No. 18-1588

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Plaintiffs-Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of North Carolina

BRIEF FOR APPELLEES

CHAD A. READLER
Acting Assistant Attorney General

ROBERT J. HIGDON, JR.
United States Attorney

MARK B. STERN
MICHAEL S. RAAB
LINDSEY POWELL
Attorneys, Appellate Staff
Civil Division, Room 7226
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
(202) 616-5372

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Regulations:

Rule:

Legislative Material:

Other Authorities:

INTRODUCTION

Plaintiffs assert a facial First Amendment challenge to a provision of the Telephone Consumer Protection Act of 1991 (TCPA) that generally precludes the use of autodialers and artificial or prerecorded voices in making calls to cell phones unless a person has agreed to receive such calls. Plaintiffs do not contend that the First Amendment precluded Congress from enacting this restriction. They argue instead that the restriction became unconstitutional more than two decades after it was first enacted, when Congress amended the statute to allow the use of these technologies in connection with calls to collect government-backed debt. Plaintiffs contend that this amendment created a content-based exception to the general restriction, that the restriction is therefore subject to strict scrutiny, and that the statute does not withstand review under that standard.

Plaintiffs' argument fails in all respects. At the outset, the government-debt exception principally turns on the relationship between the government and the person being called, not on the content of the call. The TCPA does not apply to the federal government, and plaintiffs rightly do not contend that the statute is content-based as a result. The government-debt exception simply provides that these technological restrictions likewise do not apply to persons making calls to collect government-backed debt—calls the government could unquestionably make itself.

The challenged provision readily withstands intermediate scrutiny—the standard applicable to content-neutral restrictions on the manner in which calls are

made. Indeed, as the district court concluded, this provision would survive even strict scrutiny, although that is not the appropriate standard. Plaintiffs concede that the privacy interests furthered by the autodialer restriction are compelling, and those interests are plainly furthered by a restriction that generally precludes the use of precisely those technologies that Congress found most intrusive. The narrow exception for calls to collect government-backed debt is consistent with the privacy interests underlying the broader scheme, and it also furthers the substantial government interest in safeguarding the public fisc.

Were the Court to conclude that the government-debt exception does not withstand constitutional review, the proper remedy would be to strike down the exception rather than invalidate the autodialer restriction in its entirety. The autodialer restriction was in effect for roughly twenty-three years before Congress amended the statute to add the government-debt exception, leaving no doubt that the restriction would continue to function in a manner consistent with the intent of Congress even in the exception's absence.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1331. JA 141. On March 26, 2018, the district court granted the government's motion for summary judgment. JA 424. On May 23, 2018, plaintiffs filed a timely notice of appeal. JA 438; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court correctly held that the TCPA's restrictions on the use of automated dialing systems and artificial or prerecorded voices in making calls to cellular telephone numbers absent a consumer's prior consent, 47 U.S.C. § 227(b)(1)(A)(iii), are consistent with the First Amendment.

PERTINENT STATUTE

The pertinent statute is reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

Congress enacted the TCPA in 1991 in response to overwhelming consumer complaints about the substantial intrusion on personal and residential privacy caused by the growing number of unwanted phone calls, and by automated calls in particular. Pub. L. No. 102-243, § 2(5)-(6), 105 Stat. 2394, 2394 (1991). To protect the privacy interests implicated by these calls, and as relevant to this appeal, Congress made it unlawful "to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice" to a cell phone or similar service. 47 U.S.C. § 227(b)(1)(A)(iii). An "automatic telephone dialing system" or "autodialer" refers to 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." *Id.* § 227(a)(1); 47 C.F.R. § 64.1200(d)(3). Congress amended the statute

in 2015 to provide that the autodialer restriction does not apply to calls "made solely to collect a debt owed to or guaranteed by the United States." Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a)(1)(A), 129 Stat. 584, 588 (2015).

Congress authorized the Federal Communications Commission (FCC) to exempt additional categories of calls from the autodialer restriction in certain circumstances. *See* 47 U.S.C. § 227(b)(2). Any party wishing to challenge the substance of an FCC order issued pursuant to that authority must file an action in the court of appeals, which has exclusive jurisdiction over challenges to FCC rules and orders. 28 U.S.C. § 2342; 47 U.S.C. § 402(a).

B. Factual and Procedural Background

Plaintiffs are political organizations that want to use autodialers and artificial or prerecorded voices to call people's cell phones without their consent. Plaintiffs allege that the 2015 amendment renders the TCPA facially unconstitutional because it allows the use of these technologies in making calls to collect government-backed debt. Plaintiffs also cite exemptions to the autodialer restriction promulgated by the FCC, although they do not explain how those agency orders, which they have not challenged, could make the statute facially unconstitutional.

The district court granted summary judgment for the government, holding that the TCPA's autodialer restriction is consistent with the First Amendment. The court first concluded that the government-debt exception is content-based and thus subject to strict scrutiny, rejecting the government's contention that the exception is premised

principally on the relationship between the government and the person being called, rather than the content of the call. JA 430. The court reasoned that, under the exception, "a private debt collection agency may call the same consumer twice in a row, once to collect a private, government-guaranteed loan and once to collect a similar private loan not guaranteed by the government, but, absent prior express consent, may place only the first call using an autodialer or prerecorded voice." JA 429. Thus, the court explained, "[i]n order for a court to determine whether a potential defendant violated the TCPA's government-debt exception, the court must review the communicative content of the call." *Id.*

The district court then held that the autodialer restriction satisfied strict scrutiny because it is narrowly tailored to further a compelling government interest. The court noted that the privacy interests furthered by the restriction are undoubtedly compelling, JA 431, and it found the exception for calls to collect government-backed debt consistent with that interest, JA 433. Emphasizing the narrowness of the exception, the court held that the scheme at issue "stands in stark contrast to the sign ordinance that the Supreme Court invalidated in *Reed [v. Town of Gilbert*, 135 S. Ct. 2218 (2015)*]*," which exempted twenty-three categories of signs from a general prohibition on the posting of signs without a permit. JA 432-33. The court thus rejected plaintiffs' arguments that the autodialer restriction is over- or underinclusive. And it found that plaintiffs' proposed alternatives to the restriction, including time-of-day limitations and mandatory disclosure of a caller's identity, would not prevent

privacy intrusions from occurring and therefore "would not be at least as effective in achieving the legitimate purpose that Congress enacted the TCPA to serve." JA 436 (quotation marks omitted).

The court declined to consider exemptions promulgated by the FCC in this analysis, noting that plaintiffs were not challenging the orders themselves, and concluding that the orders were not otherwise relevant to the question presented. JA 433-34. The court held that the fact "that Congress delegated authority to the FCC to make exemptions does not prove that the TCPA is underinclusive." JA 434.

SUMMARY OF ARGUMENT

A.1. In prohibiting automated calls to consumers' cell phones absent their consent, the TCPA imposes a content-neutral restriction on the manner in which such calls are placed. The restriction is subject to intermediate scrutiny, and plaintiffs do not contend that it fails to satisfy that standard. Plaintiffs' argument focuses not on the restriction itself, but on an amendment enacted more than two decades later that made the restriction inapplicable to calls to collect government-backed debt. Plaintiffs urge that this is a content-based provision, that the statute should therefore be subject to strict scrutiny, and that it should be found wanting under this standard.

Contrary to plaintiffs' contention, the government-debt exception is premised principally on the relationship between the government and the person being called, rather than the content of the call. The TCPA does not apply to the government, and the exception allows entities collecting debts on the government's behalf to use the

same means that would be available to the government if it were making the calls itself. This provision is at least as clearly content-neutral as the state autodialer statutes upheld in *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 304 (7th Cir.), *cert. denied*, 137 S. Ct. 2321 (2017), and *Van Bergen v. Minnesota*, 59 F.3d 1541, 1550 (8th Cir. 1995), in which the courts found a variety of exceptions not to be content-based because they "depend on the relation between the caller and the recipient, not on what the caller proposes to say," "and therefore do not establish content discrimination." *Patriotic Veterans*, 845 F.3d at 305; *Van Bergen*, 59 F.3d at 1550 (same). The limited exemptions promulgated by the FCC do not inform this analysis as they have no bearing on the statute's facial validity.

2. Like other content-neutral restrictions on the time, place, or manner of speech, the autodialer restriction is subject to intermediate scrutiny, meaning that it must promote "a substantial government interest that would be achieved less effectively absent the regulation," and may not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ross v. Early*, 746 F.3d 546, 552-53 (4th Cir. 2014). The autodialer restriction readily satisfies that standard. Plaintiffs do not dispute that the government has a compelling interest in protecting personal and residential privacy. That interest is plainly furthered by the general restriction on the use of autodialers and prerecorded voices, which have been found to increase significantly both the volume and the nuisance value of unwanted calls. The highly circumscribed exception for calls to collect government-backed debt

does not undermine the privacy interests furthered by the general restriction, and it additionally promotes the government's interests in protecting consumers and safeguarding the public fisc.

B. Strict scrutiny does not apply in these circumstances, but, as the district court held, that standard would in any event be satisfied here. Plaintiffs acknowledge that the privacy interests served by the autodialer restriction are compelling. And the statute is narrowly tailored to those interests. Unlike in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015), and *Cahaly v. Larosa*, 796 F.3d 399, 406 (4th Cir. 2015), in which the presence of myriad or broad exceptions allowed the "unlimited proliferation" of the types of communications that the challenged provisions sought to prevent, plaintiffs here cite a single, narrow statutory exception that allows the use of the restricted technologies in limited circumstances to collect government-backed debts. This exception in no way casts doubt on the significance of the government's interest in protecting personal and residential privacy by preventing the overwhelming volume of unwanted calls that would result in the absence of the autodialer restriction. There is likewise no merit to plaintiffs' contention that other measures would be equally effective in addressing the problem presented by automated calls; the alternatives suggested by plaintiffs would still allow the calls, and the attendant invasion of privacy, that Congress sought to prevent. For the reasons stated above, the exceptions enacted by the FCC have no bearing on this analysis.

C. If the Court were to hold that the government-debt exception violates the First Amendment, it should invalidate only that exception and uphold the remainder of the statute. The autodialer restriction was in effect for roughly twenty-three years before Congress enacted the government-debt exception, leaving no doubt about Congress's view as to whether the restriction could operate in the exception's absence. Because the exception is plainly severable from the remainder of the statute, there is no basis for invalidating the autodialer restriction as a whole.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo and may affirm on any grounds supported by the record. *O'Hara v. Nika Techs., Inc.*, 878 F.3d 470, 474 (4th Cir. 2017).

ARGUMENT

The TCPA's Autodialer Restriction Is Fully Consistent with the First Amendment.

A. The autodialer rule is a content-neutral restriction on the manner in which calls are placed, and it readily withstands intermediate scrutiny.

1. The government-debt exception is premised on the government's relationship with the debtor, not the content of the call.

When Congress enacted the TCPA in 1991, it found that the volume of unwanted calls had increased substantially with the advent of low-cost, automated devices that were able to dial as many as one thousand phone numbers per hour and deliver a prerecorded message to the person being called. S. Rep. No. 102-178, at 2

(1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970. Even with the technologies available at that time, tens of thousands of solicitors were collectively calling millions of people each day. *Id.* In addition to expressing concern about the volume of automated calls, "Congress determined that such calls were more of a nuisance and a greater invasion of privacy than calls placed by live persons because such calls cannot interact with the customer except in preprogrammed ways and do not allow the caller to feel the frustration of the called party." *Moser v. FCC*, 46 F.3d 970, 972 (9th Cir. 1995) (quotation marks omitted).

As relevant here, Congress addressed these privacy concerns in 1991 by making it unlawful "to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice" to any cell phone. *See* 47 U.S.C. § 227(b)(1)(A)(iii). Plaintiffs do not contend that this general provision is anything other than a content-neutral restriction on the manner in which calls are placed. Instead, plaintiffs argue that Congress rendered the restriction unconstitutional in 2015, when it amended the statute to permit the use of these technologies for calls "to collect a debt owed to or guaranteed by the United States." *Id.*[1] Plaintiffs argue that

[1] The autodialer restriction also allows the use of these technologies in connection with calls made "for emergency purposes." 47 U.S.C. § 227(b)(1)(A). That exception is plainly constitutional, and plaintiffs have not argued otherwise.

the amendment is content-based, and that the statute is therefore subject to strict scrutiny, rather than the intermediate scrutiny accorded to content-neutral restrictions.

Contrary to plaintiffs' suggestion, Congress's enactment of the 2015 amendment did not transform the autodialer provision into a content-based restriction. The narrow exception for calls to collect government-backed debt is premised principally on the relationship between the government and the person being called. Federal telemarketing laws have long contained relationship-based exceptions, and this has never been thought to render those restrictions content-based. For example, the do-not-call provision of the Telemarketing Sales Rule, which generally prohibits telemarketing calls to individuals who have placed their number on the national do-not-call registry, makes an exception for callers who have an established business relationship with the person being called. 16 C.F.R. § 310.4(b)(1)(iii)(B); *see also* 47 U.S.C. § 227(a)(4), (c)(3)(F) (providing a similar exception under the TCPA). The TCPA includes a similar exception to the rule prohibiting the transmission of junk faxes. 47 U.S.C. § 227(b)(1)(C). And the autodialer restriction at issue has always contained an exception for calls made with the consent of the party being called. *Id.* § 227(b)(1)(A)(iii).

The government-debt amendment with which plaintiffs take issue is also relationship-based. It provides an exception to the general restriction on the use of autodialers and prerecorded voices, based on the called party's preexisting relationship with the federal government. The government is not subject to the TCPA's

restrictions, *see Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016) (recognizing that the "United States and its agencies . . . are not subject to the TCPA's prohibitions"), and the exception simply provides that persons making debt-collection calls on the government's behalf may use the same means that would be available to the government if it were making the calls itself.

Plaintiffs observe that the statute draws a distinction insofar as persons calling to collect debts that are not backed by the federal government remain subject to the autodialer restriction. Br. 14. That is the case even if the caller uses a script that is essentially identical to a script used to collect a government-backed debt. Two callers may say precisely the same thing—for example, "Your loan from Citibank is past due; please visit your online account to make a payment"—and one caller may be subject to the autodialer restriction while the other is not, depending on the nature of the government's relationship with the person being called. That observation only underscores that the applicability of the exception principally turns not on what is being said but on the fact that the call is being made on behalf of the United States to a person who has a specified relationship with the federal government.

The exception at issue here is no more based on the content of the call being made than the exceptions to the state autodialer statutes that were held not to be content-based in *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 304 (7th Cir. 2017), and *Van Bergen v. Minnesota*, 59 F.3d 1541, 1550 (8th Cir. 1995). In those cases, the state laws at issue excepted from a general autodialer restriction messages (1) from school

districts to students, parents, or employees; (2) to subscribers with whom the caller has a current business or personal relationship; or (3) to employees in order to advise of work schedules. The courts explained that these exceptions "depend on the relation between the caller and the recipient, not on what the caller proposes to say," "and therefore do not establish content discrimination." *Patriotic Veterans*, 845 F.3d at 305; *Van Bergen*, 59 F.3d at 1550 (same). The same is true here, where the exception is premised on the government's relationship with a debtor, and allows calls germane to that relationship.

That an official must additionally refer to the substance of a call to confirm that it concerns a debt does not undermine the conclusion that the exception is ultimately premised on the relationship between the government and the person being called. Courts have long held that "[a] law is not considered content based simply because [one] must look at the content of an oral or written statement in order to determine whether a rule of law applies." *ACLU v. Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012) (quotation marks omitted). The Supreme Court's statements in *Reed v. Town of Gilbert* explaining what it means for a law to be content-based did not alter this basic principle. 135 S. Ct. 2218, 2227 (2015) (holding a municipal sign ordinance content-based because its myriad exceptions "depend[ed] *entirely* on the communicative content of the sign" (emphasis added)). Indeed, three of the Justices in the *Reed* majority joined a separate concurrence underscoring that the Court's opinion should not be understood to make content-based every law that requires for its enforcement

consideration of a speaker's message. 135 S. Ct. at 2233 (Alito, J., concurring) (noting, among other examples, that rules that distinguish between on- and off-premises signs—a distinction based on the relationship between signs and their location—are not content-based even though knowledge of a sign's message may be necessary to determine how the rules apply).

Since *Reed*, the courts of appeals have continued to hold that the fact that an official may need to consider the substance of a message to determine whether or how a law applies is not determinative of whether the law is content-based. Where, as here, the operation of a law does not turn solely on what is said, courts have declined to find the provision content-based. For example, in upholding under intermediate scrutiny a sign ordinance that required that event-related signs be removed within thirty days after the event to prevent them from accumulating as visual clutter, the D.C. Circuit explained that "[t]he fact that District officials may look at what a poster says to determine whether it is 'event-related,'" and "might read a date and place on a sign to determine that it relates to a bygone" event, "does not render the District's lamppost rule content-based." *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 846 F.3d 391, 403-04 (D.C. Cir.), *cert. denied*, 138 S. Ct. 334 (2017); *see Recycle for Change v. City of Oakland*, 856 F.3d 666, 671 (9th Cir.), *cert. denied*, 138 S. Ct. 557 (2017) (reiterating that "an officer's inspection of a speaker's message is not dispositive on the question of content neutrality"). Similarly here, the need to refer to the substance of a call to confirm that it concerns a debt does not serve to make

content-based an exception that is premised on the government's relationship with the debtor.

The autodialer restriction is wholly unlike the sign ordinance in *Reed*, which exempted twenty-three categories of signs from a general permit requirement and subjected those signs to different rules based solely on what they said. 135 S. Ct. at 2224-25. Under the ordinance, the requirements that "appl[ied] to any given sign thus depend[ed] *entirely* on the communicative content of the sign," and the Court held the ordinance subject to strict scrutiny on that basis. *Id.* at 2227 (emphasis added). The state autodialer restriction at issue in *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015), on which plaintiffs rely, is also distinguishable from the TCPA's autodialer restriction because it "applie[d] to calls with a consumer or political message but d[id] not reach calls made for any other purpose." This Court held that the presence of those broad, "facial content distinctions" made the law subject to strict scrutiny. *Id.*

By contrast to the laws at issue in *Reed* and *Cahaly*, the TCPA generally provides that autodialers and prerecorded voices may not be used in making calls to cell phones. That plainly content-neutral restriction was in place for nearly twenty-three years before Congress enacted the government-debt amendment, and that single, carefully drawn exception, premised on the government's relationship to the person being called, does not serve to make the statute content-based.

In addition to their reliance on the government-debt exception, plaintiffs note that the FCC has promulgated limited exemptions to the challenged restriction. *See*

Br. 16. The alleged import of these agency orders is unclear. Plaintiffs' contention is that the statute is facially invalid, and exemptions issued by the FCC have no bearing on the statute's facial validity. The FCC orders themselves are not subject to challenge in district court, *see* 28 U.S.C. § 2342; 47 U.S.C. § 402(a), and plaintiffs maintain that they "are not challenging . . . the FCC orders or regulations promulgated under the TCPA." Br. 11 & n.3; *see* JA 267-68. Although plaintiffs previously argued that the TCPA violates the First Amendment because Congress delegated to the FCC authority to promulgate exceptions in certain circumstances, *see* JA 434 (rejecting that argument), plaintiffs do not press that argument on appeal.[2]

2. The statute readily withstands intermediate scrutiny.

As a content-neutral restriction on the manner in which certain calls may be made, the autodialer restriction is subject to intermediate scrutiny. *See Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 376 (4th Cir. 2013) (applying intermediate

[2] Because plaintiffs did not raise this issue in their opening brief, the issue is forfeited and should not be considered on appeal. *Adbul-Mumit v. Alexandria Hyundai, LLC*, 896 F.3d 278, 290 (4th Cir. 2018) ("[C]ontentions not raised in the argument section of the opening brief are abandoned." (quotation marks omitted)). The argument in any event lacks merit. As the Ninth Circuit has observed, the statutory language authorizing the FCC to promulgate exceptions "is permissive, not mandatory," and it "in no way requires the FCC to adopt [content-based] exemptions." *Moser*, 46 F.3d at 973. "[T]he delegation does not substantively except any communications and therefore is not facially or inherently content-based." JA 434 (quotation marks omitted). Accordingly, the grant of authority to the FCC to consider the appropriateness of limited exceptions consistent with the purpose of the statute in no way calls the validity of the statute into doubt.

scrutiny to unrelated TCPA autodialer requirements). A law satisfies that standard if it "promotes a substantial government interest that would be achieved less effectively absent the regulation," and does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ross v. Early*, 746 F.3d 546, 552-53 (4th Cir. 2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). To withstand review, the law "need not be the least restrictive or least intrusive means" of serving the government's significant interests. *Id.* (quoting *Ward*, 491 U.S. at 798-99). This Court has previously upheld under this standard restrictions on the time, place, or manner in which calls may be made. *See, e.g.*, *Universal Elections*, 729 F.3d at 377 (upholding a TCPA provision requiring that all artificial or prerecorded telephone messages disclose the caller's identity and telephone number); *National Fed'n of the Blind v. FTC*, 420 F.3d 331, 341-42 (4th Cir. 2005) (upholding Federal Trade Commission regulations imposing disclosure requirements, time-of-day restrictions, and other rules with respect to certain charitable calls).

Plaintiffs concede that the government's interest in protecting consumer privacy is not only substantial but compelling. Br. 8, 18. Congress found that the use of autodialers and artificial or prerecorded voices presents a significant threat to that interest. "The lack of a live person makes the call frustrating for the recipient but cheap for the caller, which multiplies the number of these aggravating calls in the absence of legal controls." *Patriotic Veterans*, 845 F.3d at 306; *see Moser*, 46 F.3d at 972. Restricting the use of automated calling technologies in most circumstances, absent

the consent of the person being called, substantially limits this intrusion on personal privacy. TCPA, Pub. L. No. 102-243, § 2(12).

Contrary to plaintiffs' suggestion, the limited exception for calls to collect government-backed debt does not undermine the strength of this privacy interest or the effectiveness of the autodialer restriction. By its terms, the exception allows the use of these technologies only with respect to a narrow category of calls to collect debts that the government could itself collect in the same manner. As the district court observed, the exception "does not do appreciable damage to the privacy interests underlying the TCPA," JA 433, and it by no means allows the "unlimited proliferation" of automated calls, *Reed*, 135 S. Ct. at 2231; *Cahaly*, 796 F.3d at 406.

The government-debt exception also promotes other substantial interests. Congress found "evidence that consumers may benefit from calls that can prevent them from falling into potentially devastating debt." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 31 FCC Rcd. 9074, 9075 (2016). And the exception additionally furthers the government's interest in protecting the public fisc. In 2015, the federal government had $1.3 trillion of non-tax receivables, of which $162.1 billion was delinquent. *Id.* at 9077. The exception "create[s] conditions that allow debts to be more readily collected by the United States." *Id.* at 9081. Estimates relied on by Congress indicate that the government-debt exception will save the federal government $120 million over ten years. *See* ***Fiscal Year 2016: Analytical Perspectives of the U.S. Government*** 127 tbl. 11-3, 128, https://go.usa.gov/xUtw2. It is

not uncommon for the law to treat the federal government differently from other actors with respect to the collection of debts. *See, e.g.*, 31 U.S.C. § 3713(a)(1) (according first priority to the United States with respect to a bankrupt debtor's obligations).

B. As the district court held, the autodialer provision would in any event satisfy strict scrutiny.

Even if the provision at issue were subject to strict scrutiny, it would withstand review because it is "narrowly tailored to serve a compelling interest." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1665-66 (2015). Although this standard is exacting, the Supreme Court has made clear that it is not "strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995); *see Williams-Yulee*, 135 S. Ct. at 1666 (upholding a judicial solicitation ban under that standard). Like every other district court to consider the question, the district court in this case correctly held that the autodialer restriction satisfies even this demanding standard of review. *See, e.g.*, *Gallion v. Charter Commc'ns, Inc.*, 287 F. Supp. 3d 920 (C.D. Cal. 2018); *Greenley v. Laborers' Int'l Union of N. Am.*, 271 F. Supp. 3d 1128 (D. Minn. 2017); *Mejia v. Time Warner Cable, Inc.*, No. 15-6445, 2017 WL 3278926 (S.D.N.Y. Aug. 1, 2017); *Holt v. Facebook, Inc.*, 240 F. Supp. 3d 1021 (N.D. Cal. 2017); *Brickman v. Facebook, Inc.*, 230 F. Supp. 3d 1036 (N.D. Cal. 2017).

At the first step of the inquiry, plaintiffs concede that "the protection of residential privacy is undoubtedly a compelling governmental interest." Br. 8, 18

(citing *Carey v. Brown*, 447 U.S. 455, 471 (1980)). Congress enacted the TCPA to protect the public from automated phone calls and the attendant invasion of personal and residential privacy. Pub. L. No. 102-243, § 2(5); S. Rep. No. 102-178, at 5. Before this restriction was enacted, "[m]any consumers [we]re outraged over the proliferation of intrusive, nuisance calls to their homes" and cell phones. Pub. L. No. 102-243, § 2(6). The government's interest in preventing such calls and thereby "protecting the well-being, tranquility, and privacy of the home is certainly of the highest order." *Carey*, 447 U.S. at 471; *see Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988) ("[W]e have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.").

The autodialer restriction directly furthers this compelling privacy interest by generally preventing the use of precisely those technologies that Congress found to be the most intrusive. That Congress subsequently created a narrow exception to allow private callers to use autodialers in making calls that the government could itself make through the same means does not call into doubt the sincerity of the interests underlying the broader restriction.

Plaintiffs' argument that the government-debt exception renders the autodialer provision unconstitutional overlooks both the narrowness of the exception and the nature of the underinclusiveness inquiry. The exception allows private parties to use the technologies at issue with respect to a narrow category of calls to collect debts that the government could itself collect by using the restricted technologies. That limited

provision in no way undermines the conclusion that the autodialer restriction "aims squarely at the conduct most likely to" cause the harms Congress seeks to prevent. *Williams-Yulee*, 135 S. Ct. at 1668. Allowing the use of autodialers and prerecorded voices with respect to the narrow category of calls encompassed by the exception will not expose consumers to the barrage of unwanted calls that Congress documented before the restriction was put in place.

Plaintiffs' insistence that the law is nevertheless underinclusive fails to acknowledge that "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Williams-Yulee*, 135 S. Ct. at 1668 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992)). The Supreme Court has explained that, even when enacting provisions that burden speech, the government may permissibly "focus on [its] most pressing concerns," and the Court has often "upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests." *Id.* (collecting cases). The underinclusiveness inquiry asks whether exceptions to a general rule, or the failure to legislate more broadly, call into doubt the sincerity of the interests supporting the restriction. *Id.*; *Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786, 802 (2011). For the reasons stated above, the government-debt exception raises no such doubt about the legitimacy of the government's privacy interests or the effectiveness of the statute as a whole.

"[U]nlike some laws [the Supreme Court] ha[s] found impermissibly underinclusive," the autodialer restriction "is not riddled with exceptions." *Williams-*

Yulee, 135 S. Ct. at 1669. And the single, narrow exception at issue does not allow "the 'unlimited proliferation' of other types of calls causing the same problem" that the broader restriction was meant to prevent. Br. 19-20 (quoting *Cahaly*, 796 F.3d at 406). As the district court concluded, it is clear that the "government-debt exception does not do appreciable damage to the privacy interests underlying the TCPA," JA 433, and the statute is therefore free from the infirmities found dispositive in *Reed* and *Cahaly*. *See Reed*, 135 S. Ct. at 2231 (concluding that exceptions to the general rule allowed the "unlimited proliferation" of signs and thus wholly undermined the government's stated interest); *Cahaly*, 796 F.3d at 406 (same). For the reasons already discussed, *supra* pp.15-16, exemptions to the autodialer restriction promulgated by the FCC do not properly factor into this analysis.

Plaintiffs are on no firmer ground in cursorily arguing that the law is overinclusive because it prohibits certain autodialed or prerecorded calls that consumers allegedly desire, including the political calls plaintiffs seek to make. "Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy." Pub. L. No. 102-243, § 2(10). Accordingly, it is not the case that political calls do not raise the concerns Congress sought to address through this restriction. Plaintiffs' argument in any event ignores the fact that consumers are free to consent to receive wanted calls.

The district court correctly rejected plaintiffs' contention that Congress could have achieved equally effective results through less restrictive means, such as time-of-day limitations, mandatory disclosure of the caller's identity, disconnection requirements, or do-not-call lists. The court explained why each of plaintiffs' proposed alternatives would not be equally effective as the autodialer restriction in preventing unwanted calls and the attendant invasion of personal privacy. For example, "[t]ime-of-day limitations would not achieve the same privacy objectives" because they would essentially "designate a time for intrusive phone calls" rather than preventing the vast majority of such calls. JA 436. "Likewise, mandatory disclosure of a caller's identity and disconnection requirements would . . . not prevent the privacy intrusion from the phone call in the first place." *Id.* (quotation marks and alteration omitted). "Similarly, do-not-call lists would also not be a plausible less restrictive alternative because placing the burden on consumers to opt-out of intrusive calls, rather than requiring consumers to opt-in, would obviously not be as effective in achieving residential privacy." *Id.* (quotation marks and alteration omitted).

Plaintiffs do not attempt to explain how their proposed alternatives could be equally effective as the autodialer restriction in protecting personal privacy. Instead, they rehash their underinclusiveness arguments, which fail for the reasons stated above. Plaintiffs also cite *Cahaly*, in which this Court held that the state "government ha[d] offered no evidence showing that these alternatives would not be effective in achieving its interest." 796 F.3d at 406. But unlike the State in *Cahaly*, Congress

expressly found that restricting the use of autodialers and prerecorded voices "is the only effective means of protecting telephone consumers from th[e] nuisance and privacy invasion" caused by such calls. Pub. L. No. 102-243, § 2(12). Congress considered alternative means of addressing these concerns and found that they were unlikely to be effective. *See id.* § 2(11). "When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985). Notably, other provisions of federal law already impose many of the types of restrictions plaintiffs suggest. *See, e.g.*, 16 C.F.R. § 310.4(b)(1)(iii) (do-not-call rules), (c) (time-of-day restrictions), (d) (required disclosures); *see also National Fed'n of the Blind*, 420 F.3d at 341-43 (upholding these and related restrictions against First Amendment challenge). Congress reasonably determined that a variety of protections working in tandem are necessary to safeguard consumers from the substantial intrusion into their personal privacy that would otherwise result.

C. If the government-debt exception were constitutionally infirm, the proper remedy would be to sever that provision and uphold the remainder of the statute.

If the Court were to hold that the exception for calls to collect government-backed debt is inconsistent with the First Amendment, the appropriate remedy would be to sever that provision from the remainder of the autodialer restriction. The Supreme Court has made clear that "invalid portions of a statute are to be severed unless it is evident that the Legislature would not have enacted those provisions which

are within its power, independently of that which is not." *INS v. Chadha*, 462 U.S. 919, 931-32 (1983) (quotation marks and alteration omitted). Thus, "the invalid part may be dropped if what is left is fully operative as a law," *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984), and would continue to "function in a manner consistent with the intent of Congress," *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (emphasis omitted).

Here, Congress enacted the autodialer restriction separately from the government-debt exception, and the restriction functioned independently from the exception for roughly twenty-three years. There can thus be no doubt that if the government-debt exception were severed from the remainder of the autodialer restriction, the statute would continue to function independently and in a manner consistent with the intent of Congress. Although the exception itself furthers important government interests, its invalidation would not undermine the privacy interests that the autodialer restriction is meant to protect, and the statute would "remain[] complete and capable of execution." *Gresham v. Swanson*, 866 F.3d 853, 855 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 682 (2018). Congress plainly would have intended the autodialer restriction to continue to stand in the absence of the limited exception at issue—as the restriction did for well over two decades. Accordingly, if the Court were to conclude that the government-debt exception is constitutionally infirm, it should sever that provision from the remainder of the statute.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ROBERT J. HIGDON, JR.
United States Attorney

MARK B. STERN
MICHAEL S. RAAB

s/ Lindsey Powell
LINDSEY POWELL
Attorneys, Appellate Staff
Civil Division, Room 7226
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 616-5372
lindsey.e.powell@usdoj.gov

AUGUST 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 6,426 words, according to the count of Microsoft Word. This brief also complies with the typeface and type-style requirements of Rules 32(a)(5) and (6) because it was prepared in Garamond 14-point font, a proportionally spaced typeface.

s/ Lindsey Powell
LINDSEY POWELL

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Lindsey Powell
LINDSEY POWELL

ADDENDUM

TABLE OF CONTENTS

47 U.S.C. § 227 – Restrictions on use of telephone equipment

(a) Definitions

As used in this section—

(1) The term "automatic telephone dialing system" means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i), shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that—

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)).

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside

the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States, or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through—

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before July 9, 2005; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes—

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d);

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph

(1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements;

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005; and

(H) may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States.

* * *