No. 19-631

In the Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL;
FEDERAL COMMUNICATIONS COMMISSION,
PETITIONERS,
v.
AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS,
INC., ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF PORTFOLIO RECOVERY ASSOCIATES, LLC, AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the government-debt exception to the TCPA's automated-call restriction violates the First Amendment, and whether the proper remedy for any constitutional violation is to sever the exception from the remainder of the statute.

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INTEREST OF *AMICUS CURIAE*[1]

Portfolio Recovery Associates, LLC ("PRA") is one of the nation's largest private-debt buyers. Portfolio Recovery Associates, LLC, *Frequently Asked Questions*.[2] PRA purchases delinquent private debt from banks, credit-card companies, and other financial institutions, and then attempts to collect that private debt from defaulted debtors. *See id.* PRA operates with "the highest levels of compliance with the laws and regulations that govern [this] industry," including the Fair Debt Collection Practices Act. *Id.* PRA does not engage in telemarketing or the other practices that Congress designed the Telephone Consumer Protection Act ("TCPA") to stop. Yet, PRA has been subject to lawsuits under the TCPA for using ordinary debt-collection techniques, such as placing telephone calls with dialing systems intended to call *only* those who owe PRA defaulted debt. *See, e.g.*, *Lamkin v. Portfolio Recovery Assocs., LLC*, No. 19-16947 (9th Cir. *in briefing*).

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[1] Under Rule 37.6, PRA affirms that no counsel for a party authored this brief in whole or in part, and no person other than PRA or its counsel made a monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

[2] Available at https://www.portfoliorecovery.com/prapay/help/faqs (all websites last accessed Mar. 30, 2020).

SUMMARY OF ARGUMENT

In enacting the TCPA, Congress sought to achieve the laudable goal of stopping the types of uncontrolled telemarketing and scam calls that plague Americans. Unfortunately, plaintiffs and courts have applied the TCPA well beyond these core congressional purposes and, in doing so, have created an unconstitutional morass.

The TCPA's application beyond the telemarketing and scam calls for which it was intended violates the First Amendment in at least three respects. As a threshold matter, and most directly relevant here, the TCPA unconstitutionally discriminates based on the content of speech by prohibiting private and state/local debt speech, while allowing materially indistinguishable federal-government-debt speech. Second, as interpreted by the Ninth Circuit, the TCPA's definition of an "automatic telephone dialing system" ("ATDS") includes virtually every smartphone in America, which renders unlawful many ordinary communications far outside of the TCPA's core, including private and state/local debt collection calls using smartphones. Third, the TCPA includes an open-ended delegation of authority to the Federal Communications Commission ("FCC"), enabling the FCC to privilege other speech outside of federal-government-debt speech.

The proper remedial solution to the TCPA's unconstitutionality problems is to invalidate the

TCPA to the extent that its prohibitions apply beyond telemarketing and scam speech, such as its attempts to ban private-debt-collection and political speech. The severability analysis is focused on congressional intent, and all agree that Congress' core goal in enacting and amending the TCPA was to prohibit unrestricted telemarketing and scam speech. PRA's proposed remedial approach would fully advance that core goal, while also respecting *all* of the concerns that both the Government and Respondents raise in their briefs. Such a remedy would also resolve the TCPA's numerous First Amendment difficulties, meaning that it is the best approach to resolving this case and saving the statute's core.

ARGUMENT

I. To The Extent That The TPCA Sweeps Beyond Congress' Laudable Goal Of Stopping Telemarketing And Scam Calls, It Creates An Unconstitutional Morass

When it enacted the TCPA, Congress' core goal was to eliminate "intrusive, nuisance calls" from "telemarketers," Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(6), 105 Stat. 2394, 2394 (1991); *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 371–73 (2012), as well as "over-the-phone scam artists" and "foreign fraudsters," *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8072–73 (2015) ("*2015 TCPA Order*") (Pai, Comm'r, dissenting). These

"telemarketing methods" are "nuisance[s]" and "unacceptably intrusive" practices that invade the privacy of the home, H.R. Rep. No. 101-633 (1990); *see* S. Rep. No. 102-178, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969, unlike other "commercial calls," *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8773 ¶ 40 (1992) ("*1992 TCPA Order*"). As the Government itself points out in its brief before this Court, "[m]ost" of the TCPA's "numerous congressional findings concerning the abuses at which the statute was directed" appropriately "refer specifically to the activities of telemarketers." Pet'rs Br. 4. For example, Congress found that the "use of the telephone to market goods and services to the home . . . is now pervasive," Pub. L. No. 102-243, § 2(1), which "outrage[s]" many consumers, *id.* § 2(6). "Unrestricted telemarketing" is also "a risk to public safety," since a telemarketer could "seize[ ]" an "emergency or medical assistance telephone line" and block critical calls. *Id.* § 2(5). Indeed, the TCPA was necessary because, as its sponsor explained, "[t]he *telemarketing industry* appears oblivious to the harm it is creating." 137 Cong. Rec. S16204-01 (1991) (statement of Senator Fritz Hollings) (emphasis added).

As explained below, the TCPA contains at least three grave constitutional problems, all of which arise from efforts to apply its prohibitions beyond Congress' core, laudable goal of stopping unrestricted telemarketing and scam calls.

A. The TCPA Unconstitutionally Favors Speech About Federal-Government Debt Over Speech About Other Debt

The TCPA makes it "unlawful" to make any "call . . . using any automatic telephone dialing system or an artificial or prerecorded voice" if, as relevant here, that call is placed "to any telephone number assigned to a . . . cellular telephone service . . . *unless such call is made solely to collect a debt owed to or guaranteed by the United States*." 47 U.S.C. § 227(b)(1) (emphasis added).[3] This is an impermissible content-based regulation of speech because it privileges speech about federal-government debt over other speech, Resp'ts Br. 16–25, including materially identical speech about private and state/local debt of the type that companies like PRA engage in. Given that the Government is unable to offer any serious justification for privileging speech about federal-government debt over speech regarding private and state/local debt—focusing, instead, on the distinction between federal-government-debt speech and telemarketing speech—the TCPA is unconstitutional regardless of whether this Court applies strict scrutiny under *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), as Respondents correctly argue, Resp'ts Br. 16, 25, or intermediate scrutiny under *Ward v.*

[3] The FCC interprets "call" to include a text message. *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14115 ¶ 165 (2003); *accord Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016).

Rock Against Racism, 491 U.S. 781 (1989), as the Government urges, Pet'rs Br. 24.

The Government and *amicus* Student Loan Servicing Alliance ("SLSA") seek to defend the TCPA by distinguishing federal-government-debt calls, on the one hand, from unrestricted telemarketing and scam calls, on the other hand. But these arguments only underscore that the TCPA is unconstitutional under any possible standard of constitutional review because the TCPA impermissibly discriminates against speech about private and state/local debt.

The Government and SLSA claim that the TCPA's favoritism toward federal-government-debt speech is constitutional because recipients of such speech "have a significantly reduced expectation of privacy," as compared to those who receive random telemarketing or scam calls. Pet'rs Br. 27–28; SLSA *Amicus* Br. 4–5, 9. They reason that if a person who has incurred a debt allows it to "go unpaid," that person "can reasonably expect to receive a call" from the creditor. Pet'rs Br. 28; *accord* SLSA *Amicus* Br. 4–5, 9. But, of course, this rationale applies equally to debt-collection calls in general, regardless of whether those calls are about federal-government debt or private and state/local debt. Pet'rs Br. 28 n.5. As the Government is forced to concede, "calls to collect purely private delinquent debts *likewise* intrude less severely on recipients' reasonable expectations of privacy than do calls from telemarketers." *Id.* (emphasis added). That is, private debtors should

"reasonably expect to receive a call" from a creditor if they assume a debt and let it go unpaid. *Id.* at 28.

The Government and SLSA also argue that the TCPA is constitutional because of the potential benefits to both debtors and creditors from federal-government-debt collection calls, as compared to telemarketing calls that "come out of the blue." *Id.*; SLSA *Amicus* Br. 11–14. Contacting a debtor by telephone allows the creditor to collect outstanding debt "as quickly and efficiently as possible." Pet'rs Br. 32 (citation omitted); SLSA *Amicus* Br. 9–10. Such calls also benefit the debtor by helping to avoid delinquency or default, which could lead to more financial strain on the debtor. *See* SLSA *Amicus* Br. 2, 9–12. These rationales similarly apply to private-debt and state/local debt calls for the same reasons. Those debt collection calls are "beneficial" to debtors "by making them aware of the [debt collector's] inquiry," which allows debtors to avoid delinquency or default. *In the Matter of the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 2736, 2738 ¶ 15 (1992); *compare In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 31 FCC Rcd. 9074, 9075 (2016). "[O]n an annual basis" the TCPA imposes $2.26 billion in extra default costs on private debtors. *2015 TCPA Order* at 8085 (O'Reilly, Comm'r, dissenting in part and approving in part). And, like federal-government-debt collectors, private-debt collectors have every incentive to "commit[ ] to working together" with the debtor "to resolve" the debt, which is usually only possible after

conversations with debtors, including to inform debtors both of their default and of their options to come into contractual compliance. Portfolio Recovery Associates, LLC, *You May Have Debt, But You Also Have Options*;[4] *compare* SLSA *Amicus* Br. 14.

Finally, the Government attempts to distinguish federal-government-debt calls from private-debt calls, in a short footnote, on the ground that deciding to "protect[ ] the federal fisc" is "reasonable." Pet'rs Br. 28 n.5; *accord* SLSA *Amicus* Br. 16–23. But this rationale does not even satisfy the intermediate-scrutiny standard that the Government argues applies—"narrowly tailored to serve a significant governmental interest," *see Ward*, 491 U.S. at 791 (citation omitted)—let alone the properly applicable strict-scrutiny standard, *see Reed*, 135 S. Ct. at 2226; *see* Resp'ts Br. 16, 25. Banning speech about private and state/local debt, but not speech about federal-government debt, is plainly not "narrowly tailored"—nor, indeed, tailored in any meaningful way—to serving the concededly important goal of protecting the public fisc. State/local debt collection, of course, protects the public fisc just like federal-government-debt collection. And with regard to private-debt collection, many creditors are taxpayers, and allowing those creditors to use ordinary means to collect billions of dollars of debt will lead to additional taxable revenue that may well swamp the revenue the Government gains from privileging speech about its

[4] Available at https://www.portfoliorecovery.com/.

own debt. *Compare* Pet'rs Br. 25 (explaining that federal-government-debt exception is valued at $120 million over 10 years), *with 2015 TCPA Order* at 8085 (O'Reilly, Comm'r, dissenting in part and approving in part) (technology arguably banned by the TCPA can save private debtors $2.26 billion annually in extra default costs). And while protecting the public fisc is important, the Government does not even attempt to argue that collecting on federal-government debt is more important to the nation or the overall economy than collecting private debt, let alone sufficiently more important to justify discriminating against private-debt speech.

B. Under The Ninth Circuit's Interpretation Of The TCPA, The Statute Unconstitutionally Turns Every Smartphone Into A Banned ATDS

The TCPA prohibits most nonconsensual calls or texts to any cellphone when those calls are placed "using any *automatic telephone dialing system* or an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A) (emphasis added). The statute then defines ATDS as "equipment which has the capacity[ ] (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." *Id.* § 227(a)(1). The courts of appeals are divided over the meaning of that statutory phrase.[5] Below, PRA

[5] A petition for certiorari pending before this Court presents the question of "[w]hether the definition of ATDS in the TCPA

explains: (1) the division of authority over the meaning of ATDS; and (2) if the Ninth Circuit's understanding of ATDS is correct, why this would provide another reason that the TCPA violates the First Amendment.

1. The Ninth Circuit has adopted a broad definition of ATDS, concluding that ATDS "includes a device that stores [and can automatically dial] telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator." *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1043 (9th Cir. 2018), *cert. dismissed*, 139 S. Ct. 1289 (2019). According to the Ninth Circuit, the clause "using a random or sequential number generator" in the ATDS definition cannot modify "store," since "it is unclear how a number can be *stored* (as opposed to *produced*) using a random or sequential number generator." *Id.* at 1052 n.8 (citation omitted). The Ninth Circuit also claimed to draw support from the statutory context, particularly the TCPA's consensual-calls exception and the federal-government-debt exception. *Id.* at 1051–52.

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encompasses any device that can 'store' and 'automatically dial' telephone numbers, even if the device does not 'us[e] a random or sequential number generator." *Facebook, Inc. v. Duguid*, No. 19-511 (U.S. *petition for cert. filed* Oct. 17, 2019) (brackets in original).

Splitting with the Ninth Circuit, the Third, Seventh, and Eleventh Circuits have adopted a narrower understanding of ATDS. "[U]sing a random or sequential number generator" in the ATDS definition modifies "both *store* and *produce*," meaning that "a device must be capable of performing at least one of those functions using a random or sequential number generator to qualify." *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 463–65 (7th Cir. 2020); *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1306–08 (11th Cir. 2020); *see Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 119 (3d Cir. 2018). In other words, the TCPA defines what an ATDS must have the ability to do—"store or produce numbers to be called"—and explains how the ATDS must discharge those store-or-produce functions—"using a random or sequential number generator." *See* 47 U.S.C. § 227(a)(1).

This interpretation follows from "conventional rules of grammar and punctuation." *Glasser*, 948 F.3d at 1306. Under the "series-qualifier canon," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147–51 (2012), "[w]hen two conjoined verbs ('to store or produce') share a direct object ('telephone numbers to be called'), a modifier following that object ('using a random or sequential number generator') customarily modifies both verbs," *Glasser*, 948 F.3d at 1306. So "using a random or sequential number generator" must modify both conjoined verbs—to "store" and "produce"—under this canon. *See id.*; *Gadelhak*, 950 F.3d at 464–

65. And the "grammar canon," Scalia & Garner, *supra*, at 140–43, provides further support. "[T]he most natural way to view [a] modifier"—like "using a random or sequential number generator"—that is set off by a comma is to read the modifier "as applying to the entire preceding clause." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1077 (2018). Thus "using a random or sequential number generator" modifies both "store" and "produce" under this canon. *Gadelhak*, 950 F.3d at 464–65; *Glasser*, 948 F.3d at 1307.

The statutory context "cuts in the same direction." *Glasser*, 948 F.3d at 1307–08. The TCPA prohibits the use of an ATDS or an artificial or prerecorded voice "to call any emergency telephone line including any 911 line.'" *Id.* (citations omitted). Yet, "[i]t suspends belief to think that Congress passed the law to stop telemarketers from *intentionally* calling 911 operators and playing them a prerecorded message. Congress instead passed the law to prevent callers from *accidently* reaching 911 lines by dialing randomly or sequentially generated telephone numbers." *Id.* (second emphasis added). This is in line with Congress' finding that an ATDS could cause "a risk to public safety" when "an emergency or medical assistance telephone line is seized." Pub. L. No. 102-243, § 2(5). This interpretation also avoids "moot[ing] much of the Fair Debt Collection Act's

application to telephone debt collection efforts." *Glasser*, 948 F.3d at 1309–10.[6]

2. If the Ninth Circuit is correct as to the meaning of ATDS, then this provides an additional reason why the statute violates the First Amendment.

The constitutional problem with the ATDS definition, as understood by the Ninth Circuit, comes from the fact that this interpretation would render virtually every smartphone a prohibited ATDS. *See Glasser*, 948 F.3d at 1305, 1308–10. Recall that under the Ninth Circuit's definition, an ATDS includes any device that simply "store[s]" telephone numbers and has the ability to dial those numbers automatically. *See Marks*, 904 F.3d at 1043. As Judge Sutton, sitting by designation, recently explained for the Eleventh Circuit, this would sweep in virtually every modern

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[6] As noted above, the Ninth Circuit believed that the statutory context led to the opposite result, concluding that the consensual-call and federal-government-debt exceptions supported the broader definition of an ATDS, since "[t]here are not likely to be a lot of consented-to calls from randomly generated numbers" and "[d]ebt collection usually involves non-randomly identified people." *Glasser*, 948 F.3d at 1311–12 (discussing *Marks*, 904 F.3d at 1050–53). Yet, the TCPA *also* imposes liability for making calls with "an artificial or prerecorded voice," which makes sense of those two exemptions. *Id.* Moreover, the definition of an ATDS extends to "devices that have the 'capacity' to identify randomly generated numbers; it does not require that capacity to be used in every covered call." *Id.* at 1312; *see also Gadelhak*, 950 F.3d at 467.

smartphone. *Glasser*, 948 F.3d at 1309–10. After all, "it's hard to think of a phone" without such capabilities, since modern smartphones have built-in features enabling them to automatically call numbers stored in their contact lists. *Id.* ("Siri, Cortana, Alexa"); *Gadelhak*, 950 F.3d at 467 ("Do Not Disturb While Driving"). Thus, the Ninth Circuit's definition would apply the TCPA's prohibition to every unsolicited call or text from any smartphone, giving this statute a "far-reaching," *id.*, and "'eye-popping' sweep." *Glasser*, 948 F.3d at 1309 (quoting *ACA Int'l v. FCC*, 885 F.3d 687, 697 (D.C. Cir. 2018)).

Imposing a penalty for using this ubiquitous form of communications technology would violate the First Amendment because: (1) the ATDS prohibition would not be "narrowly tailored to serve a significant governmental interest," and (2) the prohibition would fail to "leave open ample alternative channels for communication." *Ward*, 491 U.S. at 791, 802 (citation omitted).

First, the Ninth Circuit's understanding of ATDS would render the TCPA's prohibition unconstitutional because it would mean that the statute lacks sufficient tailoring. *See id.* While a time-place-or-manner regulation "'need not be the least restrictive . . . means of' serving the government's interests," it still must not place "a substantial portion of the [regulation's] burden on speech [that] does not serve to advance its goals." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (quoting *Ward*, 491 U.S. at 798–99).

By defining all smartphones as an ATDS, thus subjecting "ordinary calls from any conventional smartphone" to the TCPA's prohibitions, *ACA Int'l*, 885 F.3d at 692, the Ninth Circuit has given this statute a "far-reaching," *Gadelhak*, 950 F.3d at 467, and "'eye-popping' sweep," *Glasser*, 948 F.3d at 1309 (quoting *ACA Int'l*, 885 F.3d at 697), which is not even arguably sufficiently tailored to achieve any congressional objectives.

Consider the following everyday hypothetical, which illustrates the unconstitutional breadth of the TCPA's ATDS prohibition, as interpreted by the Ninth Circuit. An ordinary American named Tom sends a group text to friends and acquaintances who all attended a weekend getaway together, asking them to pay him their share of the house that they rented. Under the Ninth Circuit's interpretation of the TCPA, Tom would be liable for $500 to $1,500 per text, *see* 47 U.S.C. § 227(b)(3), unless he obtained prior express consent from each friend and acquaintance in the group-text chain, *id.* § 227(b)(1)(A). After all, Tom would have compiled a list of people who owe him money and would have sent a message to those people using a smartphone, a technology that has the capacity to "store" and automatically "dial" those numbers. As a matter of statutory text, what Tom would have done would be no different from the debt-collection calls that PRA places regularly. And Tom would also be liable if he set a "Do Not Disturb" auto-response for the duration of that weekend trip, automatically sending a preset

message to anyone who texted him that weekend. Tom would be liable for $500 to $1,500 per "Do Not Disturb" response. *See id.* § 227(b)(3).

Subjecting these everyday calls and texts to TCPA liability, as the Ninth Circuit's interpretation does, is not tailored to forwarding Congress' core goal of protecting consumers from telemarketers and scamsters. *See* Pub. L. No. 102-243, § 2(12). While the number of robocalls across the country is indeed high, *e.g.*, *id.* § 2(3), the Ninth Circuit's view makes "nearly every American [ ] a TCPA-violator-in-waiting, if not a violator-in-fact," *ACA Int'l*, 885 F.3d at 698. The Ninth Circuit's interpretation of ATDS places "a substantial portion" of the TCPA's "burden on speech" on smartphone communications that do "not serve to advance its goals." *McCullen*, 573 U.S at 486 (quoting *Ward*, 491 U.S. at 799); *accord United States v. Williams*, 553 U.S. 285, 292 (2008).

Second, the Ninth Circuit's inclusion of smartphones within the ATDS definition leaves few effective alternative channels of communication. *See Ward*, 491 U.S. at 791, 802. Modern-day smartphones are the most important and commonly used communications technology for tens of millions of Americans today, *see Carpenter v. United States*, 138 S. Ct. 2206, 2211 (2018); *Riley v. California*, 573 U.S. 373, 395 (2014), and "for many people[ ] the sole phone equipment they own," *ACA Int'l*, 885 F.3d at 696–98. Indeed, it is now "the person who is *not* carrying a cell phone . . . who is the exception," *Riley*,

573 U.S. at 395 (emphasis added), since "[t]he vast majority of Americans—96%—now own a cellphone of some kind," with "81%" of Americans owning "smartphones," Pew Research Center, *Mobile Fact Sheet* (June 12, 2019).[7] These devices facilitate a bevy of speech, as they are simultaneously "telephone[s]," "cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, [and] newspapers." *Riley*, 573 U.S. at 393.

Given the ubiquity of smartphones, a prohibition on using a smartphone to call or text a cellular line without prior express consent would effectively censor the message contained in that call or text. *Compare Ward*, 491 U.S. at 802 (regulation on "amplification" did not prohibit communication of "quantity or content" of message). For example, in the hypothetical discussed above, extending TCPA liability to Tom's texts would almost certainly ensure that no such messages would be sent. That is, if Tom's friends and acquaintances were part of the millions of Americans whose only phone equipment was a smartphone, Tom would have no means to contact them via phone without violating the TCPA, absent obtaining prior express consent.

TCPA liability under these circumstances would chill even consensual calls or texts from a smartphone. *Accord Dombrowski v. Pfister*, 380 U.S.

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[7] Available at https://www.pewresearch.org/internet/fact-sheet/mobile/.

479, 487 (1965). Few smartphone users could possibly remember whom among their many contacts have provided prior express consent to receiving calls or texts. *Accord 2015 TCPA Order* at 7991–92 ¶ 52 (explaining that the presence of a cellphone number in a caller's contact list does not itself satisfy the TCPA's consent requirement). Accordingly, many rightfully cautious smartphone users would choose to forgo making calls or sending texts, rather than risking significant TCPA liability. *Accord Dombrowski*, 380 U.S. at 487. Thus, even the avenue for consensual communication from a smartphone left open by the Ninth Circuit's understanding of the TCPA would not truly be effectively available here. *Compare Ward*, 491 U.S. at 802.

C. The TCPA Unconstitutionally Gives The FCC Broad Authority To Decide What Other Speech The Law Will Privilege

This Court's precedent has articulated the general precept that it is "time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency" violates the First Amendment, since it subjects the power to speak lawfully to the government's caprice, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988); *see also Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130–137 (1992). While the TCPA is not itself a speech-licensing regime, it combines the vices that both the prohibition on content-based restrictions on

speech and the licensing-regime cases guard against. In particular, the TCPA grants to a federal agency—the FCC—virtually unchecked authority to discriminate among categories of protected speech, far beyond Congress' core goal of stopping telemarketing and scam calls.

The TCPA gives to the FCC open-ended authority to exempt almost any call to a cellphone from the statute's prohibitions, and the FCC has used this authority to favor speech based upon its sole judgment as to the value of the content conveyed. Under the TCPA, "the Commission . . . may, by rule or order, exempt . . . calls to . . . a cellular telephone [ ] that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect." 47 U.S.C. § 227(b)(2)(C). Under this boundless authority, the FCC has exempted calls related to "pending money transfers," thus allowing consumers to receive, without prior express consent, "messages [delivering the] steps to be taken in order to receive [ ] transferred funds." *2015 TCPA Order* at 8023–26 ¶¶ 127–33 (citation omitted). It has exempted calls that transmit healthcare information without the recipient's prior express consent, like "appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare

instructions." *Id.* ¶ 146. And it has exempted calls for "package delivery notifications" to "residential consumers," based on the "popularity" and "convenience" of these calls to consumers at large. *In re Cargo Airline Ass'n Petition for Expedited Declaratory Ruling, Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 FCC Rcd. 3432, 3432 ¶ 1 (2014). Finally, it has exempted a wireless carrier's own "calls to [its] cellular customers for which the called [customer] is not charged," *1992 TCPA Order* at 8775 ¶ 45, and a school's calls "to student family wireless phones" for "weather closures, fire, health risks, threats, and unexcused absences," *In re Rules and Regulations Implementing the Telephone Consumer Prot. Act of 1991*, 31 FCC Rcd. 9054, 9061 ¶ 17 (2016).

The TCPA also empowers the FCC to trigger certain other content-based exemptions with respect to landlines and fax machines based upon the content of the call or the identity of the speaker. The FCC may exempt landline calls "that are not made for a commercial purpose," 47 U.S.C. § 227(b)(2)(B)(i), and landline calls that, while "made for commercial purposes," do "not adversely affect the privacy rights" protected by the TCPA and "do not include the transmission of any unsolicited advertisement," *id.* § 227(b)(2)(B)(ii); *id.* § 227(b)(1)(B). The FCC has used this authority to exempt landline calls from "nonprofit organization[s]" and landline calls delivering a "'health care' message." 47 C.F.R. § 64.1200(a)(3)(iv)–(v). The TCPA also allows the

FCC to exempt certain faxes from "[non-profit] professional or trade associations . . . to their members" that "further[ ]" the group's "purpose." 47 U.S.C. § 227(b)(2)(F).

While some of these content-based exemptions are inoffensive to most Americans, the FCC's virtually unchecked power to decide what speech will and will not be permitted, usually based upon the speech's content, creates grave constitutional difficulties.

II. This Court Should Invalidate The TCPA's Application To Non-Telemarketing, Non-Scam Speech, Such As Private-Debt-Collection And Political Speech

When this Court concludes that portions of a statute are unconstitutional, it engages in a severability inquiry that asks whether the Court can cure the constitutional defect, consistent with congressional intent. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018). In conducting this intent-based inquiry, this Court "cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." *Id.* (citation omitted). Under the analytically related doctrine of constitutional avoidance, in turn, this Court has held that it can read statutory text narrowly to apply it only to the "core" conduct that Congress intended to cover. *See Skilling v. United States*, 561 U.S. 358, 404 (2010) ("to preserve what Congress certainly intended the statute to cover, we

pare that body of precedent down to its core"); *accord Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 896 F.3d 539, 550 (D.C. Cir. 2018) ("severability is a doctrine borne out of constitutional-avoidance principles, respect for the separation of powers, and judicial circumspection when confronting legislation duly enacted by the co-equal branches of government").

Here, the parties proposed two extreme severability approaches, neither of which is warranted or necessary. Under the Government's approach, this Court would invalidate only the government-debt exception, thereby reaching the anti-constitutional result that the remedy for a First Amendment violation is a prohibition on the very speech that Congress sought to permit. Petr's Br. 33–39. Respondents, on the other hand, ask this Court to invalidate all of the TCPA's restriction on ATDS and prerecorded calls to cellular phones, including as to telemarketing and scam calls at the statute's core, even though Respondents' primary rationale is that the Government cannot justify discriminating between federal-government-debt speech and political speech. Resp'ts Br. 33–43.

There is a readily available solution that would serve *all* of the values that the Government and Respondents discuss, while honoring congressional intent: invalidating the TCPA only to the extent that it stretches beyond telemarketing and scam calls, including curtailing its application to private and state/local debt speech and political speech. *See* 47

C.F.R. § 64.1200(f)(11) (defining "telemarketer"). This remedial approach would be most consistent with congressional intent, while avoiding "rewrit[ing]" the TCPA to "give it an effect altogether different from that sought by the measure viewed as a whole." *Murphy*, 138 S. Ct. at 1482 (citation omitted). As noted above, *see supra* pp. 3–4, all agree that Congress' core goal in enacting the TCPA was to stop "intrusive, nuisance calls" from "telemarketers" and scamsters, Pub. L. No. 102-243, § 2(6); *accord Mims*, 565 U.S. at 371–73. That is why the Government points out that "[m]ost" of the TCPA's explicit findings, in the statutory text, "refer specifically to the activities of telemarketers." Pet'rs Br. 4; *accord Alexander v. Sandoval*, 532 U.S. 275, 288 (2001) (looking to "the text and structure" of the statute for "Congress's intent"). By enacting the government-debt exception, Congress further underscored that it was concerned with stopping those random telemarketing and scam calls, not calls about debts owed by specific debtors to their lawful creditors. Pet'rs Br. 27–28. Invalidating the TCPA's peripheral, unconstitutional applications—such as to debt collection and political speech—would preserve the statute's laudable core, entirely consistent with congressional intent. Notably, given that the Government focuses almost the entirety of its brief on telemarketing and scam calls—aside from one short, unpersuasive footnote, *see id.* at 28 n.5—such a remedy would be largely consistent with the Government's understanding of the TCPA's constitutional justification.

This approach also would address the TCPA's constitutional problems, discussed above. Most relevant here, invalidating the TCPA's application to non-federal-government debt-collection speech and political speech would cure this problematic discrimination entirely, leaving in place the Government's persuasive rationale that random telemarketing and scam calls are categorically different, justifying differential treatment. This remedy also would address the problem arising from applying the TCPA's prohibition to ordinary smartphone communications. Even if ATDS includes a typical smartphone, as the Ninth Circuit has concluded, if the TCPA's prohibition applies only to telemarketing and scam calls, then the statute's reach would not sweep in a wide swath of ordinary communications. And if the TCPA covered only intrusive, random telemarketing and scam calls, that would greatly reduce the FCC's opportunity to make content-based distinctions among protected speech. After all, the FCC has not sought to exempt any telemarketing or scam calls from the TCPA's reach, and it appears exceedingly unlikely to do so.

Adopting this remedial approach would require reversing the judgment below. Respondents' contemplated speech in this case is fully protected political speech, *see* Cert. App. 29a, 31a; JA 32–34, not telemarketing or scam speech.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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