No. 19-631

In the Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL;
FEDERAL COMMUNICATIONS COMMISSION,

v.

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

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

BRIEF FOR HEALTHCARE COMPANIES AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are healthcare companies that regularly contact millions of their members by telephone. They do so for healthcare reasons that depend on medical needs and government requirements.

United HealthCare Services, Inc. (United) is the largest healthcare company in the United States. It offers or administers health benefits for over 45 million people across the country and its territories. United's network of providers includes 1.3 million physicians and other healthcare professionals, and more than 6,000 hospitals and other facilities. Its healthcare programs include employer-sponsored plans, plans for veterans, Medicare (for older and disabled individuals), and Medicaid (for low-income individuals) in most states. Along with a partner company, Optum, Inc., United also coordinates patient care, manages pharmacy benefits, and improves the affordability of care.

Molina Healthcare, Inc. is a healthcare management organization that provides services to families and individuals who qualify for government-sponsored programs like Medicare and Medicaid. Through its locally operated health plans in 14 states and

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[1] Pursuant to Supreme Court Rule 37.3, amici certify that all parties have consented to the filing of this brief. Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part, and no persons other than amici or their counsel made a monetary contribution to its preparation or submission.

Puerto Rico, Molina serves approximately 3.3 million members.

Amici have been and currently are defendants in myriad class action lawsuits brought under the Telephone Consumer Protection Act (TCPA). The statute imposes massive liability for even inadvertent violations. This limits amici's ability to call members about their healthcare needs, implicating important business and medical interests. Amici therefore have a direct and substantial interest in the TCPA's constitutionality.

INTRODUCTION

Helping individuals navigate the healthcare system is essential. Recognizing this—and spurred on by government regulation—health benefits plans like amici regularly call their members to ensure they understand, use, and maintain their healthcare coverage. Otherwise, millions of Americans might not know when to receive vaccinations, refill prescriptions, recertify for government support, and more.

Yet, class action plaintiffs' lawyers have threatened healthcare companies with billions of dollars in liability for placing healthcare calls to cell phone numbers provided by members. Their lawsuits exploit the TCPA, which imposes at least $500 (and up to $1,500) in private liability *per call* that uses an autodialer or prerecorded voice—unless the call is made for emergency purposes or with the called party's prior express consent. See 47 U.S.C. § 227(b)(1)(A)(iii) (cell phone restriction). Given the volume of calls needed to

address millions of members' healthcare needs, amici's calls are often made with an autodialer or pre-recorded voice. And although amici intend to call only members or others who have consented to outreach, sometimes amici accidentally reach non-consenting parties. This can happen, for example, when a phone number is inaccurately provided to amici or later re-assigned to a different person.

In fact, Americans change their cell phone numbers about once every four years on average. Changing one's phone number releases the old number for assignment to someone else. So if a health plan member changes her phone number without informing her health plan, the health plan's next call will likely reach a non-member who has not consented to outreach. That call potentially violates the TCPA. Moreover, the non-member might hang up (or not answer) instead of informing the insurer that it has the wrong number. The result is that calls continue and liability may accrue with each successive call intended for the member. Considering all the healthcare calls in the United States over the TCPA's four-year statute of limitations, the potential liability of health plans can be staggering.

As a result, the TCPA threatens to stifle vital healthcare calls and diverts resources from amici's healthcare mission. But this malady has a cure: the relief that Respondents seek. Amici urge this Court to invalidate the TCPA's cell phone restriction rather

than just its government debt exception (the Exception), which does not abridge amici's or Respondents' speech.

SUMMARY OF ARGUMENT

I. Amici agree with Respondents that the TCPA's cell phone restriction is a content-based law that is subject to strict scrutiny, and that the restriction is invalid under the First Amendment. Amici write separately here because even if the cell phone restriction were content-neutral, it would fail to withstand intermediate scrutiny.

A. For one, restrictions on healthcare calls demonstrate that the TCPA is too broad to serve a significant government interest. The Government's interest in the TCPA is to protect consumer privacy from unrestricted telemarketing. Healthcare calls intended for members of health benefits plans are not telemarketing. So healthcare calls to residential landlines do not violate the TCPA under Federal Communications Commission (FCC) orders, even though calls to homes are the most likely to invade consumer privacy. But, inexplicably, neither the TCPA nor the FCC exempt identical calls to cell phones.

B. Indeed, the TCPA is not narrowly tailored to the Government's interest. It broadly proscribes important healthcare calls, including many that are encouraged (if not required) by the Government. Some of these calls serve society's most vulnerable, such as Americans who are dual-eligible for Medicare and Medicaid.

And any TCPA liability resulting from these calls is *impossible* to avoid. Taking every reasonable precaution is not enough to ensure that (1) a member provides the right number; or (2) a call reaches its intended recipient rather than the new owner of a reassigned number, as even the FCC has acknowledged. Nor are the FCC's exemptions for healthcare calls much help. They are too weak to ward off costly class actions.

II. The Court should enjoin or declare invalid the cell phone restriction. The alternative, severing the Exception, fails to redress Respondents' (and amici's) injuries.

A. Federal courts may award only those remedies that tangibly redress a plaintiff's particular injury. For a court to do otherwise violates Article III's case-or-controversy requirement. A case or controversy resolves the rights of litigants in the specific dispute before the court.

B. Here, the right at issue is Respondents' freedom of speech—freedom to place political (or, in amici's case, healthcare) calls using commonplace and modern communications tools. At no point do Respondents challenge the Exception or claim it targets their viewpoints. Indeed, the Exception on its face does not affect Respondents. Severing the Exception thus was not a remedy the court of appeals had power to award.

Nor would severance solve the following problem: exemptions to any speech regulation may hurt the

credibility of the stated government reason for restricting speech in the first place. Here, shielding debt collection calls, but not other less intrusive calls, hurts the Government's claim that the TCPA's rationale is consumer privacy. And with the Government's reasoning already suspect, severing the Exception would not restore the Government's credibility. It would only exacerbate the TCPA's overbreadth.

To be sure, the Exception informs judicial scrutiny of the cell phone restriction. By making the restriction content-based, the Exception alerts the Court that future government officials may one day use the restriction to suppress disfavored viewpoints. That justifies strict scrutiny. But any level of scrutiny must weigh the restriction's concrete actual harm to Respondents—not the speculative future harm of viewpoint discrimination against an unknown party. In other words, scrutiny is the calibration of the scales of justice, not the weights that the parties add to each side.

The question then is whether severing the Exception redresses Respondents' actual injury. The Government implicitly argues "yes" by analogizing this case to an equal protection challenge, in which plaintiffs' rights are vindicated by leveling the playing field. But that analogy is inapt. Respondents do not bring an equal protection claim, which is formally distinct from a First Amendment claim under this Court's precedents. Nor do Respondents protest that federal debt collectors can make calls while they cannot. Rather, like in other cases where this Court

has rejected the conflation of the First Amendment and equal protection, Respondents' injury is the suppression of their speech. Severing the Exception—and thus suppressing *more* speech—does not redress that injury.

C. The proper remedy is to enjoin or declare invalid the whole cell phone restriction. That would redress Respondents' injury by halting the TCPA's abridgment of Respondents' speech, and it would do so without suppressing additional speech. It would also follow the rule that every injury has its proper redress.

Bolstering that virtually unflagging rule here is that every factor informing the Court's remedial discretion urges relief. The loss of First Amendment freedoms is irreparable. The balance of hardships is on Respondents, because the Government need only redraft one part of a law (*i.e.*, the cell phone restriction) in an area where regulation enjoys bipartisan consensus. Lastly, invalidating the restriction would promote the public interest by fostering political speech.

ARGUMENT

I. The Cell Phone Restriction Cannot Survive Intermediate Scrutiny, Let Alone Strict Scrutiny.

As Respondents explain, the TCPA's cell phone restriction is a content-based law subject to strict scrutiny, and it cannot pass muster under the First Amendment. Yet even if the restriction were content-neutral, it would still need to be "narrowly tailored to

serve a significant governmental interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). It is not.

A. Restrictions on healthcare calls to cell phones do not serve a significant government interest.

The Government's interest in the TCPA "is to protect consumers from unrestricted telemarketing, which can be an intrusive invasion of privacy." *In the Matter of the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 2736, 2737 (1992); see Telephone Consumer Protection Act of 1991, § 2, Pub. L. No. 102-243, 105 Stat. 2394. By contrast, "it is not the intent of the TCPA to prohibit or restrict [non-commercial] non-marketing uses of auto dialers." 7 FCC Rcd. at 2737.

The TCPA's treatment of calls to residences tracks this principle. These calls are exempt from liability if they are not for telemarketing. See *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8774 (1992). Calls to residences for "market surveys" or "political polling," for example, are exempt. *Ibid.* This is true even though "in the privacy of the home, . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978). The reason is

that "[c]alls do not adversely affect the privacy interests of residential subscribers" so long as they are non-telemarketing. 7 FCC Rcd. at 8782.

The TCPA nevertheless restricts non-telemarketing calls to *cell phones*, which affect weaker privacy interests than calls to homes. This is a result of inexplicable drafting. Though the interpretation of the TCPA contemporaneous with its enactment was that it "did not intend to prohibit autodialer or prerecorded message calls to cellular customers for which the called party *is not charged*," 7 FCC Rcd. at 8775 (emphasis added), the TCPA's text states otherwise. See, *e.g.*, *Susinno v. Work Out World Inc.*, 862 F.3d 346, 349 (3d Cir. 2017) (Hardiman, J.). As a result, the TCPA bans "highly desirable" and "purely informational" calls to cell phones, but not those same calls to homes. *In the Matter of Rules & Regulations Implementing the TCPA of 1991*, 27 FCC Rcd. 1830, 1841 (2012). Healthcare calls are an important example of such calls.

B. The TCPA is not narrowly tailored because it stifles not just unwanted telemarketing calls, but also critical healthcare calls.

1. Amici's calls serve vital healthcare needs.

Amici's healthcare calls are critical non-telemarketing speech. They inform members of many important things, including, for example:

- exam confirmations;

- prescription refill notifications;
- flu shot reminders;
- reminders to complete screening kits for cancer and diabetes;
- wellness checkups;
- reminders of the potential loss of healthcare coverage; and
- notices about government requirements for coverage, such as annual Medicaid redetermination.

These calls go out to millions of Americans who, as members of amici's health plans, have voluntarily provided their phone numbers. Amicus United's members, for example, comprise over 45 million people across the United States (and territories) in Medicare, Medicaid, and employer-sponsored plans.

Many calls to amici's members are at the Government's behest. Outreach to Medicaid members—who are elderly or disabled—is one example. With few exceptions, Medicaid beneficiaries must reapply annually for the Low-Income Subsidy (also LIS, a.k.a. Extra Help) that allows them to afford coverage and purchase prescription drugs despite their limited resources. See, *e.g.*, Centers for Medicare & Medicaid Services (CMS), Redetermination of Part D Low-Income Subsidy Eligibility for 2020, at 2 (Aug. 22, 2019). "[I]ndividuals who do not return the [Social Security Administration] form [that was mailed to them] may have their LIS status terminated at the

end of the year." *Ibid.* That federal decision, if in error, can deprive society's most vulnerable of their healthcare. CMS thus "expects Plan D sponsors [such as amici] to reach out by phone or mail to every member" who does not qualify automatically for the Low-Income Subsidy. *Id.* at 4. And to further telephonic outreach, CMS even provides a "Model Outbound Script for Calls" placed by amici and others. *Id.* at 6.

An even more pressing need for outreach faces amici's many millions of dual-eligible beneficiaries—Americans who qualify for Medicare and Medicaid. Most dual-eligibles are age 65 or older, have cognitive impairments, and make less than $10,000 per year. See Amanda Cassidy, Care for Dual Eligibles, Health Affairs 1–2 (June 13, 2012). Many also suffer from chronic conditions. *Id.* at 3. Given these vulnerabilities, the U.S. Department of Health and Human Services has found that "gaps in [dual eligibles'] insurance coverage can compromise access to care and result in increased costs and decreased quality of care, further increasing [their] risk for adverse health outcomes." Zhanlian Feng et al., U.S. Dep't Health & Human Servs., Loss of Medicare-Medicaid Dual Eligible Status: Frequency, Contributing Factors and Implications 1 (2019). Yet about 29% of dual-eligibles suffer gaps in coverage because they are unaware of complex annual recertification requirements that vary by state and eligibility group. See *id.* at 7–9. Amici thus often call dual-eligibles to walk them through the recertification process, check in on their

health, and encourage them to take advantage of their benefits.

2. The TCPA demands the impossible by penalizing calls to wrong numbers and reassigned numbers.

In response to these calls, plaintiffs in putative nationwide class actions seek at least $500 and up to $1,500 per call in damages. See 47 U.S.C. § 227(b)(3). They base their suits on the TCPA's requirement that calls must have the "prior express consent of the *called party*." *Id.* § 227(b)(1)(A) (emphasis added). Both the FCC and circuit courts have held that "called party" means the actual recipient of a call, not the *intended* recipient. See *ACA Int'l v. FCC*, 885 F.3d 687, 705–06 (D.C. Cir. 2018) (Srinivasan, J.). So if amici call a phone number provided by a member, but someone else answers, amici possibly face TCPA liability. This can occur when a member provides the wrong phone number, or if the member gets a new number. And since healthcare companies have millions of members who require frequent calls about their health care needs, some calls during the TCPA's four-year statute of limitations inevitably expose healthcare companies to putative class action lawsuits.

The case of a mistaken call recipient arises most often when a phone number is reassigned from its original owner (such as a member of amici's healthcare plans) to someone else. This happens more than one might expect. On average, Americans change

their cell phone numbers once every four years—commonly without notifying others (such as their health benefits plan) before or after the fact. See FCC, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services ¶ 27, FCC 17–126 (Sept. 27, 2017) (annual churn rate of 26.3%). Every change creates the likelihood of an inadvertent TCPA violation—and the number of possible violations will only increase as more Americans adopt cell phones as their main mode of telephonic communication.

It is impossible to avoid calling reassigned phone numbers. Even the FCC acknowledges that "the most careful caller, after employing all reasonably available tools to learn about reassignments, 'may nevertheless not learn of reassignment before placing a call to a new subscriber.'" *ACA Int'l*, 885 F.3d at 705 (quoting *In re Rules and Regulations Implementing the TCPA of 1991*, 30 FCC Rcd. 7961, 8009 (2015)). A supposed solution, a database of reassigned numbers, is mired in technical problems and behind schedule. See FCC, Wireline Competition Bureau and Consumer and Governmental Affairs Bureau Seek Comment on Technical Requirements for Reassigned Numbers Database, DA 20-105 (Jan. 24, 2020). Thus, "careful caller[s]" like amici potentially face crippling liability for their tens of millions of calls per year.

And because no database reliably tracks a phone number's owners over time, it is difficult to determine if a caller had consent to call *any* given number during the TCPA's four-year statute of limitations. See 28

U.S.C. § 1658(a). This again burdens even the most careful callers, since both the FCC and some circuits have held that consent is an affirmative defense to a TCPA claim. See *Zean v. Fairview Health Servs.*, 858 F.3d 520, 526 & n.3 (8th Cir. 2017). After all, callers have no reason to keep the *old* phone numbers of people they intend to reach. Nor does the FCC claim to require that type of number retention. But when amici face a TCPA suit that encompasses calls within a four-year time period, they must reconstruct history.

Consider what it would take amici to prove that a historical phone call reached a member. Amici would, at a minimum, have to locate and review four things: (1) the phone number provided on the member's hard-copy or electronic enrollment forms; (2) the current phone number on file in electronic member records; (3) any notes about phone numbers that may have been recorded in electronic member records; and (4) recordings of calls over a four-year period, if they exist. Doing this is burdensome enough for one call. It is impracticable if not impossible for the hundreds of millions of calls plaintiffs put at issue in putative class actions. All told, the TCPA imposes sweeping liability backed by a private cause of action.

To be sure, reassigned number plaintiffs face a significant obstacle at class certification. See, e.g., *Hunter v. Time Warner Cable Inc.*, 2019 WL 3812063, at *11–17 (S.D.N.Y. Aug. 14, 2019) (Oetken, J.). But for defendants to litigate up to that point is costly, and the risk of certification is real. See, e.g., *Knapper v. Cox Commc'ns, Inc.*, 329 F.R.D. 238, 247 (D. Ariz.

2019) (certifying class). But given the stakes of potential class certification, it should be unsurprising that healthcare companies have settled TCPA claims for millions of dollars to avoid the expense of litigation and the possibility of billion-dollar judgments at trial. See, *e.g.*, *Dakota Medical, Inc. v. RehabCare Grp. Inc.*, 2017 WL 1398816, at *6 (E.D. Cal. Apr. 19, 2017) ($25 million settlement fund).

Healthcare companies that choose not to settle must confront serial plaintiffs and a cottage industry of the plaintiffs' bar. United alone currently faces several putative nationwide class actions for calling cell phones—two of which are brought by serial litigants who together have filed over 80 TCPA lawsuits. See Am. Countercls. at ¶ 3, *Perrong v. Golden Rule Insurance Company and American Select Partners, LLC*, No. 19-cv-01940 (S.D. Ind. Oct. 8, 2019), ECF No. 38 (college student plaintiff who has filed over 50 other TCPA cases); *Morris v. UnitedHealthcare Ins. Co.*, 2016 WL 7115973, at *6 (E.D. Tex. Nov. 9, 2016) (enterprising plaintiff who has "thought about franchising his TCPA lawsuits" and filed at least 36), *report and recommendation adopted*, 2016 WL 7104091 (E.D. Tex. Dec. 6, 2016); see also Br. for Retail Litigation Center, Inc. and National Retail Federation as Amici Curiae Supporting Neither Party 10–11 (documenting professional plaintiffs). In all the United suits, the calls at issue were intended to reach members to help them with healthcare needs such as diabetic care, compliance with state requirements for

retaining Medicaid coverage, prescription refills, flu shots, and more.

Even so, it is difficult to obtain dismissal of the named plaintiffs' claims at the pleading stage. Accordingly, as those cases head into discovery and class certification, the cost of fighting them is millions of dollars and thousands of hours diverted from amici's healthcare mission. This cost multiplies when summed across the healthcare industry at large. Ultimately, the lawsuits *increase* the cost of healthcare and harm people who rely on their health benefits providers for undisrupted outreach, low premiums, and outstanding care. Simply put, the cell phone restriction makes healthcare delivery more difficult.

3. The FCC has failed to address the burden on healthcare calls.

The FCC has tried to reduce the TCPA's burden on healthcare calls. It has the unilateral power to do so "by rule or order." 47 U.S.C. § 227(b)(2)(C). The main limit on those powers is to prescribe conditions "necessary in the interest of [ ] privacy rights." *Ibid.* So despite being an independent agency, the FCC has broad discretion to assign "billions of dollars" in liability. *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting).

That liability has fallen on valuable healthcare speech. After a lengthy regulatory process, the FCC created just two exemptions for healthcare calls. One imposes an array of seven particular and perplexing requirements. See 30 FCC Rcd. at 8031–32 (listing

types of calls and conditions), *aff'd in part by ACA Int'l*, 885 F.3d 687. And the other is not a true exemption because it still requires consent, at least according to the FCC. See *Zani v. Rite Aid Headquarters Corp.*, 246 F. Supp. 3d 835, 845–46 (S.D.N.Y. 2017) (Nathan, J.) (discussing 47 C.F.R. § 64.1200(a)(2)), *aff'd*, 725 F. App'x 41 (2d Cir. 2018).

Often these exemptions involve disputed issues of fact and law. So they cannot be resolved until the class certification or summary judgment stage. By that time, companies have already exhausted substantial resources in litigation or settled to avoid doing so. The FCC's exemptions thus do not solve the TCPA's core problem: it is not narrowly tailored to serve an important (let alone compelling) government interest.

II. The Court Should Strike Down the Cell Phone Restriction Because Severing the Exception Fails to Redress Respondents' Injury.

Article III requires that a federal court's resolution of a case or controversy benefit the plaintiff personally. But the court of appeals' remedy fails to do that here. It instead purports to invalidate a *protection* of speech that does not injure Respondents. That remedy not only prohibits more speech, it violates Article III. The proper remedy is to enjoin or declare invalid the cell phone restriction and thus further freedom of speech.

A. Federal courts cannot order a remedy that would not benefit the plaintiff.

Federal courts violate Article III's case-or-controversy requirement if they "decide questions that cannot affect the rights of litigants in the case before them." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)). Article III thus requires that the plaintiff "personally would benefit in a tangible way from the court's intervention." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 n.5 (1998) (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975)); accord, *e.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) ("A plaintiff's remedy must be tailored to redress the plaintiff's particular injury."). This requirement "subsists through all stages of federal judicial proceedings, trial and appellate." *Chafin*, 568 U.S. at 172 (quoting *Lewis*, 494 U.S. at 477–78).

B. Invalidating the exception would not benefit Respondents.

Here, the court of appeals did not "redress [P]laintiff's particular injury." *Gill*, 138 S. Ct. at 1934. That injury is the silencing of Respondents' political calls, not the favoritism shown to U.S. government debt collection calls. By severing the Exception, the court proscribed both types of calls. This perhaps "vindicat[ed] [ ] the rule of law," *Steel Co.*, 523 U.S. at 106, but it did not redress Respondents' particular and actual abridgment of speech. Severance thus was not a remedy the court of appeals had power to grant.

Consider the TCPA's effect on Respondents. Respondents "make calls to solicit candidate donations, conduct polls on political and governmental issues, and organize 'get out the vote' efforts," among other goals. Br. for Respondents in Support of Cert. 7. The TCPA bans those calls from using "any automatic telephone dialing system or an artificial or prerecorded voice," 47 U.S.C. § 227(b)(1)(A)—a complex and often "sweeping restriction." *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 467 (7th Cir. 2020) (Barrett, J.) (discussing *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018) (Ikuta, J.)). Respondents challenge the restriction so they can "use automatic call technology to engage in political speech." Br. for Respondents in Support of Cert. 1. They do *not* challenge the Exception or claim it helps target disfavored speech. See *id.* at 10. So enjoining it or declaring it invalid cannot redress Respondents' injury.

Nor does severing the Exception avoid the pitfalls described in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). There, the Court explained the problems with content-based exceptions. "Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place." *Id.* at 52. Here, shielding debt collection calls but not other valuable, minimally intrusive calls (such as healthcare calls) hurts the Government's claim that the TCPA's rationale is consumer privacy. And just as severing

the Exception cannot mend Respondent's injury, it cannot restore the Government's credibility. Severance only exacerbates the TCPA's overbreadth.

The Exception's differential treatment for debt collection calls also does not injure Respondents. Indeed, facially content-based laws can sometimes abridge speech in an "[i]nnocent," viewpoint-neutral way. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015). They trigger strict scrutiny all the same. *Ibid.* So it cannot be that facially content-based laws require strict scrutiny *because* they worsen plaintiffs' injuries.

Rather, "'[t]he vice of content-based legislation is'" that "*future* government officials may *one day* wield such statutes to suppress" a future speaker's future viewpoints. *Ibid.* (emphasis added) (quoting *Hill v. Colorado*, 530 U.S. 703, 743 (2000) (Scalia, J., dissenting)). That is, these laws threaten the future public interest—but do not necessarily harm plaintiffs more than their content-neutral equivalent. Strict scrutiny applies even if a given plaintiff would be indifferent between a content-based and content-neutral speech restriction. In other words, scrutiny is the calibration of the scales of justice, not the weights that the parties add to each side. See, *e.g.*, *John Doe No. 1 v. Reed*, 561 U.S. 186, 199 n.2 (2010) (describing First Amendment scrutiny as a standard of review).

The Government implicitly argues otherwise by relying on equal protection cases in its severability analysis. See Br. for the Petitioners. 36–39 (discussing

Frost v. Corporation Commission of Oklahoma, 278 U.S. 515 (1929); *Truax v. Corrigan*, 257 U.S. 312 (1921); and *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017)). These cases stand for the rule that "when the right invoked is that to equal treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Morales-Santana*, 137 S. Ct. at 1698 (quotation marks omitted) (quoting *Heckler v. Mathews*, 465 U.S. 728, 740 (1984)); see also *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (framing an equal protection injury as the inability to compete on equal footing). But Respondents do not invoke the right to equal treatment. They invoke the right to be free from a law abridging freedom of speech.

The Court has rejected conflating these rights. In *R.A.V. v. City of St. Paul*, for example, the plaintiff challenged a content-based law under the First Amendment alone. See 505 U.S. 377, 380 (1992); accord Br. for R.A.V., 1991 WL 11003958 (U.S. July 25, 1991). But in a separate opinion, Justice White argued that content-based laws may also violate equal protection. See 505 U.S. at 406 (White, J., concurring in the judgment). In response, the Court held that while it had "occasionally fused the First Amendment into the Equal Protection Clause in this fashion," it had done so "with the acknowledgment (which Justice White cannot afford to make) that the First Amendment underlies its analysis." *Id.* at 384 n.4.

As support, the Court cited *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in judgment). There, Justice Kennedy explained that "our equal protection jurisprudence [ ] has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome *restriction* of speech based on content only." *Ibid.* (emphasis added) (citations omitted). So the *R.A.V.* Court concluded that a content-based law violates the Equal Protection Clause "inasmuch as 'the First Amendment means that government has no power to *restrict* expression because of its message.'" 505 U.S. at 385 n.4. (emphasis added) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

R.A.V. and other precedents thus confirm two things. First, equal protection challenges are formally distinct from First Amendment challenges. A plaintiff can plead one without the other. See also, *e.g.*, *Wisconsin v. Mitchell*, 508 U.S. 476, 481 n.2 (1993) (upholding waiver of equal protection claim while preserving First Amendment claim); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983) (analyzing equal protection and First Amendment claims separately and under different standards).

Second, when a plaintiff pleads an abridgment of speech, "equal protection jurisprudence [ ] has no real or legitimate place." *Simon & Schuster*, 502 U.S. at 124 (Kennedy, J., concurring in judgment) (citations omitted) (cited in *R.A.V.*, 505 U.S. at 406 n.4); see also

Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 418–20 (1996) (reasoning that it has not been the goal of First Amendment cases to promote "a balanced debate on public issues"); Jud Campbell, Natural Rights and the First Amendment, 127 Yale L.J. 246, 316–18 & n.328 (2017) (finding that the original public meaning of the First Amendment did not distinguish between content-based and content-neutral restrictions). The courts' focus has been and should be the restriction of the plaintiff's speech—the "operation of the laws" on the plaintiff. *Reed*, 135 S. Ct. at 2229.

Here, like in *R.A.V.* and *Mitchell*, Respondents bring a First Amendment claim against a restriction on their speech. Severing an exception to that restriction would confuse Respondents' claim with one under the equal protection component of the Fifth Amendment. By doing so, it would fail to redress Respondents' First Amendment injury, thereby violating the case-or-controversy requirement in Article III.

C. The correct remedy is to enjoin or declare invalid the cell phone restriction.

By contrast, permanently enjoining or declaring invalid the cell phone restriction—not just its debt collection exception—would redress Respondents' injury. Article III thus empowers the Court to award either remedy. And the Court should. First Amendment remedies "operate 'to protect speech,' not 'to restrict

it.'" *Reed*, 135 S. Ct. at 2229 (quoting *Hill*, 530 U.S., at 765 (Kennedy, J., dissenting)). They follow the virtually unflagging rule that "[e]very right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. 137, 147 (1803); see also, *e.g.*, *White v. Weiser*, 412 U.S. 783, 797 (1973) ("The District Court should not, in the name of state policy, refrain from providing remedies fully adequate to redress constitutional violations which have been adjudicated and must be rectified.").

Bolstering that rule here is that every factor informing the Court's remedial discretion urges complete relief. See generally *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) (permanent injunction); *Steffel v. Thompson*, 415 U.S. 452, 471–72 (1974) (declaratory judgment). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Irreparable injuries lack an adequate remedy at law, and given that lack of alternatives and its ongoing irreparable injury, Respondents bear the balance of hardships. The Government need only redraft one part of a law in an area where regulation enjoys bipartisan consensus. See, *e.g.*, Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act, Pub. L. No. 116-105, 133 Stat. 3274 (2019) (passed 417 to 3 in the House and 97 to 1 in the Senate); TCPA, 105 Stat. 2394 (passed by voice vote in both the House and Senate). Lastly, the public interest is far from disserved by protecting Respondents' political speech. To

the contrary, "[i]t is perhaps our most important constitutional task to ensure freedom of political speech." *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 503 (2007).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the TCPA's cell phone restriction should be invalidated.

Respectfully submitted.

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