No. 19-631

IN THE

Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF INDIANA, NORTH CAROLINA, AND 31 OTHER STATES IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI* STATES[1]

The States of Indiana, North Carolina, Alabama, Alaska, Arkansas, Connecticut, Delaware, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin respectfully submit this brief as *amici curiae* in support of the United States Attorney General.

For decades, the States and the federal government have sought to protect consumers from unwanted robocalls—automated telephone calls that deliver a prerecorded message. These calls invade consumer privacy with harassing messages that come at all hours, day and night. Indeed, robocalls are the most common source of consumer complaints at many State Attorney General offices. *Comment from the State Attorneys General Supporting Enactment of the Telephone Robocall Abuse Criminal Enforcement and Deterrence ("TRACED") Act* 1 (Mar. 5, 2019), *available at* http://bit.ly/390krVu. By seeking to eliminate the robocall ban in its entirety, respondents threaten the ability of States to fight one of the most pressing consumer-protection issues that their residents face.

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[1] No counsel for any party authored this brief, in whole or in part, and no person or entity other than *Amici* contributed monetarily to its preparation.

The robocall problem shows no signs of abating. In January 2020 alone, Americans received more than 4.7 billion robocalls. YouMail Robocall Index, *January 2020 Nationwide Robocall Data* (last visited Feb. 19, 2020), *available at* https://robocallindex.com/2020/january. And technological advances have helped robocalls proliferate. Robocalls inflict "more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons." S. Rep. No. 102-178, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972. They are notoriously cheap, which allows telemarketers to use them to bombard consumers with vast numbers of unwanted sales pitches and survey demands. *Id.* at 2. And because robocalls cannot engage with call recipients except in preprogrammed ways, they "do not allow the caller to feel the frustration of the called party." *Id.* at 4. Moreover, these calls have become far more than just a nuisance. Last year alone, robocalls defrauded Americans of more than $10 billion. Truecaller, *Phone Scams Cause Americans To Lose $10.5 Billion In Last 12 Months* (Apr. 17, 2019), *available at* http://bit.ly/2HCT08r.

The Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394, is a critical piece of federal consumer-protection legislation that generally prohibits the use of any "automatic telephone dialing system or an artificial or pre-recorded voice" to make a call to numbers assigned to a cellular telephone service. 47 U.S.C. § 227(b)(1)(A). The TCPA also grants both state and federal courts concurrent jurisdiction over TCPA claims, *Mims v. Arrow Fin.*

Servs., LLC, 565 U.S. 368, 372 (2012), and State Attorneys General have partnered with federal agencies to enforce the robocall ban, *see, e.g.*, Fed. Trade Comm'n, *Call It Quits: Robocall Crackdown 2019: Federal, State, and Local Actions* (June 25, 2019) (describing recent enforcement actions), *available at* http://bit.ly/2wxX0F9; Comment from the State Attorneys General, at 2–3 (same); *accord* 47 U.S.C. § 227(g)(1) (permitting parens patriae actions by states to sue for any "pattern or practice" of violating the TCPA).

In addition, as the TCPA expressly forecloses federal preemption of state telephone privacy laws, 47 U.S.C. § 227(f)(1), forty States have enforceable prohibitions or restrictions on the use of robocalls.[2] Many of

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[2] Ala. Code § 8-19A-3(3)(a); Alaska Stat. § 45.50.475(a)(4); Ariz. Rev. Stat. Ann. §§ 13-2919, 44-1278; Ark. Code § 5-63-204; Cal. Civ. Code § 1770(a)(22)(A); Cal. Pub. Util. Code § 2871; Colo. Rev. Stat. §§ 18-9-311, 6-1-302(2)(a); Conn. Stat. §§ 16-256e, 52-570c; Fla. Stat. § 501.059(8)(a); Ga. Code § 46-5-23; 815 Ill. Comp. Stat. § 305/1; Ind. Code § 24-5-14-5; Kan. Stat. § 50-670; Ky. Stat. § 367.461; La. Rev. Stat. Ann. § 45:810; Me. Rev. Stat. tit. 10, § 1498; Md. Pub. Util. Code § 8-204; Mass. Gen. Laws ch. 159C § 3, ch. 159 § 19B; Mich. Stat. § 484.125; Minn. Stat. §§ 325E.26, 332.37(13); Miss. Code §§ 77-3-451–59; Mont. Code § 45-8-216(1)(a)–(d); Neb. Stat. §§ 86-236 to 86-258; Nev. Stat. §§ 597.812, 597.814, 597.816, 597.818; N.H. Rev. Stat. Ann. § 359-E:1 to E:6; N.J. Stat. Ann. § 48:17-28; N.M. Stat. Ann. § 57-12-22; N.Y. Gen. Bus. Law § 399-p; N.C. Stat. § 75-104; N.D. Cent. Code § 51-28-04; 15 Okla. Stat. § 755.1; 21

these state laws were patterned on the federal robocall ban at issue here. In addition, many States also have separate restrictions on placing telemarketing calls of any type (even by a live operator) to consumers who register for no-call lists.[3]

Okla. Stat. § 1847a; Or. Rev. Stat. § 646A.370; 73 Pa. Stat. § 2245.2(j); R.I. Stat. §§ 5-61-3.4, 11-35-26; S.D. Stat. § 37-30-23; Tenn. Code Ann. § 47-18-1502; Tex. Bus. & Com. Code § 305.001; Utah Code Ann. § 13-25a-103; Va. Code § 59.1-518.2; Wash. Code § 80.36.400; Wis. Stat. § 100.52(4).

Two more States have enacted robocall prohibitions that have been enjoined. *See* S.C. Stat. § 16-17-446 (enjoined by *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015)); Wyo. Stat. § 6-6-104 (enjoined by *Victory Processing, LLC v. Michael*, 333 F. Supp. 3d 1263 (D. Wyo. 2018), *appeal filed*, No. 18-8063 (10th Cir.)).

[3] *See* Ind. Code § 24-4.7-4-1; Alaska Stat. § 45.50.475; Ariz. Rev. Stat. Ann. § 44-1282; Cal. Bus. & Prof. Code § 17591; Colo. Rev. Stat. § 6-1-904; Ga. Code Ann. § 46-5-27; Haw. Rev. Stat. § 481P-2; Idaho Code Ann. § 48-1003A; Kan. Stat. Ann. § 50-670; La. Rev. Stat. Ann. § 45:844.16; Me. Rev. Stat. tit. 10, § 1499-B; Mass. Gen. Laws ch. 159C, § 1; Mich. Comp. Laws § 445.111a; Mont. Code Ann. § 30-14-1602; Nev. Rev. Stat. § 228.550; N.H. Rev. Stat. Ann. § 359-E:11; N.J. Stat. Ann. 56:8-130; N.M. Stat. Ann. § 57-12-22; N.C. Gen. Stat. § 75-102; N.D. Cent. Code § 51-28-04; 73 Pa. Cons. Stat. § 2245.2; R.I. Gen. Laws § 5-61-3.5; S.C. Code Ann. § 37-21-70; S.D. Codified Laws § 49-31-99; Tenn. Code Ann. § 65-4-410; Tex. Bus. & Com. Code Ann. § 304.051; Utah Code Ann. § 13-25a-109; Vt. Stat. Ann. tit. 9, § 2464a; Va. Code Ann. § 59.1-514; Wis. Stat. § 100.52; Wyo. Stat. Ann. § 37-2-132.

Notwithstanding the compelling government interests at stake, the Fourth Circuit deemed a narrow TCPA exemption for calls to collect debt backed by the federal government to be impermissible content-based discrimination. But that ruling overlooks that the exception applies based on a call's purpose and the relationship between the parties—not based on the call's content.

The Fourth Circuit correctly held, however, that the proper remedy for any First Amendment problem with the federal-government-debt exemption was to sever the exemption and leave in place the robocall ban. Similar to the TCPA, state telephone privacy laws frequently include minor, incidental exemptions justified on content-neutral grounds. Because such laws protect the privacy of consumers, *Amici* States have a compelling interest in defending the TCPA's robocall ban as written—and in preserving the underlying restriction even if the challenged exemption is unlawful. The *Amici* States also have a strong interest in ensuring this Court reaches a ruling that will preserve their ability, under state law, to protect their citizens from the harms caused by robocalls.

SUMMARY OF THE ARGUMENT

No court has ever questioned the constitutionality of the TCPA's robocall restriction. Not even respondents argue that the robocall ban, standing alone, violates the First Amendment. Nor could they: the robocall restriction is a classic content-neutral speech

regulation. It applies to anyone who makes a robocall to speak on any topic—or no topic at all—and is narrowly tailored to serve the government's compelling interests to protect individual and residential privacy.

Respondents instead claim that a single, narrow exemption from the robocall ban—the federal-government-debt exemption, which exempts calls made "solely" to collect a debt owed to or backed by the federal government, 47 U.S.C. § 227(b)(1)(A)(iii)—violates the First Amendment. That exemption, however, is content-neutral—it applies depending on a call's purpose (to collect a debt) and depending on the debtor-creditor relationship between the call recipient and the federal government. Its applicability does not depend on the content of the call. And as a content-neutral speech regulation, the federal-government-debt exemption easily survives intermediate scrutiny by directly—and narrowly—advancing a substantial government interest in protecting the public fisc.

Even if the Court holds that the federal-government-debt exemption *does* violate the First Amendment, it should abide by the TCPA's severability clause and sever the exemption from the remaining robocall ban rather than invalidate the ban entirely. The robocall ban is fully functional even without the exemption; it was enforced for twenty-four years before Congress added the exemption to the TCPA in 2015, which proves Congress did not intend the ban to be conditioned on the exemption. Indeed, the case for severability is sufficiently straightforward that the

Court may wish to consider it first. *See I.N.S. v. Chadha*, 462 U.S. 919, 931 n.7 (1983) ("In this case we deem it appropriate to address questions of severability first.").

ARGUMENT

I. The Robocall Ban Safeguards Personal and Residential Privacy in Conformity with the First Amendment

A. The ban prohibits highly intrusive robocalls regardless of content and therefore passes First Amendment scrutiny

The TCPA permissibly prohibits the use of any "automatic telephone dialing system or an artificial or prerecorded voice" to make "any call" to a cell phone. 47 U.S.C. § 227(b)(1)(A)(iii). No court has ever held that such a blanket ban on robocalls violates the First Amendment. Indeed, every court to consider the matter has held that such laws are valid, content-neutral regulations on the manner by which speech is delivered. *See Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303 (7th Cir. 2017) (upholding Indiana's robocall ban); *Gomez v. Campbell–Ewald Co.*, 768 F.3d 871 (9th Cir. 2014) (upholding the TCPA before it was amended to add the federal-government-debt exemption), *aff'd on other grounds*, 136 S.Ct. 663 (2016); *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996) (upholding California's robocall ban); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1549–56 (8th Cir. 1995) (upholding the TCPA and

Minnesota's robocall ban); *Moser v. Fed. Commc'ns Comm'n*, 46 F.3d 970 (9th Cir. 1995) (upholding the TCPA).

These decisions are well-justified. Under the First Amendment, laws that "serve[ ] purposes unrelated to the content of expression" are constitutional so long as they "promote[ ] a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 799 (1989) (internal quotation marks and citations omitted). The robocall ban concerns the manner, not the content, of speech, and is narrowly tailored to serve the government's interests in protecting consumers' personal and residential privacy.

1. To decide whether a statute is content-based, the Court first looks to the statute's text and asks whether the statute draws content distinctions "on its face." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015). If the statute is facially neutral, the Court then looks to the statute's purpose, subjecting it to strict scrutiny only if it "cannot be justified without reference to the content of the regulated speech" or was adopted because of the government's disagreement with the message the speech conveys. *Id.* at 2227. Here, neither the text nor the purpose of the robocall ban pertain to the content of a telephone call's speech.

First, the text of the robocall ban does not draw content-based distinctions. By its terms, the robocall ban applies to "any call," 47 U.S.C. § 227(b)(1)(A)(iii),

so content is irrelevant. Instead, the prohibition applies based on the technology used to make and receive calls: It prohibits calling a cell phone with an "automatic telephone dialing system" or an "artificial or prerecorded voice." *Id.* The statute therefore bans robocalls selling products, promoting candidates, pranking friends, or addressing any other topic. Indeed, a caller could violate the statute without saying a word. *See McCullen v. Coakley*, 573 U.S. 464, 480 (2014) (explaining that the challenged law was content-neutral because one could violate it "without . . . uttering a word").

Second, the purpose of the robocall ban does not reflect impermissible content-based discrimination. Congress enacted the restriction because "telephone subscribers consider automated or prerecorded calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy"—not because the calls discussed any specific subject. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(10), 105 Stat. 2394. Nothing in the legislative record shows that Congress adopted the restriction because of disagreement with the messages that robocalls convey.

2. Because the robocall ban is content-neutral, it is reviewed under intermediate scrutiny. *Ward*, 491 U.S. at 791. Under that standard, restrictions on speech are constitutional so long as they are narrowly tailored to further an important government interest.

See id. The robocall ban principally serves the important government interest in protecting personal and residential privacy.

The Court has recognized that "in the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Fed. Commc'ns Comm'n v. Pacifica Found.*, 438 U.S. 726, 748 (1978). When Congress enacted the TCPA, it found robocalls to be "pervasive" and an "intrusive invasion of privacy" that "outraged" consumers. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(1), (5), (6), 105 Stat. 2394. Congress observed that consumers found robocalls to be a particularly severe invasion of privacy because "automated calls cannot interact with the customer except in preprogrammed ways," and "do not allow the caller to feel the frustration of the called party." S. Rep. No. 102-178, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972.

Advances in technology have enabled even more widespread privacy invasions. Robocall software is inexpensive and easy to access online. Marguerite M. Sweeney, *Do Not Call: The History of Do Not Call and How Telemarketing Has Evolved*, Nat'l Attorneys Gen. Training & Research Inst. (Aug. 2016), *available at* http://bit.ly/2SbCCkn. Robocalls have proliferated as a result. *See id*.

Although the specific provision challenged here applies to calls made to cellphones—calls that may or may not take place in the home—the privacy interests

at stake are no less compelling. 47 U.S.C. § 227(b)(1)(A)(iii). After all, residential landline phones are increasingly rare. *See* Stephen J. Blumberg & Julian V. Luke, Nat'l Ctr. for Health Statistics, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July–December 2017* 2, *available at* https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201806.pdf (finding that more than half all households in the United States no longer have landline phones). As a result, in the modern era, protecting residential telephone privacy means protecting against harassing calls to cell phones. In any event, individuals have constitutionally protected expectations of privacy in their cellphones. *Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018); *Riley v. California*, 573 U.S. 373, 393–94 (2014). The proliferation of robocalls undermines that compelling privacy interest.

The robocall ban is narrowly tailored to serve these government interests. By prohibiting calls using an automatic telephone dialing system or an artificial or prerecorded voice, Congress targeted precisely the kinds of calls that are most likely to invade individual privacy. *See Moser v. Fed. Commc'ns Comm'n*, 46 F.3d 970, 975 (9th Cir. 1995) ("Congress may reduce the volume of intrusive telemarketing calls without completely eliminating the calls.").

For these reasons, the general robocall ban easily passes intermediate scrutiny.

B. The federal-government-debt exemption applies regardless of call content and complies with the First Amendment

Exemptions from a prohibition on speech necessarily facilitate speech. Thus, "[i]t is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 448 (2015). Although a law's underinclusivity can "raise[ ] a red flag, the First Amendment imposes no freestanding underinclusiveness limitation." *Id.* at 449 (internal quotation marks and citations omitted). Exemptions raise First Amendment concerns only when they discriminate based on content and thereby betray government disfavor of a particular topic or viewpoint, or when they reveal insufficient tailoring. *See id.*; *see also City of Ladue v. Gilleo*, 512 U.S. 43, 50–51 (1994).

Neither of these concerns is implicated here. In 2015, Congress amended the TCPA to add an exemption for calls "made solely to collect a debt owed to or guaranteed by the United States." Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a), 129 Stat. 584, 588, codified at 47 U.S.C. § 227(b)(1)(A)(iii). The federal-government-debt exemption is both content-neutral and sufficiently tailored to advance important government goals.

1. The federal-government-debt exemption does not depend on a call's content

The federal-government-debt exemption depends only on the purpose of the call and the relationship of the call recipient to the federal government—*not* on the call's content. It applies only when the call is placed for a specific purpose—"solely to collect a debt"—and only when the call recipient is in debt to the government or a government-backed creditor. 47 U.S.C. § 227(b)(1)(A)(iii).

As courts have held, speech regulations of this kind are content-neutral. *See Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) (holding that motive-based speech regulations are content-neutral); *Zoeller*, 845 F.3d at 304 (same, for laws that regulate communications based on the relationship of the parties involved); *Van Bergen*, 59 F.3d at 1550 (same).

Deciding whether a call fits within the federal-government-debt exemption does not require delving into the content of speech. What the caller says on the call does not determine whether the federal-government-debt exemption applies. The exemption is therefore content-neutral. *See McCullen*, 573 U.S. at 479.

2. The federal-government-debt exemption survives intermediate scrutiny

As discussed, a content-neutral speech regulation need only satisfy intermediate scrutiny; it is constitu-

tional if it advances a substantial or important government interest without substantially burdening more speech than necessary. *Ward*, 491 U.S. at 799–800. Here, the federal-government-debt exemption serves the substantial government interest of protecting the public fisc. *See Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1156 (9th Cir. 2019) (crediting this interest), *petition for cert. pending*, No. 19-511 (filed Oct. 17, 2019). The exemption is also sufficiently tailored to achieve that interest. *Ward*, 491 U.S. at 800.

The Fourth Circuit held otherwise, but only by concluding, without evidence, that the federal-government-debt exemption would swallow any residential-privacy benefit conferred by the general robocall ban. But to be sufficiently narrowly tailored, a content-neutral law prohibiting a manner of speech need only have a "reasonable fit" with its objective. *See Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) ("What our decisions require is a 'fit' between the legislature's ends and the means chose to accomplish those ends—a fit that is not necessarily perfect, but reasonable." (internal citations omitted)). And here, even with the federal-government-debt exemption, the robocall ban is reasonably tailored to advance the government's interest in protecting individual and residential privacy. The exception applies only to calls made "solely to collect a debt owed to or guaranteed by" the federal government, 47 U.S.C. § 227(b)(1)(A)(iii), and the record contains no evidence showing that such calls make up such a significant

percentage of all robocalls that the exemption would significantly erode the robocall ban's privacy benefits.

The Fourth Circuit also erred when it faulted the federal-government-debt exemption for lacking the consent rationale of the TCPA's exceptions for emergency calls and calls pertaining to certain business relationships. Consent underscores the content neutrality of those exemptions, but (as explained above) the federal-government-debt exemption achieves content-neutrality in its own way. The relevant question for narrow-tailoring purposes is whether, notwithstanding the federal-government-debt exemption, the robocall ban reasonably advances the mission of safeguarding individual and residential privacy. While many people may owe debts backed by the federal government, robocalls are used far beyond this narrow context. It therefore stands to reason that the general commercial use of low-cost robocalls is far more massive, and correspondingly far more intrusive, than automated calls made "solely" to collect federal-government debts.

In any case, without actual proof that government-debt robocalls would erase the privacy gains of the general robocall ban, the Court should not presume such a result. By way of example, nearly two decades ago Indiana adopted a do-not-call registry law that exempted calls placed by employees or volunteers of newspapers, real estate and insurance agents, and charities. Notwithstanding these exemptions, nearly 98% of those registered for the no-call list reported

that they observed benefits from the law. *Nat'l Coal. of Prayer, Inc. v. Carter*, 455 F.3d 783, 785 (7th Cir. 2006).

As this experience shows, even exemptions from telephone privacy protections that seem significant on the surface may not significantly diminish the benefits of a basic underlying prohibition on intrusive and unwanted calls. Similarly here, notwithstanding the federal-government-debt exemption, the TCPA's robocall ban advances the government's robust interest in protecting individual and residential telephone privacy. Accordingly, the law is sufficiently narrowly tailored overall to withstand First Amendment scrutiny.

II. If Invalid, the Federal-Government-Debt Exemption Is Severable from the Remainder of the Robocall Ban

Because the TCPA's robocall ban is itself a valid, content-neutral prohibition, *see supra* Part I.A., even if the federal-government-debt exemption is invalid, the Court should sever the exemption and permit enforcement of the underlying robocall ban.

The Court has repeatedly held that "[t]he unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (quoting *Champlin Refining Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 234 (1932)). Accordingly, "the

'normal rule' is 'that partial, rather than facial, invalidation is the required course.'" *Id.* (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)); *see also Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) ("[A] court should refrain from invalidating more of the statute than is necessary").

That is, "[w]hen confronting a constitutional flaw in a statute," the Court generally "sever[s] any 'problematic portions while leaving the remainder intact.'" *Free Enterprise Fund*, 561 U.S. at 508. (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–29 (2006)). The Court declines to sever *only* when (1) the statute's other provisions are "incapable of functioning independently," or (2) when "the statute's text or historical context makes it evident that Congress . . . would have preferred no [statute] at all to" one without the offending provision. *Id.* at 509 (internal quotation marks and citations omitted). Neither of these conditions is present here.

1. The TCPA is plainly capable of functioning without the federal-government-debt exemption. It operated without the exemption for more than two decades, from the time the TCPA was originally enacted in 1991, *see* Pub. L. 102-243, 105 Stat. 2394, until the exemption was added in 2015, *see* Pub. L. 114-74, Title III, § 301(a), 129 Stat. 588. During that time, no one ever claimed that the robocall ban was somehow ineffective because it *lacked* an exception for calls to collect debts owed to the federal government. Moreover,

many *Amici* States have enacted robocall bans patterned, except for the federal-government-debt exemption, after the TCPA, which confirms that the exemption is not critical to the ban's proper functioning.

In addition, the TCPA prohibits "*any* call" made "using *any* automatic telephone dialing system or an artificial or prerecorded voice," and provides just three narrow exemptions to this rule—(1) calls made for "emergency purposes," (2) calls made with the "prior express consent of the called party," and (3) calls "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A) (emphasis added). Faced with such a statute, the commonsense solution is to invalidate the narrow federal-government-debt exemption and allow the broad prohibition on robocalls to continue in force.

That is, for example, what the Court did in *Sorrell v. IMS Health Inc.* 564 U.S. 552 (2011). There, the challenged law permitted pharmacies to "share prescriber-identifying information with anyone for any reason save one: They must not allow the information to be used for marketing." *Id.* at 572 (citing Vt. Stat. tit. 18, § 4631). The Court held that singling out marketing for disfavored treatment was unconstitutional and that the *exemption* therefore could not be enforced. *Id.* at 580.

Indeed, the Court has declined to invalidate an entire statute on First Amendment grounds even when

the regulation is "pierced by exemptions and inconsistencies." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 190 (1999). The federal statute at issue in *Greater New Orleans Broadcasting* prohibited radio and television stations from broadcasting advertisements for lotteries and similar games of chance, but exempted gaming conducted by (1) an Indian tribe pursuant to a tribal-state compact, (2) state and local governments, (3) nonprofits, and (4) commercial organizations where the promotional activity was ancillary to the organization's primary business. *Id.* at 178–79. Although the Court concluded that these exemptions undermined the government's rationale for the broadcast prohibition, it did *not* invalidate the entire law; it instead "h[e]ld that [the law] may not be applied to advertisements of private casino gambling that are broadcast by radio or television stations located in Louisiana, *where such gambling is legal*." *Id.* at 176 (emphasis added); *see also* 1999 WL 642904 (E.D. La. Aug. 23, 1999) (decision on remand "declaring unconstitutional those portions of [federal law] which prohibit advertisements of private casino gambling that are broadcast by radio or television stations located in Louisiana").

The TCPA's broad prohibition on robocalling is far more workable than the exemption-riddled broadcasting prohibition the Court allowed to remain in place in *Greater New Orleans Broadcasting*. Accordingly, the Court's First Amendment cases reinforce the conclusion that the robocalling prohibition's independent functionality should ensure the prohibition continues

in force even if the Court concludes that the federal-government-debt exemption is unconstitutional.

2. Because the TCPA "remains 'fully operative as a law'" without the federal-government-debt exemption, the 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].'" *Free Enterprise Fund*, 561 U.S. at 509 (quoting *New York v. United States*, 505 U.S. 144, 186 (1992)) (alterations in original); *see also Alaska Airlines v. Brock*, 480 U.S. 678, 685 (1987). "[A] court cannot use its remedial powers to circumvent the intent of the legislature," *Nat. Fed. of Indep. Businesses v. Sebelius*, 567 U.S. 519, 586 (2012) (quoting *Ayotte*, 546 U.S. at 330), and the "relevant inquiry" is therefore "whether the statute [as severed] will function in a *manner* consistent with the intent of Congress," *Alaska Airlines*, 480 U.S. at 685 (emphasis in original). Accordingly, the TCPA's robocall ban should be allowed to continue in force "[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." *Id.* at 684 (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (*per curiam*)).

The surest way to determine whether Congress would have adopted the statute even absent the invalid provision is the existence of an explicit severability clause. "[T]he inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the

constitutionally offensive provision." *Id.* at 686. And here the TCPA *does* include a severability clause: "If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby." 47 U.S.C. § 608.

While the Court has in some circumstances declined to apply severability clauses, it has done so only where the challenger has shown a "clear probability that the Legislature would not have been satisfied with the statute unless it had included the invalid part." *Carter v. Carter Coal Co.*, 298 U.S. 238, 312–13 (1936). The Court may invalidate an entire statute notwithstanding a severability clause only if "the provisions . . . are so interwoven that one being held invalid the others must fall." *Id.* at 313; *see also Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884 (1997) (ignoring severability clause where "[t]he open-ended character of the [statute] provides no guidance whatever for limiting its coverage"); *Williams v. Standard Oil Co. of La.*, 278 U.S. 235, 242–43 (1929) (refusing to apply severability clause where non-severable provisions were "mere adjuncts" or "mere aids" to the unconstitutional provision), *overruled in part on other grounds*, *Olson v. Nebraska ex rel. W. Reference & Bond Ass'n*, 313 U.S. 236 (1941); *Hill v. Wallace*, 259 U.S. 44, 70 (1922) (explaining that provision was "so interwoven" with the remaining statute "that they cannot be separated").

The TCPA is far from such extreme circumstances. Again, Congress enacted the robocall ban in 1991, more than two decades before it added the federal-government-debt exemption in 2015. This timing proves both that the ban and exemption are not so interwoven as to justify disregarding the law's express severability clause. It also shows that Congress was satisfied with the ban sans exemption. One cannot plausibly infer that Congress would have repealed the ban altogether in 2015 if it had lacked the votes for the exemption. Thus, Congress would never have intended for the exemption to threaten the validity of the robocall ban itself. *See Ayotte*, 546 U.S. at 330 ("[T]he touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature").

Moreover, retaining the robocall ban while striking the exemption fulfills the legislative purpose of "protecting telephone consumers from th[e] nuisance and privacy invasion" of robocalls—not to mention the severability clause. 47 U.S.C. §§ 227, 608. Congress enacted the TCPA in light of evidence that "residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy." *Id.* § 227. The robocall ban protects that privacy with or without the federal-government-debt exemption, and it did so for twenty-four years before Congress added the exemption.

3. In respondents' view, however, the TCPA's express severability directive merely requires the Court to sever the *robocall ban* from the remainder of the TCPA. Similar to many severability clauses, section 608 directs courts to sever an invalid "provision" from the "remainder" of the statute. *Id.* § 608. But while respondents argue that the entirety of section 227(b)(1)(B) constitutes the relevant severable "provision," the term "provision" does not imply any particular level of generality. Over the run of the Court's precedents, a severable "provision" has included "anywhere from six words to 281." Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate*, 16 Tex. Rev. L. & Pol. 1, 78 (2011). In some cases it has meant "one subpart of one subsection of a statute," *id.* (citing *I.N.S. v. Chadha*, 462 U.S. 919, 932 (1983)), but in other cases it has meant "one paragraph of an otherwise-valid section," *id.* (citing *Alaska Airlines v. Brock*, 480 U.S. 678, 697 (1987)), or even "a single clause," *id.* (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 494 (1985)).

Indeed, it is not too much to say that the fundamental unit of a statute subject to severability can be but a single word—"[t]hat is, a court can remedy a violation of the Constitution by striking down a single word or a group of words, but it need not strike down the larger legislative unit (be it a section, statute, chapter, or title) that contains those words." Eric S. Fish, *Severability as Conditionality*, 64 Emory L.J. 1293, 1313 (2015); *see also Hershey v. City of Clearwater*, 834 F.2d 937, 939 (11th Cir. 1987) ("The fact that

an invalid portion of a statute is not self-contained in separate sections does not prohibit the court from applying the severability rule to strike the invalid portion and to preserve the rest of the enactment.").

Respondents also contend that because they have "challenged the TCPA's *restriction* on automated calls," not the exemption, they have fully answered the severability question. Br. of Respondents in Support of Cert. 18–19 (emphasis in original). But legislative intent and functionality—not the relief claimants demand—is the test for severability. *See Ayotte*, 546 U.S. at 330.

If severability were answered simply by deferring to the plaintiff, the Court's discussion of severability in *Free Enterprise Fund*, for example, would have been much shorter—and would have reached the opposite result. There, the plaintiffs wanted "a declaratory judgment that the [Public Company Accounting Oversight] Board is unconstitutional and an injunction preventing the Board from exercising its powers." 561 U.S. at 487. The Court, however, refused to grant such relief: It held that the constitutional problem should be fixed by simply refusing to enforce the restrictions on Board members' removal, rejecting the "far more extensive" alterations to the statute the plaintiffs had proposed. *Id.* at 510.

Similarly, in *United States v. Booker*, the Court enjoined provisions of the federal sentencing guidelines that made their application mandatory, even though

Booker challenged the judicial determination of the sentencing enhancements, not their mandatory nature. 543 U.S. 220, 245 (2005). Salvaging maximum application of the statute was most "consistent with Congress' likely intent in enacting the Sentencing Reform Act" because it "preserve[d] important elements of that system while severing and excising two provisions." *Id.* at 265.

The same is plainly true here. The principles of minimal judicial intervention and maximum statutory salvage require that, if the federal-government-debt exemption violates the First Amendment, the Court should, per 47 U.S.C. § 608, sever that "provision" from the "remainder" of the robocall ban, which should remain fully enforceable.

CONCLUSION

The judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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