No. 19-511

In the
Supreme Court of the United States

FACEBOOK, INC.,
Petitioner,

v.

NOAH DUGUID, individually and on behalf of himself and all others similarly situated,
Respondent,

and

UNITED STATES OF AMERICA,
Respondent-Intervenor

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

REPLY BRIEF FOR PETITIONER

PAUL D. CLEMENT
Counsel of Record
DEVIN S. ANDERSON
KASDIN M. MITCHELL
LAUREN N. BEEBE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

ANDREW B. CLUBOK
ROMAN MARTINEZ
SUSAN E. ENGEL
SAMIR DEGER-SEN
GREGORY B. IN DEN BERKEN
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004

Counsel for Petitioner

December 2, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

I. The Government Agrees That The Court Should Grant Plenary Review Of The Constitutional Question, Including The Question Of The Proper Remedy 3

II. The Court Should Also Grant Review On The Statutory Question Which Is Logically Anterior And Independently Certworthy 6

III. This Case Is An Ideal Vehicle 9

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

ACA Int'l v. FCC,
885 F.3d 687 (D.C. Cir. 2018) 7

Am. Ass'n of Political Consultants v. FCC,
923 F.3d 159 (4th Cir. 2019) 11

Am. Ass'n of Political Consultants v. Sessions,
323 F. Supp. 3d 737 (E.D.N.C. 2018) 11

Bank of Am. Corp. v. City of Miami,
137 S. Ct. 1296 (2017) 11

Burwell v. Hobby Lobby Stores, Inc.,
573 U.S. 682 (2014) 11

Dominguez v. Yahoo, Inc.,
894 F.3d 116 (3d Cir. 2018) 7, 8

Jones v. United States,
529 U.S. 848 (2000) 9

Marks v. Crunch San Diego, LLC,
904 F.3d 1041 (9th Cir. 2018) 8

McCullen v. Coakley,
573 U.S. 464 (2014) 4

New York v. Ferber,
458 U.S. 747 (1982) 10

Nw. Austin Mun. Utility Dist. No. One v. Holder,
557 U.S. 193 (2009) 9

Rappa v. New Castle Cty.,
18 F.3d 1043 (3d Cir. 1994) 3

Reed v. Town of Gilbert,
135 S. Ct. 2218 (2015).. 4

United States ex rel. Att'y Gen. v. Del. & Hudson Co.,
213 U.S. 366 (1909).. 10

United States v. Williams,
553 U.S. 285 (2008)... 6

Other Authorities

Aurelius Inv., LLC v. Puerto Rico,
No. 18-1475 (U.S. argued Oct. 15, 2019)............... 11

FCC, *Public Notice: Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the TCPA in light of the Ninth Circuit's* Marks v. Crunch San Diego, LLC *Decision*
(Oct. 3, 2018), https://bit.ly/2Qso4KG 9

Maine Cmty. Health Options v. United States, No. 18-1023
(U.S. to be argued Dec. 10, 2019) 10

Petition for writ of certiorari, *Barr v. Am. Ass'n of Political Consultants*, No. 19-631
(U.S. filed Nov. 14, 2019)........................... 1, 3, 5, 11

Petition for writ of certiorari, *Charter Commc'ns, Inc. v. Gallion*,
No. 19-575 (U.S. filed Nov. 1, 2019)...................... 10

REPLY BRIEF

The government agrees that the constitutional question presented here, including the proper remedy, is certworthy, having presented "the same" question in its own petition in *Barr v. American Ass'n of Political Consultants* (*AAPC*), No. 19-631 (U.S. filed Nov. 14, 2019). U.S.Br.7-8. The government further recognizes that the statutory question presented here has the potential to narrow the reach of the statutory prohibition and avoid the need to reach the constitutional issue in this case. The government suggests that is a reason to hold this case pending resolution of the constitutional question in *AAPC*. *See* U.S.Br.8. But the availability of constitutional-avoidance arguments is ordinarily a jurisprudential virtue, not a vehicle problem, and in all events the complete answer to the government's concern is for the Court to grant this petition *and* the government's petition in *AAPC* so that it will be assured of reaching both the statutory and constitutional issues.

Tellingly, the government's brief does not deny that it would be difficult to meaningfully address the constitutional question apart from the statutory question. After all, it is difficult to determine whether a statute impermissibly abridges speech without first determining what speech the statute abridges. It would thus be a highly artificial exercise to evaluate the constitutionality of the TCPA's prohibition on ATDS calls without first determining just what an ATDS is. If an ATDS includes virtually every smartphone (and the prohibition reaches virtually every wrong number dialed with a smartphone), the statute would prohibit far more speech than if it

reaches narrowly targeted robocalling using specifically prohibited technology that makes random (or sequential) calls. The statutory question is thus logically anterior to the constitutional question and the far better course would be to decide the two questions together, and to grant review in at least one case where the scope of the ATDS prohibition was actively litigated. Any concern about not being able to reach the constitutional question would be fully addressed by granting both this petition and the government's petition in *AAPC*, which presents the constitutional question alone. The case for taking up the statutory issue now is reinforced by the fact that it is independently certworthy; the circuits are split, and the issue is important, as multiple *amici* briefs attest.

Finally, nothing in the government's brief calls into question that this case is an ideal vehicle for deciding the questions presented. This case arises in the same concrete posture as the vast majority of TCPA cases. A plaintiff seeks millions in statutory penalties, and the parties have actively litigated whether the statutory prohibition applies and, if so, is constitutional. That concrete scenario not only sharply presents the statutory questions but highlights the absurdity of the Ninth Circuit's remedial decision. Having accepted the defendant's argument that the statutory prohibition it allegedly violated is unconstitutional, the Ninth Circuit nonetheless denied the defendant any legal relief by rewriting a statutory prohibition to abridge more speech. That result is untenable, and both questions presented by the petition are important. This Court should grant the petition in full.

I. The Government Agrees That The Court Should Grant Plenary Review Of The Constitutional Question, Including The Question Of The Proper Remedy.

The government agrees with Facebook that the Court should grant certiorari to consider the First Amendment and related remedial issues raised in the first question presented. U.S.Br.7-8; Pet.14-22; *see also* AAPC.Pet.14-16. As the government explains, the Court has "repeatedly" granted certiorari when lower courts have invalidated Acts of Congress as unconstitutional, especially "in cases presenting significant First Amendment questions, even in the absence of a circuit conflict." AAPC.Pet.15 (collecting cases). In addition, and as explained in the petition and by several *amici*, the Ninth Circuit's bizarre invocation of "severability" principles to deny a successful First Amendment litigant any relief by rewriting a statute to abridge more speech is anathema to the First Amendment and is contrary to this Court's jurisprudence as well as decisions from other courts of appeals. *See, e.g.*, *Rappa v. New Castle Cty.*, 18 F.3d 1043 (3d Cir. 1994); Pet.17-22; Br. of Amici Curiae Chamber of Commerce & Business Roundtable ("Chamber.Br.") 18-21; Br. of Amicus Curiae Credit Union Nat'l Ass'n, Inc. ("CUNA.Br.") 4-8. Importantly, the government agrees that review of the constitutional question should include the question of remedy and framed its question presented accordingly. Certiorari is plainly warranted here.

The government's brief does little to refute the Ninth Circuit's ruling that the TCPA's prohibition on ATDS calls is unconstitutional, and its arguments in

its *AAPC* petition actually undermine the Ninth Circuit's misguided "severability" analysis. The government maintains that the statute's "automated-call restriction" is "content-neutral," U.S.Br.8, based on the same distinction between content and purpose that this Court rejected in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). In the government's view, the ATDS prohibition does not "depend on the content of the speech at issue" because the government-debt-collection exception is triggered by "the call's economic *purpose*." U.S.Br.8 (emphasis added). But this Court made clear in *Reed* that a statute is "content-based" if it "draws distinctions based on the message a speaker conveys." 135 S. Ct. at 2227. And one way a statute can do this is by "defining regulated speech by its … purpose." *Id.* That is plainly how the TCPA works, as the only way to determine whether the Act's prohibition applies is to consider the content of the call—asking whether the call was "made for emergency purposes" or "to collect a debt owed to or guaranteed by the United States" or for any of the other content-based allowable reasons. *See* CUNA.Br.4-8 (explaining that the TCPA "is riddled with content-based distinctions"); *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (a statute "would be content based if it require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred").[1]

[1] Even if the TCPA's prohibition on ATDS calls were content-neutral, it would not cure the overbreadth problem with the statute as interpreted by the Ninth Circuit. *See* Pet.10-11, 14, 22; Chamber.Br.9. Thus, while the meaning of an ATDS and the corresponding scope of the ATDS prohibition are logically anterior to considering whether the prohibition is impermissibly

Having recognized that the prohibition on ATDS calls was hopelessly content-based, the Ninth Circuit plainly should have invalidated the prohibition and given relief to petitioner, a defendant alleged to have violated an unconstitutional prohibition. Instead, the Ninth Circuit erred by assuming that what was unconstitutional was the speech-permitting government-debt-collection exception, rather than the speech-abridging prohibition. That is clearly erroneous. As the petition explained (at 16-17), Facebook never challenged the constitutionality of the exception; it challenged instead the constitutionality of the prohibition it was alleged to have violated. Having found that prohibition unconstitutional, the only question left for severability analysis was whether other provisions of the TCPA should fall along with the prohibition. Nothing in severability principles or the First Amendment allowed the Ninth Circuit to revive and broaden the prohibition to abridge more speech than Congress saw fit to penalize.

The government purports to defend the Ninth Circuit's remedial analysis, but it actually underscores the Ninth Circuit's fundamental error. As the government itself emphasizes (literally) in its *AAPC* petition, "the government-debt exception is not itself a *restriction* on speech, but an *exception* to the automated-call restriction." AAPC.Pet.11 (emphases in original). Just so, which is why Facebook never challenged the constitutionality of the exception, as such, but instead challenged the constitutionality of the "automated-call restriction." Having succeeded, it

---

content-based, those statutory questions are absolutely critical to determining whether the statute has an overbreadth problem.

was entitled to have the unconstitutional restriction invalidated. Striking an exception, which does not restrict speech, was not the basis of Facebook's alleged liability, and was not what Facebook challenged, is worse than a *non sequitur*. It impermissibly rewrites a statute and is a complete departure from basic First Amendment principles, which provide that the remedy for a First Amendment violation is more speech, not less.

II. The Court Should Also Grant Review On The Statutory Question Which Is Logically Anterior And Independently Certworthy.

The second question presented raises a critical question about the scope of the ATDS prohibition, which is both logically anterior to the constitutional question and independently deserving of this Court's plenary review.

1. The government does not dispute that it would be extremely difficult and highly artificial to decide the constitutionality of the ATDS prohibition without ascertaining the scope of the ATDS definition. This is not controversial. The "first step" in deciding whether a statute is constitutional "is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008).

In this case, Facebook was sued for allegedly violating a statute that prohibits calls using an ATDS without obtaining prior consent. While the Ninth Circuit has construed that prohibition broadly by adopting an expansive definition of an ATDS, Facebook argued for a narrow construction that would

render the statute inapplicable here. Facebook also raised two constitutional objections to that statutory prohibition as interpreted by the Ninth Circuit: that it is overbroad and impermissibly content-based. It would be a highly artificial exercise to resolve either of those constitutional arguments without answering the basic question of what an ATDS is.

That is unmistakable as to the overbreadth argument. As the D.C. Circuit has rightly recognized, "If every smartphone qualifies as an ATDS, the statute's restrictions on autodialer calls assume an eye-popping sweep," which would be "an unreasonable, and impermissible, interpretation of the statute's reach," and could well render the statute fundamentally "untenable." *ACA Int'l v. FCC*, 885 F.3d 687, 697-98 (D.C. Cir. 2018); *see also Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 120-21 (3d Cir. 2018) (interpreting an ATDS broadly "raises the same concerns about the TCPA's breadth that the D.C. Circuit addressed in *ACA International*").

But it is no less true as to arguments that the prohibition is content-based. It would be odd enough to address the ATDS prohibition without knowing whether it reaches every smartphone in the land or only robocallers using random or sequential number generators. But both the seriousness of the abridgement of speech and the strength of the government's defense of that abridgment depend on the breadth of the ATDS definition. If an ATDS includes nearly all modern telephones, then the prohibition's restriction of speech is enormous, but the government's need for an exception would be correspondingly greater. If, by contrast, the definition

of an ATDS is narrow, then that statute abridges less speech, but the government's need for an exception will be correspondingly weaker. For the Court to fully consider and meaningfully resolve the TCPA's constitutionality, the Court will thus need to determine at least implicitly what the TCPA prohibits. There is no reason why the Court should address that issue without the benefit of lower court briefing where the parties contested the statutory issue as well as the constitutional issue that all agree is certworthy.

2. As set forth in the petition and by numerous *amici*, the statutory question is certworthy, wholly apart from its relationship to the constitutional question. It is an issue of substantial national importance that has divided the courts of appeals and fully merits this Court's review in its own right. Pet.23-33; Br. of Amicus Curiae ACA Int'l, Inc. 6-18; Chamber.Br.8-15; CUNA.Br.11-21; Br. of Amici Curiae Midland Credit Mgmt., Inc. & Encore Capital Grp., Inc. 2-21; Br. of Amicus Curiae Retail Litig. Ctr., Inc. 3-27. The Ninth Circuit's holding in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018) created a direct and acknowledged conflict with the Third Circuit's decision in *Dominguez*, 894 F.3d at 121. *Marks*, 904 F.3d at 1052 n.8. It also perpetuates a long-standing division among lower courts across the country, Pet.32-33 & nn.3-4, and conflicts directly with the D.C. Circuit's decision in *ACA International*, Pet.30-31.

The government's brief does not—and cannot—deny any of that. The FCC has already recognized that *Marks* and *ACA International* are fundamentally incompatible. Pet.31-32 (citing FCC, *Public Notice:*

Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the TCPA in light of the Ninth Circuit's Marks v. Crunch San Diego, LLC *Decision* 2 (Oct. 3, 2018), https://bit.ly/2Qso4KG). There is no reason for this Court to pass up this important and consequential question.

III. This Case Is An Ideal Vehicle.

The government does not identify any persuasive vehicle issues with this petition. The only reason it suggests that its own *AAPC* petition is a superior vehicle is because its petition raises *only* the constitutional question. But that gets matters backwards, and the government's concerns are fully answered by granting both petitions and consolidating or coordinating briefing and argument.

Generally speaking, the possibility for constitutional avoidance is considered a virtue, not a vice that renders a petition less certworthy. This Court's "usual practice is to avoid the unnecessary resolution of constitutional questions." *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009). To that end, the canon of constitutional avoidance provides a "guiding principle that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Jones v. United States*, 529 U.S. 848, 857 (2000) (quoting *United States ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)). These principles apply with full force when the constitutional issues raised by one interpretation trigger serious concerns of First

Amendment overbreadth. *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982); *see also* Chamber.Br.8, 22-24. Granting and deciding the statutory issue could eliminate any need to condemn the TCPA as overbroad and substantially sharpen the issues in addressing whether the ATDS prohibition is impermissibly content-based.

Moreover, any concern that the Court might miss out on the possibility of definitively resolving the constitutional issue is fully addressed by granting review in both this case and *AAPC.*[2] The choice before the Court is not an either-or choice. The Court could grant both petitions and get the best of both worlds. The Court can address an important statutory issue that will sharpen the First Amendment dispute and may obviate the need to reach the First Amendment question in this case (and eliminate any need to decide the overbreadth issue). And if the Court accepts petitioner's interpretation of the statute, the remaining constitutional issue will be squarely presented in *AAPC* based on an explicit understanding of the statute's reach. This Court routinely grants multiple petitions raising similar or overlapping issues. *See, e.g.*, *Maine Cmty. Health Options v. United States*, No. 18-1023 (U.S. to be argued Dec. 10, 2019) (granting three private-party petitions); *Aurelius Inv., LLC v. Puerto Rico*, No. 18-

---

[2] In addition to the government's petition in *AAPC*, another pending petition presents the same constitutional issue: *Charter Communications, Inc. v. Gallion*, No. 19-575 (U.S. filed Nov. 1, 2019). The petition in *Gallion* does not present a statutory issue. If the Court were inclined to grant *Gallion* as well, it would still make sense to grant review of this petition, which alone presents both statutory and constitutional issues.

1475 (U.S. argued Oct. 15, 2019) (granting two government and three private-party petitions); *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017) (granting two private-party petitions); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (granting government and private-party petitions). And there is more justification for doing so here than in most contexts.

Granting both petitions would have the added benefit of allowing this Court to decide this case in the posture in which TCPA cases are most commonly litigated, as opposed to only in the context of the rare facial challenge to the statute brought directly against the government as a declaratory-judgment action. AAPC.Pet.4; *Am. Ass'n of Political Consultants v. FCC*, 923 F.3d 159, 161 (4th Cir. 2019); *Am. Ass'n of Political Consultants v. Sessions*, 323 F. Supp. 3d 737, 739 (E.D.N.C. 2018). This case involves a plaintiff seeking staggering statutory penalties based on actual text messages (text messages that *enhance* account security by alerting users to potentially unauthorized account access). The parties actively contested the statutory question throughout the litigation. And the concrete context of this case highlights the problems with the Ninth Circuit's "severability" analysis. Facebook did not get to choose which provision or provisions of the TCPA to challenge. It was sued for violating a specific statutory prohibition. It then raised the unconstitutionality of that prohibition as a defense and won, and yet still received no relief. While the Fourth Circuit's "severability" analysis is equally flawed, the fact that AAPC received a narrower declaratory judgement than it sought could obscure the anomaly that is starkly implicated here. In short,

there is no valid basis to hold this case while litigating these issues only in the government's hand-picked case. The far better course is to grant the petition here along with the petition in *AAPC*.

CONCLUSION

The Court should grant the petition in full.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
DEVIN S. ANDERSON
KASDIN M. MITCHELL
LAUREN N. BEEBE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

ANDREW B. CLUBOK
ROMAN MARTINEZ
SUSAN E. ENGEL
SAMIR DEGER-SEN
GREGORY B. IN DEN BERKEN
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004

Counsel for Petitioner

December 2, 2019