

No. 19-511

In the Supreme Court of the United States

FACEBOOK, INC., PETITIONER

v.

NOAH DUGUID, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

The Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394, generally prohibits the use of any “automatic telephone dialing system or an artificial or prerecorded voice” to “make any call” to “any telephone number assigned to a * * * cellular telephone service.” 47 U.S.C. 227(b)(1)(A)(iii) (Supp. V 2017). The TCPA excepts from that automated-call restriction any “call made for emergency purposes or made with the prior express consent of the called party.” *Ibid.* In 2015, Congress amended the TCPA to create an additional exception for calls “made solely to collect a debt owed to or guaranteed by the United States.” *Ibid.*

The private respondent in this case has alleged that petitioner used an automatic telephone dialing system to send him text messages for purposes *other than* the collection of government-backed debts, in violation of the TCPA. Petitioner has argued, and the court of appeals held, that the government-debt exception to the TCPA’s automated-call restriction violates the First Amendment. The court further held that the proper remedy was to sever the government-debt exception, leaving the basic automated-call restriction in place. The questions presented are as follows:

1. Whether the government-debt exception to the TCPA’s automated-call restriction violates the First Amendment, and whether the proper remedy for any constitutional violation is to sever the exception from the remainder of the statute.

2. Whether the TCPA’s definition of “automatic telephone dialing system” encompasses the equipment that petitioner used to send the messages at issue here.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 926 F.3d 1146. The orders of the district court (Pet. App. 23-38, 39-52) are not published in the Federal Supplement but are available at 2016 WL 1169365 and 2017 WL 635117.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2019. A petition for rehearing was denied on August 22, 2019 (Pet. App. 21-22). The petition for a writ of certiorari was filed on October 17, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243,

105 Stat. 2394, in light of evidence that consumers “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.” § 2(10), 105 Stat. 2394; see § 2(6), 105 Stat. 2394 (“Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.”). Since its enactment, the TCPA has generally prohibited “any person within the United States” from “mak[ing] any call * * * using any automatic telephone dialing system or an artificial or prerecorded voice” to “any telephone number assigned to a * * * cellular telephone service.” 47 U.S.C. 227(b)(1)(A)(iii) (Supp. V 2017); see TCPA § 3(a) [§ 227(b)(1)(A)(iii)], 105 Stat. 2395-2396. That prohibition is referred to here as the “automated-call restriction.” For purposes of that restriction, the statute defines “automatic telephone dialing system” to mean “equipment which has the capacity * * * (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” 47 U.S.C. 227(a)(1). The Federal Communications Commission (FCC), the agency charged with administering the TCPA, see 47 U.S.C. 154(i), 201(b), 227(b)(2) (2012 & Supp. V 2017), has construed the term “call” to encompass text messages. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14,014, 14,115 (2003).

As originally enacted, the TCPA excepted from the automated-call restriction any “call made for emergency purposes or made with the prior express consent of the called party.” § 3(a) [§ 227(b)(1)(A)], 105 Stat. 2395-2396. In November 2015, Congress enacted an

amendment to the TCPA entitled “debt collection improvements.” Bipartisan Budget Act of 2015, Pub. L. No. 114-74, Tit. III, § 301, 129 Stat. 588 (capitalization and emphasis omitted). That amendment created an additional exception to the automated-call restriction for calls “made solely to collect a debt owed to or guaranteed by the United States.” § 301(a)(1)(A), 129 Stat. 588; see 47 U.S.C. 227(b)(1)(A)(iii) (Supp. V 2017). That exception is referred to here as the “government-debt exception.”

2. In March 2015, before Congress enacted the government-debt exception, respondent Noah Duguid brought a putative class action against petitioner, the operator of an “online social network,” alleging violations of the TCPA’s automated-call restriction. Compl. ¶ 3; see Compl. ¶¶ 1, 45-54. Duguid asserted that, although he had never opened an account with petitioner, petitioner had sent him repeated text messages stating that his account had been accessed by an unrecognized device or browser. Compl. ¶¶ 20-26. Duguid alleged that petitioner had used an automatic telephone dialing system to send those text messages, in violation of the automated-call restriction. Compl. ¶¶ 29, 45-54. Duguid sought statutory damages and injunctive relief. Compl. 11; see 47 U.S.C. 227(b)(3).

Petitioner filed a motion to dismiss. D. Ct. Doc. 24 (May 18, 2015). Petitioner argued that Duguid had not plausibly alleged that petitioner had used an automatic telephone dialing system to send the text messages. *Id.* at 14-19. Petitioner further contended that subjecting it to liability “for sending non-commercial, privacy-protective” text messages would violate the First Amendment. *Id.* at 22; see *id.* at 22-25.

The United States intervened “for the limited purpose of defending the constitutionality” of the TCPA. D. Ct. Doc. 43, at 1 (Dec. 11, 2015); see 28 U.S.C. 2403(a) (requiring a court to “permit the United States to intervene * * * for argument on the question of constitutionality” when “the constitutionality of any Act of Congress affecting the public interest is drawn in question”). The United States argued that the automated-call restriction is a “content-neutral, time, place, and manner restriction” that survives First Amendment scrutiny. D. Ct. Doc. 44, at 9 (Dec. 11, 2015).

The district court granted petitioner’s motion to dismiss, holding that Duguid had not adequately alleged that petitioner had used an automatic telephone dialing system to send the text messages. Pet. App. 23-38. After the government-debt exception was enacted, Duguid filed an amended complaint. D. Ct. Doc. 53 (Apr. 22, 2016). Petitioner again moved to dismiss, arguing that Duguid still had not adequately alleged that petitioner had used an automatic telephone dialing system. D. Ct. Doc. 65, at 17-26 (May 26, 2016). Petitioner also argued that the government-debt exception renders the automated-call restriction an impermissible form of content-based discrimination, in violation of the First Amendment. *Id.* at 28-32.

The district court dismissed the amended complaint with prejudice. Pet. App. 39-52. The court agreed with petitioner that Duguid had still “failed to plausibly allege the use of an [automatic telephone dialing system].” *Id.* at 46. The court held that Duguid’s allegations suggested a “direct targeting” of his cell-phone number that would be “inconsistent with the sort of random or sequential number generation required for an

[automatic telephone dialing system].” *Id.* at 47 (citation omitted). Having found the amended complaint deficient on statutory grounds, the court did not address petitioner’s First Amendment challenge. *Id.* at 51.

3. The court of appeals reversed and remanded for further proceedings. Pet. App. 1-20.

a. The court of appeals held that Duguid’s allegations plausibly suggested that petitioner had sent him text messages using an automatic telephone dialing system. Pet. App. 6-9. The court noted its prior holding in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), cert. dismissed, 139 S. Ct. 1289 (2019), that “the adverbial phrase ‘using a random or sequential number generator’” in the TCPA’s definition of “automatic telephone dialing system” “modifies only the verb ‘to produce,’ and not the preceding verb, ‘to store.’” Pet. App. 6 (quoting *Marks*, 904 F.3d at 1052). The court thus took the view that a device qualifies as an automatic telephone dialing system so long as it has “the capacity to ‘store numbers to be called’ and ‘to dial such numbers automatically.’” *Ibid.* (citation omitted). The court held that Duguid had sufficiently alleged that petitioner had used such a device to send him the text messages at issue here. *Id.* at 7.

b. The court of appeals further held that the government-debt exception to the TCPA’s automated-call restriction violates the First Amendment. Pet. App. 10-18. “As a threshold matter,” the court determined that petitioner “has standing to challenge the constitutionality of the post-amendment TCPA.” *Id.* at 10. The court explained that, “[a]lthough the TCPA violations Duguid alleges predate the debt-collection exception, which took effect in 2015, he also seeks damages on behalf of a putative class for violations that occurred in

part in 2016, as well as forward-looking injunctive relief based on the post-amendment TCPA.” *Id.* at 10-11. The court concluded that “[t]he class allegations and request for injunctive relief vest [petitioner] with a sufficient personal stake in the post-amendment TCPA to challenge its constitutionality.” *Id.* at 11.

On the merits of petitioner’s First Amendment challenge, the court of appeals determined that the government-debt exception’s “applicability turns entirely on the content of the communication—i.e., whether it is ‘solely to collect a debt owed to or guaranteed by the United States.’” Pet. App. 12 (citation omitted). The court therefore concluded that “the exception is content-based and subject to strict scrutiny.” *Ibid.* The court then held that the exception fails such scrutiny. *Id.* at 14-18. The court determined that the government-debt exception renders the automated-call restriction “fatally underinclusive” because “it ‘subverts the privacy protections underlying the’ TCPA and ‘deviates from the purpose of the automated call ban.’” *Id.* at 16 (citation omitted). The court further concluded that, “even assuming that protecting the public fisc is a compelling interest, the debt-collection exception is not the least restrictive means to achieve it” because “Congress could protect the public fisc in a content-neutral way by phrasing the exception in terms of [the called party’s] relationship” with the federal government. *Id.* at 18.

Turning to the question of the appropriate remedy, the court of appeals found the government-debt exception severable from the rest of the TCPA, leaving the automated-call restriction intact. Pet. App. 19. The court explained that its choice of severance as the appropriate remedy was supported by the severability

provision set forth in the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, of which the TCPA is a part. Pet. App. 19; see 47 U.S.C. 608. The court also emphasized that the automated-call restriction had been “‘fully operative’ for more than two decades” before Congress enacted the government-debt exception. Pet. App. 19 (citation omitted).

4. The court of appeals denied rehearing en banc. Pet. App. 21-22.

DISCUSSION

The court of appeals invalidated part of an Act of Congress, holding that the government-debt exception to the TCPA’s restriction on automated calls violates the First Amendment. That holding is incorrect, and this Court usually grants review when a court of appeals has invalidated a provision of a federal statute. Two other pending petitions for writs of certiorari, however, present the same First Amendment and severability questions as the petition in this case. See Pet., *Charter Commc’ns, Inc. v. Gallion*, No. 19-575 (filed Nov. 1, 2019) (19-575 Pet.); Pet., *Barr v. American Ass’n of Political Consultants, Inc. (AAPC)*, No. 19-631 (filed Nov. 14, 2019) (19-631 Pet.).

Because *AAPC* provides the best vehicle for this Court’s consideration of those questions, the Court should grant the petition for a writ of certiorari in *AAPC*. With respect to the First Amendment and severability issues presented here, the Court should hold Facebook’s petition pending its disposition of *AAPC*. The second question presented in Facebook’s petition concerns the proper interpretation of the TCPA term “automatic telephone dialing system.” The government did not address that issue in its briefs below, and we

take no position at this time on the proper disposition of that aspect of the case.

1. The first question presented in Facebook’s petition encompasses the same First Amendment and severability issues as the question presented in the government’s petition for a writ of certiorari in *AAPC*. As the petition in *AAPC* explains, those issues warrant this Court’s review. 19-631 Pet. 14-16. Contrary to the conclusion of the court below, Pet. App. 11-14, the applicability of the government-debt exception does not depend on the content of the speech at issue. Rather, it depends on the call’s economic purpose (*i.e.*, whether the call is “made solely to collect a debt”), and on the existence of a specified economic relationship with the federal government (*i.e.*, whether the debt is “owed to or guaranteed by the United States”). 47 U.S.C. 227(b)(1)(A)(iii) (Supp. V 2017); see *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (recognizing that “restrictions on protected expression are distinct from restrictions on economic activity”).

Thus, like the basic automated-call restriction itself, the government-debt exception is content-neutral. 19-631 Pet. 6-10. “[L]esser scrutiny” therefore is appropriate, and the TCPA satisfies that scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015); see 19-631 Pet. 11-14. Because the court of appeals invalidated a provision of a federal statute, further review is warranted. 19-631 Pet. 15-16; see, *e.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2298 (2019). And, for the reasons stated in our certiorari petition in *AAPC*, it would be appropriate for the Court to consider the issue of the proper remedy for any First Amendment violation as part of that review. 19-631 Pet. 14-15.

AAPC provides the best vehicle for this Court’s consideration of the First Amendment and severability issues encompassed within the first question presented here. 19-631 Pet. 16-17. The certiorari petition in *AAPC* seeks review only of those First Amendment and severability issues. *Id.* at I. The certiorari petition in this case, by contrast, presents an additional question of statutory interpretation, regarding the scope of the TCPA’s definition of “automatic telephone dialing system.” See Pet. ii. If the Court grants certiorari here and resolves that statutory question in petitioner’s favor, it could order dismissal of Duguid’s suit on that basis without considering the First Amendment and severability issues that are common to this case and *AAPC*. See Pet. 14 (explaining that consideration of the statutory question “will allow the Court to * * * potentially avoid the constitutional questions altogether”); C.A. Doc. 84, at 3 (Aug. 23, 2019) (noting that “resolution of either question could lead to the dismissal of th[e] case”); see also 19-575 Pet. 22 (arguing that the petition in *Duguid* “involves a threshold question of statutory interpretation that may prevent this Court from even reaching the constitutional question”).

Granting review in *AAPC* would ensure that the First Amendment and severability issues are properly before this Court. And unlike the certiorari petition in *Gallion*, the certiorari petition in *AAPC* seeks review of a published and fully reasoned court of appeals decision. Compare *Gallion v. Charter Commc’ns, Inc.*, 772 Fed. Appx. 604 (9th Cir. 2019), petition for cert. pending, No. 19-575 (filed Nov. 1, 2019), with *American Ass’n of Political Consultants, Inc. v. FCC*, 923 F.3d 159 (4th Cir. 2019), petition for cert. pending, No. 19-631 (filed Nov. 14, 2019). Because *AAPC* provides the best

vehicle for this Court’s review, the Court should grant the certiorari petition in *AAPC*. With respect to the First Amendment and severability issues that are common to the two cases, the Court should hold the petition in this case pending its disposition of *AAPC*.

2. As noted, the certiorari petition in this case presents an additional question of statutory interpretation: “Whether the definition of [automatic telephone dialing system] in the TCPA encompasses any device that can ‘store’ and ‘automatically dial’ telephone numbers, even if the device does not ‘us[e] a random or sequential number generator.’” Pet. ii. The United States intervened in this case “for the limited purpose of defending the constitutionality” of the TCPA. D. Ct. Doc. 43, at 1. Throughout this litigation, the United States has addressed only the First Amendment and severability issues related to the constitutionality of the statute; it has not expressed any view on the proper interpretation of the statutory term “automatic telephone dialing system.” See Gov’t C.A. Br. 1 (“tak[ing] no position” on that issue); D. Ct. Doc. 44, at 8 (same).

Within the past two years, the FCC has twice sought comment on the statutory question presented. See *Public Notice: Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision*, 33 FCC Rcd 4864, 4865-4866 (2018); *Public Notice: Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit’s Marks v. Crunch San Diego, LLC Decision*, DA 18-1014, 33 FCC Rcd 9429, 9429, 2018 WL 4801356, at *1 (Oct. 3, 2018). The

agency, however, has not yet issued an order addressing the question. In light of the government's limited participation in the lower-court litigation in this case, and the FCC's ongoing consideration of the statutory question presented here, the United States expresses no view at this time on the merits of that statutory issue or on whether the question warrants this Court's review.

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be held pending the Court's consideration of the petition for a writ of certiorari in *Barr v. American Ass'n of Political Consultants, Inc.*, No. 19-631 (filed Nov. 14, 2019), and then disposed of as appropriate. The United States takes no position on the proper disposition of the second question presented in the petition.

Respectfully submitted.

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