

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM P. BARR, ATTORNEY GENERAL,)

ET AL.,)

Petitioners,)

v.) No. 19-631

AMERICAN ASSOCIATION OF POLITICAL)

CONSULTANTS, INC., ET AL.,)

Respondents.)

Pages: 1 through 75

Place: Washington, D.C.

Date: May 6, 2020

HERITAGE REPORTING CORPORATION

Official Reporters

1220 L Street, N.W., Suite 206

Washington, D.C. 20005

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8 CONSULTANTS, INC., ET AL.,)
9 Respondents.)
10 - - - - -
11
12 Washington, D.C.
13 Wednesday, May 6, 2020
14
15 The above-entitled matter came on for oral
16 argument before the Supreme Court of the United
17 States at 11:42 a.m.
18
19 APPEARANCES:
20 MALCOLM L. STEWART, Deputy Solicitor General,
21 Department of Justice, Washington, D.C.;
22 on behalf of the Petitioners.
23 ROMAN MARTINEZ, Esquire, Washington, D.C.;
24 on behalf of the Respondents.
25

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	MALCOLM L. STEWART, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	ROMAN MARTINEZ, ESQ.	
7	On behalf of the Respondents	36
8	REBUTTAL ARGUMENT OF:	
9	MALCOLM L. STEWART, ESQ.	
10	On behalf of the Petitioners	72
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
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P R O C E E D I N G S

(11:42 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 19-631, William Barr, Attorney General versus the American Association of Political Consultants.

Before we get started, I would like to remind everyone to turn their cell phones off.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE PETITIONERS

MR. STEWART: Thank you, Mr. Chief Justice, and may it please the Court:

In 1991, Congress enacted the TCPA's basic restriction on the placement of automated calls to cell phones. In the years that followed, lower courts consistently upheld the constitutionality of that provision as a content-neutral restriction on the use of calling technologies that consumers found particularly intrusive and annoying.

Congress's enactment of the government-debt exception in 2015 did not introduce any constitutional infirmity into the statutory scheme. That exception is limited to

1 a narrow category of calls that intrude less
2 severely on consumer privacy than does the
3 typical automated call and that serve an
4 important countervailing interest in protecting
5 the federal fisc.

6 There's been a good deal of back and
7 forth in the briefs about whether Respondents'
8 challenge is properly viewed as one to the
9 exception or to the general automated-call
10 restriction. And I think, in circumstances like
11 this, there's not a right way and a wrong way,
12 not a right or wrong challenge to bring.
13 There's simply two conceptually distinct
14 analytical -- analytical ways of challenging a
15 law that includes a basic restriction subject to
16 exceptions.

17 Here, we think that both challenges
18 could have been brought but that both would
19 fail. But I'd like to focus first on the
20 challenge that Respondent is asserting in its
21 brief. These are the -- this is the challenge
22 that Respondents are asking the Court to focus
23 on.

24 And that is the challenge to the
25 underlying automated-call restriction. And

1 Respondents' basic theory is that the
2 government-debt exception, taken in combination
3 with other aspects of the statutory scheme,
4 prevents the automated-call restriction from
5 performing its intended consumer protection
6 function, renders it insufficiently efficacious
7 to be upheld under the First Amendment.

8 And we think that's wrong. If you
9 look at the statute, the only other statutory
10 exceptions to the automated-call restriction are
11 those for emergency calls and calls with -- made
12 with the prior express consent of the recipient.

13 And Respondents have not contended
14 that either of those is -- raises a First
15 Amendment problem or casts doubt on the efficacy
16 of the underlying restriction.

17 CHIEF JUSTICE ROBERTS: Mr. Stewart,
18 your --

19 MR. STEWART: So that --

20 CHIEF JUSTICE ROBERTS: -- your -- one
21 of your basic points to avoid strict scrutiny
22 under the First Amendment is that you're not
23 really looking at the content of the
24 communication in this case, but, rather, it's
25 more properly viewed as part of an economic

1 relationship.

2 I don't see how that gets you out of
3 the content category. You still have to look
4 carefully at what's being said before you can
5 decide whether the phone call is covered by the
6 provision or not. I think that's the clear
7 holding of our decision in the Reed case.

8 MR. STEWART: Well, I think that as --
9 let me -- let me address Reed first and
10 foremost. At the outset of the Court's analysis
11 in Reed, after the statement of the case, the
12 Court described content-based laws as "those
13 that target speech based on its communicative
14 content."

15 And if we're focusing now on the
16 automated-call restriction, the provision of the
17 statute that Respondents say is the focus of
18 their constitutional challenge, it's impossible
19 to say that that restriction targets
20 Respondents' calls based on their communicative
21 content.

22 The -- the situation was very
23 different in Reed. In Reed, the town had 23
24 different categories of signs in its sign code,
25 a multitude of different treatments of the

1 different categories. One of them was temporary
2 directional signs, and that was the category of
3 signs that the plaintiffs in the case wanted to
4 put up. And you could tell exclusively from the
5 content of the sign what -- which category it
6 fell into and -- and what restrictions applied.
7 And in that circumstance, it was natural for the
8 plaintiffs to argue and the Court to hold that
9 they had been targeted based on the
10 communicative -- communicative content of their
11 signs.

12 Here, Respondents haven't been
13 targeted in any -- in any meaningful sense.
14 Their political communications are subject to
15 the same restrictions that apply to the vast,
16 vast majority of automated calls.

17 CHIEF JUSTICE ROBERTS: Counsel, I'd
18 like --

19 MR. STEWART: The fact that they're
20 here --

21 CHIEF JUSTICE ROBERTS: -- I'd like to
22 jump ahead a little bit and get to the severance
23 question. You say that if this exception for
24 government debt is found to be problematic, you
25 should just sever that and keep the rest of the

1 statute.

2 But, when we sever provisions, it's
3 because they are illegal. Here, there's nothing
4 illegal about the government-debt exception. It
5 just, when combined with the rest of the
6 statute, makes the whole statute vulnerable.

7 I wonder why in that situation the
8 whole statute shouldn't fall?

9 MR. STEWART: I guess the two things I
10 would say are, first, it's important to look at
11 the temporal sequence that produced the current
12 state of affairs; that is, the basic restriction
13 was enacted in 1991 and the government-debt
14 exception was enacted in a separate public law
15 in 2015. And --

16 CHIEF JUSTICE ROBERTS: Okay. I've
17 got -- I've got that. What's your second point?

18 MR. STEWART: The second point is that
19 the ultimate question of severability is one of
20 congressional intent, what result would Congress
21 have preferred. And for purposes of determining
22 what Congress would likely have preferred, it
23 seems really like the tail wagging the dog to
24 say that we will treat Congress's desire to free
25 collectors of government-backed debts from these

1 restrictions, whether -- as taking preeminence
2 over Congress's desire to protect all consumers
3 from all other automated calls.

4 We think Congress --

5 CHIEF JUSTICE ROBERTS: Thank you --

6 MR. STEWART: -- would clearly have --

7 CHIEF JUSTICE ROBERTS: -- thank you,
8 counsel.

9 Justice Thomas?

10 JUSTICE THOMAS: Thank you, Chief
11 Justice.

12 Mr. Stewart, it would seem a bit odd,
13 as you suggest, that we sever the exception,
14 but, here, it doesn't seem -- this remedy
15 doesn't seem to give anything to Respondent. It
16 doesn't add any more speech for that for the
17 Respondent. And it seems to be taking speech
18 actually away from someone who's not in this
19 case.

20 MR. STEWART: I mean, that -- that may
21 be true, but the Court's task in determining the
22 appropriate remedy is to kind of follow
23 established principles of severability, to look
24 to indicia of Congress's likely intent.

25 And if the result is that the

1 plaintiff at the end of the day doesn't get the
2 practical result that it was looking for, that's
3 not a reason to kind of re-jigger the
4 constitution -- the severability analysis. I
5 mean, it -- it often is the case that a
6 plaintiff can achieve a practical victory only
7 on -- by prevailing on both of two legal
8 questions.

9 And sometimes it is a question both of
10 the merits of the claim and of the appropriate
11 remedy. And if a court holds that, yes, you
12 were right, you've established the existence of
13 a violation, but the statute read properly
14 simply doesn't authorize the remedy you seek,
15 that that's one of the chances that the
16 plaintiff takes when it pursues a claim that
17 depends on prevailing on two separate legal
18 propositions.

19 The plaintiff persuaded the court as
20 to one legal proposition, didn't persuade the
21 court as to a second proposition that was really
22 essential to getting the practical result it
23 wanted -- that's not an unusual situation in the
24 law.

25 JUSTICE THOMAS: Well, I'd like to

1 shift gears and -- and focus, just ask the
2 question about your strict scrutiny analysis.

3 You seem to focus on the interest that
4 the individual has in privacy of the cell phone.
5 But it would seem to me that that privacy
6 interest is actually not nearly as great as you
7 would -- as a person would have in the landline
8 phone at home or in even someone knocking on
9 their front door.

10 MR. STEWART: Well, I think it --
11 it -- at the time that the statute was enacted,
12 cell phones were obviously a lot less prevalent.
13 They may have been used on -- on rare occasions,
14 and -- and most people didn't own them.

15 I think now cell phones are, as we
16 explained in the reply brief, are ubiquitous.
17 They are an integral part of daily life for most
18 individuals. And so, really, the privacy
19 interest is -- is greater than in the
20 residential landline.

21 Yes, if the phone rings at your home
22 and you happen to be there, it may be an
23 intrusion. But most people or virtually all
24 people when they are at home will have their
25 cell phones with them. So unwanted calls to

1 cell phones will still pose the same threat to
2 residential privacy that unwanted calls to
3 landlines would.

4 But, in addition, people for the most
5 part carry their cell phones with them at all
6 times. And so the effect of automated calls to
7 cell phones is not just potentially to disturb
8 residential privacy, it's potentially to disturb
9 them when they're at work, when they're on
10 social occasions, when for whatever reason they
11 might want to be open to calls from friends or
12 calls from family members but won't -- don't
13 want to be distracted by --

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Ginsburg?

17 JUSTICE GINSBURG: Counsel, I don't
18 see how you can escape a content-based
19 distinction. If the content is a debt owed to
20 the government, that's the content of the
21 message, you owe the government for a student
22 loan or whatever, then the call is okay.

23 But, if the message is, please
24 contribute to our political organization, it's
25 banned. So it's based on what the message is.

1 Pay the government what you owe the government,
2 or contribute to our political organization.

3 MR. STEWART: I think, as -- as we've
4 said in our briefs, it -- it is true that often
5 a court in determining whether the
6 government-debt exception applied would look in
7 part to the content of the call.

8 But you wouldn't be looking
9 exclusively to the content of the call. For
10 instance, determination whether the particular
11 debt that was sought to be collected was, in
12 fact, owed to or guaranteed by the federal
13 government would have nothing to do with the
14 call's content. It would depend on the
15 financial relationship between the debtor and
16 the federal government.

17 And it is characteristic in the legal
18 culture that Congress would enact statutes that
19 regulate communications made in particular
20 fields of economic activity. And so you have
21 laws that regulate what can be said or what
22 disclosures have to be made in connection with
23 the sale of securities.

24 And they're subject to First Amendment
25 challenge. Plaintiffs can argue that particular

1 restrictions go too far. But nobody thinks of
2 laws like that as being especially suspect
3 because they are limited to the field of
4 securities, even though, to determine whether a
5 particular communication was covered, a court
6 would need to look in part at the content of the
7 communication.

8 JUSTICE GINSBURG: Switching to the
9 severance, we're told that if we strike only the
10 government-debt exemption, that will leave the
11 political groups with no incentive at all to
12 assert their First Amendment claim. They're
13 going to lose at the end of the day.

14 So why should they bother challenging
15 -- why -- why should they bother with a First
16 Amendment claim when it will be unsuccessful at
17 the severance stage?

18 MR. STEWART: Well, a couple of
19 responses to that. The first is, as -- as I was
20 indicating earlier, that the plaintiffs here did
21 argue and they were entitled to argue that the
22 appropriate remedy, if there was a
23 constitutional violation, was to strike down the
24 whole restriction.

25 But they didn't persuade the court of

1 appeals on that question. And if the
2 application of ordinary severance principles
3 would confirm that result, then the Court's duty
4 is to follow those principles even though it
5 leaves this plaintiff without a remedy.

6 The other thing, as we discussed --

7 CHIEF JUSTICE ROBERTS: Counsel.

8 Justice -- Justice Breyer?

9 JUSTICE BREYER: Well, what your last
10 statement, and Justice Ginsburg leads me to ask
11 a somewhat philosophical question, which you
12 need not answer if you don't want to, but my
13 question is, what is content discrimination?

14 All human life is carried on through
15 speech. All government regulation is carried on
16 through speech. Every single statutes book is
17 filled with all kinds of content discrimination.

18 The SEC and every agency deals with
19 nothing but what do their rules apply to, where
20 are the exceptions, et cetera. And so I'd
21 always thought that that was in Justice
22 Brandeis's third category, economic regulation,
23 as far as the First Amendment is concerned, or
24 at least most of it was.

25 So how in your view do you distinguish

1 between what is in that third category, look to
2 see if it's reasonable, what is in the first
3 category, never uphold it almost no matter what?
4 How -- how? What's your way of doing it?

5 MR. STEWART: I don't think we have
6 any succinct test that would capture all cases,
7 but I would point the Court or remind the Court
8 of certain guideposts that it set up.

9 One is, if you can tell exclusively
10 from the content of a message whether a
11 particular law applies, then that's very likely
12 or almost certain to be content-based.

13 The second is, as I was referring to
14 earlier, the Court in Reed referred to
15 content-based laws as those that target space --
16 speech based on its communicative content. And,
17 here, even if you thought that the
18 government-debt exception was content-based, it
19 wouldn't follow that the automated-call
20 restriction is content-based.

21 The automated-call restriction doesn't
22 target speech because of its content, it treats
23 the vast majority of speech the same, and it
24 simply exempts from regulation a very small
25 category of speech.

1 And then the third thing I would say
2 is, whatever the right answer is, it can't be
3 that whenever speech -- the mere fact that a
4 particular law is limited to speech that is used
5 in a particular economic activity, that
6 limitation cannot by itself be sufficient to
7 render the law content-based or at least to
8 subject it to strict -- strict scrutiny because
9 that would -- that principle would cast doubt on
10 a vast array of laws that Congress and state
11 legislatures have enacted to regulate discrete
12 spheres of economic activity.

13 JUSTICE BREYER: Thank you. Thank you
14 very much.

15 CHIEF JUSTICE ROBERTS: Justice Alito?

16 JUSTICE ALITO: Mr. Stewart, the
17 so-called severability issue in this case is
18 really fascinating. I understand you don't
19 think we need to get to that, but assuming for
20 the sake of argument that we do get to that
21 question, what is your best precedent for the
22 application of a severability analysis in a case
23 like this, where, arguably, a regulation of
24 speech is unconstitutional only because it
25 contains a content-based or a viewpoint-based

1 exception?

2 MR. STEWART: I don't think either
3 side has a precedent that was specifically in
4 the First Amendment area, where the Court
5 discussed whether severability principles should
6 apply and, if so, how do they apply.

7 I think our best precedents are cases
8 like Morales-Santana and Ross. Yes, those were
9 equal protection cases, but they said, in
10 deciding whether an exception should be severed
11 or the underlying rule should be struck down, we
12 look at things like the temporal sequence in
13 which the laws were enacted, whether the
14 exception was enacted later in the day, the
15 degree of Congress's commitment to the basic
16 rule, and I think those are good analogies here.

17 Where the gravamen of the First
18 Amendment claim is that this person's speech is
19 being treated differently from another person's
20 speech --

21 JUSTICE ALITO: Well, what's your --

22 MR. STEWART: -- obviously, the --

23 JUSTICE ALITO: -- what is your
24 response to this counterargument? In an equal
25 protection case, what the complaining party is

1 objecting to is unequal treatment. So, whether
2 the -- the remedy levels up or levels down, the
3 complaining party gets what it wants, namely,
4 equal treatment, whereas, in a free speech case,
5 what the complaining party is objecting to is a
6 restriction on its speech.

7 And if we apply the severability
8 analysis in that situation, the complaining
9 party does not get what it wants, which is the
10 ability to speak without restriction.

11 MR. STEWART: I think, with respect,
12 that -- that conflates what the complaining
13 party wants with what is it -- with what it is
14 entitled to. And, for instance, in
15 Morales-Santana, there's no question that what
16 the complaining party wanted was citizenship.

17 It wanted to be able to invoke on be
18 -- the plaintiff wanted to be able to invoke on
19 behalf of his father the constitutional right to
20 equal treatment for unwed fathers and unwed
21 mothers. And, yes, the gravamen of his claim
22 is, I have a legal entitlement to equal
23 treatment.

24 But what, as a practical matter, the
25 plaintiff wanted was citizenship, and he didn't

1 get it as a result of the Court's severability
2 holding. The Court said, we apply established
3 principles of severability in order to determine
4 what we think Congress would have intended, and
5 the consequence is that even though you have
6 established a right -- a violation of the right
7 to equal treatment, you are not entitled to the
8 practical result that you are seeking.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Sotomayor?

12 JUSTICE SOTOMAYOR: Counsel, the --
13 the difficulty in my mind with this case has
14 been just touched upon by Justice Alito.

15 Assume that I do think -- or assume
16 not that I think -- but assume that this law is
17 content-based. I don't see in the record any
18 evidence by you of how small this exception is.

19 The other side says that most of the
20 complaints to the FTC are because of debt
21 collection. But there are no statistics about
22 how big or small debt collection is with respect
23 to robo- -- robot -- robo-calls generally or
24 with respect to consumer collection.

25 And even if you could show me that

1 they were a small part of the intrusions on
2 people, they certainly are a big emotional
3 complaint because they generate the most ire by
4 citizens. But putting that aside, you haven't
5 shown me why government-backed debt calls are
6 any different than commercial calls, private
7 commercial calls for debt.

8 In both situations, the debtor would
9 expect a call about debts they owe. That's an
10 interest that the government's claimed, but, you
11 know, so what? Both debtors. So there is a
12 discrimination aspect to this case that does
13 raise the equal protection ground.

14 But putting all of that aside, given
15 that the burden is on you under strict scrutiny
16 to show that you've narrowly tailored a law, if
17 this is content-based, and with all the failings
18 I've pointed to, how do you win on validating
19 this Act?

20 MR. STEWART: Let me say two or three
21 things about this. First, I think it would be
22 impossible to make an empirical showing about
23 kind of the smallness of the exemption relative
24 to the whole, because what you would want to
25 compare the government debt calls to is not to

1 other calls that are actually being made in the
2 world, because a lot of the calls that would
3 otherwise be made are not being made precisely
4 because they're barred by the TCPA.

5 What you would want to be asking is,
6 how small is this comparison in comparison --
7 how small is this class in comparison to all of
8 the other automated calls that might be made if
9 the TCPA were not in force?

10 Second, with respect to potential
11 discrimination between collectors of
12 government-backed debts and collectors of other
13 debts, the distinction that we've pointed to is
14 that the collection of government-backed debts
15 implicates the distinct federal interest in
16 protecting the federal fisc, and it's not
17 unusual for Congress to prefer federal debt
18 collection efforts.

19 For example, if Congress says the
20 federal government can collect debts owed to it
21 by offset on a tax return -- a tax refund or
22 Social Security benefits, the private predators
23 can't do that, or if the federal government has
24 greater capacity to garnish wages, that there's
25 nothing problematic about that, that the last

1 thing we would say is collectors of private
2 debts could petition the FCC for an exception.
3 They could say, there's no good reason to treat
4 us differently and, therefore, you, the FCC,
5 should exercise your statutory authority to
6 create an exception for all debt collection
7 calls as to which the recipient is not charged.

8 And then the FCC would either grant or
9 deny that. If it was denied, there could be
10 judicial review. So there could be a more
11 targeted challenge that was premised on the
12 differentiation between government-backed debts
13 and others, but that's very different from --

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Kagan?

17 JUSTICE KAGAN: Good afternoon,
18 Mr. Stewart. Could we go back to the -- what
19 you started with? You said that there was no
20 right way to think about how to analyze this
21 question, that we could either apply
22 constitutional analysis to the automated-call
23 restriction or we could apply it to the
24 exemption for government debt.

25 I'm wondering whether you could say a

1 little bit more about that, because we have to
2 pick some way, and on the one hand, the
3 restriction is the only thing -- the
4 automated-call restriction is the only thing
5 prohibiting speech, but on the other hand, the
6 exemption is the only thing that creates the
7 constitutional issue in this case.

8 So which end of the statute should we
9 look at?

10 MR. STEWART: Well, let me preface my
11 answer by -- by pointing to a hypothetical
12 that's noted in the Respondents' brief that we
13 think is a good illustration of when it would be
14 appropriate to focus on an exception.

15 At page 22, Respondents hypothesize a
16 statute that has a categorical ban on all
17 automated calls except for automated calls to a
18 residential landline that endorse the
19 re-election of Donald Trump and that are
20 approved by the Trump campaign.

21 Now we think an exception like that
22 for calls made to endorse a single political
23 candidate would surely violate the First
24 Amendment. It would be not only content-based
25 but viewpoint-based, and there would be no good

1 justification for it in terms of the basic
2 rationale for the restriction.

3 And even if the Court concluded that
4 this was a very small percentage of calls, the
5 exception didn't cast doubt on the credibility
6 of Congress's overall privacy protection
7 objectives, even if it didn't sufficiently --
8 significantly interfere with the achievement of
9 those objectives, the Court would surely say
10 that the -- the exception was invalid.

11 JUSTICE KAGAN: So is this statute --

12 MR. STEWART: And in that circumstance
13 --

14 JUSTICE KAGAN: -- is this statute
15 like that statute?

16 MR. STEWART: I don't think it's like
17 that statute. I mean, the -- the last thing I'd
18 want --

19 JUSTICE KAGAN: I mean, it's obviously
20 not in the sense that it's not -- the -- the --
21 the exemption is not viewpoint-based to the
22 extent that that statute is. But, you know,
23 some -- you've heard some arguments that the
24 exemption is content-based, so why not treat it
25 the same way?

1 MR. STEWART: I mean, I think, at the
2 very -- at the very most, you would treat the
3 exemption in the same way that you would treat
4 it if a restriction were imposed based on the
5 same criteria. And if there were certain
6 restrictions placed on -- on the collection of
7 government-backed debt and only on the
8 collection of government-backed debt, you
9 wouldn't apply strict scrutiny to such a law for
10 the same reasons I've discussed with respect to
11 the -- the securities laws, other hypothetical
12 laws that could restrict communications in a
13 particular area of commerce.

14 Now Respondents have understandably
15 focused their attention on the automated-call
16 restriction, in -- in part because of the
17 severability question. If they could persuade
18 the -- the Court that the exception was the
19 invalid provision and it was struck down, they
20 wouldn't really get what they want.

21 But they have to establish distinct
22 prerequisites to show that they have a valid
23 constitutional challenge to the automated-call
24 restriction. One might be if the exception
25 taken in combination were -- with other features

1 of the statute just made it seem as though
2 Congress wasn't serious about protecting
3 privacy. But the exception really can't --

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Gorsuch?

7 JUSTICE GORSUCH: Good morning,
8 counsel. Some of my colleagues have already
9 noted the irony of a First Amendment challenge
10 leading to the suppression of more speech as a
11 remedy. I -- I guess I wanted to explore that
12 just a little bit further.

13 As I understand it, you -- you've
14 taken a position that there's no right way to do
15 severance here, but should we -- should we take
16 cognizance of the fact that striking down the
17 government-debt provision was not relief that
18 the plaintiffs sought in this case? And we
19 normally take some cognizance of the adversarial
20 process and the plaintiff's request for relief.
21 We -- we've chided plaintiffs earlier in this
22 term for not -- not including all the relief
23 they might have wanted -- wanted in -- in their
24 complaint.

25 And what do we do about the fact as

1 well that the plaintiffs would seemingly have no
2 standing to challenge an exception for
3 government debt collection activities? So they
4 didn't seek the relief and they don't have
5 standing for this relief. Should -- should
6 those things tell us anything?

7 MR. STEWART: I mean, I think that you
8 could do it that way and the court of appeals
9 could have done it that way. That is, the
10 principal argument that the Respondents have
11 made all along is that the government-debt
12 exception, combined with other features of the
13 statutory and regulatory scheme, really call
14 into question Congress's commitment to the
15 protection of privacy or prevent a statute from
16 achieving that objective.

17 And the court of appeals clearly
18 didn't think that that was right. And the court
19 of appeals could -- could just have said:
20 That's the only claim you made, I reject it, and
21 whether or not you could have pursued a valid
22 challenge to the exception itself, you haven't
23 sought to pursue one, and, therefore, I'm not
24 going to -- to consider it.

25 I think our -- given that the court of

1 appeals ruled as it did, we have tried to -- to
2 confront that argument on the merits.

3 With respect to the standing question,
4 what the Respondents have always sought as
5 relief invalidated of -- invalidation of the
6 automated-call restriction. And they clearly
7 have standing to seek that.

8 And if the Court holds that, yes,
9 they're right to their First Amendment
10 violation, but they are wrong about the remedy,
11 that would not be a problem of standing. That
12 would just be a problem on the -- the merits of
13 their claim or at least the merits of their
14 claim with respect to the appropriate remedy.

15 JUSTICE GORSUCH: Let me come at it
16 from yet another angle, and that's the
17 separation of powers.

18 The government's remedy proposed here
19 is essentially that we should suppose or -- or
20 reimagine that Congress would have preferred a
21 regime in which more speech is suppressed than
22 one in which less is suppressed.

23 On -- on what authority do we have the
24 right to make that kind of judgment as opposed
25 to simply enforcing the First Amendment, finding

1 a violation, and -- and -- and liberating the
2 speech that's -- that's been wrongly suppressed?

3 MR. STEWART: Let me say two or three
4 different things about that. The first are,
5 either invalidation of the exception or
6 invalidation of the restriction would produce a
7 constitutional version of the TCPA. So, from
8 the standpoint of compliance with the First
9 Amendment, neither is to be preferred.

10 The second thing is, courts face that
11 same question when you're doing severability
12 analysis in the equal protection context, where
13 the result of severance may be that particular
14 --

15 JUSTICE GORSUCH: If I might --

16 MR. STEWART: -- individuals might --

17 JUSTICE GORSUCH: -- stop you -- if I
18 might stop you there, I'm sorry, but I -- I --
19 the equal protection analogy, suppose that
20 doesn't work for me because equal protection
21 is -- is a guarantee of equality, not of a -- of
22 a substance, so you can level up or level down
23 and satisfy equal protection.

24 But the First Amendment is about a
25 guarantee of speech, so it has content in a

1 different way. So suppose that argument.

2 MR. STEWART: Let me say that --

3 JUSTICE GORSUCH: Then what do you
4 have?

5 MR. STEWART: -- let me say I think
6 what we have is the temporal sequence here where
7 we had one public law in 1991 that enacted the
8 basic autodial restriction and then a second
9 public law that was enacted in 2015. And if
10 you -- if there is a constitutional infirmity,
11 if you ask which public law introduced that
12 constitutional infirmity, it would have to be
13 the 2015 public law.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel. Thank you, counsel.

16 Justice Kavanaugh?

17 JUSTICE KAVANAUGH: Thank you, Mr.
18 Chief Justice.

19 Good afternoon, Mr. Stewart. I think
20 the government-debt exception is almost
21 certainly content-based, at least for me. And I
22 just wanted as a matter of housekeeping, you
23 don't argue that it could satisfy strict
24 scrutiny, correct?

25 MR. STEWART: That's correct. We've

1 argued that the automated-call restriction could
2 satisfy --

3 JUSTICE KAVANAUGH: Yes.

4 MR. STEWART: -- strict scrutiny but
5 not the content-based exception.

6 JUSTICE KAVANAUGH: Okay. So those
7 two things together make this for me at least a
8 case about severability and leveling up or
9 leveling down. And you were just on this with
10 Justice Gorsuch, but it would help me if you
11 could kind of tick through your strong points
12 about severability again.

13 MR. STEWART: I think the -- the two
14 strongest points -- and I'll link the second to
15 Communications Act severability clause. The --
16 the two strongest points are we think there
17 would be a tail-wagging-the-dog quality to
18 striking down the whole restriction, one that
19 has been in place for nearly 30 years, that has
20 been popular with consumers, that has protected
21 a vast array of people, simply to preserve the
22 ability of government debt collectors to use one
23 more means of communication.

24 The second is the temporal sequence.
25 If we ask which law was it that introduced any

1 constitutional invalidity, it would have to be
2 the 2015 law, not the 1991 law. And so it would
3 be natural if you were otherwise in equipoise to
4 say that's the law that would be struck down.
5 And -- and then there --

6 JUSTICE KAVANAUGH: So a key --

7 MR. STEWART: -- there is a
8 severability --

9 JUSTICE KAVANAUGH: Go ahead.

10 MR. STEWART: I was going to say,
11 there is a severability clause that says if any
12 provision of the Communications Act, of which
13 the TCPA is -- is a part, is held to be invalid,
14 the remedy won't extend beyond striking down
15 that provision.

16 And for purposes of determining which
17 is the invalid provision, I'd refer back to my
18 point about temporal sequence. It is the 2015
19 law that introduced any constitutional
20 infirmity.

21 JUSTICE KAVANAUGH: So a key point I
22 think you just underscored there is that the
23 premise of your severability argument, a
24 essential premise, is that the underlying ban is
25 thoroughly constitutional.

1 MR. STEWART: Or at least that the
2 underlying ban was constitutional before 2015.

3 JUSTICE KAVANAUGH: Yeah, that's --
4 without the exception. I meant to say without
5 the exception, the underlying ban is perfectly
6 constitutional.

7 MR. STEWART: Yes.

8 JUSTICE KAVANAUGH: Okay. And how
9 much should we take into account on the what
10 would Congress have intended analyses like we
11 see in the states attorney general's brief about
12 consumer beliefs about the -- these calls, that
13 the common consumer complaint about robo-calls.
14 Does that go at all into our analysis --

15 MR. STEWART: I mean, I think --

16 JUSTICE KAVANAUGH: -- of what
17 Congress would have intended?

18 MR. STEWART: -- I -- I think
19 certainly this was not unnoticed legislation.
20 It's not legislation that fixed a technical
21 problem. I'm talking about the original TCPA
22 now, that this is legislation that was intended
23 to address a problem that Congress thought was
24 immense, that affected vast numbers of
25 consumers, and, obviously, the amicus briefs

1 describe complaints that are being made now
2 about robo-calls even with the TCPA's
3 restrictions in place. And so --

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel. Would you take a minute to wrap up,
6 Mr. Stewart?

7 MR. STEWART: Thank you. Thank you,
8 Mr. Chief Justice.

9 The -- the last thing I'd say is I'd
10 refer back to the point that I was making at the
11 beginning, where, given that Respondent is
12 asking the Court to focus on the restriction and
13 not the exception, it's appropriate to ask
14 whether the restriction is content-based, as the
15 Court in Reed understood that term.

16 And the Court in Reed described
17 content-based laws as laws that target speech
18 based on its communicative content.
19 Respondents' speech was not targeted based on
20 its content. It was treated the same way as the
21 vast majority of messages that people could use
22 automated calls to transmit.

23 Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Martinez.

2 ORAL ARGUMENT OF ROMAN MARTINEZ

3 ON BEHALF OF THE RESPONDENTS

4 MR. MARTINEZ: Mr. Chief Justice, and
5 may it please the Court:

6 My clients are political organizations
7 that want to engage in political speech at the
8 core of the First Amendment. The TCPA bars them
9 from using some of the most effective tools for
10 communication now available: automated text
11 messages and calls to cell phones.

12 At the same time, the statute's
13 exceptions let government-approved speakers use
14 these same technologies to deliver
15 government-approved messages that subvert the
16 same privacy interests supposedly requiring a
17 ban on all other calls.

18 This content-based scheme arbitrarily
19 favors commercial speech over core political
20 speech. It violates the First Amendment and
21 should be struck down.

22 The call ban is extremely broad.
23 Although the TCPA's primary purpose was to
24 address telemarketing calls, the cell phone ban
25 sweeps further and outlaws political and other

1 non-commercial calls, even when citizens are
2 open to receiving them.

3 The government says Congress needed a
4 restriction that broad in order to protect
5 privacy. The statute's history disproves that.
6 Congress and the FCC exempted non-commercial
7 calls from the residential call ban after
8 concluding that they do not adversely affect the
9 privacy rights protected by the TCPA.

10 There's no good privacy-based reason
11 for treating these exact same calls differently
12 when made to cell phones. The government-debt
13 exception confirms that Congress did not view
14 the privacy interests here as compelling.

15 That exception exposes 60 million
16 Americans to unlimited calls to collect more
17 than 4.2 trillion dollars in debt. Those are
18 the kinds of calls consumers hate the most.

19 If Congress really thought privacy was
20 paramount, it would not have allowed those
21 calls. Because the speech ban is too broad and
22 unjustified, the restriction, not the exception,
23 must be struck down. That's what the Court has
24 always done in First Amendment cases and rightly
25 so.

1 Federal courts cannot fix First
2 Amendment violations by making more speech
3 illegal. This Court should reject the remedial
4 approach that eliminates incentives to challenge
5 unconstitutional speech bans and gives my
6 clients no relief, even though they won their
7 First Amendment claim.

8 CHIEF JUSTICE ROBERTS: Mr. Martinez,
9 I'd like you to focus on the argument based on
10 our decision in Williams-Yulee, which is that
11 when Congress takes steps that help cure a
12 constitutional problem, they don't have to do
13 everything at once.

14 You object to the fact that some
15 speech is allowed, but the -- the allowance
16 doesn't reach more broadly. And what we said in
17 Williams-Yulee, again, is so long as Congress is
18 moving in -- in what the Court regarded as the
19 right direction, they don't have to do
20 everything at the same time.

21 So the fact that you say we should
22 allow more speech here, here, and here, again,
23 it doesn't mean that it has to be done at the
24 same time as the first step was taken as it was
25 here.

1 MR. MARTINEZ: Right, Your Honor. And
2 I think what -- what the Williams-Yulee inquiry
3 is really getting at is whether the exception
4 undermines the credibility of the government's
5 interests that it's been asserting.

6 And I think in this case, the 2015
7 exception really does undermine that because
8 it's not getting at like -- it -- it's not
9 trying to exempt the least intrusive of privacy
10 speech available.

11 It -- it's actually exempting the kind
12 of speech that the FCC itself has acknowledged
13 is the most intrusive kind of speech, and those
14 are the -- the -- the debt calls. And so
15 Williams-Yulee, I think, is talking about a
16 situation in which the government or Congress is
17 trying -- or the legislature is trying to
18 accommodate kind of the -- the -- this -- the --
19 the -- the speech that -- that is least
20 problematic from the purpose -- from the
21 standpoint of the interest that's being
22 asserted. But, here, Congress has done the
23 opposite. It's exempted the speech that's most
24 problematic.

25 And I think that that really makes

1 this a different case from Williams-Yulee and
2 brings us squarely within the -- the concern
3 that Williams-Yulee had, which is that when
4 Congress enacts broad exemptions, like the one
5 here, it might actually be a sign, it might be
6 evidence of the fact that the -- the interest
7 that the government has asserted for speech
8 restriction really isn't that strong.

9 CHIEF JUSTICE ROBERTS: Your --

10 MR. MARTINEZ: And I think that was
11 debate --

12 CHIEF JUSTICE ROBERTS: -- your --
13 your friend on the other side on the severance
14 question makes a very strong point, that
15 Congress had this law for 25 years and then they
16 added this, you know, pretty discrete exception
17 that created the problem we have today.

18 It seems pretty obvious that the way
19 they would solve it is get rid of this
20 exception. It's an extremely popular law.
21 Nobody wants to get robo-calls on their cell
22 phone.

23 The idea that Congress would embrace
24 that result simply to save this government debt
25 collection, they'd have to be very anxious to be

1 more unpopular than they otherwise would be.

2 MR. MARTINEZ: Well -- well, two --
3 two points on that, Your Honor. First of all, I
4 think that the fundamental problem here is the
5 invalidity of the restriction. And I think that
6 the -- even before you get to any severability
7 inquiry about intent, we have to be very careful
8 and specific about what is unconstitutional
9 about the statute.

10 And I think what the 2015 exemption
11 shows, as well as the -- the much more favorable
12 treatment to political and non-commercial speech
13 when it comes to calls to home phones, what
14 those show is that the privacy interest here
15 really isn't compelling and that the -- the
16 restriction is what falls. So you don't even
17 need to look at severability.

18 CHIEF JUSTICE ROBERTS: Thank you --

19 MR. MARTINEZ: But even as to the
20 intent --

21 CHIEF JUSTICE ROBERTS: -- counsel.

22 Justice Thomas?

23 JUSTICE THOMAS: Thank you,
24 Mr. Martinez. The -- the problem that I have is
25 you -- you just said that the -- the issue, that

1 the real problem here is the restriction. But
2 the evidence -- the focus here is on the
3 exception, the restrict -- if you solve the
4 exception problem, it doesn't solve your
5 restriction problem, particularly if you sever
6 that.

7 And that's the -- sort of the
8 asymmetry that's coming out. The problem is one
9 thing, that is, that the restriction, but the
10 constitutional problem is really the exception.

11 But then the -- so why don't you --
12 I'd like you to explain why -- what you just
13 said, why the restriction is the constitutional
14 problem as opposed to the exception.

15 MR. MARTINEZ: Right. And let me
16 start with the -- with -- with the two things
17 that I think the exception does. Number one is
18 it in -- introduces a content-based distinction.

19 JUSTICE THOMAS: Yes.

20 MR. MARTINEZ: And it defines the
21 scope of the restriction and therefore triggers
22 strict scrutiny.

23 But, number two, and more importantly
24 for purposes of our constitutional theory, what
25 the exception does is it reveals the underlying

1 frailty, the underlying insufficiency of the
2 justification for the restriction.

3 And why does it do that? It does it
4 because you have Congress saying because we want
5 to get more money, we are willing to trade off
6 privacy for revenue. And so Congress is coming
7 in and making a judgment that money is more
8 important than privacy.

9 JUSTICE THOMAS: So what --

10 MR. MARTINEZ: And I think --

11 JUSTICE THOMAS: -- would your
12 argument be if the exception did not exist?

13 MR. MARTINEZ: If the exception did
14 not exist and we were looking at the law today,
15 I think -- I think our argument would be weaker,
16 but I think we would still be able to show that
17 the restriction would be unjustified.

18 And I think the --

19 JUSTICE THOMAS: But what would the --

20 MR. MARTINEZ: -- main thing we would
21 --

22 JUSTICE THOMAS: -- content-based -- I
23 mean, what would the analysis be?

24 MR. MARTINEZ: The -- the analysis, it
25 would -- the statute would no longer be

1 content-based, so we'd be applying intermediate
2 scrutiny, but I think in the context of applying
3 intermediate scrutiny, we would look at the fact
4 that calls to residential phones, where -- you
5 know, call -- calls to the home, where privacy
6 matters the most, these same types of political
7 and non-commercial calls that my client wants to
8 make are perfectly allowed.

9 And so Congress and the FCC have made
10 a judgment -- and this is clear if you look at
11 the -- the 1992 order from the FCC. Congress
12 and the FCC have made a judgment that
13 non-commercial and non-telemarketing calls do
14 not adversely affect the privacy rights that the
15 TCPA protects. And they made that clear by --
16 by essentially allowing those calls at -- you
17 know, at all times of day to home phones.

18 And so, if -- if you have that
19 indicator of congressional intent that they're
20 not really worried about political calls and
21 non-commercial calls and they're not worried
22 about that as an intrusion of privacy, then
23 there's no rational reason to treat cell phones
24 differently. And Congress certainly didn't make
25 that judgment.

1 Of course, in this case, we have not
2 only the differential treatment of residential
3 calls, but we also have the evidence provided by
4 the 2015 exception, which shows that they're
5 willing to trade off privacy for money, even
6 though everyone would agree that money is not --
7 collecting more money is not a compelling
8 interest. And so you have Congress --

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Ginsburg?

12 JUSTICE GINSBURG: Your challenge is
13 predicated on the government-debt exemption. I
14 thought that the statute as originally enacted
15 would -- the -- the statute as it was originally
16 enacted did have an exception for calls made by
17 the government itself or government agencies.
18 Isn't that true?

19 MR. MARTINEZ: It's true that the
20 definition of -- of person, or at least as
21 interpreted by the FCC, is that the -- the
22 statute does not apply to -- to the government
23 itself.

24 JUSTICE GINSBURG: And -- and no one
25 challenged that exemption for 20-odd years. One

1 characterization is that this is really a manner
2 of restriction. That is, it doesn't prohibit
3 calling, it doesn't prohibit conveying a
4 message; it just prohibits using a certain
5 automated technology to call. So it's a manner
6 of communication. It's not a -- a restriction
7 on the message.

8 MR. MARTINEZ: Well -- well, Your --
9 Your Honor, with respect, I do think it's --
10 it's fair to say that this is a restriction on a
11 certain manner of making calls, but the types of
12 calls that are either made legal or illegal --
13 you know, the dividing line between what's
14 allowed and what's not allowed turns on the
15 content of the calls.

16 I think that if -- if -- if you were
17 facing a statute that said, you know, for
18 example, you are not allowed to advocate for
19 Libertarians using email or using phone calls or
20 using handbills, all of those would be manner
21 restrictions, but I think that -- that we would
22 all recognize that those are content-based
23 restrictions that would trigger strict scrutiny
24 and -- and would inevitably fail.

25 JUSTICE GINSBURG: On your

1 severability, we know that what Congress wanted
2 to stop were out-of-the-blue calls, calls that
3 you had no reason to anticipate. And calls
4 about debts owed to the government can be
5 regarded as less invasive in that respect, that
6 they're not out of the blue; they are simply a
7 reminder of an obligation that the debtor
8 undertook.

9 MR. MARTINEZ: I -- Your Honor, I --
10 with respect, I don't think that that's the
11 original justification for -- for this
12 particular provision. And I -- and I would
13 point to two things.

14 First of all is the fact that the kind
15 of out-of-the-blue calls that my clients might
16 want to make, you know, political calls, those
17 are calls that were perfectly allowed and were
18 perfectly acceptable to the home when Congress
19 and the FCC acted in the early '90s.

20 And at that time, of course, home
21 phones were -- you know, over 90 percent of the
22 phones in America were home phones. That's
23 where the privacy interests were at their apex.

24 And nonetheless, Congress and the FCC
25 recognized that the kinds of calls my clients

1 want to make don't tread on privacy interests
2 enough to -- to -- to -- to warrant that kind of
3 -- of -- of restriction. And I think what that
4 just shows is that, again, the privacy interest
5 being asserted here isn't really strong enough,
6 even if you go look at what the FCC said about
7 this, and I would look at the 1992 NPRM,
8 especially at -- at pages -- at pages 8773 --
9 sorry, at page 2737, and then the 1992 order at
10 8773, because, there, the FCC said that
11 non-commercial, non-telemarketing calls can be
12 exempted without undermining the TCPA.

13 If that's true --

14 CHIEF JUSTICE ROBERTS: Thank you --

15 MR. MARTINEZ: -- then there's no
16 reason --

17 CHIEF JUSTICE ROBERTS: -- counsel.

18 Justice -- Justice Breyer? Justice
19 Breyer?

20 (No response.)

21 CHIEF JUSTICE ROBERTS: Justice Alito?

22 JUSTICE ALITO: Mr. Martinez, I'm
23 interested in your analysis of the severability
24 question, and I wonder if you could say whether
25 your position depends on either the breadth of

1 an exception or exceptions or the manifestation
2 of congressional intent.

3 So let me give you an example, a
4 fanciful example that tries to reduce both of
5 those things perhaps to their lowest limit.

6 Suppose there was a total ban on
7 automated calls to cell phones or to all phones,
8 but there was one tiny exception for, let's say,
9 calls between noon and 1 p.m. on the 4th of July
10 that contained this simple message: Happy
11 Birthday, America.

12 And let's say that the statute
13 allowing this contains a provision that says
14 that if the inclusion of this exception renders
15 the statute unconstitutional, the statute itself
16 shall remain in force and the exception shall be
17 stricken.

18 So would you say even in that
19 situation the whole statute would have to fall?

20 MR. MARTINEZ: Your Honor, let me --
21 let me try to address that in each of the two
22 pieces because I think it's a -- it's a nuanced
23 question and deserves a nuanced answer.

24 First of all, with respect to the
25 narrowness of that particular ban, I think that

1 the fact that that particular restriction or
2 exception is so narrow, I think that probably,
3 you know, looking at the totality of the
4 circumstances, we would look at that and we
5 would think the existence of this one tiny
6 exception and the fact that this really isn't
7 going to invade privacy that much, I think that
8 would probably be a reason to conclude that the
9 restriction is not unconstitutional. And if
10 that's true, then, of course, the severability
11 analysis wouldn't be necessary.

12 If you take your -- the other part of
13 your hypothetical, though, if -- if -- as I
14 understand it, if the statute had a provision in
15 it that essentially said if -- if the
16 restriction fails, you should nonetheless sever
17 the exception and reinstate the restriction, I
18 don't think that that would be appropriate
19 because I think that the reason that the
20 restriction would fail in that circumstance is
21 that it's insufficiently justified, and getting
22 rid of that exception doesn't solve that
23 problem.

24 The exception, you know, again,
25 assuming that the exception was big enough to

1 actually create a problem of constitutional
2 deficiency with the statute, the exception is
3 evidence of why the restriction is unjustified.

4 And so getting rid -- rid of that
5 doesn't solve the problem with the -- with the
6 restriction.

7 JUSTICE ALITO: That does seem to
8 thwart a pretty clear manifestation of
9 congressional intent, but you think that's
10 irrelevant in this situation?

11 MR. MARTINEZ: Well, I think in a
12 circumstance, Your Honor, I don't think this is
13 -- I don't think the government disagrees with
14 us on this. If you look at pages 17 to 18 of
15 their reply brief, they essentially agree that
16 if the problem with the statute is the
17 restriction, then -- then the restriction has to
18 fall.

19 Now I think there's another way to
20 look at the case, and -- and, you know, I think
21 my -- my friend on the other side has sort of
22 tried to frame it this way.

23 If you thought that the only problem
24 with the statute was not the justification for
25 the restriction but, rather, the fact that

1 there's differential treatment, we think that
2 you still as a First Amendment matter for a
3 number of the reasons already mentioned, that
4 you would still need to get rid of the
5 restriction.

6 But, even if you didn't agree with us
7 on that, I think there's -- our fallback
8 position would be the position the Third Circuit
9 took in the Rappa case, which is that you'd need
10 very specific evidence of congressional intent.
11 And I guess in that case, in your hypothetical,
12 if your hypothetical expressly addressed this
13 situation, then maybe in that case the -- the
14 exception would be severed.

15 But, again, that -- that is not the
16 case here because, here, the underlying
17 restriction is what's unconstitutional.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Sotomayor?

21 JUSTICE SOTOMAYOR: Mr. Martinez, are
22 you taking the position that all restrictions of
23 robo-calls are unconstitutional or that just a
24 broad -- a broad restriction like this one is
25 unconstitutional? Because there's some types of

1 speech that should not be covered.

2 MR. MARTINEZ: Well, I think, Your
3 Honor, in this case, obviously, we're dealing
4 with -- with the statute at hand. I think
5 that -- that there are some restrictions on
6 robo-calls that I think -- that probably would
7 satisfy the -- the -- the appropriate level of
8 scrutiny.

9 And just to take one example, the --
10 the way that the -- the ban on calls works in --
11 to home phones right now, it's essentially a --
12 a ban on commercial telemarketing call --
13 robo-calls to the home. And that's the kind of
14 -- that -- that is the heart of what the TCPA
15 was getting at.

16 And that's what Congress and the FCC
17 said, you know, this is really the core privacy
18 that we're trying to protect. I think that --

19 JUSTICE SOTOMAYOR: Well --

20 MR. MARTINEZ: -- kind of statute is
21 much --

22 JUSTICE SOTOMAYOR: -- Mr. Martinez --
23 and I agree with you. And I -- I can think of
24 others, if any -- any schemes to get money, any
25 -- because there's so many scams from

1 robo-calls, but putting all of that aside,
2 assuming that there is a part of the restriction
3 that could survive strict scrutiny under your
4 claim, why shouldn't we limit any remedy
5 striking down this provision simply to permit
6 the types of calls that your clients make?

7 MR. MARTINEZ: Well, Your Honor --

8 JUSTICE SOTOMAYOR: Why should we be
9 --

10 MR. MARTINEZ: -- your --

11 JUSTICE SOTOMAYOR: -- why should we
12 be striking down the entire statute? Now you
13 would have to prove -- and I don't know that the
14 Court has done this below -- that restricting
15 political speech is not -- is -- is -- is not
16 narrowly tailored, and I don't know that that's
17 been done in this case, but, if the issue is the
18 remedy, shouldn't we let the circuit below
19 decide that question?

20 MR. MARTINEZ: Your Honor, two points
21 on that. First of all, we -- we brought this as
22 a facial challenge. We, of course, would
23 welcome the kind of relief that you -- you've
24 hypothesized, although we do -- we do think that
25 the appropriate relief here really is to strike

1 down the restriction in its entirety.

2 And one of the reasons for that is the
3 point that you raised with Mr. Stewart earlier,
4 which is the -- the entire absence of any
5 evidence or justification for this particular
6 ban for -- for any of it, all of it or -- or
7 pieces of it, that the government has completely
8 failed to put forward.

9 I mean, this -- this statute is
10 subject to strict scrutiny, and this Court has
11 said over and over again that the government is
12 the one that bears the burden of satisfying
13 strict scrutiny.

14 They address strict scrutiny in, I
15 think, a single sentence of the -- with respect
16 to the exception -- restriction, a single
17 sentence in their opening brief, a single
18 substantive sentence in their reply brief, and
19 nothing else. They're trying to turn strict
20 scrutiny into a rubber stamp.

21 And I think the best thing to do in
22 these circumstances is hold the government to
23 its burden of proof, invalidate the restriction,
24 and then Congress can come back and act and
25 legislate in a -- in a way that's rational in

1 light of the Court's decision.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Breyer?

5 JUSTICE BREYER: Yeah, thank you. I'm
6 sorry. The telephone started to ring, and it
7 cut me off the call. And I don't think it was a
8 robo-call.

9 (Laughter.)

10 JUSTICE BREYER: And we got it
11 straightened out.

12 Okay. My question is this: Forget
13 the political part of this. Assume it's out of
14 it. So now what worries me is, if you call this
15 strict -- calling for strict scrutiny, I guess
16 the government's justification, which is that
17 government debt is owed to us all as taxpayers,
18 private debt is not, so treat it specially.

19 Well, there are many situations, food
20 and drug agencies, agricultural agencies,
21 governing selling, the FTC, the SEC, where they
22 will have regulations and the regulations will
23 have a broad category, and Item X falls within
24 it, lamps may fall within categories that
25 require you to put electricity regulation on how

1 many amps does it use or whatever.

2 But then you discover a sub-category
3 of the one you just put in and you say leave out
4 the sub-category for some reason. Now, if
5 courts start criticizing that for strict
6 scrutiny, well, very few will survive.

7 But the normal way of looking at it
8 is, is it a reasonable thing, Justice Brandeis's
9 third category. Very well. Why does this case
10 fall into strict scrutiny once I get the
11 politics out but not Justice Brandeis's
12 regulation?

13 MR. MARTINEZ: Your Honor, a couple
14 points on that. I think this case falls into
15 strict scrutiny because it satisfies the test
16 for what constitutes a content-based restriction
17 that was set forth in Reed, and as I note, Your
18 Honor will remember --

19 JUSTICE BREYER: You realize that what
20 I'm doing is I -- I dissented and I'm wondering
21 whether to stick to that approach or not. So
22 Reed will not convince me, it's a good a
23 majority but I didn't think good enough. Okay?

24 MR. MARTINEZ: Well, I would -- I
25 would hope that stare decisis would be a factor

1 even if you disagreed with me.

2 JUSTICE BREYER: Yes. Okay, okay.
3 But that isn't what I'm trying to get at. I'm
4 trying to clarify my own thinking on it.

5 MR. MARTINEZ: Fair enough, Your
6 Honor. Well, I think -- I don't think you
7 should be concerned about the -- the -- the
8 prospect of other laws that are economic
9 regulations sort of being impacted by this at
10 all because I think in the --

11 JUSTICE BREYER: Yes, that's what I
12 want the answer to, exactly why.

13 MR. MARTINEZ: Right. In those cases,
14 those kinds of -- of restrictions that -- that
15 sort of get tangled up with speech in the
16 context of those kind of regulations, those
17 would be, at most, commercial regulations of
18 speech, which wouldn't be subject to strict
19 scrutiny, regardless of whether or not
20 they're -- they're considered content-based.

21 So, for example, the government lists
22 a number of statutes in its brief that it says,
23 you know, the sky's going to fall and all those
24 statutes are going to be unconstitutional if we
25 win. That's just simply not true. At most,

1 those statutes are -- are -- would be
2 regulations of commercial speech at most and, if
3 so, they would try -- trigger intermediate
4 scrutiny under this Court's settled doctrine.

5 JUSTICE BREYER: And isn't --

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

7 JUSTICE BREYER: Thanks.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

9 JUSTICE KAGAN: Good afternoon, Mr.
10 Martinez.

11 MR. MARTINEZ: Good afternoon.

12 JUSTICE KAGAN: I'll give you a
13 hypothetical. Suppose this statute was written
14 in a slightly different way and it exempted any
15 calls between the holder of a government debt
16 and the debtor. Would strict scrutiny apply?

17 MR. MARTINEZ: Your Honor, I think
18 that in -- in that circumstance, the -- the --
19 the -- the regulation would not turn on the
20 content of the calls, and so I don't think
21 strict scrutiny would apply for that reason.

22 JUSTICE KAGAN: Right. In other
23 words, it would turn on the relationship. And
24 so I guess the question is, what -- what's the
25 difference? I mean, that's what Congress was

1 trying to get at, and maybe they didn't know all
2 our arcane First Amendment rules, but that
3 regulation basically covers a particular kind of
4 economic activity, the collection of government
5 debts, and this regulation covers the same kind
6 of economic activity, the collection of
7 government debts.

8 There are two ways of getting at the
9 same thing. Both are directed at the economic
10 activity of the people involved. Why should
11 there be any difference?

12 MR. MARTINEZ: Well, with respect, and
13 perhaps I misunderstood the hypothetical,
14 Justice Kagan, but I thought in your
15 hypothetical that the -- as long as the
16 relationship element was satisfied, the call
17 could be on any subject whatsoever. For -- so,
18 in other words --

19 JUSTICE KAGAN: Oh, yeah. Well, we
20 know that holders of government debt call
21 debtors, you know, to collect debts. That's
22 what they call them for. They're not calling
23 them to discuss political issues.

24 MR. MARTINEZ: Well, with respect,
25 Justice Kagan, I'm -- I'm not sure that's right,

1 and the FCC has expressly addressed this
2 situation in their August 2016 order at page
3 9087, where the FCC has contemplated -- it --
4 it's discussing and addressing the content of
5 the calls at issue being made by -- by
6 collectors of government-backed debt, and it
7 contemplates that -- that the subject matter of
8 the call might range beyond the collection of
9 government-backed debt. Maybe they're going to
10 be marketing some other product. Maybe they're
11 going to be saying, hey, call your Congressman
12 and change these laws that apply to banks.

13 And what the FCC has said is that when
14 the subject matter of the call ranges to such
15 topics, then the call is transformed and it's --
16 it's a call that would have been allowed and
17 it's no longer allowed. And so I think that --
18 I think that the chronicling of the call --

19 JUSTICE KAGAN: Well, I guess a
20 technical issue --

21 MR. MARTINEZ: -- is different here.

22 JUSTICE KAGAN: Excuse me. I guess a
23 technical issue, Mr. Martinez, but I guess what
24 I'm saying is that there are two ways where
25 Congress is trying to get at the same thing,

1 which is the calls between debt holders and
2 debtors almost always about the debt.

3 But, you know, why should we care?
4 You know, even if Congress didn't write this in
5 exactly the right way, why is it that we should
6 care so much as to put strict scrutiny into
7 place? This doesn't raise any real concerns
8 about government censorship, about the
9 suppression of ideas, about a distorted
10 marketplace of ideas. What -- why is this an
11 appropriate time to put strict scrutiny into
12 place, given that what the government -- what
13 the -- what the legislation is trying to get at
14 is an economic relationship and the things that
15 flow from that relationship?

16 MR. MARTINEZ: Your Honor, I think
17 that the -- that the robust test for
18 content-based speech restrictions this Court
19 adopted in Reed is important because it protects
20 liberty. It makes it harder for Congress to
21 enact broad speech bans that affect everyone
22 while at the same time assuming it can then just
23 carve out special exemptions for favored groups.

24 And I think the way to police that
25 problem is by -- by making sure that Congress

1 has to be very careful before it enacts the
2 broadband and make it clear to them that they
3 can't just do that and then, for example, as in
4 this case, delegate authority to a government
5 agency to hand out specialized exceptions for
6 whatever well-heeled party turns up and claims
7 an exemption.

8 And so I think that that is one of
9 the --

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice -- Justice Gorsuch?

13 JUSTICE GORSUCH: Counsel, I'd like to
14 just turn back to the -- the intuitive appeal of
15 the government's severability argument.

16 If, as I think you've -- you've
17 conceded, that the -- the statute before the
18 government-debt exception would not have been
19 content-based and might have been permissible
20 under the First Amendment, Congress then comes
21 in and adds the government-debt exception, and
22 that changes the equation.

23 The intuitive argument based on that
24 sequence of events is, well, just get rid of the
25 government-debt exception and we go back to the

1 status quo ante where everything was fine.

2 Why -- why should we reject that
3 intuition?

4 MR. MARTINEZ: I think there's --
5 there's a philosophical reason and a historical
6 reason. The philosophical reason is essentially
7 that in the First Amendment context, courts
8 should not be making more speech illegal
9 because, if -- if courts take a certain type of
10 speech that Congress expressly chose to -- to
11 allow, and then courts make the decision to --
12 to prohibit that speech, they're essentially
13 stepping into the legislature's shoes and making
14 very sensitive policy tradeoffs that -- that
15 indisputably cut against First Amendment
16 interests, and they shouldn't be the ones to do
17 that. Philosophically as well, you need to make
18 sure that people have incentives to challenge
19 unconstitutional laws.

20 I think, as a historical matter,
21 though, it's -- I think it's important to
22 recognize that the original justification for
23 the ban on cell phone calls here was essentially
24 that those kind of calls to cell phones would
25 inflict charges on called parties. And that's

1 the reason that the ban was in place, you know,
2 originally and -- and that's -- that's why it
3 may have been justified earlier.

4 But, in today's world, those call
5 plans essentially don't exist or -- or are --
6 overwhelmingly people are not charged when they
7 receive calls to their cell phone. And so the
8 -- the historical facts are different now. And
9 because of the fact that everyone has cell
10 phones, the government has an especially strong
11 interest now, from a revenue perspective, of
12 making those debt calls.

13 If you take all that and wrap it up
14 together, I don't think there's a good
15 historical basis or empirical basis for
16 concluding that, in fact, we know with certainty
17 or the kind of certainty we should have in the
18 First Amendment context that Congress would have
19 wanted to -- to -- to re-enact this statute if
20 it wasn't allowed to make the calls to collect
21 government-backed debts.

22 JUSTICE GORSUCH: Let me see if I --
23 if I've got at least that second point, my hands
24 around it. The argument is that maybe the first
25 Congress that enacted the original statute

1 thought that all -- all robo-calls should be
2 prohibited, with some exceptions that you're not
3 -- you have no complaint with.

4 The second Congress, acting in a
5 different time, had a different judgment about
6 which calls should be permitted, and that
7 included this government-debt exception. And we
8 don't know whether the second Congress enacting
9 the revised statute would prefer a situation in
10 which all calls are prohibited or all calls are
11 allowed. Does that -- does that sum it up?

12 MR. MARTINEZ: I think that sums it
13 up, with one small caveat, which is that we are
14 talking now on the assumption that this -- there
15 -- that there is a severability analysis that's
16 required here that turns on intent.

17 I do think our -- our primary position
18 is that the nature of the First Amendment and
19 the nature of the constitutional flaw in this
20 statute, which is the -- the flaw with the
21 restriction, we think that that means that
22 essentially, under -- under everyone's
23 understanding of -- of severability principles,
24 the restriction must be struck down.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 JUSTICE GORSUCH: And then --

3 CHIEF JUSTICE ROBERTS: I'm sorry,
4 Justice Gorsuch?

5 JUSTICE GORSUCH: No, I'm fine. Thank
6 you, Chief.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh?

9 JUSTICE KAVANAUGH: Thank you, Chief
10 Justice.

11 Good afternoon, Mr. Martinez. On
12 severability --

13 MR. MARTINEZ: Good afternoon.

14 JUSTICE KAVANAUGH: -- we have no
15 precedent either way on severability, as I
16 understand it, when the First Amendment problem
17 is created by an exception to a ban on speech,
18 rather than the First Amendment problem being
19 created by the underlying ban without the
20 exception. So I don't think we have any
21 precedent either way.

22 And the question, as you've pointed
23 out and Mr. Stewart's pointed out, is level up
24 or level down as the remedy.

25 The key first question -- and I asked

1 Mr. Stewart about this; I want to make sure I
2 have you on this -- is the underlying
3 restriction here, the underlying restriction on
4 cell phone robo-calls, constitutional without
5 the government-debt exception? So I want you to
6 focus exactly on that question.

7 MR. MARTINEZ: Yes. We -- we think
8 that -- that given all the evidence we know now
9 about what Congress's interests are and how
10 strongly they believe or don't believe in the
11 privacy interests, we believe that the
12 restriction is unconstitutional.

13 And I think the two prime --

14 JUSTICE KAVANAUGH: Let me just -- let
15 me make sure I have you exactly right. The
16 underlying restriction, if there had never been
17 a government-debt exception -- let me phrase it
18 that way. If there had never been a
19 government-debt exception, is the underlying
20 restriction unconstitutional?

21 MR. MARTINEZ: We would say yes based
22 primarily on the differential treatment of the
23 residential call bans. But I just want to say
24 one thing on that, Justice Kavanaugh, because if
25 you -- you want me to hypothesize that -- that

1 the -- that the 2015 law had never been passed.

2 JUSTICE KAVANAUGH: Correct.

3 MR. MARTINEZ: I think that the 2015
4 law, if you think about that law as evidence --
5 as evidence of what Congress thought about
6 privacy, the fact that it wasn't passed doesn't
7 mean that deep down Congress believed in privacy
8 more than we later -- you know, than was later
9 revealed.

10 And so I think it's important to
11 recognize that, in our argument, the role of the
12 2015 exception is not merely to introduce the
13 textual content-based distinction, but it's also
14 to reveal the underlying lack of justification,
15 which was always there. And, again --

16 JUSTICE KAVANAUGH: Well, I'm not -- I
17 guess on that point I would pick up on what the
18 Chief Justice said and -- and the states' amicus
19 brief. And if you just take a peek, just a
20 peek, at the real world here, this is one of the
21 more popular laws on the books because people
22 don't like cell phone robo-calls.

23 That seems just common sense. Do you
24 want to argue against that common sense?

25 MR. MARTINEZ: I think aspects of the

1 law are popular. I think, you know, the head of
2 the FCC has called this law the -- "the poster
3 child for lawsuit abuse." And the reason for
4 that is -- and this is indirectly implicated in
5 this case -- there's a whole bunch of other
6 problems with the law as well.

7 And so I think this law has its
8 supporters and its detractors, but I don't think
9 you should worry about Congress's ability to
10 protect people. Even if we win this case,
11 Congress is going to have plenty of options that
12 are fully constitutional in order to protect
13 people from -- from unwanted calls.

14 It can focus on the telemarketing
15 calls. It can focus -- it can expand the
16 remedies available under the Do Not Call list,
17 which essentially allow consumers to --

18 JUSTICE KAVANAUGH: Well, even if --

19 MR. MARTINEZ: -- to opt --

20 JUSTICE KAVANAUGH: -- even if you --

21 MR. MARTINEZ: -- out.

22 JUSTICE KAVANAUGH: -- even -- sorry.

23 Even if you lose this case, Congress can, of
24 course, scale back when you view as overbroad
25 restrictions, but if you lose this case,

1 Congress will still have in place a restriction
2 that's been on the books for 30 years and that
3 has been perceived as constitutional and that is
4 very popular.

5 MR. MARTINEZ: Well -- well, I -- I --
6 I -- I -- I guess what I would say is that I
7 think the right way to think about this is to
8 apply the doctrinal tools that you always apply
9 in First Amendment cases, even in cases where
10 the speech involved is not popular.

11 I mean, the First Amendment is there
12 not just to protect speech that people like but
13 to protect speech --

14 JUSTICE KAVANAUGH: Yeah.

15 MR. MARTINEZ: -- that people might
16 find offensive or -- or annoying. And -- and --

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. Mr. Martinez, would you like to take a
19 minute to wrap up?

20 MR. MARTINEZ: Thank you, Your Honor.

21 The -- the core purpose of the First
22 Amendment is to protect the free exchange of
23 political speech, even when people might find
24 that speech to be a nuisance. That's what this
25 Court recognized in the Martin case when it said

1 that First Amendment rights protect people from
2 -- from making intrusive door-to-door
3 solicitations. That's protected activity. The
4 calls at issue here are protected activity as
5 well.

6 We ask you to do what you always do in
7 First Amendment cases, strike down the
8 unconstitutional restriction on speech. Thank
9 you, Your Honors.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. Stewart, you have rebuttal?

13 REBUTTAL ARGUMENT OF MALCOLM L. STEWART
14 ON BEHALF OF THE PETITIONERS

15 MR. STEWART: Thank you, Mr. Chief
16 Justice.

17 I took Mr. Martinez to acknowledge
18 that if -- if this were a restriction on speech
19 undertaken to collect a government-backed debt,
20 it would be subject at most to intermediate
21 scrutiny because it would be commercial speech
22 and would be subject to distinct First Amendment
23 treatment on that basis.

24 And the -- the position of the other
25 side is this provision should be reviewed more

1 skeptically, should be subject to more
2 certiorari review because its effect is to take
3 particular speech out from under regulation
4 rather than to regulate it.

5 And that's contrary to the -- the
6 usual understanding that the First Amendment
7 exists to foster speech. It's contrary to the
8 Court's reference in Reed to laws that target
9 speech because of its communicative content.

10 Why would the Court review more
11 skeptically the law that looked at the same
12 basis as a rationale for exempting speech rather
13 than to regulate?

14 The second thing is Mr. Martinez said
15 many times that Congress and the FCC have
16 exempted non-commercial calls from the
17 automated-call restriction. And I think that
18 really overlooks the respective responsibilities
19 of Congress and the FCC.

20 Congress has broadly regulated at
21 least calls using a pre-recorded voice or an
22 artificial voice to residential landlines just
23 as it has calls to cell phones. Both of the
24 underlying bans encompass non-commercial calls.

25 Congress has vested the FCC with

1 broad, though not identical, authority to exempt
2 particular categories of calls from the
3 residential and the cell phone ban respectively,
4 and you can look at page 5A and 6A of the
5 appendix to the government's merits brief to see
6 that the -- the exemption authority is -- is
7 basically comparable.

8 The discrepancy under current law
9 results from the fact that the FCC has exercised
10 its exemption authority much more robustly with
11 respect to residential landlines than it has
12 with respect to cell phones. That can't create
13 a facial constitutional infirmity in the statute
14 itself. If people think that the FCC should
15 adopt comparable exemptions for non-commercial
16 calls to cell phones, they can file a petition
17 to that effect.

18 The -- the last thing I'd say in
19 respect is -- goes to the colloquy between Mr.
20 Martinez and Justice Kagan, where Mr. Martinez
21 said, yes, if they had framed it not in terms of
22 the content of the call but in terms of all
23 calls from the holder of a government-backed
24 debt to -- to the debtor that that would be
25 subject to more relaxed scrutiny. And that

1 would simply be -- an approach that
2 distinguished on that basis would simply
3 encourage Congress to enact laws with more of a
4 broad brush.

5 It would discourage Congress from
6 trying to fine-tune laws, and that
7 discouragement would only be exacerbated if we
8 took the Respondents' approach to severability
9 striking down the whole law.

10 Thank you, Mr. Chief Justice.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel. The case is submitted.

13 (Whereupon, at 12:55 p.m., the case
14 was submitted.)

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Official - Subject to Final Review

1	acting ^[1] 66:4 activities ^[1] 28:3 activity ^[8] 13:20 17:5,12 60:4,6, 10 72:3,4 actually ^[6] 9:18 11:6 22:1 39:11 40:5 51:1 add ^[1] 9:16 added ^[1] 40:16 addition ^[1] 12:4 address ^[5] 6:9 34:23 36:24 49:21 55:14 addressed ^[2] 52:12 61:1 addressing ^[1] 61:4 adds ^[1] 63:21 adopt ^[1] 74:15 adopted ^[1] 62:19 adversarial ^[1] 27:19 adversely ^[2] 37:8 44:14 advocate ^[1] 46:18 affairs ^[1] 8:12 affect ^[3] 37:8 44:14 62:21 affected ^[1] 34:24 afternoon ^[6] 23:17 31:19 59:9,11 67:11,13 agencies ^[3] 45:17 56:20,20 agency ^[2] 15:18 63:5 agree ^[4] 45:6 51:15 52:6 53:23 agricultural ^[1] 56:20 ahead ^[2] 7:22 33:9 AL ^[2] 1:4,8 Alito ^[8] 17:15,16 18:21,23 20:14 48:21,22 51:7 allow ^[3] 38:22 64:11 70:17 allowance ^[1] 38:15 allowed ^[11] 37:20 38:15 44:8 46: 14,14,18 47:17 61:16,17 65:20 66: 11 allowing ^[2] 44:16 49:13 almost ^[4] 16:3,12 31:20 62:2 already ^[2] 27:8 52:3 Although ^[2] 36:23 54:24 Amendment ^[36] 5:7,15,22 13:24 14:12,16 15:23 18:4,18 24:24 27: 9 29:9,25 30:9,24 36:8,20 37:24 38:2,7 52:2 60:2 63:20 64:7,15 65: 18 66:18 67:16,18 71:9,11,22 72: 1,7,22 73:6 America ^[2] 47:22 49:11 AMERICAN ^[2] 1:7 3:5 Americans ^[1] 37:16 amicus ^[2] 34:25 69:18 amps ^[1] 57:1 analogies ^[1] 18:16 analogy ^[1] 30:19 analyses ^[1] 34:10 analysis ^[13] 6:10 10:4 11:2 17:22 19:8 23:22 30:12 34:14 43:23,24 48:23 50:11 66:15 analytical ^[2] 4:14,14 analyze ^[1] 23:20 angle ^[1] 29:16 annoying ^[2] 3:21 71:16 another ^[3] 18:19 29:16 51:19 answer ^[5] 15:12 17:2 24:11 49:23	B
2	58:12 ante ^[1] 64:1 anticipate ^[1] 47:3 anxious ^[1] 40:25 apex ^[1] 47:23 appeal ^[1] 63:14 appeals ^[5] 15:1 28:8,17,19 29:1 APPEARANCES ^[1] 1:19 appendix ^[1] 74:5 application ^[2] 15:2 17:22 applied ^[2] 7:6 13:6 applies ^[1] 16:11 apply ^[15] 7:15 15:19 18:6,6 19:7 20:2 23:21,23 26:9 45:22 59:16, 21 61:12 71:8,8 applying ^[2] 44:1,2 approach ^[4] 38:4 57:21 75:1,8 appropriate ^[10] 9:22 10:10 14:22 24:14 29:14 35:13 50:18 53:7 54: 25 62:11 approved ^[1] 24:20 arbitrarily ^[1] 36:18 arcane ^[1] 60:2 area ^[2] 18:4 26:13 arguably ^[1] 17:23 argue ^[6] 7:8 13:25 14:21,21 31:23 69:24 argued ^[1] 32:1 argument ^[20] 1:16 2:2,5,8 3:4,10 17:20 28:10 29:2 31:1 33:23 36:2 38:9 43:12,15 63:15,23 65:24 69: 11 72:13 arguments ^[1] 25:23 around ^[1] 65:24 array ^[2] 17:10 32:21 artificial ^[1] 73:22 aside ^[3] 21:4,14 54:1 aspect ^[1] 21:12 aspects ^[2] 5:3 69:25 assert ^[1] 14:12 asserted ^[3] 39:22 40:7 48:5 asserting ^[2] 4:20 39:5 ASSOCIATION ^[2] 1:7 3:5 Assume ^[4] 20:15,15,16 56:13 assuming ^[4] 17:19 50:25 54:2 62: 22 assumption ^[1] 66:14 asymmetry ^[1] 42:8 attention ^[1] 26:15 ATTORNEY ^[3] 1:3 3:5 34:11 August ^[1] 61:2 authority ^[6] 23:5 29:23 63:4 74:1, 6,10 authorize ^[1] 10:14 autodial ^[1] 31:8 automated ^[12] 3:15 4:3 7:16 9:3 12:6 22:8 24:17,17 35:22 36:10 46:5 49:7 automated-call ^[14] 4:9,25 5:4,10 6:16 16:19,21 23:22 24:4 26:15, 23 29:6 32:1 73:17 available ^[3] 36:10 39:10 70:16 avoid ^[1] 5:21 away ^[1] 9:18	back ^[8] 4:6 23:18 33:17 35:10 55: 24 63:14,25 70:24 ban ^[19] 24:16 33:24 34:2,5 36:17, 22,24 37:7,21 49:6,25 53:10,12 55:6 64:23 65:1 67:17,19 74:3 banks ^[1] 61:12 banned ^[1] 12:25 bans ^[4] 38:5 62:21 68:23 73:24 BARR ^[2] 1:3 3:4 barred ^[1] 22:4 bars ^[1] 36:8 based ^[11] 6:13,20 7:9 12:25 16:16 26:4 35:18,19 38:9 63:23 68:21 basic ^[8] 3:15 4:15 5:1,21 8:12 18: 15 25:1 31:8 basically ^[2] 60:3 74:7 basis ^[5] 65:15,15 72:23 73:12 75: 2 bears ^[1] 55:12 beginning ^[1] 35:11 behalf ^[9] 1:22,24 2:4,7,10 3:11 19: 19 36:3 72:14 beliefs ^[1] 34:12 believe ^[3] 68:10,10,11 believed ^[1] 69:7 below ^[2] 54:14,18 benefits ^[1] 22:22 best ^[3] 17:21 18:7 55:21 between ^[9] 13:15 16:1 22:11 23: 12 46:13 49:9 59:15 62:1 74:19 beyond ^[2] 33:14 61:8 big ^[3] 20:22 21:2 50:25 Birthday ^[1] 49:11 bit ^[4] 7:22 9:12 24:1 27:12 blue ^[1] 47:6 book ^[1] 15:16 books ^[2] 69:21 71:2 both ^[9] 4:17,18 10:7,9 21:8,11 49: 4 60:9 73:23 bother ^[2] 14:14,15 Brandeis's ^[3] 15:22 57:8,11 breadth ^[1] 48:25 Breyer ^[13] 15:8,9 17:13 48:18,19 56:4,5,10 57:19 58:2,11 59:5,7 brief ^[10] 4:21 11:16 24:12 34:11 51:15 55:17,18 58:22 69:19 74:5 briefs ^[3] 4:7 13:4 34:25 bring ^[1] 4:12 brings ^[1] 40:2 broad ^[10] 36:22 37:4,21 40:4 52: 24,24 56:23 62:21 74:1 75:4 broadband ^[1] 63:2 broadly ^[2] 38:16 73:20 brought ^[2] 4:18 54:21 brush ^[1] 75:4 bunch ^[1] 70:5 burden ^[3] 21:15 55:12,23
3	acting ^[1] 66:4 activities ^[1] 28:3 activity ^[8] 13:20 17:5,12 60:4,6, 10 72:3,4 actually ^[6] 9:18 11:6 22:1 39:11 40:5 51:1 add ^[1] 9:16 added ^[1] 40:16 addition ^[1] 12:4 address ^[5] 6:9 34:23 36:24 49:21 55:14 addressed ^[2] 52:12 61:1 addressing ^[1] 61:4 adds ^[1] 63:21 adopt ^[1] 74:15 adopted ^[1] 62:19 adversarial ^[1] 27:19 adversely ^[2] 37:8 44:14 advocate ^[1] 46:18 affairs ^[1] 8:12 affect ^[3] 37:8 44:14 62:21 affected ^[1] 34:24 afternoon ^[6] 23:17 31:19 59:9,11 67:11,13 agencies ^[3] 45:17 56:20,20 agency ^[2] 15:18 63:5 agree ^[4] 45:6 51:15 52:6 53:23 agricultural ^[1] 56:20 ahead ^[2] 7:22 33:9 AL ^[2] 1:4,8 Alito ^[8] 17:15,16 18:21,23 20:14 48:21,22 51:7 allow ^[3] 38:22 64:11 70:17 allowance ^[1] 38:15 allowed ^[11] 37:20 38:15 44:8 46: 14,14,18 47:17 61:16,17 65:20 66: 11 allowing ^[2] 44:16 49:13 almost ^[4] 16:3,12 31:20 62:2 already ^[2] 27:8 52:3 Although ^[2] 36:23 54:24 Amendment ^[36] 5:7,15,22 13:24 14:12,16 15:23 18:4,18 24:24 27: 9 29:9,25 30:9,24 36:8,20 37:24 38:2,7 52:2 60:2 63:20 64:7,15 65: 18 66:18 67:16,18 71:9,11,22 72: 1,7,22 73:6 America ^[2] 47:22 49:11 AMERICAN ^[2] 1:7 3:5 Americans ^[1] 37:16 amicus ^[2] 34:25 69:18 amps ^[1] 57:1 analogies ^[1] 18:16 analogy ^[1] 30:19 analyses ^[1] 34:10 analysis ^[13] 6:10 10:4 11:2 17:22 19:8 23:22 30:12 34:14 43:23,24 48:23 50:11 66:15 analytical ^[2] 4:14,14 analyze ^[1] 23:20 angle ^[1] 29:16 annoying ^[2] 3:21 71:16 another ^[3] 18:19 29:16 51:19 answer ^[5] 15:12 17:2 24:11 49:23	C
4	58:12 ante ^[1] 64:1 anticipate ^[1] 47:3 anxious ^[1] 40:25 apex ^[1] 47:23 appeal ^[1] 63:14 appeals ^[5] 15:1 28:8,17,19 29:1 APPEARANCES ^[1] 1:19 appendix ^[1] 74:5 application ^[2] 15:2 17:22 applied ^[2] 7:6 13:6 applies ^[1] 16:11 apply ^[15] 7:15 15:19 18:6,6 19:7 20:2 23:21,23 26:9 45:22 59:16, 21 61:12 71:8,8 applying ^[2] 44:1,2 approach ^[4] 38:4 57:21 75:1,8 appropriate ^[10] 9:22 10:10 14:22 24:14 29:14 35:13 50:18 53:7 54: 25 62:11 approved ^[1] 24:20 arbitrarily ^[1] 36:18 arcane ^[1] 60:2 area ^[2] 18:4 26:13 arguably ^[1] 17:23 argue ^[6] 7:8 13:25 14:21,21 31:23 69:24 argued ^[1] 32:1 argument ^[20] 1:16 2:2,5,8 3:4,10 17:20 28:10 29:2 31:1 33:23 36:2 38:9 43:12,15 63:15,23 65:24 69: 11 72:13 arguments ^[1] 25:23 around ^[1] 65:24 array ^[2] 17:10 32:21 artificial ^[1] 73:22 aside ^[3] 21:4,14 54:1 aspect ^[1] 21:12 aspects ^[2] 5:3 69:25 assert ^[1] 14:12 asserted ^[3] 39:22 40:7 48:5 asserting ^[2] 4:20 39:5 ASSOCIATION ^[2] 1:7 3:5 Assume ^[4] 20:15,15,16 56:13 assuming ^[4] 17:19 50:25 54:2 62: 22 assumption ^[1] 66:14 asymmetry ^[1] 42:8 attention ^[1] 26:15 ATTORNEY ^[3] 1:3 3:5 34:11 August ^[1] 61:2 authority ^[6] 23:5 29:23 63:4 74:1, 6,10 authorize ^[1] 10:14 autodial ^[1] 31:8 automated ^[12] 3:15 4:3 7:16 9:3 12:6 22:8 24:17,17 35:22 36:10 46:5 49:7 automated-call ^[14] 4:9,25 5:4,10 6:16 16:19,21 23:22 24:4 26:15, 23 29:6 32:1 73:17 available ^[3] 36:10 39:10 70:16 avoid ^[1] 5:21 away ^[1] 9:18	call ^[27] 4:3 6:5 12:22 13:7,9 21:9 28:13 36:22 37:7 44:5 46:5 53:12 56:7,14 60:16,20,22 61:8,11,14,15,
5	back ^[8] 4:6 23:18 33:17 35:10 55: 24 63:14,25 70:24 ban ^[19] 24:16 33:24 34:2,5 36:17, 22,24 37:7,21 49:6,25 53:10,12 55:6 64:23 65:1 67:17,19 74:3 banks ^[1] 61:12 banned ^[1] 12:25 bans ^[4] 38:5 62:21 68:23 73:24 BARR ^[2] 1:3 3:4 barred ^[1] 22:4 bars ^[1] 36:8 based ^[11] 6:13,20 7:9 12:25 16:16 26:4 35:18,19 38:9 63:23 68:21 basic ^[8] 3:15 4:15 5:1,21 8:12 18: 15 25:1 31:8 basically ^[2] 60:3 74:7 basis ^[5] 65:15,15 72:23 73:12 75: 2 bears ^[1] 55:12 beginning ^[1] 35:11 behalf ^[9] 1:22,24 2:4,7,10 3:11 19: 19 36:3 72:14 beliefs ^[1] 34:12 believe ^[3] 68:10,10,11 believed ^[1] 69:7 below ^[2] 54:14,18 benefits ^[1] 22:22 best ^[3] 17:21 18:7 55:21 between ^[9] 13:15 16:1 22:11 23: 12 46:13 49:9 59:15 62:1 74:19 beyond ^[2] 33:14 61:8 big ^[3] 20:22 21:2 50:25 Birthday ^[1] 49:11 bit ^[4] 7:22 9:12 24:1 27:12 blue ^[1] 47:6 book ^[1] 15:16 books ^[2] 69:21 71:2 both ^[9] 4:17,18 10:7,9 21:8,11 49: 4 60:9 73:23 bother ^[2] 14:14,15 Brandeis's ^[3] 15:22 57:8,11 breadth ^[1] 48:25 Breyer ^[13] 15:8,9 17:13 48:18,19 56:4,5,10 57:19 58:2,11 59:5,7 brief ^[10] 4:21 11:16 24:12 34:11 51:15 55:17,18 58:22 69:19 74:5 briefs ^[3] 4:7 13:4 34:25 bring ^[1] 4:12 brings ^[1] 40:2 broad ^[10] 36:22 37:4,21 40:4 52: 24,24 56:23 62:21 74:1 75:4 broadband ^[1] 63:2 broadly ^[2] 38:16 73:20 brought ^[2] 4:18 54:21 brush ^[1] 75:4 bunch ^[1] 70:5 burden ^[3] 21:15 55:12,23	
6	acting ^[1] 66:4 activities ^[1] 28:3 activity ^[8] 13:20 17:5,12 60:4,6, 10 72:3,4 actually ^[6] 9:18 11:6 22:1 39:11 40:5 51:1 add ^[1] 9:16 added ^[1] 40:16 addition ^[1] 12:4 address ^[5] 6:9 34:23 36:24 49:21 55:14 addressed ^[2] 52:12 61:1 addressing ^[1] 61:4 adds ^[1] 63:21 adopt ^[1] 74:15 adopted ^[1] 62:19 adversarial ^[1] 27:19 adversely ^[2] 37:8 44:14 advocate ^[1] 46:18 affairs ^[1] 8:12 affect ^[3] 37:8 44:14 62:21 affected ^[1] 34:24 afternoon ^[6] 23:17 31:19 59:9,11 67:11,13 agencies ^[3] 45:17 56:20,20 agency ^[2] 15:18 63:5 agree ^[4] 45:6 51:15 52:6 53:23 agricultural ^[1] 56:20 ahead ^[2] 7:22 33:9 AL ^[2] 1:4,8 Alito ^[8] 17:15,16 18:21,23 20:14 48:21,22 51:7 allow ^[3] 38:22 64:11 70:17 allowance ^[1] 38:15 allowed ^[11] 37:20 38:15 44:8 46: 14,14,18 47:17 61:16,17 65:20 66: 11 allowing ^[2] 44:16 49:13 almost ^[4] 16:3,12 31:20 62:2 already ^[2] 27:8 52:3 Although ^[2] 36:23 54:24 Amendment ^[36] 5:7,15,22 13:24 14:12,16 15:23 18:4,18 24:24 27: 9 29:9,25 30:9,24 36:8,20 37:24 38:2,7 52:2 60:2 63:20 64:7,15 65: 18 66:18 67:16,18 71:9,11,22 72: 1,7,22 73:6 America ^[2] 47:22 49:11 AMERICAN ^[2] 1:7 3:5 Americans ^[1] 37:16 amicus ^[2] 34:25 69:18 amps ^[1] 57:1 analogies ^[1] 18:16 analogy ^[1] 30:19 analyses ^[1] 34:10 analysis ^[13] 6:10 10:4 11:2 17:22 19:8 23:22 30:12 34:14 43:23,24 48:23 50:11 66:15 analytical ^[2] 4:14,14 analyze ^[1] 23:20 angle ^[1] 29:16 annoying ^[2] 3:21 71:16 another ^[3] 18:19 29:16 51:19 answer ^[5] 15:12 17:2 24:11 49:23	C
7	58:12 ante ^[1] 64:1 anticipate ^[1] 47:3 anxious ^[1] 40:25 apex ^[1] 47:23 appeal ^[1] 63:14 appeals ^[5] 15:1 28:8,17,19 29:1 APPEARANCES ^[1] 1:19 appendix ^[1] 74:5 application ^[2] 15:2 17:22 applied ^[2] 7:6 13:6 applies ^[1] 16:11 apply ^[15] 7:15 15:19 18:6,6 19:7 20:2 23:21,23 26:9 45:22 59:16, 21 61:12 71:8,8 applying ^[2] 44:1,2 approach ^[4] 38:4 57:21 75:1,8 appropriate ^[10] 9:22 10:10 14:22 24:14 29:14 35:13 50:18 53:7 54: 25 62:11 approved ^[1] 24:20 arbitrarily ^[1] 36:18 arcane ^[1] 60:2 area ^[2] 18:4 26:13 arguably ^[1] 17:23 argue ^[6] 7:8 13:25 14:21,21 31:23 69:24 argued ^[1] 32:1 argument ^[20] 1:16 2:2,5,8 3:4,10 17:20 28:10 29:2 31:1 33:23 36:2 38:9 43:12,15 63:15,23 65:24 69: 11 72:13 arguments ^[1] 25:23 around ^[1] 65:24 array ^{[2]</}	

Official - Subject to Final Review

<p>16,18 65:4 68:23 70:16 74:22 call's [1] 13:14 called [2] 64:25 70:2 calling [4] 3:20 46:3 56:15 60:22 calls [84] 3:16 4:1 5:11,11 6:20 7:16 9:3 11:25 12:2,6,11,12 21:5,6,7,25 22:1,2,8 23:7 24:17,17,22 25:4 34:12 35:22 36:11,17,24 37:1,7,11,16,18,21 39:14 41:13 44:4,5,7,13,16,20,21 45:3,16 46:11,12,15,19 47:2,2,3,15,16,17,25 48:11 49:7,9 53:10 54:6 59:15,20 61:5 62:1 64:23,24 65:7,12,20 66:6,10,10 70:13,15 72:4 73:16,21,23,24 74:2,16,23 came [1] 1:15 campaign [1] 24:20 candidate [1] 24:23 cannot [2] 17:6 38:1 capacity [1] 22:24 capture [1] 16:6 care [2] 62:3,6 careful [2] 41:7 63:1 carefully [1] 6:4 carried [2] 15:14,15 carry [1] 12:5 carve [1] 62:23 Case [36] 3:4 5:24 6:7,11 7:3 9:19 10:5 17:17,22 18:25 19:4 20:13 21:12 24:7 27:18 32:8 39:6 40:1 45:1 51:20 52:9,11,13,16 53:3 54:17 57:9,14 63:4 70:5,10,23,25 71:25 75:12,13 cases [8] 16:6 18:7,9 37:24 58:13 71:9,9 72:7 cast [2] 17:9 25:5 casts [1] 5:15 categorical [1] 24:16 categories [4] 6:24 7:1 56:24 74:2 category [10] 4:1 6:3 7:2,5 15:22 16:1,3,25 56:23 57:9 caveat [1] 66:13 cell [25] 3:8,16 11:4,12,15,25 12:1,5,7 36:11,24 37:12 40:21 44:23 49:7 64:23,24 65:7,9 68:4 69:22 73:23 74:3,12,16 censorship [1] 62:8 certain [6] 16:8,12 26:5 46:4,11 64:9 certainly [4] 21:2 31:21 34:19 44:24 certainty [2] 65:16,17 certiorari [1] 73:2 cetera [1] 15:20 challenge [16] 4:8,12,20,21,24 6:18 13:25 23:11 26:23 27:9 28:2,22 38:4 45:12 54:22 64:18 challenged [1] 45:25 challenges [1] 4:17 challenging [2] 4:14 14:14 chances [1] 10:15 change [1] 61:12 changes [1] 63:22</p>	<p>characteristic [1] 13:17 characterization [1] 46:1 charged [2] 23:7 65:6 charges [1] 64:25 chided [1] 27:21 CHIEF [47] 3:3,12 5:17,20 7:17,21 8:16 9:5,7,10 12:14 15:7 17:15 20:9 23:14 27:4 31:14,18 35:4,8,24 36:4 38:8 40:9,12 41:18,21 45:9 48:14,17,21 52:18 56:2 59:6,8 63:10 66:25 67:3,6,7,9 69:18 71:17 72:10,15 75:10,11 child [1] 70:3 chose [1] 64:10 chronicling [1] 61:18 Circuit [2] 52:8 54:18 circumstance [5] 7:7 25:12 50:20 51:12 59:18 circumstances [3] 4:10 50:4 55:22 citizens [2] 21:4 37:1 citizenship [2] 19:16,25 claim [11] 10:10,16 14:12,16 18:18 19:21 28:20 29:13,14 38:7 54:4 claimed [1] 21:10 claims [1] 63:6 clarify [1] 58:4 class [1] 22:7 clause [2] 32:15 33:11 clear [5] 6:6 44:10,15 51:8 63:2 clearly [3] 9:6 28:17 29:6 client [1] 44:7 clients [5] 36:6 38:6 47:15,25 54:6 code [1] 6:24 cognizance [2] 27:16,19 colleagues [1] 27:8 collect [5] 22:20 37:16 60:21 65:20 72:19 collected [1] 13:11 collecting [1] 45:7 collection [13] 20:21,22,24 22:14,18 23:6 26:6,8 28:3 40:25 60:4,6 61:8 collectors [6] 8:25 22:11,12 23:1 32:22 61:6 colloquy [1] 74:19 combination [2] 5:2 26:25 combined [2] 8:5 28:12 come [2] 29:15 55:24 comes [2] 41:13 63:20 coming [2] 42:8 43:6 commerce [1] 26:13 commercial [7] 21:6,7 36:19 53:12 58:17 59:2 72:21 commitment [2] 18:15 28:14 common [3] 34:13 69:23,24 communication [6] 5:24 14:5,7 32:23 36:10 46:6 communications [5] 7:14 13:19 26:12 32:15 33:12 communicative [7] 6:13,20 7:10,10 16:16 35:18 73:9 comparable [2] 74:7,15 compare [1] 21:25</p>	<p>comparison [3] 22:6,6,7 compelling [3] 37:14 41:15 45:7 complaining [6] 18:25 19:3,5,8,12,16 complaint [4] 21:3 27:24 34:13 66:3 complaints [2] 20:20 35:1 completely [1] 55:7 compliance [1] 30:8 conceded [1] 63:17 conceptually [1] 4:13 concern [1] 40:2 concerned [2] 15:23 58:7 concerns [1] 62:7 conclude [1] 50:8 concluded [1] 25:3 concluding [2] 37:8 65:16 confirm [1] 15:3 confirms [1] 37:13 conflates [1] 19:12 confront [1] 29:2 Congress [58] 3:14 8:20,22 9:4 13:18 17:10 20:4 22:17,19 27:2 29:20 34:10,17,23 37:3,6,13,19 38:11,17 39:16,22 40:4,15,23 43:4,6 44:9,11,24 45:8 47:1,18,24 53:16 55:24 59:25 61:25 62:4,20,25 63:20 64:10 65:18,25 66:4,8 69:5,7 70:11,23 71:1 73:15,19,20,25 75:3,5 Congress's [9] 3:22 8:24 9:2,24 18:15 25:6 28:14 68:9 70:9 congressional [5] 8:20 44:19 49:2 51:9 52:10 Congressman [1] 61:11 connection [1] 13:22 consent [1] 5:12 consequence [1] 20:5 consider [1] 28:24 considered [1] 58:20 consistently [1] 3:17 constitutes [1] 57:16 constitution [1] 10:4 constitutional [25] 3:24 6:18 14:23 19:19 23:22 24:7 26:23 30:7 31:10,12 33:1,19,25 34:2,6 38:12 42:10,13,24 51:1 66:19 68:4 70:12 71:3 74:13 constitutionality [1] 3:18 CONSULTANTS [2] 1:8 3:6 consumer [5] 4:2 5:5 20:24 34:12,13 consumers [6] 3:20 9:2 32:20 34:25 37:18 70:17 contained [1] 49:10 contains [2] 17:25 49:13 contemplated [1] 61:3 contemplates [1] 61:7 contended [1] 5:13 content [25] 5:23 6:3,14,21 7:5,10 12:19,20 13:7,9,14 14:6 15:13,17 16:10,16,22 30:25 35:18,20 46:15 59:20 61:4 73:9 74:22 content-based [26] 6:12 12:18 16:12,15,18,20 17:7,25 20:17 21:17</p>	<p>24:24 25:24 31:21 32:5 35:14,17 36:18 42:18 43:22 44:1 46:22 57:16 58:20 62:18 63:19 69:13 content-neutral [1] 3:19 context [5] 30:12 44:2 58:16 64:7 65:18 contrary [2] 73:5,7 contribute [2] 12:24 13:2 conveying [1] 46:3 convince [1] 57:22 core [4] 36:8,19 53:17 71:21 correct [3] 31:24,25 69:2 Counsel [25] 7:17 9:8 12:15,17 15:7 20:10,12 23:15 27:5,8 31:15,15 35:5,25 41:21 45:10 48:17 52:19 56:3 63:11,13 67:1 71:18 72:11 75:12 counterargument [1] 18:24 countervailing [1] 4:4 couple [2] 14:18 57:13 course [5] 45:1 47:20 50:10 54:22 70:24 COURT [37] 1:1,16 3:13 4:22 6:12 7:8 10:11,19,21 13:5 14:5,25 16:7,7,14 18:4 20:2 25:3,9 26:18 28:8,17,18,25 29:8 35:12,15,16 36:5 37:23 38:3,18 54:14 55:10 62:18 71:25 73:10 Court's [7] 6:10 9:21 15:3 20:1 56:1 59:4 73:8 courts [7] 3:17 30:10 38:1 57:5 64:7,9,11 covered [3] 6:5 14:5 53:1 covers [2] 60:3,5 create [3] 23:6 51:1 74:12 created [3] 40:17 67:17,19 creates [1] 24:6 credibility [2] 25:5 39:4 criteria [1] 26:5 criticizing [1] 57:5 culture [1] 13:18 curé [1] 38:11 current [2] 8:11 74:8 cut [2] 56:7 64:15</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C [3] 1:12,21,23 daily [1] 11:17 day [4] 10:1 14:13 18:14 44:17 deal [1] 4:6 dealing [1] 53:3 deals [1] 15:18 debate [1] 40:11 debt [29] 7:24 12:19 13:11 20:20,22 21:5,7,25 22:17 23:6,24 26:7,8 28:3 32:22 37:17 39:14 40:24 56:17,18 59:15 60:20 61:6,9 62:1,2 65:12 72:19 74:24 debtor [5] 13:15 21:8 47:7 59:16 74:24 debtors [3] 21:11 60:21 62:2 debts [13] 8:25 21:9 22:12,13,14,20 23:2,12 47:4 60:5,7,21 65:21 decide [2] 6:5 54:19</p>
---	---	---	---

Official - Subject to Final Review

<p>deciding [1] 18:10 decision [4] 6:7 38:10 56:1 64:11 decisis [1] 57:25 deep [1] 69:7 deficiency [1] 51:2 defines [1] 42:20 definition [1] 45:20 degree [1] 18:15 delegate [1] 63:4 deliver [1] 36:14 denied [1] 23:9 deny [1] 23:9 Department [1] 1:21 depend [1] 13:14 depends [2] 10:17 48:25 Deputy [1] 1:20 describe [1] 35:1 described [2] 6:12 35:16 deserves [1] 49:23 desire [2] 8:24 9:2 determination [1] 13:10 determine [2] 14:4 20:3 determining [4] 8:21 9:21 13:5 33:16 detractors [1] 70:8 difference [2] 59:25 60:11 different [14] 6:23,24,25 7:1 21:6 23:13 30:4 31:1 40:1 59:14 61:21 65:8 66:5,5 differential [3] 45:2 52:1 68:22 differentiation [1] 23:12 differently [4] 18:19 23:4 37:11 44:24 difficulty [1] 20:13 directed [1] 60:9 direction [1] 38:19 directional [1] 7:2 disagreed [1] 58:1 disagrees [1] 51:13 disclosures [1] 13:22 discourage [1] 75:5 discouragement [1] 75:7 discover [1] 57:2 discrepancy [1] 74:8 discrete [2] 17:11 40:16 discrimination [4] 15:13,17 21:12 22:11 discuss [1] 60:23 discussed [3] 15:6 18:5 26:10 discussing [1] 61:4 disproves [1] 37:5 dissented [1] 57:20 distinct [4] 4:13 22:15 26:21 72:22 distinction [4] 12:19 22:13 42:18 69:13 distinguish [1] 15:25 distinguished [1] 75:2 distorted [1] 62:9 distracted [1] 12:13 disturb [2] 12:7,8 dividing [1] 46:13 doctrinal [1] 71:8 doctrine [1] 59:4</p>	<p>dog [1] 8:23 doing [3] 16:4 30:11 57:20 dollars [1] 37:17 Donald [1] 24:19 done [6] 28:9 37:24 38:23 39:22 54:14,17 door [1] 11:9 door-to-door [1] 72:2 doubt [3] 5:15 17:9 25:5 down [20] 14:23 18:11 19:2 26:19 27:16 30:22 32:9,18 33:4,14 36:21 37:23 54:5,12 55:1 66:24 67:24 69:7 72:7 75:9 drug [1] 56:20 duty [1] 15:3</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each [1] 49:21 earlier [5] 14:20 16:14 27:21 55:3 65:3 early [1] 47:19 economic [10] 5:25 13:20 15:22 17:5,12 58:8 60:4,6,9 62:14 effect [3] 12:6 73:2 74:17 effective [1] 36:9 efficacious [1] 5:6 efficacy [1] 5:15 efforts [1] 22:18 either [9] 5:14 18:2 23:8,21 30:5 46:12 48:25 67:15,21 electricity [1] 56:25 element [1] 60:16 eliminates [1] 38:4 email [1] 46:19 embrace [1] 40:23 emergency [1] 5:11 emotional [1] 21:2 empirical [2] 21:22 65:15 enact [3] 13:18 62:21 75:3 enacted [12] 3:14 8:13,14 11:11 17:11 18:13,14 31:7,9 45:14,16 65:25 enacting [1] 66:8 enactment [1] 3:22 enacts [2] 40:4 63:1 encompass [1] 73:24 encourage [1] 75:3 end [3] 10:1 14:13 24:8 endorse [2] 24:18,22 enforcing [1] 29:25 engage [1] 36:7 enough [5] 48:2,5 50:25 57:23 58:5 entire [2] 54:12 55:4 entirety [1] 55:1 entitled [3] 14:21 19:14 20:7 entitlement [1] 19:22 equal [11] 18:9,24 19:4,20,22 20:7 21:13 30:12,19,20,23 equality [1] 30:21 equation [1] 63:22 equipoise [1] 33:3 escape [1] 12:18 especially [3] 14:2 48:8 65:10</p>	<p>ESQ [3] 2:3,6,9 Esquire [1] 1:23 essential [2] 10:22 33:24 essentially [11] 29:19 44:16 50:15 51:15 53:11 64:6,12,23 65:5 66:22 70:17 establish [1] 26:21 established [4] 9:23 10:12 20:2,6 ET [3] 1:4,8 15:20 even [27] 11:8 14:4 15:4 16:17 20:5,25 25:3,7 35:2 37:1 38:6 41:6,16,19 45:5 48:6 49:18 52:6 58:1 62:4 70:10,18,20,22,23 71:9,23 events [1] 63:24 everyone [4] 3:8 45:6 62:21 65:9 everyone's [1] 66:22 everything [3] 38:13,20 64:1 evidence [10] 20:18 40:6 42:2 45:3 51:3 52:10 55:5 68:8 69:4,5 exacerbated [1] 75:7 exact [1] 37:11 exactly [4] 58:12 62:5 68:6,15 example [7] 22:19 46:18 49:3,4 53:9 58:21 63:3 except [1] 24:17 exception [72] 3:23,25 4:9 5:2 7:23 8:4,14 9:13 13:6 16:18 18:1,10,14 20:18 23:2,6 24:14,21 25:5,10 26:18,24 27:3 28:2,12,22 30:5 31:20 32:5 34:4,5 35:13 37:13,15,22 39:3,7 40:16,20 42:3,4,10,14,17,25 43:12,13 45:4,16 49:1,8,14,16 50:2,6,17,22,24,25 51:2 52:14 55:16 63:18,21,25 66:7 67:17,20 68:5,17,19 69:12 exceptions [7] 4:16 5:10 15:20 36:13 49:1 63:5 66:2 exchange [1] 71:22 exclusively [3] 7:4 13:9 16:9 Excuse [1] 61:22 exempt [2] 39:9 74:1 exempted [5] 37:6 39:23 48:12 59:14 73:16 exempting [2] 39:11 73:12 exemption [13] 14:10 21:23 23:24 24:6 25:21,24 26:3 41:10 45:13,25 63:7 74:6,10 exemptions [3] 40:4 62:23 74:15 exempts [1] 16:24 exercise [1] 23:5 exercised [1] 74:9 exist [3] 43:12,14 65:5 existence [2] 10:12 50:5 exists [1] 73:7 expand [1] 70:15 expect [1] 21:9 explain [1] 42:12 explained [1] 11:16 explore [1] 27:11 exposes [1] 37:15 express [1] 5:12 expressly [3] 52:12 61:1 64:10 extend [1] 33:14 extent [1] 25:22</p>	<p>extremely [2] 36:22 40:20</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face [1] 30:10 facial [2] 54:22 74:13 facings [1] 46:17 fact [17] 7:19 13:12 17:3 27:16,25 38:14,21 40:6 44:3 47:14 50:1,6 51:25 65:9,16 69:6 74:9 factor [1] 57:25 facts [1] 65:8 fail [3] 4:19 46:24 50:20 failed [1] 55:8 failings [1] 21:17 fails [1] 50:16 fair [2] 46:10 58:5 fall [6] 8:8 49:19 51:18 56:24 57:10 58:23 fallback [1] 52:7 falls [3] 41:16 56:23 57:14 family [1] 12:12 fanciful [1] 49:4 far [2] 14:1 15:23 fascinating [1] 17:18 father [1] 19:19 fathers [1] 19:20 favorable [1] 41:11 favored [1] 62:23 favours [1] 36:19 FCC [23] 23:2,4,8 37:6 39:12 44:9,11,12 45:21 47:19,24 48:6,10 53:16 61:1,3,13 70:2 73:15,19,25 74:9,14 features [2] 26:25 28:12 federal [9] 4:5 13:12,16 22:15,16,17,20,23 38:1 fell [1] 7:6 few [1] 57:6 field [1] 14:3 fields [1] 13:20 file [1] 74:16 filled [1] 15:17 financial [1] 13:15 find [2] 71:16,23 finding [1] 29:25 fine [2] 64:1 67:5 fine-tune [1] 75:6 first [50] 4:19 5:7,14,22 6:9 8:10 13:24 14:12,15,19 15:23 16:2 18:4,17 21:21 24:23 27:9 29:9,25 30:4,8,24 36:8,20 37:24 38:1,7,24 41:3 47:14 49:24 52:2 54:21 60:2 63:20 64:7,15 65:18,24 66:18 67:16,18,25 71:9,11,21 72:1,7,22 73:6 fisc [2] 4:5 22:16 fix [1] 38:1 fixed [1] 34:20 flaw [2] 66:19,20 flow [1] 62:15 focus [12] 4:19,22 6:17 11:1,3 24:14 35:12 38:9 42:2 68:6 70:14,15 focused [1] 26:15 focusing [1] 6:15 follow [3] 9:22 15:4 16:19</p>
--	---	--	--

Official - Subject to Final Review

<p>followed ^[1] 3:17 food ^[1] 56:19 force ^[2] 22:9 49:16 foremost ^[1] 6:10 Forget ^[1] 56:12 forth ^[2] 4:7 57:17 forward ^[1] 55:8 foster ^[1] 73:7 found ^[2] 3:20 7:24 frailty ^[1] 43:1 frame ^[1] 51:22 framed ^[1] 74:21 free ^[3] 8:24 19:4 71:22 friend ^[2] 40:13 51:21 friends ^[1] 12:11 front ^[1] 11:9 FTC ^[2] 20:20 56:21 fully ^[1] 70:12 function ^[1] 5:6 fundamental ^[1] 41:4 further ^[2] 27:12 36:25</p> <hr/> <p style="text-align: center;">G</p> <p>garnish ^[1] 22:24 gears ^[1] 11:1 GENERAL ^[4] 1:3,20 3:5 4:9 general's ^[1] 34:11 generally ^[1] 20:23 generate ^[1] 21:3 gets ^[2] 6:2 19:3 getting ^[7] 10:22 39:3,8 50:21 51:4 53:15 60:8 Ginsburg ^[8] 12:16,17 14:8 15:10 45:11,12,24 46:25 give ^[3] 9:15 49:3 59:12 given ^[5] 21:14 28:25 35:11 62:12 68:8 gives ^[1] 38:5 Gorsuch ^[13] 27:6,7 29:15 30:15,17 31:3 32:10 63:12,13 65:22 67:2,4,5 got ^[4] 8:17,17 56:10 65:23 governing ^[1] 56:21 government ^[36] 7:24 12:20,21 13:1,1,13,16 15:15 21:25 22:20,23 23:24 28:3 32:22 37:3 39:16 40:7,24 45:17,17,22 47:4 51:13 55:7,11,22 56:17 58:21 59:15 60:4,7,20 62:8,12 63:4 65:10 government's ^[6] 21:10 29:18 39:4 56:16 63:15 74:5 government-approved ^[2] 36:13,15 government-backed ^[12] 8:25 21:5 22:12,14 23:12 26:7,8 61:6,9 65:21 72:19 74:23 government-debt ^[19] 3:23 5:2 8:4,13 13:6 14:10 16:18 27:17 28:11 31:20 37:12 45:13 63:18,21,25 66:7 68:5,17,19 grant ^[1] 23:8 gravamen ^[2] 18:17 19:21 great ^[1] 11:6 greater ^[2] 11:19 22:24</p>	<p>ground ^[1] 21:13 groups ^[2] 14:11 62:23 guarantee ^[2] 30:21,25 guaranteed ^[1] 13:12 guess ^[10] 8:9 27:11 52:11 56:15 59:24 61:19,22,23 69:17 71:6 guideposts ^[1] 16:8</p> <hr/> <p style="text-align: center;">H</p> <p>hand ^[4] 24:2,5 53:4 63:5 handbills ^[1] 46:20 hands ^[1] 65:23 happen ^[1] 11:22 Happy ^[1] 49:10 harder ^[1] 62:20 hate ^[1] 37:18 head ^[1] 70:1 hear ^[1] 3:3 heard ^[1] 25:23 heart ^[1] 53:14 held ^[1] 33:13 help ^[2] 32:10 38:11 historical ^[4] 64:5,20 65:8,15 history ^[1] 37:5 hold ^[2] 7:8 55:22 holder ^[2] 59:15 74:23 holders ^[2] 60:20 62:1 holding ^[2] 6:7 20:2 holds ^[2] 10:11 29:8 home ^[11] 11:8,21,24 41:13 44:5,17 47:18,20,22 53:11,13 Honor ^[16] 35:23 39:1 41:3 46:9 47:9 49:20 51:12 53:3 54:7,20 57:13,18 58:6 59:17 62:16 71:20 Honors ^[1] 72:9 hope ^[1] 57:25 housekeeping ^[1] 31:22 human ^[1] 15:14 hypothesize ^[2] 24:15 68:25 hypothesized ^[1] 54:24 hypothetical ^[8] 24:11 26:11 50:13 52:11,12 59:13 60:13,15</p> <hr/> <p style="text-align: center;">I</p> <p>idea ^[1] 40:23 ideas ^[2] 62:9,10 identical ^[1] 74:1 illegal ^[5] 8:3,4 38:3 46:12 64:8 illustration ^[1] 24:13 immense ^[1] 34:24 impacted ^[1] 58:9 implicated ^[1] 70:4 implicates ^[1] 22:15 important ^[6] 4:4 8:10 43:8 62:19 64:21 69:10 importantly ^[1] 42:23 imposed ^[1] 26:4 impossible ^[2] 6:18 21:22 INC ^[1] 1:8 incentive ^[1] 14:11 incentives ^[2] 38:4 64:18 included ^[1] 66:7 includes ^[1] 4:15 including ^[1] 27:22</p>	<p>inclusion ^[1] 49:14 indicating ^[1] 14:20 indicator ^[1] 44:19 indicia ^[1] 9:24 indirectly ^[1] 70:4 indisputably ^[1] 64:15 individual ^[1] 11:4 individuals ^[2] 11:18 30:16 inevitably ^[1] 46:24 infirmity ^[5] 3:24 31:10,12 33:20 74:13 inflict ^[1] 64:25 inquiry ^[2] 39:2 41:7 instance ^[2] 13:10 19:14 insufficiency ^[1] 43:1 insufficiently ^[2] 5:6 50:21 integral ^[1] 11:17 intended ^[5] 5:5 20:4 34:10,17,22 intent ^[9] 8:20 9:24 41:7,20 44:19 49:2 51:9 52:10 66:16 interest ^[12] 4:4 11:3,6,19 21:10 22:15 39:21 40:6 41:14 45:8 48:4 65:11 interested ^[1] 48:23 interests ^[8] 36:16 37:14 39:5 47:23 48:1 64:16 68:9,11 interfere ^[1] 25:8 intermediate ^[4] 44:1,3 59:3 72:20 interpreted ^[1] 45:21 introduce ^[2] 3:24 69:12 introduced ^[3] 31:11 32:25 33:19 introduces ^[1] 42:18 intrude ^[1] 4:1 intrusion ^[2] 11:23 44:22 intrusions ^[1] 21:1 intrusive ^[4] 3:21 39:9,13 72:2 intuition ^[1] 64:3 intuitive ^[2] 63:14,23 invade ^[1] 50:7 invalid ^[4] 25:10 26:19 33:13,17 invalidate ^[1] 55:23 invalidated ^[1] 29:5 invalidation ^[3] 29:5 30:5,6 invalidity ^[2] 33:1 41:5 invasive ^[1] 47:5 invoke ^[2] 19:17,18 involved ^[2] 60:10 71:10 ire ^[1] 21:3 irony ^[1] 27:9 irrelevant ^[1] 51:10 isn't ^[7] 40:8 41:15 45:18 48:5 50:6 58:3 59:5 issue ^[8] 17:17 24:7 41:25 54:17 61:5,20,23 72:4 issues ^[1] 60:23 Item ^[1] 56:23 itself ^[7] 17:6 28:22 39:12 45:17,23 49:15 74:14</p> <hr/> <p style="text-align: center;">J</p> <p>judgment ^[6] 29:24 43:7 44:10,12,25 66:5 judicial ^[1] 23:10</p>	<p>July ^[1] 49:9 jump ^[1] 7:22 Justice ^[150] 1:21 3:3,13 5:17,20 7:17,21 8:16 9:5,7,9,10,11 10:25 12:14,16,17 14:8 15:7,8,8,9,10,21 17:13,15,15,16 18:21,23 20:9,11,12,14 23:14,16,17 25:11,14,19 27:4,6,7 29:15 30:15,17 31:3,14,16,17,18 32:3,6,10 33:6,9,21 34:3,8,16 35:4,8,24 36:4 38:8 40:9,12 41:18,21,22,23 42:19 43:9,11,19,22 45:9,11,12,24 46:25 48:14,17,18,18,18,21,21,22 51:7 52:18,20,21 53:19,22 54:8,11 56:2,4,5,10 57:8,11,19 58:2,11 59:5,6,6,7,8,8,9,12,22 60:14,19,25 61:19,22 63:10,12,12,13 65:22 66:25 67:2,3,4,5,7,7,9,10,14 68:14,24 69:2,16,18 70:18,20,22 71:14,17 72:10,16 74:20 75:10,11 justification ^[8] 25:1 43:2 47:11 51:24 55:5 56:16 64:22 69:14 justified ^[2] 50:21 65:3</p> <hr/> <p style="text-align: center;">K</p> <p>Kagan ^[16] 23:16,17 25:11,14,19 59:6,8,9,12,22 60:14,19,25 61:19,22 74:20 Kavanaugh ^[21] 31:16,17 32:3,6 33:6,9,21 34:3,8,16 67:8,9,14 68:14,24 69:2,16 70:18,20,22 71:14 keep ^[1] 7:25 key ^[3] 33:6,21 67:25 kind ^[18] 9:22 10:3 21:23 29:24 32:11 39:11,13,18 47:14 48:2 53:13,20 54:23 58:16 60:3,5 64:24 65:17 kinds ^[4] 15:17 37:18 47:25 58:14 knocking ^[1] 11:8</p> <hr/> <p style="text-align: center;">L</p> <p>lack ^[1] 69:14 lamps ^[1] 56:24 landline ^[3] 11:7,20 24:18 landlines ^[3] 12:3 73:22 74:11 last ^[5] 15:9 22:25 25:17 35:9 74:18 later ^[3] 18:14 69:8,8 Laughter ^[1] 56:9 law ^[31] 4:15 8:14 10:24 16:11 17:4,7 20:16 21:16 26:9 31:7,9,11,13 32:25 33:2,2,4,19 40:15,20 43:14 69:1,4,4 70:1,2,6,7 73:11 74:8 75:9 laws ^[17] 6:12 13:21 14:2 16:15 17:10 18:13 26:11,12 35:17,17 58:8 61:12 64:19 69:21 73:8 75:3,6 lawsuit ^[1] 70:3 leading ^[1] 27:10 leads ^[1] 15:10 least ^[11] 15:24 17:7 29:13 31:21 32:7 34:1 39:9,19 45:20 65:23 73:21 leave ^[2] 14:10 57:3 leaves ^[1] 15:5</p>
--	---	---	--

Official - Subject to Final Review

<p>legal [6] 10:7,17,20 13:17 19:22 46:12</p> <p>legislate [1] 55:25</p> <p>legislation [4] 34:19,20,22 62:13</p> <p>legislature [1] 39:17</p> <p>legislature's [1] 64:13</p> <p>legislatures [1] 17:11</p> <p>less [4] 4:1 11:12 29:22 47:5</p> <p>level [5] 30:22,22 53:7 67:23,24</p> <p>leveling [2] 32:8,9</p> <p>levels [2] 19:2,2</p> <p>liberating [1] 30:1</p> <p>Libertarians [1] 46:19</p> <p>liberty [1] 62:20</p> <p>life [2] 11:17 15:14</p> <p>light [1] 56:1</p> <p>likely [3] 8:22 9:24 16:11</p> <p>limit [2] 49:5 54:4</p> <p>limitation [1] 17:6</p> <p>limited [3] 3:25 14:3 17:4</p> <p>line [1] 46:13</p> <p>link [1] 32:14</p> <p>list [1] 70:16</p> <p>lists [1] 58:21</p> <p>little [3] 7:22 24:1 27:12</p> <p>loan [1] 12:22</p> <p>long [2] 38:17 60:15</p> <p>longer [2] 43:25 61:17</p> <p>look [18] 5:9 6:3 8:10 9:23 13:6 14:6 16:1 18:12 24:9 41:17 44:3,10 48:6,7 50:4 51:14,20 74:4</p> <p>looked [1] 73:11</p> <p>looking [6] 5:23 10:2 13:8 43:14 50:3 57:7</p> <p>lose [3] 14:13 70:23,25</p> <p>lot [2] 11:12 22:2</p> <p>lower [1] 3:17</p> <p>lowest [1] 49:5</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>made [19] 5:11 13:19,22 22:1,3,3,8 24:22 27:1 28:11,20 35:1 37:12 44:9,12,15 45:16 46:12 61:5</p> <p>main [1] 43:20</p> <p>majority [4] 7:16 16:23 35:21 57:23</p> <p>MALCOLM [5] 1:20 2:3,9 3:10 72:13</p> <p>manifestation [2] 49:1 51:8</p> <p>manner [4] 46:1,5,11,20</p> <p>many [4] 53:25 56:19 57:1 73:15</p> <p>marketing [1] 61:10</p> <p>marketplace [1] 62:10</p> <p>Martin [1] 71:25</p> <p>MARTINEZ [6] 1:23 2:6 36:1,2,4 38:8 39:1 40:10 41:2,19,24 42:15,20 43:10,13,20,24 45:19 46:8 47:9 48:15,22 49:20 51:11 52:21 53:2,20,22 54:7,10,20 57:13,24 58:5,13 59:10,11,17 60:12,24 61:21,23 62:16 64:4 66:12 67:11,13 68:7,21 69:3,25 70:19,21 71:5,15,18,20 72:17 73:14 74:20,20</p> <p>matter [8] 1:15 16:3 19:24 31:22</p>	<p>52:2 61:7,14 64:20</p> <p>matters [1] 44:6</p> <p>mean [13] 9:20 10:5 25:17,19 26:1 28:7 34:15 38:23 43:23 55:9 59:25 69:7 71:11</p> <p>meaningful [1] 7:13</p> <p>means [2] 32:23 66:21</p> <p>meant [1] 34:4</p> <p>members [1] 12:12</p> <p>mentioned [1] 52:3</p> <p>mere [1] 17:3</p> <p>merely [1] 69:12</p> <p>merits [5] 10:10 29:2,12,13 74:5</p> <p>message [7] 12:21,23,25 16:10 46:4,7 49:10</p> <p>messages [3] 35:21 36:11,15</p> <p>might [14] 12:11 22:8 26:24 27:23 30:15,16,18 40:5,5 47:15 61:8 63:19 71:15,23</p> <p>million [1] 37:15</p> <p>mind [1] 20:13</p> <p>minute [2] 35:5 71:19</p> <p>misunderstood [1] 60:13</p> <p>money [6] 43:5,7 45:5,6,7 53:24</p> <p>Morales-Santana [2] 18:8 19:15</p> <p>morning [1] 27:7</p> <p>most [17] 11:14,17,23 12:4 15:24 20:19 21:3 26:2 36:9 37:18 39:13,23 44:6 58:17,25 59:2 72:20</p> <p>mothers [1] 19:21</p> <p>moving [1] 38:18</p> <p>much [7] 17:14 34:9 41:11 50:7 53:21 62:6 74:10</p> <p>multitude [1] 6:25</p> <p>must [2] 37:23 66:24</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>namely [1] 19:3</p> <p>narrow [2] 4:1 50:2</p> <p>narrowly [2] 21:16 54:16</p> <p>narrowness [1] 49:25</p> <p>natural [2] 7:7 33:3</p> <p>nature [2] 66:18,19</p> <p>nearly [2] 11:6 32:19</p> <p>necessary [1] 50:11</p> <p>need [7] 14:6 15:12 17:19 41:17 52:4,9 64:17</p> <p>needed [1] 37:3</p> <p>neither [1] 30:9</p> <p>never [4] 16:3 68:16,18 69:1</p> <p>next [1] 3:4</p> <p>nobody [2] 14:1 40:21</p> <p>non-commercial [10] 37:1,6 41:12 44:7,13,21 48:11 73:16,24 74:15</p> <p>non-telemarketing [2] 44:13 48:11</p> <p>nonetheless [2] 47:24 50:16</p> <p>noon [1] 49:9</p> <p>normal [1] 57:7</p> <p>normally [1] 27:19</p> <p>note [1] 57:17</p> <p>noted [2] 24:12 27:9</p> <p>nothing [5] 8:3 13:13 15:19 22:25</p>	<p>55:19</p> <p>NPRM [1] 48:7</p> <p>nuanced [2] 49:22,23</p> <p>nuisance [1] 71:24</p> <p>Number [4] 42:17,23 52:3 58:22</p> <p>numbers [1] 34:24</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>object [1] 38:14</p> <p>objecting [2] 19:1,5</p> <p>objective [1] 28:16</p> <p>objectives [2] 25:7,9</p> <p>obligation [1] 47:7</p> <p>obvious [1] 40:18</p> <p>obviously [5] 11:12 18:22 25:19 34:25 53:3</p> <p>occasions [2] 11:13 12:10</p> <p>odd [1] 9:12</p> <p>offensive [1] 71:16</p> <p>offset [1] 22:21</p> <p>often [2] 10:5 13:4</p> <p>Okay [8] 8:16 12:22 32:6 34:8 56:12 57:23 58:2,2</p> <p>once [2] 38:13 57:10</p> <p>one [30] 4:8 5:20 7:1 8:19 10:15,20 16:9 24:2 26:24 28:23 29:22 31:7 32:18,22 40:4 42:8,17 45:24,25 49:8 50:5 52:24 53:9 55:2,12 57:3 63:8 66:13 68:24 69:20</p> <p>ones [1] 64:16</p> <p>only [13] 5:9 10:6 14:9 17:24 24:3,4,6,24 26:7 28:20 45:2 51:23 75:7</p> <p>open [2] 12:11 37:2</p> <p>opening [1] 55:17</p> <p>opposed [2] 29:24 42:14</p> <p>opposite [1] 39:23</p> <p>opt [1] 70:19</p> <p>options [1] 70:11</p> <p>oral [5] 1:15 2:2,5 3:10 36:2</p> <p>order [6] 20:3 37:4 44:11 48:9 61:2 70:12</p> <p>ordinary [1] 15:2</p> <p>organization [2] 12:24 13:2</p> <p>organizations [1] 36:6</p> <p>original [4] 34:21 47:11 64:22 65:25</p> <p>originally [3] 45:14,15 65:2</p> <p>other [23] 5:3,9 9:3 15:6 20:19 22:1,8,12 24:5 26:11,25 28:12 36:17,25 40:13 50:12 51:21 58:8 59:22 60:18 61:10 70:5 72:24</p> <p>others [2] 23:13 53:24</p> <p>otherwise [3] 22:3 33:3 41:1</p> <p>out [13] 6:2 42:8 47:6 56:11,13 57:3,11 62:23 63:5 67:23,23 70:21 73:3</p> <p>out-of-the-blue [2] 47:2,15</p> <p>outlaws [1] 36:25</p> <p>outset [1] 6:10</p> <p>over [5] 9:2 36:19 47:21 55:11,11</p> <p>overall [1] 25:6</p> <p>overbroad [1] 70:24</p> <p>overlooks [1] 73:18</p> <p>overwhelmingly [1] 65:6</p>	<p>owe [3] 12:21 13:1 21:9</p> <p>owed [5] 12:19 13:12 22:20 47:4 56:17</p> <p>own [2] 11:14 58:4</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p.m [2] 49:9 75:13</p> <p>PAGE [5] 2:2 24:15 48:9 61:2 74:4</p> <p>pages [3] 48:8,8 51:14</p> <p>paramount [1] 37:20</p> <p>part [11] 5:25 11:17 12:5 13:7 14:6 21:1 26:16 33:13 50:12 54:2 56:13</p> <p>particular [16] 13:10,19,25 14:5 16:11 17:4,5 26:13 30:13 47:12 49:25 50:1 55:5 60:3 73:3 74:2</p> <p>particularly [2] 3:21 42:5</p> <p>parties [1] 64:25</p> <p>party [7] 18:25 19:3,5,9,13,16 63:6</p> <p>passed [2] 69:1,6</p> <p>Pay [1] 13:1</p> <p>peek [2] 69:19,20</p> <p>people [18] 11:14,23,24 12:4 21:2 32:21 35:21 60:10 64:18 65:6 69:21 70:10,13 71:12,15,23 72:1 74:14</p> <p>perceived [1] 71:3</p> <p>percent [1] 47:21</p> <p>percentage [1] 25:4</p> <p>perfectly [4] 34:5 44:8 47:17,18</p> <p>performing [1] 5:5</p> <p>perhaps [2] 49:5 60:13</p> <p>permissible [1] 63:19</p> <p>permit [1] 54:5</p> <p>permitted [1] 66:6</p> <p>person [2] 11:7 45:20</p> <p>person's [2] 18:18,19</p> <p>perspective [1] 65:11</p> <p>persuade [3] 10:20 14:25 26:17</p> <p>persuaded [1] 10:19</p> <p>petition [2] 23:2 74:16</p> <p>Petitioners [6] 1:5,22 2:4,10 3:11 72:14</p> <p>philosophical [3] 15:11 64:5,6</p> <p>Philosophically [1] 64:17</p> <p>phone [12] 6:5 11:4,8,21 36:24 40:22 46:19 64:23 65:7 68:4 69:22 74:3</p> <p>phones [25] 3:8,16 11:12,15,25 12:1,5,7 36:11 37:12 41:13 44:4,17,23 47:21,22,22 49:7,7 53:11 64:24 65:10 73:23 74:12,16</p> <p>phrase [1] 68:17</p> <p>pick [2] 24:2 69:17</p> <p>pieces [2] 49:22 55:7</p> <p>place [6] 32:19 35:3 62:7,12 65:1 71:1</p> <p>placed [1] 26:6</p> <p>placement [1] 3:15</p> <p>plaintiff [7] 10:1,6,16,19 15:5 19:18,25</p> <p>plaintiff's [1] 27:20</p> <p>plaintiffs [7] 7:3,8 13:25 14:20 27:18,21 28:1</p>
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Official - Subject to Final Review

<p>plans ^[1] 65:5 please ^[3] 3:13 12:23 36:5 plenty ^[1] 70:11 point ^[11] 8:17,18 16:7 33:18,21 35:10 40:14 47:13 55:3 65:23 69:17 pointed ^[4] 21:18 22:13 67:22,23 pointing ^[1] 24:11 points ^[7] 5:21 32:11,14,16 41:3 54:20 57:14 police ^[1] 62:24 policy ^[1] 64:14 POLITICAL ^[19] 1:7 3:6 7:14 12:24 13:2 14:11 24:22 36:6,7,19,25 41:12 44:6,20 47:16 54:15 56:13 60:23 71:23 politics ^[1] 57:11 popular ^[6] 32:20 40:20 69:21 70:1 71:4,10 pose ^[1] 12:1 position ^[7] 27:14 48:25 52:8,8,22 66:17 72:24 poster ^[1] 70:2 potential ^[1] 22:10 potentially ^[2] 12:7,8 powers ^[1] 29:17 practical ^[5] 10:2,6,22 19:24 20:8 pre-recorded ^[1] 73:21 precedent ^[4] 17:21 18:3 67:15,21 precedents ^[1] 18:7 precisely ^[1] 22:3 predators ^[1] 22:22 predicated ^[1] 45:13 preeminence ^[1] 9:1 preface ^[1] 24:10 prefer ^[2] 22:17 66:9 preferred ^[4] 8:21,22 29:20 30:9 premise ^[2] 33:23,24 premised ^[1] 23:11 prerequisites ^[1] 26:22 preserve ^[1] 32:21 pretty ^[3] 40:16,18 51:8 prevailing ^[2] 10:7,17 prevalent ^[1] 11:12 prevent ^[1] 28:15 prevents ^[1] 5:4 primarily ^[1] 68:22 primary ^[2] 36:23 66:17 prime ^[1] 68:13 principal ^[1] 28:10 principle ^[1] 17:9 principles ^[6] 9:23 15:2,4 18:5 20:3 66:23 prior ^[1] 5:12 privacy ^[30] 4:2 11:4,5,18 12:2,8 25:6 27:3 28:15 36:16 37:5,9,14,19 39:9 41:14 43:6,8 44:5,14,22 45:5 47:23 48:1,4 50:7 53:17 68:11 69:6,7 privacy-based ^[1] 37:10 private ^[4] 21:6 22:22 23:1 56:18 probably ^[3] 50:2,8 53:6 problem ^[23] 5:15 29:11,12 34:21,23 38:12 40:17 41:4,24 42:1,4,5,8,</p>	<p>10,14 50:23 51:1,5,16,23 62:25 67:16,18 problematic ^[4] 7:24 22:25 39:20,24 problems ^[1] 70:6 process ^[1] 27:20 produce ^[1] 30:6 produced ^[1] 8:11 product ^[1] 61:10 prohibit ^[3] 46:2,3 64:12 prohibited ^[2] 66:2,10 prohibiting ^[1] 24:5 prohibits ^[1] 46:4 proof ^[1] 55:23 properly ^[3] 4:8 5:25 10:13 proposed ^[1] 29:18 proposition ^[2] 10:20,21 propositions ^[1] 10:18 prospect ^[1] 58:8 protect ^[9] 9:2 37:4 53:18 70:10,12 71:12,13,22 72:1 protected ^[4] 32:20 37:9 72:3,4 protecting ^[3] 4:4 22:16 27:2 protection ^[10] 5:5 18:9,25 21:13 25:6 28:15 30:12,19,20,23 protects ^[2] 44:15 62:19 prove ^[1] 54:13 provided ^[1] 45:3 provision ^[13] 3:18 6:6,16 26:19 27:17 33:12,15,17 47:12 49:13 50:14 54:5 72:25 provisions ^[1] 8:2 public ^[5] 8:14 31:7,9,11,13 purpose ^[3] 36:23 39:20 71:21 purposes ^[3] 8:21 33:16 42:24 pursue ^[1] 28:23 pursued ^[1] 28:21 pursues ^[1] 10:16 put ^[6] 7:4 55:8 56:25 57:3 62:6,11 putting ^[3] 21:4,14 54:1</p> <p style="text-align: center;">Q</p> <p>quality ^[1] 32:17 question ^[23] 7:23 8:19 10:9 11:2 15:1,11,13 17:21 19:15 23:21 26:17 28:14 29:3 30:11 40:14 48:24 49:23 54:19 56:12 59:24 67:22,25 68:6 questions ^[1] 10:8 quo ^[1] 64:1</p> <p style="text-align: center;">R</p> <p>raise ^[2] 21:13 62:7 raised ^[1] 55:3 raises ^[1] 5:14 range ^[1] 61:8 ranges ^[1] 61:14 Rappa ^[1] 52:9 rare ^[1] 11:13 rather ^[5] 5:24 51:25 67:18 73:4,12 rational ^[2] 44:23 55:25 rationale ^[2] 25:2 73:12 re-election ^[1] 24:19</p>	<p>re-enact ^[1] 65:19 re-jigger ^[1] 10:3 reach ^[1] 38:16 read ^[1] 10:13 real ^[3] 42:1 62:7 69:20 realize ^[1] 57:19 really ^[22] 5:23 8:23 10:21 11:18 17:18 26:20 27:3 28:13 37:19 39:3,7,25 40:8 41:15 42:10 44:20 46:1 48:5 50:6 53:17 54:25 73:18 reason ^[16] 10:3 12:10 23:3 37:10 44:23 47:3 48:16 50:8,19 57:4 59:21 64:5,6,6 65:1 70:3 reasonable ^[2] 16:2 57:8 reasons ^[3] 26:10 52:3 55:2 REBUTTAL ^[2] 8:72:12,13 receive ^[1] 65:7 receiving ^[1] 37:2 recipient ^[2] 5:12 23:7 recognize ^[3] 46:22 64:22 69:11 recognized ^[2] 47:25 71:25 record ^[1] 20:17 reduce ^[1] 49:4 Reed ^[12] 6:7,9,11,23,23 16:14 35:15,16 57:17,22 62:19 73:8 refer ^[2] 33:17 35:10 reference ^[1] 73:8 referred ^[1] 16:14 referring ^[1] 16:13 refund ^[1] 22:21 regarded ^[2] 38:18 47:5 regardless ^[1] 58:19 regime ^[1] 29:21 regulate ^[5] 13:19,21 17:11 73:4,13 regulated ^[1] 73:20 regulation ^[10] 15:15,22 16:24 17:23 56:25 57:12 59:19 60:3,5 73:3 regulations ^[6] 56:22,22 58:9,16,17 59:2 regulatory ^[1] 28:13 reimagine ^[1] 29:20 reinstate ^[1] 50:17 reject ^[3] 28:20 38:3 64:2 relationship ^[6] 6:1 13:15 59:23 60:16 62:14,15 relative ^[1] 21:23 relaxed ^[1] 74:25 relief ^[9] 27:17,20,22 28:4,5 29:5 38:6 54:23,25 remain ^[1] 49:16 remedial ^[1] 38:3 remedies ^[1] 70:16 remedy ^[15] 9:14,22 10:11,14 14:22 15:5 19:2 27:11 29:10,14,18 33:14 54:4,18 67:24 remember ^[1] 57:18 remind ^[2] 3:8 16:7 reminder ^[1] 47:7 render ^[1] 17:7 renders ^[2] 5:6 49:14 reply ^[3] 11:16 51:15 55:18 request ^[1] 27:20 require ^[1] 56:25</p>	<p>required ^[1] 66:16 requiring ^[1] 36:16 residential ^[11] 11:20 12:2,8 24:18 37:7 44:4 45:2 68:23 73:22 74:3,11 respect ^[17] 19:11 20:22,24 22:10 26:10 29:3,14 46:9 47:5,10 49:24 55:15 60:12,24 74:11,12,19 respective ^[1] 73:18 respectively ^[1] 74:3 Respondent ^[4] 4:20 9:15,17 35:11 Respondents ^[12] 1:9,24 2:7 4:22 5:13 6:17 7:12 24:15 26:14 28:10 29:4 36:3 Respondents' ^[6] 4:7 5:1 6:20 24:12 35:19 75:8 response ^[2] 18:24 48:20 responses ^[1] 14:19 responsibilities ^[1] 73:18 rest ^[2] 7:25 8:5 restrict ^[2] 26:12 42:3 restricting ^[1] 54:14 restriction ^[75] 3:15,19 4:10,15,25 5:4,10,16 6:16,19 8:12 14:24 16:20,21 19:6,10 23:23 24:3,4 25:2 26:4,16,24 29:6 30:6 31:8 32:1,18 35:12,14 37:4,22 40:8 41:5,16 42:1,5,9,13,21 43:2,17 46:2,6,10 48:3 50:1,9,16,17,20 51:3,6,17,17,25 52:5,17,24 54:2 55:1,16,23 57:16 66:21,24 68:3,3,12,16,20 71:1 72:8,18 73:17 restrictions ^[13] 7:6,15 9:1 14:1 26:6 35:3 46:21,23 52:22 53:5 58:14 62:18 70:25 result ^[9] 8:20 9:25 10:2,22 15:3 20:1,8 30:13 40:24 results ^[1] 74:9 return ^[1] 22:21 reveal ^[1] 69:14 revealed ^[1] 69:9 reveals ^[1] 42:25 revenue ^[2] 43:6 65:11 review ^[3] 23:10 73:2,10 reviewed ^[1] 72:25 revised ^[1] 66:9 rid ^[6] 40:19 50:22 51:4,4 52:4 63:24 rightly ^[1] 37:24 rights ^[3] 37:9 44:14 72:1 ring ^[1] 56:6 rings ^[1] 11:21 ROBERTS ^[37] 3:3 5:17,20 7:17,21 8:16 9:5,7 12:14 15:7 17:15 20:9 23:14 27:4 31:14 35:4,24 38:8 40:9,12 41:18,21 45:9 48:14,17,21 52:18 56:2 59:6,8 63:10 66:25 67:3,7 71:17 72:10 75:11 robo ^[1] 20:23 robo-call ^[1] 56:8 robo-calls ^[11] 20:23 34:13 35:2 40:21 52:23 53:6,13 54:1 66:1 68:4 69:22</p>
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Official - Subject to Final Review

<p>robot ^[1] 20:23 robust ^[1] 62:17 robustly ^[1] 74:10 role ^[1] 69:11 ROMAN ^[3] 1:23 2:6 36:2 Ross ^[1] 18:8 rubber ^[1] 55:20 rule ^[2] 18:11,16 ruled ^[1] 29:1 rules ^[2] 15:19 60:2</p>	<p>17:17,22 18:5 19:7 20:1,3 26:17 30:11 32:8,12,15 33:8,11,23 41:6, 17 47:1 48:23 50:10 63:15 66:15, 23 67:12,15 75:8 severance ^[7] 7:22 14:9,17 15:2 27:15 30:13 40:13 severed ^[2] 18:10 52:14 severely ^[1] 4:2 shall ^[2] 49:16,16 shift ^[1] 11:1 shoes ^[1] 64:13 shouldn't ^[4] 8:8 54:4,18 64:16 show ^[5] 20:25 21:16 26:22 41:14 43:16 showing ^[1] 21:22 shown ^[1] 21:5 shows ^[3] 41:11 45:4 48:4 side ^[5] 18:3 20:19 40:13 51:21 72: 25 sign ^[3] 6:24 7:5 40:5 significantly ^[1] 25:8 signs ^[4] 6:24 7:2,3,11 simple ^[1] 49:10 simply ^[11] 4:13 10:14 16:24 29:25 32:21 40:24 47:6 54:5 58:25 75:1, 2 single ^[5] 15:16 24:22 55:15,16,17 situation ^[10] 6:22 8:7 10:23 19:8 39:16 49:19 51:10 52:13 61:2 66: 9 situations ^[2] 21:8 56:19 skeptically ^[2] 73:1,11 sky's ^[1] 58:23 slightly ^[1] 59:14 small ^[8] 16:24 20:18,22 21:1 22:6, 7 25:4 66:13 smallness ^[1] 21:23 so-called ^[1] 17:17 social ^[2] 12:10 22:22 solicitations ^[1] 72:3 Solicitor ^[1] 1:20 solve ^[5] 40:19 42:3,4 50:22 51:5 someone ^[2] 9:18 11:8 sometimes ^[1] 10:9 somewhat ^[1] 15:11 sorry ^[5] 30:18 48:9 56:6 67:3 70: 22 sort ^[4] 42:7 51:21 58:9,15 Sotomayor ^[8] 20:11,12 52:20,21 53:19,22 54:8,11 sought ^[4] 13:11 27:18 28:23 29:4 space ^[1] 16:15 speakers ^[1] 36:13 special ^[1] 62:23 specialized ^[1] 63:5 specially ^[1] 56:18 specific ^[2] 41:8 52:10 specifically ^[1] 18:3 speech ^[6] 6:13 9:16,17 15:15,16 16:16,22,23,25 17:3,4,24 18:18,20 19:4,6 24:5 27:10 29:21 30:2,25 35:17,19 36:7,19,20 37:21 38:2,5, 15,22 39:10,12,13,19,23 40:7 41: 12 53:1 54:15 58:15,18 59:2 62:</p>	<p>18,21 64:8,10,12 67:17 71:10,12, 13,23,24 72:8,18,21 73:3,7,9,12 spheres ^[1] 17:12 squarely ^[1] 40:2 stage ^[1] 14:17 stamp ^[1] 55:20 standing ^[5] 28:2,5 29:3,7,11 standpoint ^[2] 30:8 39:21 stare ^[1] 57:25 start ^[2] 42:16 57:5 started ^[3] 3:7 23:19 56:6 state ^[2] 8:12 17:10 statement ^[2] 6:11 15:10 STATES ^[3] 1:1,17 34:11 states' ^[1] 69:18 statistics ^[1] 20:21 status ^[1] 64:1 statute ^[42] 5:9 6:17 8:1,6,6,8 10: 13 11:11 24:8,16 25:11,14,15,17, 22 27:1 28:15 41:9 43:25 45:14, 15,22 46:17 49:12,15,15,19 50:14 51:2,16,24 53:4,20 54:12 55:9 59: 13 63:17 65:19,25 66:9,20 74:13 statute's ^[2] 36:12 37:5 statutes ^[5] 13:18 15:16 58:22,24 59:1 statutory ^[5] 3:25 5:3,9 23:5 28:13 step ^[1] 38:24 stepping ^[1] 64:13 steps ^[1] 38:11 STEWART ^[51] 1:20 2:3,9 3:9,10, 12 5:17,19 6:8 7:19 8:9,18 9:6,12, 20 11:10 13:3 14:18 16:5 17:16 18:2,22 19:11 21:20 23:18 24:10 25:12,16 26:1 28:7 30:3,16 31:2,5, 19,25 32:4,13 33:7,10 34:1,7,15, 18 35:6,7 55:3 68:1 72:12,13,15 Stewart's ^[1] 67:23 stick ^[1] 57:21 still ^[6] 6:3 12:1 43:16 52:2,4 71:1 stop ^[3] 30:17,18 47:2 straightened ^[1] 56:11 stricken ^[1] 49:17 strict ^[25] 5:21 11:2 17:8,8 21:15 26:9 31:23 32:4 42:22 46:23 54:3 55:10,13,14,19 56:15,15 57:5,10, 15 58:18 59:16,21 62:6,11 strike ^[4] 14:9,23 54:25 72:7 striking ^[6] 27:16 32:18 33:14 54: 5,12 75:9 strong ^[5] 32:11 40:8,14 48:5 65: 10 strongest ^[2] 32:14,16 strongly ^[1] 68:10 struck ^[6] 18:11 26:19 33:4 36:21 37:23 66:24 student ^[1] 12:21 sub-category ^[2] 57:2,4 subject ^[13] 4:15 7:14 13:24 17:8 55:10 58:18 60:17 61:7,14 72:20, 22 73:1 74:25 submitted ^[2] 75:12,14 substance ^[1] 30:22 substantive ^[1] 55:18</p>	<p>subvert ^[1] 36:15 succinct ^[1] 16:6 sufficient ^[1] 17:6 sufficiently ^[1] 25:7 suggest ^[1] 9:13 sum ^[1] 66:11 sums ^[1] 66:12 supporters ^[1] 70:8 suppose ^[5] 29:19 30:19 31:1 49: 6 59:13 supposedly ^[1] 36:16 suppressed ^[3] 29:21,22 30:2 suppression ^[2] 27:10 62:9 SUPREME ^[2] 1:1,16 surely ^[2] 24:23 25:9 survive ^[2] 54:3 57:6 suspect ^[1] 14:2 sweeps ^[1] 36:25 Switching ^[1] 14:8</p>
S			
<p>sake ^[1] 17:20 sale ^[1] 13:23 same ^[21] 7:15 12:1 16:23 25:25 26:3,5,10 30:11 35:20 36:12,14, 16 37:11 38:20,24 44:6 60:5,9 61: 25 62:22 73:11 satisfied ^[1] 60:16 satisfies ^[1] 57:15 satisfy ^[4] 30:23 31:23 32:2 53:7 satisfying ^[1] 55:12 save ^[1] 40:24 saying ^[3] 43:4 61:11,24 says ^[6] 20:19 22:19 33:11 37:3 49: 13 58:22 scale ^[1] 70:24 scams ^[1] 53:25 scheme ^[4] 3:25 5:3 28:13 36:18 schemes ^[1] 53:24 scope ^[1] 42:21 scrutiny ^[29] 5:21 11:2 17:8 21:15 26:9 31:24 32:4 42:22 44:2,3 46: 23 53:8 54:3 55:10,13,14,20 56: 15 57:6,10,15 58:19 59:4,16,21 62:6,11 72:21 74:25 SEC ^[2] 15:18 56:21 second ^[13] 8:17,18 10:21 16:13 22:10 30:10 31:8 32:14,24 65:23 66:4,8 73:14 securities ^[3] 13:23 14:4 26:11 Security ^[1] 22:22 see ^[7] 6:2 12:18 16:2 20:17 34:11 65:22 74:5 seek ^[3] 10:14 28:4 29:7 seeking ^[1] 20:8 seem ^[7] 9:12,14,15 11:3,5 27:1 51:7 seemingly ^[1] 28:1 seems ^[4] 8:23 9:17 40:18 69:23 selling ^[1] 56:21 sense ^[4] 7:13 25:20 69:23,24 sensitive ^[1] 64:14 sentence ^[3] 55:15,17,18 separate ^[2] 8:14 10:17 separation ^[1] 29:17 sequence ^[6] 8:11 18:12 31:6 32: 24 33:18 63:24 serious ^[1] 27:2 serve ^[1] 4:3 set ^[2] 16:8 57:17 settled ^[1] 59:4 sever ^[5] 7:25 8:2 9:13 42:5 50:16 severability ^[28] 8:19 9:23 10:4</p>	<p>17:17,22 18:5 19:7 20:1,3 26:17 30:11 32:8,12,15 33:8,11,23 41:6, 17 47:1 48:23 50:10 63:15 66:15, 23 67:12,15 75:8 severance ^[7] 7:22 14:9,17 15:2 27:15 30:13 40:13 severed ^[2] 18:10 52:14 severely ^[1] 4:2 shall ^[2] 49:16,16 shift ^[1] 11:1 shoes ^[1] 64:13 shouldn't ^[4] 8:8 54:4,18 64:16 show ^[5] 20:25 21:16 26:22 41:14 43:16 showing ^[1] 21:22 shown ^[1] 21:5 shows ^[3] 41:11 45:4 48:4 side ^[5] 18:3 20:19 40:13 51:21 72: 25 sign ^[3] 6:24 7:5 40:5 significantly ^[1] 25:8 signs ^[4] 6:24 7:2,3,11 simple ^[1] 49:10 simply ^[11] 4:13 10:14 16:24 29:25 32:21 40:24 47:6 54:5 58:25 75:1, 2 single ^[5] 15:16 24:22 55:15,16,17 situation ^[10] 6:22 8:7 10:23 19:8 39:16 49:19 51:10 52:13 61:2 66: 9 situations ^[2] 21:8 56:19 skeptically ^[2] 73:1,11 sky's ^[1] 58:23 slightly ^[1] 59:14 small ^[8] 16:24 20:18,22 21:1 22:6, 7 25:4 66:13 smallness ^[1] 21:23 so-called ^[1] 17:17 social ^[2] 12:10 22:22 solicitations ^[1] 72:3 Solicitor ^[1] 1:20 solve ^[5] 40:19 42:3,4 50:22 51:5 someone ^[2] 9:18 11:8 sometimes ^[1] 10:9 somewhat ^[1] 15:11 sorry ^[5] 30:18 48:9 56:6 67:3 70: 22 sort ^[4] 42:7 51:21 58:9,15 Sotomayor ^[8] 20:11,12 52:20,21 53:19,22 54:8,11 sought ^[4] 13:11 27:18 28:23 29:4 space ^[1] 16:15 speakers ^[1] 36:13 special ^[1] 62:23 specialized ^[1] 63:5 specially ^[1] 56:18 specific ^[2] 41:8 52:10 specifically ^[1] 18:3 speech ^[6] 6:13 9:16,17 15:15,16 16:16,22,23,25 17:3,4,24 18:18,20 19:4,6 24:5 27:10 29:21 30:2,25 35:17,19 36:7,19,20 37:21 38:2,5, 15,22 39:10,12,13,19,23 40:7 41: 12 53:1 54:15 58:15,18 59:2 62:</p>	<p>18,21 64:8,10,12 67:17 71:10,12, 13,23,24 72:8,18,21 73:3,7,9,12 spheres ^[1] 17:12 squarely ^[1] 40:2 stage ^[1] 14:17 stamp ^[1] 55:20 standing ^[5] 28:2,5 29:3,7,11 standpoint ^[2] 30:8 39:21 stare ^[1] 57:25 start ^[2] 42:16 57:5 started ^[3] 3:7 23:19 56:6 state ^[2] 8:12 17:10 statement ^[2] 6:11 15:10 STATES ^[3] 1:1,17 34:11 states' ^[1] 69:18 statistics ^[1] 20:21 status ^[1] 64:1 statute ^[42] 5:9 6:17 8:1,6,6,8 10: 13 11:11 24:8,16 25:11,14,15,17, 22 27:1 28:15 41:9 43:25 45:14, 15,22 46:17 49:12,15,15,19 50:14 51:2,16,24 53:4,20 54:12 55:9 59: 13 63:17 65:19,25 66:9,20 74:13 statute's ^[2] 36:12 37:5 statutes ^[5] 13:18 15:16 58:22,24 59:1 statutory ^[5] 3:25 5:3,9 23:5 28:13 step ^[1] 38:24 stepping ^[1] 64:13 steps ^[1] 38:11 STEWART ^[51] 1:20 2:3,9 3:9,10, 12 5:17,19 6:8 7:19 8:9,18 9:6,12, 20 11:10 13:3 14:18 16:5 17:16 18:2,22 19:11 21:20 23:18 24:10 25:12,16 26:1 28:7 30:3,16 31:2,5, 19,25 32:4,13 33:7,10 34:1,7,15, 18 35:6,7 55:3 68:1 72:12,13,15 Stewart's ^[1] 67:23 stick ^[1] 57:21 still ^[6] 6:3 12:1 43:16 52:2,4 71:1 stop ^[3] 30:17,18 47:2 straightened ^[1] 56:11 stricken ^[1] 49:17 strict ^[25] 5:21 11:2 17:8,8 21:15 26:9 31:23 32:4 42:22 46:23 54:3 55:10,13,14,19 56:15,15 57:5,10, 15 58:18 59:16,21 62:6,11 strike ^[4] 14:9,23 54:25 72:7 striking ^[6] 27:16 32:18 33:14 54: 5,12 75:9 strong ^[5] 32:11 40:8,14 48:5 65: 10 strongest ^[2] 32:14,16 strongly ^[1] 68:10 struck ^[6] 18:11 26:19 33:4 36:21 37:23 66:24 student ^[1] 12:21 sub-category ^[2] 57:2,4 subject ^[13] 4:15 7:14 13:24 17:8 55:10 58:18 60:17 61:7,14 72:20, 22 73:1 74:25 submitted ^[2] 75:12,14 substance ^[1] 30:22 substantive ^[1] 55:18</p>	<p>tail ^[1] 8:23 tail-wagging-the-dog ^[1] 32:17 tailored ^[2] 21:16 54:16 tangled ^[1] 58:15 target ^[5] 6:13 16:15,22 35:17 73:8 targeted ^[4] 7:9,13 23:11 35:19 targets ^[1] 6:19 task ^[1] 9:21 tax ^[2] 22:21,21 taxpayers ^[1] 56:17 TCPA ^[10] 22:4,9 30:7 33:13 34:21 36:8 37:9 44:15 48:12 53:14 TCPA's ^[3] 3:14 35:2 36:23 technical ^[3] 34:20 61:20,23 technologies ^[2] 3:20 36:14 technology ^[1] 46:5 telemarketing ^[3] 36:24 53:12 70: 14 telephone ^[1] 56:6 temporal ^[5] 8:11 18:12 31:6 32: 24 33:18 temporary ^[1] 7:1 term ^[2] 27:22 35:15 terms ^[3] 25:1 74:21,22 test ^[3] 16:6 57:15 62:17 text ^[1] 36:10 textual ^[1] 69:13 Thanks ^[1] 59:7 theory ^[2] 5:1 42:24 There's ^[20] 4:6,11,13 8:3 19:15 22:24 23:3 27:14 37:10 44:23 48: 15 51:19 52:1,7,25 53:25 64:4,5 65:14 70:5 therefore ^[3] 23:4 28:23 42:21 thinking ^[1] 58:4 thinks ^[1] 14:1 third ^[5] 15:22 16:1 17:1 52:8 57:9 Thomas ^[10] 9:9,10 10:25 41:22, 23 42:19 43:9,11,19,22 thoroughly ^[1] 33:25 though ^[9] 14:4 15:4 20:5 27:1 38: 6 45:6 50:13 64:21 74:1 threat ^[1] 12:1</p>
T			

Official - Subject to Final Review

<p>three ^[2] 21:20 30:3 thwart ^[1] 51:8 tick ^[1] 32:11 tiny ^[2] 49:8 50:5 today ^[2] 40:17 43:14 today's ^[1] 65:4 together ^[2] 32:7 65:14 took ^[3] 52:9 72:17 75:8 tools ^[2] 36:9 71:8 topics ^[1] 61:15 total ^[1] 49:6 totality ^[1] 50:3 touched ^[1] 20:14 town ^[1] 6:23 trade ^[2] 43:5 45:5 tradeoffs ^[1] 64:14 transformed ^[1] 61:15 transmit ^[1] 35:22 tread ^[1] 48:1 treat ^[7] 8:24 23:3 25:24 26:2,3 44:23 56:18 treated ^[2] 18:19 35:20 treating ^[1] 37:11 treatment ^[10] 19:1,4,20,23 20:7 41:12 45:2 52:1 68:22 72:23 treatments ^[1] 6:25 treats ^[1] 16:22 tried ^[2] 29:1 51:22 tries ^[1] 49:4 trigger ^[2] 46:23 59:3 triggers ^[1] 42:21 trillion ^[1] 37:17 true ^[7] 9:21 13:4 45:18,19 48:13 50:10 58:25 Trump ^[2] 24:19,20 try ^[2] 49:21 59:3 trying ^[11] 39:9,17,17 53:18 55:19 58:3,4 60:1 61:25 62:13 75:6 turn ^[5] 3:8 55:19 59:19,23 63:14 turns ^[3] 46:14 63:6 66:16 two ^[19] 4:13 8:9 10:7,17 21:20 30:3 32:7,13,16 41:2,3 42:16,23 47:13 49:21 54:20 60:8 61:24 68:13 type ^[1] 64:9 types ^[4] 44:6 46:11 52:25 54:6 typical ^[1] 4:3</p> <hr/> <p style="text-align: center;">U</p> <p>ubiquitous ^[1] 11:16 ultimate ^[1] 8:19 unconstitutional ^[13] 17:24 38:5 41:8 49:15 50:9 52:17,23,25 58:24 64:19 68:12,20 72:8 under ^[11] 5:7,22 21:15 54:3 59:4 63:20 66:22,22 70:16 73:3 74:8 underlying ^[16] 4:25 5:16 18:11 33:24 34:2,5 42:25 43:1 52:16 67:19 68:2,3,16,19 69:14 73:24 undermine ^[1] 39:7 undermines ^[1] 39:4 undermining ^[1] 48:12 underscored ^[1] 33:22 understand ^[4] 17:18 27:13 50:14 67:16</p>	<p>understandably ^[1] 26:14 understanding ^[2] 66:23 73:6 understood ^[1] 35:15 undertaken ^[1] 72:19 undertook ^[1] 47:8 unequal ^[1] 19:1 UNITED ^[2] 1:1,16 unjustified ^[3] 37:22 43:17 51:3 unlimited ^[1] 37:16 unnoticed ^[1] 34:19 unpopular ^[1] 41:1 unsuccessful ^[1] 14:16 unusual ^[2] 10:23 22:17 unwanted ^[3] 11:25 12:2 70:13 unwed ^[2] 19:20,20 up ^[14] 7:4 16:8 19:2 30:22 32:8 35:5 58:15 63:6 65:13 66:11,13 67:23 69:17 71:19 upheld ^[2] 3:17 5:7 uphold ^[1] 16:3 using ^[6] 36:9 46:4,19,19,20 73:21 usual ^[1] 73:6</p> <hr/> <p style="text-align: center;">V</p> <p>valid ^[2] 26:22 28:21 validating ^[1] 21:18 vast ^[7] 7:15,16 16:23 17:10 32:21 34:24 35:21 version ^[1] 30:7 versus ^[1] 3:5 vested ^[1] 73:25 victory ^[1] 10:6 view ^[3] 15:25 37:13 70:24 viewed ^[2] 4:8 5:25 viewpoint-based ^[3] 17:25 24:25 25:21 violate ^[1] 24:23 violates ^[1] 36:20 violation ^[5] 10:13 14:23 20:6 29:10 30:1 violations ^[1] 38:2 virtually ^[1] 11:23 voice ^[2] 73:21,22 vulnerable ^[1] 8:6</p> <hr/> <p style="text-align: center;">W</p> <p>wages ^[1] 22:24 wagging ^[1] 8:23 wanted ^[12] 7:3 10:23 19:16,17,18,25 27:11,23,23 31:22 47:1 65:19 wants ^[5] 19:3,9,13 40:21 44:7 warrant ^[1] 48:2 Washington ^[3] 1:12,21,23 way ^[25] 4:11,11 16:4 23:20 24:2 25:25 26:3 27:14 28:8,9 31:1 35:20 40:18 51:19,22 53:10 55:25 57:7 59:14 62:5,24 67:15,21 68:18 71:7 ways ^[3] 4:14 60:8 61:24 weaker ^[1] 43:15 Wednesday ^[1] 1:13 welcome ^[1] 54:23 well-heeled ^[1] 63:6 whatever ^[5] 12:10,22 17:2 57:1</p>	<p>63:6 whatsoever ^[1] 60:17 whenever ^[1] 17:3 whereas ^[1] 19:4 Whereupon ^[1] 75:13 whether ^[19] 4:7 6:5 9:1 13:5,10 14:4 16:10 18:5,10,13 19:1 23:25 28:21 35:14 39:3 48:24 57:21 58:19 66:8 who's ^[1] 9:18 whole ^[8] 8:6,8 14:24 21:24 32:18 49:19 70:5 75:9 will ^[11] 8:24 11:24 12:1 14:10,16 56:22,22 57:6,18,22 71:1 WILLIAM ^[2] 1:3 3:4 Williams-Yulee ^[6] 38:10,17 39:2,15 40:1,3 willing ^[2] 43:5 45:5 win ^[3] 21:18 58:25 70:10 within ^[3] 40:2 56:23,24 without ^[7] 15:5 19:10 34:4,4 48:12 67:19 68:4 won ^[1] 38:6 wonder ^[2] 8:7 48:24 wondering ^[2] 23:25 57:20 words ^[2] 59:23 60:18 work ^[2] 12:9 30:20 works ^[1] 53:10 world ^[3] 22:2 65:4 69:20 worried ^[2] 44:20,21 worries ^[1] 56:14 worry ^[1] 70:9 wrap ^[3] 35:5 65:13 71:19 write ^[1] 62:4 written ^[1] 59:13 wrongly ^[1] 30:2</p> <hr/> <p style="text-align: center;">Y</p> <p>years ^[5] 3:16 32:19 40:15 45:25 71:2</p>
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