No. 19-631

IN THE

Supreme Court of the United States

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

v.

AMERICAN ASSOCIATION OF
POLITICAL CONSULTANTS, INC., *et al.*,
Respondents.

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

BRIEF OF THE RETAIL ENERGY SUPPLY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Retail Energy Supply Association ("RESA") is a broad and diverse group of retail energy suppliers throughout the United States. Its members share the common vision that competitive retail energy markets deliver a more efficient, customer-oriented outcome than a regulated utility structure. Since its founding in 1990, it has been devoted to promoting vibrant and sustainable competitive retail energy markets for residential, commercial, and industrial consumers.

RESA and its members have a significant interest in the outcome of this proceeding. RESA's members communicate with existing and prospective customers by making telephone calls and sending text messages. Many energy companies have become defendants in the thousands of cases filed each year under the Telephone Consumer Protection Act ("TCPA"). Many of these cases have been filed by a cottage industry of lawyers and professional plaintiffs who use various tactics to manufacture TCPA claims and extract settlements in exchange for abandoning class actions that threaten astronomical aggregate statutory damages that bear no relation to any actual harm suffered by the plaintiff or anyone else. This has not only created an invisible tax that increases the cost of energy and other goods and services, but also caused a substantial chilling effect on important speech. RESA and its members will therefore be directly and significantly affected by the decision in this case.

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[1] This amicus brief is filed with the parties' written consent. No part of it was authored by any party or counsel for any party, and no monetary contribution toward its preparation was made by any person other than *amicus*, its members, or its counsel.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 227(b) of the TCPA is an unusual statute. It first imposes broad—and, we assume for present purposes, constitutional—time, place, and manner restrictions on the right to speak. As is relevant here, it restricts (1) the *manner* of speech (e.g., using an autodialer or an artificial or pre-recorded voice to make calls without the prior express consent of the called party), and (2) the *place* to which it is directed (e.g., a residential phone or cellphone). See 47 U.S.C. § 227(b)(1)(A)(iii), (b)(1)(B).[2] It then prescribes stiff—and, at least in the context of a class-action lawsuit, potentially ruinous—statutory damages for violating those restrictions. See *id.* § 227(b)(3)(B).

Then comes the curveball. The statute then creates *content-based* exceptions to those restrictions: one for "emergency" communications and another for attempts to collect debt held or guaranteed by the federal government. *Id.* § 227(b)(1)(A)(iii), (b)(1)(B). And it authorizes the FCC to enact additional content-based exceptions—something the FCC has done time and again over the past 30 years. *Id.* § 227(b)(2)(C).

As the Court of Appeals correctly concluded, the government-debt exception is a content-based regulation of speech that fails strict scrutiny because it is not narrowly tailored to further a compelling government interest. *Am. Ass'n of Political Consultants, Inc.* v. *F.C.C.*, 923 F.3d 159, 166-70 (CA4 2019). It follows that virtually all of the other content-based regulations

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[2] For ease of reference, we refer to calls placed using an autodialer or with an artificial or pre-recorded voice as "automated" calls, and to Section 227(b)(1)(A)(iii)'s regulation of them as "automated-calling restrictions."

of speech contained in, or enacted pursuant to, the TCPA are likewise unconstitutional.[3]

All of which begs an atypical question of severability: If Congress had known not only that the government-debt exception was unconstitutional, but *also* that virtually all of the other content-based exceptions were unconstitutional as well, would it still have enacted a near-total ban on automated calls?

RESA respectfully submits that the answer is no, because the text, structure, and history of the TCPA all show that the automated-calling restrictions would not exist without their content-based exceptions, including, but not limited to, the government-debt exception. Consequently, the Court should not sever that exception from Section 227(b)(1)(A)(iii). It should instead strike that entire provision—but, to be clear, *only* that provision—as unconstitutional.

ARGUMENT

As the parties have observed, severability issues ultimately distill to a question of congressional intent: if the Legislature had known that the offending provision would be stricken, would it have wanted the surrounding provisions to stand? Or to be thrown out *in toto*? *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987).

Legislative deference and judicial minimalism often cause courts to assume that Congress would have wanted the balance of a statute to stand. *Id.*, at 684.

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[3] There are, of course, exceptions to that. But they are few in number and include only those regulations that, like the emergency purposes exception, are narrowly drawn to protect a compelling government interest (*e.g.*, alerting the public to threats to their health, safety, and welfare).

That makes sense in the mine-run of cases and often carries the day. It cannot do so here, however, because the very legitimacy of the automated-calling restrictions depends on the availability of content-based exceptions.

I. THE TCPA'S CORE AUTOMATED-CALLING RESTRICTIONS ARE INSEPARABLE FROM ITS CONTENT-BASED EXCEPTIONS.

The TCPA's restriction on making automated calls to cellphones is found in 47 U.S.C. § 227(b)(1)(A). That provision provides (in pertinent part):

> It shall be unlawful for any person . . .
>
> (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—
>
> . . .
>
> (iii) to any telephone number assigned to a . . . cellular telephone service . . . , unless such call is made solely to collect a debt owed to or guaranteed by the United States.

47 U.S.C. § 227(b)(1)(A)(iii); cf. *id.* § 227(b)(1)(B) (creating parallel government-debt exception to the restrictions on automated calls to residential phones).

In addition to the "emergency purposes" exceptions in Section 227(b)(1)(A) and (b)(1)(B), the statute has, since its inception, also authorized the FCC to exempt other categories of calls—including categories of calls defined by the *content* of the caller's message—from the statute's automated-calling restrictions. *Id.*

§ 227(b)(2)(C) (authorizing the FCC to "exempt from the requirements of paragraph (1)(A)(iii) . . . calls to a . . . cellular telephone . . . that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the [called party's] privacy"); cf. *id.* § 227(b)(2)(B) (authorizing the FCC to carve out exceptions to Section 227(b)(1)(B)'s restriction on automated calls to residential telephone numbers).

Indeed, the TCPA's legislative history contains numerous expressions of support for the FCC's enactment of many such content-based exceptions. See, *e.g.*, S. 1462, Cong. Rec. H11310 (Nov. 26, 1991) (statement of Rep. Edward J. Markey, Chairman, Subcommittee on Telecommunications and Finance) ("Second, the bill also allows the Federal Communications Commission to exempt, by rule or order, classes or categories of calls made for commercial purposes that do not 'adversely affect the privacy rights' that this section of the bill is intended to protect and, that 'do not include the transmission of any unsolicited advertisement.'"); *ibid.* (citing as an "example" of a potential exemption a call "to leave messages with consumers to call a debt collection agency to discuss their student loan"); *ibid.* ("I fully expect the Commission to grant an exemption, for instance, for voice messaging services that forward calls. For example, if a consumer is late catching a plane and calls his home to tell his wife he'll be arriving late and can't get through to her, this service allows him to leave a message and board the plane. While he is traveling, the service automatically dials the number repeatedly until the message is delivered."); see also S. 1462, Cong. Rec. S16206 (Nov. 7, 1991) (statement of Sen. Ernest F. Hollings, Chairman, Committee on Commerce, Science, and Transportation) (observing that although the bill itself "carefully avoids

drawing any distinctions among types of calls based on the content of the message being delivered . . . . "[i]f the FCC finds . . . that some distinctions can be justified on policy grounds and constitutional grounds, the FCC is free to adopt rules to recognize those distinctions"); *ibid.* (stating that the provision allowing the FCC to create exceptions "responds to the concerns expressed by . . . some companies that use machines to place calls for debt-collection purposes").

In deciding to sign the TCPA into law, the President expressly acknowledged the importance of the FCC's power to exempt categories of calls from the automated-calling restrictions, explaining that he "ha[d] signed the bill because it gives the Federal Communications Commission ample authority to preserve legitimate business practices . . . includ[ing] automated calls to consumers with whom a business has preexisting business relationships, such as calls to notify consumers of the arrival of merchandise ordered from a catalog." Indeed, he stated it was his "ful[l] expect[ation] that the Commission will use these authorities to ensure that the requirements of the Act are met at the least possible cost to the economy." Statement of President George H.W. Bush on Signing S. 1462, the Telephone Consumer Protection Act of 1991, Dec. 20, 1991.

The FCC did not disappoint. In the years that followed, it adopted numerous exceptions that turn on the content of the call, including calls that concern:

- the security of financial information, see *In re Rules & Regs. Implementing the TCPA of 1991*, 30 FCC Rcd. 7961, 8023–8024 (July 10, 2015);
- the confirmation of a delivery, see *In re Cargo Airline Ass'n Petition for Expedited Declaratory Ruling, Rules & Regulations Implementing the*

Tel. Consumer Prot. Act of 1991, Declaratory Ruling, 29 FCC Rcd. 3432, 3439 (Mar. 27, 2014)

- exigent and non-exigent health-care treatment messages, *In re Rules & Regs. Implementing the TCPA of 1991, supra,* at 8031; *See In re Rules & Regs. Implementing the TCPA of 1991*, 27 FCC Rcd. 1830, ¶¶ 57–65 (Feb. 15, 2012);
- messages from wireless providers, see 77 Fed. Reg. 34233, 34235 (June 11, 2012); and
- messages from government contractors, see *In re Broadnet Teleservices, LLC, et al. Petition for Expedited Declaratory Ruling, Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Declaratory Ruling, 31 FCC Rcd. 7394, 7399-7904 (July 5, 2016).

In addition to creating these exceptions from the automated-calling restrictions, the FCC also created *enhancements* of the restrictions that turn on the content of a call. For example, 47 C.F.R. § 64.1200(a)(1)(iii) requires "prior express consent" for automated calls to cellphones. If a call "introduces an advertisement or constitutes telemarketing," however, "prior express *written* consent" is required. *Id.* § 64.1200(a)(2) (emphasis added).

Similarly, pre-recorded or artificial voice calls to residential phones require "prior express *written* consent" unless they are "made for emergency purposes," are not "made for a commercial purpose," are "made for a commercial purpose but d[o] not include or introduce an advertisement or constitute telemarketing," or deliver" a 'health care' message made by, or on behalf of, a 'covered entity' or its 'business associate,' as those terms are defined [under HIPAA]." *Id.* § 64.1200(a)(3)(ii), (iii), (v) (emphasis added).

Rather than halt this trend or undo any of the FCC's content-based exemptions or enhancements, Congress itself got into the act by adding the government-debt exception in November 2015. See Pub. L. No. 114-74, Bipartisan Budget Act of 2015 (Nov. 2, 2015), sec. 301(a)(1).

Simply put, the TCPA's core automated-calling restrictions and its content-based exclusions have, since the statute's inception, been inseparable sides of the same statutory coin.

II. BECAUSE CONGRESS WOULD NOT HAVE ENACTED THE TCPA'S AUTOMATED-CALLING RESTRICTION WITHOUT THE AVAILABILITY OF CONTENT-BASED EXCEPTIONS, THE GOVERNMENT-DEBT EXCEPTION MAY NOT BE SEVERED.

In ascertaining whether an unconstitutional provision can be severed from the remainder of the statutory scheme, the Court asks the question—easy to state but sometimes difficult to resolve—whether the "statute created in [the] absence [of the unconstitutional provision] is legislation that Congress would not have enacted." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987). Framed in the context of this case: Would Congress have enacted a near-total ban on automated calls to cellphones if it had known that there could be virtually *no* content-based carveouts from that ban?

Ultimately, this question is one of legislative intent, which must be answered using the traditional tools for ascertaining Congress's wishes, including "the language and structure of the Act" and "its legislative history." *Id.*, at 687; see also *Murphy* v. *Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1482 (2018) (conducting a holistic assessment of the text, structure, history, and purpose of the statute in question when assessing severability).

Taken together, those various indicia of intent demonstrate that Congress would not have enacted, and the President would not have signed, Section 227(b)(1)(A)(iii) if they had known that content-based exceptions would be largely unavailable to soften its most oppressive effects. See Section I, *supra*.

The political branches' desire for such carveouts proved prescient, as the last decade has shown the devastating financial toll that even meritless TCPA litigation can impose on scrupulous businesses trying earnestly to comply with the statute's mandates. See 47 U.S.C. § 227(b)(3) (providing for an award of "$500 in damages for each such violation [of the automated-calling restriction]" or, if the violation was "knowin[g]" or "willfu[l]," up to $1,500 per violation); Br. of Retail Litg. Ctr., Inc. and Nat'l Retail Fed. 14 (observing that, in the years since the TCPA was enacted, a statute that "was originally meant to be a shield for consumers has become a sword for lawyers"—and, indeed, "'the poster child for lawsuit abuse'" (quoting *Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 8073 (2015) (Pai, Comm'r, dissenting))).

Echoing the Court of Appeals, the government places much weight on the Communications Act's "separability" clause. See Gov't Br. 34–35; *Am. Ass'n of Political Consultants, Inc.*, 923 F.3d, at 171. But 47 U.S.C. § 608 is a small part of a sprawling statutory code that was drafted decades before the TCPA (and, indeed, decades before things like cellphones and autodialers were even invented). It sheds no light on Congress's intent concerning the regulation of automated calls to wireless devices. See *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2319 (2016) (describing a severability clause as "an aid

merely; not an inexorable command" (citation and internal quotation marks omitted)).[4]

Because Section 227(b)(1)(A)(iii)'s automated-calling restriction is inextricably bound up with its government-debt exception and other content-based exceptions that have been bored into the statute over the past 30 years, the one cannot be severed from the other. It follows that all of Section 227(b)(1)(A)(iii) is unconstitutional and void.[5]

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[4] It is also revealing that Congress did not include a severability clause in the text of the TCPA itself. *Amicus*'s review of the legislative history likewise revealed no statement by any Member of Congress expressing either a desire for severability or a belief that no such clause was needed due to the presence of the separability clause in Section 608.

[5] Some have suggested that adopting respondents' position would result in the invalidation of "the TCPA" in its entirety. But the immediate taint is confined to Section 227(b)(1)(A)(iii). It is clear that much of the statute—for example the provisions creating a national "Do Not Call" registry—would have been enacted even in the absence of automated-calling restrictions. Those provisions serve discrete and salutary purposes and do not depend for their legitimacy on the content-based exceptions that doom Section 227(b)(1)(A)(iii). See *Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) ("[W]e try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people'" (quoting *Regan* v. *Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion))).

To be sure, a finding of invalidity for Section 227(b)(1)(A)(iii) would inevitably cast a long constitutional shadow over the parallel provision that exempts government-debt collection calls from the regulation of automated calls to *residential* phones. See 47 U.S.C. § 227(b)(1)(B). But the formal determination of that provision's fate—and how the severability calculus tips in those circumstances—must await resolution in a future case.

CONCLUSION

The Fourth Circuit's invalidation of the government-debt exception should be affirmed, and the case should be remanded with direction not to sever that provision from Section 227(b)(1)(A)(iii).

Respectfully submitted,

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