No. 19-631

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents,

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

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents an underlying membership of three million businesses and professional organizations of every size, in every economic sector, and from every region of the country.

An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* curiae briefs in cases that raise issues of concern to the nation's business community, including in cases concerning the scope of liability under the Telephone Consumer Protection Act, *see, e.g.*, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (the Chamber as petitioner), and the First Amendment rights of businesses, *see, e.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

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[1] Pursuant to Rule 37.3(a), counsel for all parties consented in writing to the filing of this brief. No counsel for any party authored this brief in any part, and no person or entity other than *amicus*, *amicus*'s members, or *amicus*'s counsel made a monetary contribution to fund the preparation or submission of this brief.

Section 227(b)(1)(A)(iii) of the Telephone Consumer Protection Act of 1991 prohibits the use of an "automatic telephone dialing system" (or "ATDS") to "make any call" to "any telephone number assigned to a … cellular telephone service" without the recipient's "prior express consent." With shocking frequency, businesses find themselves sued under this once-obscure provision because they used ordinary equipment to send ordinary calls or texts to their customers. These communications provide helpful information to consumers, such as security alerts, shipping notifications, and other important notices. Yet litigation against these communications seeks to leverage judicial disagreement about the scope of the law, relatively low barriers to class certification, and significant statutory damages into seven- or eight-figure payouts. It often works.

In 2015, Congress shielded from this maelstrom calls and texts "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). The Chamber takes no position on whether the TCPA now violates the First Amendment. But it agrees with Respondents that, if it does, the remedy is to do what this Court has always done in such circumstances: open up speech by striking the prohibition, not restrict speech by severing the exemption. That result is particularly appropriate given the TCPA litigation sweeping the country.

SUMMARY OF ARGUMENT

I. Congress passed section 227(b)(1)(A) of the TCPA to tackle two problems. First, some telemarketers used artificial or prerecorded voice messages that consumers found particularly aggravating. Second, some telemarketers used equipment that randomly or sequentially generated and then dialed numbers. This undirected dialing caused unique harms; random dialing put telemarketers in contact with numbers they would never reach on purpose, and sequential dialing knocked out nascent wireless and pager networks by tying up blocks of consecutive numbers.

These parts of the TCPA worked; legitimate telemarketers stopped using prerecorded or artificial voice messages without consent, and everyone stopped using random and sequential dialing machines. But the FCC then began to suggest that, contrary to its earlier views, the ATDS provision might sweep in any equipment that automatically dialed from a list. Armed with these suggestions—and with the idea that courts *could not* review the legality of the FCC's interpretation in light of the Hobbs Act—the plaintiffs' bar began filing suit after suit alleging that ordinary communications, placed from ordinary equipment, violated the TCPA. These suits jeopardize communications that provide consumers with critical account updates and other beneficial information.

The tide of meritless TCPA litigation will continue to rise until this Court intercedes. Courts remain divided over the scope of the statute—does it cover only equipment that randomly or sequentially generates numbers, or does it also cover anything that dials from a list? That disagreement makes it

impossible for businesses to structure their affairs as they strive to meet consumer demand for rapid, personalized communications. They can't just refrain from using random or sequential dialing equipment, because some jurisdictions think that the statute sweeps farther. They can't just avoid equipment that dials from a list, because that test covers nearly every modern device—including smartphones. And they can't hope to dodge these questions by securing recipients' prior express consent; millions of wireless numbers are reassigned every year, so a call or text intended for a consenting recipient may well land on the phone of a non-consenting one.

No matter what businesses do, they are likely to get sued. And those lawsuits are unusually tough to defend. The TCPA provides statutory damages of $500 *per call or text*. Because businesses often call or text each consumer more than once to provide important information or alerts, and because district courts certify ATDS classes with relative ease, callers face a perfect storm: class actions alleging enormous damages under a statute whose scope is subject to widespread disagreement. The result is predictable—settlement, often in the seven or eight figures, for calls and texts that bear no resemblance to those that inspired the statute. Unless this Court acts, the TCPA litigation machine will continue humming away.

II. This case provides the Court with one way to do that. In 2015, Congress exempted calls made solely to collect government-owned or government-backed debt from the TCPA's reach. Defendants facing private TCPA litigation—and callers like Respondents who wish to place calls without fear of liability—challenged the post-amendment TCPA as a content-based

restriction on speech. The lower courts agreed that this scheme violated the First Amendment, but "remedied" that violation by severing the exemption, not striking down the prohibition.

Whether or not Respondents' First Amendment argument—thoroughly addressed in Respondents' brief—is correct, the Government's backwards remedial conclusion is wrong. The remedy for a First Amendment violation is *more* speech, not less. If the TCPA violates the First Amendment, the prohibition must go, not the exemption.

That approach makes sense. Those who successfully challenge content-based restrictions should get something for their trouble. And if any speech is to be restricted in this country, democratically accountable legislatures, not courts, should make that decision. Moreover, once courts start blue-penciling speech codes, they won't know where to stop. Federal courts should not decide what categories of exempt speech are "important" enough to keep.

The Government's counterarguments misfire. The Communications Act's severability clause does not support severing the exemption. The exemption itself is not "invalid," 47 U.S.C. § 608; it restricts no one's speech. Instead, Respondents challenge the prohibition, which does restrict their speech, and which can be "held invalid" without affecting the rest of the TCPA. In any event, this severability clause—enacted nearly 90 years ago, as part of a different law—deserves little weight here.

The Government argues that Congress must prefer an equally oppressive TCPA to no TCPA at all because the statute was around for 24 years before the

exemption. But the Government rewrites the TCPA's history. Only after the FCC tried to update the statute—and only after the rise of cell phones—did the TCPA begin to pinch government debt collectors. Congress's prompt action at that time proves that it would prefer no prohibition to one that gores its ox.

The Government also frets that, without the prohibition, consumers will be inundated with calls. But the ATDS provision targets random or sequential dialing, not computer-assisted calling generally, let alone the beneficial kinds of communications now swept up in the plaintiffs' bars crosshairs. Without the sweeping ATDS prohibition, Congress could enact legislation that targets truly unwanted communications, such as harassing and fraudulent calls. In the meantime, individuals who do not wish to receive newly lawful calls can generally opt out.

The Government further contends that some equal protection cases support its position. It disregards entirely, however, the First Amendment authorities supporting Respondents, claiming that the Court simply whiffed in those cases. Even on their own terms, the Government's cases are outdated (because they depart from modern severability doctrine) or distinguishable (because the legislature indisputably would have preferred to eliminate the exemption).

More importantly, the Government's reliance on equal protection analogies in general ignores the differences between these provisions. Unlike the Fourteenth Amendment's neutrality with respect to legislation, the First Amendment emphatically prefers free speech to restricted speech. As a result, the thumb on the scale in favor of extending a benefit, strong in

the equal protection context, becomes insuperable in First Amendment cases. In addition, because it is impossible to determine what Congress would have wanted in this area without weighing the value of various kinds of speech, that perilous task should be left for legislators, not judges.

III. If the Court concludes that the amended TCPA is unconstitutional but remedies that flaw by severing the exemption, it should make clear that no caller may be held liable for calls placed between the enactment of the exemption and the decision severing it. This Court has repeatedly held that defendants cannot be held liable for conduct that took place under an unequal scheme, even if a court would remedy that inequality by leveling down. That principle applies with full force here for calls placed between 2015 and now. Happily, immunizing this window of calls would also spare defendants from some of the worst consequences of TCPA litigation—the deluge of suits seeking to hold ordinary businesses liable for ordinary calls placed with ordinary equipment.

ARGUMENT

I. THE ATDS PROVISION HAS BECOME A TREMENDOUS SOURCE OF MERITLESS LITIGATION

As explained below, the remedy for any constitutional violation here is to invalidate the TCPA's prohibition on speech, not to sever the exemption. The history of TCPA litigation demonstrates that the ATDS provision has been extended far beyond its text and purpose, sweeping up ordinary communications that Congress never meant to prohibit. By following its precedent and striking down the prohibition, the Court will bring an end to this scourge of unintended litigation.

A. Congress Targeted Random and Sequential Dialing Machines

1. In the 1980s and early 1990s, telemarketers deployed two particularly aggravating techniques. First, some used prerecorded or automated voice messages, not live operators, to deliver their sales pitches. While many found these calls useful—as evidenced by the volume of sales they generated—others found them intrusive. Some of these machines would not disconnect until after they had delivered their message, tying up a consumer's phone long after the consumer had hung up. They also deprived unwilling recipients of the satisfaction of expressing their displeasure to a real person.

Second, some telemarketers used random and sequential dialing equipment to place outbound calls. Because these machines dialed unthinkingly, they reached numbers that no telemarketer would dare dial on purpose—like the "exam rooms, patient rooms, offices, labs, emergency rooms, and x-ray facilities" of

a hospital or the dedicated, unlisted pager number of a would-be transplant recipient.[2] And because they dialed sequentially, they often overloaded then-nascent wireless and pager networks (which hosted batches of sequential numbers), leaving customers unable to "make []or receive calls, including emergency notifications to medical personnel."[3]

Congress responded in the TCPA. First, Congress made it unlawful to "make any telephone call … using … an artificial or prerecorded voice" without the "prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A) (covering calls to specialized lines); *see id.* § 227(b)(1)(B) (similar ban on calls to "residential telephone line[s]"). Second, Congress made it unlawful to place calls using an "automatic telephone dialing system"—defined as equipment that "has the capacity … (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers"—to the specialized lines most likely to be harmed by them, including "emergency telephone line[s]," "guest room[s] [and] patient room[s]" at a health care facility, and numbers "assigned to a paging service[] [or] cellular telephone service." *Id.* § 227(b)(1)(A)(i)–(iii). Notably,

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[2] *S. 1462, The Automated Telephone Consumer Protection Act of 1991: Hearing Before the Subcomm. on Commc'ns of the Senate Commerce, Sci., & Transp.*, 102d Cong. 43, 110 (1991) (statements of Michael Jacobsen and Michael J. Frawley).

[3] *S. 1462, The Automated Telephone Consumer Protection Act of 1991; S. 1410, the Telephone Advertising Consumer Protection Act; and S. 857, Equal Billing for Long Distance Charges: Hearing Before the Subcomm. on Commc'ns of the Senate Commerce, Sci., & Transp.*, 102d Cong. 45 (1991) (statement of Thomas Stroup).

Congress did not protect residential lines from ATDS calls. Instead, it empowered residential subscribers to opt out and penalized callers who failed to comply with such requests. *See id.* § 227(c)(5).

2. Contemporary sources recognized the limited but important scope of these provisions. As for prerecorded or automated voice message telemarketing calls to residential lines, legitimate telemarketers either secured consent or switched to live-operator calls. And the FCC, acknowledging that the TCPA targeted *telemarketing* rather than unwanted calls generally, exempted calls "not made for a commercial purpose," calls "made for a commercial purpose but [which] do[] not include the transmission of any unsolicited advertisement," calls to persons "with whom the caller has an established business relationship," and calls from "tax-exempt nonprofit organizations." FCC, *Telephone Consumer Protection Act of 1991*, 57 Fed. Reg. 48333, 48335 (1992); *see* 47 C.F.R. § 64.1200(a)(2) (current version).

The ATDS provision was also understood in keeping with its limited but important purpose. For example, in its initial rulemaking, the FCC explained that equipment with "speed dialing," "call forwarding," and "delayed message" functions does not qualify as an ATDS, "because the numbers called are not generated in a random or sequential fashion."[4]

The ATDS provision fulfilled this purpose. According to Westlaw, there were just seventeen lawsuits between 1991 and 2003 that mentioned the

[4] *In re Rules & Regs. Implementing the TCPA*, 7 FCC Rcd. 8752, 8776 (1992); *see also In re Rules & Regs. Implementing the TCPA*, 10 FCC Rcd. 12391, 12400 (1995) (same).

term "automatic telephone dialing system." Indeed, by 2003, the FCC could remark that, "*[i]n the past*, telemarketers may have used dialing equipment to create and dial 10-digit telephone numbers arbitrarily," but they no longer did so.[5]

B. The FCC Creates Uncertainty and Chaos Ensues

Beginning in 2003, the FCC started to suggest that the ATDS provision covered equipment with more mundane features: maybe the capacity to dial "at random, in sequential order, or from a database of numbers"; maybe the capacity to "store or produce telephone numbers"; or maybe the capacity to "dial numbers without human intervention."[6] But the FCC also seemed to recognize the statutory test as well.[7] At the same time, the FCC increased the importance of the ATDS provision by holding that text messages qualify as "calls" under the Act.[8]

In 2015, the FCC followed its earlier orders with an even less comprehensible one.[9] It "appear[e]d to be of two minds" on the central interpretive question: must the "device[] *itself* have the ability to generate random or sequential telephone numbers to be dialed," or "is it enough if the device can call from a database of

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[5] *In re Rules & Regs. Implementing the TCPA*, 18 FCC Rcd. 14014, 14092 (2003) ("2003 TCPA Order") (emphasis added).

[6] *Id.* at 14091–92.

[7] *See id.* at 14092.

[8] *See id.* at 14115.

[9] *See In re Rules & Regs. Implementing the TCPA*, 30 FCC Rcd. 7961 (2015) ("2015 TCPA Order"), *vacated in relevant part by ACA Int'l*, 885 F.3d at 692.

telephone numbers generated elsewhere?" *ACA Int'l*, 885 F.3d at 701. Because the FCC "espouse[d] both competing interpretations," the D.C. Circuit held that it flunked the "requirement of reasoned decisionmaking." *Id.* at 703.

Much of the damage, however, had already been done. Armed with the FCC's prior statements and the courts' muscular interpretation of the Hobbs Act—namely, that federal courts must defer without question to the FCC's views in private litigation—the plaintiffs' bar had already transformed the ATDS provision from a once-a-year issue into a mainstay of federal litigation. For example, the number of TCPA suits filed between 2009 and 2016 jumped from fewer than one hundred to nearly 5,000.[10] (In 2018, federal prisoners filed 5,734 motions under 28 U.S.C. § 2255.[11]) Few of these plaintiffs alleged that the defendant randomly or sequentially dialed numbers. Instead, they sued companies that had simply used computer-assisted dialing to contact customers. The ATDS provision had strayed far from its text and purpose.

C. Meritless ATDS Litigation Still Plagues the Federal Courts

The D.C. Circuit's decision has not stemmed the tide; indeed, in the first three months of 2019 alone

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[10] *See* WebRecon LLC, WebRecon Stats for Dec 2017 & Year in Review, https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review/.

[11] *See* Fed. Judicial Ctr., Federal Judicial Caseload Statistics 2019 Tables, tbl. C-3 (Mar. 31, 2019), *available at* https://www.uscourts.gov/federal-judicial-caseload-statistics-2019-tables.

plaintiffs filed nearly 3,000 cases.[12] The rush will continue unless this Court intervenes.

1. Modern businesses must communicate with their customers, and they must do so in a rapid, efficient manner. This isn't (just) because businesses *want* to contact their customers. Instead, customers expect—indeed, demand—routine communications like reminder notifications, confirmation texts, promotional offers, and so on. But businesses now face impossible choices when doing so.

Most fundamentally, businesses have no idea what kinds of equipment they may use. There is a circuit split over the most basic question of all: what makes a piece of equipment an ATDS in the first place? *Compare Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 469 (7th Cir. 2020) ("[T]he capacity to generate random or sequential numbers is necessary to the statutory definition"); *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301 (11th Cir. 2020) (same); *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018) (same), *with Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018) (reversing summary judgment because the equipment "store[d] numbers and dial[ed] them automatically").

The disagreement does not stop there. A few circuits have held that courts may construe the TCPA for themselves, without regard to the FCC's pre-2015 orders. *See, e.g.*, *Marks*, 904 F.3d at 1049. But many

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[12] *See* WebRecon LLC, WebRecon Stats for Oct 2019: Litigation Up Across the Board, https://webrecon.com/webrecon-stats-for-oct-2019-litigation-up-across-the-board/.

district courts elsewhere have disagreed.[13] According to these courts, the FCC's pre-2015 statements remain valid—and *binding* under the Hobbs Act—despite the D.C. Circuit's decision in *ACA International*.[14]

Because of this disagreement, businesses cannot avoid litigation by eschewing equipment that generates random or sequential numbers. Some courts (like the Ninth Circuit) have held that the statute sweeps farther, reaching equipment that has the capacity to store and dial numbers automatically. Others (like many district courts) have held that the FCC has unreviewably expanded the statute.

Callers also can't escape litigation by avoiding equipment with the capacity to store and dial numbers automatically, consistent with the Ninth Circuit's definition of an ATDS. That definition sweeps broadly; indeed, "it would create liability for every text message sent from an iPhone." *Gadelhak*, 2020 WL 808270, at *6; *see also Glasser*, 948 F.3d at 1309–10 (same). That is not hyperbole. Nearly every iPhone has a feature called "Do Not Disturb." When activated, it automatically texts all incoming callers or a select list of them, such as the user's contacts or favorites list.[15]

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[13] *See, e.g.*, *Jiminez v. Credit One Bank, N.A.*, 377 F. Supp. 3d 324 (S.D.N.Y. 2019); *Ammons v. Ally Fin., Inc.*, 2018 WL 3134619 (M.D. Tenn. June 27, 2018).

[14] Even this point will now lead to litigation. In *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019), this Court left open the possibility that the Hobbs Act does not prohibit courts from assessing the legality of the FCC's interpretations under *Chevron*.

[15] *See* Apple, *How To Use Do Not Disturb While Driving*, https://apple.co/2w8nurH; *see also* Nick Douglas, Lifehacker, *Add*

The Ninth Circuit has held that an indistinguishable system—one that automatically texts security warnings when someone accesses an account from a new device—qualifies as an ATDS. *See Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1151 (9th Cir. 2019); *see also Marks*, 904 F.3d at 1053 (holding that a texting platform very similar to group texting qualifies). If *smartphones* count as ATDSs, businesses will struggle to find any calling equipment that does not.

Finally, callers can't dodge these problems by securing consent. "[M]illions of wireless numbers are reassigned [from one subscriber to another] each year." *ACA Int'l*, 885 F.3d at 705. "[T]he caller might initiate a phone call (or send a text message) based on a mistaken belief that the owner of the receiving number has given consent, when in fact the number has been reassigned to someone else." *Id.* The circuits have concluded that the caller is still liable, *even if* it could not have known about the reassignment. *See Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014); *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. 2012).[16]

As things stand, then, the TCPA presents business with a series of unsavory options. They can refrain from calling or texting, thereby frustrating customers

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an Auto-Responder to Do Not Disturb, https://bit.ly/2NDKQxg (May 7, 2018) (explaining how to configure the feature to autoreply generally, not just while driving).

[16] The FCC has begun to establish a reassigned number database. *See* FCC, *Advanced Methods To Target & Eliminate Unwanted Robocalls*, 84 Fed. Reg. 11226 (Mar. 26, 2019). However, that database is not yet fully operational, and its effectiveness and cost remain far from clear.

and missing opportunities. They can secure consent, but it may not matter when they accidentally call reassigned numbers. They can use equipment that lacks a random or sequential generator, but they will still face liability in some jurisdictions and may face it in others. Or they can *try* to avoid equipment that stores and automatically dials numbers, but they will struggle mightily to do so in an era in which *smartphones* trigger liability and where technology constantly evolves. Litigation will inevitably ensue.

2. Other factors make this situation even worse. The statute offers $500 *per call or text* in damages, with no statutory cap and with treble damages for "willful[] or knowing[] violat[ions]." 47 U.S.C. § 227(b)(3)(C). Given the number of calls and texts that businesses often need or want to send, $500 a pop quickly adds up to eye-watering numbers. Indeed, the statute's aggregated damages are so astonishing that courts have struck them down as grossly disproportionate. *See Golan v. FreeEats.com, Inc.*, 930 F.3d 950 (8th Cir. 2019) (affirming reduction of $1.6 billion award to $32.4 million).

Plaintiffs' lawyers can also more plausibly threaten to certify massive classes in ATDS cases. Callers use the same equipment to place calls or texts, so would-be class representatives have a ready-made common issue. And because some callers do not try to secure consent (because they do not think they use ATDSs) or secure consent through standardized channels, would-be class representatives also often have stronger-than-average predominance arguments.

"[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and

decided at once, the risk of an error will often become unacceptable." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id.* And that is precisely what has happened in TCPA land. According to one report, the settlements submitted for approval *in 2018 alone* totaled at least *$171 million*.[17]

Plaintiffs' firms have gone to extraordinary lengths to capitalize on the gold rush. One created an app, "Block Calls Get Cash," promising users that they could "laugh all the way to the bank."[18] Plaintiffs themselves have been just as creative. A Pennsylvania resident acquired "at least thirty-five cell phones" with numbers from an economically depressed region in Florida, hoping that creditors would call the (now-reassigned) numbers. *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 788 (W.D. Pa. 2016). Another "had several different phone numbers at his home to get a higher volume of telemarketing calls." *Fitzhenry v. ADT Corp.*, 2014 WL 6663379, at *4 (S.D. Fla. Nov. 3, 2014) (internal quotation marks and alterations omitted). Indeed, *34%* of the plaintiffs who filed TCPA lawsuits in October 2019 had filed at least

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[17] JDSupra, *Happy Halloween TCPALand!: More Ghoulish TCPA Statistics to Freak You Out*, https://www.jdsupra.com/legalnews/happy-halloween-tcpaland-more-ghoulish-85348/ (Nov. 1, 2018).

[18] 2015 TCPA Order, 30 FCC Rcd. at 8091 n.108 (statement of Commissioner O'Rielly dissenting in part and approving in part).

one previous case.[19] It has gotten so bad that several companies offer to scrub professional TCPA plaintiffs from a company's communications. *See, e.g.*, Contact Compliance Center, Litigator Scrub®, https://www.dnc.com/litigator-scrub.

II. THIS COURT SHOULD INVALIDATE THE PROHIBITION IF IT CONCLUDES THAT THE TCPA'S SCHEME IS UNCONSTITUTIONAL

Something must be done about spiraling TCPA litigation. In fact, Congress has already agreed—at least for certain communications. The Treasury Department had long complained that the FCC's orders had "create[d] confusion regarding the scope and applicability of the autodialer ban to debt collection calls," confusion which "negatively impacted collections government-wide."[20] In response, in 2015, Congress exempted prerecorded, automated voice, and ATDS calls to wireless phones if those calls were "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii).

The Chamber takes no position on whether the revised TCPA is unconstitutional. But it strongly agrees with Respondents that, if it is, then the proper

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[19] WebRecon, LLC, WebRecon Stats for Oct 2019: Litigation Up Across the Board, https://webrecon.com/webrecon-stats-for-oct-2019-litigation-up-across-the-board/.

[20] Letter from Rita Bratcher, Financial Management Service, U.S. Department of the Treasury, to Kevin Martin, FCC, CC Docket No. 02-278, at 2 (filed Jan. 26, 2007), *available at* https://ecfsapi.fcc.gov/file/6518723834.pdf.; *see also, e.g.*, Letter from Scott Johnson, Financial Management Service, U.S. Department of the Treasury, to Marlene Dortch, FCC, CC Docket No. 02-278, at 2 (filed May 20, 2010) (raising similar concerns), *available at* https://ecfsapi.fcc.gov/file/7020544285.pdf.

remedy is to invalidate the TCPA's prohibition, not to sever the exemption. That is the course of action that this Court has followed in case after case. And that is a course of action that will bring an end to the meritless TCPA litigation swamping the federal courts.

A. Precedent and Policy Require Striking the Ban, Not Severing the Exemption

1. This Court has often confronted a broad, content-neutral speech restriction coupled with a content-based exemption. Every time, it has done what the lower courts would not: strike down the challenged prohibition, not the speech-permitting exemption.

Take *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972), and *Grayned v. City of Rockford*, 408 U.S. 104 (1972), decided the same day. Two municipalities banned picketing near schools, but exempted "the peaceful picketing of any school involved in a labor dispute." *Mosley*, 408 U.S. at 93 (internal quotation marks omitted); *Grayned*, 408 U.S. at 107. Mosley sued because he wished to continue protesting outside a school that he believed "practice[d] black discrimination," 408 U.S. at 93, while Grayned sought to overturn his conviction for protesting for equal rights, *see* 408 U.S. at 105.

This Court agreed with Mosley and Grayned that the ordinances "ma[de] an impermissible distinction between labor picketing and other peaceful picketing." *Mosley*, 408 U.S. at 94; *see Grayned*, 408 U.S. at 107. But rather than do what the Ninth Circuit did here, this Court then held that the *content-neutral ordinances*, not the content-based exemption, had to go. *See Mosley*, 408 U.S. at 102; *see Grayned*, 408 U.S.

at 107 (reversing Grayned's conviction because it came "under [an] invalid ordinance").

Indeed, in *Grayned*, the municipality had *already* "delete[d] the labor picketing proviso" by the time the case reached this Court. 408 U.S. at 107 n.2. "This amendment and deletion ha[d], of course, no effect on [Grayned's] personal situation," because the Court had to "consider the facial constitutionality of the ordinance in effect when [he] was arrested and convicted." *Id.* (internal quotation marks omitted); *see also, e.g.*, *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (invalidating the application of a sales tax to magazines rather than strike content-based exemptions); *Carey v. Brown*, 447 U.S. 455 (1980) (invalidating a residential antipicketing ordinance rather than strike its labor-dispute exemption)

These cases are not outliers or relics. Rather, the Court recently deployed precisely the same approach in its seminal decision in *Reed*, 135 S. Ct. 2218. There, the Town of Gilbert's Land Development Code "prohibit[ed] the display of outdoor signs anywhere within the Town without a permit, but … exempt[ed] 23 categories of signs from that requirement," subjecting those signs to varying requirements depending on the sign in question. *Id.* at 2224–25. The Court concluded that the "Town's Sign Code [wa]s content based on its face" and failed strict scrutiny. *See id.* at 2227, 2231. It then held that the Sign Code's "content-based *restrictions*" had to go, *id.* at 2231 (emphasis added); it did not even consider the possibility of invalidating the Sign Code's exemptions, even though the ordinance had a capacious severability clause, *see* Joint App'x in *Reed v. Town of Gilbert*, No. 13-502, 2014 WL 4631244, at *78, and

even though the Town sought a remand on severability, *see* Brief of Respondents, 2014 WL 6466937, at *48 n.15; *see also, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563–66 (2011) (invalidating ban on selling prescriber-identifying information except in certain circumstances); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430–31 (1993) (invalidating restriction on using newsracks to deliver commercial handbills rather than subject exempt newspapers to the same prohibition); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592–93 (1983) (overturning tax rather than sever preferential treatment of smaller newspapers).

2. Striking the prohibition rather than severing the exemption also makes sense as a practical matter. To begin, courts generally deploy remedies that "create incentives to raise [constitutional] challenges." *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018) (internal quotation marks and alterations omitted). Under the Government's approach, the prize for *successfully* challenging an unjustified content-based scheme is, well, nothing.

In fact, it's worse than that. If the Government prevails here, the reward for defeating a content-based scheme will be a *broader prohibition on speech*. Given speech's special place in our constitutional regime, legislatures themselves should impose any speech restrictions that may be warranted. At the least, courts should demand "quite specific evidence of a legislative preference for elimination of the exception" before taking that route. *Rappa v. New Castle County*, 18 F.3d 1043, 1073 (3d Cir. 1994)

Once courts get into the business of blue-penciling speech codes, it will be difficult to divine any principled place to stop. The ATDS provision offers a great example. In addition to adding a content-based exemption directly into the statute, Congress empowered the FCC to exempt speech it preferred. *See* 47 U.S.C. § 227(b)(2). The FCC has liberally deployed that power, exempting, for example, "package delivery notifications"[21] and calls and texts about "financial and healthcare issues" like "money transfers" and "exam reminders."[22]

Who's to say whether these exemptions are "severable" under the Government's balancing approach? The general saving clause (incorporated into the telecommunications laws decades ago) does not help; it applies—at most—where a court invalidates "a[] provision *of this chapter*," not a regulation. 47 U.S.C. § 608 (emphasis added); *see infra* 24 (explaining why the severability clause doesn't help for the statutory exemption either). History is no help either. Although these exemptions are recent, that can't be enough to demonstrate that they are severable. Congress conferred *ongoing* power to craft exemptions, not just exemptions promulgated in or around 1991.

In the end, then, a court determining whether to strike these exemptions must compare the importance of the exempted speech with the purported harms of ATDS calls. Parsing speech in that fashion is no

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[21] *In re Cargo Airline Ass'n Pet. for Expedited Declaratory Ruling*, 29 FCC Rcd. 5056, 5056 (2014).

[22] 2015 TCPA Order at 8023, 8026, 8030.

business for federal courts—as this Court's contrary categorical approach amply demonstrates.

B. The Government's Arguments Are Wrong

The Government points to several items—a few cases from the *Lochner* era, a severability clause enacted a few years later, and so on—to support its contrary position. *See* Gov't Br. 33–39. Those contentions are wrong in their own right, but it is worth noting what the Government does not even *try* to explain: this Court's First Amendment jurisprudence. Confronted with the wall of cases in which the Court has struck a general prohibition rather than sever a content-based exemption, the Government shrugs its shoulders. In "none of th[ose] decisions," the Government says, "did this Court conduct any severability analysis." *Id*. at 42. And if the Court had bothered to look, the "legislature's intent [regarding severability] may have been" different in those cases. *Id.* In other words, the Government argues that in case after case, for decade after decade, this Court got it wrong; at the least, it failed to ask the obvious remedial question, and it may well have wrongly invalidated general prohibitions rather than sever content-based exemptions.

This Court should demand quite a lot before accepting the Government's invitation to throw away these precedents. Nothing meets that high bar here.

1. The Government first argues that the severability clause in the Communications Act of 1934 requires this Court to sever the exemption. *See id*. at 34–35. That clause provides that "[i]f any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the

chapter and the application of such provision to other persons or circumstances shall not be affected thereby." 47 U.S.C. § 608. But Respondents are not asking this Court to hold the *exemption* "invalid"; instead, they argue that the prohibition is unconstitutional, because it is the part of the TCPA that restricts their speech. *See* Respondents' Br. 43–45. Striking down that prohibition while retaining the rest of the Communications Act, including other prohibitions in the TCPA itself, comports with the severability clause. Indeed, in keeping with this view, the Court in *Greater New Orleans Broadcasting Association v. United States* struck a prohibition (rather than sever exemptions) subject to *the same severability clause*. 527 U.S. 173, 177–79 (1999).

Even if there were some doubt on this front, this Court has repeatedly "held that a severability clause is an aid merely; not an inexorable command." *Reno v. ACLU*, 521 U.S. 844, 884 n.49 (1997) (internal quotation marks omitted); *see, e.g.*, *Dorchy v. Kansas*, 264 U.S. 286 (1924). If ever a severability clause proved the wisdom of that approach, this is it. Section 608 was originally enacted in 1934, as part of Congress's efforts to regulate radio and Ma Bell. It says next to nothing about Congress's intent regarding an exemption passed in 2015 to a prohibition enacted in 1991 that now regulates text messages to iPhones. Indeed, the severability clause speaks so poorly of Congress's intent that the Government failed to *mention* it in the Fourth or Ninth Circuit. *See* Br. of the United States in *Am. Ass'n of Political Consultants, Inc. v. Barr*, No. 18-1588 (4th Cir.), 2018 WL 4075961, at *24–25; Br. of the United States in *Duguid v.*

Facebook, Inc., No. 17-15320 (9th Cir.), 2018 WL 4863438, at *25–26.

2. The Government next contends that, because the TCPA existed for 24 years without the debt-collection exemption, Congress must prefer a return to that regime over striking the prohibition. *See* Gov't Br. 36. The Government's revisionist history is seriously misleading. For most of those 24 years, the TCPA's ban on ATDS and automated or prerecorded voice calls to wireless numbers had little impact on those collecting government-owned or government-backed debt. Few people *had* cellphones, let alone used them exclusively, so those collecting debt could call residential lines using prerecorded or automated voice messages. *See* 47 C.F.R. § 64.1200(a)(3)(iii). Moreover, the ATDS provision was construed to cover only machines that randomly or sequentially dial numbers; no one would use such machines to collect debt. *See supra* 10–11. It was only when exclusive use of cellphones exploded—and when the FCC started rewriting the ATDS provision—that debt collectors began to feel the pinch. Congress's quick action at that point demonstrates that it would prefer no prohibition to massive liability for those collecting its debt.

The Government also argues that striking the prohibition will "expos[e] all Americans to millions of unwanted automated calls to their cell phones every day." Gov't Br. 36. But Congress never restricted every "automated" call to wireless numbers; it restricted only calls made with an "automatic telephone dialing system," and it specifically defined that term to target now-obsolete equipment. Striking down this obsolete prohibition will only eliminate a scourge of litigation under an often abused law. In fact, striking the

prohibition will *benefit* consumers in many ways. Companies have responded to the uncertainty surrounding ATDS calls (and the inability to secure effective consent) by refraining from communicating with their customers—sending fewer security alerts and reminder notifications, making fewer promotional offers to repeat customers, and so on. If the ATDS prohibition were invalidated, companies could make these beneficial contacts without fear of crushing liability. Other would-be communicators—such as charitable organizations, political causes, and pollsters—similarly would be able to engage in core First Amendment conduct without existential dread.

In the absence of the ATDS prohibition, Congress could consider targeted legislation aimed at truly harassing and fraudulent calls, without ensnaring communications that benefit consumers. Cheap internet-based telephony and easy number spoofing already allow scofflaws to make millions of unwanted, illegal calls. Until Congress and the FCC successfully attack the root causes of these calls, judgment-proof scammers, often operating overseas, will continue to place them no matter what the TCPA says. In the meantime, consumers may exercise their right to opt out of telemarketing calls under the Do Not Call Registry, *see, e.g.*, 2003 TCPA Order at 14028–42, 14037–39 (establishing the Do Not Call Registry and allowing residential wireless consumers to use it), and to contact the caller to opt out of communications.

3. Ignoring First Amendment case law, the Government relies instead on a few *Lochner*-era Equal Protection cases to support its position. *See* Gov't Br. 36–37. Some of these cases conflict with modern severability doctrine. For example, in *Frost v.*

Corporation Commission, the Court severed a subsequently added exemption to a general licensing regime rather than invalidate the regime itself. *See* 278 U.S. 515, 526–27 (1929). But the formalist reason it gave for doing so—that the subsequent amendment, "being unconstitutional, [wa]s a nullity" and therefore could not shed light on "legislative intent," *id.*—would not pass muster today. No one doubts that if Congress had expressly declared the debt-collection exemption to be inseverable when amending the statute, it would be. Under *Frost*, however, that would be a "nullity."

To the extent that these old cases reflect modern severability doctrine, they are distinguishable. In *Truax v. Corrigan*, for example, the Court refused to strike down the general statute authorizing Arizona courts to issue injunctions, instead invalidating a subsequently enacted provision that eliminated the ability to enjoin certain labor practices. 257 U.S. 312, 341–42 (1921). But of course Arizona's legislature would have preferred to eliminate the specific provision regarding labor injunctions rather than destroy entirely courts' ability to enter injunctions in any case. The same cannot be said here.

4. More fundamentally, the Government's reliance on these cases—and on equal protection analogies more generally, *see* Gov't Br. 40–41—ignores the differences between the First and Fourteenth Amendments. "The purpose of the equal protection clause … is to secure every person within the state's jurisdiction against intentional and arbitrary *discrimination*." *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352 (1918) (emphasis added). Accordingly, that Clause does not generally care whether the Government imposes a burden or extends

a benefit; so long as it does not "invidiously discriminat[e]," it may pass "unwise," "improvident" legislation. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 486–89 (1955). And even then, "extension [of a benefit], rather than nullification," is generally the "proper course." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017) (internal quotation marks omitted).

The First Amendment is quite different. It reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In keeping with that commitment, this Court subjects even content-neutral restrictions on speech to heightened scrutiny. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (content-neutral time, place, or manner restrictions must be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels of communication" (internal quotation marks omitted)). As a result, even if a challenge to a content-based speech restriction bears some resemblance to an equal protection claim, the Court's remedial response to an acknowledged violation should (and does) differ. Given speech's special status in our constitutional scheme, Congress, not courts, should impose any restrictions. At the very least, there must be "quite specific evidence of a legislative preference for elimination of the exception." *Rappa*, 18 F.3d at 1073. Here there is none.

There is a second, independent reason to level up in the free speech context. This Court looks to Justice Harlan's concurrence in *Welsh v. United States*, 398 U.S. 333 (1970), to determine whether "to cure [an]

equal protection violation" by leveling up or leveling down. *Morales-Santana*, 137 S. Ct. at 1700. Under that approach, the Court assesses legislative intent by "measur[ing] the intensity of commitment to the residual policy and consider[ing] the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Welsh*, 398 U.S. at 365 (Harlan, J., concurring).

In an ordinary equal protection case, this inquiry is judicially manageable, if not exactly rule-like: ask how important the general rule has been and how much damage would be done by extending the exception rather than eliminating that rule. But where a content-based speech restriction is at issue, these inquiries cannot be conducted without weighing the value of speech—a fraught task for legislatures, and an impermissible one for courts. For example, any assessment of Congress's devotion to banning "unwanted calls," Gov't Br. 39, would have to consider Congress's willingness to let the FCC exempt *any* free-to-the-recipient wireless calls, as well as Congress's willingness to let the FCC exempt non-telemarketing calls to (now indistinguishable) wireline numbers. *See* 47 U.S.C. § 227(b)(2)(B), (C). With those exemptions in mind, the Court would have to consider just how much each kind of call is unwanted. Are telemarketing calls categorically more unwanted than debt collection calls? Are commercial calls categorically more intrusive than solicitation calls from aggressive charities?

The other part of the inquiry—how much damage would be done to Congress's scheme under the alternative options—also turns on an evaluation of the worth of speech. Are ATDS, prerecorded, or automated voice message calls so inherently awful that Congress

would rather raise taxes (to eat defaulted debts) than allow callers to place them? And are such calls so inherently displeasing that Congress would rather lose hundreds of millions of dollars than rely upon other protections like the Do Not Call Registry or individual opt outs to shield unwilling recipients? Neither of these questions can be answered without assessing the value of the myriad kinds of speech now swept up by the prohibition. Federal courts should not be launched on that perilous remedial inquiry.

III. CALLERS MAY NOT BE HELD LIABLE FOR CALLS PLACED UNDER AN UNCONSTITUTIONAL REGIME

If, however, the Court decides that, going forward, the exemption will be severed but the prohibition will remain, it should make clear that no caller may be held liable for calls or texts placed between the exemption's enactment in 2015 and this Court's decision severing that exemption. In *Grayned*, the Court already took that course where the legislature *itself* repealed the content-based exemption prior to the conclusion of the defendant's appeals. Per the Court, that "amendment and deletion ha[d] … no effect on [the defendant's] personal situation," because the Court had to "consider the facial constitutionality of the ordinance in effect when [he] was arrested and convicted." *Grayned*, 408 U.S. at 107 n.2 (internal quotation marks omitted).

The Court reiterated the point in *Morales-Santana*. Severing an impermissibly sex-based benefit (and subjecting men and women to a more onerous regime going forward), the Court noted that "a defendant convicted under a law classifying on an impermissible basis may assail his conviction without regard to the

manner in which the legislature might subsequently cure the infirmity." 137 S. Ct. at 1699 n.24. In such circumstances, it is "irrelevant … whether the legislature likely would … cure[] the constitutional infirmity by excising" the exemption or invalidating the prohibition. *Id.* Either way, the adverse judgment must be overturned. *See id.*; *see also Welsh*, 398 U.S. at 362 (Harlan, J., concurring) (voting to overturn a conviction regardless of the remedial conclusion because the law was unequal at the time of the defendant's conduct).

The same principles compel the conclusion that, whatever remains of the TCPA going forward, callers may not be held liable for calls or texts placed between the enactment of the challenged exemption and this Court's decision. Just like the civil rights protester in *Grayned* and the conscientious (but not religious) objectors in *Welsh*, these defendants (and potential defendants) acted at a time when, by hypothesis, the TCPA unconstitutionally favored certain speech over other speech. And just like those defendants, these callers therefore cannot be held liable for that conduct, even if this Court concludes that, in the future, all shall be equally subject to the TCPA's prohibitions.

Serendipitously, that window of time corresponds nicely with the heyday of TCPA litigation spawned by the FCC's 2015 TCPA Order, when professional plaintiff after professional plaintiff sued to shake down corporate America for everyday communications that benefit consumers. *See supra* 11–18. The Court should follow its precedent and prevent even further harm from a TCPA run amok.

CONCLUSION

If the Court concludes that the TCPA's restrictions on calls to wireless numbers are unconstitutional, it should reverse the decision below and strike down the prohibition, not sever the exemption. But even if it avoids that course, it should make clear that callers may not be held liable for calls placed under an unconstitutional regime, no matter how that regime is cured going forward.

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Respectfully submitted,

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