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 *AMICUS CURIAE* INSTITUTE FOR FREE SPEECH IN SUPPORT OF RESPONDENTS

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QUESTIONS 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." *Id.* 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." *Id.*

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. First Am. Compl. ¶¶ 8-10, 12. 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.

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The Institute for Free Speech ("Institute") is a nonpartisan, nonprofit organization that works to defend the rights to free speech, assembly, press, and petition. Over the last decade and a half, the Institute has represented individuals and civil society groups in cases at the intersection of political regulation and First Amendment liberties. These efforts have included a challenge to Indiana's ban on automated telephone calls. *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303 (7th Cir. 2017) *cert denied som. nom. Patriotic Veterans v. Hill*, 582 U.S. ___, 137 S.Ct. 2321 (2017). The Institute regularly brings challenges to political speech regulations at all levels of government and the Institute has substantial experience wrestling with the various First Amendment standards announced by this Court and the federal courts of appeal.[1]

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[1] Pursuant to Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief. In accordance with this Court's Rule 37.2, all parties were timely notified of *amicus's* intent to file this brief and have provided their consent.

SUMMARY OF ARGUMENT

"[S]peech concerning public affairs is more than self-expression; it is the essence of self government[,]" *Garrison v. La.*, 379 U.S. 64, 74-75 (1964), and heightened constitutional protections apply to such expressions regardless of whether the speaker is an individual or a group. *E.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010). These protections also should apply regardless of the method of communication the speaker uses. Such regulations threaten to decrease public debate among grass roots civil society groups and the general public. *Id*. at 355. The First Amendment represents our society's decision to shelter speech, association, and matters of conscience from unnecessary governmental intrusion and censure.

This case considers the Telephone Consumer Protection Act (TCPA), which imposes a blanket prohibition on speech with certain exemptions. Because those exceptions are based on content, and the statute otherwise flatly prohibits the use of autodialing technology to communicate, the TCPA imposes an unconstitutionally content-based restriction. Because the avowed goals of the blanket prohibition, and exemptions, could be met by an opt-in/opt-out system used in other sections of the TCPA, the scheme at issue here is not at all narrowly tailored. This Court should follow its precedent, strike the scheme, and leave to Congress whether a different and properly tailored legislative approach can achieve the purported interests served by the TCPA.

ARGUMENT

I. The TCPA Violates the First Amendment.

This case concerns the question of whether certain provisions of the Telephone Consumer Protection Act (TCPA), which prohibit the use of automatic telephone dialing or an artificial or prerecorded voice, to call another's cell phone, 47 U.S.C. § 227(b)(1)(A)(iii), facially constitute a content-based restriction on speech such that it triggers strict scrutiny. Respondents are political participants who wish to use automatic-call technology to engage in political speech, organizing "get out the vote efforts," making calls to registered voters on topics of political issue, polling to track public opinion in order to inform the public on political preferences on issues of interest, etc. The TCPA prohibits them from using such technology to promote their messages, thereby inherently limiting core political speech.

Given Respondents' communicative intentions, the TCPA's limitations "operate in an area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam). Indeed, "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Id.* "The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957) (brackets in *Buckley*)). "Although First Amendment protections are not confined to the exposition of ideas, there is practically

universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, of course including discussions of candidates." *Id.* (internal citations, quotation marks and ellipses omitted).

A. The TCPA is a Content-Based Restriction on Speech.

The First Amendment prohibits the enactment of laws "abridging the freedom of speech." U.S. Const., Amend. 1. Under that Clause, our government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015), *quoting Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227 (citing *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653, 2663–2664 (2011); *Carey v. Brown*, 447 U.S. 455, 462 (1980); *Mosley*, 408 U.S. at 95). "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* (quoting *Sorrell*, 131 S.Ct. at 2664). "Some 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. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id*.

One need only consider the categorical exemptions in the TCPA to note that the statute is unquestionably content-based, as it contains carve outs from regulation based on topic, content, function and purpose. These constitute "distinctions based on a message a speaker conveys [and] . . . defining regulated speech by its function or purpose." *Id*. Indeed, *Reed* is directly on point here, as the outdoor sign code at issue in that case exempted 23 categories of signs from code requirements, based upon type of message conveyed. *Id*. at 2224.

The TCPA is similarly content-based government regulation of speech. For instance, categorizing by function and purpose the TCPA exempts calls "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). It similarly exempts calls "made for emergency purposes." 47 U.S.C. § 227(b)(1)(A). Perhaps more strikingly, the statute provides that the FCC "may, by rule or order, exempt from" liability any "calls to a telephone number assigned to a cellular telephone service that are not charged to the called party." 47 U.S.C. § 227(b)(2)(C). And using this provision, the FCC has exempted numerous categories of calls based on content, function and purpose. For example, certain healthcare-related calls (such as medical appointment reminders and prescription reminders) are exempted, as are package-delivery notifications and calls relating to bank transfers. *See* Rules and

Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, 30 FCC Rcd. 7961, 8024-28 ¶¶ 129-38, 8031-32 ¶¶ 146-48 (2015); Cargo Airline Association Petition for Expedited Declaratory Ruling, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Order, CG Docket No. 02-278, 29 FCC Rcd. 3432, 3436-38 ¶¶ 13-18 (2014).

B. In *Buckley* and *Reed* this Court Rejected the "Manner Restriction" Argument the Government Advances Here.

Here, the government contends that the TCPA's automated-call restriction is not an unconstitutional abridgment of speech, as the prohibition on automated calls, according to the government "regulates the manner of speech, not the content of it." Gov't Br. at 14. The government's argument here is nearly identical to the one it advanced and this Court rejected in *Buckley* and in *Reed*.

In *Reed*, the government contended that "regulation is content neutral—even if it expressly draws distinctions based on . . . communicative content—if those distinctions can be '"justified without reference to the content of regulated speech."' *Reed*, 135 S.Ct. at 2228 (quoting Brief of United States as *Amicus Curiae*, which quoted *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Reed squarely rejected this bait and switch argument, as there the government did not persuade the Court with an argument focusing on the communication medium while ignoring the facial

distinctions in a regulation: "[A] law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." *Id*. at 2230 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1992)). Indeed, this Court has insisted that "'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference'. . . . Thus, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based." *Id*. at 2223 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994)). Consequently, the fact that the TCPA involves regulation of telephone communications makes no difference for the First Amendment analysis, as this Court in *Reed* indicated that the medium of speech should not factor into the question.

Similarly, the government's argument that the TCPA regulates conduct and not content is almost identical to the argument it raised in favor of the Federal Election Campaign Act provision at issue in *Buckley*. In that case, the government argued that the cap on independent expenditure spending was merely an economic regulation with incidental effect on speech. *See Buckley*, 424 U.S. at 16. Here, the government incorrectly states the automated call restriction regulates the manner of speech, not the content of it. Gov't Br. at 11. Likewise, in *Buckley* the government argued that the restriction on independent expenditures was a manner restriction on conduct. *Compare Buckley*, 424 U.S. at 16-18 *with* Gov't Br. at 11. Yet *Buckley* noted: "The critical

difference between this case and those time, place, and manner cases is that the present Act's contribution and expenditure limitations impose direct quantity restrictions on political communication." *Id*. at 18. So here; the fact that no exemption in the TCPA allows for political communications, while it allows exempt categories for other types of communications, imposes a direct quantity restriction on political speech.

This Court has consistently found the regulatory regimes that disallow uses of modes of communication because of speech category are not conduct or manner regulations. For instance, this Court rejected the conclusions of the Ninth Circuit and district court in *Reed*, who, like the government here, characterized the regulatory regime at issue as non-content-based because they purportedly regulated categories—such as "directional signs" or "political signs"—rather than content. *Reed*, 135 S.Ct. at 2226. Rejecting the distinction of the lower courts, this Court clearly and correctly held that a law is "content based if [it] applies to particular speech because of the topic discussed." *Id*. at 2227 (citations omitted). TCPA regulation falls squarely in the content-based category because, as is amply apparent in TCPA's exemptions, it "regulate[s] speech by its function or purpose." *Id*.

The fact that the TCPA regulates by topic is what matters for the First Amendment analysis: "'it is well established that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."' *Id*.

at 2230 (quoting *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980)). "[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* (citing *Consolidated Edison*, 447 U.S. at 537). Because the TCPA is facially discriminatory, strict scrutiny applies, and therefore its constitutionality turns on whether it is narrowly tailored to achieve a compelling government interest.

C. The Government's Argument Regarding Privacy and Narrow Tailoring is Hopelessly Flawed.

The Government largely discounts Respondent's arguments regarding appropriate level of scrutiny by not addressing them directly. Instead of focusing on the overall structure of the TCPA, including its exemptions, the Government merely argues that the debt exception is content-neutral and therefore subject to intermediate scrutiny and that the debt exception is "narrowly tailored to serve a significant government interest." Gov't Br. at 24, *quoting Ward*, 491 U.S. at 791.

The Government's argument regarding the proper standard of review here is as logically flawed as it was in *Reed* because it begs the question: it ignores the regime which is at issue in this case—that the automated call prohibition is unconstitutional because the statutory scheme makes content-based distinctions. *Reed*, 135 S.Ct. at 2228 (rejecting the United States' argument for using *Ward* when examining a "facially content-based restriction" and noting "the United States misunderstand[s] our

decision in *Ward*. . . . *Ward* had nothing to say about facially content-based restrictions"). Rather than confront the question posed by this case—whether the TCPA scheme as a whole survives constitution muster—the Government baits and switches an exemption and simply argues that exemption is constitutional. Just as this Court in *Reed* did not pick and choose regarding which sign restrictions might or might not survive constitutional scrutiny, so here the TCPA's approach to automated call restrictions is what is at issue, and the Government's argument is flawed for the reasons just stated and those treated in the previous section.

Because the Government focuses on the debt exception's constitutionality it consequently focuses on the state interest in "protecting the public fisc." Gov't Br. at 24-25. While protecting the public fisc is a state interest, it is largely irrelevant to the issue here. One exemption cannot justify the regulatory scheme. Indeed, the TCPA is horrifically overinclusive if that interest is served by the scheme, as it precludes, based on content, *all speech* (including Respondent's unquestionably core political speech) in the name of only promoting the public fisc interests of the government.

The Government's emphasis on the debt exception is logically and legally erroneous just as the Fourth Circuit's reasoning is: both focus on an exception that by definition cannot abridge any speech at all, *because the exemptions expressly allow speech*. Both ignore the prohibition on speech—the automatic call prohibition—which as a matter of logic and law is the only prohibition possibly at issue here, as the

exceptions to that prohibition are not the provisions "abridging the freedom of speech[,]" U.S. Const., Amend. 1. It would be unquestionably unconstitutional if the government listed 1000 categories of prohibited speech which could not use telephone communications, and then listed 4 out of the 1000 that the government believed met a governmental interest and were therefore exempted. This example is logically identical to the scheme at issue in *Reed* as well as to the TCPA scheme at issue here. All three are unconstitutional for the same reason.

Leaving aside these logical fallacies, the Government otherwise rationalizes broad prohibition regarding automated calling by stating it is narrowly tailored to protect consumer privacy. Gov't Br. at 14. This argument too is foreclosed by precedent and flawed in reasoning.

Privacy is undoubtedly a legitimate governmental interest. This Court has clearly noted that "the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (quoting *Carey*, 447 U.S. at471). Indeed, this Court in *Frisby* held:

> One important aspect of residential privacy is protection of the unwilling listener. . . . [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to

> welcome unwanted speech into their own homes and that the government may protect this freedom.

Id. at 484-85 (citations omitted).

Similarly, in *Rowan v. United States Post Office Dep't*, this Court upheld the right of a homeowner under an opt-in/opt-out do-not-mail program to restrict material that could be mailed to his or her house, and emphasized the importance of individual privacy, noting that "the ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality." 397 U.S. 728, 737 (1970) (quoting *Camara v. Mun. Court*, 387 U.S. 523 (1967). And in *Hill v. Colorado*, this court called the unwilling listener's interest in avoiding unwanted communication part of the broader right to be let alone, which it noted Justice Brandeis described as "'the right most valued by civilized men.'" 530 U.S. 703, 716-17 (2000) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

Precedent treating such prohibitions—with stated privacy interests in mind—have held that blanket prohibitions would be hopelessly overinclusive and not narrowly tailored absent opt-in/opt-out provisions. For instance, the challenges to the national do-not-call registry withstood constitutional challenge precisely because its opt-in/opt-out provisions, like the mail provisions in *Rowan*, ensured narrow tailoring; they did not constitute a prohibition on speech because the opt-in/opt-out feature of the FCC regulations—passed under a parallel TCPA/FCC provisions, 47 U.S.C. § 251 *et seq.*; 47 C.F.R. § 64.1200(c)(2), authorizing

and implementing the national do-not-call registry—stopped only that speech which would-be listeners individually elected not to hear. *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1242 (10th Cir. 2004); (applying analysis of *Rowan* and *Frisby* to narrow tailoring analysis and finding proper tailoring due to opt-in/opt out provision), cert. denied 543 U.S. 812 (2004); *see also Nat. Coal. of Prayer, Inc. v. Carter*, 455 F.3d 783, 787-89 (7th Cir. 2006) (treating constitutionality of Indiana do not call list and applying *Rowan* for opt-in/opt-out analysis).

The cases cited by the government all assumed that the section of the TCPA at issue here was content neutral and do not address the content-based argument treated here and addressed, *supra*, in this brief. Gov't Br. at 14-15 (citing *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876 (9th Cir. 2014) (treating provision as content neural) *aff'd on other grounds* 136 S.Ct. 663 (2016); *Moser v. FCC*, 46 F.3d 970, 973 (9th Cir. 1995) (treating provision as content neutral) *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) (same). And none of those cases addressed narrow tailoring to achieve the statute's purported interest in privacy or addressed the arguments advanced here under the logic of *Reed*. *E.g., Moser*, 46 F.3d at 974-75; *Gomez*, 768 F.3d at 876; *Wreyford*, 957 F. Supp. 2d at 1380-1382. Moreover, the Seventh Circuit case, cited by the government as authority, seems to have come to its conclusion regarding a similar Indiana statute because that law, like the do not call registry, has an opt-in/opt-out structure. *Patriotic Veterans*, 845 F.3d at 305-06 (relying on *Rowan* and upholding Indiana's

anti-robocall statute in part because statutory scheme includes a provision for "consent").

Given the foregoing, the statutory regime here is not narrowly tailored to further the government's interest in privacy. As the cases suggest, and parallel applications parallel provisions of the TCPA recognize, government regulation can achieve narrow tailoring by including a simple opt-in/opt-out provision. The blanket prohibition on automatic calling at issue in the TCPA is appallingly overinclusive. It assumes that all Americans would prefer not to receive political communications of Respondents, and consequently it is not narrowly tailored at all—assuming that *all* Americans would not like such communications and consequently sweeps in even those individual listeners who might very well appreciate some of the political communications.

And Congress could easily remedy the tailoring problem created under the automatic dialing prohibition. Therefore, this Court should find that the current scheme is not narrowly tailored, strike it for nonconformity with the First Amendment, and allow Congress to weigh whether the policy interests warrant statutory revision or empowering the FCC to do the same. This was the approach the Court took to the facially discriminatory law in *Reed*, and it should do the same with the facially discriminatory TCPA prohibition on (some) automatic dialing calls.

II. This Court's Decision in *Reed* Controls the Remedy Question.

The TCPA automatic dial prohibition currently blanketly applies to all speech, including the core political speech of Respondent, except those exemptions expressly allowing speech the government favors. As described above, the regime is both content based and not narrowly tailored to achieve its overall privacy interests. The TCPA's content-based regime should be struck as facially unconstitutional.

"To succeed in a typical facial attack, [litigants] have to establish 'that no set of circumstances exists under which [the provision] would be valid," or that the statute lacks any 'plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 472 (2010) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987) and *Washington v. Glucksberg*, 521 U.S. 702, 740, n. 7 (1997) (Stevens, J., concurring in judgments) (internal quotation marks omitted)). "Which standard applies in a typical case is a matter of dispute that we need not and do not [need to] address, a[s] neither *Salerno* nor *Glucksberg* is a speech case." *Id.*

"In the First Amendment context, however, this Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Id.* at 473, quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n.6 (2008) (internal quotation marks omitted in text).

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Id.* at 474, quoting *United States v. Williams*, 553 U.S. 285, 293 (2008). Here, the reach is broad, perhaps alarmingly so, as but for the exceptions it reaches all speech that would use an automatic dialing system.

As it indicated in *Reed*, this Court invalidates statutory schemes that on their face distinguish among types of speech because such schemes are inherently constitutionally suspect. 135 S.Ct. at 2228. The TCPA provisions at issue acts the same way because the scheme prohibits would-be users of autodialing communications based on categories of speech. Just as the statutory scheme in *Reed* prohibited certain users from sign use, so the TCPA autodialing regime disallows non-exempt users from automated telecommunications. As in *Reed*, this Court should analyze the restrictions of the TCPA, as facial and structural, and find that the statute is facially flawed. Just as in *Reed*, the remedy is to strike the regime entirely, as this Court is not at liberty to rewrite the law. *See id.* at 2232.

In addition, the remedy the Fourth Circuit crafted is erroneous because it neglects to address the prohibition at issue. By simply severing a provision that allows speech, and then rubber stamping a scheme which, as noted *supra*, is hopelessly overinclusive in meeting a purported government regulatory interest, the Fourth Circuit ignored the constitutional defect and also endorsed it. Yet in *Reed*, as here, the remedy is to strike the scheme and

let the policy making branches of government regulate, if possible, in conformity with constitutional parameters. *Id*. (noting that the application of strict scrutiny "will not prevent governments from enacting effective" laws, but only force them to write content-neutral laws).

CONCLUSION

This Court should reverse the decision of the of the Fourth Circuit and remand with instructions to enter judgment for Respondents.

Respectfully submitted,

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