

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 WILLIAM P. BARR, ATTORNEY GENERAL,)
4 ET AL.,)
5 Petitioners,)
6 v.) No. 19-631
7 AMERICAN ASSOCIATION OF POLITICAL)
8 CONSULTANTS, INC., ET AL.,)
9 Respondents.)
10 - - - - -
11
12 Washington, D.C.
13 Wednesday, May 6, 2020
14
15 The above-entitled matter came on for oral
16 argument before the Supreme Court of the United States
17 at 11:42 a.m.
18
19 APPEARANCES:
20 MALCOLM L. STEWART, Deputy Solicitor General,
21 Department of Justice, Washington, D.C. ;
22 on behalf of the Petitioners.
23 ROMAN MARTINEZ, Esquire, Washington, D.C. ;
24 on behalf of the Respondents.
25

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P R O C E E D I N G S

(11:42 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 19-631, William Barr, Attorney General versus the American Association of Political Consultants.

Before we get started, I would like to remind everyone to turn their cell phones off.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE PETITIONERS

MR. STEWART: Thank you, Mr. Chief Justice, and may it please the Court:

In 1991, Congress enacted the TCPA's basic restriction on the placement of automated calls to cell phones. In the years that followed, lower courts consistently upheld the constitutionality of that provision as a content-neutral restriction on the use of calling technologies that consumers found particularly intrusive and annoying.

Congress's enactment of the government-debt exception in 2015 did not introduce any constitutional infirmity into the statutory scheme. That exception is limited to

1 a narrow category of calls that intrude less
2 severely on consumer privacy than does the
3 typical automated call and that serve an
4 important countervailing interest in protecting
5 the federal fisc.

6 There's been a good deal of back and
7 forth in the briefs about whether Respondents'
8 challenge is properly viewed as one to the
9 exception or to the general automated-call
10 restriction. And I think, in circumstances like
11 this, there's not a right way and a wrong way,
12 not a right or wrong challenge to bring.
13 There's simply two conceptually distinct
14 analytical -- analytical ways of challenging a
15 law that includes a basic restriction subject to
16 exceptions.

17 Here, we think that both challenges
18 could have been brought but that both would
19 fail. But I'd like to focus us first on the
20 challenge that Respondent is asserting in its
21 brief. These are the -- this is the challenge
22 that Respondents are asking the Court to focus
23 on.

24 And that is the challenge to the
25 underlying automated-call restriction. And

1 Respondents' basic theory is that the
2 government-debt exception, taken in combination
3 with other aspects of the statutory scheme,
4 prevents the automated-call restriction from
5 performing its intended consumer protection
6 function, renders it insufficiently efficacious
7 to be upheld under the First Amendment.

8 And we think that's wrong. If you
9 look at the statute, the only other statutory
10 exceptions to the automated-call restriction are
11 those for emergency calls and calls with -- made
12 with the prior express consent of the recipient.

13 And Respondents have not contended
14 that either of those is -- raises a First
15 Amendment problem or casts doubt on the efficacy
16 of the underlying restriction.

17 CHIEF JUSTICE ROBERTS: Mr. Stewart,
18 your --

19 MR. STEWART: So that --

20 CHIEF JUSTICE ROBERTS: -- your -- one
21 of your basic points to avoid strict scrutiny
22 under the First Amendment is that you're not
23 really looking at the content of the
24 communication in this case, but, rather, it's
25 more properly viewed as part of an economic

1 relationship.

2 I don't see how that gets you out of
3 the content category. You still have to look
4 carefully at what's being said before you can
5 decide whether the phone call is covered by the
6 provision or not. I think that's the clear
7 holding of our decision in the Reed case.

8 MR. STEWART: Well, I think that as --
9 let me -- let me address Reed first and
10 foremost. At the outset of the Court's analysis
11 in Reed, after the statement of the case, the
12 Court described content-based laws as "those
13 that target speech based on its communicative
14 content."

15 And if we're focusing now on the
16 automated-call restriction, the provision of the
17 statute that Respondents say is the focus of
18 their constitutional challenge, it's impossible
19 to say that that restriction targets
20 Respondents' calls based on their communicative
21 content.

22 The -- the situation was very
23 different in Reed. In Reed, the town had 23
24 different categories of signs in its sign code,
25 a multitude of different treatments of the

1 different categories. One of them was temporary
2 directional signs, and that was the category of
3 signs that the plaintiffs in the case wanted to
4 put up. And you could tell exclusively from the
5 content of the sign what -- which category it
6 fell into and -- and what restrictions applied.
7 And in that circumstance, it was natural for the
8 plaintiffs to argue and the Court to hold that
9 they had been targeted based on the
10 communicative -- communicative content of their
11 signs.

12 Here, Respondents haven't been
13 targeted in any -- in any meaningful sense.
14 Their political communications are subject to
15 the same restrictions that apply to the vast,
16 vast majority of automated calls.

17 CHIEF JUSTICE ROBERTS: Counsel, I'd
18 like --

19 MR. STEWART: The fact that they're
20 here --

21 CHIEF JUSTICE ROBERTS: -- I'd like to
22 jump ahead a little bit and get to the severance
23 question. You say that if this exception for
24 government debt is found to be problematic, you
25 should just sever that and keep the rest of the

1 statute.

2 But, when we sever provisions, it's
3 because they are illegal. Here, there's nothing
4 illegal about the government-debt exception. It
5 just, when combined with the rest of the
6 statute, makes the whole statute vulnerable.

7 I wonder why in that situation the
8 whole statute shouldn't fall?

9 MR. STEWART: I guess the two things I
10 would say are, first, it's important to look at
11 the temporal sequence that produced the current
12 state of affairs; that is, the basic restriction
13 was enacted in 1991 and the government-debt
14 exception was enacted in a separate public law
15 in 2015. And --

16 CHIEF JUSTICE ROBERTS: Okay. I've
17 got -- I've got that. What's your second point?

18 MR. STEWART: The second point is that
19 the ultimate question of severability is one of
20 congressional intent, what result would Congress
21 have preferred. And for purposes of determining
22 what Congress would likely have preferred, it
23 seems really like the tail wagging the dog to
24 say that we will treat Congress's desire to free
25 collectors of government-backed debts from these

1 restrictions, whether -- as taking preeminence
2 over Congress's desire to protect all consumers
3 from all other automated calls.

4 We think Congress --

5 CHIEF JUSTICE ROBERTS: Thank you --

6 MR. STEWART: -- would clearly have --

7 CHIEF JUSTICE: -- thank you, counsel.

8 Justice Thomas?

9 JUSTICE THOMAS: Thank you, Chief
10 Justice.

11 Mr. Stewart, it would seem a bit odd,
12 as you suggest, that we sever the exception,
13 but, here, it doesn't seem -- this remedy
14 doesn't seem to give anything to Respondent. It
15 doesn't add any more speech for that for the
16 Respondent. And it seems to be taking speech
17 actually away from someone who's not in this
18 case.

19 MR. STEWART: I mean, that -- that may
20 be true, but the Court's task in determining the
21 appropriate remedy is to kind of follow
22 established principles of severability, to look
23 to indicia of Congress's likely intent.

24 And if the result is that the
25 plaintiff at the end of the day doesn't get the

1 practical result that it was looking for, that's
2 not a reason to kind of re-jigger the
3 constitution -- the severability analysis. I
4 mean, it -- it often is the case that a
5 plaintiff can achieve a practical victory only
6 by prevailing on both of two legal questions.

7 And sometimes it is a question both of
8 the merits of the claim and of the appropriate
9 remedy. And if a court holds that, yes, you
10 were right, you've established the existence of
11 a violation, the statute read properly simply
12 doesn't authorize the remedy you seek, that
13 that's one of the chances that the plaintiff
14 takes when it pursues a claim that depends on
15 prevailing on two separate legal propositions.
16 The plaintiff persuaded the court as to one
17 legal proposition, didn't persuade the court as
18 to a second proposition that was really
19 essential to getting the practical result it
20 wanted -- that's not an unusual situation in the
21 law.

22 JUSTICE THOMAS: Well, I'd like to
23 shift gears and -- and focus, just ask the
24 question about your strict scrutiny analysis.

25 You seem to focus on the interest that

1 the individual has in privacy of the cell phone.
2 But it would seem to me that that privacy
3 interest is actually not nearly as great as you
4 would -- as a person would have in the landline
5 phone at home or in even someone knocking on
6 their front door.

7 MR. STEWART: Well, I think it --
8 it -- at the time that the statute was enacted,
9 cell phones were obviously a lot less prevalent.
10 They may have been used on -- on rare occasions,
11 and -- and most people didn't own them.

12 I think now cell phones are, as we
13 explained in the reply brief, are ubiquitous.
14 They are an integral part of daily life for most
15 individuals. And so, really, the privacy
16 interest is -- is greater than in the
17 residential landline.

18 Yes, if the phone rings at your home
19 and you happen to be there, it may be an
20 intrusion. But most people or virtually all
21 people when they are at home will have their
22 cell phones with them. So unwanted calls to
23 cell phones will still pose the same threat to
24 residential privacy that unwanted calls to
25 landlines would.

1 But, in addition, people for the most
2 part carry their cell phones with them at all
3 times. And so the effect of automated calls to
4 cell phones is not just potentially to disturb
5 residential privacy, it's potentially to disturb
6 them when they're at work, when they're on
7 social occasions, when for whatever reason they
8 might want to be open to calls from friends or
9 calls from family members but won't -- don't
10 want to be distracted by --

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Ginsburg?

14 JUSTICE GINSBURG: Counsel, I don't
15 see how you can escape a content-based
16 distinction. If the content is a debt owed to
17 the government, that's the content of the
18 message, you owe the government for a student
19 loan or whatever, then the call is okay.

20 But, if the message is, please
21 contribute to our political organization, it's
22 banned. So it's based on what the message is.
23 Pay the government what you owe the government,
24 or contribute to our political organization.

25 MR. STEWART: I think, as -- as we've

1 said in our briefs, it's -- it is true that
2 often a court in determining whether the
3 government-debt exception applied would look in
4 part to the content of the call.

5 But you wouldn't be looking
6 exclusively to the content of the call. For
7 instance, determination whether the particular
8 debt that was sought to be collected was, in
9 fact, owed to or guaranteed by the federal
10 government would have nothing to do with the
11 call's content. It would depend on the
12 financial relationship between the debtor and
13 the federal government.

14 And it is characteristic in the legal
15 culture that Congress would enact statutes that
16 regulate communications made in particular
17 fields of economic activity. And so you have
18 laws that regulate what can be said or what
19 disclosures have to be made in connection with
20 the sale of securities.

21 And they're subject to First Amendment
22 challenge. Plaintiffs can argue that particular
23 restrictions go too far. But nobody thinks of
24 laws like that as being especially suspect
25 because they are limited to the field of

1 securities, even though, to determine whether a
2 particular communication was covered, a court
3 would need to look in part at the content of the
4 communication.

5 JUSTICE GINSBURG: Switching to the
6 severance, we're told that if we strike only the
7 government debt exemption, that will leave the
8 political groups with no incentive at all to
9 assert their First Amendment claim. They're
10 going to lose at the end of the day.

11 So why should they bother challenging
12 -- why -- why should they bother with a First
13 Amendment claim when it will be unsuccessful at
14 the severance stage?

15 MR. STEWART: Well, a couple of
16 responses to that. The first is, as -- as I was
17 indicating earlier, that the plaintiffs here did
18 argue and they were entitled to argue that the
19 appropriate remedy, if there was a
20 constitutional violation, was to strike down the
21 whole restriction.

22 But they didn't persuade the Court of
23 Appeals on that question. And if the
24 application of ordinary severance principles
25 would confirm that result, then the Court's duty

1 is to follow those principles even though it
2 leaves this plaintiff without a remedy.

3 The other thing, as we discussed --

4 CHIEF JUSTICE ROBERTS: Counsel.

5 Justice -- Justice Breyer?

6 JUSTICE BREYER: Well, what your last
7 statement, and Justice Ginsburg leads me to ask
8 a somewhat philosophical question, which you
9 need not answer if you don't want to, but my
10 question is, what is content discrimination?

11 All human life is carried on through
12 speech. All government regulation is carried on
13 through speech. Every single statutes book is
14 filled with all kinds of content discrimination.

15 The SEC and every agency deals with
16 nothing but what do their rules apply to, where
17 are the exceptions, et cetera. And so I'd
18 always thought that that was in Justice
19 Brandeis's third category, economic regulation,
20 as far as the First Amendment is concerned, or
21 at least most of it was.

22 So how in your view do you distinguish
23 between what is in that third category, look to
24 see if it's reasonable, what is in the first
25 category, never uphold it almost no matter what?

1 How -- how? What's your way of doing it?

2 MR. STEWART: I don't think we have
3 any succinct test that would capture all cases,
4 but I would point the Court or remind the Court
5 of certain guideposts that it set up.

6 One is, if you can tell exclusively
7 from the content of a message whether a
8 particular law applies, then that's very likely
9 or almost certain to be content-based.

10 The second is, as I was referring to
11 earlier, the Court in Reed referred to
12 content-based laws as those that target space --
13 speech based on its communicative content. And,
14 here, even if you thought that the
15 government-debt exception was content-based, it
16 wouldn't follow that the automated-call
17 restriction is content-based.

18 The automated-call restriction doesn't
19 target speech because of its content, it treats
20 the vast majority of speech the same, and it
21 simply exempts from regulation a very small
22 category of speech.

23 And then the third thing I would say
24 is, whatever the right answer is, it can't be
25 that whenever speech -- the mere fact that a

1 particular law is limited to speech that is used
2 in a particular economic activity, that
3 limitation cannot by itself be sufficient to
4 render the law content-based or at least to
5 subject it to strict -- strict scrutiny because
6 that would -- that principle would cast doubt on
7 a vast array of laws that Congress and state
8 legislatures have enacted that regulate the
9 spheres of economic activity.

10 JUSTICE BREYER: Thank you. Thank you
11 very much.

12 CHIEF JUSTICE ROBERTS: Justice Alito?

13 JUSTICE ALITO: Mr. Stewart, the
14 so-called severability issue in this case is
15 really fascinating. I understand you don't
16 think we need to get to that, but assuming for
17 the sake of argument that we do get to that
18 question, what is your best precedent for the
19 application of a severability analysis in a case
20 like this, where, arguably, a regulation of
21 speech is unconstitutional only because it
22 contains a content-based or a viewpoint-based
23 exception?

24 MR. STEWART: I don't think either
25 side has a precedent that was specifically in

1 the First Amendment area, where the Court
2 discussed whether severability principles should
3 apply and, if so, how do they apply.

4 I think our best precedents are cases
5 like Morales-Santana and Ross. Yes, those were
6 equal protection cases, but they said, in
7 deciding whether an exception should be severed
8 or the underlying rule should be struck down, we
9 look at things like the temporal sequence in
10 which the laws were enacted, whether the
11 exception was enacted later in the day, the
12 degree of Congress's commitment to the basic
13 rule, and I think those are good analogies here.

14 Where the gravamen of the First
15 Amendment claim is that this person's speech is
16 being treated differently from another person's
17 speech --

18 JUSTICE ALITO: Well, what's your --

19 MR. STEWART: -- obviously, the --

20 JUSTICE ALITO: -- what is your
21 response to this counterargument? In an equal
22 protection case, what the complaining party is
23 objecting to is unequal treatment. So whether
24 the remedy levels up or levels down, the
25 complaining party gets what it wants, namely,

1 equal treatment, whereas, in a free speech case,
2 what the complaining party is objecting to is a
3 restriction on its speech.

4 And if we apply the severability
5 analysis in that situation, the complaining
6 party does not get what it wants, which is the
7 ability to speak without restriction.

8 MR. STEWART: I think with respect,
9 that -- that conflates what the complaining
10 party wants with what is it -- with what it is
11 entitled to. And, for instance, in
12 Morales-Santana, there's no question that what
13 the complaining party wanted was citizenship.

14 It wanted to be able to invoke on be
15 -- the plaintiff wanted to be able to invoke on
16 behalf of his father the constitutional right to
17 equal treatment for unwed fathers and unwed
18 mothers. And, yes, the gravamen of his claim
19 is, I have a legal entitlement to equal
20 treatment.

21 But what, as a practical matter, the
22 plaintiff wanted was citizenship, and he didn't
23 get it as a result of the Court's severability
24 holding. The Court said, we apply established
25 principles of severability in order to determine

1 what we think Congress would have intended, and
2 the consequence is that even though you have
3 established a right -- a violation of the right
4 to equal treatment, you are not entitled to the
5 practical result that you are seeking.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Sotomayor?

9 JUSTICE SOTOMAYOR: Counsel, the --
10 the difficulty in my mind with this case has
11 been just touched upon by Justice Alito.

12 Assume that I do think -- or assume
13 not that I think -- but assume that this law is
14 content-based. I don't see in the record any
15 evidence by you of how small this exception is.

16 The other side says that most of the
17 complaints to the FTC are because of debt
18 collection. But there are no statistics about
19 how big or small debt collection is with respect
20 to robo- -- robot -- robo-calls generally or
21 with respect to consumer collection.

22 And even if you could show me that
23 they were a small part of the intrusions on
24 people, they certainly are a big emotional
25 complaint because they generate the most ire by

1 citizens. But putting that aside, you haven't
2 shown me why government-backed debt calls are
3 any different than commercial calls, private
4 commercial calls for debt.

5 In both situations, the debtor would
6 expect a call about debts they owe. That's an
7 interest that the government's claimed, but, you
8 know, so what? Both debtors. So there is a
9 discrimination aspect to this case that does
10 raise the equal protection ground.

11 But putting all of that aside, given
12 that the burden is on you under strict scrutiny
13 to show that you've narrowly tailored a law, if
14 this is content-based, and with all the failings
15 I've pointed to, how do you win on validating
16 this Act?

17 MR. STEWART: Let me say two or three
18 things about this. First, I think it would be
19 impossible to make an empirical showing about
20 kind of the smallness of the exemption relative
21 to the whole, because what you would want to
22 compare the government debt calls to is not to
23 other calls that are actually being made in the
24 world, because a lot of the calls that would
25 otherwise be made are not being made precisely

1 because they're barred by the TCPA.

2 What you would want to be asking is,
3 how small is this comparison in comparison --
4 how small is this class in comparison to all of
5 the other automated calls that might be made if
6 the TCPA were not in force?

7 Second, with respect to potential
8 discrimination between collectors of
9 government-backed debts and collectors of other
10 debts, the distinction that we've pointed to is
11 that the collection of government-backed debts
12 implicates the distinct federal interest in
13 protecting the federal fisc, and it's not
14 unusual for Congress to prefer federal debt
15 collection efforts.

16 For example, if Congress says the
17 federal government can collect debts owed to it
18 by offset on a tax return -- a tax refund or
19 Social Security benefits, the private predators
20 can't do that, or if the federal government has
21 greater capacity to garnish wages, that there's
22 nothing problematic about that, that the last
23 thing we would say is collectors of private
24 debts could petition the FCC for an exception.
25 They could say, there's no good reason to treat

1 us differently and, therefore, you, the FCC,
2 should exercise your statutory authority to
3 create an exception for all debt collection
4 calls as to which the recipient is not charged.

5 And then the FCC would either grant or
6 deny that. If it was denied, there could be
7 judicial review. So there could be a more
8 targeted challenge that was premised on the
9 differentiation between government-backed debts
10 and others, but that's very different from --

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Kagan?

14 JUSTICE KAGAN: Good afternoon,
15 Mr. Stewart. Could we go back to the -- what
16 you started with? You said that there was no
17 right way to think about how to analyze this
18 question, that we could either apply
19 constitutional analysis to the automated-call
20 restriction or we could apply it to the
21 exemption for government debt.

22 I'm wondering whether you could say a
23 little bit more about that, because we have to
24 pick some way, and on the one hand, the
25 restriction is the only thing -- the

1 automated-call restriction is the only thing
2 prohibiting speech, but on the other hand, the
3 exemption is the only thing that creates the
4 constitutional issue in this case.

5 So which end of the statute should we
6 look at?

7 MR. STEWART: Well, let me preface my
8 answer by -- by pointing to a hypothetical
9 that's noted in the Respondents' brief that we
10 think is a good illustration of when it would be
11 appropriate to focus on an exception.

12 At page 22, Respondents hypothesize a
13 statute that has a categorical ban on all
14 automated calls except for automated calls to a
15 residential landline that endorse the reelection
16 of Donald Trump and that are approved by the
17 Trump campaign.

18 Now we think an exception like that
19 for calls made to endorse a single political
20 candidate would surely violate the First
21 Amendment. It would be not only content-based
22 but viewpoint-based, and there would be no good
23 justification for it in terms of the basic
24 rationale for the restriction.

25 And even if the Court concluded that

1 this was a very small percentage of calls, the
2 exception didn't cast doubt on the credibility
3 of Congress's overall privacy protection
4 objectives, even if it didn't sufficiently --
5 significantly interfere with the achievement of
6 those objectives, the Court would surely say
7 that the -- the exception was invalid.

8 JUSTICE KAGAN: So is this statute --

9 MR. STEWART: And in that circumstance
10 --

11 JUSTICE KAGAN: -- is this statute
12 like that statute?

13 MR. STEWART: I don't think it's like
14 that statute. I mean, the -- the last thing I'd
15 want --

16 JUSTICE KAGAN: I mean, it's obviously
17 not in the sense that it's not the -- the -- the
18 exemption is not viewpoint-based to the extent
19 that that statute is. But, you know, some --
20 you've heard some arguments that the exemption
21 is content-based, so why not treat it the same
22 way?

23 MR. STEWART: I mean, I think, at the
24 very -- at the very most, you would treat the
25 exemption in the same way that you would treat

1 it if a restriction were imposed based on the
2 same criteria. And if there were certain
3 restrictions placed on -- on the collection of
4 government-backed debt and only on the
5 collection of government-backed debt, you
6 wouldn't apply strict scrutiny to such a law for
7 the same reasons I've discussed with respect to
8 the -- the securities laws, other hypothetical
9 laws that could restrict communications in a
10 particular area of commerce.

11 Now Respondents have understandably
12 focused their attention on the automated-call
13 restriction, in -- in part because of the
14 severability question. If they could persuade
15 the -- the Court that the exception was the
16 invalid provision and it was struck down, they
17 wouldn't really get what they want.

18 But they have to establish distinct
19 prerequisites to show that they have a valid
20 constitutional challenge to the automated-call
21 restriction. One might be if the exception
22 taken in combination were -- with other features
23 of the statute, just made it seem as though
24 Congress wasn't serious about protecting
25 privacy. But the exception really can't --

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Gorsuch?

4 JUSTICE GORSUCH: Good morning,
5 counsel. Some of my colleagues have already
6 noted the irony of a First Amendment challenge
7 leading to the suppression of more speech as a
8 remedy. I -- I guess I wanted to explore that
9 just a little bit further.

10 As I understand it, you -- you've
11 taken a position that there's no right way to do
12 severance here, but should we -- should we take
13 cognizance of the fact that striking down the
14 government debt provision was not relief that
15 the plaintiffs sought in this case? And we
16 normally take some cognizance of the adversarial
17 process and the plaintiff's request for relief.
18 We -- we've chided plaintiffs earlier in this
19 term for not -- not including all the relief
20 they might have wanted -- wanted in -- in their
21 complaint.

22 And what do we do about the fact as
23 well that the plaintiffs would seemingly have no
24 standing to challenge an exception for
25 government debt collection activities? So they

1 didn't seek the relief and they don't have
2 standing for this relief. Should -- should
3 those things tell us anything?

4 MR. STEWART: I mean, I think that you
5 could do it that way and the court of appeals
6 could have done it that way. That is, the
7 principal argument that the Respondents have
8 made all along is that the government-debt
9 exception, combined with other features of the
10 statutory and regulatory scheme, really call
11 into question Congress's commitment to the
12 protection of privacy or prevent a statute from
13 achieving that objective.

14 And the court of appeals clearly
15 didn't think that that was right. And the court
16 of appeals could -- could just have said:
17 That's the only claim you made, I reject it, and
18 whether or not you could have pursued a valid
19 challenge to the exception itself, you haven't
20 sought to pursue one, and, therefore, I'm not
21 going to -- to consider it.

22 I think our -- given that the court of
23 appeals ruled as it did, we have tried to -- to
24 confront that argument on the merits.

25 With respect to the standing question,

1 what the Respondents have always sought as
2 relief invalidated of -- invalidation of the
3 automated-call restriction. And they clearly
4 have standing to seek that.

5 And if the Court holds that, yes,
6 they're right to their First Amendment
7 violation, but they are wrong about the remedy,
8 that would not be a problem of standing. That
9 would just be a problem on the -- the merits of
10 their claim or at least the merits of their
11 claim with respect to the appropriate remedy.

12 JUSTICE GORSUCH: Let me come at it
13 from yet another angle, and that's the
14 separation of powers.

15 The government's remedy proposed here
16 is essentially that we should suppose or -- or
17 reimagine that Congress would have preferred a
18 regime in which more speech is suppressed than
19 one in which less is suppressed.

20 On -- on what authority do we have the
21 right to make that kind of judgment as opposed
22 to simply enforcing the First Amendment, finding
23 a violation, and -- and -- and liberating the
24 speech that's -- that's been wrongly suppressed?

25 MR. STEWART: Let me say two or three

1 different things about that. The first are,
2 either invalidation of the exception or
3 invalidation of the restriction would produce a
4 constitutional version of the TCPA. So, from
5 the standpoint of compliance with the First
6 Amendment, neither is to be preferred.

7 The second thing is, courts face that
8 same question when you're doing severability
9 analysis in the equal protection context, where
10 the result of severance may be that particular
11 --

12 JUSTICE GORSUCH: If I might --

13 MR. STEWART: -- individuals might --

14 JUSTICE GORSUCH: -- stop you -- if I
15 might stop you there, I'm sorry, but I -- I --
16 the equal protection analogy, suppose that
17 doesn't work for me because equal protection
18 is -- is a guarantee of a quality, not of a --
19 of a substance, so you can level up or level
20 down and satisfy equal protection.

21 But the First Amendment is about a
22 guarantee of speech, so it has content in a
23 different way. So suppose that argument.

24 MR. STEWART: Let me say that --

25 JUSTICE GORSUCH: Then what do you

1 have?

2 MR. STEWART: -- let me say I think
3 what we have is the temporal sequence here where
4 we had one public law in 1991 that enacted the
5 basic autodial restriction and then a second
6 public law that was enacted in 2015. And if
7 you -- if there is a constitutional infirmity,
8 if you ask which public law introduced that
9 constitutional infirmity, it would have to be
10 the 2015 public law.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel. Thank you, counsel.
13 Justice Kavanaugh?

14 JUSTICE KAVANAUGH: Thank you, Mr.
15 Chief Justice.

16 Good afternoon, Mr. Stewart. I think
17 the government-debt exception is almost
18 certainly content-based, at least for me. And I
19 just wanted as a matter of housekeeping, you
20 don't argue that it could satisfy strict
21 scrutiny, correct?

22 MR. STEWART: That's correct. We've
23 argued that the automated-call restriction could
24 satisfy --

25 JUSTICE KAVANAUGH: Yes.

1 MR. STEWART: -- strict scrutiny but
2 not the content-based exception.

3 JUSTICE KAVANAUGH: Okay. So those
4 two things together make this for me at least a
5 case about severability and leveling up or
6 leveling down. And you were just on this with
7 Justice Gorsuch, but it would help me if you
8 could kind of tick through your strong points
9 about severability again.

10 MR. STEWART: I think the -- the two
11 strongest points -- and I'll link the second to
12 Communications Act severability clause. The --
13 the two strongest points are we think there
14 would be a tail wagging the dog quality to
15 striking down the whole restriction, one that
16 has been in place for nearly 30 years, that has
17 been popular with consumers, that has protected
18 a vast array of people, simply to preserve the
19 ability of government debt collectors to use one
20 more means of communication.

21 The second is the temporal sequence.
22 If we ask which law was it that introduced any
23 constitutional invalidity, it would have to be
24 the 2015 law, not the 1991 law. And so it would
25 be natural if you were otherwise in equipoise to

1 say that's the law that would be struck down.

2 And -- and then there --

3 JUSTICE KAVANAUGH: So a key --

4 MR. STEWART: -- there is a
5 severability --

6 JUSTICE KAVANAUGH: Go ahead.

7 MR. STEWART: I was going to say,
8 there is a severability clause that says if any
9 provision of the Communications Act, of which
10 the TCPA is -- is a part, is held to be invalid,
11 the remedy won't extend beyond striking down
12 that provision.

13 And for purposes of determining which
14 is the invalid provision, I'd refer back to my
15 point about temporal sequence. It is a 2015 law
16 that introduced any constitutional infirmity.

17 JUSTICE KAVANAUGH: So a key point I
18 think you just underscored there is that the
19 premise of your severability argument, essential
20 premise, is that the underlying ban is
21 thoroughly constitutional.

22 MR. STEWART: Or at least that the
23 underlying ban was constitutional before 2015.

24 JUSTICE KAVANAUGH: Yeah, that's --
25 without the exception. I meant to say without

1 the exception, the underlying ban is perfectly
2 constitutional.

3 MR. STEWART: Yes.

4 JUSTICE KAVANAUGH: Okay. And how
5 much should we take into account on the what
6 would Congress have intended analyses like we
7 see in the states attorney general's brief about
8 consumer beliefs about the -- these calls, that
9 the common consumer complaint about robocalls.
10 Does that go at all into our analysis --

11 MR. STEWART: I mean, I think --

12 JUSTICE KAVANAUGH: -- of what
13 Congress would have intended?

14 MR. STEWART: -- I -- I think
15 certainly this was not unnoticed legislation.
16 It's not legislation that fixed a technical
17 problem. I'm talking about the original TCPA
18 now, that this is legislation that was intended
19 to address a problem that Congress thought was
20 immense, that affected vast numbers of
21 consumers, and obviously the amicus briefs
22 describe complaints that are being made now
23 about robocalls even with the TCPA's
24 restrictions in place. And so --

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. Would you take a minute to wrap up,
2 Mr. Stewart?

3 MR. STEWART: Thank you. Thank you,
4 Mr. Chief Justice.

5 The -- the last thing I'd say is I'd
6 refer back to the point that I was making at the
7 beginning, where given that Respondent is asking
8 the Court to focus on the restriction and not
9 the exception, it's appropriate to ask whether
10 the restriction is content-based, as the Court
11 in Reed understood that term.

12 And the Court in Reed described
13 content-based laws as laws that target speech
14 based on its communicative content.
15 Respondents' speech was not targeted based on
16 its content. It was treated the same way as the
17 vast majority of messages that people could use
18 automated calls to transmit.

19 Thank you, Your Honor.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Martinez.

23 ORAL ARGUMENT OF ROMAN MARTINEZ

24 ON BEHALF OF THE RESPONDENTS

25 MR. MARTINEZ: Mr. Chief Justice, and

1 may it please the Court:

2 My clients are political organizations
3 that want to engage in political speech at the
4 core of the First Amendment. The TCPA bars them
5 from using some of the most effective tools for
6 communication now available: automated text
7 messages and calls to cell phones.

8 At the same time, the statute's
9 exceptions let government-approved speakers use
10 these same technologies to deliver
11 government-approved messages that subvert the
12 same privacy interests supposedly requiring a
13 ban on all other calls.

14 This content-based scheme arbitrarily
15 favors commercial speech over core political
16 speech. It violates the First Amendment and
17 should be struck down.

18 The call ban is extremely broad.
19 Although the TCPA's primary purpose was to
20 address telemarketing calls, the cell phone ban
21 sweeps further and outlaws political and other
22 non-commercial calls, even when citizens are
23 open to receiving them.

24 The government says Congress needed a
25 restriction that broad in order to protect

1 privacy. The statute's history disproves that.
2 Congress and the FCC exempted non-commercial
3 calls from the residential call ban after
4 concluding that they do not adversely affect the
5 privacy rights protected by the TCPA.

6 There's no good privacy-based reason
7 for treating these exact same calls differently
8 when made to cell phones. The government-debt
9 exception confirms that Congress did not view
10 the privacy interests here as compelling.

11 That exception exposes 60 million
12 Americans to unlimited calls to collect more
13 than 4.2 trillion dollars in debt. Those are
14 the kinds of calls consumers hate the most.

15 If Congress really thought privacy was
16 paramount, it would not have allowed those
17 calls. Because the speech ban is too broad and
18 unjustified, the restriction, not the exception,
19 must be struck down. That's what the Court has
20 always done in First Amendment cases and rightly
21 so.

22 Federal courts cannot fix First
23 Amendment violations by making more speech
24 illegal. This Court should reject the remedial
25 approach that eliminates incentives to challenge

1 unconstitutional speech bans and gives my
2 clients no relief, even though they won their
3 First Amendment claim.

4 CHIEF JUSTICE ROBERTS: Mr. Martinez,
5 I'd like you to focus on the argument based on
6 our decision in Williams-Yulee, which is that
7 when Congress takes steps that help cure a
8 constitutional problem, they don't have to do
9 everything at once.

10 You object to the fact that some
11 speech is allowed, but the -- the allowance
12 doesn't reach more broadly. And what we said in
13 Williams-Yulee, again, is so long as Congress is
14 moving in -- in what the Court regarded as the
15 right direction, they don't have to do
16 everything at the same time.

17 So the fact that you say we should
18 allow more speech here, here, and here, again,
19 it doesn't mean that it has to be done at the
20 same time as the first step was taken as it was
21 here.

22 MR. MARTINEZ: Right, Your Honor. And
23 I think what -- what the Williams-Yulee inquiry
24 is really getting at is whether the exception
25 undermines the credibility of the government's

1 interests that it's been asserting.

2 And I think in this case, the 2015
3 exception really does undermine that because
4 it's not getting at like -- it's -- it's not
5 trying to exempt the least intrusive of privacy
6 speech available.

7 It -- it's actually exempting the kind
8 of speech that the FCC itself has acknowledged
9 is the most intrusive kind of speech. And those
10 are the -- the -- the debt calls. And so
11 Williams-Yulee, I think, is talking about a
12 situation in which the government or Congress is
13 trying -- or the legislature is trying to
14 accommodate kind of the -- the -- this -- the --
15 the -- the speech that -- that is least
16 problematic from the purpose -- from the
17 standpoint of the interest that's being
18 asserted. But here Congress has done the
19 opposite. It's exempted the speech that's most
20 problematic.

21 And I think that -- that really makes
22 this a different case from Williams-Yulee and
23 brings us squarely within the -- the concern
24 that Williams-Yulee had, which is that when
25 Congress enacts broad exemptions, like the one

1 here, it might actually be a sign, it might be
2 evidence of the fact that the -- the interest
3 that the government has asserted for speech
4 restriction really isn't that strong.

5 CHIEF JUSTICE ROBERTS: Your --

6 MR. MARTINEZ: And I think that was
7 debate --

8 CHIEF JUSTICE ROBERTS: Your -- your
9 friend on the other side on the severance
10 question makes a very strong point, that
11 Congress had this law for 25 years and then they
12 added this, you know, pretty discrete exception
13 that created the problem we have today.

14 It seems pretty obvious that the way
15 they would solve it is get rid of this
16 exception. It's an extremely popular law.
17 Nobody wants to get robo-calls on their cell
18 phone.

19 The idea that Congress would embrace
20 that result simply to save this government debt
21 collection, they'd have to be very anxious to be
22 more unpopular than they otherwise would be.

23 MR. MARTINEZ: Well -- well, two --
24 two points on that, Your Honor. First of all, I
25 think that the fundamental problem here is the

1 invalidity of the restriction. And I think that
2 the -- even before you get to any severability
3 inquiry about intent, we have to be very careful
4 and specific about what is unconstitutional
5 about the statute.

6 And I think what the 2015 exemption
7 shows, as well as the -- the much more favorable
8 treatment to political and non-commercial speech
9 when it comes to calls to home phones, what
10 those show is that the privacy interest here
11 really isn't compelling and that the -- the
12 restriction is what falls. So you don't need to
13 look at severability.

14 CHIEF JUSTICE ROBERTS: Thank you --

15 MR. MARTINEZ: But even as to the
16 intent --

17 CHIEF JUSTICE ROBERTS: -- counsel.

18 Justice Thomas?

19 JUSTICE THOMAS: Thank you,
20 Mr. Martinez.

21 The -- the problem that I have is you
22 -- you just said that the -- the issue, that the
23 real problem here is the restriction. But the
24 evidence -- the focus here is on the exception,
25 the restrict -- and if you solve the exception

1 problem, it doesn't solve your restriction
2 problem, particularly if you sever that.

3 And that's the sort of the asymmetry
4 that's coming out. The problem is one thing,
5 that is, that the restriction, but the
6 constitutional problem is really the exception.

7 But then the -- so why don't you --
8 I'd like you to explain why -- what you just
9 said, why the restriction is the constitutional
10 problem as opposed to the exception.

11 MR. MARTINEZ: Right. And let me
12 start with the -- with -- with the two things
13 that I think the exception does. Number 1, is
14 it in -- introduces a content-based distinction.

15 JUSTICE THOMAS: Yes.

16 MR. MARTINEZ: And it defines the
17 scope of the restriction, and therefore triggers
18 strict scrutiny.

19 But, Number 2, and more importantly
20 for purposes of our constitutional theory, what
21 the exception does is it reveals the underlying
22 frailty, the underlying insufficiency of the
23 justification for the restriction.

24 And why does it do that? It does it
25 because you have Congress saying because we want

1 to get more money, we are willing to trade off
2 privacy for revenue. And so Congress is coming
3 in and making a judgment that money is more
4 important than privacy.

5 JUSTICE THOMAS: So what --

6 MR. MARTINEZ: And I think --

7 JUSTICE THOMAS: -- would your
8 argument be if the exception did not exist?

9 MR. MARTINEZ: If the exception did
10 not exist and we were looking at the law today,
11 I think -- I think our argument would be weaker,
12 but I think we would still be able to show that
13 the restriction would be unjustified.

14 And I think the --

15 JUSTICE THOMAS: But what would the --

16 MR. MARTINEZ: Main thing we would --

17 JUSTICE THOMAS: -- content-based -- I
18 mean, what would the analysis be?

19 MR. MARTINEZ: The -- the analysis, it
20 would -- the statute would no longer be
21 content-based, so we'd be applying intermediate
22 scrutiny, but I think in the context of applying
23 intermediate scrutiny, we would look at the fact
24 that calls to residential phones, where -- you
25 know, call -- calls to the home, where privacy

1 matters the most, these same types of political
2 and non-commercial calls that my client wants to
3 make are perfectly allowed.

4 And so Congress and the FCC have made
5 a judgment -- and this is clear if you look at
6 the -- the 1992 order from the FCC. Congress
7 and the FCC have made a judgment that
8 non-commercial and non-telemarketing calls do
9 not adversely affect the privacy rights that the
10 TCPA protects. And they made that clear by --
11 by essentially allowing those calls at -- you
12 know, at all times of day to home phones.

13 So if -- if you have that indicator of
14 congressional intent that they're not really
15 worried about political calls and non-commercial
16 calls, and they're not worried about that as an
17 intrusion of privacy, then there's no rational
18 reason to treat cell phones differently. And
19 Congress certainly didn't make that judgment.

20 Of course, in this case, we have not
21 only the differential treatment of residential
22 calls, but we also have the evidence provided by
23 the 2015 exception, which shows that they're
24 willing to trade off privacy for money, even
25 though everyone would agree that money is not --

1 collecting more money is not a compelling
2 interest. And so you have Congress --

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Ginsburg?

6 JUSTICE GINSBURG: Your challenge is
7 predicated on the government-debt exemption. I
8 thought that the statute as originally enacted
9 would -- the -- the statute as it was originally
10 enacted did have an exception for calls made by
11 the government itself or government agencies.
12 Isn't that true?

13 MR. MARTINEZ: It's true that the
14 definition of -- of person, or at least as
15 interpreted by the FCC, is that the -- the
16 statute does not apply to -- to the government
17 itself.

18 JUSTICE GINSBURG: And -- and no one
19 challenged that exemption for 20-odd years. One
20 characterization is that this is really a manner
21 of restriction. That is, it doesn't prohibit
22 calling, it doesn't prohibit conveying a
23 message; it just prohibits using a certain
24 automated technology to call. So it's a manner
25 of communication. It's not a -- a restriction

1 on the message.

2 MR. MARTINEZ: Well -- well, Your --
3 Your Honor, with respect, I do think it's --
4 it's fair to say that this is a restriction on a
5 certain manner of making calls, but the types of
6 calls that are either made legal or illegal --
7 you know, the dividing line between what's
8 allowed and what's not allowed turns on the
9 content of the calls.

10 I think that if -- if -- if you were
11 facing a statute that said, you know, for
12 example, you are not allowed to advocate for
13 Libertarians using e-mail or using phone calls
14 or using handbills, all of those would be manner
15 restrictions, but I think that -- that we would
16 all recognize that those are content-based
17 restrictions that would trigger strict scrutiny
18 and -- and would inevitably fail.

19 JUSTICE GINSBURG: On your
20 severability, we know that what Congress wanted
21 to stop were out-of-the-blue calls, calls that
22 you had no reason to anticipate. And calls
23 about debts owed to the government can be
24 regarded as less invasive in that respect, that
25 they're not out of the blue; they are simply a

1 reminder of an obligation that the debtor
2 undertook.

3 MR. MARTINEZ: I -- Your Honor, I --
4 with respect, I don't think that that's the
5 original justification for -- for this
6 particular provision. And I -- and I would
7 point to two things.

8 First of all is the fact that the kind
9 of out-of-the-blue calls that my clients might
10 want to make, you know, political calls, those
11 are calls that were perfectly allowed and were
12 perfectly acceptable to the home when Congress
13 and the FCC acted in the early '90s.

14 And at that time, of course, home
15 phones were -- you know, over 90 percent of the
16 phones in America were home phones. That's
17 where the privacy interests were at their apex.

18 And nonetheless, Congress and the FCC
19 recognized that the kinds of calls my clients
20 want to make don't tread on privacy interests
21 enough to -- to -- to warrant that kind of -- of
22 -- of restriction. And I think what that just
23 shows is that, again, the privacy interest being
24 asserted here isn't really strong enough, even
25 if you look at what the FCC said about this, and

1 I would look at the 1992 NPRM, especially at --
2 at pages -- at pages 8773 -- sorry, at page
3 2737, and then the 1992 order at 8773, because
4 there the FCC said that non-commercial,
5 non-telemarketing calls can be exempted without
6 undermining the TCPA.

7 If that's true --

8 CHIEF JUSTICE ROBERTS: Thank you --

9 MR. MARTINEZ: -- then there's no
10 reason --

11 CHIEF JUSTICE ROBERTS: -- counsel.

12 Justice -- Justice Breyer? Justice
13 Breyer?

14 (No response.)

15 CHIEF JUSTICE ROBERTS: Justice Alito?

16 JUSTICE ALITO: Mr. Martinez, I'm
17 interested in your analysis of the severability
18 question, and I wonder if you could say whether
19 your position depends on either the breadth of
20 an exception or exceptions or the manifestation
21 of congressional intent.

22 So let me give you an example, a
23 fanciful example that tries to reduce both of
24 those things, perhaps to their lowest limit.

25 Suppose there was a total ban on

1 automated calls to cell phones or to all phones,
2 but there was one tiny exception for, let's say,
3 calls between noon and 1 p.m. on the 4th of July
4 that contained this simple message: Happy
5 birthday, America.

6 And let's say that the statute
7 allowing this contains a provision that says
8 that if the inclusion of this exception renders
9 the statute unconstitutional, the statute itself
10 shall remain in force and the exception shall be
11 stricken.

12 So would you say even in that
13 situation the whole statute would have to fall?

14 MR. MARTINEZ: Your Honor, let me --
15 let me try to address that in each of the two
16 pieces because I think it's a -- it's a nuanced
17 question and deserves a nuanced answer.

18 First of all, with respect to the
19 narrowness of that particular ban, I think that
20 the fact that that particular restriction or
21 exception is so narrow, I think that probably,
22 you know, looking at the totality of the
23 circumstances, we would look at that and we
24 would think the existence of this one tiny
25 exception and the fact that this really isn't

1 going to invade privacy that much, I think that
2 would probably be a reason to conclude that the
3 restriction is not unconstitutional. And if
4 that's true, then, of course, the severability
5 analysis wouldn't be necessary.

6 If you take your -- the other part of
7 your hypothetical, though, if -- if -- as I
8 understand it, if the statute had a provision in
9 it that essentially said if -- if the
10 restriction fails you should nonetheless sever
11 the exception and reinstate the restriction, I
12 don't think that that would be appropriate
13 because I think that the reason that the
14 restriction would fail in that circumstance is
15 that it's insufficiently justified, and getting
16 rid of that exception doesn't solve that
17 problem.

18 The exception, you know, again,
19 assuming that the exception was big enough to
20 actually create a problem of constitutional
21 deficiency with the statute, the exception is
22 evidence of why the restriction is unjustified.

23 And so getting rid -- rid of that
24 doesn't solve the problem with the -- with the
25 restriction.

1 JUSTICE ALITO: That does seem to
2 thwart a pretty clear manifestation of
3 congressional intent, but you think that's
4 irrelevant in this situation?

5 MR. MARTINEZ: Well, I think in a
6 circumstance, Your Honor, I don't think this is
7 -- I don't think the government disagrees with
8 us on this. If you look at pages 17 to 18 of
9 their reply brief, they essentially agree that
10 if the problem with the statute is the
11 restriction, then -- then the restriction has to
12 fall.

13 Now I think there's another way to
14 look at the case and -- and, you know, I think
15 my -- my friend on the other side has sort of
16 tried to frame it this way.

17 If you thought that the only problem
18 with the statute was not the justification for
19 the restriction but, rather, the fact that
20 there's differential treatment, we think that
21 you still as a First Amendment matter for a
22 number of the reasons already mentioned, that
23 you would still need to get rid of the
24 restriction.

25 But, even if you didn't agree with us

1 on that, I think there's -- our fallback
2 position would be the position the Third Circuit
3 took in the Rappa case, which is that you'd need
4 very specific evidence of congressional intent.
5 And I guess in that case in your hypothetical,
6 if your hypothetical expressly addressed this
7 situation, then maybe in that case the -- the
8 exception would be severed.

9 But, again, that -- that is not the
10 case here because, here, the underlying
11 restriction is what's unconstitutional.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Sotomayor?

15 JUSTICE SOTOMAYOR: Mr. Martinez, are
16 you taking the position that all restrictions of
17 robocalls are unconstitutional or that just a
18 broad -- a broad restriction like this one is
19 unconstitutional? Because there's some types of
20 speech that should not be covered.

21 MR. MARTINEZ: Well, I think, Your
22 Honor, in this case, obviously, we're dealing
23 with -- with the statute at hand. I think
24 that -- that there are some restrictions on
25 robocalls that I think -- that probably would

1 satisfy the -- the -- the appropriate level of
2 scrutiny.

3 And just to take one example, the --
4 the way that the -- the ban on calls works in --
5 to home phones right now, it's essentially a --
6 a ban on commercial telemarketing call --
7 robocalls to the home. And that's the kind of
8 -- that -- that is the heart of what the TCPA
9 was getting at.

10 And that's what Congress and the FCC
11 said, you know, this is really the core privacy
12 that we're trying to protect. I think that --

13 JUSTICE SOTOMAYOR: Well --

14 MR. MARTINEZ: -- kind of statute is
15 much --

16 JUSTICE SOTOMAYOR: -- Mr. Martinez --
17 and I agree with you. And I -- I can think of
18 others, if any -- any schemes to get money, any
19 -- because there's so many scams from robocalls,
20 but putting all of that aside, assuming that
21 there is a part of the restriction that could
22 survive strict scrutiny under your claim, why
23 shouldn't we limit any remedy, striking down
24 this provision, simply to permit the types of
25 calls that your clients make?

1 MR. MARTINEZ: Well, Your Honor --

2 JUSTICE SOTOMAYOR: Why should we be

3 --

4 MR. MARTINEZ: -- your --

5 JUSTICE SOTOMAYOR: -- why should we
6 be striking down the entire statute? Now you
7 would have to prove -- and I don't know that the
8 Court has done this below -- that restricting
9 political speech is not -- is -- is -- is not
10 narrowly tailored, and I don't know that that's
11 been done in this case, but if the issue is the
12 remedy, shouldn't we let the circuit below
13 decide that question?

14 MR. MARTINEZ: Your Honor, two points
15 on that. First of all, we -- we brought this as
16 a facial challenge. We, of course, would
17 welcome the kind of relief that you -- you've
18 hypothesized, although we do -- we do think that
19 the appropriate relief here really is to strike
20 down the restriction in its entirety.

21 And one of the reasons for that is the
22 point that you raised with Mr. Stewart earlier,
23 which is the -- the entire absence of any
24 evidence or justification for this particular
25 ban for -- for any of it, all of it or -- or

1 pieces of it, that the government has completely
2 failed to put forward.

3 I mean, this -- this statute is
4 subject to strict scrutiny, and this Court has
5 said over and over again that the government is
6 the one that bears the burden of satisfying
7 strict scrutiny.

8 They address strict scrutiny in, I
9 think, a single sentence of the -- with respect
10 to the exception -- restriction, a single
11 sentence in their opening brief, a single
12 substantive sentence in their reply brief, and
13 nothing else. They're trying to turn strict
14 scrutiny into a rubber stamp.

15 And I think the best thing to do in
16 these circumstances is hold the government to
17 its burden of proof, invalidate the restriction,
18 and then Congress can come back and act and
19 legislate in a -- in a way that's rational in
20 light of the Court's decision.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Breyer?

24 JUSTICE BREYER: Yeah, thank you. I'm
25 sorry. The telephone started to ring, and it

1 cut me off the call. And I don't think it was a
2 robocall.

3 (Laughter.)

4 JUSTICE BREYER: And we got it
5 straightened out.

6 Okay. My question is this: Forget
7 the political part of this. Assume it's out of
8 it. So now what worries me is, if you call this
9 strict -- calling for strict scrutiny, I guess
10 the government's justification, which is that
11 government debt is owed to us all as taxpayers,
12 private debt is not, so treat it specially.

13 Well, there are many situations, food
14 and drug agencies, agricultural agencies,
15 governing selling, the FTC, the SEC, where they
16 will have regulations and the regulations will
17 have a broad category, and Item X falls within
18 it, lamps may fall within categories that
19 require you to put electricity regulation on how
20 many amps does it use or whatever.

21 But then you discover a sub-category
22 of the one you just put in and you say leave out
23 the sub-category for some reason. Now, if
24 courts start criticizing that for strict
25 scrutiny, well, very few will survive.

1 But the normal way of looking at it
2 is, is it a reasonable thing, Justice Brandeis's
3 third category. Very well. Why does this case
4 fall into strict scrutiny once I get the
5 politics out but not Justice Brandeis's
6 regulation?

7 MR. MARTINEZ: Your Honor, a couple
8 points on that. I think this case falls into
9 strict scrutiny because it satisfies the test
10 for what constitutes a content-based restriction
11 that was set forth in Reed, and as I note, Your
12 Honor will remember --

13 JUSTICE BREYER: You realize that what
14 I'm doing is I -- I dissented and I'm wondering
15 whether to stick to that approach or not. So
16 Reed will not convince me, it's a good a
17 majority but I didn't think good enough. Okay?

18 MR. MARTINEZ: Well, I would -- I
19 would hope that stare decisis would be a factor
20 even if you disagreed with me.

21 JUSTICE BREYER: Yes. Okay, okay.
22 But that isn't what I'm trying to get at. I'm
23 trying to clarify my own thinking on it.

24 MR. MARTINEZ: Fair enough, Your
25 Honor. Well, I think -- I don't think you

1 should be concerned about the -- the -- the
2 prospect of other laws that are economic
3 regulations sort of being impacted by this at
4 all because I think in the --

5 JUSTICE BREYER: Yes, that's what I
6 want the answer to, exactly why.

7 MR. MARTINEZ: Right. In those cases,
8 those kinds of -- of restrictions that -- that
9 sort of get tangled up with speech in the
10 context of those kind of regulations, those
11 would be, at most, commercial regulations of
12 speech, which wouldn't be subject to strict
13 scrutiny, regardless of whether or not
14 they're -- they're considered content-based.

15 So, for example, the government lists
16 a number of statutes in its brief that it says,
17 you know, the sky's going to fall and all those
18 statutes are going to be unconstitutional if we
19 win. That's just simply not true. At most,
20 those statutes are -- are -- would be
21 regulations of commercial speech at most and, if
22 so, they would trigger intermediate scrutiny
23 under this Court's settled doctrine.

24 JUSTICE BREYER: And isn't --

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 JUSTICE BREYER: Thanks.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 JUSTICE KAGAN: Good afternoon, Mr.
4 Martinez.

5 MR. MARTINEZ: Good afternoon.

6 JUSTICE KAGAN: I'll give you a
7 hypothetical. Suppose this statute is written
8 in a slightly different way and it exempted any
9 calls between the holder of a government debt
10 and the debtor. Would strict scrutiny apply?

11 MR. MARTINEZ: Your Honor, I think
12 that in -- in that circumstance, the -- the --
13 the regulation would not turn on the content of
14 the calls, and so I don't think strict scrutiny
15 would apply for that reason.

16 JUSTICE KAGAN: Right. In other
17 words, it would turn on the relationship. And
18 so I guess the question is what -- what's the
19 difference? I mean, that's what Congress was
20 trying to get at, and maybe they didn't know all
21 of our arcane First Amendment rules, but that
22 regulation basically covers a particular kind of
23 economic activity, the collection of government
24 debts. And this regulation covers the same kind
25 of economic activity, the collection of

1 government debts.

2 There are two ways of getting at the
3 same thing. Both are directed at the economic
4 activity of the people involved. Why should
5 there be any difference?

6 MR. MARTINEZ: Well, with respect, and
7 perhaps I misunderstood the hypothetical,
8 Justice Kagan, but I thought in your
9 hypothetical that the -- as long as the
10 relationship element was satisfied, the call
11 could be on any subject whatsoever. For -- so,
12 in other words --

13 JUSTICE KAGAN: Oh, yeah. Well, we
14 know that holders of government debt call
15 debtors, you know, to collect debts. That's
16 what they call them for. They're not calling
17 them to discuss political issues.

18 MR. MARTINEZ: Well, with respect,
19 Justice Kagan, I'm -- I'm not sure that's right,
20 and the FCC has expressly addressed this
21 situation in their August 2016 order at page
22 9087, where the FCC has contemplated -- it --
23 it's discussing and addressing the content of
24 the calls at issue being made by -- by
25 collectors of government-backed debt, and it

1 contemplates that -- that the subject matter of
2 the call might range beyond the collection of
3 government-backed debt. Maybe they're going to
4 be marketing some other product. Maybe they're
5 going to be saying, hey, call your Congressman
6 and change these laws that apply to banks.

7 And what the FCC has said is that when
8 the subject matter of the call ranges to such
9 topics, then the call is transformed and it's --
10 it's a call that would have been allowed and
11 it's no longer allowed. And so I think that --
12 I think that the chronicling of the call --

13 JUSTICE KAGAN: Well, I guess a
14 technical issue --

15 MR. MARTINEZ: -- is different here.

16 JUSTICE KAGAN: Excuse me. I guess a
17 technical issue, Mr. Martinez, but I guess what
18 I'm saying is that there are two ways where
19 Congress is trying to get at the same thing,
20 which is the calls between debt holders and
21 debtors almost always about the debt.

22 But, you know, why should we care?
23 You know, even if Congress didn't write this in
24 exactly the right way, why is it that we should
25 care so much as to put strict scrutiny into

1 place? This doesn't raise any real concerns
2 about government censorship, about the
3 suppression of ideas, about a distorted
4 marketplace of ideas. What -- why is this an
5 appropriate time to put strict scrutiny into
6 place, given that what the government -- what
7 the -- what the legislation is trying to get at
8 is an economic relationship and the things that
9 flow from that relationship?

10 MR. MARTINEZ: Your Honor, I think
11 that the -- that the robust test for
12 content-based speech restrictions this Court
13 adopted in Reed is important because it protects
14 liberty. It makes it harder for Congress to
15 enact broad speech bans that affect everyone
16 while at the same time assuming it can then just
17 carve out special exemptions for favored groups.

18 And I think the way to police that
19 problem is by -- by making sure that Congress
20 has to be very careful before it enacts the
21 broadband and make it clear to them that they
22 can't just do that and then, for example, as in
23 this case, delegate authority to a government
24 agency to hand out specialized exceptions for
25 whatever well-heeled party turns up and claims

1 an exemption.

2 And so I think that that is one of
3 the --

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice -- Justice Gorsuch?

7 JUSTICE GORSUCH: Counsel, I'd like to
8 just turn back to the -- the intuitive appeal of
9 the government's severability argument.

10 If, as I think you've -- you've
11 conceded, that the -- the statute before the
12 government-debt exception would not have been
13 content-based and might have been permissible
14 under the First Amendment, Congress then comes
15 in and adds the government-debt exception, and
16 that changes the equation.

17 The intuitive argument based on that
18 sequence of events is, well, just get rid of the
19 government-debt exception and we go back to the
20 status quo ante where everything was fine. Why
21 -- why should we reject that intuition?

22 MR. MARTINEZ: I think there's --
23 there's a philosophical reason and a historical
24 reason. The philosophical reason is essentially
25 that in the First Amendment context, courts

1 should not be making more speech illegal
2 because, if -- if courts take a certain type of
3 speech that Congress expressly chose to -- to
4 allow, and then courts make the decision to --
5 to prohibit that speech, they're essentially
6 stepping into the legislature's shoes and making
7 very sensitive policy tradeoffs that -- that
8 indisputably cut against First Amendment
9 interests, and they shouldn't be the ones to do
10 that. Philosophically as well, you need to make
11 sure that people have incentives to challenge
12 unconstitutional laws.

13 I think, as a historical matter,
14 though, it's -- I think it's important to
15 recognize that the original justification for
16 the ban on cell phone calls here was essentially
17 that those kind of calls to cell phones would
18 inflict charges on called parties. And that's
19 the reason that the ban was in place, you know,
20 originally and that's -- that's why it may have
21 been justified earlier.

22 But, in today's world, those call
23 plans essentially don't exist or -- or are --
24 overwhelmingly people are not charged when they
25 receive calls to their cell phone. And so the

1 -- the historical facts are different now. And
2 because of the fact that everyone has cell
3 phones, the government has an especially strong
4 interest now, from a revenue perspective, of
5 making those debt calls.

6 If you take all that and wrap it up
7 together, I don't think there's a good
8 historical basis or empirical basis for
9 concluding that, in fact, we know with certainty
10 or the kind of certainty we should have in the
11 First Amendment context that Congress would have
12 wanted to -- to -- to reenact this statute if it
13 wasn't allowed to make the calls to collect
14 government-backed debts.

15 JUSTICE GORSUCH: Let me see if I --
16 if I've got at least that second point, my hands
17 around it. The argument is that maybe the first
18 Congress that enacted the original statute
19 thought that all -- all robocalls should be
20 prohibited, with some exceptions that you're not
21 -- you have no complaint with.

22 The second Congress, acting in a
23 different time, had a different judgment about
24 which calls should be permitted, and that
25 included this government-debt exception. And we

1 don't know whether the second Congress enacting
2 the revised statute would prefer a situation in
3 which all calls are prohibited or all calls are
4 allowed. Does that -- does that sum it up?

5 MR. MARTINEZ: I think that sums it
6 up, with one small caveat, which is that we are
7 talking now on the assumption that this -- there
8 -- that there is a severability analysis that's
9 required here that turns on intent.

10 I do think our -- our primary position
11 is that the nature of the First Amendment and
12 the nature of the constitutional flaw in this
13 statute, which is that -- the flaw with the
14 restriction, we think that that means that
15 essentially, under -- under everyone's
16 understanding of -- of severability principles,
17 the restriction must be struck down.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 JUSTICE GORSUCH: And then --

21 CHIEF JUSTICE ROBERTS: I'm sorry,
22 Justice Gorsuch?

23 JUSTICE GORSUCH: No, I'm fine. Thank
24 you, Chief.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

2 JUSTICE KAVANAUGH: Thank you, Chief
3 Justice.

4 Good afternoon, Mr. Martinez. On
5 severability --

6 MR. MARTINEZ: Good afternoon.

7 JUSTICE KAVANAUGH: -- we have no
8 precedent either way on severability, as I
9 understand it, when the First Amendment problem
10 is created by an exception to a ban on speech,
11 rather than the First Amendment problem being
12 created by the underlying ban without the
13 exception. So I don't think we have any
14 precedent either way.

15 And the question, as you've pointed
16 out and Mr. Stewart's pointed out, is level up
17 or level down as the remedy.

18 The key first question -- and I asked
19 Mr. Stewart about this; I want to make sure I
20 have you on this -- is the underlying
21 restriction here, the underlying restriction on
22 cell phone robocalls, constitutional without the
23 government-debt exception? So I want you to
24 focus exactly on that question.

25 MR. MARTINEZ: Yes. We -- we think

1 that -- that given all the evidence we know now
2 about what Congress's interests are and how
3 strongly they believe or don't believe in the
4 privacy interests, we believe that the
5 restriction is unconstitutional.

6 And I think the two prime --

7 JUSTICE KAVANAUGH: Let me just -- let
8 me make sure I have you exactly right. The
9 underlying restriction, if there had never been
10 a government-debt exception -- let me phrase it
11 that way. If there had never been a
12 government-debt exception, is the underlying
13 restriction unconstitutional?

14 MR. MARTINEZ: We would say yes based
15 primarily on the differential treatment of the
16 residential call bans. But I just want to say
17 one thing on that, Justice Kavanaugh, because if
18 you -- you want me to hypothesize that -- that
19 the -- that the 2015 law had never been passed.

20 JUSTICE KAVANAUGH: Correct.

21 MR. MARTINEZ: I think that the 2015
22 law, if you think about that law as evidence --
23 as evidence of what Congress thought about
24 privacy, the fact that it wasn't passed doesn't
25 mean that deep down Congress believed in privacy

1 more than we later -- you know, than was later
2 revealed.

3 And so I think it's important to
4 recognize that, in our argument, the role of the
5 2015 exception is not merely to introduce the
6 textual content-based distinction, but it's also
7 to reveal the underlying lack of justification,
8 which was always there. And, again --

9 JUSTICE KAVANAUGH: Well, I'm not -- I
10 guess on that point I would pick up on what the
11 Chief Justice said and -- and the states' amicus
12 brief. And if you just take a peek, just a
13 peek, at the real world here, this is one of the
14 more popular laws on the books because people
15 don't like cell phone robocalls.

16 That seems just common sense. Do you
17 want to argue against that common sense?

18 MR. MARTINEZ: I think aspects of the
19 law are popular. I think, you know, the head of
20 the FCC has called this law the -- "the poster
21 child for lawsuit abuse." And the reason for
22 that is, and this is indirectly implicated in
23 this case, there's a whole bunch of other
24 problems with the law as well.

25 So I think this law has its supporters

1 and its detractors, but I don't think you should
2 worry about Congress's ability to protect
3 people. Even if we win this case, Congress is
4 going to have plenty of options that are fully
5 constitutional in order to protect people from
6 -- from unwanted calls.

7 It can focus on the telemarketing
8 calls. It can focus -- it can expand the
9 remedies available under the Do Not Call list,
10 which essentially allow consumers to --

11 JUSTICE KAVANAUGH: Well, even if --

12 MR. MARTINEZ: -- to opt --

13 JUSTICE KAVANAUGH: Even if you --

14 MR. MARTINEZ: -- out.

15 JUSTICE KAVANAUGH: Even -- sorry.

16 Even if you lose this case, Congress can of
17 course scale back when you view as overbroad
18 restrictions, but if you lose this case,
19 Congress will still have in place a restriction
20 that's been on the books for 30 years and that
21 has been perceived as constitutional, and that
22 is very popular.

23 MR. MARTINEZ: Well -- well, I -- I --

24 I -- I -- I guess what I would say is that I
25 think the right way to think about this is to

1 apply the doctrinal tools that you always apply
2 in First Amendment cases, even in cases where
3 the speech involved is not popular.

4 I mean, the First Amendment is there
5 not just to protect speech that people like but
6 to protect speech --

7 JUSTICE KAVANAUGH: Yeah.

8 MR. MARTINEZ: -- that people might
9 fight offensive or annoying. And -- and --

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. Martinez, would you like to take a
13 minute to wrap up?

14 MR. MARTINEZ: Thank you, Your Honor.

15 The -- the core purpose of the First
16 Amendment is to protect the free exchange of
17 political speech, even when people might find
18 that speech to be a nuisance. That's what this
19 Court recognized in the Martin case when it said
20 that the First Amendment rights protect people
21 from -- from making intrusive door-to-door
22 solicitations. That's protected activity. The
23 calls at issue here are protected activity as
24 well.

25 We ask you to do what you always do in

1 First Amendment cases, strike down the
2 unconstitutional restriction on speech. Thank
3 you, Your Honors.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Stewart, you have rebuttal?

7 REBUTTAL ARGUMENT OF MALCOLM L. STEWART
8 ON BEHALF OF THE PETITIONERS

9 MR. STEWART: Thank you, Mr. Chief
10 Justice.

11 I took Mr. Martinez to acknowledge
12 that if -- if this were a restriction on speech
13 undertaken to collect a government-backed debt,
14 it would be subject at most to intermediate
15 scrutiny because it would be commercial speech
16 and would be subject to distinct First Amendment
17 treatment on that basis.

18 And the -- the position of the other
19 side is this provision should be reviewed more
20 skeptically, should be subject to more
21 certiorari review because its effect is to take
22 particular speech out from under regulation,
23 rather than to regulate it.

24 And that's contrary to the -- the
25 usual understanding that the First Amendment

1 exists to foster speech. It's contrary to the
2 Court's reference in Reed to laws that target
3 speech because of its communicative content.

4 Why would the Court review more
5 skeptically the law that looked at the same
6 basis as a rationale for exempting speech rather
7 than to regulate?

8 The second thing is Mr. Martinez said
9 many times that Congress and the FCC have
10 exempted non-commercial calls from the
11 automated-call restriction. And I think that
12 really overlooks the respective responsibilities
13 of Congress and the FCC.

14 Congress has broadly regulated at
15 least calls using a prerecorded voice or an
16 artificial voice to residential landlines just
17 as it has calls to cell phones. Both of the
18 underlying bans encompass non-commercial calls.

19 Congress has vested the FCC with
20 broad, though not identical, authority to exempt
21 particular categories of calls from the
22 residential and the cell phone ban respectively
23 and you can look at page 5A and 6A of the
24 appendix to the government's merits brief to see
25 that the -- the exemption authority is -- is

1 basically comparable.

2 The discrepancy under current law
3 results from the fact that the FCC has exercised
4 its exemption authority much more robustly with
5 respect to residential landlines than it has
6 with respect to cell phones. That can't create
7 a facial constitutional infirmity in the statute
8 itself. If people think that the FCC should
9 adopt comparable exemptions for non-commercial
10 calls to cell phones, they can file a petition
11 to that effect.

12 The -- the last thing I'd say in
13 respect is -- goes to the colloquy between Mr.
14 Martinez and Justice Kagan, where Mr. Martinez
15 said, yes, if they had framed it not in terms of
16 the content of the call but in terms of all
17 calls from the holder of a government-backed
18 debt to the -- to the debtor that that would be
19 subject to more relaxed scrutiny. And that
20 would simply be -- an approach that
21 distinguished on that basis would simply
22 encourage Congress to enact laws with more of a
23 broad brush.

24 It would discourage Congress from
25 trying to fine-tune laws, and -- and that

1 discouragement would only be exacerbated if we
2 took the Respondent's approach to severability
3 striking down the whole law.

4 Thank you, Mr. Chief Justice.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. The case is submitted.

7 (Whereupon, at 12:55 p.m., the case
8 was submitted.)

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Official - Subject to Final Review

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