No. 19-575

IN THE

Supreme Court of the United States

CHARTER COMMUNICATIONS, INC., *ET AL.*,

Petitioners,

v.

STEVE GALLION, *ET AL.*,

Respondents.

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

RESPONDENT STEVE GALLION'S BRIEF IN OPPOSITION

TODD M. FRIEDMAN
ADRIAN R. BACON
LAW OFFICES OF TODD M. FRIEDMAN, P.C.
21550 Oxnard Street
Suite 780
Woodland Hills, CA 91367
(877) 206-4741

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Respondent Steve Gallion

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QUESTION PRESENTED

The Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, prohibits calls to cell phones using autodialers and/or prerecorded or artificial voice messages. In 2015, Congress amended this prohibition (and a similar prohibition on calls to residential telephones using prerecorded or artificial voice messages) 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 the exception was a content-based preference for some forms of speech over others, and that the preference violated the First Amendment. Applying this Court's severability jurisprudence, the court went on to hold the exception severable from the remainder of the statute. The court further held that, with the exception severed, the TCPA remained a valid, content-neutral restriction on the time, place, or manner of speech. The court's holding followed a prior published decision of the Ninth Circuit and agreed with an earlier decision of the Fourth Circuit.

The question presented is:

Whether the court of appeals erred in severing the exception for calls to collect government-backed debts from the TCPA and sustaining the remainder of the statute.

RELATED CASES

The following proceedings are directly related to this case:

Gallion v. Charter Communications Inc., No. 5:17-cv-01361-CAS(KKx), United States District Court for the Central District of California. Motion for judgment on the pleadings denied and order certified for interlocutory appeal, Feb. 26, 2018.

Gallion v. Charter Communications, Inc., No. 18-55667, United States Court of Appeals for the Ninth Circuit. Judgment entered July 8, 2019.

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INTRODUCTION

Two courts of appeals, in three cases, have addressed whether the Telephone Consumer Protection Act (TCPA) violates the First Amendment in light of a recent TCPA amendment exempting from some of its requirements calls to collect debts owed to or guaranteed by the federal government. Both courts—the Fourth and Ninth Circuits—reached the same conclusion: The addition of the exception, they ruled, transformed the TCPA into a content-based speech restriction, and the distinction drawn by the statute between government debt-collection calls and other robocalls does not satisfy strict scrutiny. However, the provision exempting calls to collect government-guaranteed debt is severable and, with that provision severed, the remainder of the statute is constitutional. *See* Pet. App. 1a; *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019); *Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159 (4th Cir. 2019) ("*AAPC*").

Petitions for writs of certiorari have now been filed in all three of the cases. In this case, Charter Communications, a corporation sued for making telemarketing robocalls, seeks review of the Ninth Circuit's severability determination. In the other two cases, petitions filed from opposing points of view raise both the merits of the constitutional question and the severability issue. In the Fourth Circuit case, which involves an action brought by political organizations seeking declaratory and injunctive relief against the United States, the United States principally seeks review of the court of appeals' ruling that the statute as amended is unconstitutional, but also suggests that the Court decide the severability issue—even though

the government acknowledges that the latter question is not independently worthy of review. *Barr v. Am. Ass'n of Political Consultants, Inc.*, No. 19-631 (filed Nov. 14, 2019). In the other Ninth Circuit case, another corporate defendant to a TCPA suit seeks review both of the constitutional issue on which it prevailed in the Ninth Circuit and of the severability issue on which it lost, as well as of an unrelated issue of statutory construction. *Facebook, Inc. v. Duguid*, No. 19-511 (filed Oct. 21, 2019).

The flurry of petitions should not obscure the absence of any important need for this Court's review of either issue, but especially of the severability issue presented by the petition here. The two courts of appeals that have considered the issues so far have agreed on both the result and the reasoning used to reach it. Their decisions leave intact a statute providing important protections to the public against intrusive telemarketing, while setting aside only an exception added long after the statute's original enactment and affecting, in the government's words, only "a small fraction of the calls that are otherwise subject to" the relevant provisions of the TCPA, "which continues to prevent millions of unwanted calls every day." *Barr* Pet. 12.

Moreover, the lower courts' consistent rulings on the severability issue comport with both common sense and the long-settled legal principle that unconstitutional provisions of a federal statute must be severed "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not," *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)), as long as "the law remains 'fully operative' without the

invalid provisions," *Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010)). As both the Ninth and Fourth Circuit agree, there is no doubt that Congress would have enacted the TCPA without the limited exception that, in those courts' view, rendered it improperly content-based. Accordingly, a remedy that preserves the fundamental purpose of the TCPA best comports with severability principles and the congressional intent they seek to honor.

Meanwhile, litigation over the issues continues in other circuits. *See Barr* Pet. 16. Should a conflict arise over the resolution of either the First Amendment issue or the severability issue, the Court can consider whether it requires resolution. Until then, however, the agreement among the lower courts and the clear consistency of their severability decisions with Congress's expressed purpose to protect members of the public against intrusive telemarketing counsel strongly against granting review in this case.

STATEMENT

Congress enacted the TCPA in 1991 to halt widespread abuses of telephone and facsimile technology that were inundating consumers with unwanted and intrusive robocalls to home telephones and cell phones, as well as junk faxes. *See Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 370–72 (2012). As this Court explained in *Mims*, "the TCPA principally outlaws four practices." *Id.* at 373.

> First, the Act makes it unlawful to use an automatic telephone dialing system or an artificial or prerecorded voice message, without the prior express consent of the called party, to call any emergency telephone line, hospital patient, pager,

> cellular telephone, or other service for which the receiver is charged for the call. See 47 U.S.C. § 227(b)(1)(A). Second, the TCPA forbids using artificial or prerecorded voice messages to call residential telephone lines without prior express consent. § 227(b)(1)(B). Third, the Act proscribes sending unsolicited advertisements to fax machines. § 227(b)(1)(C). Fourth, it bans using automatic telephone dialing systems to engage two or more of a business' telephone lines simultaneously. § 227(b)(1)(D).

Id.

Following the TCPA's passage, telemarketers challenged its constitutionality on First Amendment grounds. In two cases, the Ninth Circuit rejected those challenges, holding that the Act's restrictions on use of telephone technology including prerecorded messages and autodialers are 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 2015, as part of a budget bill, Congress amended the TCPA to provide that the Act's prohibitions on the use of autodialers and artificial or prerecorded voice messages in calls to cell phones, and its restriction on the use of artificial or prerecorded voice messages to residential telephones, 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); *see also id.* § 227(b)(1)(B). In the wake of that amendment, defendants in TCPA cases again began asserting challenges to the Act's constitutionality.

This action began in 2017 when respondent Steve Gallion, on behalf of a putative class, sued Charter Communications Service for using autodialers and recorded messages to make telemarketing robocalls to his cell phone. Charter, without contesting whether Mr. Gallion's complaint stated a claim for violation of the TCPA, moved for judgment on the pleadings on the ground that the TCPA, as amended, violates the First Amendment by imposing a content-based speech restriction.

The United States intervened to defend the statute's constitutionality. The district court then denied Charter's motion, holding that the TCPA's amendment had rendered it content-based but that the Act remained constitutional because it was narrowly tailored to further a compelling government interest in protecting privacy. Pet. App. 23a. The court certified its order for interlocutory appeal. Pet. App. 24a. The Ninth Circuit accepted the appeal and affirmed on different grounds in an unpublished opinion that adopted the analysis of its published opinion in *Duguid*, which was argued the same day and in which the court had issued its opinion one month before its decision in this case. Pet. App. 2a.

Specifically, the Ninth Circuit held in *Duguid* and in the decision below that the addition of the government-backed debt exception changed what had been a content-neutral statute into a content-based statute by making application of the exception depend, in the court's view, on the content of a call. *See* Pet. App. 2a; *Duguid*, 926 F.3d at 1153–54. The court further held that the distinction drawn by the exception does not satisfy strict scrutiny. *See* Pet. App. 2a; *Duguid*, 926 F.3d at 1154–56. Declining to consider whether the TCPA, as a whole, continues to serve a compelling

interest in a narrowly tailored manner, the Ninth Circuit focused on whether the *exception* serves a compelling interest. *Duguid*, 926 F.3d at 1155. The court concluded that it does not, because the calls it permits undermine the statute's overall purpose of protecting against invasive calls that intrude on residential and personal privacy. 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 1155–56.

The Ninth Circuit concluded, however, that the government-backed debt exception is severable from the TCPA's other provisions, *see* Pet. App. 2a; *Duguid*, 926 F.3d at 1156–57, and on that basis affirmed the denial of Charter's motion for judgment. Pet. App. 3a. The court emphasized that, under this Court's decisions, "[c]ongressional intent is the touchstone of severability analysis." *Duguid*, 926 F.3d at 1156. 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*, 480 U.S. at 686).

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*, 561 U.S. at 509). The limited exception enacted in 2015, the court concluded, "did not suddenly and silently become so integral to the TCPA that the statute could not function without

it." *Id.* at 1157. The Ninth Circuit acknowledged the point 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.* (quoting *Rappa v. New Castle County*, 18 F.3d 1043, 1073 (3d Cir. 1994) (emphasis added by *Duguid*)). 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 court of appeals declined Charter's invitation to reconsider arguments that other provisions of the TCPA that the court had upheld in *Moser* and *Gomez* rendered the statute content-based. *See* Pet. App. 2a. It also declined to consider, as not properly before it, challenges to regulatory exceptions to the TCPA promulgated by the FCC, *id.* at 3a—a ruling that Charter's petition does not challenge. In addition, the court did not reach Charter's argument "that severing the unconstitutional portion of the TCPA raises retroactivity concerns" because Charter had not raised that argument until its reply brief. *Id.*

REASONS FOR DENYING THE WRIT

I. The courts of appeals are in complete agreement on both the severability issue and the underlying question of the constitutionality of the TCPA's exception for collection of government-backed debt.

After Congress amended the TCPA's longstanding provisions in 2015 to include a limited exception for calls made to collect debts owed to or guaranteed by the federal government, companies and organizations affected by the TCPA have sought to strike down the entire statute as a "content-based" speech restriction. So far, in the three cases decided by federal appellate courts, two circuits have agreed on the resolution of both the merits of the First Amendment challenge and the question whether the government-debt exception can be severed from the remainder of the statute to remedy any constitutional infirmity. Further decisions of other courts of appeals are likely to follow, and they will generate either continued uniformity or conflict on one or both issues. Under these circumstances, there is no immediate need for review of the issues posed by these cases—and, in particular, no important reason for reviewing the severability question posed by this petition.

As the government notes in its petition for certiorari in *Barr*, this Court often grants certiorari where a court of appeals has held a federal statute unconstitutional, *see Barr* Pet. 15, but that usual practice is not invariable. And despite the flaws in the reasoning on which the lower courts relied in holding the TCPA to be a content-based speech restriction, these cases are instances where following that usual practice may not be warranted even as to the *Barr* petition, in

which the United States challenges the lower courts' constitutional holdings. The decisions of the Ninth and Fourth Circuits hold only a single exception to the TCPA's robocalling restrictions to be constitutionally problematic; the statute remains fully operational and offers important public protections without that provision; and there will undoubtedly be future opportunities for review of the constitutional issue in cases arising from other circuits if a conflict develops or if, absent a conflict, further development of the issues in the lower courts warrants intervention for purposes of error correction.

In this case, Charter, like the United States in *Barr*, invokes the proposition that "the invalidation of a federal statute on constitutional grounds" is "ordinarily alone a sufficient basis for this Court's review." Pet. 18–19. That consideration, however, is typically a justification for granting a petition *contesting* invalidation of a statute, and Charter's petition, of course, does not challenge the lower courts' holding that the TCPA as amended is invalid. Moreover, although its question presented includes the First Amendment issue, the argument in the petition is focused solely on severability. Both respondent Gallion and the United States would argue the incorrectness of the constitutional holding as an alternative ground for affirmance of the judgment below if Charter's petition were granted, but that in itself would not render this case worthy of review unless Charter's challenge to the court of appeals' severability holding itself merited this Court's consideration. And that issue, as the United States points out in its *Barr* petition, "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*. As Charter's petition acknowledges, there is complete agreement among the only federal appellate authorities directly on point—the Ninth Circuit's rulings in this case and in *Duguid* and the Fourth Circuit's decision in *AAPC*. As the petition also concedes, the most closely on-point 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), are also consistent with the Fourth and Ninth Circuit's severability rulings regarding the TCPA. In both cases, courts considering challenges to state robocall restrictions analogous to the TCPA's noted that the challenged statutory exceptions could be severed from the remainder of the statutes, leaving the statutes operational as to the prohibited activity of sending automated calls and messages.

Charter nonetheless claims that there is a conflict among the circuits because other federal appellate courts, in cases considering state-law speech restrictions entirely different from the TCPA, did not sever statutory exceptions to preserve the constitutionality of the statutes at issue. The decisions Charter cites, however, do not in any way present a conflict among the circuits. To begin with, only one of the appellate decisions Charter cites, the Third Circuit's decision in *Rappa*, 18 F.3d at 1073, even discusses the issue of severability. The rest have nothing in common with this case except that they involved First Amendment challenges in which the existence of exceptions to statutory restrictions played some role (in some of the cases, a relatively small one) in the courts'

constitutional analysis. Moreover, each involved a constitutional challenge to a state statute or local ordinance, and severability in such cases is a matter of state or local law, not federal law. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988). Indeed, *Rappa*, the sole decision that addresses severability, expressly acknowledges that whether to sever provisions of a state statute is a question of state law. *See* 18 F.3d at 1072.

Even leaving aside that *Rappa* decided severability as a matter of Delaware law, its holding does not, as Charter asserts, "directly conflict[] with the decision below." Pet. 17. *Rappa* itself recognized that severing an exception to a speech restriction to restore a statute's content neutrality *would* be appropriate where there was specific evidence that the legislature would prefer that outcome. *See* 18 F.3d at 1073. Far from disagreeing with that view, the Ninth Circuit held that the circumstances where *Rappa* acknowledged it would be appropriate to sever a statutory exception were present with respect to the TCPA.

Rappa concerned a statute that prohibited political signs along Delaware roadways but allowed a large number of other types of signs, including for-sale signs and signs advertising local industries, meetings, buildings and attractions. *Rappa* held that the statute was not content-neutral and that the distinctions it drew did not survive strict scrutiny. The court then proceeded to consider whether the statutory exceptions could be severed. Importantly, *Rappa* did not hold, as Charter insists, that the First Amendment forbids a court from remedying a constitutional defect in a statute by severing a statutory exception to a speech restriction to restore the statute's content-neutrality. Had that been *Rappa*'s holding, it would not

have embarked on a state-law severability analysis at all. Rather, the Third Circuit stated in *Rappa* that, informed by First Amendment concerns about "sever[ing] the statute so that it restricts more speech than it did before," it would not "generally" sever such a provision "absent quite specific evidence of a legislative preference for elimination of the exception." 18 F.3d at 1073. Given the broad range of exceptions that would have to be severed to preserve the statute in the case before it, the Third Circuit concluded that it could not "assume that the Delaware legislature would prefer us to sever the exception and restrict more speech than to declare [the statute] invalid." *Id.*

In *Duguid*, the Ninth Circuit specifically acknowledged *Rappa*'s point 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." 926 F.3d at 1157 (quoting *Rappa*, 18 F.3d at 1073 (emphasis added in *Duguid*)). The court found such specific evidence here, not only in the Communication Act's severability clause, 47 U.S.C. § 608, but also in the statute's history. As the court noted, the TCPA "has been 'fully operative' for more than two decades," 926 F.3d at 1156, and the statute as a whole serves important privacy interests identified by Congress, *see id.* at 1149, 1155–56. By contrast, the exception for calls to collect government-backed debt, enacted "with little fanfare" two decades after the statute's passage, *id.* at 1156, is central neither to the Act's purposes nor to its ability to function.

In light of these considerations, the court concluded that there was every reason to think Congress would prefer a TCPA that did not exempt calls to collect government-backed debt over no TCPA

robocalling restrictions at all. *See id*. Unlike in *Rappa*, where severing the statute's exceptions would have resulted in prohibiting a wide variety of signs that the legislature likely never contemplated forbidding, severing the exception here merely brought back within the TCPA's scope a single category of calls that had been subject to it for years. Thus, 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.

II. The lower courts' application of severability doctrine is fully consistent with this Court's decisions.

In the absence of a conflict among the circuits, Charter asserts that the Ninth and Fourth Circuits' consensus on severability conflicts with rulings of this Court. But Charter identifies no decision of this Court holding that a court may not sever a statutory exception that it has concluded renders an otherwise constitutional statute impermissibly content-based. Charter has thus identified no "conflict[] with relevant decisions of this Court" within the meaning of this Court's Rule 10(c).

Rather, Charter's claim is that the Ninth and Fourth Circuits erred in applying this Court's severability and First Amendment jurisprudence to the TCPA. Such claims of error generally do not merit review. *See*, *e.g.*, *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1278 (2017) ("[W]e rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case.") (Alito, J., concurring in denial of certiorari). This case is no exception, given the

absence of any direct support in any decision of this Court (or the lower courts) for Charter's position.

A. Charter's argument that a content-based exception to a statute that imposes time, place, or manner limitations, or other restrictions on speech, is categorically ineligible for severance to preserve the constitutionality of the larger statute is at odds with this Court's precedents. The Court has often stated that when a court has found 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, 328–329 (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 … independently of that which is [invalid].'" *Id.* at 509 (citations omitted). *Accord*, *e.g.*, *Murphy*, 138 S. Ct. at 1482; *Alaska Airlines*, 480 U.S. at 684. Under this "normal rule," where the conditions for severability are met, "partial, rather than facial, invalidation is the required course." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985). These principles, moreover, apply to First Amendment cases as fully as they do to cases involving other constitutional provisions. *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*, 486 U.S. at 772; *Brockett*, 472 U.S. at 506.

Applying these conventional principles, the Ninth and Fourth Circuits correctly concluded that the government-backed debt exception met the criteria for

severance. 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 the exception for nearly 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 never have chosen to sacrifice the entire ban on autodialed calls if it could not make one exception for calls to collect government-backed debt.

Despite the consistency of the lower courts' rulings with this Court's severability precedents, Charter insists that some of the Court's First Amendment decisions imply that there is an exception to the general requirement that constitutionally problematic provisions be severed: A court may not, Charter contends, sever a content-based exception to a restriction on speech to save an otherwise content-neutral statute. But Charter does not cite a single decision of this Court that holds or even suggests that severance is impermissible in these circumstances. Instead, Charter cites a grab-bag of cases in which this Court struck down overbroad content-based speech restrictions without severing content-based exceptions that played some role in the Court's conclusion that the laws did not withstand strict scrutiny. *See* Pet. 9–11.

For example, Charter's leading case, *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), contains no holding whatsoever regarding severability. Neither the subject nor even the term is mentioned in the opinion.

That *Reed* does not address severance does not, as Charter suggests, imply a *sub silentio* holding that severance is categorically prohibited when a statute contains content-based exceptions. There are any number of more plausible reasons *Reed* did not discuss severability. First, the respondent's brief in this Court did not argue for severability and referred to the subject only hypothetically in a single footnote. *See Reed*, Resp. Br. 48 n.15, No. 13-502 (filed Nov. 14, 2014). Second, because *Reed* involved a city ordinance, severability would have been a question of state law. *See supra* p. 11. Third, *Reed* did not turn on the existence of one or two content-based exceptions to an otherwise neutral statute; rather, the Court concluded that the sign code at issue was content-based through and through: The code defined different categories of signs based on their content and then subjected each category to different restrictions. 135 S. Ct. at 2227. The circumstances of *Reed* are starkly different from those posed by the single TCPA exception that the Ninth and Fourth Circuits determined to be content-based and severed. Charter's assertion that "[t]he decision below is in irreconcilable conflict with … *Reed*," Pet. 10, is therefore patently wrong.

The same is true of the other cases Charter string-cites on page 11 of its petition. Not one of them discusses severability, let alone holds severance impermissible. And none of the cases concerned a single exception without which the challenged law would have been content-neutral and constitutional. Moreover, in all but two of the cases Charter cites, state or local laws were at issue, so severance likewise would have been an issue of local law that this Court would have had no reason to address. The only two cases involving federal laws, *Greater New Orleans Broad. Ass'n v.*

United States, 527 U.S. 173, 190 (1999), and *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488–91 (1995), likely did not address severability because no one exception could cleanly be excised from the statutes at issue in a way that would even arguably address the numerous defects the Court found in them: The statute in *Greater New Orleans* was "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it," 527 U.S. at 190, while the restriction on alcohol-content advertising in *Rubin* was condemned by the "overall irrationality of the Government's regulatory scheme," 514 U.S. at 488, which could not have been cured by surgically removing one or a handful of exceptions. In sum, Charter does not cite a single decision of this Court that conflicts with the Ninth and Fourth Circuits' holdings or even suggests that those holdings were incorrect.

B. Absent a plausible claim that the decision below conflicts with any decision of this Court, Charter falls back on the assertion that the lower courts evinced "misunderstanding" of the First Amendment, Pet. 11, by "focus[ing] only on whether the government-backed debt collection exception, standing alone, was unconstitutional," *id.* at 12. Charter now insists that this was the "wrong inquiry," *id.*, and that the lower courts instead should have focused on whether the exception indicated that the TCPA's restrictions on other kinds of calls do not genuinely serve their asserted purposes. If the courts concluded that they do not, Charter asserts, the restrictions should have fallen, not the exception.

The problem with Charter's claim that the lower courts erred (in addition to the unworthiness for this Court's review of such a claim of error) is that if the lower courts had followed the approach Charter now

advocates—as the government and respondent urged them to do, *see Duguid*, 926 F.3d at 1155 ("[T]he government would have us focus our analysis on the TCPA writ large rather than the debt-collection exception.")—they would have concluded that the TCPA as a whole remained constitutional. That is, they would have been forced to recognize that, despite a limited exception that served other purposes, it continued to promote substantial, and indeed compelling, interests in protecting consumers against unwanted, intrusive telemarketing. The Ninth Circuit, at Charter's urging, instead focused on whether the exception giving more favorable treatment to calls aimed at collecting government-backed debt served a compelling interest, and concluded that it did not. *See id.* at 1155–56.

Having found that the TCPA's preferential treatment of one type of call lacked adequate justification, but that the statute was otherwise both fully operative and constitutional, the Ninth Circuit followed the logic of its approach and severed the exemption rather than striking down the autodialing restriction in its entirety. That remedy was entirely in keeping 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, as in other cases involving severance, 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 all robocallers free rein.[1]

Charter nonetheless insists that this approach was improper because the "speech-promoting exception" to the TCPA "*in isolation* is obviously not unconstitutional." Pet. 14. Charter's statement is nonsensical because an "exception" by definition cannot exist in "isolation" from the rule to which it is an exception. And the Ninth Circuit's holding was indeed that it was the *exception*—which it saw as an unjustified content-based preference granted to one type of speech over others—that was unconstitutional.

Charter's further assertion that "what the Ninth Circuit did … was not 'severability' but a crude rewriting of the statute," Pet. 14, is equally wrong. The Ninth and Fourth Circuits did not rewrite anything. They did no more than what this Court's precedents allow: They severed a discrete, constitutionally "problematic" provision, *Free Enter. Fund*, 561 U.S. at 508, and left the remainder of the statute intact, just as it was before that provision was enacted. If such a surgical approach constituted "rewriting," then severance would never be permissible.

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[1] Notably, the appellate decision on which Charter principally relies, *Rappa*, recognizes that the severability issue in First Amendment cases is essentially the same as the remedial issue posed by equal protection cases where courts must choose between nullifying an exception or striking down an entire statute, and it is governed by the same consideration: Congress's preference. *See* 18 F.3d at 1073 n.53.

Finally, Charter half-heartedly seeks to demonstrate a conflict with this Court's precedents by asserting that even if severance is otherwise permissible, it is impermissible in a case where a company asserts a First Amendment defense to civil damages liability for violating a statute at a time when an unconstitutional exception had not yet been severed. Again, the decisions Charter cites offer no support for its assertion. Its leading precedent, *Grayned v. City of Rockford*, 408 U.S. 104, 107 n.2 (1972), says only that the amendment of a statute after a defendant is arrested and criminally convicted for violating it has no bearing on the question of the constitutionality of the criminal conviction. Charter's backup citation to another footnote, this one in *Sessions*, likewise refers (in dicta) only to whether severance of an unconstitutional provision could validate a criminal conviction. *See* 137 S. Ct. at 1699 n.24. Nothing Charter cites calls into doubt the applicability of severance principles to this case.

Moreover, the court of appeals declined to reach Charter's argument that applying the TCPA, with its government-backed debt exception severed, to conduct predating the severance would raise retroactivity concerns because Charter raised the argument for the first time in its reply brief, and thus the argument was deemed waived. Pet. App. 3a.

III. Charter's policy arguments do not support review of the severability issue.

Charter contends that its request for review of the lower courts' severability rulings is important because those rulings would create disincentives to challenge unconstitutional laws in circumstances like those here, where the result of severance is to allow the

claims against Charter to proceed as they would have had it not raised its constitutional defense. As this Court has recognized, severance sometimes has such consequences. In *Sessions*, for example, when this Court severed and invalidated a statutory provision giving preferential treatment to children born abroad to unwed citizen mothers, the result was that the child of an unwed citizen father who successfully challenged the law received no relief. *See* 137 S. Ct. at 1701. Likewise, in *Free Enterprise Fund*, the effect of this Court's severability ruling was to deny the petitioners the relief they wanted: an injunction that would have stripped the Public Company Accounting Oversight Board of all power and authority, and prohibited it from regulating and investigating them. *See* 561 U.S. at 508. The Court's severability doctrine reflects the view that parties should not be given unduly broad remedies just to reward them for raising valid constitutional claims. Rather, the remedy for a constitutional violation should be no broader than necessary to eliminate the violation while preserving Congress's legislative handiwork to the extent consistent with the Constitution and with congressional intent.

In any event, the suggestion that severability will deter meritorious constitutional challenges is unfounded. Parties do not know the result of the severability calculus in advance and have ample incentive to raise constitutional claims both defensively and offensively in situations where they face potential liability or otherwise stand to gain if a statute is struck down. Moreover, in the TCPA context (as in most others) there are alternative avenues by which the constitutional issue could have been raised if defendants had been deterred from raising First Amendment defenses for fear that they would gain no benefit from

prevailing because of a severability ruling: Recipients of autodialed calls seeking to collect government-backed debt could challenge the constitutionality of the statutory exception; the United States or companies engaged in such calls could seek declaratory relief concerning the constitutionality of the exception if they feared consumer lawsuits might target the exception; or the issue could be raised (as it was in the Fourth Circuit case) in an action seeking declaratory and injunctive relief against the government.

Charter also asserts that resolution of the severability issue is a matter of importance because, it claims, the TCPA has led to excessive litigation and liability. Charter's policy argument has nothing to do with the constitutional and severability issues here. Charter's complaints about the TCPA do not bear on the correctness of the Ninth and Fourth Circuits' application of the severability doctrine, but instead reflect disagreement with Congress's choice of broadly prohibiting autodialed calls and other telemarketing practices addressed by the TCPA and its creation of a private right of action to enforce the law through claims for statutory damages. As this Court noted in *Mims*, however, Congress's enactment of the TCPA responded to "[v]oluminous consumer complaints about abuses of telephone technology" by targeting "practices invasive of privacy." 565 U.S. at 371. The extent of litigation under the TCPA reflects "'a shocking degree of noncompliance' with the Act," *id.* at 386, not the illegitimacy of the Act's scope and the remedies it provides. Disagreement with Congress's proper objectives in enacting the TCPA should play no role in determining whether a dispute over the severability of a later-added exception is a matter warranting this Court's attention.

Likewise meritless is the argument, advanced in an amicus curiae brief by the Chamber of Commerce, that the Court should grant review because the Chamber believes that TCPA claimants, the FCC, and lower courts have misread the Act's definition of automated telephone dialing systems. The petition in this case does not raise that statutory issue, and it is absurd to suggest that the Court should strike down a statute on constitutional grounds because of concerns about the proper construction of one of its provisions.

IV. This case is a poor candidate for review.

This case presents a particularly unsuitable vehicle for considering the question presented or the underlying merits issue of the constitutionality of the TCPA's government-backed debt exception. To the extent that the Court's ordinary practice of reviewing cases where federal statutes are held unconstitutional bears on whether certiorari should be granted in any of these cases, *see* Pet. 18–19, it argues sharply against a grant of certiorari in this one, where that question is not the subject of the petition and would arise as an alternative ground for affirmance of the decision below. If it is the constitutional issue that merits review, granting certiorari on a petition devoted almost exclusively to the remedial question and relegating the underlying constitutional issue to a subsidiary role would be a case of the tail wagging the dog.

Moreover, if, as shown above, the severability issue does not itself merit review, granting certiorari in either this case or the other Ninth Circuit case, *Duguid*, would be particularly unwarranted. Reversal of the judgments below in these cases would be possible only if the petitioners prevailed not only on the

constitutional issue, but also on an issue that there is no compelling reason for the Court even to decide. Thus, even if the Court were to conclude that the merits issue of the constitutionality of the TCPA warranted review at this time, the proper course would be to grant the *Barr* petition, limit the grant to the constitutional question, and deny the petitions in both Ninth Circuit cases, as the outcomes of those cases would be unaffected regardless of the outcome in *Barr*.[2]

The procedural posture of this case (as well as that of *Duguid*) also disfavors review. The decisions are interlocutory and arise from motions challenging the pleadings (in this case, Charter's motion for judgment on the pleadings, and, in *Duguid*, a motion to dismiss under Rule 12(b)(6)). If the actions proceed, they may end in any number of ways that would obviate the need to decide the severability question or the underlying constitutional issue.[3] This Court usually avoids

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[2] In *Barr*, it is at least arguable that a decision on the constitutional issue would result in a different judgment with a different practical impact, as the district court on remand in *Barr* may enter a declaratory judgment that the government-backed debt exception is stricken from the statute, which may in turn affect FCC rulemaking activity or bind persons acting in concert with the federal government in making autodialed calls to collect government debt. That potential impact, however, does not by itself justify granting certiorari on the constitutional question even in *Barr*. The possibility that some debtors may be spared intrusive autodialed calls by the effect of the *Barr* judgment does not add appreciably to the importance of the constitutional issue on which the two lower courts are in agreement.

[3] As the United States has pointed out in its *Barr* petition and its responses to this petition and the one in *Duguid*, *Duguid* is also an unsuitable candidate for review of either the constitutional or severability issue because of the confounding factor of

(*Footnote continued*)

cases in such a preliminary posture. *See Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari). Especially in light of the complete agreement among the courts that have so far addressed the issues, and the likelihood that there will be future opportunities to address the issues on appeal from a final judgment should some disagreement among the lower courts emerge, review at this time is unwarranted.

CONCLUSION

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

Respectfully submitted,

TODD M. FRIEDMAN
ADRIAN R. BACON
LAW OFFICES OF TODD M. FRIEDMAN, P.C.
21550 Oxnard Street
Suite 780
Woodland Hills, CA 91367
(877) 206-4741

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Respondent Steve Gallion

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its inclusion of another issue that is the subject of ongoing regulatory consideration by the FCC. *See Barr* Pet. 17; U.S. *Gallion* Opp. 6; U.S. *Duguid* Opp. 10–11.