No. 17-15320

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOAH DUGUID,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee,

and

UNITED STATES,

Intervenor-Appellee.

On Appeal from the United States District Court
for the Northern District of California

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

JOSEPH H. HUNT
Assistant Attorney General

DAVID L. ANDERSON
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:

Legislative Materials:

Other Authorities:

RULE 35 STATEMENT

The United States seeks panel rehearing and rehearing en banc because the panel misapprehended a question of exceptional importance when it erroneously invalidated part of an Act of Congress—and it did so even though its disposition of that constitutional question failed to provide any actual relief to either party and was thus unnecessary to the resolution of this case.

INTRODUCTION AND SUMMARY

Since its enactment in 1991, the Telephone Consumer Protection Act (TCPA) has restricted the use of certain automated technologies when calling individuals' cell phones without their consent. Congress found that these technologies substantially increase the volume and nuisance of such calls, and by restricting their use Congress sought to safeguard individuals' privacy. This Court has twice held that the restriction, as originally enacted, is consistent with the First Amendment.

Facebook's motion to dismiss this suit on First Amendment grounds is premised on a 2015 amendment that allows the use of these technologies in making calls to collect government-backed debts. Facebook urges that the exception is content-based and renders the restriction as a whole subject to strict scrutiny. The government intervened to defend the validity of these provisions and explained that the exception is in any event severable from the concededly valid remainder of the statute. The panel held that the government-debt exception violates the First Amendment but agreed that the provision is severable.

Although the panel's severability analysis is correct, the result of its decision is to partially invalidate an Act of Congress without affording any party meaningful relief. Facebook's alleged misconduct has nothing to do with the government-debt exception, and the invalidation of that provision does not save Facebook from suit. Rather, Facebook is alleged to have violated provisions that have been in place since the TCPA's enactment and that remain in place following the panel's decision.

Under the circumstances, the panel should have avoided the constitutional question by addressing severability first. The Court should assume, *arguendo*, that the exception is invalid, and then, after holding that the exception is severable, conclude that Facebook's motion to dismiss should be denied on that basis without unnecessarily deciding the constitutionality of the statutory provision. Doing so is consistent with longstanding principles counseling the avoidance of constitutional questions when an alternative ground for decision is available.

Even if it had been appropriate to reach the constitutional question, moreover, the panel's holding was in error. The government-debt exception is content-neutral, and the autodialer restriction in any event withstands strict scrutiny. In holding otherwise, the panel partially invalidated an Act of Congress based on a flawed analysis, and that error provides an additional basis for rehearing.

STATEMENT

A. Congress enacted the TCPA in 1991 in response to complaints about the intrusion on personal and residential privacy caused by the growing number of automated phone calls. Pub. L. No. 102-243, § 2(5)-(6), 105 Stat. 2394, 2394 (1991). To protect the privacy interests implicated by these calls, 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). A text message is a "call" for purposes of this provision. *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1041-42 (9th Cir. 2017). In 2015, Congress amended the TCPA 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. Prior to the amendment's enactment, this Court twice held that the autodialer restriction is content-neutral and consistent with the First Amendment. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876 (9th Cir. 2014), *aff'd*, 136 S. Ct. 663 (2016); *Moser v. FCC*, 46 F.3d 970, 975 (9th Cir. 1995).

B. In March 2015, plaintiff Noah Duguid filed suit on behalf of himself and a putative class of similarly situated individuals, alleging that Facebook had used an autodialer to send him text messages without his consent. Duguid alleges that he has never had a Facebook account. Facebook moved to dismiss, arguing that plaintiff had

failed to state a claim, and that the autodialer restriction violates the First Amendment. The United States intervened to defend the constitutionality of the statute. In February 2017, the district court granted Facebook's motion on nonconstitutional grounds, holding that plaintiff had not adequately alleged Facebook's use of an autodialer. *Duguid v. Facebook, Inc.*, No. 15-985, 2017 WL 635117, at *5 (N.D. Cal. Feb. 16, 2017).

C. On June 13, 2019, a panel of this Court reversed and remanded, holding that plaintiff had adequately alleged the use of an autodialer, and that, although the government-debt exception is unconstitutional, it is severable from the concededly valid remainder of the statute that Facebook is alleged to have violated. *Duguid v. Facebook, Inc.*, 926 F.3d 1146. With respect to the constitutional question, the panel first rejected the government's argument that the exception is content-neutral. The panel concluded that the "exception's applicability turns entirely on the content of the communication—i.e., whether it is 'solely to collect a debt owed to or guaranteed by the United States'"—and held that "[t]he identity and relationship of the caller are irrelevant" to that inquiry. *Id.* at 1153 (quoting 47 U.S.C. § 227(b)(1)(A)(iii)). The panel next held that the exception does not withstand strict scrutiny because calls to collect government-backed debts undermine the government's privacy interests, making the autodialer restriction underinclusive. *Id.* at 1155. The panel further held that the exception could be severed from the remainder of the statute because "[e]xcising the debt-collection exception preserves the fundamental purpose of the

TCPA and leaves us with the same content-neutral TCPA that [the Court] upheld . . . in *Moser* and *Gomez*." *Id.* at 1157.

ARGUMENT

The TCPA Is Consistent with the First Amendment, and the Panel Erred in Partially Invalidating a Federal Statute When That Constitutional Question Could Be Avoided.

Rehearing is needed because the panel erroneously invalidated part of a federal statute, and it did so when that holding was unnecessary to the resolution of this case.

There is no dispute as to the validity of the autodialer restriction as initially enacted. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876 (9th Cir. 2014), *aff'd*, 136 S. Ct. 663 (2016); *Moser v. FCC*, 46 F.3d 970, 975 (9th Cir. 1995). That provision was in effect for more than twenty years before the government-debt exception was added, and the exception did not fundamentally alter the character of the statute. As it did prior to the exception's enactment, the autodialer restriction prevents tens of millions of intrusive calls every day, thereby protecting the residential and personal privacy interests that these calls otherwise threaten.

Although Facebook's argument for dismissal has focused on the government-debt exception, Facebook does not allege that it has been harmed by the exception itself, and the panel's invalidation of that provision does not provide Facebook any relief. Under the circumstances, rather than partially invalidating a federal statute in an essentially advisory opinion, the panel should have avoided the constitutional

question by considering the severability analysis first and holding that Facebook's motion should be dismissed on that basis.

A. The government-debt exception comports with the First Amendment, but the panel did not need to reach that question to resolve the dispute in this case. The validity of the autodialer restriction as initially enacted is well established in this Circuit. *See Gomez*, 768 F.3d at 876; *Moser*, 46 F.3d at 975. Because the exception is plainly severable from the undisputedly valid remainder of the statute, the exception's validity is not determinative in this case. Accordingly, the panel should have started with the severability analysis and thereby avoided an unnecessary constitutional ruling.

The panel correctly held that the government-debt exception is severable. *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1156-57 (9th Cir. 2019). "Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability." *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984); *see Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010). "[T]he invalid part may be dropped if what is left is fully operative as a law," *Regan*, 468 U.S. at 653, 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 provided an express severability provision, 47 U.S.C. § 608, and the statute operated for more than two decades before the government-debt exception was added, leaving no doubt that Congress would have intended the

autodialer restriction to continue to function in the exception's absence. The fact that this is a First Amendment case in no way changes the analysis. *See Gresham v. Swanson*, 866 F.3d 853, 855 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 682 (2018) (severing an invalid, content-based exception from an otherwise valid state autodialer restriction).

The government-debt exception has nothing to do with Facebook's conduct in this case. Although Facebook depends on the exception for its constitutional argument, Facebook can obtain relief from this suit only if the Court finds the autodialer provision as a whole unconstitutional—a result that the severability analysis forecloses. Accordingly, rather than address the exception's constitutionality, the panel could have assumed, *arguendo*, that the exception is invalid and held that Facebook's motion to dismiss should nevertheless be denied based on the exception's severability from the remainder of the statute.

This approach is consistent with the rule that courts normally "will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009); *see McCorkle v. United States*, 559 F.2d 1258, 1261 (4th Cir. 1977) ("The canons of constitutional litigation dictate that we initially consider the statutory issue of separability before we turn to the question of constitutionality."). Addressing severability at the outset follows the example of other cases. For instance, the Supreme Court in *INS v. Chadha*, 462 U.S. 919, 931-32 (1983), considered whether a provision was severable from the remainder of the statute before addressing the

constitutionality of the provision in circumstances in which the redressability of the plaintiff's injury turned on the answer to the severability question. And in *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 305 (7th Cir.), *cert. denied*, 137 S. Ct. 2321 (2017), the Seventh Circuit declined to reach the validity of an exception to a state autodialer restriction when it "would do plaintiff no good." *See Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 799-801 (8th Cir. 2006) (declining to consider a First Amendment challenge to severable provisions of a sign ordinance). Here, too, the panel should have avoided a constitutional decision that provided no party relief.

Avoiding the constitutional question does not insulate the government-debt exception from review but rather ensures that the constitutional issue is reached only as necessary and when presented by an appropriate party. An individual receiving unwanted debt-collection calls pursuant to the exception could likely challenge that provision, and the Court could consider the constitutionality of the exception in circumstances in which its validity determines the availability of relief.

B. The panel in any event erred in holding that the government-debt exception is invalid. That conclusion misapprehends the federal government's role in this scheme. It is well established that the government is not subject to the TCPA's restrictions, including the autodialer provision. *Gomez*, 136 S. Ct. at 672. The government-debt exception simply allows private parties to make calls that the government could itself make to collect past-due loans that are backed by the government. Congress has broad authority to decide that, for particular purposes,

private entities should be treated as though they were part of the government. Just as the government is largely unconstrained by the First Amendment when it engages in its own speech, *see Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015); *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009), the government has a freer hand when it enlists the services of private parties to convey the government's message than when it differentiates among purely private speakers. This is true even if the private parties are not acting as the government's agents.

The government-debt exception is principally based on whether the person being called has a specified economic relationship with the federal government. The exception allows calls that pertain directly to that relationship, and that the government could in any event make itself in order to protect the public fisc. The resulting calls serve the government's financial interests by decreasing the likelihood that the government will ultimately be required to make good on its guarantees.

Other courts of appeals have upheld exceptions that single out certain types of speech based on the relationship between the caller and the person being called. For example, the Seventh and Eighth Circuits have upheld state autodialer restrictions that make exceptions for calls by school districts to students or parents, and by employers in connection with employee work schedules. *See Gresham*, 866 F.3d at 854; *Patriotic Veterans*, 845 F.3d at 304. Here, it is the government rather than the caller that has the pertinent relationship with the person being called. But that fact does not change the analysis. In determining whether a provision is content-based, the question is whether

the law's applicability turns entirely on the content of the regulated speech. Where a statute's applicability turns largely on the existence of a specified relationship and not solely on the subject matter of the call, the provision is not content-based. *See Patriotic Veterans*, 845 F.3d at 304; *Van Bergen v. Minnesota*, 59 F.3d 1541, 1550 (8th Cir. 1995).

For the government-debt exception to apply, a call need not refer to the necessary government relationship, it need only be true that the relationship exists. Thus, a person could receive two identical debt-collection calls that follow precisely the same script—for example, "Your student loan from Citibank is past due; please visit your online account to make a payment"—and the TCPA might treat the calls differently depending on the underlying relationship between the government and the person receiving the call. The fact that the exception may treat identical calls differently underscores that the provision principally turns on the existence of a particular economic relationship between the government and a debtor, and not on the content of the call.

In order to fall within the exception, a call must additionally be germane to the specified economic relationship—that is, it must concern the collection of a government-backed debt and not an unrelated matter. The requirement of germaneness, and the narrow tailoring that it reflects, does not serve to make the exception content-based. Many federal statutes regulate communications concerning discrete spheres of economic activity. The Fair Debt Collection Practices Act, for example, regulates debt-collection activities, but not efforts to induce consumers to

borrow money. *See* 15 U.S.C. §§ 1692a(6)(C), 1692b-1692g. And the securities laws regulate securities transactions and related activities, but not the selling of cars or other goods. *See* 15 U.S.C. § 77w. To the extent those laws regulate communicative activity, they are subject to First Amendment scrutiny. But no court has suggested that they are subject to *strict* scrutiny simply because they regulate speech related to particular, narrowly defined spheres of commercial activity. That is so even though the content of the regulated speech will vary according to the nature of the economic activity involved (*e.g.*, a person who is trying to sell securities will use different words than a person who is trying to sell cars). The same is true here. The fact that the government-debt exception is concerned with calls made to prevent the public losses that may result from a particular economic relationship between the government and a debtor does not serve to make the law content-based.

Because its application does not turn solely on the content of the speech at issue, the government-debt exception is unlike the ordinance in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015), the applicability of which turned entirely on what was being said. At issue in *Reed* was a sign ordinance that exempted twenty-three categories of signs from a general permit requirement and subjected those signs to different rules based solely on their message. 135 S. Ct. at 2224-25. One did not need to consider anything other than the content of the speech at issue to determine how that law applied. 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). Because the same is not true of the government-debt exception, it is content-neutral and subject only to intermediate scrutiny—a standard of review that it readily withstands for the same reasons that it withstands strict scrutiny, as discussed below.

C. The autodialer restriction would withstand strict scrutiny if that standard applied because the statute is narrowly tailored to further the government's compelling interest in protecting residential and personal privacy. 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 less advanced 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*, 46 F.3d at 972 (quotation marks omitted).

The technologies supporting automated calls have advanced since the TCPA was enacted, and the potential volume and nuisance of such calls have likewise

increased. When coupled with the now-pervasive use of cell phones, automated calls threaten to disrupt nearly every aspect of our lives if not adequately regulated.

The government's interest in "protecting the well-being, tranquility, and privacy of the home is certainly of the highest order," *Carey v. Brown*, 447 U.S. 455, 471 (1980), and that compelling interest also extends beyond the residential space, *see Gomez*, 768 F.3d at 876. Unwanted calls intrude on our privacy in the most intimate of places, including hospitals, places of worship, and places of work, and it is not always an option simply to turn off one's phone.

The autodialer restriction is narrowly tailored to protect against such intrusions. Even with the recent addition of the government-debt exception, the restriction does substantial work in preventing the deluge of unwanted calls that would otherwise result by imposing a high-tech time, place, or manner restriction that targets precisely those types of calls that Congress found to cause the greatest intrusion. There is no dispute regarding the validity of the restriction as originally enacted, *see Gomez*, 768 F.3d at 876; *Moser*, 46 F.3d at 974-75, and the limited number of additional calls allowed by the government-debt exception—calls that Congress singled out in order to protect the public fisc—do not do appreciable harm to the privacy interests that the restriction seeks to protect.

Notwithstanding the broader statutory context, the panel "focus[ed] [its] analysis on the content-based differentiation—the debt-collection exception—*not* on the TCPA overall." *Duguid*, 926 F.3d at 1155. That framing misses the mark.

Facebook challenged the constitutionality of the autodialer restriction, and the restriction is the relevant unit of analysis. Indeed, the government-debt exception could not itself be the sole focus of a First Amendment inquiry because it in no way limits speech or expression. The exception is thus relevant to the First Amendment inquiry only insofar as it might be thought to call the validity of the autodialer restriction into doubt. The traditional framing of the underinclusivity inquiry underscores this focus by asking whether an exception "raise[s] 'doubts about whether the government is in fact pursuing the interest it invokes'" in support of a restriction on speech. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015); *see Reed*, 135 S. Ct. at 2232 (holding that a "law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited").

The question is thus whether the autodialer restriction, inclusive of any exceptions, is adequately tailored to the government's interests. The panel erred in answering that question in the negative. In considering the statute as a whole, the panel focused on the fact that calls to collect government-backed debts can cause the same sort of privacy intrusion that the autodialer restriction is meant to prevent. *Duguid*, 926 F.3d at 1155. That analysis overlooks two important points. First, the automated calls allowed by the exception are distinguishable from those that the statute prohibits because the former advance the government's interest in protecting the public fisc. Accordingly, the statute is not guilty of treating similar calls

differently. Second, the government-debt exception allows only a limited number of calls not already allowed by the concededly valid remainder of the statute, and therefore does not do appreciable harm to the privacy interests that the statute protects. Even without the government-debt exception, the autodialer restriction allows debt-collection calls that are made by the government or its agents, or with the consent of the party being called.[1] The only additional calls authorized by the exception are those made by private entities that are not acting pursuant to a federal contract and that have not obtained the debtor's consent. There is no reason to think the number of such calls is substantial.

An exception that allows only a small number of potentially intrusive communications in relation to those that the statute prevents—and that does so in furtherance of an independent government interest—does not raise the same underinclusivity concerns as the ordinance in *Reed*. The exceptions to that ordinance allowed the "unlimited proliferation" of speech that presented precisely the type of harm the statute was meant to prevent, and there was no basis for the city's uneven treatment of different types of speech. *Reed*, 135 S. Ct. at 2231. The government-debt exception presents no such problem. It allows only incrementally more automated calls than those already allowed by the restriction itself. And the additional

[1] A debtor can give consent by, for example, providing a cell phone number in connection with a loan application. *See* 23 FCC Rcd. 559, 564, ¶ 9 (2008).

calls authorized by the exception further the government's interest in protecting the public fisc, thus distinguishing them from other types of calls.

CONCLUSION

For the foregoing reasons, the petition for panel rehearing and rehearing en banc should be granted.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

DAVID L. ANDERSON
United States Attorney

MARK B. STERN
MICHAEL S. RAAB
s/ Lindsey Powell
LINDSEY POWELL
(202) 616-5372
Attorneys, Appellate Staff
Civil Division, Room 7237
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

JULY 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing petition complies with Federal Rules of Appellate Procedure 32(a)(5)(A) and 35(b)(2)(A) because it uses a proportionately spaced 14-point font and contains 3,899 words according to the count of Microsoft Word.

s/ Lindsey Powell
LINDSEY POWELL

CERTIFICATE OF SERVICE

On July 29, 2019, I electronically filed the foregoing petition with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on counsel of record for all parties through the appellate CM/ECF system.

s/ Lindsey Powell
LINDSEY POWELL