No. 19-631

In the
Supreme Court of the United States

WILLIAM P. BARR, Attorney General;
and 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 FOR *AMICUS CURIAE* FACEBOOK, INC. IN SUPPORT OF RESPONDENTS

PAUL D. CLEMENT
Counsel of Record
DEVIN S. ANDERSON
KASDIN M. MITCHELL
LAUREN N. BEEBE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com
Counsel for Amicus Curiae Facebook, Inc.

April 1, 2020

CORPORATE DISCLOSURE STATEMENT

Facebook, Inc. is a publicly traded company and has no parent corporation. No publicly held company owns 10% or more of its stock.

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STATEMENT OF INTEREST[1]

Amicus curiae Facebook, Inc. ("Facebook") is a social media and technology company with a direct and substantial interest in the question presented in this case. Facebook's mission is to give people the power to build community and bring the world closer together. To that end, Facebook operates a service used by more than 2.4 billion people around the globe, including more than 220 million in the United States. People use the Facebook service to stay connected with friends and family, to discover what is going on in the world, and to share and express what matters to them.

Facebook has a particular interest in the issue raised here because it has been sued in multiple jurisdictions for allegedly violating the 1991 Telephone Consumer Protection Act's ("TCPA") prohibition on making "calls" using an automatic telephone dialing system ("ATDS"). In *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019), for example, the plaintiff sought mandatory statutory penalties for targeted *security*-related text message notifications. These security messages notify an individual user that her Facebook account has been accessed from a new device at a specific time so she can take immediate action and prevent improper access by an unknown actor. Other lawsuits against

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

Facebook relate to text messages that users request, such as updates regarding friends' birthdays or recent activities. *See Brickman v. Facebook, Inc.*, 230 F. Supp. 3d 1036 (N.D. Cal. 2017); *Holt v. Facebook, Inc.*, 240 F. Supp. 3d 1021 (N.D. Cal. 2017). The plaintiffs in these cases claim *they* did not sign up for these notifications, likely because they acquired "recycled" cellphone numbers previously assigned to Facebook users who *did* sign up for these security and other alerts.

Courts adjudicating such lawsuits have split over the meaning and reach of the TCPA's prohibition on ATDS calls. They have simultaneously recognized serious First Amendment problems with the statute, but without providing meaningful relief to parties facing massive liability for allegedly violating the TCPA. Once again, *Duguid* is a case in point. First, the Ninth Circuit doubled down on its broad reading of an ATDS that would treat an ordinary smartphone as an ATDS, while acknowledging that this view was in acknowledged conflict with the Third Circuit. Two other circuits have subsequently rejected the Ninth Circuit's statutory analysis. *See Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301 (11th Cir. 2020); *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020).

Second, the Ninth Circuit accepted Facebook's argument that the prohibition on ATDS calls violated the First Amendment because it penalized Facebook's alleged ATDS calls while exempting comparable calls based on their content. But despite accepting Facebook's First Amendment argument, the Ninth Circuit denied Facebook any relief. Instead of

invalidating the challenged ATDS prohibition as unconstitutional, the Ninth Circuit broadened it by excising the statute's exception for calls designed to collect government debts.

Facebook's petition for a writ of certiorari from the Ninth Circuit's mistaken decision is fully briefed and remains pending. *Facebook, Inc. v. Duguid*, No. 19-511 (U.S. filed Oct. 17, 2019). Facebook has an acute interest in explaining that the Ninth Circuit's statutory ruling is wrong and exacerbates the TCPA's constitutional difficulties. It also has an interest in explaining how the Ninth Circuit's "severability" analysis is flawed and incompatible with bedrock First Amendment principles.

STATUTORY BACKGROUND

1. In 1991, "[a]lmost thirty years ago, in the age of fax machines and dial-up internet," and long before the first smartphones or the widespread adoption of unlimited text messaging plans, Congress "took aim at unsolicited robocalls" by enacting the TCPA. *Duguid*, 926 F.3d at 1149; *see also Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 370-71 (2012) (Congress passed the TCPA in response to "[v]oluminous consumer complaints about abuses of telephone technology"). The TCPA, among other things, makes it unlawful for a person to place calls without prior consent to cellphones using a device called an "automatic telephone dialing system" or ATDS. 47 U.S.C. §227(b)(1)(A). Although Congress has not updated the TCPA to address technological changes, like the rise of texting, courts have interpreted "calls" to include text messages, even when the recipient is not charged

for receiving the message. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016).

The statute defines an ATDS as "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." 47 U.S.C. §227(a)(1). Congress used the phrase "random or sequential number generator" to address distinct problems posed by the autodialing technology prevalent in 1991. At that time, "telemarketers [were using] autodialing equipment that either called numbers in large sequential blocks or dialed random 10-digit strings." *Dominguez v. Yahoo, Inc.* (*Dominguez I*), 629 F. App'x 369, 372 (3d Cir. 2015). Random dialing created a risk that unlisted and specialized numbers could be "tie[d] up," preventing those numbers from making or receiving any other calls. S. Rep. No. 102-178, at 2 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1969. Sequential dialing allowed callers to reach every number in a particular area, creating a "potentially dangerous" situation in which no outbound calls (including, for example, emergency calls) could be placed. H.R. Rep. No. 102-317, at 10 (1991), *available at* 1991 WL 245201.

2. The TCPA includes a private right of action that carries substantial potential penalties. 47 U.S.C. §227(b)(3). A person who uses an ATDS to place a call (which includes sending a text message) to a cellphone without consent is subject to an automatic $500 statutory penalty per call, with treble damages available—increasing the potential statutory penalty to $1,500 per call—"[i]f the court finds that the

defendant willfully or knowingly" committed the violation. *Id.* §227(b)(3)(B)-(C). The substantial statutory penalties available under the statute have made the TCPA one of the most frequently litigated federal statutes, and the availability of fixed statutory penalties that arguably obviate the need to prove individualized damages has made it a frequent basis for putative class actions and *in terrorem* settlements. *See, e.g.*, *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 655-56 (4th Cir. 2019); *WebRecon Stats for Dec 2019*, WebRecon LLC (Jan. 28, 2020), https://bit.ly/3bbNYfS; Marissa A. Potts, *"Hello, It's Me [Please Don't Sue Me!]": Examining the FCC's Overbroad Calling Regulations Under the TCPA*, 82 Brook. L. Rev. 281, 302-05 (2016) ("Recent trends in TCPA litigation show that TCPA lawsuits are clogging the judicial system. These lawsuits attract plaintiffs' attorneys because they frequently provide lucrative class-action settlement opportunities." (footnote omitted)).

3. The TCPA's prohibition on ATDS calls has included a number of speaker-based and content-based exceptions from the beginning. When the TCPA was passed in 1991, the government exempted itself and its agents from the ATDS prohibition. *See* U.S.Br. at 5 ("[T]he term 'person' as used in the TCPA does not encompass the federal government or its agencies."); *see also Campbell-Ewald*, 136 S. Ct. at 672. Congress also exempted ATDS calls "made for emergency purposes," 47 U.S.C. §227(b)(1)(A), which the FCC has defined as calls "made necessary in any situation affecting the health and safety of consumers," 47 C.F.R. §64.1200(f)(4). And it exempted calls made with the recipient's "prior express consent." 47 U.S.C.

§227(b)(1)(A). The prior-consent exception was relatively straightforward to apply in the early 1990s when most telephone numbers were landline numbers that rarely changed, but its application has become increasingly challenging as tens of millions of phone numbers are transferred (or "recycled") each year, and yet there is no reliable database of recycled numbers or means for verifying the current ownership of a particular number. *See* Second Notice of Inquiry, *Advanced Methods to Target and Eliminate Unlawful Robocalls*, 32 FCC Rcd. 6007, 6009 ¶5 (2017). As a result, it is not unusual for someone to dial the number of a person who had given consent yet inadvertently reach a different person who has not given consent. Finally, Congress gave the FCC a free-floating ability to exempt free calls and texts "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." 47 U.S.C. §227(b)(2)(C).

Following a sharp rise in TCPA litigation in the mid-2000s, Congress amended the TCPA to add yet another speaker- and content-based exception to the ATDS prohibition, excepting calls "made solely to collect a debt owed to or guaranteed by the United States." Bipartisan Budget Act of 2015, Pub. L. No. 114-74, §301(a)(1)(A), 129 Stat. 584, 588; 47 U.S.C. §227(b)(1)(A)(iii); *see WebRecon Stats for Dec 2019*, https://bit.ly/3bbNYfS (showing rise in TCPA complaints from approximately 350 in 2010 to more than 3,500 in 2015); Nick Jarman, *Modernizing the Debt Collection Process: TCPA Risks and Foti*,

WebRecon LLC (Apr. 28, 2013), https://bit.ly/39hC8j9 ("Lawsuits alleging violations of the [TCPA] are increasing at a rapid pace against debt collectors, with each lawsuit threatening the potential liability of class action litigation.").

SUMMARY OF ARGUMENT

The First Amendment provides that "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I. Two principles that flow directly from that text strongly support respondents' position on both the merits and the remedy. First, the proper focus is the aspect of the law that abridges speech—here, the statutory prohibition on ATDS calls—and not on speech-permitting exceptions. The speech-permitting exceptions may underscore the content-based nature of the speech-abridging prohibition and may trigger strict scrutiny, but the focus of the constitutional analysis—and what is unconstitutional if the government cannot carry its burden—is the speech-abridging prohibition. And if, as here, the speech-abridging prohibition is unconstitutional, the only appropriate remedy is to invalidate that prohibition, not to broaden it by excising a speech-permitting exception.

Second, the First Amendment is not an anti-discrimination prohibition; it is a prohibition against abridging speech. Statutes that discriminate on the basis of speaker, viewpoint, or topic appropriately trigger heightened scrutiny, but it is not the discrimination as such that violates the First Amendment, it is the abridgement of speech. This has obvious implications for the appropriate remedy. When a content-based prohibition triggers and fails

heightened scrutiny, the only remedy consistent with the First Amendment is one that invalidates the speech-abridging prohibition. A "remedy" that broadens the prohibition of speech by excising speech-permitting exceptions is antithetical to the First Amendment.

These two principles make clear that the Fourth Circuit was correct in concluding that the TCPA was unconstitutional, but erred in excising the speech-permitting government-debt-collection exception. Even in its constitutional analysis, the Fourth Circuit was unduly focused on the government-debt-collection exception. In reality, the TCPA's prohibition on ATDS calls included speaker- and content-based exceptions from the outset. The government-debt-collection exception simply confirms that the ATDS prohibition is an unconstitutional abridgement of speech.

The constitutional question before the Court is informed by an important question of statutory construction that has divided the lower courts. The Ninth Circuit has interpreted the term ATDS—and thus the TCPA's prohibition on ATDS calls—broadly to encompass virtually every modern smartphone. Every other circuit to consider the question has rejected the Ninth Circuit's view and limited the statute to the kind of specialized robocalling devices that were prevalent when Congress passed the TCPA in 1991. Indeed, since the Court granted this petition, the Seventh and Eleventh Circuit have weighed in to deepen the circuit split and cement the Ninth Circuit's view as an outlier.

The Ninth Circuit's position exacerbates the constitutional problems in two ways. First, it

amplifies the TCPA's content-based problems: the broader the prohibition, the greater need for exceptions for favored topics and speakers. Second, wholly apart from any troubling distinctions based on speaker or topic, a prohibition on potentially every number dialed by a smartphone would be hopelessly overbroad. If this Court broadly invalidates the prohibition on ATDS calls such that it cannot be a basis for liability even for calls placed before the government-debt-exception was added to the statute in 2015, then the Ninth Circuit's outlying view will have no effect. But absent such a broad holding, the Court will need to resolve this critical statutory issue that has divided the circuits, and could do so by granting Facebook's pending petition.

ARGUMENT

I. The TCPA's Prohibition On ATDS Calls Is Unconstitutional And The Prohibition Must Be Struck Down, Not Expanded To Abridge Even More Speech.

A. The TCPA's Prohibition on ATDS Calls Is Unconstitutional.

The basic principles of this Court's First Amendment jurisprudence—from prohibitions on content-based and viewpoint discrimination to levels of scrutiny—are so familiar that it can be tempting to skip to the doctrine and past the constitutional text. But as in every constitutional case, the proper starting place is the actual text. The First Amendment provides that "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I. Two important principles follow directly from that prohibition on laws abridging the freedom of

speech. First, the focus of the constitutional analysis should be on the prohibition or abridgement of speech. Exceptions to a prohibition, such as the government-debt-collection exception to the TCPA's prohibition on ATDS calls, may inform the nature of or justification for the prohibition, but the focus of the constitutional analysis must remain on what "abridges" speech. Second, the First Amendment is not an anti-discrimination prohibition. While discrimination among speakers, viewpoints or topics may be a powerful indicator of an unconstitutional abridgement of speech, the constitutional violation consists of abridging speech, not discriminating against speakers. Indeed, the most obvious First Amendment violation imaginable—a blanket prior restraint on all speech—would be entirely non-discriminatory. Applying these two text-based principles to the TCPA's prohibition on ATDS calls makes the prohibition's unconstitutionality clear.

1. This Court's cases underscore that the proper focus for determining the constitutionality of the TCPA's prohibition on ATDS calls is that speech-abridging *prohibition*, not its speech-permitting *exceptions*. That focus on the speech-abridging prohibition is particularly clear in a case like *Duguid* where Facebook is being sued for violating the TCPA's prohibition on ATDS calls. Facebook has an obvious interest in challenging the constitutionality of the very prohibition it stands accused of violating. Inapplicable exceptions that benefit other speakers, but not Facebook, by allowing them to speak because of the differential content of their speech undoubtedly inform the constitutionality of the prohibition, but

they are not the focus of Facebook's complaint or the Court's analysis.

The government elides this critical distinction throughout its brief, starting with the question presented. The government presents this case as being about "whether the government-debt exception to the TCPA's automated-call restriction violates the First Amendment." U.S.Br. at i. But no one, either in this case or *Duguid*, suggested that the government-debt exception violated the First Amendment. How could it? The exception permits speech and imposes no penalties. What the challengers have argued violates the First Amendment is the TCPA's prohibition on ATDS calls, which is backed with substantial statutory penalties. The government-debt exception may make clear that the government is not willing to abide by the prohibition when it comes to certain favored speech and that content-based discrimination may make it particularly clear that the prohibition violates the First Amendment. But it is the speech-abridging prohibition, and not the speech-permitting exception, that violates the First Amendment and should be the focus of this Court's analysis.

This Court's cases are entirely consistent with this focus on the prohibition that allegedly abridges speech in violation of the First Amendment. In *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), for example, the Court addressed the Town of Gilbert's "Sign Code." The Gilbert code contained a blanket "prohibit[ion]" on "the display of outdoor signs anywhere within the Town," but subjected that prohibition to several "exemptions" based on what the sign said (*e.g.*,

ideological signs, directional signs, or political signs). *Id.* at 2224. Pastor Reed's concern was obviously with the Town's blanket prohibition, and not with the various exceptions that permitted the speech of others. Indeed, the whole point of the constitutional controversy was that the signs that Pastor Reed wished to post did not qualify for the exceptions and thus were taken down by Town officials. Accordingly, this Court's analysis focused on the Town's speech restriction. The prohibition's 23 different exemptions, three of which were most relevant, certainly informed the Court's conclusion that the prohibition was content-based and needed to be struck down. But the ultimate focus of the lawsuit and the remedy was the applicable speech-abridging prohibition, not the inapplicable speech-permitting exceptions.

Reed followed a long line of this Court's cases holding that when the government enacts a broad prohibition on speech, but then exempts certain types of speech from that prohibition based on the content of the speech, the statutory prohibition—not the exception—is subject to strict scrutiny and potential invalidation under the First Amendment. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 805 (2011); S*orrell v. IMS Health Inc.*, 564 U.S. 552, 563-64, 580 (2011); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 189-90 (1999); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 233 (1987); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794-95 (1978). The vast majority of the Courts of Appeals are in accord. *See, e.g.*, *Willson v. City of Bel-Nor*, 924 F.3d 995, 1000, 1004 (8th Cir. 2019); *Rappa v. New Castle Cty.*, 18 F.3d 1043 (3rd Cir. 1994); *id.* at 1079-80 (Alito, J., concurring); *Matthews v. Town of*

Needham, 764 F.2d 58, 61 (1st Cir. 1985) (Rosenn, Breyer, and Torruella, JJ.).

2. A related, and equally basic, principle is that the First Amendment is not an anti-discrimination provision. *Cf. Reed*, 135 S. Ct. at 2229 ("[T]he First Amendment expressly targets the operation of the laws—*i.e.*, the 'abridg[ement] of speech'—rather than merely the motives of those who enacted them."). It prohibits Congress from making any law that abridges the freedom of speech, not any law that discriminates among speakers, viewpoints, or topics. To be sure, that kind of discrimination triggers heightened scrutiny under the First Amendment, *see, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."), but that does not transform the basic prohibition of the First Amendment. Put differently, discrimination among speakers, viewpoints, and topics is not what violates the First Amendment, but instead provides a strong indicator that the government is impermissibly abridging speech. Thus, such discrimination is an appropriate trigger for heightened scrutiny, but the ultimate constitutional violation is the impermissible abridgement of speech.

In that regard, exceptions for certain favored speakers or topics directly inform the justification for the speech prohibition in the first place. If the government is not willing to live with the prohibition when it comes to its own speech or third-party speech on favored topics, that is powerful evidence that the

speech restriction is both meaningful (why else would the government exempt favored speakers and topics?) and unjustified (the permissibility of exceptions undermines the claimed need to prohibit certain forms or means of speech). To be sure, discrimination among speakers, viewpoints, and topics raises the distinct concern that the government is playing the forbidden role of censor. But even then the principal constitutional evil is the abridgement of the speech of disfavored speakers, not discrimination *qua* discrimination.

3. Applying these basic principles to the TCPA makes the unconstitutionality of its prohibition on ATDS calls plain. The TCPA is a classic example of a statute where a prohibition with numerous exceptions produces a content-based restriction on speech. That is most obviously true when the prohibition on ATDS calls is evaluated in light of the exception for ATDS calls "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. §227(b)(1)(A)(iii). In light of the word "solely," discussion of any topic besides government-debt collection, even in the context of a call that otherwise focuses on government-debt collection, renders the exception inapplicable and the prohibition applicable (absent some other exception). The only way to determine whether the Act's prohibition applies is to consider the content of the call in order to ascertain whether it is prohibited or permitted, which is the hallmark of content-based discrimination, as explained in *Reed*, 135 S. Ct. at 2227, and *McCullen v. Coakely*, 573 U.S. 464, 479 (2014).

The Fourth and Ninth Circuits focused exclusively on the government-debt-collection exception in §227(b)(1)(A)(iii). But while that exception may be the most obvious provision that renders the ATDS prohibition content-based, it is hardly the only such provision. Indeed, the TCPA drew numerous speaker-based and content-based distinctions even before Congress added the government debt exception in 2015. Most obviously, from the very beginning, as the government emphasizes, the TCPA exempted the government from its prohibition entirely. Given the government's distinct perspective on numerous issues, that carve-out for the government's own speech is problematic and risks a form of implicit viewpoint discrimination. The government's self-carve-out seems particularly problematic in the context of time, place, and manner restrictions. The justification for those restrictions is that they leave ample alternatives for speakers to communicate their messages. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). But if the government is unwilling to abide by those same rules when it comes to its own speech, the reasonableness of those restrictions becomes doubtful. A restriction on rallies in public parks after 10:00 p.m. sounds reasonable enough, unless and until the government decides that its own civic pride rally can continue unabated until midnight.

Even beyond the exemption for the government's own speech, the ATDS ban has been subject to content-based exceptions from the outset. Perhaps most alarming, the statute grants the FCC a free-floating ability to exempt free calls and texts "subject to such conditions … as necessary in the interest of

the privacy rights this section is intended to protect." 47 U.S.C. §227(b)(2)(C). The Commission has deployed this exception in a content-based manner to allow, among other things, notifications concerning a wide variety of "financial and healthcare issues." *In Re Rules & Regulations Implementing the the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 8023 (2015). Moreover, the statute itself carves out an exception for ATDS calls "made for emergency purposes," 47 U.S.C. §227(b)(1)(A), which has been capaciously applied by courts and the FCC to encompass routine notifications, such as for prescriptions, *see Roberts v. Medco Health Sols., Inc.*, 2016 WL 3997071, at *2 (E.D. Mo. July 26, 2016), or school activities, *In Re Rules & Regs. Implementing the Telephone Consumer Protection Act of 1991*, 31 FCC Rcd. 9054, 9062-63 (2016), but apparently not notifications of an account log-in from a new device, *see Duguid*, 926 F.3d at 1152.

The distinctions between these permitted calls and prohibited calls plainly turn on content and the government's valued-based judgments that one message should be favored over the other. Thus, even apart from the obvious content-discrimination reflected in the government-debt-collection exception, the ATDS prohibition "target[s] speech based on its communicative content," "appl[ies] to particular speech because of the topic discussed or the idea or message expressed," and "draw[s] distinctions based on the message a speaker conveys." *Reed*, 135 S. Ct. at 2226-27; *see also McCullen*, 573 U.S. at 479.

4. As explained in more detail below, *see infra* Part II, the Ninth Circuit's outlying and expansive

definition of an ATDS exacerbates the First Amendment problems with the TCPA's prohibition on ATDS calls. The statute defines an ATDS as "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." 47 U.S.C. §227(a)(1). The definition thus describes the functionality an ATDS must have—*i.e.*, it must be able either "to store or produce numbers to be called"—and further defines how those functions must be discharged—*i.e.*, "using a random or sequential number generator." That statutory definition follows directly from the problem Congress was trying to solve in 1991. In the late 1980s and early 1990s, "telemarketers [were using] autodialing equipment that either called numbers in large sequential blocks or dialed random 10-digit strings." *Dominguez I*, 629 F. App'x at 372.

But the Ninth Circuit, in a decision it reaffirmed in *Duguid*, decoupled the requirement that an ATDS employ a "random or sequential number generator" from the requirement that the device store the numbers to be called. *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018); *see also Duguid*, 926 F.3d at 1151-52. Under the Ninth Circuit's construction of the statute, any device with the capacity to store numbers and dial them automatically qualifies as an ATDS without regard to whether the storage employs random or sequential number generators to do the storage.

That interpretation not only mangles the statutory text and creates a circuit split, *see infra* Part II, but it vastly expands the scope of the prohibition on

ATDS calls in ways that magnify the TCPA's constitutional problems. Simply put, typical telephones, whether landlines or smartphones, generally lack the capacity to store or produce numbers "using a random or sequential number generator" without further configurations, but virtually any modern smartphone has the capacity to store numbers and then contact those numbers automatically (*e.g.*, voice-activated software or automated do-not-disturb-while-driving text messages). And because the TCPA imposes liability on any call or text made from an ATDS—regardless of whether it actually uses the autodialing functions to make the particular calls—the Ninth Circuit's interpretation renders virtually every modern smartphone an ATDS and virtually every number called on such a smartphone a potential TCPA violation punishable by statutory penalties.

The Ninth Circuit's expansive definition of an ATDS in *Marks* and *Duguid* greatly exacerbates the unconstitutionality of the statutory prohibition on ATDS calls. The Ninth Circuit's expansive definition amplifies the TCPA's content-based problems: if the prohibition reaches not just specialized robocalling technology but virtually all smartphones, then the need for exceptions for the government's favored topics and speakers is substantially greater. Moreover, wholly apart from any troubling distinctions based on speaker or topic, a prohibition on potentially every number dialed by a smartphone would be hopelessly overbroad and have little connection to the privacy and safety concerns that motivated the statute. Congress enacted the TCPA and its prohibition on ATDS calls based on the abuse

of specialized dialing technologies by telemarketers and the distinct problems created by random or sequential dialing. A prohibition that swept in not only specialized devices employed by individuals who place calls for a living, but also ubiquitous devices used by everyone would be overbroad in the extreme.

B. The Proper Remedy Is to Invalidate the TCPA's Speech-Restricting Prohibition on ATDS Calls, Not to Rewrite It to Abridge Even More Speech.

Having recognized that the TCPA's prohibition on ATDS calls violated the First Amendment, the Fourth Circuit in the decision below (and the Ninth Circuit in *Duguid*) should have simply invalidated the prohibition, rather than expanding it under the guise of "severability" analysis. The only severability question that could arise here is whether in light of the ATDS prohibition's invalidity any additional provisions in the TCPA must also fall. Severability principles do not empower courts to rewrite a statute or deny successful litigants an effective remedy. Here, as in *Duguid*, the challenged provision is the prohibition on ATDS calls and the proper remedy for a successful challenge is to invalidate the speech-abridging prohibition, not to excise a speech-permitting exception with the net effect of having the courts abridge even more speech than Congress. That remedial result follows from both ordinary severability principles and the basic nature of the First Amendment, which prohibits the abridgement of speech, not discrimination.

1. The Fourth and Ninth Circuits not only went beyond any proper application of severability doctrine,

but turned First Amendment principles on their head. Both courts not only left in place a challenged speech-abridging prohibition, but expanded it. At the same time, both courts excised an exception that no party challenged and that permitted rather abridged speech.

Those through-the-looking-glass results have no grounding in this Court's First Amendment precedents. To the contrary, this Court has repeatedly remedied a First Amendment violation by invalidating the speech-abridging prohibition—not by striking speech-permitting exceptions or rewriting the law to prohibit more speech. In *Reed*, for example, evaluating a speech-restricting prohibition on outdoor signs, subject to some 23 speech-permitting exemptions, the Court found the prohibition unconstitutional. 135 S. Ct. at 2224. As a remedy, the Court quite naturally invalidated the prohibition. The Court never suggested that it could cure the First Amendment problem by excising or "severing" the exceptions to create a new broader, content-neutral prohibition. That omission was not an oversight or a lack of remedial creativity. Striking the exemptions and abridging more, not less, speech would have been completely antithetical to First Amendment principles.

All this Court's First Amendment precedents are in accord. They all strike down speech-restricting prohibitions, and none invoke "severability" principles to excise speech-permitting exceptions that may mark the prohibition as content-based but do not themselves abridge any speech. Indeed, the government admits that it can find no First Amendment precedent of this

Court that supports its novel proposal that the Court "remedy" a First Amendment problem by abridging more speech.

The best the government can muster is some Equal Protection cases suggesting that a violation of that Clause can be remedied by "leveling up" or "leveling down." *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1806 (2015). But that is because the Equal Protection Clause is an anti-discrimination provision. Its basic guarantee is satisfied as long as there is equal treatment, and so it is agnostic between leveling up and leveling down. The Free Speech Clause is fundamentally different; it is not an anti-discrimination provision, but an anti-abridgement, pro-speech guarantee. Discrimination on the basis of speaker, viewpoint, and topic is not the constitutional violation, but a sign of impermissible abridgement. Thus, where the Court has found impermissible abridgement—whether because of content-discrimination, viewpoint discrimination, unreasonable time, place, and manner restrictions, prior restraints, or anything else—the remedy is always more speech, not less speech. The First Amendment is not agnostic or even tolerant of "leveling up" a prohibition when it comes to constitutionally protected speech. *See Rappa*, 18 F.3d at 1073; *id.* at 1079-80 (Alito, J., concurring).

2. The Fourth and Ninth Circuit's misguided "severability" analysis also makes no sense from a practical, remedial standpoint. Facebook's experience in *Duguid* is a case in point. Facebook was sued based on Duguid's allegations that Facebook violated the TCPA's prohibition on calls made without consent

from an ATDS by sending security-related text messages. *See supra* pp.1-2. Facebook sought to have those claims dismissed by, *inter alia*, challenging the TCPA's prohibition on ATDS calls as unconstitutional. The Ninth Circuit agreed and, based on Facebook's arguments, found the TCPA unconstitutional.

Yet even though Facebook succeeded in convincing the Ninth Circuit that the prohibition was in fact unconstitutional, it received no meaningful relief. Instead, the court simply broadened the TCPA's speech-abridging prohibition by excising the government-debt-collection exception. But that was a *non sequitur*. The exception was neither what Facebook was alleged to have violated nor what Facebook challenged as unconstitutional. Facebook was sued for violating—and therefore challenged—the TCPA's prohibition on making calls with an ATDS, which decidedly does abridge speech. Having succeeded in its challenge to that prohibition, the proper course was for the court to invalidate the prohibition and then see whether the rest of the statute could stand.

Denying successful First Amendment challengers any meaningful relief creates a profound disincentive for parties to seek to vindicate their constitutional liberties. If the prize for a party mounting a successful First Amendment challenge is zero meaningful relief and a broader speech prohibition (which incidentally deprives absent debt collectors of their exception), parties will have little incentive to vindicate their First Amendment rights. Thus, for doctrinal and practical reasons, the "cure" for a First Amendment

violation cannot be worse than the disease in terms of its effect on speech.

3. Finally, it bears emphasis that in addition to all the other defects with the Fourth and Ninth Circuit's misguided "severability" analyses, excising the government-debt-collection exception from the TCPA does not even remedy the constitutional defect. Not only is the real First Amendment problem with a prohibition that the government was not willing to apply even handedly, but as explained above, *see supra* pp.5-6, 15-16, the TCPA's discrimination on the basis of speaker and topic is hardly limited to its government-debt-collection exception. Remedying the TCPA's constitutional defect is not a simple matter of "excising" the government-debt-collection exception, when the statute has long drawn speaker- and content-based distinctions even before the government-debt-collection exception was added to the statute in 2015.

This all only underscores that the proper remedy for a speech-abridging prohibition on speech is to invalidate the prohibition in its entirety, not engage in a judicial broadening exercise that is antithetical to First Amendment values and the basic reality that entities like Facebook face liability not because of any speech-permitting exception, but for allegedly violating a speech-abridging prohibition.

II. The Statutory ATDS Question Is Closely Related, Has Divided The Circuits, And The Ninth Circuit's Outlier Interpretation Exacerbates The Constitutional Problems.

Although this case presents the question whether the TCPA's ATDS ban violates the First Amendment

and if so what remedy is appropriate, the statutory question concerning the scope of the TCPA's ATDS prohibition is closely related. Indeed, the government posits the question presented in terms of "the government-debt exception to the TCPA's automated-call restriction." U.S.Br. at i. But the TCPA does not impose an "automated-call restriction" in so many words. Instead, the Act restricts any unconsented call made using ATDS devices, regardless of whether the particular call is "automated," unless one of the TCPA's numerous speaker-based or content-based exceptions applies. As a result, the statutory question concerning the scope of the TCPA's definition of an ATDS directly informs the constitutional question before the Court. If virtually every smartphone is an ATDS (and the prohibition reaches potentially every number dialed with a smartphone), the statute would prohibit far more speech than if it reaches only specialized robocalling technology. There is a well-defined, entrenched circuit split on the scope of an ATDS that will require this Court's review if it does not broadly invalidate the TCPA's prohibition on ATDS calls.

1. In *Duguid*, the Ninth Circuit doubled down on its expansive interpretation of an ATDS as encompassing any device that can store and automatically dial telephone numbers—even if that device cannot store them "using a random or sequential number generator." 47 U.S.C. §227(a)(1)(A); *see Duguid*, 926 F.3d at 1151-52; *see also Marks*, 904 F.3d at 1049-53. By decoupling the statutory requirement that an ATDS must use "a random or sequential number generator" from the requirement that the device be able to store numbers

and dial them automatically, the Ninth Circuit radically expanded the statute in ways that Congress never intended. Based on changes in technology, the Ninth Circuit's decision sweeps virtually every modern smartphone into a statute originally targeted at the specialized machinery employed by telemarketers. The Ninth Circuit acknowledged that its expansive conception of an ATDS could sweep in "ubiquitous devices and commonplace consumer communications," *Duguid*, 926 F.3d at 1151, but was unmoved. It acknowledged that its "gloss on the statutory text" could "not avoid capturing smartphones." *Id.* at 1152.

The Ninth Circuit's expansive view of the ATDS has deeply divided the lower courts, with the Ninth Circuit becoming more and more of a national outlier. The Ninth Circuit's initial decision in *Marks* was reached in acknowledged disagreement with the Third Circuit. Facebook's petition in *Duguid* noted the resulting clear split between the Ninth and Third Circuits, *see also Marks*, 904 F.3d at 1052 n.8 (citing *Dominguez v. Yahoo, Inc.* (*Dominguez II*), 894 F.3d 116, 120 (3d Cir. 2018)), as well as the conflict with the D.C. Circuit's decision in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). *See Duguid*.Pet. at 29-34 & nn.3-4. The FCC, likewise, had already recognized that *Marks* and *ACA International* are fundamentally incompatible. *Id.* at 31-32 (citing FCC, *Public Notice: Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the TCPA in light of the Ninth Circuit's* Marks v. Crunch San Diego, LLC *Decision* 2 (Oct. 3, 2018), https://bit.ly/2Qso4KG).

In the time since the certiorari-stage reply briefs in *Duguid* were filed, the split has deepened and the Ninth Circuit's outlier status has been cemented. Two additional circuits have now weighed in, and both have squarely rejected the Ninth Circuit's counter-textual statutory construction. In *Glasser*, the Eleventh Circuit, in an opinion written by visiting Judge Sutton, concluded that the statutory clause "using a random or sequential number generator" modifies both verbs ("to store" and "[to] produce"). 948 F.3d at 1306. In reaching that conclusion, the court "start[ed] with conventional rules of grammar and punctuation," including the series-qualifier canon, which provides that "[w]hen two conjoined verbs ('to store or produce') share a direct object ('telephone numbers to be called'), a modifier following that object ('using a random or sequential number generator') customarily modifies both verbs." *Id.* at 1306-07 (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 148 (2012)). "On top of that," the court explained, "the sentence contains a comma separating the phrase 'to store or produce telephone numbers to be called' from the phrase 'using a random or sequential number generator,'" which also "indicates that the clause modifies both 'store' and 'produce' and does not modify just the second verb." *Id.* at 1307 (citing Scalia & Garner at 150).

The Eleventh Circuit directly addressed the perceived "oddity of 'stor[ing]' telephone numbers using a number generator" that troubled the Ninth Circuit and caused it to put a "gloss" on the statutory text. *Id.*; *see also Marks*, 904 F.3d at 1050-52 & n.8. The Eleventh Circuit correctly observed that this

problem quickly "fades when one considers how automatic phone-dialing technology works and when one keeps in mind the goal of giving content to each word and phrase in the statute," along with "the fact that devices that randomly generated phone numbers and stored them existed at the time Congress passed the Act." *Glasser*, 948 F.3d at 1307. Ultimately, the Eleventh Circuit recognized that the "key clause" in the statutory definition was "'using a random or sequential number generator,'" and the court rejected a reading that would eliminate the operation of that clause while bringing ubiquitous devices like smartphones within the definition's fold. *Id.*

"In the age of smartphones, it's hard to think of a phone that does not have the capacity to automatically dial telephone numbers stored in a list, giving § 227 an 'eye-popping' sweep." *Id.* at 1309. The Eleventh Circuit recognized that extending the TCPA to smartphones would put the statute at odds with Congress' more modest intent. "Not everyone is a telemarketer, not even in America. One would not expect to find this exponential expansion of coverage in a law targeting auto-dialers and randomly generated numbers." *Id.* Judge Martin dissented and would have followed the Ninth Circuit's lead in *Marks*.

Even more recently, the Seventh Circuit further cemented the Ninth Circuit's outlier status when it rejected the reasoning of *Marks* and *Duguid* in *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458 (7th Cir. 2020). The Seventh Circuit, like the Eleventh Circuit, held "that 'using a random or sequential number generator' modifies both 'store' and 'produce,'" meaning that "a device must be capable of performing

at least one of those functions using a random or sequential number generator to qualify as an 'automatic telephone dialing system.'" *Id.* at 460, 463. That interpretation "is certainly the most natural one based on sentence construction and grammar." *Id.* at 464.

The Seventh Circuit likewise emphasized that its plain text reading was reinforced by "the far-reaching consequences of [the] ungrammatical interpretation" adopted by the Ninth Circuit in *Marks* and reaffirmed in *Duguid*. *Id.* at 467. Under the Ninth Circuit view, "to qualify as an 'automatic telephone dialing system' a device need only have the 'capacity … to store … telephone numbers' and then to call or text them automatically." *Id.* But "[e]very iPhone today has that capacity right out of the box." *Id.* Thus, the Ninth Circuit "would create liability for every text message sent from an iPhone," producing "a sweeping restriction on private consumer conduct that is inconsistent with the statute's narrower focus." *Id.*

2. The Ninth Circuit's minority view of the scope of an ATDS exacerbates the TCPA's First Amendment problems, as the circuits that have rejected the Ninth Circuit view all recognize. While there is a general relationship between statutory breadth and constitutionality in the First Amendment context, *see, e.g.*, *United States v. Williams*, 553 U.S. 285, 293 (2008), that relationship is particularly acute in the TCPA context. As court after court has recognized, an expansive interpretation of an ATDS exacerbates the constitutional problems with the TCPA. *See Gadelhak*, 950 F.3d at 467; *Glasser*, 948 F.3d at 1309-

10; *Dominguez II*, 894 F.3d at 120-21; *ACA Int'l*, 885 F.3d at 697-98. This is true in at least two ways.

First, the scope of the speech-restricting prohibition informs both the degree of the restriction and the purported justifications for both the speech-restricting prohibition and the speech-permitting exceptions, and underscores the absence of narrow tailoring. Under any form of heightened scrutiny, the government is limited to the justifications and interests that actually motivated Congress in abridging speech. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 760 (1996) (plurality opinion). In contrast to rational basis review, the government is not free to invent *post hoc* justifications. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 130-31 (1989).

That fundamental principle of heightened scrutiny poses distinct problems for the Ninth Circuit's expansive interpretation of an ATDS. While the Ninth Circuit candidly acknowledged that its broad conception of an ATDS would sweep in virtually all modern smartphones, not even the Ninth Circuit claimed that Congress envisioned that result in 1991. Rather, as the government acknowledges, Congress was principally motivated in protecting residential privacy from random intrusion by telemarketers. U.S.Br. at 4. Congress was also concerned about the public safety dangers uniquely associated with random and sequential dialing that had the capacity to tie up emergency numbers and all the telephones in a building or area. *See supra* p.4. As respondents emphasize, those justifications are less compelling and less tailored when it comes to the dialing of

cellphones, rather than the landline telephones Congress focused on in 1991.

But those narrow tailoring problems pale in comparison to the gap between Congress' interests and the scope of the statute if every smartphone is itself an ATDS. No one could seriously argue that receiving a misdirected smartphone text poses any material concern to the privacy and public safety concerns that motivated Congress to target specialized technology employed by telemarketers in 1991. Simply put, if the Ninth Circuit is correct about the scope of an ATDS, the government's efforts to justify a content-based prohibition as adequately tailored are non-starters.

Second, the Ninth Circuit's construction of the statute creates an obvious overbreadth problem. As the Seventh Circuit explained in *Gadelhak*: Because virtually every smartphone has the capacity to store telephone numbers and call or text them automatically "right out of the box," the Ninth Circuit's interpretation creates potential "liability for every text message sent from an iPhone." 950 F.3d at 467. This plainly expands the TCPA too broadly to be justified by any conceivable rationale, wholly apart from any concerns about the prohibition's exceptions for certain speakers and content. Even an entirely neutral prohibition on unsolicited texts and calls from smartphones would be obviously incompatible with the First Amendment.

3. The constitutional and remedial questions before this Court are undoubtedly important. Depending on how the Court resolves them, it should not be the Court's last word on the TCPA's prohibition

on ATDS calls. There is an entrenched circuit split that has cemented the Ninth Circuit's status as a true outlier on the proper interpretation of an ATDS. There can thus be little doubt that the Court will need to address and redress the problems created by the Ninth Circuit's outlier ATDS interpretation. The Court could obviate the need to address the statutory question separately if it holds here that the TCPA's speech-restricting prohibition on ATDS calls is invalid and thus the prohibition must be struck down as unconstitutional. In particular, the Court should confirm that the prohibition was impermissibly content-based both before and after the addition of the government-debt-collection exception in 2015, as that exception simply confirmed and exacerbated the speaker-based and content-based distinctions that have always permeated the prohibition. Such a holding should make crystal clear the prohibition was always unconstitutional and cannot be made a basis for imposing any liability, no matter what the scope of an ATDS, even for calls made before 2015. This would provide meaningful relief to companies, like Facebook, that collectively face hundreds of millions of dollars in liability in the Ninth Circuit for calls made *before* the government-debt-collection exception was added to the statute.

If the Court does not invalidate the ATDS prohibition in this broad manner, but instead accepts either of the government's arguments (on constitutionality or "severability"), or otherwise limits its relief to the government-debt-collection exception, the Court should grant Facebook's pending *Duguid* petition to resolve the circuit split on the scope of the ATDS definition. The circuit split has only deepened

since the cert-stage briefing was completed in *Duguid*. The Court now has the benefit of two more decisions that have squarely confronted—and rejected—the Ninth Circuit's reasoning. The issue is fully joined and enormously consequential. If the Court rules in favor of the Government or otherwise limits relief to the government-debt-collection exception, hundreds of millions of dollars in damages will continue to turn on the scope of the prohibition on ATDS calls. There is no reason that litigation stopped in its tracks in the Third, Seventh, and Eleventh Circuits should continue in the Ninth.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Fourth Circuit and provide meaningful relief by striking down the TCPA's prohibition on ATDS calls as an unconstitutional, content-based restriction of speech. Unless the Court follows that course and makes clear that the prohibition's invalidity predates the addition of the government-debt-collection exception, this Court should also grant review in *Duguid* and resolve the statutory ATDS issue that has divided the circuits.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
DEVIN S. ANDERSON
KASDIN M. MITCHELL
LAUREN N. BEEBE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Amicus Curiae Facebook, Inc.

April 1, 2020