No. 19-511

IN THE

Supreme Court of the United States

FACEBOOK, INC.,

Petitioner,

v.

NOAH DUGUID, *ET AL.*

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT NOAH DUGUID'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, prohibits calls to cell phones using automated telephone dialing systems without the recipients' consent. In 2015, after the calls alleged in the complaint in this case took place, Congress amended this prohibition to make an exception for calls to collect debts owed to or guaranteed by the federal government. In this case, the Ninth Circuit held that respondent Noah Duguid properly alleged a violation of the statute. It further held that the government-debt exception is a content-based preference for some forms of speech over others that violates the First Amendment. Applying this Court's severability jurisprudence, the court went on to hold that the exception is severable from the remainder of the statute and that, with the exception severed, the TCPA remains a valid, content-neutral restriction on the time, place, or manner of speech. The court's holding agreed with an earlier decision of the Fourth Circuit.

The questions presented are:

(1) Whether petitioner Facebook lacks standing to assert that the unconstitutionality of a statutory amendment that postdated its claimed unlawful conduct is a basis for dismissal of the complaint in this case.

(2) Whether the court of appeals correctly severed the exception for calls to collect government-backed debts from the TCPA and sustained the remainder of the statute.

(3) Whether the court of appeals correctly held that Mr. Duguid stated a claim that Facebook made unconsented-to calls to his cell phone using an automated telephone dialing system.

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INTRODUCTION

Petitioner Facebook asks this Court to validate the practice of making robocalls to cell phones over their owners' objection—a textbook example of the intrusions Congress enacted the Telephone Consumer Protection Act (TCPA) to prohibit. Facebook presents no compelling reason for the Court to entertain its arguments. Facebook's principal claim is that the Ninth Circuit erred in severing a TCPA provision that, it held, created an unconstitutional, content-based exception to the statute's otherwise neutral prohibition of unconsented-to robocalls to cell phones. Both courts of appeals that have addressed that issue have reached complete agreement on it. Facebook's claim that this consensus is erroneous rests almost entirely on precedents that do not even discuss severability. The only authority Facebook cites that addresses severability is a Third Circuit decision that *acknowledges* the availability of severance in circumstances such as those here.

Facebook also asks this Court to decide a statutory issue concerning the TCPA's definition of an automated dialing system (ATDS): whether a system that dials stored numbers automatically but does not generate them randomly or sequentially is an ATDS. That issue implicates no inter-circuit conflict because the Ninth Circuit is the only appellate court that has independently analyzed the controlling statutory language. The panel below correctly followed *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), which concluded that the statute's text, structure and context are incompatible with Facebook's view that an ATDS must have random or sequential number-generating capability.

Facebook's request for review of the ATDS issue rests largely on its false assertion that the Ninth Circuit has read the TCPA to apply to all calls made by ordinary smartphone users. This case has nothing to do with calls made by smartphones. It concerns use of sophisticated technology to send automated text messages to cell phones, and nothing in the result threatens liability for ordinary phone calls. Rather, it is Facebook's position that would have breathtaking consequences. Facebook concededly seeks to limit the TCPA to a "small universe" of calls made with obsolete technologies, Pet. 14, leaving the flood of robocalls that besiege consumers' cell phones unchecked—a result contrary to congressional intent, expressed in legislation signed into law on December 30, 2019, that the TCPA's robocall protections be *strengthened*. Rather than taking up Facebook's request to hamstring the TCPA, the Court should leave refinement of the ATDS definition to pending FCC proceedings.

In any event, neither the First Amendment severability issue nor the statutory question is well presented by this case. Facebook has no standing to complain of an alleged content-based exception that was added to the statute *after* the unlawful messages alleged in this case took place. That amendment did not affect violations that predated it, and Facebook suffers no cognizable First Amendment injury from application of the content-neutral pre-amendment statute to its pre-amendment conduct. Likewise, holding the amended statute unconstitutional and inseverable would afford Facebook no relief because it would not affect respondent's claim under the pre-amendment statute.

As for the ATDS issue, even if Facebook were correct in contending that an ATDS must be able to generate random or sequential numbers, the complaint in this case alleged that Facebook's system had exactly that capability, and there is no factual record on the issue. Thus, even if this Court were to disagree with the Ninth Circuit on the statutory question Facebook poses, its ruling would not dispose of this case.

STATEMENT

1. Congress enacted the TCPA in 1991 to halt widespread abuses of telephone technology that were inundating consumers with intrusive robocalls to home telephones and cell phones. *See Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 370–72 (2012). The TCPA generally prohibits using an ATDS to call a cell phone without the called party's consent. 47 U.S.C. § 227(b)(1)(A)(iii). An ATDS is "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).

Following the TCPA's passage, robocallers challenged its constitutionality on First Amendment grounds. In two cases, the Ninth Circuit rejected those challenges, holding that the Act sets forth content-neutral time, place, or manner restrictions that serve substantial government interests. *See Moser v. FCC*, 46 F.3d 970 (9th Cir.), *cert. denied*, 515 U.S. 1161 (1995); *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *aff'd on other grounds*, 136 S. Ct. 663 (2016).

In a 2015 budget bill, Congress amended the TCPA to provide that its prohibitions on the use of

ATDSs and artificial or prerecorded voice messages in calls to cell phones do not apply to any call "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). Thereafter, defendants in TCPA cases redoubled their challenges to the Act's constitutionality.

The ATDS definition has also engendered litigation and regulatory issues. Robocallers who use systems that do not call randomly or sequentially created numbers, but nonetheless besiege consumers with automatic calls and texts using stored lists of numbers, have sought to escape the Act's application by arguing that a device is not an ATDS unless it can spontaneously generate random or sequential numbers to be called. After the FCC issued a regulatory ruling that appeared to say that such capacity both is and is not required, the D.C. Circuit in *ACA International v. FCC*, 885 F.3d 687 (2018), set aside the agency's internally inconsistent order as arbitrary and capricious.

Thereafter, in *Marks*, a panel of the Ninth Circuit consisting of Judges Ikuta, Callahan, and Bea, reviewing the issue de novo because the FCC's interpretation had been vacated, addressed the ATDS definition. The panel concluded that although the definition is ambiguous, it is best read to cover devices that automatically dial stored lists of numbers in addition to devices that dial numbers generated randomly or sequentially. 904 F.3d at 1051–52. The court found support in the statute's language, structure and context. *Id*. at 1051. In particular, it pointed out that the statutory exceptions for calls with consent and for government-debt-collection calls would be nonsensical if the ATDS definition covered only

devices using random or sequential number generators. *Id*. at 1051–52.

2. Facebook is a social media company frequently criticized for disregarding consumer privacy. This case arose when Facebook, before the 2015 amendment adding the government-debt-collection exception to the TCPA, instituted a policy of automatically sending text messages when Facebook users' accounts were accessed from unknown devices. In 2014, respondent Noah Duguid, though not a Facebook user, repeatedly received such messages, to which he had never consented and over his express objection.

In 2016, Mr. Duguid sued Facebook under the TCPA on behalf of a putative class. His complaint alleged in detail that Facebook's system had the capacity of generating random or sequential numbers, but Facebook sought dismissal on the ground that those allegations were "conclusory" and that if they were disregarded, he had failed to allege use of an ATDS. Facebook also contended that because of the intervening amendment of the TCPA to except government-debt-collection calls from its robocalling restrictions, the statute is now a content-based speech regulation that violates the First Amendment. Accepting Facebook's argument that Mr. Duguid's allegations that its system had random or sequential number-generating capacity were conclusory, the district court dismissed the complaint without reaching Facebook's First Amendment argument.

Mr. Duguid appealed to the Ninth Circuit, and Facebook argued for affirmance on the ATDS issue and, alternatively, based on its First Amendment argument. Facebook's claim that the TCPA was content-based rested solely on the government-debt-

collection exception. While the appeal was pending, the Ninth Circuit issued its opinion in *Marks*.

The Ninth Circuit reversed. As to the ATDS issue, the court pointed out that *Marks* had held that an ATDS need not have random or sequential number-generating capacity, so the adequacy of Mr. Duguid's allegations of such capacity was no longer relevant. Because Mr. Duguid alleged that Facebook automatically dialed stored numbers, the court of appeals held, he stated a claim under the TCPA. *See* Pet. App. 6–7.

As to the First Amendment, the court held that the addition of the government-backed-debt exception changed what had been a content-neutral statute into a content-based one because the exception depends, in the court's view, on the content of a call. *See id.* at 11–12. The court further held that the distinction drawn by the exception does not satisfy strict scrutiny. *See id.* at 16. Declining to consider whether the TCPA, as a whole, continues to serve a compelling interest in a narrowly tailored manner, the court focused on whether the *exception* serves a compelling interest. The court concluded that it does not, because the calls it permits undermine the statute's purpose of protecting against invasive calls that intrude on residential and personal privacy. *See id.* at 17. The court also found that the exception is not the least restrictive means of achieving the alternative interest in protecting the public fisc posited by the government. *Id.* at 18.

The court concluded, however, that the government-backed-debt exception is severable from the TCPA's other provisions. *See id.* at 19. The court emphasized that, under this Court's decisions,

"[c]ongressional intent is the touchstone of severability analysis." *Id.* The court found one source of such intent in the Communications Act's severability provision, which provides that "[i]f any provision of this chapter … is held invalid, the remainder … shall not be affected thereby." *Id.* (quoting 47 U.S.C. § 608). That language, the court concluded, creates "a presumption of severability absent 'strong evidence that Congress intended otherwise.'" *Id.* (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987)).

Far from finding strong evidence overcoming the severability clause, the court found strong support for severability in the TCPA's structure and history. It pointed out that, without the exception, the TCPA had been "'fully operative' for more than two decades." *Id.* (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010)). The new exception, the court concluded, "did not suddenly and silently become so integral to the TCPA that the statute could not function without it." *Id.* The court acknowledged that a court should generally be hesitant to cure content discrimination by severing a statutory exception so that the statute restricts more speech, "*absent quite specific evidence of a legislative preference* for elimination of the exception." *Id.* at 20 (quoting *Rappa v. New Castle County*, 18 F.3d 1043, 1073 (3d Cir. 1994) (emphasis added by court)). However, the court found such evidence with respect to the TCPA and, therefore, concluded that Congress's intent was served by retaining the statute without the exception rather than by jettisoning the Act's robocalling restrictions altogether. "Excising the debt-collection exception preserves the fundamental purpose of the TCPA," the court concluded,

"and leaves us with the same content-neutral TCPA that we upheld … in *Moser* and *Gomez*." *Id.*

The Ninth Circuit's First Amendment and severance rulings agreed with the Fourth Circuit's earlier decision in *American Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159 (4th Cir. 2019) ("*AAPC*"). The same Ninth Circuit panel subsequently issued an identical ruling in *Gallion v. Charter Communications, Inc.*, 772 F. App'x 604 (9th Cir. 2019). The federal government has filed a petition for certiorari seeking review of the Fourth Circuit's holding that the TCPA is unconstitutional, *Barr v. Am. Ass'n of Political Consultants, Inc.*, No. 19-631 (filed Nov. 14, 2019), while the defendant in *Gallion* seeks review of the Ninth Circuit's severability holding, *see Charter Commc'ns, Inc. v. Gallion*, No. 19-575 (filed Nov. 1, 2019).

REASONS FOR DENYING THE WRIT

I. The Court should not disturb the lower courts' consensus on severability.

A. Applying the TCPA to calls predating the government-debt exception does not injure Facebook.

Facebook's argument that the Ninth Circuit erred in severing the government-backed-debt-collection exception from the TCPA and sustaining the claims against it presupposes that Facebook suffered some redressable constitutional injury from what it claims is a content-based regulation. But the provision Facebook says is content-based was not enacted until November 2015, *after* Facebook sent the text messages that are the subject of this case. The constitutionality of the statute as amended has no bearing on Facebook's liability for conduct predating the

amendment, and Facebook thus lacks standing to seek review of the Ninth Circuit's judgment based on its constitutional arguments.

The TCPA's 2015 amendment altered the statute to permit unconsented-to robocalls to collect debts owed to or backed by the federal government. Such robocalls were illegal before the amendment, and the amendment did not purport to alter the consequences of past illegal conduct. Moreover, a longstanding statute provides that repeal of a substantive statutory provision "shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action … for the enforcement of such … liability." 1 U.S.C. § 109. Section 109 applies to laws creating civil liabilities, *see Hertz v. Woodman*, 218 U.S. 205, 218 (1910), and its reference to "repeal" encompasses amendments that negate or limit preexisting statutory provisions creating liabilities, *see*, *e.g.*, *United States v. Ward*, 770 F.3d 1090, 1095 (4th Cir. 2014); *Fujitsu Ltd. v. Fed. Exp. Corp.*, 247 F.3d 423, 432 (2d Cir. 2001).

Thus, a caller who used an ATDS to call a cell phone to collect government-backed debt in 2014, when Facebook sent Mr. Duguid its messages, would, under the law at that time, be liable to the same extent as Facebook. And it would remain so today because § 109 provides that a pre-amendment statute "remain[s] in force" for purposes of any action to enforce the liability it created. Accordingly, even on Facebook's view that the 2015 amendment transformed the TCPA into a content-based statute thenceforth, applying the statute to Facebook's pre-amendment

calls (or anyone else's) involves no content-based discrimination and no First Amendment injury. The answer to the question whether the TCPA, after the 2015 amendment, discriminates based on content has no impact on persons who, before the amendment, engaged in robocalls that were prohibited on a content-neutral basis.

For the same reason, the holding Facebook seeks—that the current restriction on unconsented-to robocalls is unconstitutional in its entirety—would not afford Facebook redress. The pre-amendment statute, which under § 109 is still in effect as to liabilities it imposed, would remain valid and enforceable even if the amended prohibition were not. Thus, the Ninth Circuit's judgment sustaining the complaint in this case, which seeks to impose liability for calls predating the amendment, would remain intact.

Facebook cannot sidestep the point by now suggesting that the TCPA was already content-based because of pre-2015 provisions creating an emergency-calls exception and authorizing the FCC to create regulatory exceptions. *See* Pet. 17. Below, Facebook's claim of content discrimination relied *solely* on the government-debt exception. *See* Facebook App'ee Br. 16, 37–38. Facebook not only failed to advance the implausible claim that the emergency exception is impermissibly content-based, it claimed the benefit of that exception. *See id*. at 50–53.

As this Court has long insisted, "standing 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)). "To have standing, a

litigant must seek relief for an injury that affects him in a 'personal and individual way,'" and have a "'direct stake' in the outcome of the[] appeal." *Id.* at 705–06. Facebook's First Amendment/severability claim fails on both counts. Facebook therefore lacks standing to seek this Court's review on the issue.

B. The severability issue does not merit review.

1. Facebook's request that this Court consider whether the Ninth Circuit erred in severing the government-debt exception from the TCPA's robocalling provision does not merit review in any event. So far, two circuits, in three cases, have agreed that the debt-collection exception is impermissibly content-based and that this constitutional infirmity can and should be remedied by severing the government-debt exception from the remainder of the statute. If further litigation results in an inter-circuit conflict, this Court can resolve it then. In light of the current appellate consensus, there is no need to intervene now.

The government's petition in *Barr*, the only one of the three pending petitions that challenges the lower courts' holdings that the TCPA violates the First Amendment, invokes the Court's "usual" practice of granting certiorari when a court of appeals strikes down a federal statute. *Barr* Pet. 15. That practice, however, is not invariable. Here, the lower courts' constitutional rulings have limited consequences. They hold a single exception to the TCPA's robocalling restrictions to be constitutionally problematic; the statute remains operational and offers important public protections without that provision; and the Court will have future opportunities to address the

constitutional and/or severability issues should there be developments that warrant such review.

Facebook's own invocation of the proposition that "[t]he determination that an Act of Congress violates the Constitution almost always merits this Court's plenary review," Pet. 13, carries little weight because Facebook asserts that the Ninth Circuit's ruling that the TCPA is unconstitutional was not only "right," but "plainly" so. *Id.* at 15. The proposition Facebook invokes is a reason for granting a petition *contesting* invalidation of a statute. And while Facebook's question presented includes the underlying First Amendment issue, its argument focuses on severability. Although the incorrectness of the underlying constitutional holding would be an alternative ground for affirmance, that possibility would not render this case worthy of review unless the severability issue itself merited consideration. Yet the severability issue, as the United States points out in *Barr*, "does not independently satisfy the usual criteria for this Court's review." *Barr* Pet. 14.

The court of appeals' severability ruling plainly "does not conflict with any decision of another court of appeals." *Id.* There is complete agreement among the only federal appellate authorities directly on point—the Ninth Circuit's rulings in this case and *Gallion* and the Fourth Circuit's decision in *AAPC*. And as Facebook concedes, the most "comparable" decisions of other circuits, *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 305 (7th Cir.), *cert. denied*, 137 S. Ct. 2321 (2017), and *Gresham v. Swanson*, 866 F.3d 853, 854–55 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 682 (2018), which involved challenges to state anti-robocall laws, "likewise … contemplate that sever-

ing [a content-based] exception is the proper remedy." Pet. 20.

2. Absent a conflict, Facebook contends that the decision below reflects the "mistaken premise" that the debt-collection exception rather than "the TCPA's basic prohibition on ATDS calls" is unconstitutional. Pet. 16–17. Facebook concedes that the *basis* for its challenge was that the exception "rendered the prohibition content-based and unconstitutional." *Id.* at 17. Nonetheless, Facebook asserts that "it was always the speech-restricting prohibition that Facebook assailed as unconstitutional" and that Facebook was therefore "entitled to have the prohibition invalidated." *Id.*

Facebook's claim that the lower courts were "mistaken" is a slender basis for invoking this Court's jurisdiction. *See*, *e.g.*, *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in denial of certiorari). Facebook's solipsistic view that the proper remedy is dictated solely by how it framed its constitutional challenge is also baseless. The Ninth and Fourth Circuits' severability analysis applied well-settled legal principles to the TCPA.

This Court has often stated that when a court finds a constitutional defect in a statute, it generally has a duty "'to limit the solution to the problem,' [by] severing any 'problematic portions while leaving the remainder intact.'" *Free Enter. Fund*, 561 U.S. at 508 (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–29 (2006)). Thus, if the statute is "fully operative as a law" with the defective provision excised, a court "must sustain its remaining provisions '[u]nless it is evident that the Legislature would not have enacted those provisions … in-

dependently of that which is [invalid].'" *Id.* at 509 (citations omitted). *Accord*, *e.g.*, *Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018); *Alaska Airlines*, 480 U.S. at 684. These principles are as applicable to First Amendment claims as to other constitutional claims. *See*, *e.g.*, *Reno v. ACLU*, 521 U.S. 844, 882–83 (1997); *Denver Area Educ. Telecommc'ns Consortium, Inc. v. FCC*, 518 U.S. 727, 767 (1996); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504–06 (1985).

Facebook's argument below was that the government-debt collection exception *alone* made the TCPA content-based. Having accepted Facebook's argument that preferential treatment for one type of call lacked adequate justification, the court of appeals naturally focused on whether that problematic preference was severable. Applying standard severability principles, the court of appeals correctly concluded that the government-backed-debt exception meets the applicable criteria. The exception is a discrete "textual provision[] that can be severed" without rewriting the statute, *Reno*, 521 U.S. at 882, and the statute is, without question, "fully operative" without the exception, *Murphy*, 138 S. Ct. at 1482. Indeed, the TCPA operated without it for a quarter of a century. And, as both the Ninth and Fourth Circuits concluded, the structure and history of the statute, the Communications Act's severability provision, and Congress's statutory findings concerning the harms of telemarketing, *see* 47 U.S.C. § 227 note, leave no doubt that Congress would not have sacrificed the restriction on autodialed calls if it could not make a new exception for calls to collect government-backed debt.

The lower court's severability rulings were consistent with this Court's recognition, in the equal protection context, that when a statutory exception impermissibly gives a small group more favorable treatment than the majority, a court has a remedial choice between "extend[ing] favorable treatment" to everyone or eliminating the exception and subjecting everyone to the unfavorable general rule. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 (2017). The choice depends on "the remedial course Congress likely would have chosen 'had it been apprised of the constitutional infirmity.'" *Id.* (quoting *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426–427 (2010)). Here, as in *Sessions*, "considering whether the legislature would have struck an exception and applied the general rule equally to all, or instead, would have broadened the exception," *id.* at 1700, can lead only to one result: Congress would have chosen to dispense with the exception rather than give robocallers free rein.

3. Despite the lower courts' faithful application of this Court's severability precedents, Facebook asserts that "[t]his Court has repeatedly remedied a First Amendment violation by invalidating the unconstitutional restriction, not the exception." Pet. 18. Not one of the cases Facebook cites, however, supports its contention that a discrete content-based exception can never be severed from an otherwise content-neutral statute to remedy a First Amendment violation. Indeed, none of the decisions of this Court that Facebook cites says anything about severability.

Facebook's leading case, *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), does not mention severability. *Reed*'s silence does not imply that severance is prohibited when a statute contains content-based excep-

tions. Rather, *Reed* does not discuss severability because the respondent's brief in this Court did not argue for severability and referred to it only hypothetically in a single footnote. *See Reed*, Resp. Br. 48 n.15, No. 13-502 (filed Nov. 14, 2014). In addition, because *Reed* involved a city ordinance, severability would have been a question of state law. *See City of Lakewood*, 486 U.S. at 772. Moreover, *Reed* did not involve one or two content-based exceptions to an otherwise neutral statute: The sign code at issue was pervasively content-based. *See* 135 S. Ct. at 2227. For all these reasons, *Reed* says nothing about the appropriateness of severance here.

Likewise, none of the other decisions of this Court that Facebook string-cites on page 19 of its petition discusses severability, let alone holds severance impermissible. None concerned a law that would have been content-neutral but for a single, discrete exception. Moreover, all but two involved state or local laws, so severance would have been a state-law issue that this Court had no reason to address. In the only two cases involving federal laws, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999), and *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), it would have been impossible to remedy pervasive defects the Court found in the statutes by excising a discrete exception. *See Greater New Orleans*, 527 U.S. at 190; *Rubin*, 514 U.S. at 488.

Facebook's assertion that the "vast majority" of federal courts of appeals have held that the First Amendment requires courts in cases like this one to "strik[e] down … speech-restrictive prohibitions, rather than excising speech-permitting exceptions to broaden the abridgement," Pet. 19, is also erroneous. The handful of decisions Facebooks cites do not con-

tradict the Ninth and Fourth Circuits' TCPA severance decisions. Only one of the cases, the Third Circuit's decision in *Rappa*, 18 F.3d at 1073, even discusses severability. The rest have little in common with this case except that they involved First Amendment challenges. And because all of them involved challenges to state or local laws, severability would have been a state-law matter. *See City of Lakewood*, 486 U.S. at 772; *Rappa*, 18 F.3d at 1072.

Leaving aside that *Rappa* decided severability as a matter of Delaware law, its holding is consistent with the decision below. *Rappa* acknowledged that severing an exception to a speech restriction to restore a statute's content neutrality *is* appropriate where there is specific evidence that the legislature would "prefer[] … elimination of the exception." *See* 18 F.3d at 1073. *Rappa* found such evidence lacking in the circumstances before it, where a state statute prohibited political billboards along highways but permitted a wide range of other signs, which there was no reason to think the state legislature would have wanted to prohibit in order to salvage the restriction on other billboards. *See id.* Nothing in *Rappa* suggests that the Third Circuit would similarly reject severance here.

Indeed, the opinion below approvingly cited *Rappa*'s statement that severing a content-based exception to a speech restriction is "*generally*" not proper "*absent quite specific evidence of a legislative preference* for elimination of the exception." Pet. App. 20 (quoting *Rappa*, 18 F.3d at 1073 (emphasis added by court)). The court found such specific evidence in the Communication Act's severability clause, 47 U.S.C. § 608, and the statute's history. Unlike in *Rappa*, severing the TCPA's debt-collection exception did not

regulate calls that Congress never contemplated prohibiting, but only brought back within the TCPA a single category of calls that had been subject to it for years. Consistent with *Rappa*, the Ninth Circuit concluded that it was clear Congress would prefer elimination of the exception to invalidation of the TCPA's robocalling prohibitions as a whole.

4. Facebook complains that by "denying any relief to the party successfully challenging the statute's constitutionality," Pet. 13, the Fourth and Ninth Circuits' rulings will "deter future challenges," Pet. 21. But this Court has long recognized that the proper application of severability doctrine sometimes denies relief to a party that has made a successful constitutional argument. For example, the severability holding in *Sessions* denied relief to a litigant who prevailed on an equal-protection challenge to a law denying him citizenship. *See* 137 S. Ct. at 1701. Likewise, the severability ruling in *Free Enterprise Fund* denied the petitioners the relief they sought against an investigation by the Public Company Accounting Oversight Board. *See* 561 U.S. at 508. The premise of severability doctrine is that remedies should be no broader than necessary to eliminate constitutional violations while respecting congressional intent, not that parties should receive remedies as rewards for raising constitutional claims.

Facebook's assertion that severance will deter meritorious constitutional challenges is in any event implausible. Parties do not know the result of the severability calculus in advance and have ample incentive to raise constitutional claims both defensively and offensively when they face potential liability or otherwise stand to gain if a statute is struck down.

5. This case presents a particularly unsuitable vehicle for considering the TCPA's government-backed-debt exception. If the Court were inclined to follow its frequent practice of reviewing decisions striking down federal statutes, *see* Pet. 13, the government's petition in *Barr* challenging the lower courts' constitutional holdings would be the logical choice. This petition, by contrast, focuses on the remedial question and relegates the underlying constitutional issue to a subsidiary role. And, as shown above, the severability issue does not itself merit review. If the Court seeks a vehicle for deciding the First Amendment issue, it should not select a case where the judgment below would only be affected if the petitioner also prevailed on an issue that there is no compelling reason for the Court even to decide. Indeed, for that reason, the Court should deny certiorari in this case even if it were to grant certiorari on the constitutional issue in *Barr*.

The procedural posture of this case also disfavors review. Unlike *Barr*, where the decision below resolves the merits of the ultimate issues in the case (except for the form of any declaratory or injunctive relief), Facebook's petition challenges a ruling that merely requires denial of a Rule 12(b)(6) motion to dismiss. The action may end in any number of ways that would obviate the need to decide the severability question or the underlying constitutional issue. This Court usually avoids such cases. *See Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari).

Finally, this case would be a poor choice for review to decide the constitutional question because of the confounding factor, not present in *Barr*, of the petition's inclusion of a separate statutory question

that Facebook claims could obviate the need to decide the constitutional or severability questions here, but would not do so in *Barr*. Although, as demonstrated below, Facebook's statutory arguments are meritless, accepting a petition that presented the constitutional issues cleanly would be preferable if the Court were inclined to review them.

II. The ATDS question does not warrant review.

A. There is no inter-circuit conflict.

Facebook's contention that the circuits are split over the TCPA's definition of an ATDS is erroneous. The panel below followed the Ninth Circuit's decision in *Marks*, which held that the best reading of the statute's language is that it applies to systems that store and automatically dial numbers from a list, regardless of whether that list is the product of a random or sequential number generator. 904 F.3d at 1051–52. That reading of the statute does not conflict with either the D.C. Circuit's decision in *ACA International* or the Third Circuit's decision in *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (2018). Neither of those decisions independently analyzed the statutory language to reach a conclusion regarding its application to systems with the present capability of dialing numbers from a stored but not randomly or sequentially generated list.

1. *ACA International*

ACA International considered an FCC order that addressed two aspects of the statutory definition of an ATDS: (1) whether such a system must have the "present capacity" or merely the "potential functionality" to perform the functions that define an ATDS; and (2) what "precise functions … a device must have

the capacity to perform for it to be considered an ATDS." 885 F.3d at 693–94. The court held that both aspects of the Commission's order were arbitrary and capricious.

As to the first, the court held that by defining an ATDS based on a device's potential rather than actual capacity, the FCC had read the definition too broadly. The FCC's definition, the court emphasized, appeared to encompass smartphones because of the mere potential that, with the addition of an app, they could function as ATDSs; thus, they could be subject to the TCPA's restrictions regardless of whether any such app was ever installed. The court held it was arbitrary and capricious for the Commission to give the statute such an apparently sweeping interpretation without clearly explaining whether its decision in fact had that sweep and, if it did not, explaining why it did not. Thus, as to the present-versus-potential-capacity issue, the Commission had adopted an "unreasonably, and impermissibly, expansive" statutory interpretation. *Id*. at 700.

As to what functions an ATDS must have the capacity to perform—the question at issue here—*ACA International*'s reasoning was quite different. The court indicated that it found the statute itself ambiguous as to whether random or sequential number generation is a necessary feature of an ATDS, so "[i]t might be permissible for the Commission to adopt either interpretation." *Id*. at 703. The problem, *ACA International* held, was that the FCC in 2015 appeared to have simultaneously embraced *both* interpretations: The Commission's "ruling indicate[d] in certain places that a device must be able to generate and dial random or sequential numbers to meet the TCPA's definition of an autodialer, [but] it also sug-

gest[ed] a competing view: that equipment can meet the statutory definition even if it lacks that capacity." *Id*. at 702. The court found the Commission's adoption of an internally inconsistent stance arbitrary and capricious, because "the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order." *Id*. at 703.

Marks's reading of the statute, followed by the panel below, is fully consistent with *ACA International*'s. *Marks* addressed the second of the two aspects of the ATDS definition at issue in *ACA International*: whether an ATDS must have the capacity to generate random or sequential numbers. As to that issue, *Marks* took *ACA International*'s order setting aside the FCC's construction of the ATDS definition as its starting point, noting that with the agency's interpretation vacated, "only the statutory definition of ATDS as set forth by Congress in 1991 remains," and, "[a]ccordingly, we must begin anew to consider the definition of ATDS under the TCPA." 904 F.3d at 1049–50. Further, *Marks* expressly "agreed" with *ACA International* that the words of the ATDS definition, viewed in isolation, are ambiguous. *Id*. at 1051. *Marks* thus had to "turn to other aids in statutory interpretation" to determine the meaning of the statute in the absence of an agency construction. *Id*. By contrast, the court in *ACA International* was not called upon to, and did not, place its own construction on the statutory language. *Marks*'s de novo resolution of the statute's meaning in no way conflicts with *ACA International*'s holding that an internally contradictory agency construction was arbitrary and capricious.

Facebook nonetheless insists that *Marks* adopted the construction of the statute that *ACA International* found impermissibly overbroad because it would apparently apply to all smartphones. But Facebook is comparing apples to oranges. The overbroad construction that *ACA International* rejected was one that would apply the ATDS to a device based on its hypothetical rather than actual capabilities. *Marks*, by contrast, did not address the potential-versus-present-capacity issue, nor did the panel below. Rather, *Marks*, and the decision below in this case, concerned *what* capacities a device must possess—the issue as to which *ACA International* expressly recognized that *either* view of the statute could be permissible. 885 F.3d at 703. Nowhere did *ACA International* express concern that applying the statute to a device with the *present* capacity of calling stored lists of numbers that the device did not randomly or sequentially generate would threaten to render the TCPA applicable to all smartphone users.

Facebook wrongly asserts that the court below, in following *Marks*, "acknowledged" that the effect of *Marks* was to make all smartphone calls and texts violations of the statute. Pet. 27. In fact, as Facebook elsewhere puts it, what the panel "acknowledged" was that Facebook *argued* that its construction of the statute was necessary to avoid sweeping all smartphones within the statute. *See* Pet. 10. The panel did not acknowledge that Facebook's argument was *correct*: Instead, it said that even if Facebook's premise were correct, a specific construction of the statute that Facebook proffered in the court of appeals would not solve the problem. That is, if smartphones were otherwise covered by the definition, Facebook's proposal to exclude devices like its equipment from the

ATDS definition "would not avoid capturing smartphones." Pet. App. 9. Facebook's assertion that the court acknowledged that *Marks*'s reading of the statute "could 'not avoid capturing smartphones,'" Pet. 27, badly distorts the court's opinion.

In fact, neither *Marks* nor the opinion below renders all smartphone calls "presumptively" subject to the TCPA's robocalling restrictions. Pet. 22. While smartphones may have the potential capability of dialing lists of stored numbers automatically, merely telling one's smartphone to text or call a single stored number (*see* Pet. 26) would not fall within the Act's prohibition because the human caller's selection of a particular number to dial would take the call outside the definition's requirement that the calls be made "automatically": It would involve too much "human intervention." *See Marks*, 904 F.3d at 1050, 1052–53; *ACA Int'l*, 885 F.3d at 703. Moreover, the statute applies to calls made "using" an ATDS. Therefore, a smartphone call or text would not necessarily violate the TCPA even if the phone had been programmed to be *capable* of calling a list of 10,000 numbers automatically, if the call were not placed using that capability. *See ACA Int'l*, 885 F.3d at 704 (noting, but not deciding, this point).

If, on the other hand, someone used a smartphone to place robocalls to lists of thousands of stored numbers, those calls could be covered by the statute under *Marks*. That application of the statute would be fully consistent with the TCPA's text, structure, and evident purpose, and would not raise the concern expressed in *ACA International*: the possibility that "everyday calls made with a smartphone" would violate the TCPA. *Id*. *ACA International* expressed no similar concern about the TCPA's application to a

smartphone "configured to function as an autodialer" and actually "used" as such "to initiate calls or send messages." *Id.*

2. *Dominguez*

The Third Circuit's decision in *Dominguez* likewise does not conflict with *Marks*'s statutory analysis. *Dominguez*, issued shortly after *ACA International*, addressed the first of the two ATDS definitional questions at issue in *ACA International*: whether an ATDS is defined by its present or potential capabilities. The court held that given *ACA International*'s vacatur of the FCC's potential-capability interpretation, it would adhere to its prior view that only a device's actual capabilities qualified. 894 F.3d at 119. The court then reviewed the summary judgment record, in which the plaintiff had presented affidavits attempting to demonstrate that the device at issue had the capability of generating random or sequential numbers. Finding that the admissible evidence did not create an issue of fact as to the device's *present* capacity to generate random or sequential numbers, the court affirmed the district court's summary judgment for the defendant. *Id.* at 121.

Dominguez did not address the issue of statutory construction decided in *Marks*: whether the capability of dialing a list of stored numbers is sufficient to make a device an ATDS, or whether the capability of generating random or sequential numbers is required. At most, *Dominguez* assumed that the latter capacity is required—an assumption reflecting the arguments presented to the court. The plaintiff in *Dominguez* argued that the device was an ATDS because it had the capacity to generate random num-

bers, not that its capacity to dial a stored list of numbers was sufficient. *See* Br. for Appellant at 15–40, *Dominguez*, No. 17-1243 (3d Cir. filed May 18, 2017). Unsurprisingly, therefore, the Third Circuit did not address the latter question, but focused solely on the appellant's claim that the system had the capacity to generate random numbers. As a result, nothing in *Dominguez* touches on, let alone conflicts with, the statutory analysis that led the court in *Marks* to conclude that number-generating capability is not required by the ATDS definition.

Not only is *Dominguez*'s untested assumption not a holding, but any possible nascent conflict between *Dominguez* and *Marks* would not currently require resolution by the Court in any event. The Third and Ninth Circuits (in *Dominguez*, *Marks*, and the decision below) are the only federal courts of appeals that have yet issued published opinions touching on this aspect of the ATDS definition in the wake of *ACA International*, and only the Ninth Circuit has devoted any analysis to the question. If there is any conflict, it is neither broad nor deep, nor is it entrenched. Facebook's citation of district court authority on the point only establishes that the issue is percolating through the courts and will likely be the subject of further appellate decisions that may yield either conflict or further consensus. The Court should await development of the issue in the lower courts before determining whether it needs to delve into this issue of statutory construction.

B. *Marks*'s holding is correct.

The Ninth Circuit's resolution of the statutory issue also does not merit review because it is correct. The *Marks* panel, consisting of three dedicated tex-

tualists, conscientiously reviewed the statutory text, structure, and context and concluded that the best reading of the statutory definition is that it applies to systems that automatically dial stored lists of numbers as well as systems that generate random or sequential numbers.

Facebook's contrary reading is that the phrase "using a random or sequential number generator" applies to both the verbs "store" and "produce" in the definition. That reading rests on what Facebook describes as a grammar-based principle of statutory construction, the "punctuation canon," which Facebook says dictates reading a qualifying phrase set off by commas to refer to all antecedents that precede it. Pet. 24. But this Court has never cited the "punctuation canon" and, in contrast, has recognized that "a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning." *U.S. Nat'l Bank of Ore. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993).

The one decision of this Court that Facebook cites as ostensible support for its position, *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061, 1077 (2018), neither applies the "punctuation canon" nor, contrary to Facebook's assertion, relies on the existence of commas setting off a phrase. *Cyan* does not even use the word "comma." Instead, *Cyan* holds that the phrase at issue there is most naturally read to modify the entire preceding clause because "that clause hangs together as a unified whole, referring to a single thing." *Id.* *Cyan* explains, moreover, that under a well-established principle of construction, the "rule of the last antecedent" applies

when applying a modifier to an entire preceding phrase would "stretch[] the modifier too far." *Id*.

Here, unlike in *Cyan*, the phrase that precedes "using a random or sequential number generator" refers to two separate things: storing or producing numbers. Moreover, "using a random or sequential number generator" most naturally refers to the closest antecedent, "producing numbers," which is what number generators do. Thus, as both the appellate courts that have looked at the definition's language agreed, the provision's punctuation alone does not unambiguously dictate that a random or sequential number generator is a required feature of an ATDS. *See Marks*, 904 F.3d at 1050–51; *ACA Int'l*, 885 F.3d at 701–03.

Marks's resolution of that perceived ambiguity is the reading that best accounts for the statute's language and structure. The definition uses the disjunctive "or" to describe two separate categories of covered devices: devices that store numbers to be called, *or* that produce numbers to be called. Facebook's contention that both categories are subject to the requirement that they carry out their function "using a random or sequential number generator" renders the first category superfluous. Even if Facebook's counterintuitive assertion that some devices use their number generating capacity to store numbers as well as produce them were correct, there would be no need, on Facebook's view of the intended scope of the definition, to specify devices that store numbers in addition to those that produce them: The devices Facebook hypothesizes would necessarily be covered because they could produce numbers to be called using their random or sequential number generators.

As *Marks* points out, other parts of the statute confirm that it covers devices that call numbers from a stored list that was *not* randomly or sequentially generated. The statutory language permitting the use of an ATDS to call recipients who have consented to receive such calls makes no sense unless an ATDS includes a device that makes calls from a list of persons who have consented to receive them, and such a list could not be generated randomly or sequentially. Likewise, the amendment permitting calls for the purpose of collecting government-backed debt assumes that automatically calling a list of numbers of debtors would otherwise be covered by the prohibition on using an ATDS to make unconsented-to calls: No one could plausibly claim that calls to randomly generated or sequential numbers were intended to collect a specific type of debt. *See* 904 F.3d at 1051–52.

Moreover, as *Marks* observes, when Congress amended the statute in 2015 to incorporate the government-backed-debt exception, the FCC had already issued a number of orders indicating that the ATDS definition covered devices that dialed from stored lists of numbers but did not generate those lists randomly or sequentially. Congress's addition of an exception that makes no sense under Facebook's reading, while leaving the ATDS definition intact in the face of the FCC's constructions, provides a powerful indication that the statute is best read to cover devices without a random or sequential number-generating capacity. *See id.* at 1052 (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

Finally, Facebook's concession that under its view, the statutory ATDS definition "refers to a small universe of rapidly obsolescing robocalling ma-

chines," Pet. 13–14 is a telling indication that its reading is wrong. Robocalls using randomly or sequentially generated numbers may be on the wane, but the scourge of robocalling is not. Every cell-phone owner knows that calls and texts automatically dialed from stored lists pose an ongoing threat to privacy. As a recent House Committee Report noted, "Americans are receiving more unlawful robocalls than ever before," an estimated 48 billion in 2018 alone. H.R. Rep. No. 116-173, at 11 (2019). Congress's concern with the flood of illegal robocalls has in recent weeks led the House and Senate to enact, and the President to sign, legislation giving the government new enforcement tools and mandating new efforts to crack down on calls that are illegal under existing law. Pallone-Thune Robocall Abuse Criminal Enforcement & Deterrence Act, S. 151 (signed Dec. 30, 2019) (P.L. number not yet assigned).

Facebook's reading of the statute would negate Congress's handiwork and open the floodgates to permit all but a few of the robocalls targeted by the TCPA and the new legislation enacted to strengthen it. Reading the TCPA to allow scammers and telemarketers to declare open season on consumers would be no more justifiable than the unduly expansive view rejected in *ACA International*.

C. The issue is subject to pending agency action.

Addressing the ATDS definition now would be particularly inadvisable because the scope of the definition—and in particular, whether it is limited to systems that can generate random or sequential numbers—is under active consideration by the FCC in light of *ACA International* and *Marks*.

In May 2018, less than a week after the mandate issued in *ACA International*, the FCC requested comments on four interrelated aspects of the TCPA definition in light of *ACA International*: (1) "how to more narrowly interpret the word 'capacity' to better comport with the congressional findings and the intended reach of the statute"; (2) "[h]ow 'automatic' must dialing be for equipment to qualify as an automatic telephone dialing system"; (3) whether equipment that "cannot itself dial random or sequential numbers[] can … be an automatic telephone dialing system"; and (4) whether the TCPA's bar on use of an ATDS "appl[ies] only to calls made using the equipment's [ATDS] functionality." *Public Notice: Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's* ACA International *Decision*, 33 FCC Rcd. 4864, 4865–66, 2018 WL 2253215 (May 14, 2018). The FCC's notice underscored the importance of "interpret[ing] these various statutory provisions in harmony." *Id.* at 4866.

The FCC followed up two weeks after the decision in *Marks* (even before the court had disposed of a rehearing petition) with another notice requesting comment on what constitutes an ATDS. *See Public Notice: Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's* Marks v. Crunch San Diego, LLC *Decision*, 33 FCC Rcd. 9429, 2018 WL 4801356 (Oct. 3, 2018). The notice sought "further comment on how to interpret and apply the statutory definition of [ATDS], including the phrase 'using a random or sequential number generator,' in light of the recent decision in

Marks, as well as how that decision might bear on the analysis set forth in *ACA International*." *Id.*, 2018 WL 4801356 at *1. The agency further asked: "To the extent the statutory definition is ambiguous, how should the Commission exercise its discretion to interpret such ambiguities here?" *Id.* The agency also specifically requested comment on the potential implications of the ATDS definition with respect to the coverage of smartphones. *Id.*

These pending regulatory proceedings strongly weigh against the Court's consideration of the ATDS definition at this time. If, as the court below held, the definition is ambiguous, the FCC's authority to prescribe regulations to implement the requirements of § 227(b) would provide it authority to fill any statutory gap. Such regulatory action would be subject to deference under *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), and *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), and it would potentially supersede a judicial ruling on the best reading of the statute, *see Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–85 (2005). This Court's intervention before the FCC completes its deliberations would create the risk that a later agency action could deprive the Court's ruling of lasting effect and render the Court's consideration of the issue a waste of time and resources.

In addition, as described above, the FCC is considering an interrelated set of issues concerning the ATDS definition, including not only whether an ATDS must have a random or sequential number generator, but also the correct reading of the definitional terms "capacity" and "automatically" and whether a call must make use of the required ATDS functionality to be covered by the statute. Such an

effort to construe the statute as an integrated whole is more likely to arrive at a sensible and workable definition that serves the statute's purposes than the isolated focus on a single aspect of the definition that Facebook's petition proposes. The Court should not forestall the regulatory process by addressing the definition before the FCC has completed its deliberations.

D. This case is a poor vehicle for addressing the ATDS issue.

Finally, if there were any reason for this Court to take up the ATDS definition at this time, this would be a particularly poor case in which to do so, because whether a device must possess random or sequential number-generating capacity to meet the ATDS definition would not dispose of the case. The holding in *Marks* was a sufficient basis for the ruling in this case that the complaint stated a claim under the TCPA, but it was not necessary: The complaint alleged, in considerable detail, that Facebook's system in fact had the present capacity to generate random numbers. Those plausibly pleaded factual allegations must be accepted as true on a motion to dismiss under Rule 12(b)(6). *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, even if Facebook were correct in asserting that all ATDSs must possess random or sequential number-generating capacity, the Ninth Circuit would still be required to consider whether the district court erred in finding the complaints' allegations too conclusory to pass muster under that standard.

Moreover, if the Court were to undertake to delve into the question of what constitutes an ATDS, it would be far better to do so on a fully developed fac-

tual record that made clear what capacities Facebook's system in fact has. Additional facts would also be relevant to Facebook's assertions, unsupported by the record in this case, that all smartphones possess the capacity to call stored lists of numbers automatically and that random number generators in fact *store* lists of numbers to be called as well as *producing* them. The potential relevance of such questions is not only an indication that an administrative agency's expertise may be useful in establishing the bounds of the statutory definition, but also a sound reason for not attempting to address that issue on an appeal from a decision on a Rule 12(b)(6) motion in the absence of any factual record.

This case is thus a textbook example of the reasons this Court normally adheres to the practice of not addressing cases in an interlocutory posture. *See* p. 19, *supra*. In addition to the obvious possibility that the case could ultimately be resolved in any number of ways that would avoid the need to address the issues Facebook raises, the benefits of deciding the issues on a fully developed record tilt decidedly against Facebook's request for review of the ATDS issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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