning was correct, however, then so was the court's further conclusion that the statute as a whole may continue to stand if the offending exception is severed. That holding correctly applies this Court's severability precedents, which are fully applicable here.

Finally, even if the court of appeals were correct to find a constitutional violation and incorrect to sever the amendment responsible for it, the consequence would not be facial invalidation of the robocall restriction in all its applications. The bulk of the provision's application is to calls involving commercial speech that may be subjected to content-based regulation without triggering strict scrutiny. Even if the

statute may not validly be applied to respondents' political speech, this Court's precedents foreclose a broader invalidation of the law.

ARGUMENT

I. The TCPA is not subject to strict scrutiny.

The TCPA provision at issue is not, as respondent AAPC would have it, a content-based "prohibition on speech." *E.g.*, Resp. Br. in Sppt. of Cert. i.[2] That characterization is doubly wrong because the provision does not prohibit speech and is not content based. The TCPA does not prohibit anyone from calling anyone else or restrict the messages that callers may communicate. Rather, the provision regulates conduct: "using" certain automated technology, 47 U.S.C. § 227(b)(1)(A), to place calls to cellular telephones, *id.* § 227(b)(1)(A)(iii). The TCPA exception for calls made to collect a debt owed to the government does not transform the provision into a content-based restriction because the exception is based not on the content of speech, but on the nature of the commercial activity in which the user of automated telephone equipment is engaged. Because the challenged provision is not content based, it is not subject to strict scrutiny.

A. The TCPA regulates conduct to protect significant privacy interests.

The TCPA's restriction on the conduct of using particular technologies to place calls does not even arguably call into play the First Amendment scrutiny applicable to direct restraints on speech. Whether regulating robocalls to cell phones is viewed as a time,

---

[2] This brief refers to respondents American Association of Political Consultants, *et al.*, collectively as "AAPC."

place, or manner restriction or a regulation of conduct that burdens speech, its constitutionality depends on whether it is "justified without reference to the content of the regulated speech, … narrowly tailored to serve a significant governmental interest, and … leave[s] open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted) (applying this standard to restrictions on the use of sound technology in a public forum); *see also McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (applying standard to restrictions on access to sidewalks near entrances to clinics); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (applying standard to requirements that cable television systems carry certain broadcast signals); *Clark v. Comty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (applying standard to restrictions on camping on public property); *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (applying standard to prohibition on burning draft cards). Under this standard, a regulation "'need not be the least restrictive or least intrusive means of' serving the government's interests," as long as it does "'not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'" *McCullen*, 573 U.S. at 486 (quoting *Ward*, 491 U.S. at 798–99).

A restriction on use of robocalling technology, without more, readily satisfies these standards. The interest it serves is not just significant, but compelling: the protection of individuals against technologies that bombard them with unwanted and invasive intrusions on personal privacy. Protecting individuals against unwanted intrusions in their homes and other private spaces is an interest "of the highest order." *Frisby v.*

Schultz, 487 U.S. 474, 484 (1988) (emphasis added; quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)). Within such spaces, the government may protect an individual's "ability to avoid intrusions," including by offering "protection of the unwilling listener." *Id.* "[I]ndividuals are not required to welcome unwanted speech into their own homes and … the government may protect this freedom." *Id.* at 485; *see also Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 736 (1970).

Although the interest in avoiding unwanted messages in a public forum is more limited, *see Street v. New York*, 394 U.S. 576 (1969), an individual's personal cell phone is not a public forum to which others must be permitted unfettered access. For most users, the cell phones in their pockets are every bit as private as the telephones in their homes; indeed, for increasing numbers of Americans, the two are one and the same. *See Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876–77 (9th Cir. 2014), *aff'd on other grounds*, 136 S. Ct. 663 (2016). Just as individuals may be "captive audiences" in their homes to unwanted junk mail, *Rowan*, 397 U.S. at 736, they are captive audiences to unwanted junk calls on their cell phones. Thus, "a sufficient measure of individual autonomy must survive to permit … exercise [of] control over unwanted [calls]." *Id.*

The TCPA's restriction on use of automated technologies to place calls to cell phones is a narrowly targeted response to Congress's findings that those technologies pose severe and increasing threats to individual privacy. The TCPA was prompted by "[v]oluminous consumer complaints about abuses of telephone technology—for example, computerized calls dispatched to private homes." *Mims*, 565 U.S. at 370–71; *see also id.* at 372. Congress found that "[u]nrestricted

telemarketing can be an intrusive invasion of privacy." 47 U.S.C. § 227 note (congressional findings). Congress determined that consumers were "outraged over the proliferation of intrusive, nuisance calls," and "consider[ed] automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy." *Id*. The robocalling restriction aims precisely at the practice that most directly implicates these concerns: use of automated dialing technology to overwhelm consumers' cell phones with a flood of calls and texts, and prerecorded voices that heighten the recipients' sense of an unwanted intrusion into their privacy.

The interest that the TCPA's restriction on the use of calling technology addresses remains substantial. "Unsolicited robocalls are among the top consumer complaints to the [Federal Communications Commission (FCC)], the Federal Trade Commission (FTC) and many State attorneys general," and "available data indicate that robocalls are likely to increase and continue to be a major concern for consumers." S. Rep. No. 116-41, at 1–2 (2019). "It is estimated that in 2019, nearly 50 percent of all calls to mobile phones will be scam robocalls," and that "robocalls rang Americans' phones almost 5 billion times in April 2019—that is close to 2,000 calls per second." *Id*. at 2. Consumers remain "plagued by illegal robotic or prerecorded messages," so much so that "frustrated recipients, fearing unwanted or illegal robocalls, are hesitant to answer their phones" even for legitimate calls. *Id*. at 2, 3. The problem remains severe enough that large bipartisan majorities in both Houses of Congress recently enacted, and the President signed into law, legislation giving the government new enforcement tools and mandating new efforts to crack down on automated

calls that are illegal under existing law. *See* Pallone-Thune Telephone Robocall Abuse Criminal Enforcement & Deterrence Act (TRACED Act), Pub. L. No. 116-105, 133 Stat. 3274 (2019).

B. The TCPA's restriction on automated calls to cell phones is not content based.

Restricting use of automated calling equipment to place calls to cellular phones without their owners' consent readily meets the criterion of content-neutrality on which application of the *Ward* and *O'Brien* lines of cases depends. The consent requirement turns on whether the recipient has expressly manifested agreement to receive calls from the sender using the restricted technologies, not on the call's content. On its face, this requirement does not draw "distinctions based on the message a speaker conveys," *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015), and its application does not "depend entirely on the communicative content" of a call, *id*. Moreover, the restriction on use of automated calling equipment without consent is "justified without reference to the content of … regulated speech," *Ward*, 491 U.S. at 791, and was not "adopted by the government 'because of disagreement with the message [the speech] conveys." *Reed*, 135 S. Ct. at 2227 (quoting *Ward*, 491 U.S. at 791). The consent requirement—the central feature of the automated-equipment restriction—is, in itself, content neutral. *See*, *e.g.*, *Hill v. Colorado*, 530 U.S. 703, 723 (2000).

1. The TCPA's differential regulation of one category of commercial conduct is not content based.

The Fourth Circuit's determination that the TCPA's regulation of the use of automated equipment

to call cell phones is content based rests on an amendment, enacted nearly 25 years after the TCPA's original passage, that exempts the use of automated equipment for calls "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii).[3] That exception, however, is based not on the content of particular messages, but on whether the otherwise-restricted use of automated telephone equipment is part of a course of commercial conduct: collection of debt owed to or guaranteed by the federal government. There is no doubt that Congress can subject activity carried out for the purpose of collecting debts to regulation distinct from that imposed on other forms of conduct, and that the terms of regulation may depend on whose debt is being collected. *See*, *e.g.*, *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) (construing terms of Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq*.). Such regulation is not content-based regulation of speech merely because debt-collection, like all commercial activity, is "in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

Thus, enactment of an exception for some debt-collection activity did not turn the TCPA into a law that

---

[3] The statute, as more recently amended by the TRACED Act, potentially subjects such debt-collection activity to a restriction to which other commercial activity is not subject: The FCC may by regulation limit the number and duration of calls to cell phones by persons seeking to collect a debt owed to or guaranteed by the United States. 47 U.S.C. § 227(b)(2)(H). No such regulation is currently in effect.

"applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. Nor is the "particular subject matter" of a call, *id.*, the basis for determining whether the statutory restrictions apply. The applicability of the statute depends in the first instance on the manner of calling a cell phone (through an autodialer and/or a recorded message) and the presence or absence of consent, regardless of the message the caller wishes to convey. The determination whether the exemption applies rests on the existence of a debt to or guaranteed by the federal government, on the caller's engagement in the activity of attempting to collect that debt, and on the call's function as a part of that activity.

The debt-collection exception thus does not require a court to examine a message's content. Here, for example, respondent AAPC does not claim that its members have authority to collect debt owed to or guaranteed by the federal government, that they engage in any such debt-collection activity, or that they target their robocalls at persons owing such debt. No examination of their messages, therefore, is necessary to determine that they could not qualify for the exemption. The same is true for the vast bulk of telemarketing messages. Only persons engaged in collecting debts owed to or guaranteed by the federal government, and sending messages to persons who owe such debts, are eligible for the exemption. A call whose sender and recipient lack those characteristics—which are not dependent on the ideas expressed in the call—falls outside the exemption without regard to its content.

That examination of a call's message may play a role in determining whether the caller's conduct qualifies it for the debt-collection exception in some instances does not make the regulation content based.

Where a statute applies to or exempts conduct carried out for a particular purpose (here, the use of an autodialer or recorded message to collect debts owed to or guaranteed by the federal government), the possibility that the actor's speech may be examined to determine the conduct's purpose does not render the statute content based. This Court has "never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Hill*, 530 U.S. at 721. The First Amendment "does not prohibit the evidentiary use of speech to … prove motive or intent." *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).

Although the First Amendment may limit regulation of *speech* "based on its … purpose," *Reed*, 135 S. Ct. at 2227, it does not prohibit regulating *conduct* based on its purpose, even when speech may be evidence of that purpose. In *McCullen*, for example, the Court held that a statute prohibiting presence on sidewalks near clinic entrances was content neutral, *see* 573 U.S. at 485, even though it had exemptions that depended on the purpose of a person's use of the sidewalks, *see id.* at 482–83. One exemption covered those using the sidewalk "solely for the purpose of reaching a destination other than" the clinic. *Id.* at 472. Whether a person stopped on the sidewalk to express a pro- or anti-abortion view would be highly relevant evidence of whether his purpose was something other than merely getting from point A to point B, but the Court rejected the argument that the statute's exemptions rendered it content based.

At bottom, the TCPA remains content neutral because it neither "target[s] speech based on its communicative content" nor "applies to particular speech because of the topic discussed or the idea or message

expressed." *Reed*, 135 S. Ct. at 2226–27. The Act's justifications, moreover, rest on the impact of unwanted telemarketing calls on personal privacy, regardless of their contents. And there is no reason to think that the TCPA, or the exception, was adopted based on agreement or disagreement with particular messages that callers use robocalls to convey.

The government-debt exception also does not involve prohibited discrimination among viewpoints, based on "the opinion or perspective of the speaker." *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995). Exempting calls made to collect debts does not discriminate among "viewpoints" about government-backed debt. Debt-collection is a regulable form of commercial activity, not the expression of a "viewpoint" about debt. Otherwise, the FDCPA, which regulates how debt collectors may contact consumers in connection with attempts to collect a debt, would be subject to strict scrutiny because it disfavored pro-debt-collection "viewpoints," as compared to communications about debts to which the FDCPA does not apply. The TCPA, like the FDCPA, does not suppress or favor expressions of opinion about debt. It provides that a specific form of activity (collecting government-backed debt) may be carried out through particular conduct (use of automated telephone equipment).

2. AAPC's alternative arguments for strict scrutiny fail.

Beyond the government-debt exception, AAPC asserts that other features of the TCPA call for strict scrutiny because they are content or speaker based. The court of appeals properly gave no credence to these alternative arguments.

First, the Fourth Circuit found that AAPC had waived any argument that the FCC's regulatory authority to exempt calls from the automated-equipment restriction, *see* 47 U.S.C. § 227(b)(2), renders the statute content based. AAPC explicitly disclaimed any challenge to specific regulatory exemptions, and it did not adequately flesh out any argument that the statutory provisions granting the FCC regulatory authority rendered the statute itself content based on its face. *See* Pet. App. 10a n.7. Even absent AAPC's waiver, however, the TCPA's grant of regulatory authority could render the law *facially* content based only if it required content-based exceptions. It does not do so.

Second, AAPC contends that because the TCPA's restrictions apply to "persons"—a term that does not encompass the federal government, *see* 47 U.S.C. § 153(39)—the statute is speaker based because it provides "broad exemption" for calls by governments. Resp. Br. in Sppt. of Cert. 14 n.4.[4] The Fourth Circuit, however, did not address that argument. In any event, the First Amendment neither applies to government speech nor requires the government to impose on itself regulations that it imposes on private conduct. *See*, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009); *see also Reed*, 135 S. Ct. at 2233 (Alito,

---

[4] AAPC's assertion that the Act exempts all state and local governments and their agents, Resp. Br. in Sppt. of Cert. 4, is not supported by the FCC ruling it cites, which addressed only the federal government and its agents. The Act's application to state and local governments is unsettled. *See Smith v. Truman Rd. Dev., LLC*, 414 F. Supp. 3d 1205, 1232 (W.D. Mo. 2019). Moreover, the applicable definition of "persons" includes "corporations." 47 U.S.C. § 153(39). Both terms apply to municipal corporations. *See Cook Cty. v. United States ex rel. Chandler*, 538 U.S. 119, 125–29 (2003).

J., concurring). Moreover, speaker-based restrictions require strict scrutiny only where "the legislature's speaker preference reflects a content preference." *Turner*, 512 U.S. at 658. Here, there is no reason to think that Congress's conventional choice of regulating the activities of "persons" reflects a content preference.

Third, AAPC argued at the petition stage that the TCPA's exception allowing use of robocalls for "emergency purposes," 47 U.S.C. § 227(b)(1)(A), makes the statute content based. Resp. Br. in Sppt. of Cert. 16. Yet again, the Fourth Circuit did not consider such a challenge to be before it. *See* Pet. App. 5a. In any event, the emergency exception does not mean that "the only way to determine whether the automated-call prohibition applies is to consider the content of the call." Resp. Br. in Sppt. of Cert. 16. Rather, the exception applies when a call is made in emergency circumstances affecting health and safety. *See* Pet. App. 20a. Moreover, by definition, the exception serves a compelling interest, and it does not undermine the privacy interests the TCPA protects. *See id.* Its existence therefore provides no basis for questioning the statute's constitutionality.

II. The TCPA's restriction on robocalls to cell phones survives strict scrutiny.

Because the debt-collection exception is not content based, strict scrutiny does not apply. Nonetheless, the automated-equipment restriction would survive strict scrutiny because, as a whole, it is narrowly tailored to serve the compelling interest in protecting personal privacy. Although that interest would *also* be served by restricting robocalls to collect government-backed debts, Congress's decision to exempt such calls

does not mean that regulation of the use of automated telephone equipment for the calls that remain subject to that restriction no longer protects personal privacy.

In *Williams-Yulee v. Florida Bar*, this Court emphasized that "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" 575 U.S. 433, 449 (2015). Thus, when a challenger asserts that the constitutional flaw in a statute is that it "violates the First Amendment by abridging *too little* speech," *id.* at 448, courts should inquire into whether the claimed "underinclusiveness … raise[s] 'doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.'" *Id.* at 449 (quoting *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 802 (2011)). Courts should also examine whether a law's underinclusiveness "reveal[s] that [it] does not actually advance a compelling interest." *Id.* If, however, the law serves a compelling interest as far as it goes, it is not unconstitutional merely because it could have gone further. Because lawmakers "need not address all aspects of a problem" and "may focus on their most pressing concerns," a law may survive "even under strict scrutiny" notwithstanding that it "conceivably could have restricted even greater amounts of speech in service of [its] stated interests." *Id.*

Laws are most likely to fail such scrutiny when they are "wildly underinclusive," *Brown*, 564 U.S. at 802, or leave unregulated "vast swaths" of conduct that implicate their asserted interests, *Williams-Yulee*, 552 U.S. at 448, because such laws are more likely to target particular messages, speakers, or viewpoints. Or a law may be so underinclusive that "it does not accomplish its stated purpose" at all—for example, a law that purportedly protects anonymity of

juvenile offenders while permitting their names to be broadcast on electronic media. *Smith v. Daily Mail Publ'g Co.,* 443 U.S. 97, 105 (1979). By contrast, where a statute continues to "aim squarely at … conduct" central to its concerns and is not "riddled with exceptions," *Williams-Yulee*, 552 U.S. at 449, it does not fail strict scrutiny solely because it does not reach as far as it might.

The TCPA's government-debt exception does not prevent its robocalling restrictions from advancing the compelling interest in protecting consumer privacy. In light of the vast swaths of intrusive calls that *remain* subject to restriction, the exception does not make the statute wildly underinclusive. It achieves its purpose of restricting a broad universe of calls, although it does not prevent one significant category of debt-collection robocalls.[5] And the breadth of its coverage rules out the inference that it is not genuinely directed at protecting privacy but is instead targeted at disfavored messages.

To be sure, the law's privacy-protection purposes would be *better* served if the exception did not exist. But Congress's decision to carve some calls out of the robocalling restriction based on countervailing considerations does not negate what the statute still accomplishes. Thus, even if strict scrutiny applied, the law would satisfy that scrutiny because the robocalling restriction serves a compelling interest.

---

[5] The limitation of the statute's coverage to "persons" likewise does not render ineffectual its restrictions on the countless calls those "persons" would place using automated telephone equipment in its absence.

III. The debt-collection exception is severable.

Having determined the TCPA to be content based because of the addition of the government-debt exception, the Fourth Circuit held that the statute as amended violated the First Amendment. The court, however, did not conclude that the statute's *restrictions* on the use of automated telephone equipment to call cell phones do not serve a compelling governmental interest. Instead, flipping *Williams-Yulee* on its head, the court held that the *exception* "does not serve the compelling governmental interest in protecting privacy" that the statute otherwise advances. Pet. App. 18a. The Ninth Circuit likewise concluded in *Duguid v. Facebook, Inc.*, that the proper focus was on whether the debt-collection exception furthers a compelling government interest, "*not* on the TCPA overall." 926 F.3d 1146, 1155 (9th Cir. 2019). That court, too, concluded that the exception does not serve the compelling interest in protecting consumer privacy and, in fact, has a "detrimental impact" on that interest. *Id*. at. 1155.[6]

If, as the Fourth and Ninth Circuits concluded, the TCPA's sole constitutional flaw is that Congress amended it to add an exception that fails to advance the compelling interest the statute otherwise serves, their holdings that the amendment creating the exception is severable and that the restriction on robocalls to cell phones is otherwise constitutional is

---

[6] Both the Fourth and Ninth Circuits also held that the exception is not justified by a compelling interest in protecting the public fisc. *See* Pet. App. 18a–19a n.10; *Duguid*, 926 F.3d at 1156. In this Court, the government does not appear to contend that, if it must provide a compelling justification for the exception, its fiscal interests suffice. *See* Pet'rs Br. 24–33.

correct. The lower courts' rulings on severability adhere both to dictates of common sense and to the long-settled legal principle that unconstitutional provisions of a federal statute must be severed unless severance would be inconsistent with congressional intent or leave the statute inoperative. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018). Here, there can be no doubt that Congress would have enacted the TCPA without the limited exception that, in those courts' view, rendered it improperly content based—because Congress in fact did so. Accordingly, a remedy that preserves the fundamental purpose of the TCPA best comports with severability principles and the congressional intent they seek to honor.

A. This Court has often stated that when a court finds a constitutional defect in a statute, it generally has a duty "'to limit the solution to the problem,' [by] severing any 'problematic portions while leaving the remainder intact.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–329 (2006)). Thus, if the statute is "fully operative as a law" with the defective provision excised, a court "must sustain its remaining provisions '[u]nless it is evident that the Legislature would not have enacted those provisions … independently of that which is [invalid].'" *Id.* at 509 (citations omitted). *Accord*, *e.g.*, *Murphy*, 138 S. Ct. at 1482; *Alaska Airlines*, 480 U.S. at 684; *Buckley v. Valeo*, 424 U.S. 1, 108 (1976).

Under this "normal rule," where the conditions for severability are met, "partial, rather than facial, invalidation is the required course." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985). These princi-

ples apply to First Amendment cases as fully as they do to cases involving other constitutional provisions. *See*, *e.g.*, *Reno v. ACLU*, 521 U.S. 844, 882–83 (1997); *Denver Area Educ. Telecommc'ns Consortium, Inc. v. FCC*, 518 U.S. 727, 767 (1996); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988); *Brockett*, 472 U.S. at 506.

Below, AAPC argued, and the court of appeals held, that the government-debt exception made the TCPA content based and unconstitutional. Having accepted the argument that preferential treatment for one type of call lacked adequate justification, the court naturally focused on whether that problematic preference was severable. Applying conventional principles, the court correctly concluded that the government-backed debt exception meets the criteria for severance. The exception is a discrete "textual provision[] that can be severed" without rewriting the statute, *Reno*, 521 U.S. at 882, and the statute is, without question, "fully operative" without the exception, *Murphy*, 138 S. Ct. at 1482. Indeed, the TCPA operated without the exception for nearly a quarter of a century. And, together, the structure and history of the statute, the Communications Act's severability provision, 47 U.S.C. § 608, and Congress's statutory findings concerning the harms of telemarketing, *see* 47 U.S.C. § 227 note, leave no doubt that Congress would never have chosen to sacrifice the robocalling restriction if it could not make one exception for calls to collect government-backed debt.

The Fourth Circuit's severability ruling not only respected congressional intent, but also directly addressed AAPC's constitutional claims by excising the exact part of the statute that, the court concluded, violated AAPC's rights by unjustifiably giving other

callers more favorable treatment. The ruling was consistent with this Court's recognition, in the equal protection context, that when a statutory exception impermissibly gives a small group more favorable treatment than the majority, a court has a remedial choice between "extend[ing] favorable treatment" to everyone or eliminating the exception and subjecting everyone to the unfavorable general rule. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 (2017). As in other cases involving severance, the choice in such circumstances depends on "the remedial course Congress likely would have chosen 'had it been apprised of the constitutional infirmity.'" *Id.* (quoting *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426–27 (2010)). Here, "considering whether the legislature would have struck an exception and applied the general rule equally to all, or instead, would have broadened the exception," *id.* at 1700, can lead only to one result: Congress would have chosen to dispense with the exception rather than give robocallers free rein.

B. Despite the Fourth Circuit's faithful application of this Court's severability precedents, AAPC insists that some of the Court's First Amendment decisions imply that there is an exception to the general requirement that constitutionally problematic provisions be severed: A court may not, AAPC contends, sever a content-based exception to a restriction affecting speech even to save an otherwise content-neutral statute. *See* Resp. Br. in Sppt. of Cert. 19–20. But AAPC's petition-stage brief does not cite a single decision of this Court that holds or even suggests that severance is impermissible in these circumstances. Instead, AAPC cites a list of cases in which this Court struck down overbroad content-based speech restrictions without severing content-based exceptions

that played some role in the Court's conclusion that the laws did not withstand strict scrutiny. *See id.* at 20–21. Not one of the cases AAPC cites, however, supports its contention that a discrete content-based exception can never be severed from an otherwise content-neutral statute to remedy a First Amendment violation. Indeed, none of the Court's decisions cited by AAPC says anything about severability.

For example, AAPC's leading case, *Reed*, 135 S. Ct. 2218, contains no holding whatsoever on severability. The *Reed* opinion mentions neither the subject nor the word. That *Reed* does not address severance does not, as AAPC suggests, imply a *sub silentio* holding that severance is categorically prohibited when a statute contains content-based exceptions. Rather, *Reed* does not discuss severability because the respondent's brief in this Court did not argue for severability and referred to it only hypothetically in a footnote. *See Reed*, Resp. Br. 48 n.15, No. 13-502 (filed Nov. 14, 2014). In addition, because *Reed* involved a city ordinance, severability would have been a question of state law. *See City of Lakewood*, 486 U.S. at 772. Moreover, *Reed* did not involve one or two content-based exceptions to an otherwise neutral statute. There, the sign code at issue was pervasively content based, defining different categories of signs based on their content and subjecting each category to different restrictions. 135 S. Ct. at 2227. The circumstances of *Reed* are starkly different from those posed by the single TCPA exception that the Fourth Circuit determined to be content based and severed.

The same is true of the other cases AAPC invokes. Resp. Br. in Sppt. of Cert. 20–21. Not one discusses severability, let alone holds severance impermissible. None concerned a law that would have been content

neutral but for a single, discrete exception. And all but two involved state or local laws, so severance would have been a state-law issue that this Court had no reason to address. The only two cases involving federal laws, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190 (1999), and *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488–91 (1995), did not address severability because no one exception could cleanly be excised from the statutes at issue in a way that would even arguably address the numerous defects the Court found in them. In *Greater New Orleans*, the statute was "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." 527 U.S. at 190. In *Rubin*, the restriction on alcohol-content advertising was condemned by the "overall irrationality of the Government's regulatory scheme," 514 U.S. at 488, which could not have been cured by surgically removing one or a handful of exceptions. No decision of this Court suggests that the Fourth Circuit's severability holding, in the dramatically different circumstances here, was incorrect.

AAPC invokes *Rappa v. New Castle County*, 18 F.3d 1043, 1072–74 (3d Cir. 1994), as exemplifying the proper approach to severance. Resp. Br. in Sppt. of Cert. 21–22. That decision, however, correctly acknowledges that severing an exception to a speech restriction to restore a statute's content neutrality *is* appropriate where there is specific evidence that the legislature would "prefer[] … elimination of the exception." *See id.* at 1073. Here, the Communication Act's severability clause, 47 U.S.C. § 608, and the statute's history supply exactly such specific evidence. Severing the TCPA's debt-collection exception does not extend regulation to calls that Congress never contemplated prohibiting, but only brings back within the TCPA a

single category of calls that were subject to it for many years. It is abundantly clear that elimination of the later-added exception, rather than invalidation of the TCPA's robocalling restriction as a whole, would best respect Congress's legislative choices.

C. AAPC argues that because it challenged the "*restriction* on automated calls," Resp. Br. in Sppt. of Cert. 18, it necessarily follows that the "restriction is the 'problematic portion[]' of the statute that violates the First Amendment[]," *id.* (quoting *Free Enter. Fund*, 561 U.S. at 508), and "[t]he restriction must therefore be set aside," *id.* According to AAPC, the court of appeals "concluded otherwise by mischaracterizing this case as a challenge to the government-debt *exception*, instead of to the automated-call *restriction*." *Id.* AAPC contends that this view of the case "makes no sense" because "[t]he First Amendment prohibits restrictions on speech—not exemptions from those restrictions that permit speech." *Id.*

AAPC misunderstands the consequences of its own constitutional theory. To be sure, AAPC challenged the TCPA's restriction on its members' use of automated telephone equipment—a point the Fourth Circuit fully understood. *See* Pet. App. 10a. But the *basis* of its challenge, and the argument accepted by the Fourth Circuit, was *not* that the restriction itself would be improper in the absence of the exception. Rather, AAPC's theory was that the enactment of the exception rendered the TCPA unconstitutional by unjustifiably treating some calls more favorably than others on the basis of content. Thus, at AAPC's urging, the Fourth Circuit held that the government was required to "show that the debt-collection exemption has been narrowly tailored to further a compelling governmental interest." Pet. App. 15a (citing *Reed*, 135 S. Ct. at

2231). Similarly, the Ninth Circuit in *Duguid* held that the government was required to "demonstrate that the TCPA's 'differentiation between [robocalls to collect a debt owed to or guaranteed by the United States] and other types of [robocalls] ... furthers a compelling government interest and is narrowly tailored to that end.'" 926 F.3d at 1155 (quoting *Reed*, 135 S. Ct. at 2231; brackets by *Duguid* court). Both courts, in short, correctly understood that the challengers were asking them to conclude that, under *Reed*, they had to determine whether the *exception* had a compelling justification.

AAPC cannot have it both ways. Having successfully argued that it was the TCPA's preferential treatment of one type of call that lacked adequate justification, AAPC cannot now complain that the court of appeals followed the logic of the argument and severed the exemption rather than striking down the robocalling restriction in its entirety. In light of the court's conclusion that the flaw in the statute is not that restricting robocalls fails to serve a compelling interest, but that *differentiating* between the robocalls covered by the exception and those subject to the restriction is unjustified, the court correctly concluded that the "problematic portion[]" of the statute, *Free Enter. Fund*, 561 U.S. at 508, was the exception. The exception was therefore the proper focus of the court's severability analysis.

D. AAPC's further assertion that "[t]he Fourth Circuit's ruling rewrites the statute," Resp. Br. in Sppt. of Cert. 19, is likewise wrong. The Fourth Circuit (and the Ninth Circuit in *Duguid*) did not "rewrite" anything. They did no more than what this Court's precedents allow: They severed a discrete amendment to the statute and left the remainder of

the law just as it was before that provision was enacted. If such a surgical approach constituted "rewriting," severance would never be permissible. AAPC's suggestion that severing a problematic provision from a statute violates "separation-of-powers principles" by usurping Congress's legislative role, *id.*, gets the matter backwards. Severance of discrete statutory provisions shows respect for Congress's role by ensuring that its "overall intent" is not "frustrated," *New York v. United States*, 505 U.S. 144, 186 (1992), while at the same time avoiding the exercise of "editorial freedom" that properly "belongs to the Legislature, not the Judiciary," *Free Ent. Fund*, 561 U.S. at 510.

AAPC's assertion that the severance of the exception not only "rewrites" the statute, but also "makes *more* speech unlawful than Congress ever intended," Resp. Br. in Sppt. of Cert. 19, is flatly wrong. As originally enacted by Congress and in force for more than two decades, the statute did not except calls to collect government-backed debt. It was not until 2015 that Congress amended the statute to create the exception that, the court of appeals held, made the law unconstitutional. Under such circumstances, the statute that "before the amendment, was entirely valid," still "stand[s] as the only valid expression of legislative intent." *Frost v. Corp. Comm'n*, 278 U.S. 515, 526–27 (1929). Thus, if there were some general principle against extending the reach of a statute by severing an invalid exception—a proposition that Justice Scalia once rightly characterized as highly doubtful, *see Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 561 (2001) (Scalia, J., dissenting)—it would be wholly inapplicable here. *See Frost*, 278 U.S. at 525–26.

E. Finally, AAPC contends that, in circumstances like those here, severance creates a disincentive to

assertion of meritorious constitutional claims because it has the effect of leaving the successful challenger to a statute subject to the same statutory restrictions that would have applied to it had it not raised its claims at all. As this Court has recognized, however, the proper application of severability doctrine sometimes has such consequences. In *Sessions*, for example, when this Court severed and invalidated a statutory provision giving preferential treatment to children born abroad to unwed citizen mothers, the result was that the child of an unwed citizen father who successfully challenged the law received no other relief. *See* 137 S. Ct. at 1701. Likewise, in *Free Enterprise Fund*, the effect of this Court's severability ruling was to deny the petitioners the relief they wanted: an injunction that would have stripped the Public Company Accounting Oversight Board of all power and authority, and prohibited it from regulating and investigating them. *See* 561 U.S. at 508. The Court's severability doctrine reflects the view that parties should not receive unduly broad remedies as a reward for raising valid constitutional claims. Instead, the remedy for a constitutional violation should be no broader than necessary to eliminate the violation while preserving Congress's legislative handiwork to the extent consistent with the Constitution and with congressional intent.

Severance in these circumstances does not afford a remedy that the plaintiff lacks standing to seek. To the extent that being subjected to content discrimination without proper justification is a cognizable First Amendment injury, ending such discrimination by invalidating and severing the offending provisions redresses that injury, just as the relief in *Sessions* redressed the complained-of equal-protection violation

in that case. *Cf. City of Ladue v. Gilleo*, 512 U.S. 43, 53 (1994) (noting that when a statute is challenged under a "content discrimination rationale," eliminating content-based exemptions removes the constitutional defects in a statute unless it "is also vulnerable because it prohibits too much speech" without regard to the exemptions).

In any event, the suggestion that severance will deter meritorious constitutional challenges is unfounded. Parties do not know the result of the severability calculus in advance and have ample incentive to raise constitutional claims both defensively and offensively when they face potential liability under a statute or otherwise stand to gain if it is struck down. Constitutional litigation is hardly in short supply even though obtaining a remedy in such cases, like establishing liability, is always uncertain.

IV. Respondents' arguments, even if accepted, would not justify facial invalidation of the robocalling provision.

Notwithstanding the foregoing, if the Court were to agree with AAPC on the First Amendment and severability issues, the proper relief would be limited to a declaration that the TCPA provision restricting robocalls to cell phones cannot permissibly be applied to AAPC's calls involving fully protected, political speech. Declaring the provision unconstitutional on its face—and hence unenforceable even against commercial speakers who may permissibly be subjected to content-based regulation—would violate "the rule that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Brockett*, 472 U.S. at 502. Because in this case a plaintiff is claiming that a statute cannot

constitutionally be applied to its own speech, rather than relying on the overbreadth doctrine to assert the rights of others, the relief to which the plaintiff is entitled if it succeeds is limited to an order under which the statute is "declared invalid to the extent that it reaches too far, but otherwise left intact." *Id.* at 504.

AAPC differs from the great majority of users of telephone equipment subject to the TCPA's restrictions on automated calls to cell phones in that its members assert an intention to engage in fully protected political speech.[7] By contrast, the vast bulk of telemarketing that is subject to the TCPA's robocalling restriction involves commercial speech or the promotion of scams. *See* S. Rep. No. 116-41, at 1–4; *see also* Patricia Figliola, *Protecting Consumers and Businesses from Fraudulent Robocalls*, Congressional Research Service (December 21, 2018), https://fas.org/sgp/crs/misc/R45070.pdf.; YouMail Robocall Index, https://robocallindex.com/. The statute evinces Congress's special concern for commercial robocalling activity by limiting the FCC's authority to exempt it from the law's provisions. *See* 47 U.S.C. § 227(b)(2)(B).

This Court's precedents have long recognized that regulations affecting commercial speech, including regulations that are based on the contents of different types of commercial messages, are not subject to strict scrutiny, but face only intermediate scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service*

---

[7] *See* Pet'rs Br. i ("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." (citing First Am. Complaint ¶¶ 8–12, J.A. 32–34)).

Commission, 447 U.S. 557 (1980). *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018); *see*, *e.g.*, *Fla. Bar v. Went For It, Inc.,* 515 U.S. 618 (1995); *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–81 (1989). As Justice Kennedy recognized in his concurring opinion in *Matal v. Tam*, "content based discrimination" is not "of serious concern in the commercial context." 137 S. Ct. 1744, 1767 (2017).

Importantly, the less stringent commercial-speech standard governs the application of *content-based* time, place, or manner regulations to commercial speech even when such regulations also affect some fully protected speech. *See Fox*, 492 U.S. at 484–85. In such circumstances, a commercial speaker may obtain facial invalidation of a regulation, based on its failure to satisfy strict scrutiny as applied to fully protected speech, only if the unconstitutional application of the statute to non-commercial speech is "substantial, not only as an absolute matter, but 'judged in relation to the statute's plainly legitimate sweep.'" *Id.* at 485 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Here, the TCPA's legitimate application to commercial robocalling (and telemarketing scams) dwarfs its assertedly unconstitutional applications to fully protected speech. Accordingly, a commercial challenger could not obtain an order striking down the statute on its face. "[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which [the law's] sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615–16.

Here, the question of facial invalidity of the statute in all its potential applications, including to commercial robocalls, is not properly before the Court, as

AAPC's desire to make calls subject to the restriction on automated calls to cell phones is limited to political calls. In such circumstances, the Court has no occasion to set aside other applications of the statute that would not raise similar constitutional concerns. Rather, as the Court held in *Brockett*, in a case "where the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish," 472 U.S. at 504, a court should go no further than necessary to redress the invalid application of the law to the challengers. Thus, even if (1) the government-debt exception made the statute's application to fully protected speech subject to strict scrutiny, (2) the statute failed such scrutiny, and (3) the exception were inseverable, the Court should do nothing to limit the statute's legitimate application to the vast quantity of commercial robocalling that would be unleashed on consumers if the TCPA's restriction on robocalls to cell phones were struck down on its face.

CONCLUSION

The Court should reverse the judgment of the court of appeals that 47 U.S.C. § 227(b)(1)(A)(iii) is unconstitutional or, in the alternative, affirm the court of appeals' holding that the government-debt exception is severable. In no event should the Court hold that § 227(b)(1)(A)(iii) is unconstitutional in all its applications.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org
Attorneys for Amici Curiae

March 2020