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Manuel Farach

Barr v. American Association Of Political Consultants, Inc., Case No. 19–631 (2020).
The federal government cannot exempt itself from the anti-robocall provisions of the Telephone Consumer Protection Act of 1991, 47 U. S. C. §227(b)(1)(A)(iii).

Trichell v. Midland Credit Management, Inc., Case No. 18-14144 (11th Cir. 2020).
Litigants who claim injury under the Federal Debt Collection Practices Act, 15 U.S.C. § 1692(e), arising out of a misleading communication lack Article III standing if they were not misled, i.e., did not rely on the misleading communication.

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An "Asset Management Agreement" that permits delegation of "certain aspects of asset resolution tasks to a workout specialist, loan consultant, asset management advisor, real estate broker or agent, attorney, or others, to be determined by [assignor]" does not, under the principle of *ejusdem generis*, limit the ability of assignor to assign foreclosure rights to a third party.

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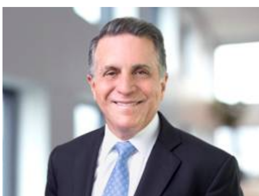

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BARR, ATTORNEY GENERAL, ET AL. *v*. AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 19–631. Argued May 6, 2020—Decided July 6, 2020

In response to consumer complaints, Congress passed the Telephone Consumer Protection Act of 1991 (TCPA) to prohibit, *inter alia*, almost all robocalls to cell phones. 47 U. S. C. §227(b)(1)(A)(iii). In 2015, Congress amended the robocall restriction, carving out a new government-debt exception that allows robocalls made solely to collect a debt owed to or guaranteed by the United States. 129 Stat. 588. The American Association of Political Consultants and three other organizations that participate in the political system filed a declaratory judgment action, claiming that §227(b)(1)(A)(iii) violated the First Amendment. The District Court determined that the robocall restriction with the government-debt exception was content-based but that it survived strict scrutiny because of the Government's compelling interest in collecting debt. The Fourth Circuit vacated the judgment, agreeing that the robocall restriction with the government-debt exception was a content-based speech restriction, but holding that the law could not withstand strict scrutiny. The court invalidated the government-debt exception and applied traditional severability principles to sever it from the robocall restriction.

Held: The judgment is affirmed.

923 F. 3d 159, affirmed.

JUSTICE KAVANAUGH, joined by THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO, concluded in Part II that the 2015 government-debt exception violates the First Amendment. Pp. 6–9.

(a) The Free Speech Clause provides that government generally "has no power to restrict expression because of its message, its ideas, its

subject matter, or its content." *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 95. Under this Court's precedents, content-based laws are subject to strict scrutiny. See *Reed* v. *Town of Gilbert*, 576 U. S. 155, 165. Section 227(b)(1)(A)(iii)'s robocall restriction, with the government-debt exception, is content based because it favors speech made for the purpose of collecting government debt over political and other speech. Pp. 6–7.

(b) The Government's arguments for deeming the statute content-neutral are unpersuasive. First, §227(b)(1)(A)(iii) does not draw distinctions based on speakers, and even if it did, that would not "automatically render the distinction content neutral." *Reed*, 576 U. S., at 170. Second, the law here focuses on whether the caller is *speaking* about a particular topic and not, as the Government contends, simply on whether the caller is engaged in a particular economic activity. See *Sorrell* v. *IMS Health Inc.,* 564 U. S. 552, 563–564. Third, while "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech," this law "does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers." *Id*., at 567.

(c) As the Government concedes, the robocall restriction with the government-debt exception cannot satisfy strict scrutiny. The Government has not sufficiently justified the differentiation between government-debt collection speech and other important categories of robocall speech, such as political speech, issue advocacy, and the like. Pp. 7–9.

JUSTICE KAVANAUGH, joined by THE CHIEF JUSTICE and JUSTICE ALITO, concluded in Part III that the 2015 government-debt exception is severable from the underlying 1991 robocall restriction. The TCPA is part of the Communications Act, which has contained an express severability clause since 1934. Even if that clause did not apply to the exception, the presumption of severability would still apply. See, *e.g., Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477. The remainder of the law is capable of functioning independently and would be fully operative as a law. Severing this relatively narrow exception to the broad robocall restriction fully cures the First Amendment unequal treatment problem and does not raise any other constitutional problems. Pp. 9–24.

JUSTICE SOTOMAYOR concluded that the government-debt exception fails under intermediate scrutiny and is severable from the rest of the Act. Pp. 1–2.

JUSTICE BREYER, joined by JUSTICE GINSBURG and JUSTICE KAGAN, would have upheld the government-debt exception, but given the contrary majority view, agreed that the provision is severable from the rest of the statute. Pp. 11–12.

JUSTICE GORSUCH concluded that content-based restrictions on

speech are subject to strict scrutiny, that the Telephone Consumer Protection Act's rule against cellphone robocalls is a content-based restriction, and that this rule fails strict scrutiny and therefore cannot be constitutionally enforced. Pp. 1–4.

KAVANAUGH, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and ALITO, J., joined, and in which THOMAS, J., joined as to Parts I and II. SOTOMAYOR, J., filed an opinion concurring in the judgment. BREYER, J., filed an opinion concurring in the judgment with respect to severability and dissenting in part, in which GINSBURG and KAGAN, JJ., joined. GORSUCH, J., filed an opinion concurring in the judgment in part and dissenting in part, in which THOMAS, J., joined as to Part II.

NOTICE: This opinion is subject to formal resvision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 19–631

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL., PETITIONERS *v.* AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[July 6, 2020]

JUSTICE KAVANAUGH announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE ALITO join, and in which JUSTICE THOMAS joins as to Parts I and II.

Americans passionately disagree about many things. But they are largely united in their disdain for robocalls. The Federal Government receives a staggering number of complaints about robocalls—3.7 million complaints in 2019 alone. The States likewise field a constant barrage of complaints.

For nearly 30 years, the people's representatives in Congress have been fighting back. As relevant here, the Telephone Consumer Protection Act of 1991, known as the TCPA, generally prohibits robocalls to cell phones and home phones. But a 2015 amendment to the TCPA allows robocalls that are made to collect debts owed to or guaranteed by the Federal Government, including robocalls made to collect many student loan and mortgage debts.

This case concerns robocalls to cell phones. Plaintiffs in this case are political and nonprofit organizations that want

to make political robocalls to cell phones. Invoking the First Amendment, they argue that the 2015 government-debt exception unconstitutionally favors debt-collection speech over political and other speech. As relief from that unconstitutional law, they urge us to invalidate the entire 1991 robocall restriction, rather than simply invalidating the 2015 government-debt exception.

Six Members of the Court today conclude that Congress has impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment. See *infra*, at 6–9; *post*, at 1–2 (SOTOMAYOR, J., concurring in judgment); *post*, at 1, 3 (GORSUCH, J., concurring in judgment in part and dissenting in part). Applying traditional severability principles, seven Members of the Court conclude that the entire 1991 robocall restriction should not be invalidated, but rather that the 2015 government-debt exception must be invalidated and severed from the remainder of the statute. See *infra*, at 10–25; *post*, at 2 (SOTOMAYOR, J., concurring in judgment); *post*, at 11–12 (BREYER, J., concurring in judgment with respect to severability and dissenting in part). As a result, plaintiffs still may not make political robocalls to cell phones, but their speech is now treated equally with debt-collection speech. The judgment of the U. S. Court of Appeals for the Fourth Circuit is affirmed.

I

A

In 1991, Congress passed and President George H. W. Bush signed the Telephone Consumer Protection Act. The Act responded to a torrent of vociferous consumer complaints about intrusive robocalls. A growing number of telemarketers were using equipment that could automatically dial a telephone number and deliver an artificial or prerecorded voice message. At the time, more than 300,000 solicitors called more than 18 million Americans every day.

TCPA, §2, ¶¶3, 6, 105 Stat. 2394, note following 47 U. S. C. §227. Consumers were "outraged" and considered robocalls an invasion of privacy "regardless of the content or the initiator of the message." ¶¶6, 10.

A leading Senate sponsor of the TCPA captured the zeitgeist in 1991, describing robocalls as "the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall." 137 Cong. Rec. 30821 (1991).

In enacting the TCPA, Congress found that banning robocalls was "the only effective means of protecting telephone consumers from this nuisance and privacy invasion." TCPA §2, ¶12. To that end, the TCPA imposed various restrictions on the use of automated telephone equipment. §3(a), 105 Stat. 2395. As relevant here, one restriction prohibited "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 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." *Id.*, at 2395–2396 (emphasis added). That provision is codified in §227(b)(1)(A)(iii) of Title 47 of the U. S. Code.

In plain English, the TCPA prohibited almost all robocalls to cell phones.[1]

[1] The robocall restriction, as implemented by the Federal Communications Commission, bars both automated voice calls and automated text messages. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14115 (2003). The robocall restriction applies to "persons," which does not include the Government itself. See 47 U. S. C. §153(39). Congress has also authorized the FCC to promulgate regulatory exceptions to the robocall restriction. See §227(b)(2)(C). The FCC has authorized various exceptions over the years, such as exceptions for package-delivery notifications and certain

Twenty-four years later, in 2015, Congress passed and President Obama signed the Bipartisan Budget Act. In addition to making other unrelated changes to the U. S. Code, that Act amended the TCPA's restriction on robocalls to cell phones. It stated:

> "(a) IN GENERAL.—Section 227(b) of the Communications Act of 1934 (47 U. S. C. 227(b)) is amended—
>
> (1) in paragraph (1)—
>
> (A) in subparagraph (A)(iii), by inserting ', unless such call is made solely to collect a debt owed to or guaranteed by the United States' after 'charged for the call.'" 129 Stat. 588.[2]

In other words, Congress carved out a new government-debt exception to the general robocall restriction.

The TCPA imposes tough penalties for violating the robocall restriction. Private parties can sue to recover up to $1,500 per violation or three times their actual monetary losses, which can add up quickly in a class action. §227(b)(3). States may bring civil actions against robocallers on behalf of their citizens. §227(g)(1). And the

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healthcare-related calls. In this case, plaintiffs do not separately challenge the validity of the FCC's regulatory exceptions.

[2] After the 2015 amendment, §227(b)(1) now provides:

"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—

. . . . .

(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*." (Emphasis added.)

Federal Communications Commission can seek forfeiture penalties for willful or repeated violations of the statute. §503(b).

B

Plaintiffs in this case are the American Association of Political Consultants and three other organizations that participate in the political system. Plaintiffs and their members make calls to citizens to discuss candidates and issues, solicit donations, conduct polls, and get out the vote. Plaintiffs believe that their political outreach would be more effective and efficient if they could make robocalls to cell phones.[3] But because plaintiffs are not in the business of collecting government debt, §227(b)(1)(A)(iii) prohibits them from making those robocalls.

Plaintiffs filed a declaratory judgment action against the U. S. Attorney General and the FCC, claiming that §227(b)(1)(A)(iii) violated the First Amendment. The U. S. District Court for the Eastern District of North Carolina determined that the robocall restriction with the government-debt exception was a content-based speech regulation, thereby triggering strict scrutiny. But the court concluded that the law survived strict scrutiny, even with the content-based exception, because of the Government's compelling interest in collecting debt.

The U. S. Court of Appeals for the Fourth Circuit vacated the judgment. *American Assn. of Political Consultants, Inc.* v. *FCC*, 923 F. 3d 159 (2019). The Court of Appeals agreed with the District Court that the robocall restriction with the government-debt exception was a content-based speech restriction. But the court held that the law could not withstand strict scrutiny and was therefore unconstitutional. The Court of Appeals then applied traditional severability

[3] Plaintiffs have not challenged the TCPA's separate restriction on robocalls to home phones. See 47 U. S. C. §227(b)(1)(B).

principles and concluded that the government-debt exception was severable from the underlying robocall restriction. The Court of Appeals therefore invalidated the government-debt exception and severed it from the robocall restriction.

The Government petitioned for a writ of certiorari because the Court of Appeals invalidated part of a federal statute—namely, the government-debt exception. Plaintiffs supported the petition, arguing from the other direction that the Court of Appeals did not go far enough in providing relief and should have invalidated the entire 1991 robocall restriction rather than simply invalidating the 2015 government-debt exception. We granted certiorari. 589 U. S. ___ (2020).

II

Ratified in 1791, the First Amendment provides that Congress shall make no law "abridging the freedom of speech." Above "all else, the First Amendment means that government" generally "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972).

The Court's precedents allow the government to "constitutionally impose reasonable time, place, and manner regulations" on speech, but the precedents restrict the government from discriminating "in the regulation of expression on the basis of the content of that expression." *Hudgens* v. *NLRB*, 424 U. S. 507, 520 (1976). Content-based laws are subject to strict scrutiny. See *Reed* v. *Town of Gilbert*, 576 U. S. 155, 163–164 (2015). By contrast, content-neutral laws are subject to a lower level of scrutiny. *Id.*, at 166.

Section 227(b)(1)(A)(iii) generally bars robocalls to cell phones. Since the 2015 amendment, the law has exempted robocalls to collect government debt. The initial First Amendment question is whether the robocall restriction,

with the government-debt exception, is content-based. The answer is yes.

As relevant here, a law is content-based if "a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed,* 576 U. S., at 163. That description applies to a law that "singles out specific subject matter for differential treatment." *Id.*, at 169. For example, "a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." *Ibid.*; see, *e.g.*, *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 116 (1991); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 229–230 (1987); *Widmar* v. *Vincent*, 454 U. S. 263, 265, 276–277 (1981); *Carey* v. *Brown*, 447 U. S. 455, 459–463 (1980); *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 211–212 (1975); *Mosley*, 408 U. S., at 95–96.

Under §227(b)(1)(A)(iii), the legality of a robocall turns on whether it is "made solely to collect a debt owed to or guaranteed by the United States." A robocall that says, "Please pay your government debt" is legal. A robocall that says, "Please donate to our political campaign" is illegal. That is about as content-based as it gets. Because the law favors speech made for collecting government debt over political and other speech, the law is a content-based restriction on speech.

The Government advances three main arguments for deeming the statute content-neutral, but none is persuasive.

First, the Government suggests that §227(b)(1)(A)(iii) draws distinctions based on speakers (authorized debt collectors), not based on content. But that is not the law in front of us. This statute singles out calls "made solely to collect a debt owed to or guaranteed by the United States," not all calls from authorized debt collectors.

In any event, "the fact that a distinction is speaker based" does not "automatically render the distinction content neutral." *Reed*, 576 U. S., at 170; *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 563–564 (2011). Indeed, the Court has held that "'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.'" *Reed*, 576 U. S., at 170 (quoting *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 658 (1994)).

Second, the Government argues that the legality of a robocall under the statute depends simply on whether the caller is engaged in a particular economic activity, not on the content of speech. We disagree. The law here focuses on whether the caller is *speaking* about a particular topic. In *Sorrell*, this Court held that a law singling out pharmaceutical marketing for unfavorable treatment was content-based. 564 U. S., at 563–564. So too here.

Third, according to the Government, if this statute is content-based because it singles out debt-collection speech, then so are statutes that *regulate* debt collection, like the Fair Debt Collection Practices Act. See 15 U. S. C. §1692 *et seq*.[4] That slippery-slope argument is unpersuasive in this case. As we explained in *Sorrell*, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." 564 U. S., at 567. The law here, like the Vermont law in *Sorrell*, "does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers." *Ibid.* The Government's concern is understandable, but the courts have generally been able to distinguish impermissible content-based speech restrictions from traditional or or-

[4] This opinion uses the term "debt-collection speech" and "debt-collection robocalls" as shorthand for *government*-debt collection speech and robocalls.

dinary economic regulation of commercial activity that imposes incidental burdens on speech. The issue before us concerns only robocalls to cell phones. Our decision today on that issue fits comfortably within existing First Amendment precedent. Our decision is not intended to expand existing First Amendment doctrine or to otherwise affect traditional or ordinary economic regulation of commercial activity.

In short, the robocall restriction with the government-debt exception is content-based. Under the Court's precedents, a "law that is content based" is "subject to strict scrutiny." *Reed*, 576 U. S., at 165. The Government concedes that it cannot satisfy strict scrutiny to justify the government-debt exception. We agree. The Government's stated justification for the government-debt exception is collecting government debt. Although collecting government debt is no doubt a worthy goal, the Government concedes that it has not sufficiently justified the differentiation between government-debt collection speech and other important categories of robocall speech, such as political speech, charitable fundraising, issue advocacy, commercial advertising, and the like.[5]

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[5] In his scholarly separate opinion, JUSTICE BREYER explains how he would apply freedom of speech principles. But the Court's longstanding precedents, which we carefully follow here, have not adopted that approach. In essence, therefore, JUSTICE BREYER argues for overruling several of the Court's First Amendment cases, including the recent 2015 decision in *Reed* v. *Town of Gilbert*, 576 U. S. 155 (2015). Before overruling precedent, the Court usually requires that a party ask for overruling, or at least obtains briefing on the overruling question, and then the Court carefully evaluates the traditional *stare decisis* factors. Here, no party has asked for overruling, and JUSTICE BREYER's opinion does not analyze the usual *stare decisis* factors. JUSTICE BREYER's opinion therefore discounts both the Court's precedent and the Court's precedent on precedent.

III

Having concluded that the 2015 government-debt exception created an unconstitutional exception to the 1991 robocall restriction, we must decide whether to invalidate the entire 1991 robocall restriction, or instead to invalidate and sever the 2015 government-debt exception. Before we apply ordinary severability principles, we must address plaintiffs' broader initial argument for why the entire 1991 robocall restriction is unconstitutional.

A

Plaintiffs correctly point out that the Government's asserted interest for the 1991 robocall restriction is consumer privacy. But according to plaintiffs, Congress's willingness to enact the government-debt exception in 2015 betrays a newfound lack of genuine congressional concern for consumer privacy. As plaintiffs phrase it, the 2015 exception "undermines the credibility" of the Government's interest in consumer privacy. Tr. of Oral Arg. 38. Plaintiffs further contend that if Congress no longer has a genuine interest in consumer privacy, then the underlying 1991 robocall restriction is no longer justified (presumably under any level of heightened scrutiny) and is therefore now unconstitutional.

Plaintiffs' argument is not without force, but we ultimately disagree with it. It is true that the Court has recognized that exceptions to a speech restriction "may diminish the credibility of the government's rationale for restricting speech in the first place." *City of Ladue* v. *Gilleo*, 512 U. S. 43, 52 (1994). But here, Congress's addition of the government-debt exception in 2015 does not cause us to doubt the credibility of Congress's continuing interest in protecting consumer privacy.

After all, the government-debt exception is only a slice of the overall robocall landscape. This is not a case where a

restriction on speech is littered with exceptions that substantially negate the restriction. On the contrary, even after 2015, Congress has retained a very broad restriction on robocalls. The pre-1991 statistics on robocalls show that a variety of organizations collectively made a huge number of robocalls. And there is no reason to think that the incentives for those organizations—and many others—to make robocalls has diminished in any way since 1991. The continuing robocall restriction proscribes *tens of millions* of would-be robocalls that would otherwise occur *every day*. Congress's continuing broad prohibition of robocalls amply demonstrates Congress's continuing interest in consumer privacy.

The simple reality, as we assess the legislative developments, is that Congress has competing interests. Congress's growing interest (as reflected in the 2015 amendment) in collecting government debt does not mean that Congress suddenly lacks a genuine interest in restricting robocalls. Plaintiffs seem to argue that Congress must be interested either in debt collection or in consumer privacy. But that is a false dichotomy, as we see it. As is not infrequently the case with either/or questions, the answer to this either/or question is "both." Congress is interested both in collecting government debt and in protecting consumer privacy.

Therefore, we disagree with plaintiffs' broader initial argument for holding the entire 1991 robocall restriction unconstitutional.

B

Plaintiffs next focus on ordinary severability principles. Applying those principles, the question before the Court is whether (i) to invalidate the entire 1991 robocall restriction, as plaintiffs want, or (ii) to invalidate just the 2015 government-debt exception and sever it from the remainder of the statute, as the Government wants.

We agree with the Government that we must invalidate the 2015 government-debt exception and sever that exception from the remainder of the statute. To explain why, we begin with general severability principles and then apply those principles to this case.

1

When enacting a law, Congress sometimes expressly addresses severability. For example, Congress may include a *severability* clause in the law, making clear that the unconstitutionality of one provision does not affect the rest of the law. See, *e.g.*, 12 U. S. C. §5302; 15 U. S. C. §78gg; 47 U. S. C. §608. Alternatively, Congress may include a *nonseverability* clause, making clear that the unconstitutionality of one provision means the invalidity of some or all of the remainder of the law, to the extent specified in the text of the nonseverability clause. See, *e.g.*, 4 U. S. C. §125; note following 42 U. S. C. §300aa–1; 94 Stat. 1797.

When Congress includes an express severability or nonseverability clause in the relevant statute, the judicial inquiry is straightforward. At least absent extraordinary circumstances, the Court should adhere to the text of the severability or nonseverability clause. That is because a severability or nonseverability clause leaves no doubt about what the enacting Congress wanted if one provision of the law were later declared unconstitutional. A severability clause indicates "that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 686 (1987). And a nonseverability clause does the opposite.

On occasion, a party will nonetheless ask the Court to override the text of a severability or nonseverability clause on the ground that the text does not reflect Congress's "actual intent" as to severability. That kind of argument may

have carried some force back when courts paid less attention to statutory text as the definitive expression of Congress's will. But courts today zero in on the precise statutory text and, as a result, courts hew closely to the text of severability or nonseverability clauses. See *Seila Law LLC* v. *Consumer Financial Protection Bureau*, *ante*, at 33 (plurality opinion); cf. *Milner* v. *Department of Navy*, 562 U. S. 562, 569–573 (2011).[6]

Of course, when enacting a law, Congress often does not include either a severability clause or a nonseverability clause.

In those cases, it is sometimes said that courts applying severability doctrine should search for other indicia of congressional intent. For example, some of the Court's cases declare that courts should sever the offending provision unless "the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines*, 480 U. S., at 685. But experience shows that this formulation often leads to an analytical dead end. That is because courts are not well equipped to imaginatively reconstruct a prior Congress's hypothetical intent. In other words, absent a severability or nonseverability clause, a court often cannot really know what the two Houses of Congress and the President from the time of original enactment of a law would have wanted if one provision of a law were later declared unconstitutional.

The Court's cases have instead developed a strong pre-

[6] When Congress enacts a law with a severability clause and later adds new provisions to that statute, the severability clause applies to those new provisions to the extent dictated by the text of the severability clause. Likewise, when Congress has *not* included a severability clause in initial legislation, Congress can subsequently enact a severability clause that applies to the existing statute to the extent dictated by the text of the later-added severability clause. In both scenarios, the text of the severability clause remains central to the severability inquiry.

sumption of severability. The Court presumes that an unconstitutional provision in a law is severable from the remainder of the law or statute. For example, in *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, the Court set forth the "normal rule": "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." 561 U. S. 477, 508 (2010) (internal quotation marks omitted); see also *Seila Law*, *ante*, at 32 (same). In *Regan* v. *Time, Inc.*, the plurality opinion likewise described a "presumption" in "favor of severability" and stated that the Court should "refrain from invalidating more of the statute than is necessary." 468 U. S. 641, 652–653 (1984).

The Court's power and preference to partially invalidate a statute in that fashion has been firmly established since *Marbury* v. *Madison*. There, the Court invalidated part of §13 of the Judiciary Act of 1789. 1 Cranch 137, 179–180 (1803). The Judiciary Act did not contain a severability clause. But the Court did not proceed to invalidate the entire Judiciary Act. As Chief Justice Marshall later explained, if any part of an Act is "unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution of the United States." *Bank of Hamilton* v. *Lessee of Dudley*, 2 Pet. 492, 526 (1829); see also *Dorchy* v. *Kansas*, 264 U. S. 286, 289–290 (1924) ("A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad"); *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 490 (1900) ("one section of a statute may be repugnant to the Constitution without rendering the whole act void").

From *Marbury* v. *Madison* to the present, apart from some isolated detours mostly in the late 1800s and early 1900s, the Court's remedial preference after finding a provision of a federal law unconstitutional has been to salvage

rather than destroy the rest of the law passed by Congress and signed by the President. The Court's precedents reflect a decisive preference for surgical severance rather than wholesale destruction, even in the absence of a severability clause.

The Court's presumption of severability supplies a workable solution—one that allows courts to avoid judicial policymaking or *de facto* judicial legislation in determining just how much of the remainder of a statute should be invalidated.[7] The presumption also reflects the confined role of the Judiciary in our system of separated powers—stated otherwise, the presumption manifests the Judiciary's respect for Congress's legislative role by keeping courts from unnecessarily disturbing a law apart from invalidating the provision that is unconstitutional. Furthermore, the presumption recognizes that plaintiffs who successfully challenge one provision of a law may lack standing to challenge *other* provisions of that law. See *Murphy* v. *National Collegiate Athletic Assn.*, 584 U. S. ___, ___–___ (2018) (THOMAS, J., concurring) (slip op., at 5–6).

Those and other considerations, taken together, have steered the Court to a presumption of severability. Applying the presumption, the Court invalidates and severs unconstitutional provisions from the remainder of the law rather than razing whole statutes or Acts of Congress. Put in common parlance, the tail (one unconstitutional provision)

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[7] If courts had broad license to invalidate more than just the offending provision, a reviewing court would have to consider what other provisions to invalidate: the whole section, the chapter, the statute, the public law, or something else altogether. Courts would be largely at sea in making that determination, and usually could not do it in a principled way. Here, for example, would a court invalidate all or part of the Bipartisan Budget Act of 2015 rather than all or part of the 1991 TCPA? After all, that 2015 Bipartisan Budget Act, not the 1991 TCPA, added the constitutionally problematic government-debt exception. That is the kind of free-wheeling policy question that the Court's presumption of severability avoids.

does not wag the dog (the rest of the codified statute or the Act as passed by Congress). Constitutional litigation is not a game of gotcha against Congress, where litigants can ride a discrete constitutional flaw in a statute to take down the whole, otherwise constitutional statute. If the rule were otherwise, the entire Judiciary Act of 1789 would be invalid as a consequence of *Marbury* v. *Madison*.[8]

Before severing a provision and leaving the remainder of a law intact, the Court must determine that the remainder of the statute is "capable of functioning independently" and

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[8] The term "invalidate" is a common judicial shorthand when the Court holds that a particular provision is unlawful and therefore may not be enforced against a plaintiff. To be clear, however, when it "invalidates" a law as unconstitutional, the Court of course does not formally repeal the law from the U. S. Code or the Statutes at Large. Instead, in Chief Justice Marshall's words, the Court recognizes that the Constitution is a "superior, paramount law," and that "a legislative act contrary to the constitution is not law" at all. *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). The Court's authority on this front "amounts to little more than the negative power to disregard an unconstitutional enactment." *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923).

JUSTICE THOMAS's thoughtful approach to severability as outlined in *Murphy* v. *National Collegiate Athletic Assn.*, 584 U. S. ___, ___–___ (2018) (slip op., at 2–6), and *Seila Law LLC* v. *Consumer Financial Protection Bureau*, *ante*, at 14–24, (joined by JUSTICE GORSUCH in the latter) would simply enjoin enforcement of a law as applied to the particular plaintiffs in a case. Under either the Court's approach or JUSTICE THOMAS's approach, an offending provision formally remains on the statute books (at least unless Congress also formally repeals it). Under either approach, the formal remedy afforded to the plaintiff is an injunction, declaration, or damages. One difference between the two approaches is this: Under the Court's approach, a provision is declared invalid and cannot be lawfully enforced against others. Under JUSTICE THOMAS's approach, the Court's ruling that a provision cannot be enforced against the plaintiff, plus executive respect in its enforcement policies for controlling decisional law, plus vertical and horizontal *stare decisis* in the courts, will mean that the provision will not and cannot be lawfully enforced against others. The Court and JUSTICE THOMAS take different analytical paths, but in many cases, the different paths lead to the same place.

thus would be "fully operative" as a law. *Seila Law*, *ante*, at 33; see *Murphy*, 584 U. S., at ___–___ (slip op., at 25–30). But it is fairly unusual for the remainder of a law not to be operative.[9]

2

We next apply those general severability principles to this case.

Recall how this statute came together. Passed by Congress and signed by President Franklin Roosevelt in 1934, the Communications Act is codified in Title 47 of the U. S. Code. The TCPA of 1991 amended the Communications Act by adding the robocall restriction, which is codified at §227(b)(1)(A)(iii) of Title 47. The Bipartisan Budget Act of 2015 then amended the Communications Act by adding the government-debt exception, which is codified along with the robocall restriction at §227(b)(1)(A)(iii) of Title 47.

Since 1934, the Communications Act has contained an express severability clause: "If 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 (emphasis added). The "chapter" referred to in the severability clause is Chapter 5 of Title 47. And Chapter 5 in turn encompasses §151 to §700 of Title 47, and therefore covers §227 of Title 47, the provision with the robocall restriction and the government-debt exception.[10]

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[9] On occasion, of course, it may be that a particular surrounding or connected provision is not operative in the absence of the unconstitutional provision, even though the rest of the law would be operative. That scenario may require severance of somewhat more than just the offending provision, albeit not of the entire law. Courts address that scenario as it arises.

[10] A codifier's note explains a change in wording from the original Public Law: "This chapter, referred to in text, was in the original 'this Act',

Enacted in 2015, the government-debt exception added an unconstitutional discriminatory exception to the robocall restriction. The text of the severability clause squarely covers the unconstitutional government-debt exception and requires that we sever it.

To get around the text of the severability clause, plaintiffs point out that the Communications Act's severability clause was enacted in 1934, long before the TCPA's 1991 robocall restriction and the 2015 government-debt exception. But a severability clause must be interpreted according to its terms, regardless of when Congress enacted it. See n. 6, *supra*.

Even if the severability clause did not apply to the government-debt provision at issue in this case (or even if there were no severability clause in the Communications Act), we would apply the presumption of severability as described and applied in cases such as *Free Enterprise Fund*. And under that presumption, we likewise would sever the 2015 government-debt exception, the constitutionally offending provision.

With the government-debt exception severed, the remainder of the law is capable of functioning independently and thus would be fully operative as a law. Indeed, the remainder of the robocall restriction did function independently and fully operate as a law for 20-plus years before the government-debt exception was added in 2015.

The Court's precedents further support severing the 2015 government-debt exception. The Court has long applied severability principles in cases like this one, where Congress added an unconstitutional amendment to a prior law. In those cases, the Court has treated the original, pre-

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meaning act June 19, 1934, ch. 652, 48 Stat. 1064, known as the Communications Act of 1934, which is classified principally to this chapter." Note following 47 U. S. C. §608.

amendment statute as the "valid expression of the legislative intent." *Frost* v. *Corporation Comm'n of Okla.*, 278 U. S. 515, 526–527 (1929). The Court has severed the "exception introduced by amendment," so that "the original law stands without the amendatory exception." *Truax* v. *Corrigan*, 257 U. S. 312, 342 (1921).

For example, in *Eberle* v. *Michigan*, the Court held that "discriminatory wine-and-cider amendments" added in 1899 and 1903 were severable from the underlying 1889 state law generally prohibiting the manufacture of alcohol. 232 U. S. 700, 704–705 (1914). In *Truax*, the Court ruled that a 1913 amendment prohibiting Arizona courts from issuing injunctions in labor disputes was invalid and severable from the underlying 1901 law authorizing Arizona courts to issue injunctions generally. 257 U. S., at 341–342. In *Frost*, the Court concluded that a 1925 amendment exempting certain corporations from making a showing of "public necessity" in order to obtain a cotton gin license was invalid and severable from the 1915 law that required that showing. 278 U. S., at 525–528. Echoing *Marbury*, the Court in *Frost* explained that an unconstitutional statutory amendment "is a nullity" and "void" when enacted, and for that reason has no effect on the original statute. 278 U. S., at 526–527 (internal quotation marks omitted).[11]

Similarly, in 1932, Congress enacted the Federal Kidnaping Act, and then in 1934, added a death penalty provision to the Act. The death penalty provision was later declared unconstitutional by this Court. In considering severability,

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[11] The cases cited in the text above are pre-*Erie* decisions involving the constitutionality of state laws. See *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). In that era, the Court often treated severability of state laws and federal laws in the same general way. In the post-*Erie* era, severability of state laws can potentially pose different questions than severability of federal laws. We need not address post-*Erie* severability of state laws. See, *e.g.*, *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 328–331 (2006); *Leavitt* v. *Jane L.*, 518 U. S. 137, 139 (1996) (*per curiam*) ("Severability is of course a matter of state law").

the Court stated that the "law as originally enacted in 1932 contained no capital punishment provision." *United States* v. *Jackson*, 390 U. S. 570, 586 (1968). And when Congress amended the Act in 1934 to add the death penalty, "the statute was left substantially unchanged in every other respect." *Id.*, at 587–588. The Court found it "difficult to imagine a more compelling case for severability." *Id.*, at 589. So too here.

In sum, the text of the Communications Act's severability clause requires that the Court sever the 2015 government-debt exception from the remainder of the statute. And even if the text of the severability clause did not apply here, the presumption of severability would require that the Court sever the 2015 government-debt exception from the remainder of the statute.

3

One final severability wrinkle remains. This is an equal-treatment case, and equal-treatment cases can sometimes pose complicated severability questions.

The "First Amendment is a kind of Equal Protection Clause for ideas." *Williams-Yulee* v. *Florida Bar*, 575 U. S. 433, 470 (2015) (Scalia, J., dissenting). And Congress violated that First Amendment equal-treatment principle in this case by favoring debt-collection robocalls and discriminating against political and other robocalls.

When the constitutional violation is unequal treatment, as it is here, a court theoretically can cure that unequal treatment either by extending the benefits or burdens to the exempted class, or by nullifying the benefits or burdens for all. See, *e.g.*, *Heckler* v. *Mathews*, 465 U. S. 728, 740 (1984). Here, for example, the Government would prefer to cure the unequal treatment by extending the robocall restriction and thereby proscribing nearly all robocalls to cell phones. By contrast, plaintiffs want to cure the unequal treatment by nullifying the robocall restriction and thereby

allowing all robocalls to cell phones.

When, as here, the Court confronts an equal-treatment constitutional violation, the Court generally applies the same commonsense severability principles described above. If the statute contains a severability clause, the Court typically severs the discriminatory exception or classification, and thereby extends the relevant statutory benefits or burdens to those previously exempted, rather than nullifying the benefits or burdens for all. In light of the presumption of severability, the Court generally does the same even in the absence of a severability clause. The Court's precedents reflect that preference for extension rather than nullification. See, *e.g.*, *Sessions* v. *Morales-Santana*, 582 U. S. ___, ___ (2017) (slip op., at 25); *Califano* v. *Westcott*, 443 U. S. 76, 89–91 (1979); *Califano* v. *Goldfarb*, 430 U. S. 199, 202–204, 213–217 (1977) (plurality opinion); *Jimenez* v. *Weinberger*, 417 U. S. 628, 637–638 (1974); *Department of Agriculture* v. *Moreno*, 413 U. S. 528, 529, 537–538 (1973); *Frontiero* v. *Richardson*, 411 U. S. 677, 678–679, 690–691 (1973) (plurality opinion); *Welsh* v. *United States*, 398 U. S. 333, 361–367 (1970) (Harlan, J., concurring in result).

To be sure, some equal-treatment cases can raise complex questions about whether it is appropriate to extend benefits or burdens, rather than nullifying the benefits or burdens. See, *e.g.*, *Morales-Santana*, 582 U. S. ___. For example, there can be due process, fair notice, or other independent constitutional barriers to extension of benefits or burdens. Cf. *Miller* v. *Albright*, 523 U. S. 420, 458–459 (1998) (Scalia, J., concurring in judgment); see generally Ginsburg, Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation, 28 Clev. St. L. Rev. 301 (1979). There also can be knotty questions about what is the exception and what is the rule. But here, we need not tackle all of the possible hypothetical applications of severability doctrine in equal-treatment cases. The government-debt exception is a relatively narrow exception to the broad robocall restriction,

and severing the government-debt exception does not raise any other constitutional problems.

Plaintiffs insist, however, that a *First Amendment* equal-treatment case is different. According to plaintiffs, a court should not cure "a First Amendment violation by outlawing more speech." Brief for Respondents 34. The implicit premise of that argument is that extending the robocall restriction to debt-collection robocalls would be unconstitutional. But that is wrong. A generally applicable robocall restriction would be permissible under the First Amendment. Extending the robocall restriction to those robocalls raises no First Amendment problem. So the First Amendment does not tell us which way to cure the unequal treatment in this case. Therefore, we apply traditional severability principles. And as we have explained, severing the 2015 government-debt exception cures the unequal treatment and constitutes the proper result under the Court's traditional severability principles. In short, the correct result in this case is to sever the 2015 government-debt exception and leave in place the longstanding robocall restriction.[12]

4

JUSTICE GORSUCH's well-stated separate opinion makes a number of important points that warrant this respectful response.

JUSTICE GORSUCH suggests that our decision provides "no relief" to plaintiffs. *Post*, at 6. We disagree. Plaintiffs want to be able to make political robocalls to cell phones,

[12] As the Government acknowledges, although our decision means the end of the government-debt exception, no one should be penalized or held liable for making robocalls to collect government debt after the effective date of the 2015 government-debt exception and before the entry of final judgment by the District Court on remand in this case, or such date that the lower courts determine is appropriate. See Reply Brief 24. On the other side of the ledger, our decision today does not negate the liability of parties who made robocalls covered by the robocall restriction.

and they have not received *that* relief. But the First Amendment complaint at the heart of their suit was unequal treatment. Invalidating and severing the government-debt exception fully addresses that First Amendment injury.[13] JUSTICE GORSUCH further suggests that plaintiffs may lack standing to challenge the government-debt exception, because that exception merely favors others. See *ibid*. But the Court has squarely held that a plaintiff who suffers unequal treatment has standing to challenge a discriminatory exception that favors others. See *Heckler* v. *Mathews*, 465 U. S., at 737–740 (a plaintiff who suffers unequal treatment has standing to seek "withdrawal of benefits from the favored class"); see also *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656, 666 (1993) ("The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit").

JUSTICE GORSUCH also objects that our decision today "harms strangers to this suit" by eliminating favorable treatment for debt collectors. *Post*, at 6. But that is necessarily true in many cases where a court cures unequal treatment by, for example, extending a burden or nullifying a benefit. See, *e.g.*, *Morales-Santana*, 582 U. S., at ___ (slip op., at 28) (curing unequal treatment of children born to unwed U. S.-citizen fathers by extending a burden to children of unwed U. S.-citizen mothers); *Orr* v. *Orr*, 374 So. 2d 895, 896–897 (Ala. Civ. App. 1979) (extending alimony obligations to women after a male plaintiff successfully challenged Alabama's discriminatory alimony statute in this

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[13] Plaintiffs suggest that parties will not have incentive to sue if the cure for challenging an unconstitutional exception to a speech restriction is to eliminate the exception and extend the restriction. But many individuals and organizations often have incentive to challenge unequal treatment of speech, especially when a competitor is regulated less heavily.

Court).

Moreover, JUSTICE GORSUCH's approach to this case would not solve the problem of harming strangers to this suit; it would just create a different and much bigger problem. His proposed remedy of injunctive relief, plus *stare decisis*, would in effect allow all robocalls to cell phones—notwithstanding Congress's decisive choice to prohibit most robocalls to cell phones. That is not a judicially modest approach but is more of a wolf in sheep's clothing. That approach would disrespect the democratic process, through which the people's representatives have made crystal clear that robocalls must be restricted. JUSTICE GORSUCH's remedy would end up harming a different and far larger set of strangers to this suit—the tens of millions of consumers who would be bombarded every day with nonstop robocalls notwithstanding Congress's clear prohibition of those robocalls.

JUSTICE GORSUCH suggests more broadly that severability doctrine may need to be reconsidered. But when and how? As the saying goes, John Marshall is not walking through that door. And this Court, in this and other recent decisions, has clarified and refined severability doctrine by emphasizing firm adherence to the text of severability clauses, and underscoring the strong presumption of severability. The doctrine as so refined is constitutionally well-rooted, see, *e.g.*, *Marbury* v. *Madison*, 1 Cranch 137 (Marshall, C. J.), and can be predictably applied. True, there is no magic solution to severability that solves every conundrum, especially in equal-treatment cases, but the Court's current approach as reflected in recent cases such as *Free Enterprise Fund* and *Seila Law* is constitutional, stable, predictable, and commonsensical.

* * *

In 1991, Congress enacted a general restriction on robocalls to cell phones. In 2015, Congress carved out an exception that allowed robocalls made to collect government debt. In doing so, Congress favored debt-collection speech over plaintiffs' political speech. We hold that the 2015 government-debt exception added an unconstitutional exception to the law. We cure that constitutional violation by invalidating the 2015 government-debt exception and severing it from the remainder of the statute. The judgment of the U. S. Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 19–631

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL., PETITIONERS *v.* AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[July 6, 2020]

JUSTICE SOTOMAYOR, concurring in the judgment.

I agree with much of the partial dissent's explanation that strict scrutiny should not apply to all content-based distinctions. Cf. *post*, at 5–9 (BREYER, J., concurring in judgment with respect to severability and dissenting in part). In my view, however, the government-debt exception in 47 U. S. C. §227(b) still fails intermediate scrutiny because it is not "narrowly tailored to serve a significant governmental interest." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989) (internal quotation marks omitted). Even under intermediate scrutiny, the Government has not explained how a debt-collection robocall about a government-backed debt is any less intrusive or could be any less harassing than a debt-collection robocall about a privately backed debt. As the Fourth Circuit noted, the government-debt exception is seriously underinclusive because it permits "many of the intrusive calls that the automated call ban was enacted to prohibit." *American Assn. of Political Consultants, Inc.* v. *FCC*, 923 F. 3d 159, 168 (2019) (case below). The Government could have employed far less restrictive means to further its interest in collecting debt, such as "secur[ing] consent from the debtors to make debt-collection calls" or "plac[ing] the calls itself." *Id.*, at 169,

n. 10; see also §227(b)(1)(A). Nor has the Government "sufficiently justified the differentiation between government-debt collection speech and other important categories of robocall speech, such as political speech, charitable fundraising, issue advocacy, commercial advertising, and the like." *Ante*, at 9.

Nevertheless, I agree that the offending provision is severable. See *ante*, at 2; *post*, at 11–12 (opinion of BREYER, J.); see also *City of Ladue* v. *Gilleo*, 512 U. S. 43, 51–53 (1994) (explaining that an appropriate "solution" to a law that covers "too little speech because its exemptions discriminate on the basis of [the speaker's] messages" could be to "remove" the discrimination).

With those understandings, I concur in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 19–631

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[July 6, 2020]

JUSTICE BREYER, with whom JUSTICE GINSBURG and JUSTICE KAGAN join, concurring in the judgment with respect to severability and dissenting in part.

A federal statute forbids, with some exceptions, making automatically dialed or prerecorded telephone calls (called robocalls) to cell phones. This case concerns one of these exceptions, which applies to calls "made solely to collect a debt owed to or guaranteed by the United States." 47 U. S. C. §227(b)(1)(A)(iii). A majority of the Court holds that the exception violates the Constitution's First Amendment. In my view, it does not.

I

This case concerns the Telephone Consumer Protection Act of 1991. That Act was designed to "protec[t] telephone consumers from th[e] nuisance and privacy invasion" caused by automated and prerecorded phone calls. §2(12), 105 Stat. 2395. The Act, among other things, bans almost all robocalls made to cell phones. In particular, it forbids "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 telephone number assigned to a . . . cellular telephone service." §3(a) (codified at 47

U. S. C. §227(b)(1)(A)(iii)). The Act delegates authority to the Federal Communications Commission to make certain additional exceptions from that general cell phone robocall restriction. §227(b)(2)(C).

More than 20 years later, Congress enacted another statute, which created the government-debt exception. The Office of Management and Budget had reported to Congress that in "this time of fiscal constraint . . . the Federal Government should ensure that all debt owed to the United States is collected as quickly and efficiently as possible." Office of Management and Budget, Analytical Perspectives, Budget of the U. S. Government, Fiscal Year 2016, p. 128 (2015), https://www.govinfo.gov/content/pkg/BUDGET-2016-PER/pdf/BUDGET-2016-PER.pdf. It recommended that Congress permit "the use of automatic dialing systems and prerecorded voice messages" to contact "wireless phones in the collection of debt owed to or granted [*sic*] by the United States." *Ibid.*

Congress adopted that recommendation. It enacted a provision that excepts from the general cell phone robocall restriction any call "made solely to collect a debt owed to or guaranteed by the United States." 129 Stat. 588; see also *ibid.* (categorizing the exception as a "debt collection improvemen[t]" measure). The question here is whether the First Amendment prohibits the Federal Government from enacting that government-debt collection measure.

II

The plurality finds the government-debt exception unconstitutional primarily by applying a logical syllogism: (1) "Content-based laws are subject to strict scrutiny." *Ante,* at 6 (citing *Reed* v. *Town of Gilbert*, 576 U. S. 155, 163–164 (2015)). (2) The exception is based on "content." *Ante,* at 7. (3) Hence, the exception is subject to "strict scrutiny." *Ante*, at 9. (4) And the Government concedes that the exception cannot survive "strict scrutiny" examination. *Ibid.*

The problem with that approach, which reflexively applies strict scrutiny to all content-based speech distinctions, is that it is divorced from First Amendment values. This case primarily involves commercial regulation—namely, debt collection. And, in my view, there is no basis here to apply "strict scrutiny" based on "content-discrimination."

To appreciate why, it is important to understand at least one set of values that underlie the First Amendment and the related reasons why courts scrutinize some speech restrictions strictly. The concept is abstract but simple: "We the People of the United States" have created a government of laws enacted by elected representatives. For our government to remain a *democratic* republic, the people must be free to generate, debate, and discuss both general and specific ideas, hopes, and experiences. The people must then be able to transmit their resulting views and conclusions to their elected representatives, which they may do directly, or indirectly through the shaping of public opinion. The object of that transmission is to influence the public policy enacted by elected representatives. As this Court has explained, "[t]he First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Meyer* v. *Grant*, 486 U. S. 414, 421 (1988) (internal quotation marks omitted). See generally R. Post, Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State 1–25 (2012).

In other words, the free marketplace of ideas is not simply a debating society for expressing thought in a vacuum. It is in significant part an instrument for "bringing about . . . political and social chang[e]." *Meyer*, 486 U. S., at 421. The representative democracy that "We the People" have created insists that this be so. See *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 583 (2011) (BREYER, J., dissenting). See generally, *e.g.,* B. Neuborne, Madison's Music: On Reading the First Amendment (2015).

It is thus no surprise that our First Amendment jurisprudence has long reflected these core values. This Court's cases have provided heightened judicial protection for political speech, public forums, and the expression of all viewpoints on any given issue. See, *e.g.*, *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U. S. 182, 186–187 (1999) (heightened protection for "core political speech"); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829–830 (1995) (government discrimination on basis of "particular views taken by speakers on a subject" presumptively unconstitutional); *Boos* v. *Barry*, 485 U. S. 312, 321 (1988) ("content-based restriction[s] on political speech in a public forum" subject to "most exacting scrutiny" (emphasis deleted)); *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45–46 (1983) (content-based exclusions in public forums subject to strict scrutiny). These cases reflect the straightforward principle that "governments must not be allowed to choose which issues are worth discussing or debating." *Reed*, 576 U. S., at 182 (KAGAN, J., concurring in judgment) (internal quotation marks omitted).

From a democratic perspective, however, it is equally important that courts not use the First Amendment in a way that would threaten the workings of ordinary regulatory programs posing little threat to the free marketplace of ideas enacted as result of that public discourse. As a general matter, the strictest scrutiny should not apply indiscriminately to the very "political and social changes desired by the people"—that is, to those government programs which the "unfettered interchange of ideas" has sought to achieve. *Meyer*, 486 U. S., at 421 (internal quotation marks omitted). Otherwise, our democratic system would fail, not through the inability of the people to speak or to transmit their views to government, but because of an elected government's inability to translate those views into action.

Thus, once again, it is not surprising that this Court has

applied less strict standards when reviewing speech restrictions embodied in government regulatory programs. This Court, for example, has applied a "rational basis" standard for reviewing those restrictions when they have only indirect impacts on speech. See *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 469–470, 477 (1997). And it has applied a mid-level standard of review—often termed "intermediate scrutiny"—when the government directly restricts protected commercial speech. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 561–564 (1980).

This account of well-established principles at the core of the First Amendment demonstrates the problem with the plurality's approach. To reflexively treat all content-based distinctions as subject to strict scrutiny regardless of context or practical effect is to engage in an analysis untethered from the First Amendment's objectives. And in this case, strict scrutiny is inappropriate. Recall that the exception at issue here concerns debt collection—specifically a method for collecting government-owned or -backed debt. Regulation of debt collection does not fall on the first side of the democratic equation. It has next to nothing to do with the free marketplace of ideas or the transmission of the people's thoughts and will to the government. It has everything to do with the second side of the equation, that is, with government response to the public will through ordinary commercial regulation. To apply the strictest level of scrutiny to the economically based exemption here is thus remarkable.

I recognize that the underlying cell phone robocall restriction primarily concerns a means of communication. And that fact, as I discuss below, triggers some heightened scrutiny, reflected in an intermediate scrutiny standard. Strict scrutiny and its strong presumption of unconstitutionality, however, have no place here.

The plurality claims that its approach, which categorically applies strict scrutiny to content-based distinctions, will not "affect traditional or ordinary economic regulation of commercial activity." *Ante,* at 9. But how is that so? Much of human life involves activity that takes place through speech. And much regulatory activity turns upon speech content. See, *e.g., Reed*, 576 U. S., at 177–178 (BREYER, J., concurring in judgment) (giving examples). Consider, for example, the regulation of securities sales, drug labeling, food labeling, false advertising, workplace safety warnings, automobile airbag instructions, consumer electronic labels, tax forms, debt collection, and so on. All of those regulations necessarily involve content-based speech distinctions. What are the differences between regulatory programs themselves other than differences based on content? After all, the regulatory spheres in which the Securities and Exchange Commission or the Federal Trade Commission operate are defined by content. Put simply, treating all content-based distinctions on speech as presumptively unconstitutional is unworkable and would obstruct the ordinary workings of democratic governance.

That conclusion is true here notwithstanding the plurality's effort to bring political speech into the First Amendment analysis. See *ante,* at 7, 25 (characterizing Congress as having "favored debt-collection speech over plaintiffs' political speech"). It is true that the underlying cell phone robocall restriction generally prohibits political speakers from making robocalls. But that has little to do with the government-debt exception or *its* practical effect. Nor does it justify the application of strict scrutiny.

Consider prescription drug labels, securities forms, and tax statements. A government agency might reasonably specify just what information the form or label must contain and further provide that the form or label may not contain other information (thereby excluding political statements). No one would think that the exclusion of political speech,

say, from a drug label, means that courts must examine all other regulatory exceptions with strict scrutiny. Put differently, it is hard to imagine that such exceptions threaten political speech in the marketplace of ideas, or have any significant impact on the free exchange of ideas. To treat those exceptions as presumptively unconstitutional would work a significant transfer of authority from legislatures and agencies to courts, potentially inhibiting the creation of the very government programs for which the people (after debate) have voiced their support, despite those programs' minimal speech-related harms. See *Sorrell*, 564 U. S., at 584–585 (BREYER, J., dissenting). Given the values at the heart of the First Amendment, see *supra,* at 3–5, that interpretation threatens to stand that Amendment on its head. It could also lead the Court to water down the strict scrutiny standard, which would limit speech protections in situations where strict scrutiny's strong protections should properly apply. *Reed*, 576 U. S., at 178 (BREYER, J., concurring in judgment).

If, as I have argued, the First Amendment does not support the mechanical conclusion that content discrimination automatically triggers strict scrutiny, what role might content discrimination play? The plurality is correct when it quotes this Court as having said that the government may not discriminate "'in the regulation of expression on the basis of the content of that expression.'" *Ante,* at 6 (quoting *Hudgens* v. *NLRB*, 424 U. S. 507, 520 (1976)). If, however, this Court is to apply the First Amendment consistently with the democratic values embodied within that Amendment, that kind of statement must reflect a rule of thumb applicable only in certain circumstances. See *Reed*, 576 U. S., at 176 (BREYER, J., concurring in judgment); *id.,* at 183 (KAGAN, J., concurring in judgment) ("We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function").

Indeed, that must be so given that this Court's First Amendment jurisprudence itself ties the constitutional protection speech receives to the content or purpose of that speech. The Court has held that entire categories of speech—for example, obscenity, fraud, and speech integral to criminal conduct—are generally unprotected by the First Amendment entirely because of their content. See *Miller* v. *California*, 413 U. S. 15, 23 (1973) (obscenity); *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976) (fraud); *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 498 (1949) (speech integral to criminal conduct). As Justice Stevens pointed out, "our entire First Amendment jurisprudence creates a regime based on the content of speech." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 420 (1992) (opinion concurring in judgment); see *id.,* at 420–422 (providing examples). Given that this Court looks to the nature and content of speech to determine whether, or to what extent, the First Amendment protects it, it makes little sense to treat *every* content-based distinction Congress has made as presumptively unconstitutional.

Moreover, it is no answer to claim that this Court's precedents categorically require such an analysis. See *ante,* at 9, n. 5 (plurality opinion). Our First Amendment jurisprudence has always been contextual and has defied straightforward reduction to unyielding categorical rules. The idea that broad language in any one case (even *Reed*) has categorically determined how content discrimination should be applied in *every single context* is both wrong and reflects an oversimplification and over-reading of our precedent. The diversity of approaches in this very case underscores the point that the law here is far from settled. Indeed, the plurality itself disclaims the idea that its rule would apply to unsettle "traditional or ordinary economic regulation of commercial activity," indicating that the plurality presumably thinks there are some outer bounds to its broad language. *Ante,* at 9. The question here is whether the Court's

general statements about content discrimination triggering strict scrutiny, including in *Reed*, make sense as applied in *this* context. As I have explained, they do not.

That said, I am not arguing for the abolition of the concept of "content discrimination." There are times when using content discrimination to trigger scrutiny is eminently reasonable. Specifically, when content-based distinctions are used as a method for suppressing particular viewpoints or threatening the neutrality of a traditional public forum, content discrimination triggering strict scrutiny is generally appropriate. See *Reed*, 576 U. S., at 176 (BREYER, J., concurring in judgment); *id.,* at 182–183 (KAGAN, J., concurring in judgment).

Neither of those situations is present here. Outside of these circumstances, content discrimination can at times help determine the strength of a government justification or identify a potential interference with the free marketplace of ideas. See *id.,* at 176–177 (BREYER, J., concurring in judgment). But, as I have explained, this case is not about protecting the marketplace of ideas. It is not about the formation of public opinion or the transmission of the people's will to elected representatives. It is fundamentally about a method of regulating debt collection.

III

I would examine the validity of the regulation at issue here using a First Amendment standard that (unlike strict scrutiny) does not strongly presume that a regulation that affects speech is unconstitutional. However, given that the government-debt exception does directly impact a means of communication, the appropriate standard requires a closer look at the restriction than does a traditional "rational basis" test. A proper inquiry should examine the seriousness of the speech-related harm, the importance of countervailing objectives, the likelihood that the restriction will achieve those objectives, and whether there are other, less

restrictive ways of doing so. Narrow tailoring in this context, however, does not necessarily require the use of the least-restrictive means of furthering those objectives. Cf. *Ward* v. *Rock Against Racism*, 491 U. S. 781, 797–799, and n. 6 (1989) (explaining that outside of strict scrutiny review, narrow tailoring does not require the use of least-restrictive-means analysis). That inquiry ultimately evaluates a restriction's speech-related harms in light of its justifications. We have typically called this approach "intermediate scrutiny," though we have sometimes referred to it as an assessment of "fit," sometimes called it "proportionality," and sometimes just applied it without using a label. See *United States* v. *Alvarez*, 567 U. S. 709, 730–731 (2012) (BREYER, J., concurring in judgment); *Reed*, 576 U. S., at 179 (BREYER, J., concurring in judgment).

Applying this Court's intermediate scrutiny analysis, I would begin by asking just what the First Amendment harm is here. As JUSTICE KAVANAUGH notes, the government-debt exception provides no basis for undermining the general cell phone robocall restriction. *Ante,* at 10–11. Indeed, looking at the government-debt exception in context, we can see that the practical effect of the exception, taken together with the rest of the statute, is to put *non*-government debt collectors at a disadvantage. Their speech operates in the same sphere as government-debt collection speech, communicates comparable messages, and yet does not have the benefit of a particular instrument of communication (robocalls). While this is a speech-related harm, debt-collection speech is both commercial and highly regulated. See Brief for Petitioners 20–21 (describing multiple restrictions imposed by the Fair Debt Collection Practices Act on communications by debt collectors in the course of debt collection). The speech-related harm at issue here—and any related effect on the marketplace of ideas—is modest.

What, then, is the justification for this harm? The purpose of the exception is to further the protection of the public fisc. See *supra,* at 2. That protection is an important governmental interest. Private debt typically involves private funds; public debt typically involves funds that, in principle, belong to all of us, and help to implement numerous governmental policies that the people support.

Finally, is the exception narrowly tailored? Its limited scope shows that it is. Congress has minimized any speech-related harm by tying the exception directly to the Government's interest in preserving the public fisc. The statutory text makes clear that calls will only fall within the bounds of that exception if they are "made *solely* to collect" Government debt. 47 U. S. C. §227(b)(1)(A)(iii) (emphasis added). Thus, the exception cannot be used to permit communications unrelated or less directly related to that public fiscal interest.

The upshot is that the government-debt exception, taken in context, inflicts some speech-related harm. But the harm, as I have explained, is related not to public efforts to develop ideas or transmit them to the Government, but to the Government's response to those efforts, which here takes the form of highly regulated commercial communications. Moreover, there is an important justification for that harm, and the exception is narrowly tailored to further that goal. Given those facts, the government-debt exception should survive intermediate First Amendment scrutiny.

IV

For the reasons described above, I would find that the government-debt exception does not violate the First Amendment. A majority of the Court, however, has concluded the contrary. It must thus decide whether that provision is severable from the rest of the statute. As to that question, I agree with JUSTICE KAVANAUGH's conclusion that the provision is severable. Accordingly, I respectfully

concur in the judgment with respect to severability and dissent in part.

SUPREME COURT OF THE UNITED STATES

No. 19–631

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL., PETITIONERS *v.* AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[July 6, 2020]

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins as to Part II, concurring in the judgment in part and dissenting in part.

I agree with JUSTICE KAVANAUGH that the provision of the Telephone Consumer Protection Act before us violates the First Amendment. Respectfully, however, I disagree about why that is so and what remedial consequences should follow.

I

The TCPA is full of regulations on robocalls. The statute limits robocalls to residential landlines, hospitals, emergency numbers, and business lines. The only provision before us today, however, concerns robocalls to cell phones, mobile devices, or "any service for which the called party is charged for the call." 47 U. S. C. §227(b)(1)(A)(iii). Before the law's enactment, many cell phone users had to pay for each call, so they suffered not only the pleasure of robocalls, but also the privilege of paying for them. In 1991, Congress sought to address the problem by banning nearly all unsolicited robocalls to cell phones.

But much has changed since then. Now, cell phone users often pay a flat monthly fee for unlimited minutes, reducing the cost (if not the annoyance) of hearing from robocallers.

New weapons in the fight against robocallers have emerged, too—including tools that allow consumers to more easily screen and block unwanted calls. Perhaps in recognition of these changes, Congress relaxed the ban on cellphone robocallers in 2015. Today, unsolicited calls are permitted if they are "made solely to collect a debt owed to or guaranteed by the United States."

That leaves robocallers no shortage of material. The government backs millions upon millions of loans—student loans, home mortgages, veterans' loans, farm loans, business loans. When it comes to student loans alone, the government guarantees more than $150 billion in private loans involving over 7 million individuals. And, to be clear, it's not just the government that's allowed to call about these loans. Private lenders and debt collectors are free to send in the robots too, so long as the debt at issue is ultimately guaranteed by the government.

Today's plaintiffs wish to use robocalls for something different: to campaign and solicit donations for political causes. The plaintiffs allege that the law's continuing ban on calls like theirs violates the First Amendment, and on the main points of their argument the parties agree. First, no one doubts the TCPA regulates speech. Second, everyone accepts that restrictions on speech—no matter how evenhanded—must be justified by at least a "'significant governmental interest.'" *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989). And, third, the parties agree that laws that go further by regulating speech on the basis of content invite still greater scrutiny. When the government seeks to censor speech based on its content, favoring certain voices and punishing others, its restrictions must satisfy "strict scrutiny"—meaning they must be justified by interests that are "compelling," not just significant. After all, a constitutional right would hardly be needed to protect popular speakers; the First Amendment does its real work in

giving voice to those a majority would silence. See *McCullen* v. *Coakley*, 573 U. S. 464, 477–478 (2014); but see *ante,* at 5–6 (BREYER, J., concurring in judgment with respect to severability and dissenting in part) (seeking to overturn precedent and allow the government sometimes to impose content-based restrictions to "respon[d] to the public will").

In my view, the TCPA's rule against cellphone robocalls is a content-based restriction that fails strict scrutiny. The statute is content-based because it allows speech on a subject the government favors (collecting its debts) while banning speech on other disfavored subjects (including political matters). Cf. *ante,* at 9–11 (opinion of BREYER, J.) (mistakenly characterizing the content discrimination as "not about" political activities). The statute fails strict scrutiny because the government offers no compelling justification for its prohibition against the plaintiffs' political speech. In fact, the government does not dispute that, if strict scrutiny applies, its law must fall.

It's easy enough to see why the government makes no effort to satisfy strict scrutiny. Now that most cell phone plans do not charge by the call, the only justification the government cites for its robocall ban is its interest in protecting consumer privacy. No one questions that protecting consumer privacy qualifies as a legitimate and "genuine" interest for the government to pursue. *Ante,* at 2–3, 10. But before the government may censor the plaintiffs' speech based on its content, it must point to a *compelling* interest. And if the government thinks consumer privacy interests are insufficient to overcome its interest in collecting debts, it's hard to see how the government might invoke consumer privacy interests to justify banning private political speech. Especially when consumers seem to find debt collection efforts particularly intrusive: Year after year, the Federal Trade Commission receives more complaints about the debt collection industry than any other. The nature and breadth of the law's exception calls into question the necessity of its

rule.

Much precedent supports this course. As this Court has long explained, a law's failure to address a wide swath of conduct implicating its supposed concern "diminish[es] the credibility of the government's [stated] rationale for [its] restrict[ion]." *City of Ladue* v. *Gilleo*, 512 U. S. 43, 52 (1994). Or, as the Court has elsewhere put it, the compellingness of the government's putative interest is undermined when its law "leaves appreciable damage to [the] supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 547 (1993) (internal quotation marks omitted); see also *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418, 433 (2006). The insight is simple: A law's failure to cover "significant tracts of conduct implicating [its] putatively compelling interes[t] can raise . . . the inference that the . . . claimed interest isn't . . . so compelling after all." *Yellowbear* v. *Lampert*, 741 F. 3d 48, 60 (CA10 2014).

That's not to say the inference is irrebuttable. The government might, for example, show that the apparent inconsistency in its law is justified by some qualitative or quantitative difference between the speech it favors and the speech it disfavors. See *id.,* at 61. So if debt collection robocalls were less invasive of consumer privacy than other kinds of robocalls, or if they were inherently rare, an exception permitting debt collection calls might not undermine the government's claimed interest in banning other calls. But the government, a party with every incentive and ample resources, has not even tried to suggest conditions like those are present here, and understandably so: The government-debt exception allows a seemingly *infinite* number of robocalls of the type consumers appear to find *most* invasive.

II

With a First Amendment violation proven, the question

turns to remedy. Because the challenged robocall ban unconstitutionally infringes on their speech, I would hold that the plaintiffs are entitled to an injunction preventing its enforcement against them. This is the traditional remedy for proven violations of legal rights likely to work irreparable injury in the future. Preventing the law's enforcement against the plaintiffs would fully address their injury. And going this far, but no further, would avoid "short circuit[ing] the democratic process" by interfering with the work of Congress any more than necessary. *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 451 (2008).

JUSTICE KAVANAUGH's opinion pursues a different course. Invoking "severability doctrine," it declares the government-debt exception void and severs it from the statute. As revised by today's decision, the law prohibits nearly all robocalls to cell phones, just as it did back in 1991. In support of this remedy, we are asked to consider cases involving equal protection violations, where courts have sometimes solved the problem of unequal treatment by leveling others "down" to the plaintiff's status rather than by leveling the plaintiff "up" to the status others enjoy.

I am doubtful of our authority to rewrite the law in this way. Many have questioned the propriety of modern severability doctrine,* and today's case illustrates some of the reasons why. To start, it's hard to see how today's use of severability doctrine qualifies as a remedy at all: The plaintiffs have not challenged the government-debt exception, they have not sought to have it severed and stricken, and far from placing "unequal treatment" at the "heart of their

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*See, *e.g.*, *Seila Law LLC* v. *Consumer Financial Protection Bureau*, *ante*, at 14–24 (THOMAS, J., concurring in part and dissenting in part); Harrison, Severability, Remedies, and Constitutional Adjudication, 83 Geo. Wash. L. Rev. 56 (2014); see also Movsesian, Severability in Statutes and Contracts, 30 Ga. L. Rev. 41, 41–42 (1995) (collecting academic criticism of severability doctrine).

suit," they have never complained of unequal treatment as such. *Ante,* at 23. The plaintiffs point to the government-debt exception only to show that the government lacks a compelling interest in restricting their speech. It isn't even clear the plaintiffs would have standing to challenge the government-debt exception. They came to court asserting a right to speak, not a right to be free from other speakers. Severing and voiding the government-debt exception does nothing to address the injury they claim; after today's ruling, federal law bars the plaintiffs from using robocalls to promote political causes just as stoutly as it did before. What is the point of fighting this long battle, through many years and all the way to the Supreme Court, if the prize for winning is no relief at all?

A severance remedy not only fails to help the plaintiffs, it harms strangers to this suit. Just five years ago, Congress expressly authorized robocalls to cell phones to collect government-backed debts. Yet, today, the Court reverses that decision and outlaws the entire industry. It is highly unusual for judges to render unlawful conduct that Congress has explicitly made lawful—let alone to take such an extraordinary step without warning to those who have ordered their lives and livelihoods in reliance on the law, and without affording those individuals any opportunity to be heard. This assertion of power strikes me as raising serious separation of powers questions, and it marks no small departure from our usual reliance on the adversarial process.

Nor does the analogy to equal protection doctrine solve the problem. That doctrine promises equality of treatment, whatever that treatment may be. The First Amendment isn't so neutral. It pushes, always, in one direction: against governmental restrictions on speech. Yet, somehow, in the name of vindicating the First Amendment, our remedial course today leads to the unlikely result that not a single person will be allowed to speak more freely and, instead, more speech will be banned.

In an effort to mitigate at least some of these problems, JUSTICE KAVANAUGH suggests that the ban on government-debt collection calls announced today might be applied only prospectively. See *ante*, at 22, n. 13. But prospective decisionmaking has never been easy to square with the judicial power. See, *e.g., James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. 529, 548–549 (Scalia, J., concurring in judgment) (judicial power is limited to "discerning what the law *is*, rather than decreeing . . . what it will *tomorrow* be"). And a holding that shields *only* government-debt collection callers from past liability under an admittedly unconstitutional law would wind up endorsing the very same kind of content discrimination we say we are seeking to eliminate.

Unable to solve the problems associated with its preferred severance remedy, today's decision seeks at least to identify "harm[s]" associated with mine. Cf. *ante*, at 24 (opinion of KAVANAUGH, J.). In particular, we are reminded that granting an injunction in this case would allow the plaintiffs' (unpopular) speech, and that could induce others to seek injunctions of their own, resulting in still more (unpopular) speech. But this "harm" is hardly comparable to the problems associated with using severability doctrine: Having to tolerate unwanted speech imposes no cognizable constitutional injury on anyone; it is life under the First Amendment, which is almost always invoked to protect speech some would rather not hear.

*

In the end, I agree that 47 U. S. C. §227(b)(1)(A)(iii) violates the First Amendment, though not for the reasons JUSTICE KAVANAUGH offers. Nor am I able to support the remedy the Court endorses today. Respectfully, if this is what modern "severability doctrine" has become, it seems to me all the more reason to reconsider our course.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14144

D.C. Docket No. 4:18-cv-00132-ACA

JOHN TRICHELL,
individually and on behalf of all others similarly situated,

Plaintiff - Appellant,

versus

MIDLAND CREDIT MANAGEMENT, INC.,
a Kansas corporation,
MIDLAND FUNDING, LLC,
a Delaware limited company,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

No. 19-10120

D.C. Docket No. 4:18-cv-00082-CDL

KEITH COOPER,
individually on behalf of himself and all others similarly situated,

Plaintiff - Appellant,

versus

MIDLAND CREDIT MANAGEMENT, INC.,

Defendant - Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(July 6, 2020)

Before WILLIAM PRYOR, Chief Judge, MARTIN and KATSAS,* Circuit Judges.

KATSAS, Circuit Judge:

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* Honorable Gregory G. Katsas, United States Circuit Judge for the District of Columbia Circuit, sitting by designation.

Plaintiffs John Trichell and Keith Cooper received debt-collection letters that they say were *misleading*, but neither of them claims to have been *misled*. We consider whether Trichell and Cooper have Article III standing to pursue claims under the Fair Debt Collection Practices Act (FDCPA).

I

The FDCPA seeks to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). Section 807 of the FDCPA provides that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* § 1692e. Section 808 provides that "[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." *Id.* § 1692f. Section 813 provides that "any debt collector who fails to comply with any provision of [the FDCPA] with respect to any person is liable to such person" for "any actual damage sustained by such person as a result of such failure," *id.* § 1692k(a)(1), and "such additional damages as the court may allow," subject to statutory caps, *id.* § 1692k(a)(2)(A).

These cases arise from alleged FDCPA violations by defendants Midland Funding, LLC, which buys defaulted consumer debt, and its sister company Midland Credit Management, Inc., which attempts to collect the debt.

In 2017, Midland Credit sent three collection letters to Alabama resident John Trichell, who had defaulted on credit-card debt sometime before 2011. Each

letter said that Trichell, who owed almost $43,000, had been "**pre-approved** for a discount program designed to save you money." Trichell App. 1-2 at 1, 2, 3 (formatting in original). The letters offered three repayment plans, all seemingly generous. Trichell could pay off his debt completely for about $13,000. He could pay off his debt in twelve monthly installments of about $1,800. Or he could create his own repayment plan with monthly payments as low as $50. The letters congratulated Trichell and encouraged him to "[a]ct now to maximize your savings and put this debt behind you." *Id.*

In fact, the offers were not so generous. Under Alabama law, the governing statute of limitations provides a defense if a suit to recover on a debt was filed more than six years after the last payment. *See* Ala. Code § 6-2-34(5); *Ex parte HealthSouth Corp.*, 974 So. 2d 288, 296 (Ala. 2007). Because Trichell had made no payments for over six years, any claim to recover the debt would be time-barred. At the bottom of each letter, a disclaimer acknowledged as much: "The law limits how long you can be sued on a debt and how long a debt can appear on your credit report. Due to the age of this debt, we will not sue you for it or report payment or non-payment of it to a credit bureau." Trichell App. 1-2 at 1, 2, 3.

Trichell sued Midland Funding and Midland Credit under the FDCPA. He alleged that the collection letters were misleading and unfair in falsely suggesting that he could be sued or that the debt could be reported to credit-rating agencies.

Trichell sought to represent a class of similarly situated debtors and to recover statutory damages.

The district court dismissed the complaint for failure to state a claim. The court did not address whether Trichell had Article III standing to maintain his lawsuit. On the merits, the court concluded that the collection letters were neither misleading nor unfair.

The case of Keith Cooper, a Georgia resident, is similar. In 2017, Midland Credit sent a collection letter to Cooper, who had defaulted on credit-card debt in 2010. The letter offered Cooper seemingly attractive options for paying off his balance at steep discounts. But because the debt had been delinquent since 2010, claims on it would be time-barred. Ga. Code § 9-3-24. The letter contained a disclaimer, identical to those in the letters to Trichell, stating that Midland Credit would neither sue Cooper on the debt nor report it to credit bureaus.

Cooper sued Midland Credit under the FDCPA. He alleged that the letter was misleading because it failed to warn that making a partial payment on the debt could constitute a new promise to pay giving rise to a new limitations period. Cooper sought class certification and damages.

The district court dismissed the complaint for failure to state a claim. The court did not consider whether Cooper had Article III standing. On the merits, the

court reasoned that because the disclaimer promised no lawsuit, the collection letter was not misleading.

In briefing the appeals, no party raised the question of Article III standing. In both cases, however, we ordered the parties to address that issue at argument.

II

Before reaching the merits, we must consider our own jurisdiction and that of the district court. *See*, *e.g.*, *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 398 (1979). In particular, we must ourselves decide whether the plaintiffs in these cases have Article III standing, *see United States v. Hays*, 515 U.S. 737, 742 (1995), and we must do so before reaching the merits, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998).

A

When the delegates to the Constitutional Convention gathered in the summer of 1787, the extent of federal-court jurisdiction formed a focal point of their discussions. *See* W. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* 5–16 (1995). In a debate over what became Article III, section 2, James Madison urged that the jurisdiction of the Supreme Court be limited to cases of a "Judiciary Nature," for the "right of expounding the Constitution in cases not of this nature ought not to be given to that

Department." 2 *Records of the Federal Convention of 1787*, at 430 (M. Farrand ed., 1911). The delegates agreed without objection. *Id.*

Consistent with Madison's admonition, Article III grants federal courts the "judicial Power" to resolve only "Cases" or "Controversies." U.S. Const. art. III §§ 1–2. As a result, federal courts may exercise their power only for "the determination of real, earnest, and vital controversy between individuals." *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quotation marks omitted). This case-or-controversy requirement, embodied in the doctrine of standing, "confines the federal courts to a properly judicial role." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Under settled precedent, the "irreducible constitutional minimum" of standing consists of three elements: the plaintiff must have suffered an injury in fact, the defendant must have caused that injury, and a favorable decision must be likely to redress it. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). The party invoking the jurisdiction of a federal court bears the burden of establishing these elements to the extent required at each stage of the litigation. *Id.* at 561. Thus, at the motion-to-dismiss stage, Trichell and Cooper bore the burden of

alleging facts that plausibly establish their standing. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677–84 (2009); *Salcedo v. Hanna*, 936 F.3d 1162, 1168 (11th Cir. 2019).

The "foremost" standing requirement is injury in fact. *Steel Co.*, 523 U.S. at 103. An injury in fact consists of "an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Defs. of Wildlife*, 504 U.S. at 560 (quotation marks omitted). A "concrete" injury must be "*de facto*"—that is, it must be "real, and not abstract." *Spokeo*, 136 S. Ct. at 1548 (quotation marks omitted). A "particularized" injury "must affect the plaintiff in a personal and individual way." *Id.* (quotation marks omitted). Each subsidiary element of injury—a legally protected interest, concreteness, particularization, and imminence—must be satisfied. *See id.* at 1545; *Defs. of Wildlife*, 504 U.S. at 560. These cases turn most centrally on the requirement of concreteness.

As a general matter, tangible injuries qualify as concrete. *See Spokeo*, 136 S. Ct. at 1549. But the complaints here do not allege that the collection letters caused Trichell or Cooper any tangible injury. For example, neither plaintiff alleges that he made any payments in response to the defendants' letters—or even that he wasted time or money in determining whether to do so. Instead, when confronted with the standing issue during oral argument, Trichell and Cooper asserted only intangible injuries, in the form of alleged violations of the FDCPA.

Intangible injuries sometimes qualify as concrete, but not always. In particular, a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*, 136 S. Ct. at 1549. Rather, "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* To determine whether an intangible injury is sufficiently concrete, we must look to both history and the judgment of Congress. *Id.*

B

For history, we consider whether the alleged intangible injury bears a "close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549. *Spokeo* applied this analysis to claims under the Fair Credit Reporting Act (FCRA), which requires consumer reporting agencies to follow procedures to ensure the accuracy of consumer reports, and which authorizes private suits for willful violations. *See id.* at 1545. The Court analogized statutory claims for the disclosure of inaccurate reports to the traditional torts of libel and slander *per se*, which permit recovery even if the plaintiff's harms are "difficult to prove or measure." *Id.* at 1549. So, for example, a FCRA claim arising from the disclosure of an inaccurate zip code would not be actionable, for it is "difficult to imagine" how such a disclosure "could work any concrete harm" that would have been actionable at common law.

Id. at 1550. On the other hand, the Ninth Circuit concluded that a FCRA claim arising from the disclosure of false information about the plaintiff's age, employment, education, and wealth does involve a concrete injury, and therefore is actionable, because it is similar to claims actionable at common law. *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1113–17 (9th Cir. 2017). And, of course, a FCRA claim involving not only disclosure of false and sensitive information, but also consequential harms such as a reduced credit score, is also actionable. *Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1279–80 (11th Cir. 2017).

In *Perry v. Cable News Network, Inc.*, 854 F.3d 1336 (11th Cir. 2017), this Court applied a historical analysis to assess Article III standing to raise claims under the Video Privacy Protection Act. That statute prohibits video tape service providers from disclosing customer records, and it provides a cause of action to anyone aggrieved by a violation. *See id.* at 1340. The Court analogized this statutory cause of action to the traditional tort of intrusion upon seclusion, which makes a defendant liable for invading the plaintiff's privacy without any further harm. *Id.* at 1340–41. Given the similarity of the statutory claim to the traditional tort, the Court held that a wrongful disclosure of the plaintiff's browsing records "satisfied the concreteness requirement of Article III standing." *Id.* at 1341.

By contrast, the common law furnishes no analog to the FDCPA claims asserted here. The closest historical comparison is to causes of action for

fraudulent or negligent misrepresentation, but these torts differ from the plaintiffs' claims in fundamental ways. For centuries, misrepresentation torts have required a showing of justifiable reliance and actual damages. *See Pasley v. Freeman* (1789) 100 Eng. Rep. 450, 453 (Buller, J.) ("Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies."); *Prosser & Keeton on the Law of Torts* §§ 105, 108 (5th ed. 1984). Today as well, a claim for fraudulent misrepresentation still requires the plaintiff to prove harm "caused to him by his justifiable reliance upon the misrepresentation." Restatement (Second) of Torts, § 525 (1977); *see also* Restatement (First) of Torts, § 525 (1938). Likewise, negligent misrepresentation claims still require plaintiffs to show harm "caused to them by their justifiable reliance upon" the false information. Restatement (Second) of Torts, § 552; *see also* Restatement (First) of Torts, § 552. In short, under our common-law tradition, "there can be no recovery if the plaintiff is none the worse off for the misrepresentation, however flagrant it may have been." *Prosser & Keeton*, *supra*, § 110.

The claims asserted here depart dramatically from these centuries of tradition. The plaintiffs seek to recover for representations that they contend were misleading or unfair, but without proving even that they relied on the representations, much less that the reliance caused them any damages. By jettisoning the bedrock elements of reliance and damages, the plaintiffs assert

claims with no relationship to harms traditionally remediable in American or English courts. This cuts against Article III standing, for the purpose of that doctrine is to confine courts to their "traditional role." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009); *see also Spokeo*, 136 S. Ct. at 1547; *Raines*, 521 U.S. at 819.[1]

C

In assessing injury in fact, we also consider the judgment of Congress. It can matter for two reasons. First, Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Defs. of Wildlife*, 504 U.S. at 578. So, for example, Congress may make "legally cognizable" the interests of a competitor harmed by conduct that violates a statute. *See*, *e.g.*, *Hardin v. Ky. Utils. Co.*, 390 U.S. 1, 5–6 (1968); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476–77 (1940). Second, Congress is "well positioned" to make its own judgment about which harms are sufficiently concrete, particularized, and imminent to constitute injuries in fact. *Spokeo*, 136 S. Ct. at 1549. For example, the Telephone Consumer Protection Act (TCPA) prohibits certain unsolicited communications and provides a cause of action to individuals

[1] The dissent contends that the claims here also bear a close relationship to the common-law tort of abuse of process. *Post*, at 37–39. But that tort requires "harm" caused by the improper use of "legal process." Restatement (Second) of Torts § 682; *see also* Restatement (First) of Torts § 682. Trichell and Cooper do not allege that the defendants used legal process against them or that they suffered any harm.

receiving them. Although the statute has been understood to apply to both telephone calls and text messages, the TCPA's statutory findings highlight the burden imposed by unwanted calls but say nothing about unwanted texts. *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394, 2394. In part, this Court relied on those findings in holding that the receipt of unwanted phone calls is a concrete injury, *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1270 (11th Cir. 2019), but the receipt of a single unwanted text message is not, *Salcedo*, 936 F.3d at 1169–70.

Congress's role in our assessment of Article III standing is necessarily limited. As the master of its own statutes, Congress may freely make injuries legally cognizable for statutory purposes. *See Defs. of Wildlife*, 504 U.S. at 578. But the requirements of concreteness, particularization, and imminence are "irreducible" elements of Article III itself. *See id.* at 560–61. In enacting statutory causes of action, Congress must assess for itself whether these constitutional requirements have been met. *See* U.S. Const. art. VI, cl. 3 ("The Senators and Representatives ... shall be bound by Oath or Affirmation, to support this Constitution."). And in adjudicating cases or controversies (or determining whether they exist), federal courts must decide for themselves whether applicable statutes are consistent with the Constitution. *See City of Boerne v. Flores*, 521 U.S. 507, 524 (1997); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

That is why, as the Supreme Court has insisted time and again, "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*, 136 S. Ct. at 1549; *see Earth Island Inst.*, 555 U.S. at 497; *Raines*, 521 U.S. at 820 n.3. On the contrary, the existence of a "cause of action does not affect the Article III standing analysis." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1620 (2020). "Article III standing requires a concrete injury even in the context of a statutory violation," *Spokeo*, 136 S. Ct. at 1549, and Article III courts—while exercising jurisdiction to determine their own jurisdiction—must ultimately decide what injuries qualify as concrete. Congress's judgment may inform that assessment but cannot control it.[2]

Here, the judgment of Congress disfavors Trichell and Cooper. The FDCPA's statutory findings contain one sentence identifying the harms against which the statute is directed: "Abusive debt collection practices contribute to [a] number of personal bankruptcies, to marital instability, to the loss of jobs, and to

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[2] The dissent repeatedly stresses the point that "when a statutory right itself protects a concrete interest, a plaintiff need not allege 'any *additional* harm beyond the one Congress has identified.'" *Post*, at 29 (quoting *Spokeo*, 136 S. Ct. at 1549); *see also id.* at 39, 44. We have no quarrel with that general proposition. But as we have shown, we cannot treat an injury as "concrete" for Article III purposes based only on Congress's say-so. Like the Sixth Circuit, we reject the "anything-hurts-so-long-as-Congress-says-it-hurts theory of Article III injury." *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018).

invasions of individual privacy." 15 U.S.C. § 1692(a). These serious harms are a far cry from whatever injury one may suffer from receiving in the mail a misleading communication that fails to mislead. In terms of "privacy and nuisance concerns," *Salcedo*, 936 F.3d at 1169, an unwanted mailing is more like an unwanted text message than an unwanted phone call. *See Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 447 U.S. 530, 542 (1980) (recipient "may escape exposure to objectionable material simply by transferring the [communication] from envelope to wastebasket"). And while a recipient may take offense that a private party has violated the FDCPA, that is akin to taking offense that the government has violated other statutes—an injury that is canonically abstract as opposed to concrete. *See*, *e.g.*, *Defs. of Wildlife*, 504 U.S. at 575–76; *Allen v. Wright*, 468 U.S. 737, 754 (1984).

The FDCPA's private cause of action reinforces this analysis. It provides that a person may recover "any actual damage sustained by such person as a result of" an FDCPA violation and "such additional damages as the court may allow." 15 U.S.C. § 1692k(a). This formulation suggests that Congress viewed statutory damages not as an independent font of standing for plaintiffs without traditional injuries, but as an "additional" remedy for plaintiffs suffering "actual damage" caused by a statutory violation. For example, the Real Estate Settlement Procedures Act (RESPA) provides a cause of action for "actual damages" resulting

from statutory violations and, in pattern-or-practice cases, for "any additional damages, as the court may allow." 12 U.S.C. § 2605(f)(1). In construing RESPA, this Court held that "damages are an essential element" of a claim, *Renfroe v. Nationstar Mortg., LLC*, 822 F.3d 1241, 1245–46 (11th Cir. 2016), and further stated that "the use of 'additional' seems to indicate that a plaintiff cannot recover pattern-or-practice damages in the absence of actual damages," *id.* at 1247 n.4.

In sum, the FDCPA's narrow findings and cause of action affirmatively cut against Cooper and Trichell and, in any event, suggest no congressional judgment firm enough to break with centuries of tradition indicating that misrepresentations are not actionable absent reliance and ensuing damages.[3]

D

Against this history and congressional judgment, Trichell and Cooper assert standing based on risk and informational injuries. Neither theory works.

1

Trichell and Cooper assert that the collections letters they received created a risk that unsophisticated consumers might be misled into making unnecessary or even harmful payments on time-barred debt. And that risk, they conclude, is enough to establish a concrete injury. This theory suffers from two fatal defects:

[3] We do not decide the scope of the FDCPA's statutory cause of action. Under *Steel Co.*, we must decide questions of Article III standing, which here are dispositive, before reaching questions about the scope of a statutory cause of action. *See* 523 U.S. at 88–93.

First, Trichell and Cooper do not allege that the collection letters posed any risk of harm to themselves. Second, any risk that the letters may have posed to them had dissipated by the time they filed suit.

Risk to Plaintiffs: An injury in fact must be particularized as well as concrete. *See Spokeo*, 136 S. Ct. at 1548. To be particularized, the injury "must affect *the plaintiff* in a personal and individual way." *Defs. of Wildlife*, 504 U.S. at 560 n.1 (emphasis added). In other words, "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972). The same principle holds true when the plaintiff invokes a statutory cause of action: "where a statute confers new legal rights on a person, that person will have Article III standing to sue where the facts establish a concrete, particularized, and personal injury *to that person* as a result of the violation of the newly created legal rights." *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1251 (11th Cir. 2015) (emphasis added). Because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), what matters is whether the plaintiff has suffered a concrete injury, not whether other parties have.

The plaintiffs' risk-as-injury theory founders because their complaints do not allege that the collection letters "substantially increased the risk" of harm to Trichell or Cooper. *Thole*, 140 S. Ct. at 1621. Trichell asserts only that the letters

"would lead *a consumer* to believe that they [*sic*] had to pay this debt to avoid being sued, credit reported, or having to pay the full amount at some point in the future." Trichell App. 1 at 6 (emphasis added). Cooper comes closer, but he too falls short. He alleges that the collection letter sent to him "puts an unsophisticated consumer, i.e. Plaintiff, into a difficult position. The consumer is enticed by the prospect of saving a great deal of money on a debt but not advised that by making a payment, he will be re-starting the statute of limitations that could subject him to a future lawsuit for which he previously had an absolute defense." Cooper App. 1 at 8. Cooper's allegation that he was put into a "difficult position" does not support a plausible inference that he was at substantial risk of making any payment. Nor does Cooper's allegation that the collection letter "expos[ed] him to a potential lawsuit that he would not have previously been exposed to." *Id.* at 8–9. Moreover, Cooper's complaint reflects a perfect understanding of why the collection letters were arguably misleading, without any suggestion that Cooper figured this out only after flirting with the idea of making a payment. With no plausible allegation that *they* were ever at substantial risk of being misled, Trichell and Cooper cannot show standing based on such a risk to others.[4]

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[4] The dissent posits that the increase in risk must be measured in relative terms, not absolute amount. *Post*, at 43 n.2. But an action creating a small risk of injury cannot support Article III standing on the theory that the risk, although not "substantial in itself," is "substantially *increased*" from zero. *Id.* (cleaned up). To the contrary, no small risk of injury

Casillas v. Madison Avenue Associates, Inc., 926 F.3d 329 (7th Cir. 2019), reinforces our conclusion. That case involved an FDCPA requirement to tell recipients of debt-collection letters how to preserve their rights to contest the debt. *Id.* at 332. The debt collector failed to provide the notice, the plaintiff sued, and the Seventh Circuit affirmed a dismissal for lack of Article III standing. The court reasoned that, because the plaintiff had never planned to contest the debt, she was never at risk of forfeiting her rights. *See id.* at 334. And because the debt collector's "bare procedural violation" did not increase the risk of any harm to the plaintiff's concrete interests, it could not support Article III standing. *Id.* at 334–35; *see also Earth Island Inst.*, 555 U.S. at 496 ("deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing"). Moreover, the likely reaction of "unsophisticated consumer[s]" may inform a merits determination whether a communication is misleading, but it cannot allow "those who have not been injured to vindicate the rights of those who have." *Casillas*, 926 F.3d at 336

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would satisfy the Article III requirement of imminence. *See*, *e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409–14 (2013). And that imminence requirement—of at least a "'substantial risk' that the harm will occur," *id.* at 414 n.5—is precisely what *Thole* cited for the proposition that the challenged act must have "substantially increased the risk" of harm to the plaintiff. 140 S. Ct. at 1621. The Court was plainly speaking in terms of the absolute increase rather than the percentage increase—which would be infinite in every case where the plaintiff was at no risk before the defendant acted.

n.3. The same logic controls this case—Trichell and Cooper cannot prove standing merely by alleging risks posed to consumers other than themselves.

Our analysis draws further support from *Frank v. Autovest, LLC*, No. 19-7119, 2020 WL 3053199 (D.C. Cir. June 9, 2020). There the plaintiff claimed that the defendants had violated the FDCPA by filing false affidavits in a collection action. The plaintiff invoked the same FDCPA provisions at issue here: Section 807's prohibition on misleading statements and Section 808's prohibition on unfair collection methods. *Id.* at *2. The D.C. Circuit held that the plaintiff lacked standing because the false affidavits did not mislead or otherwise injure the plaintiff. *Id.* As for the judgment of Congress, the court stressed that "[n]othing in the FDCPA suggests that *every* violation of the provisions implicated here" creates an Article III injury. *Id.* at *3. Moreover, it made no difference that the affidavits might have misled a hypothetical unsophisticated debtor. Tracking *Casillas*, the court explained that "[a]fter *Spokeo*, a plaintiff must demonstrate a subjective—that is, an actual—personal injury for standing even when his merits argument turns on the perspective of an objective, unsophisticated consumer." *Id.* at *4. Like the plaintiff in *Frank*, Trichell and Cooper have failed to allege such a personal injury.

We recognize that other circuits disagree. In *Macy v. GC Services Limited Partnership*, 897 F.3d 747 (6th Cir. 2018), which involved the same FDCPA

provisions at issue in *Casillas*, the Sixth Circuit found standing based on the increased forfeiture risk to consumers in general, without any showing that the failure to provide notice placed the plaintiffs at greater risk. *See id.* at 758–59. Likewise, in *Cohen v. Rosicki, Rosicki & Associates, P.C.*, 897 F.3d 75 (2d Cir. 2018), which involved the FDCPA's prohibition on misleading communications, the Second Circuit found standing based only on a risk of harm, even though the plaintiff never alleged that the communication at issue might have affected him personally. *See id.* at 80–82.

In our view, the approach of the Seventh and D.C. Circuits is more faithful to Article III. As we have explained, a statutory violation that poses a risk of concrete harm to consumers in general, but not to the individual plaintiff, cannot fairly be described as causing a particularized injury to the plaintiff. Here, neither Trichell nor Cooper has alleged such a particularized injury.

Dissipated Risk: In any event, any risk to Trichell and Cooper had entirely dissipated by the time they filed their respective complaints. As noted above, the complaints explain perfectly well why the collection letters were arguably misleading. The complaints thus did not, and could not, make any allegation that Trichell or Cooper was at risk of being misled in the future. Moreover, any past risk had dissipated before they filed the complaints, and courts must assess Article III standing as of when a complaint is filed. *See Focus on the Family v. Pinellas*

Suncoast Transit Auth., 344 F.3d 1263, 1275 (11th Cir. 2003). In other cases finding standing on the ground that the defendant's statutory violation had increased the plaintiff's risk of injury, the risk still existed when the complaint was filed. *See*, *e.g.*, *Spokeo*, 867 F.3d at 1115–17 (ongoing risk of harm from disclosure of false credit information).

By contrast, this Court has rejected claims of Article III standing where the plaintiff's risk of harm had dissipated before the complaint was filed. In *Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998 (11th Cir. 2016), a bank failed to timely record a discharge of the plaintiff's mortgage, and New York law provided a statutory cause of action for the failure. But the bank recorded the discharge before the plaintiff filed his lawsuit, and no harm had befallen the plaintiff in the interim. On these facts, with an allegation "only that [the bank] recorded the [discharge] late and nothing else," the Court held that the plaintiff "failed to establish that he suffered or could suffer any harm that could constitute a concrete injury." *Id.* at 1003. Later, two members of the *Nicklaw* panel elaborated that no Supreme Court decision "holds—or even hints—that a plaintiff has standing to sue because he faced a risk of harm that never materialized and has since disappeared." *Nicklaw v. CitiMortgage, Inc.*, 855 F.3d 1265, 1267 (11th Cir. 2017) (W. Pryor, J., respecting the denial of rehearing *en banc*).

So too here: Even if Trichell and Cooper were placed at risk of being defrauded when they received their collection letters, the risk never materialized, had dissipated before the complaints were filed, and cannot possibly threaten any future concrete injury. For this additional reason, Trichell and Cooper cannot show Article III standing based on a risk of injury.

Trichell counters that this analysis is inconsistent with *Holzman v. Malcolm S. Gerald & Associates, Inc.*, 920 F.3d 1264 (11th Cir. 2019), which permitted an FDCPA claim to go forward on facts similar to those alleged here. But *Holzman* did not address any question of Article III standing. And "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011). *Holzman* thus provides no support for the plaintiffs.

2

Trichell and Cooper also seek to base standing on a claimed informational injury. They contend that the FDCPA gives them a right to receive truthful communications from debt collectors, which makes any violation of that right qualify as a concrete injury. We disagree.

The plaintiffs' theory invokes two Supreme Court cases addressing when a denial of information constitutes an injury in fact. In *Public Citizen v. DOJ*, 491

U.S. 440 (1989), the Court held that the government's refusal to disclose information about prospective judicial nominees, as assertedly required by the Federal Advisory Committee Act, constituted a concrete Article III injury. *See id.* at 448–50. Likewise, in *FEC v. Akins*, 524 U.S. 11 (1998), the Court held that the government's refusal to compel disclosure of information about a political group, as assertedly required by the Federal Election Campaign Act, also constituted a concrete Article III injury. *See id.* at 21–25. For two reasons, these cases provide no support to Trichell and Cooper.

First, the statutes at issue in *Public Citizen and Akins* made certain information subject to public disclosure. But the FDCPA is not a public disclosure law at all. The provisions at issue here create no substantive entitlement to receive information from debt collectors. Instead, they provide only that debt-collection letters may not be misleading or unfair. *See* 15 U.S.C. §§ 1692e, 1692f. And the gravamen of the plaintiffs' complaints is not that they sought and were denied desired information, but that they received unwanted communications that were misleading and unfair. The informational-injury cases thus are inapposite.

Casillas makes a similar point. That case involved FDCPA provisions requiring debt collectors to disclose specific information about what the recipient of a letter must do to preserve statutory rights to contest the debt. *See* 926 F.3d at 334–35. Yet the Seventh Circuit described the provisions as "procedural" ones

designed to protect against forfeitures, rather than "sunshine" provisions making information available to all who wish to have it. *See id.* at 337–39. And given that characterization, the court held that the critical fact for standing purposes was not that the debt collector had failed to give the notice required by the FDCPA, but that the failure created no risk of a forfeiture by the plaintiff. *See id.* at 338. If that line of reasoning governs FDCPA provisions requiring the disclosure of specific information about how to preserve rights, then it surely also governs FDCPA provisions that merely prohibit misleading or unfair communications.

Second, the plaintiffs in *Public Citizen* and *Akins* identified consequential harms from the failure to disclose the contested information. The advocacy organizations in *Public Citizen* alleged that they needed the information to "participate more effectively in the judicial selection process." 491 U.S. at 449. And the voters in *Akins* alleged that the information "would help them (and others to whom they would communicate it) to evaluate candidates for public office." 524 U.S. at 21. Trichell and Cooper have identified no comparable downstream consequences from their receipt of allegedly misleading communications that failed to mislead. Absent any such concrete impact, they can complain only about *receiving* information that had no impact on them. As several other courts have recognized, an asserted informational injury that causes no adverse effects cannot satisfy Article III. *See Frank*, 2020 WL 3053199, at *3; *Casillas*, 926 F.3d at 338;

Huff v. TeleCheck Servs., Inc., 923 F.3d 458, 467 (6th Cir. 2019); *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 346–47 (4th Cir. 2017).

Finally, we note that *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), is also inapposite. That case arose under the Fair Housing Act of 1968, which makes it unlawful to falsely state to any applicant for housing, because of the applicant's race, that available housing is unavailable, and which provides for private civil enforcement. *See id.* at 367 n.2, 372 n.11. Construing these provisions, the Court held that a black tester, employed by a housing organization to detect unlawful discrimination, had standing to sue for false representations made to her even though she did not intend to rent an apartment. *Id.* at 373–74. Trichell and Cooper claim to have suffered a similar injury when they received the allegedly misleading collection letters.

Havens Realty does not sweep that broadly. For one thing, it is unclear whether the Court rendered a holding about the concreteness of the tester's injury, as opposed to whether Congress had made the injury legally cognizable under the Fair Housing Act. *See* 455 U.S. at 373–75. To be sure, *Havens Realty* did not itself distinguish those questions, but *Defenders of Wildlife* and *Spokeo* make clear that we must. In any event, the Fair Housing Act does not seek to vindicate some amorphous interest in receiving unusable housing information. Instead, it protects the weighty interest in not being subjected to racial discrimination, which can

inflict a concrete injury on anyone who "personally" experiences it. *See Wright*, 468 U.S. at 755 (quotation marks omitted). Trichell and Cooper allege nothing comparable here, so their harm in receiving information that might mislead others cannot support Article III standing.

III

Neither Trichell nor Cooper suffered an injury in fact when they received allegedly misleading communications that did not mislead them. Because they lack Article III standing, we vacate the district courts' judgments and remand the cases with instructions to dismiss for lack of Article III standing.

VACATED and **REMANDED**.

MARTIN, Circuit Judge, concurring in part and dissenting in part:

Keith Cooper and John Trichell received letters from Midland Credit Management, Inc. ("Midland") seeking to collect on time-barred debt. Mr. Cooper and Mr. Trichell view these letters as deceptive because they gave the false impression that debts previously owed by the men were still legally enforceable. Mr. Cooper goes a step further, saying that if he had responded to the letter by making a payment on the time-barred debt, he would have unwittingly restarted the statute of limitations. In other words, his payment would have converted a debt he was not legally obligated to pay into one he was. Plaintiffs claim these letters violate the Fair Debt Collection Practices Act ("FDCPA"), which prohibits "false, deceptive, or misleading representation[s]" and "unfair or unconscionable means" to collect debt. 15 U.S.C. §§ 1692e, 1692f.

I believe both plaintiffs have satisfied Article III's concreteness requirement by alleging that Midland sent them deceptive letters in violation of §§ 1692e and 1692f. Because in addition, Mr. Cooper alleged particularized injury, I believe he satisfied Article III's injury-in-fact requirement. As for Mr. Trichell, I agree with the majority that he lacks standing to bring his claim because he failed to allege any particularized harm.

I.

I begin with basic principles of our Article III jurisprudence. The majority is right to say that, in order to satisfy the injury-in-fact requirement for Article III standing, a plaintiff must allege an injury that is both "concrete" and "particularized." Spokeo v. Robins, 578 U.S. ___, 136 S. Ct. 1540, 1548 (2016), as revised (May 24, 2016). The majority is also correct that the Supreme Court in Spokeo recognized an injury need not be "tangible" to satisfy the concreteness requirement. Id. at 1549. Rather, even intangible injuries, such as the "risk of real harm," may be concrete. Id. In this regard, the Supreme Court tells us that "both history and the judgment of Congress" inform our analysis of whether an intangible injury is sufficiently concrete. Id. And while the majority opinion recognizes this, it makes no mention of the fact that when a statutory right itself protects a concrete interest, a plaintiff need not allege "any additional harm beyond the one Congress has identified." Id.; see also Perry v. Cable News Network, Inc., 854 F.3d 1336, 1340–41 (11th Cir. 2017) (holding that a plaintiff alleging a violation of the Video Privacy Protection Act need not allege "any additional harm beyond the statutory violation" because both congressional judgment and common law support a finding of concreteness).

Contrary to the majority opinion, I read §§ 1692e and 1692f to protect a concrete interest, and both history and the judgment of Congress support this idea.

Plaintiffs' claims are analogous to the common law torts of abuse of process and fraudulent misrepresentation, and the violations they allege are at the very core of the interests Congress sought to protect when enacting the FDCPA. Left to decide this case on my own, I would hold that these plaintiffs satisfied Article III's concreteness requirement without having to allege "any additional harm beyond" the one Congress identified in enacting §§ 1692e and 1692f.

A.

Although Congress's decision to grant a right to sue "is not determinative of Article III standing," its judgment is "instructive and important because Congress is well positioned to identify intangible harms that meet minimum Article III requirements." Cordoba v. DIRECTV, LLC, 942 F.3d 1259, 1268 (11th Cir. 2019) (quotation marks omitted); see also Daniel Townsend, Who Should Define Injuries for Article III Standing?, 68 Stan. L. Rev. Online 76, 81–83 (2015) (explaining that Congress is better positioned to gather facts and make empirical judgments about whether a practice is injurious). Here, Congress expressed its judgment to protect people's concrete interest in being free from false, deceptive, or unfair debt collection notices, when it enacted §§ 1692e and 1692f.

Congress passed the FDCPA after concluding that "debt collection abuse by third party debt collectors is a widespread and serious national problem." S. Rep. No. 95-382, at 2 (1977). The official Senate report on the FDCPA found,

> While unscrupulous debt collectors comprise only a small segment of the industry, the suffering and anguish which they regularly inflict is substantial. Unlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them.

Id. The report went on to find that "[c]ollection abuse [by debt collectors] takes many forms, including . . . [the] misrepresentation of a consumer's legal right" as well as "simulating legal process." Id. Similarly, a House report concluded that at the time of the FDCPA's passage, "there ha[d] been an increasing incidence of debt collectors abusing consumers by using various means of harassment and deception," including by sending "phony legal documents." H. Rep. No. 95-131, at 2 (1977). Based on the "abundant evidence" of abusive and deceptive debt collection practices, Congress concluded that those practices contribute to "personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a).

To address these abuses, the FDCPA prohibits debt collectors from using any "false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. One of the prohibited deceptive practices is misrepresentation of "the character, amount, or legal status of any debt." Id. § 1692e(2)(A). Likewise, a debt collector may not use any "unfair or unconscionable means to collect or attempt to collect any debt." Id. § 1692f. The

complaints allege that Mr. Cooper and Mr. Trichell each received letters suggesting they had to pay off certain debts to avoid being sued or reported to a credit agency. According to plaintiffs, these letters gave the impression that the debts they referenced were legally enforceable, when in fact they were barred by the statute of limitations. In Mr. Cooper's case, payment on his debt may have restarted the limitations period. Midland's letters thus presented "a risk of harm to the FDCPA's goal of ensuring that consumers are free from deceptive debt-collection practices." Macy v. GC Servs. Ltd. P'ship, 897 F.3d 747, 757 (6th Cir. 2018).

In reaching its conclusion that "the judgment of Congress disfavors Trichell and Cooper," Maj. Op. at 14, I fear the majority opinion trivializes the harm resulting from misleading debt collection letters. The majority holds that the receipt of a deceptive debt collection letter is "like an unwanted text message," which this Court said is insufficient to confer standing in Salcedo v. Hanna, 936 F.3d 1162, 1168 (11th Cir. 2019). It is not similar, according to the majority, to an unwanted phone call, which this court said is enough to establish standing in Cordoba, 942 F.3d at 1268. Neither comparison withstands scrutiny. The Salcedo plaintiff received a single text message from his former attorney offering a ten percent discount on legal services. 936 F.3d at 1165. The Cordoba plaintiff got advertising phone calls from DIRECTV. 942 F.3d at 1266. Marketing texts or

phone calls causing a temporary nuisance to the recipient are a far cry from one of Midland's letters, which plaintiffs say falsely represented that they were on the hook for tens of thousands of dollars of debt.

The majority also minimizes plaintiffs' injuries by analogizing them to a person "taking offense that the government has violated other statutes." Maj. Op. at 15. That the majority relies on Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130 (1992), for this proposition demonstrates the weakness of the comparison. In Lujan, environmental organizations challenged a regulation requiring federal agencies to consult with the Secretary of the Interior about threats to endangered species caused by agency action. Id. at 558–59, 112 S. Ct. at 2135. The appeals court held that the injury-in-fact requirement was satisfied because Congress had "confer[red] upon all persons . . . an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." Id. at 573, 112 S. Ct. at 2143. The Supreme Court reversed, reiterating that standing does not exist to assert a "generally available grievance about government" that "no more directly and tangibly" affects the plaintiffs "than it does the public at large." Id. at 573–74, 112 S. Ct. at 2143. But in its discussion, the Court recognized the difference between "generalized grievance" cases, like Lujan, and others in which "plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of

theirs." Id. at 572, 112 S. Ct. at 2142. The claims of Mr. Cooper and Mr. Trichell fall squarely into the latter category. They did not allege merely that Midland ran afoul of the FDCPA in some abstract or generally applicable sense. Rather, they say that Midland violated the FDCPA by sending them collection notices implying that their time-barred debts were still legally enforceable. In so doing, Midland impaired their concrete interest in being free from false, deceptive, or unfair debt collection communications.

Finally, the majority opinion speculates that the FDCPA's private right of action provision may not permit statutory damages in the absence of actual damages, and says this idea "reinforces" its view that Congress did not believe violations of § 1692e constitute concrete injury. Maj. Op. at 15. But this approach conflates our merits inquiry with our Article III standing analysis. Even if it were true that the FDCPA requires proof of "actual damages" as a prerequisite to damages,[1] this would at most reflect a judgment about whether such plaintiffs should prevail on their claims. It says nothing about whether Congress judged them to have suffered an injury in fact. See Whitmore v. Arkansas, 495 U.S. 149, 155, 110 S. Ct. 1717 (1990) ("Our threshold inquiry into standing in no way depends on the merits of the [plaintiff's] contention that particular conduct is

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[1] As the majority correctly recognizes, this Court has not decided (and does not decide here) whether statutory damages are available under the FDCPA in the absence of actual damages. Maj. Op. at 16 n.3.

illegal . . . ." (quotation marks omitted)); Rocky Mountain Helium, LLC v. United States, 841 F.3d 1320, 1325 (Fed. Cir. 2016) ("[A] merits determination is not a permissible one for the standing analysis, which assumes the merits of a litigant's claim . . . ."); Brown v. Medtronic, Inc., 628 F.3d 451, 457 (8th Cir. 2010) (observing that it is "important not to conflate" Article III's injury requirements with the "plaintiff's ultimate burden of proof as to the issues of damages and causation").

I believe the judgment of Congress supports plaintiffs' claim that they have each suffered concrete injury.

B.

Also instructive on whether a statutory violation constitutes a concrete injury is an examination of whether it "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." Spokeo, 136 S. Ct. at 1549. The majority recognizes that a statutory violation will often be sufficiently concrete when it is closely related to a claim that has historically been recognized at common law. Maj. Op. at 9–12. This Court's decision in Perry serves as an example. The panel found Mr. Perry had standing to assert a claim based solely on the violation of a provision of the Video Privacy Protection Act ("VPPA") that prohibited the wrongful disclosure of video tape rental or sale records, without any allegations of further harm. 854 F.3d

at 1340. Our Court reasoned that a violation of the statute, without more, was sufficient for Article III standing because this provision of the VPPA bore a "close relationship" to the tort of intrusion upon seclusion. Id. at 1340–41. And in Pedro v. Equifax, Inc., 868 F.3d 1275 (11th Cir. 2017), this Court found Mr. Pedro had standing based on a bare violation of a provision in the Fair Credit Reporting Act ("FCRA") that requires consumer reporting agencies to follow reasonable procedures "to assure maximum possible accuracy" of reported information. Id. at 1278, 1280 (quoting 15 U.S.C § 1681e(b)). Our Court reached this conclusion because the FCRA provision at issue had a "close relationship to the harm caused by the publication of defamatory information, which has long provided the basis for a lawsuit in English and American courts." Id. at 1280.

I see a close relationship between Mr. Trichell and Mr. Cooper's FDCPA claims and common law harms like the ones this Court recognized in Perry and Pedro. As I discussed above, Congress enacted the FDCPA to provide redress against debt collectors who mistreat consumers by misrepresenting the character or legal status of debts, "simulating legal process," sending "phony legal documents," and harassing consumers at home and at work. S. Rep. No. 95-382, at 2; H. Rep. No. 95-131, at 2. And Congress recognized "abusive debt collection practices contribute to harms that can flow from mental distress, like 'marital instability' and 'the loss of jobs.'" Demarais v. Gurstel Chargo, P.A., 869 F.3d 685, 691–92 (8th

Cir. 2017) (quoting 15 U.S.C. § 1692(a)). These abuses, and the harms that flow from them, sound in the common law torts of abuse of process and fraudulent or negligent misrepresentation.

Abuse of process protects against the "the unscrupulous use of the courts by individuals as instruments with which to maliciously injure their fellow men." Bertero v. Nat'l Gen. Corp., 529 P.2d 608, 614 (Cal. 1974) (alteration adopted) (quotation marks omitted). For over 300 years, common law courts have recognized that "contriving to injure someone by pretense and color of legal process demand[s] redress because it resulted in a loss of reputation, anxiety and the expenditure of funds in defense." Bd. of Ed. of Farmingdale Union Free Sch. Dist. v. Farmingdale Classroom Teachers Ass'n, Inc., Local 1889, 343 N.E.2d 278, 281 (N.Y. 1975) (citing Savile v. Roberts (1698) 91 Eng. Rep. 1147). Beyond that, "[t]he employment of process to extort property was, of itself, a sufficient cause of action," a principle which has carried into modern jurisprudence. Id. at 282. And while abuse of process has typically required the initiation of formal legal proceedings, the "effecting [of] a not too subtle threat . . . should be actionable" as well. Id. at 283; cf. Ruberton v. Gabage, 654 A.2d 1002, 1005 (N.J. Super. Ct. App. Div. 1995) (defining "abuse of process" as "the abuse of procedural methods used by a court to acquire or exercise its jurisdiction over a person or over specific property." (quotation marks omitted)).

The common law also protects against harms resulting from intentionally false communications and misleading nondisclosures. See Dan B. Dobbs et al., The Law of Torts § 662 (2d ed. June 2020 update); Restatement (Second) of Torts § 525 (1977); Cunningham v. Credit Bureau of Lancaster Cty., Inc., No. 17-cv-5102, 2018 WL 6062351, at *6 (E.D. Pa. Nov. 20, 2018) (observing that "the common law has long reflected an interest in avoiding the harms inherent to receiving misleading information") And some common law courts have allowed plaintiffs "to recover for [emotional] distress arising where the defendant negligently transmits or fails to transmit important information." Dobbs, supra, § 395.

There is a close relationship between these common law claims and the harms from which Congress sought to guard consumers when it passed the FDCPA. Both Congress, by enacting the FDCPA, and the common law provided causes of action for the emotional harm caused by abusing legal process and deceiving consumers. The majority fails to account for the similarity between §§ 1692e and 1692f, and abuse of process torts. The majority also goes beyond requiring a showing that the harm has a close relationship with one recognized at common law. It also says that plaintiffs must show that the alleged conduct satisfies "the bedrock elements of reliance and damages." Maj. Op. at 11–12. But this is mistaken, because, in order to satisfy Spokeo, congressionally proscribed

"conduct [need not] give rise to a cause of action under common law." Susinno v. Work Out World Inc., 862 F.3d 346, 351 (3d Cir. 2017) (emphasis added); see also Golan v. FreeEats.com, Inc., 930 F.3d 950, 958 (8th Cir. 2019) ("An alleged harm need not actually have been actionable at common law to satisfy this inquiry, rather it must have a "close relationship" to the type of harm that has traditionally been recognized as actionable."). If a plaintiff were required to satisfy every element of a common law cause of action before qualifying for statutory relief, Congress's power to "elevat[e] intangible harms" by defining injuries and chains of causation which will "give rise to a case or controversy where none existed before" would be illusory. Spokeo, 136 S. Ct. at 1549 (quotation marks omitted); see also id. (recognizing that Congress may "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law" (alteration in original) (quotation marks omitted)). These plaintiffs have alleged intangible harms that are closely related to harms traditionally protected at common law, so they need only allege a violation of that statute to satisfy Article III's concreteness requirement.

C.

The idea that where a statute itself protects a concrete interest, a plaintiff need not allege any harm beyond that which was identified by Congress, was as true before Spokeo as it is after. See Spokeo 136 S. Ct. at 1549 (citing Fed.

Election Comm'n v. Akins, 524 U.S. 11, 20–25, 118 S. Ct. 1777, 1784–87 (1998), and Pub. Citizen v. Dep't of Justice, 491 U.S. 440, 449, 109 S. Ct. 2558, 2564 (1989)). Both history and the judgment of Congress suggest that Midland's violations of the FDCPA constitute an injury to these plaintiffs' concrete interest in being free from false, deceptive, or unfair debt collection notices. Thus, plaintiffs' allegations that Midland violated §§ 1692e and 1692f by sending them false and misleading letters satisfies Article III's concreteness requirement.

Other Circuit Courts agree. The majority recognizes that both the Second and Sixth Circuits are at odds with its holding. In Cohen v. Rosicki, Rosicki & Associates, P.C., 897 F.3d 75 (2d Cir. 2018), the Second Circuit considered whether the plaintiff had standing to assert an FDCPA violation for the defendant's failure to identify the proper creditor on a foreclosure complaint. Id. at 79–80. That court rejected the defendant's argument that the plaintiff lacked standing because he "has alleged only a bare statutory procedural violation, divorced from any concrete harm." Id. at 81 (alteration adopted) (quotation marks omitted). It concluded that congressional judgment supported a finding of concreteness because Congress passed the FDCPA to "protect against the abusive debt collection practices likely to disrupt a debtor's life." Id. (quotation marks omitted). Because the defendant's failure to identify the proper creditor in its complaint "could [have] hinder[ed] the exercise of [plaintiff's] right to defend or otherwise

litigate that action," the plaintiff's bare allegation of a statutory violation was sufficient to satisfy Article III's concreteness requirement. Id. at 81–82.

In Macy, the plaintiffs claimed the defendant debt collector failed to provide notice, as required under the FDCPA, that the plaintiffs could dispute their debts only in writing. 897 F.3d at 758. The plaintiffs alleged that the failure to provide this notice could lead a consumer to waive or otherwise not properly vindicate her rights under the FDCPA. Id. The Sixth Circuit said these plaintiffs satisfied the concreteness requirement because the defendant's FDCPA violations "created a material risk of harm to a congressionally recognized interest." Id. at 759. That interest—what the Sixth Circuit termed the "core object of the FDCPA"—was the elimination of abusive debt collection practices. Id. The court concluded that a violation of the in-writing requirement harms that interest because it increases the risk that the debtor will waive her right to verify and challenge her debts. Id. Along the same lines, Mr. Cooper and Mr. Trichell allege they were subject to deceptive, misleading, and unfair collection communications, the elimination of which was another core object of the FDCPA. See H. Rep. No. 95-131, at 2. They have thus alleged a concrete injury.

II.

Of course, Mr. Cooper and Mr. Trichell cannot establish standing by solely alleging a concrete harm. Rather, Article III requires an injury that is both

"concrete and particularized." Spokeo, 136 S. Ct. at 1548 (quotation marks omitted). The particularity requirement says that an injury "must affect the plaintiff in a personal and individual way." Id. (quotation marks omitted). I share the majority's view that Mr. Trichell's complaint fails the particularity requirement because it states only that the "least sophisticated consumer" would have been misled by Midland's debt collection letter. Mr. Trichell does not say he was affected in any way by the letter. See Frank v. Autovest, LLC, ___ F.3d ___, 2020 WL 3053199, at *4 (D.C. Cir. June 9, 2020) (holding that a plaintiff cannot establish standing merely by alleging that the "least sophisticated consumer" would have been misled by a debt collection communication). I therefore join the majority's conclusion that Mr. Trichell failed to allege particularized harm, and that his complaint must be dismissed for lack of standing.

However, I reject the majority's conclusion as to Mr. Cooper. He met his burden to allege a particularized injury at the pleading stage. Mr. Cooper's complaint alleges that Midland's letter put him "into a difficult position" because it "entice[d]" him to make a payment by offering significant savings on his debts. He says that if he had acted on Midland's letter and made a payment on his debt, he would have "expos[ed] him[self] to a potential lawsuit that he would not have previously been exposed to." According to the complaint, Midland's letter thus employed "deceptive means" "[w]ith respect to [Mr. Cooper]." I view Mr.

Cooper's complaint to sufficiently allege that Midland's letter put him at real risk of making a payment on his time-barred debt.[2] He has therefore made the necessary showing, at the motion to dismiss stage, that he was affected by the conduct at issue in a "in a personal and individual way." Spokeo, 136 S. Ct. at 1549 (quotation marks omitted); see also Lujan, 504 U.S. at 561, 112 S. Ct. at 2137 ("[O]n a motion to dismiss we presume that general allegations embrace those

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[2] The majority says Mr. Cooper failed to allege an injury in fact because his complaint does not plausibly allege that he was at "substantial risk" of making payment on his debt. Maj. Op. at 18. However, in the context of statutory causes of action, the Supreme Court has not held that a plaintiff must allege risk that was "substantial" in itself. Rather, in Spokeo the Court held that a plaintiff must allege a "real" or "material" risk of harm, 136 S. Ct. at 1550, and in Thole v. U.S. Bank N.A., 590 U.S. ___, 140 S. Ct. 1615 (2020), it suggested that a "substantially increased" risk of harm would be sufficient, id. at 1621 (emphasis added). Mr. Cooper's complaint satisfies both articulations. He was subject to a real or material risk of harm when Midland's letter put him in a "difficult position" by "entic[ing]" him to restart the limitations period on time-barred debt. And he was subject to substantially increased risk of harm because before receiving Midland's letter, Cooper says he was not at all at risk of making payment on his debt.

Although the Court in Thole suggested that plaintiffs must allege a "substantially increased" risk of harm to satisfy Article III standing, the majority posits that, by citing to Clapper v. Amnesty International USA, 568 U.S. 398, 133 S. Ct. 1138 (2013), the Court really meant to say plaintiffs must allege a "substantial risk" of harm. Maj. Op. at 18 n.4. In Clapper, the Court held that plaintiffs challenging the constitutionality of a surveillance program lacked standing because they did not show a "certainly impending" risk or a "substantial risk" that their communications would be intercepted. Id. at 414 & n.5, 133 S. Ct. at 1150 & n.5. In my view, the Thole Court's failure to expressly adopt Clapper's "substantial risk" language was no accident. Unlike Thole, which addressed a claim arising under ERISA, 140 S. Ct. at 1618, Clapper did not involve a statutory cause of action. And as the Third Circuit has recognized, the Supreme Court requires a lesser magnitude of risk for statutory injuries in order to "strike[] a balance between Congress's power to define injuries . . . and the requirement that—absent a statutory right of action—a threatened harm be certainly impending or based on a substantial risk of harm to amount to injury in fact." Kamal v. J. Crew Grp., Inc., 918 F.3d 102, 113 (3d Cir. 2019) (citation and quotation marks omitted).

specific facts that are necessary to support the claim." (alteration adopted) (quotation marks omitted).

The majority looks to the Seventh Circuit's decision in Casillas v. Madison Avenue Associates, Inc., 926 F.3d 329 (7th Cir. 2019), and the D.C. Circuit's decision in Frank to support its holding that Mr. Cooper did not allege a particularized harm. Neither case lends support to the majority's holding. In Casillas, the court assessed whether the plaintiff had alleged a concrete injury, as opposed to whether that injury was particularized. Id. at 333 ("The question here is whether Casillas has alleged that she suffered—or faced a real risk of suffering—a concrete harm."); see also Spokeo, 136 S. Ct. at 1548 ("Concreteness . . . is quite different from particularization."). And to the extent Casillas held that plaintiffs cannot satisfy the injury-in-fact requirement by alleging an FDCPA violation alone, Casillas suffers from the same fundamental flaw as the majority opinion. It fails to recognize that where a statute itself protects a concrete interest, a plaintiff need not allege any more than the harm identified by Congress. The panel in Casillas never considered this avenue for establishing injury in fact, as evidenced by its failure to consult the common law or the judgment of Congress before concluding that the plaintiff failed to allege an injury in fact. See id.; cf. Macy, 897 F.3d at 759 (finding standing after concluding that Congress established

the FDCPA provision at issue to protect a concrete interest); Cohen, 897 F.3d at 80–81 (same).

The majority's reliance on Frank is similarly unavailing. The Frank court assessed an FDCPA plaintiff's standing at the summary judgment stage, concluding that the plaintiff failed to meet her burden because there was no testimony that "she was . . . confused, misled, or harmed in any relevant way during the collection action." ___ F.3d ___, 2020 WL 3053199, at *2. Here, in contrast, the court is assessing standing at the pleading stage, which requires only "general factual allegations" of personal injury. Lujan, 504 U.S. at 561, 112 S. Ct. at 2137. Mr. Cooper satisfied this burden by asserting he was confused and misled by a collection letter offering savings on time-barred debt, the payment of which might have restarted the applicable limitations period.

III.

The majority also concludes that Plaintiffs could not have suffered an injury in fact because any risk to them "had entirely dissipated by the time they filed their respective complaints." Maj. Op. at 21–22. I reject this conclusion as well. As set out above, the concrete injury identified by Congress was the risk of being misled by deceptive collection letters into paying time-barred debt. Mr. Cooper's complaint adequately alleges that he personally experienced exactly this concrete harm, thus satisfying Article III's injury-in-fact requirement. See Macy, 897 F.3d

at 759 (holding that an alleged FDCPA violation creating a "material risk of harm to a congressionally recognized interest" satisfies the concreteness prong of the injury-in-fact requirement); Strubel v. Comenity Bank, 842 F.3d 181, 190 (2d Cir. 2016) ("[A]n alleged procedural violation can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff's concrete interests and where the procedural violation presents a 'risk of real harm' to that concrete interest." (quoting Spokeo, 136 S. Ct. at 1549)). I see no basis for requiring a plaintiff previously at risk of being misled to allege a continuation of that risk.

Nicklaw v. CitiMortgage, Inc., 839 F.3d 998 (11th Cir. 2016), is not to the contrary. Our court held that Mr. Nicklaw lacked standing because he failed to allege that he was ever subject to either "a harm [or] a material risk of harm that the district court could remedy." Id. at 1003. The Nicklaw panel also properly recognized that plaintiffs may satisfy Article III standing by alleging statutory violations which expose a plaintiff to a material risk of harm. Id. at 1002–03. And while it is true that standing is determined at the moment a plaintiff's complaint is filed, there is no requirement that a plaintiff seeking redress for past injury show ongoing harm. See City of Los Angeles v. Lyons, 461 U.S. 95, 109, 103 S. Ct.

1660, 1669 (1983) (noting that allegations of past harm were sufficient to establish standing for damages claim).[3]

The D.C. Circuit addressed a similar circumstance in Jeffries v. Volume Services of America, Inc., 928 F.3d 1059 (D.C. Cir. 2019). The question in Jeffries was whether the plaintiff suffered an injury in fact when a vendor printed the expiration date and all sixteen digits of her credit card number on her receipt, in violation of the Fair and Accurate Credit Transactions Act ("FACTA"). Id. at 1062. The plaintiff argued that she suffered a concrete injury because the receipt exposed her to an "increased risk of identity theft." Id. at 1063–64. In response, the vendor argued that the plaintiff could not satisfy the injury-in-fact requirement because the plaintiff "through her own efforts, . . . has mitigated any risk of a third party accessing her credit card information." Id. at 1066. The court rejected this argument, observing that FACTA was designed not to criminalize identity theft, but to ensure that consumers do not experience "an increased risk" of identity theft. Id. Although that risk did not materialize, the panel recognized that the plaintiff nevertheless experienced harm, analogizing her to "someone who replaces the pin in a grenade [and] remains, nonetheless, previously at risk of getting blown up."

[3] While the majority cites Focus on the Family v. Pinellas Suncoast Transit Authority, 344 F.3d 1263 (11th Cir. 2003), for the proposition that an injury or a risk of injury must be present at the time that a complaint is filed, Maj. Op. at 21, that case discusses only equitable standing, not standing in a suit for damages. Focus on the Family, 344 F.3d at 1275.

Id. at 1067 (emphasis omitted). Similarly, even though Mr. Cooper was not tricked into making payments on his time-barred debt, Midland's letters nevertheless put him at risk of doing so.

Here, Mr. Cooper seeks retrospective relief for his past exposure to precisely the sort of risk Congress sought to curb when it enacted the FDCPA. I say that is enough. To require him to have actually been deceived presses far beyond Spokeo's requirements and significantly undermines Congress's ability to identify and prevent risks to the public.

IV.

Congress passed the FDCPA to protect consumers' concrete interest in being free from deceptive and abusive debt collection notices. Both the conduct Congress sought to prevent and the harms resulting from that conduct have close analogues in common law causes of action. Mr. Cooper has plausibly alleged that he suffered precisely the harm Congress sought to prevent in passing this statute. I understand Spokeo to require us to recognize Mr. Cooper's injury in fact under these circumstances.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

FOLEY & LARDNER, LLP, Appellant, v. UNKNOWN HEIRS, DEVISEES, GRANTEES, ASSIGNEES, LIENORS, CREDITORS, TRUSTEES, or OTHER CLAIMANTS OF NORMAND W. GENDRON, DECEASED; AEGIS WHOLESALE CORPORATION; AMERICAN HOME MORTGAGE; AMERICANS WHOLESALE LENDER; AMNET MORTGAGE LLC; BADGER INVESTMENTS LLC; BANK OF AMERICA NA; ROSE MARIE BARNES; SCOTT BENSON; DANIELLE BRINKMAN; GLENN BURRIS; KIMBERLEE BURRIS; C & N RENOVATION INC; CAROLE CHAMBERLAIN; CHASE HOME FINANCE LLC; CITIBANK NA; CYPRESS FALLS AT PALM HARBOR CONDOMINIUM ASSOCIATION INC; DEUTSCHE BANK NATIONAL TRUST COMPANY; BRIAN DOYLE; GAIL DOYLE; PATRICK DOYLE; CRISTINA DRUKER; JULIE EGERT; FEDERAL NATIONAL MORTGAGE CORPORATION; FIFTH THIRD BANK; FIFTH THIRD MORTGAGE COMPANY;	)	Case No. 2D18-2929

ALYSSA FOSTER; NORMAND W GENDRON; GENEVA MORTGAGE CORP; ADELLA GONZALEZ; GREEN TREE SERVICING LLC; LEORA HART; CHELSEA HIRVELA; KYLE HIVERLA; JOHN C IRIZARRY; KEVIN JONES; VERNELL JONES; JP MORGAN CHASE BANK NA; MONICA KARCZ; WILLIAM KRACHT IV; LOANCITY; LUAN LUAN; BRIAN JAMES MAGARBAN; JIOVANNI MANNINO; JOHN MARLOW; ROLLIN GUY MARNVILLE; ADRIANA MENDOZA; MEZANKA LLC; MIDFIRST BANK; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC; FAITH OCASIO; WILLIAM OCASIO; ONEWEST BANK FSB; PALISADES COLLECTION LLC; PELICAN CAPITAL INVESTMENT GROUP; JEAN PERSON; PINELLAS COUNTY BOARD OF COUNTY COMMISSIONERS; PINNACLE FINANCIAL CORPORATION; NADIA QUELL; CESAR JOSEPH REY; MARIBEL RUIZ; THOMAS SALVATO; WILLIAM SAVICKAS; CHRISTINE STANNISH; GARY STANNISH; IAN STROUD; SUNTRUST BANK; KAYAN JULIAN TELLER; ALEXIS THEBEAU; ANTHONY TIMONERE; UNKNOWN HEIRS DEVISEES GRANTEES ETC; US BANK NATIONAL ASSOCIATION; RONDAL JOSEPH VICKERS; EDWIN VOGT; JENNIFER LYNN WATERS; MARLON WEINTRAUB; WELLS FARGO BANK NA; CLETUS WOO; MICHELLE WOO; SHERRY WOO; and VICTOR ZOUBENKO,

Appellees.

Opinion filed July 10, 2020.

Appeal from the Circuit Court for Pinellas
County; Patricia A. Muscarella, Judge.

Ceci C. Berman and Joseph T. Eagleton of
Brannock & Humphries, Tampa; Patrick M.
Mosley of Hill Ward Henderson, Tampa, for
Appellant.

Michael A. Cohn, Martin S. Awerbach, and
Jacqueline F. Perez of Awerbach Cohn,
Clearwater, for Appellees Deutsche Bank
and OneWest Bank.

Michele A. Cavallaro of Fidelity National
Law Group, Fort Lauderdale, for Appellees
Wells Fargo Bank, N.A. and Monica Karcz.

No appearance for remaining
Appellees.

ATKINSON, Judge.

Foley & Lardner, LLP (Foley) appeals a final summary judgment entered in favor of the remaining defendants (Appellees) in the underlying foreclosure case. Foley argues that the trial court erred in finding that its predecessor-in-interest, CCM Pathfinder Palm Harbor Management, LLC (Pathfinder Palm Harbor), lacked standing to foreclose. We agree and reverse.

Palm Harbor One, LLC (the Developer) borrowed $29 million from over 300 fractional lenders (the Direct Lenders) to develop Cypress Falls at Palm Harbor Condominium (the Property). The Developer executed and delivered a promissory note, a mortgage, and a loan agreement in favor of the Direct Lenders. The Property, including all of the individual units, served as security for the loan. As such, purchasers

of the condominium units needed to pay the Direct Lenders a release payment in order to release their units from the encumbrance of the Developer's mortgage. Appellees are condominium unit owners who never obtained releases. Thus, their units remained encumbered by the mortgage and were subject to foreclosure.

USA Commercial Mortgage Company (USA Commercial) was the original loan servicer for the Direct Lenders. However, less than six months after inception of the loan, USA Commercial filed for bankruptcy in Nevada, after which it serviced the loan for approximately nine months until it assigned its servicing rights to Compass USA SPE LLC (Compass). Thereafter, the Developer defaulted on the loan and filed for bankruptcy in Massachusetts. After recognizing USA Commercial's assignment of servicing rights to Compass, the Massachusetts bankruptcy court ordered Compass to proceed with a foreclosure action on behalf of the Direct Lenders. However, Compass assigned its servicing rights to Asset Resolution, LLC (Asset Resolution), before filing a foreclosure action.

Asset Resolution then filed its own bankruptcy action in Nevada. Pathfinder Pompano, one of the Direct Lenders that owned roughly forty percent of the loan, sought to be appointed by the Nevada bankruptcy court as the asset manager of the loan. The bankruptcy court approved the Asset Management and Majority Cooperation Agreement (Asset Management Agreement), which stated, in part, the following:

> 2. Designation of Manager. Direct Lenders hereby designate and appoint [Pathfinder Pompano], and [Pathfinder Pompano] hereby accepts such designation and appointment, as the agent and representative of Direct Lenders <u>for the purpose of administering, operating and</u>

> supervising the management, leasing, financing, foreclosure, assignment and disposition of the Loan/Property.
> . . .
> 5. Authority/Advisory Committee. [Pathfinder Pompano] shall be solely authorized to take any and all actions on behalf of the Direct Lenders, including but not limited to executing all documents and paying all costs, fees and expenses on behalf of all the Direct Lenders relating to the Loan and/or Property. Notwithstanding anything contained herein, [Pathfinder Pompano] may, in its sole discretion, delegate communications and certain aspects of asset resolution tasks to a workout specialist, loan consultant, asset management advisor, real estate broker or agent, attorney, or others, to be determined by [Pathfinder Pompano] in its sole and absolute discretion. . . . No additional approvals shall be required from the Direct Lenders except in the event that [Pathfinder Pompano] elects to vary from the initial business plan of rehabilitating and selling the Property within the initial Term of this Agreement. In such event, the approval of a Majority of Direct Lenders shall be required. . . .
> . . .
> 8.7. Hiring. [Pathfinder Pompano], on behalf of Direct Lenders, shall have authority to hire and terminate, and shall supervise, all employees and independent contractors hired in connection with [Pathfinder Pompano's] duties hereunder, if any, and reasonably required for the operation of the Property. . . .

(Emphasis added.) That same day, Pathfinder Pompano delegated its obligations to Pathfinder Palm Harbor in an Agreement to Delegate Duties under Asset Management Agreement and Majority Cooperation Agreement (the Delegation Agreement), which provided, in part, the following:

> WHEREAS, on June 10, 2010, the United States Bankruptcy Court for the District of Nevada entered an order approving the [Asset] Management Agreement and appointing the [Pathfinder Pompano] as the Asset Manager for the Palm Harbor Loan; and
>
> WHEREAS, pursuant to sections 5 and 8.7 of the [Asset] Management Agreement, [Pathfinder Pompano] is authorized to delegate its duties and obligations under the

> [Asset] Management Agreement to [Pathfinder Palm Harbor];
>
> WHEREAS, <u>[Pathfinder Pompano] desires to delegate all of its duties and obligations under the [Asset] Management Agreement to [Pathfinder Palm Harbor]</u> and [Pathfinder Palm Harbor] desires to accept the duties and obligations of the [Pathfinder Pompano] under the Management Agreement;
>
> . . .
>
> 1. Delegation. [Pathfinder Pompano] <u>hereby delegates all of its obligations and duties under the [Asset] Management Agreement to [Pathfinder Palm Harbor] pursuant to sections 5 and 8.7 of the [Asset] Management Agreement</u> and [Pathfinder Palm Harbor] hereby accepts and agrees to perform all of [Pathfinder Pompano]'s obligations and duties under the [Asset] Management Agreement.

(Emphasis added.) Subsequently, Pathfinder Palm Harbor initiated the underlying foreclosure action on behalf of the Direct Lenders.

Appellees successfully moved to dismiss the foreclosure complaint with prejudice on grounds of the statute of limitations and statute of repose. This court reversed that dismissal. <u>See</u> <u>CCM Pathfinder Palm Harbor Mgmt., LLC v. Unknown Heirs of Gendron</u>, 198 So. 3d 3 (Fla. 2d DCA 2015). While the appeal was pending, Pathfinder Palm Harbor assigned its rights and interests in the underlying foreclosure proceeding as part of a settlement agreement. Foley then substituted for Pathfinder Palm Harbor as plaintiff.

Over the next few years, Foley pursued the foreclosure action, settling claims with some defendants and dismissing claims against others. A number of the remaining defendants moved for summary judgment, arguing in part that Pathfinder Palm Harbor never became an authorized loan servicer and thus lacked standing to bring the foreclosure action. In response, Foley argued that Pathfinder Palm Harbor derived its standing from the Asset Management Agreement and the Delegation

Agreement. The trial court ultimately agreed that Pathfinder Palm Harbor lacked standing and entered summary judgment in favor of the remaining defendants.

This court reviews a trial court's determination of whether a foreclosure plaintiff has standing de novo. Peters v. Bank of N.Y. Mellon, 227 So. 3d 175, 178 (Fla. 2d DCA 2017). Issues involving contract interpretation are also reviewed de novo. See Kaplan v. Bayer, 782 So. 2d 417, 419 (Fla. 2d DCA 2001).

It is undisputed that Pathfinder Pompano was authorized to service the loan and bring a foreclosure action on behalf of the Direct Lenders under the Asset Management Agreement. The questions before this court are whether the Asset Management Agreement authorized Pathfinder Pompano to delegate this duty to Pathfinder Palm Harbor, and, if so, whether Pathfinder Pompano did delegate that duty to Pathfinder Palm Harbor under the Delegation Agreement.

Foley contends that the Asset Management Agreement authorizes Pathfinder Pompano to delegate its ability to bring a foreclosure action on behalf of the Direct Lenders. This authority to delegate is found in section 5, which allows Pathfinder Pompano to, "in its sole discretion, delegate communications and certain aspects of asset resolution tasks to a workout specialist, loan consultant, asset management advisor, real estate broker or agent, attorney, or others, to be determined by [Pathfinder Pompano] in its sole and absolute discretion."

Appellees argue that the qualifier "certain aspects" limits the "asset resolution tasks" that Pathfinder Pompano was permitted delegate—that section 5 does not vest Pathfinder Pompano with unlimited authority to delegate its authority and responsibility. However, assuming arguendo that the phrase "certain aspects" suggests

that there might be certain duties Pathfinder Pompano was not authorized to delegate, the Asset Management Agreement does not indicate that bringing a foreclosure action is one of them. Section 5 does not indicate which "certain aspects" of asset resolution tasks are delegable. In fact, there is nothing in the Asset Management Agreement that would suggest that some asset resolution tasks are delegable and others are not, much less an indication of which specific tasks would fall in either category.

Appellees do not identify any provision that would guide the parties in differentiating between delegable and non-delegable tasks. Instead, invoking the canon of construction known as ejusdem generis, they argue that foreclosure is non-delegable because the non-exhaustive list of entities to whom the Asset Management Agreement permits delegation includes entities whose "roles" are not "in keeping" with mortgage foreclosure. See Mazur v. Ospina Baraya, 275 So. 3d 812, 817 (Fla. 2d DCA 2019) ("[W]here general words follow an enumeration of specific words, the general words are construed as applying to the same kind or class as those that are specifically mentioned." (quoting State v. Weeks, 202 So. 3d 1, 8 (Fla. 2016))). Appellees give no explanation for their premise that an entity such as an "asset management advisor" or an "attorney" should not be considered of the type that could foreclose as an agent on behalf of a principal. See id. at 817 (explaining that the canon of ejusdem generis holds that a general phrase following a list of specifics should "be interpreted to include only items of the same type as those listed" (quoting Weeks, 202 So. 3d at 8)). And Appellees' conclusion is belied by open-ended language indicating plenary authority to decide to whom to delegate. The list of delegees includes "or others," the identity of whom is to be determined by Pathfinder Pompano "in its sole and absolute discretion."

The question is whether a reasonable reader would understand that an entity with the authority to foreclose on another's behalf would belong among the "others" in a list that includes "a workout specialist, loan consultant, asset management advisor, real estate broker or agent, [and] attorney." In context, the answer is yes. Section 2 of the Asset Management Agreement appoints Pathfinder Pompano as "Asset Manager" and makes it an "agent and representative" of the Direct Lenders for the purpose of, among other things "foreclosure." Section 5, titled "Authority," authorizes Pathfinder Pompano to "take any and all actions on behalf of the Direct Lenders," including the authority to delegate, in its "sole discretion, . . . certain aspects of asset resolution tasks" to entities it has the "sole and absolute discretion" to select. And the fact that "foreclosure" is listed as one of the functions for which an entity described as an "Asset Manager" was appointed suggests that an entity with the authority to foreclose would be at home on a list that includes an "asset management advisor."

Parties to this agreement would understand that permissible delegees include those who could foreclose on behalf of the Direct Lenders as Pathfinder Pompano was authorized to do. And in the absence of any provision describing which aspects of asset resolution tasks are delegable and which are not, they would understand that they are not limited by the word "certain."[1]

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[1]It is worth remembering that Appellees are not parties to either agreement. Nonetheless, by dint (or incident) of Florida foreclosure law, they are permitted to challenge the contractual relationship between the holders of the promissory notes and their agents. Cf., e.g., Buckingham v. Bank of Am., N.A., 230 So. 3d 923, 924–25 (Fla. 2d DCA 2017) (finding a bank lacked "standing to foreclose" because it had not established that its servicer was "acting as its agent with the power to file suit on its behalf").

Appellees also argue that, even if Pathfinder Pompano had the ability to delegate its authority to foreclose, it did not do so in the Delegation Agreement. For this proposition Appellees rely on a misreading of the phrase "pursuant to" in the provision of the Delegation Agreement in which Pathfinder Pompano "delegates all of its obligations and duties under the [Asset] Management Agreement to [Pathfinder Palm Harbor] pursuant to sections 5 and 8.7 of the [Asset] Management Agreement . . . ." Appellees construe the phrase to mean that Pathfinder Pompano delegated only those duties outlined in sections 5 and 8.7, neither of which mention foreclosure. However, "pursuant to" can more logically be read to mean that the delegation is being made <u>under the authority of</u> sections 5 and 8.7. This is consistent with how the same language is used elsewhere. The Delegation Agreement includes a WHEREAS clause indicating that it is "pursuant to sections 5 and 8.7" that Pathfinder Pompano is "authorized to delegate its duties and obligations under the Management Agreement to the [Pathfinder Palm Harbor]."

Reading "pursuant to" as merely an acknowledgment that the authority to delegate is <u>derived from</u> sections 5 and 8.7 of the Asset Management Agreement makes sense because neither of those sections contains a list of obligations and duties. Enumeration of the specific things Pathfinder Pompano is obligated to do can be found in sections 2 and 4, as well as other portions of section 8. Sections 5 and 8.7, on the other hand, give Pathfinder Pompano the general authority, respectively, to delegate its duties and to hire employees in connection with those duties. It makes little sense to construe "pursuant to sections 5 and 8.7" as an indicator that only duties listed in those sections have been delegated if those sections do not list any duties at all. And if

Appellees' argument is to be taken to mean that only those actions authorized under sections 5 and 8.7 were delegated, it should be noted that section 5 broadly authorizes Pathfinder Pompano to take "any and all actions on behalf of the Direct Lenders."

Pathfinder Pompano was authorized to delegate its ability to bring foreclosure actions on behalf of the Direct Lenders under the Asset Management Agreement, and Pathfinder Pompano delegated that duty to Pathfinder Palm Harbor in the Delegation Agreement. As such, Pathfinder Palm Harbor had standing to bring the foreclosure action. We reverse the trial court's order granting summary judgment and remand for further proceedings.

Reversed and remanded.

NORTHCUTT and VILLANTI, JJ., Concur.

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

July 10, 2020

JOHN DOE and JANE DOE, Appellants, v. WAYNE NATT and AIRBNB, INC., Appellees.	))))))))))	Case No. 2D19-1383

BY ORDER OF THE COURT:

Appellee's "motion for rehearing en banc, and in the alternative, request for certification from the en banc panel" is denied. On the court's own motion, the prior opinion dated March 25, 2020, is withdrawn and the attached opinion is issued in its place. No further motions for rehearing will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL, CLERK

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JOHN DOE and JANE DOE,	)	
Appellants,	)	
v.	)	Case No. 2D19-1383
WAYNE NATT and AIRBNB, INC.,	)	
Appellees.	)	

Opinion filed July 10, 2020.

Appeal from the Circuit Court for Manatee County; Charles Sniffen, Circuit Judge.

Thomas J. Seider of Brannock & Humphries, Tampa, and Damian Mallard and Alan L. Perez of Mallard Law Firm, P.A., Sarasota, for Appellants.

Charles E. Stoecker and William L. Grimsley of McGlinchey Stafford, PLLC, Fort Lauderdale, for Appellee Airbnb, Inc.

No appearance for remaining Appellee.

LUCAS, Judge

This appeal requires us to delve into the "rather arcane" issue in arbitration[1] of who decides whether a dispute is subject to a contract's arbitration provision: an arbitrator or a judge. As we will explain, the contract's provision in this

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[1]See First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995) ("[T]he former question—the 'who (primarily) should decide arbitrability' question—is rather arcane.").

case did not provide clear and unmistakable evidence that only the arbitrator could decide the issue of arbitrability. Therefore, we must reverse the circuit court's order which held to the contrary.

I.

A Texas couple, who will be referred to as John and Jane Doe to preserve their confidentiality, decided to vacation in Longboat Key. Through a business, Airbnb, Inc. (Airbnb), they located a condominium unit online that was available for a short-term rental in the Longboat Key area. Using Airbnb's website, Mr. and Mrs. Doe rented the unit for a three-day stay in May of 2016.

The condominium unit was owned by Wayne Natt. Unbeknownst to the Does, Mr. Natt had installed hidden cameras throughout the unit. The Does allege that Mr. Natt secretly recorded their entire stay in his unit, including some private and intimate interactions. After they learned of Mr. Natt's recordings, the Does filed a complaint in the circuit court of Manatee County, naming both Mr. Natt and Airbnb as defendants. Their complaint included claims of intrusion against Mr. Natt, constructive intrusion against Airbnb, and loss of consortium against both Mr. Natt and Airbnb. In their constructive intrusion claims, the Does alleged that Airbnb failed to warn them of past invasions of privacy that had occurred at other properties rented through Airbnb. They also alleged that Airbnb failed to ensure that Mr. Natt's property did not contain electronic recording devices.

In response to the Does' complaint, Airbnb filed a motion to compel arbitration. Airbnb argued that the Does' claims were subject to arbitration under Airbnb's Terms of Service, which the Does agreed to be bound to pursuant to a

"clickwrap" agreement[2] they had entered when they first created their respective Airbnb accounts online.

Specifically, Airbnb's motion relied upon the following language that appears near the end of the twenty-two-page clickwrap agreement:

> **Dispute Resolution**
>
> You and Airbnb agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation or validity thereof, or to the use of the Services of use of the Site or Application (collectively, "Disputes") will be settled by binding arbitration . . . . You acknowledge and agree that you and Airbnb are each waiving the right to a trial by jury . . . .
>
> Arbitration Rules and Governing Law. The arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect, except as modified by this Dispute Resolution section. (The AAA Rules are available at www.adr.org/arb_med or by calling the AAA at 1-800-778-7879.) The Federal Arbitration Act will govern the interpretation and enforcement of this section.

Airbnb's motion argued that the Does' complaint's allegations "that Airbnb failed to do what [the Does] alleged should have been done, or otherwise breached certain duties alleged to be owed to them, are claims for negligence, which have been held to be within the scope of broad arbitration provisions, such as the one here." But

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[2]A clickwrap agreement has been defined as one that is entered online by proposing contractual terms and conditions of service to a user, who then indicates his or her assent to the terms and conditions by clicking an "I agree" box. See Nicosia v. Amazon.com, Inc., 834 F.3d 220, 233 (2d Cir. 2016). In its motion to compel arbitration, Airbnb styled its agreement with the Does as "a modified click-wrap presentation" of Airbnb's terms of service, while the Does refer to it simply as a "clickwrap agreement." Inasmuch as Airbnb's different nomenclature does not appear to encompass any substantive definitional distinction, we will use the more widely understood term clickwrap agreement in this opinion.

according to Airbnb, the circuit court should not even consider whether the Does' claims were arbitrable because the scope of what is or is not arbitrable had to be decided by American Arbitration Association's (AAA) arbitrator, not the circuit court. Issues about the scope of arbitrability had been contractually assigned to the arbitrator, according to Airbnb, by virtue of the clickwrap agreement's reference to the American Arbitration Association's Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes ("AAA Rules"). Although the AAA Rules were not reproduced within the clickwrap agreement, the clickwrap agreement did direct the Does to a AAA website (and telephone number) through which, Airbnb contended, they would have found AAA Rule 7, which states: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or the arbitrability of any claim or counterclaim."

A hearing was held before the circuit court on Airbnb's motion on February 6, 2019. On March 7, 2019, the court issued an order granting Airbnb's motion to compel arbitration. The order is noteworthy in two respects. First, the court seemed to be persuaded by the Does' argument that their claims would have been outside the scope of the clickwrap agreement's arbitration provision. However, the circuit court went on to conclude that it was powerless to make that determination because the issue of arbitrability had to be decided by the arbitrator, not the court. The circuit court held "that the parties entered an express agreement which incorporated the AAA rules, and that this court is therefore bound to submit the issue of arbitrability to the arbitrator." In so holding, the circuit court distinguished this court's prior holding in Morton v.

Polivchack, 931 So. 2d 935, 939 (Fla. 2d DCA 2006), as a case that was "fact-specific" and confined to the "particular provision" before that panel and instead relied upon the cases of Reunion West Development Partners, LLLP v. Guimaraes, 221 So. 3d 1278 (Fla. 5th DCA 2017); Younessi v. Recovery Racing, LLC, 88 So. 3d 364 (Fla. 4th DCA 2012); and Terminix International Co. v. Palmer Ranch Ltd. Partnership, 432 F.3d 1327 (11th Cir. 2005), to stay the proceedings and order the parties to proceed to arbitration.

The Does have appealed the circuit court's order pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv).

II.

Generally, we review an order on a motion to compel arbitration de novo. Hernandez v. Crespo, 211 So. 3d 19, 24 (Fla. 2016); Wilson v. AmeriLife of E. Pasco, LLC, 270 So. 3d 542, 545 (Fla. 2d DCA 2019). Issues of contract interpretation are also subject to de novo review. Bethany Trace Owners' Ass'n v. Whispering Lakes I, LLC, 155 So. 3d 1188, 1191 (Fla. 2d DCA 2014). The particular arbitration provision before us is governed by the Federal Arbitration Act (FAA),[3] which can be applied in both federal and state court proceedings. Global Travel Mktg., Inc. v. Shea, 908 So. 2d 392, 396-97 (Fla. 2005).

A.

When a question over arbitrability arises, who should decide the answer—the arbitrator or the court—can pose something of an analytical challenge. However, the United States Supreme Court provided a framework to resolve that first order issue in First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945 (1995). In First Options, a

[3]See generally 9 U.S.C. §§ 1–307 (2018).

plaintiff firm brought an arbitration proceeding against a husband, his wife, and his wholly owned corporation. In connection with a "workout agreement," the husband's corporation had signed a contract with the plaintiff that contained an arbitration provision, but neither the husband nor his wife had ever executed an agreement with a similar provision. The arbitrators determined they had the power to rule on all the issues before them, including the husband and wife's objections to arbitration, and their award was confirmed by the district court. After the Third Circuit reversed the district court's confirmation, the case came before the Supreme Court. Id. at 940-41.

The First Options Court began its analysis by highlighting the importance of the "who decides" arbitrability question under the FAA:

> Although the question is a narrow one, it has a certain practical importance. That is because a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. Hence, who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration.

Id. at 942 (citations omitted). The First Options Court then went on to explain how to go about deciding the "who decides" question of arbitrability and the practical concerns that inform that analysis:

> Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration? . . .

> . . . .
>
> When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts. . . .
>
> This Court, however, has (as we just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: **Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so.** In this manner the law treats silence or ambiguity about the question "*who* (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement"—for in respect to this latter question the law reverses the presumption.
>
> But, this difference in treatment is understandable. The latter question arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter. On the other hand, the former question—the "who (primarily) should decide arbitrability" question—is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

Id. at 943-45 (fourth and fifth alterations in original) (bold emphasis added) (citations omitted). The Court concluded that there was no clear and unmistakable evidence that

either the husband or wife had agreed to submit the issue of arbitrability to an arbitrator and affirmed the judgment of the Third Circuit. Id. at 946-47; cf. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83-84, 86 (2002) (characterizing First Options' clear and unmistakable evidence standard as an "interpretive rule" and a "strong pro-court presumption" that applies "where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate").

In a more recent term, the Supreme Court made it a point to repeat First Options' "who decides" arbitrability test under the FAA: "This Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence." Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 530 (2019) (quoting First Options, 514 U.S. at 944). Thus, as the Supreme Court has repeatedly instructed, under the FAA there must be clear and unmistakable evidence that the parties agreed to have the arbitrator decide threshold questions about arbitrability; short of that, the assumption remains that such disputes are to be decided by a court.

Our district applied First Options in a case that holds certain similarities to the case at bar. In Morton, 931 So. 2d at 938, a dispute arose between a seller and a buyer of a residential property over drainage problems that were later discovered on the property. Pursuant to the purchase contract, the buyer filed a demand for arbitration alleging fraud against the seller, to which the seller responded with various

counterclaims. Id. Both parties sought punitive damages, but the arbitration panel concluded it did not have the authority to award punitive damages. Id. Apparently dissatisfied with that ruling, the buyer filed a separate complaint in the circuit court. Id. When he attempted to assert a claim for punitive damages in the civil proceeding, the trial court agreed with the seller that it did not have the authority to review the arbitration panel's ruling that the arbitration panel had no power to award punitive damages. Id. The buyer appealed, arguing that the circuit court, not the arbitration panel, should have decided the scope of arbitrability for his claim of punitive damages. Id.

Like the Does' clickwrap agreement, the real estate contract in Morton did "not expressly address the question of who decides issues of arbitrability." Id. And, like the clickwrap agreement here, the contract before the Morton court stated that a set of AAA rules would apply in an arbitration proceeding under the contract. Id. There, however, the similarities between the cases appear to diminish.

From what is reported in the Morton opinion, the AAA rules that were adopted in the parties' real estate contract contained a section that generally addressed the timing of raising objections to the arbitrability of a claim; but the rule section did not explicitly state who could decide those objections. Id. at 939. Although one could fairly infer that that section likely contemplated the arbitrator hearing such objections (it was, after all, found within a body of rules promulgated by an arbitration business for use by its arbitrators and customers), the Morton court held otherwise. We explained:

> "[D]ecisions regarding arbitrability are to be made by the trial court, unless the parties have entered an agreement stating otherwise." Romano v. Goodlette Office Park, Ltd., 700 So. 2d 62, 64 (Fla. 2d DCA 1997) (relying on Thomas W. Ward & Assocs. v. Spinks, 574 So. 2d 169 (Fla. 4th DCA 1991)); see also Royal Prof'l Builders, Inc. v. Roggin, 853

> So. 2d 520, 523 (Fla. 4th DCA 2003); Premier Med. Mgmt., Ltd. v. Salas, 830 So. 2d 959, 961 n.2 (Fla. 1st DCA 2002). "Contractual silence or ambiguity regarding who determines the questions of arbitrability is insufficient to give that authority to the arbitrators." Romano, 700 So. 2d at 64. "If . . . the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." Id. at 944, 115 S. Ct. 1920 (quoting AT & T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)).

Id. at 938-39 (alterations in original).

The Morton court found "no merit" in the seller's argument that the circuit court could not decide arbitrability of the punitive damages claim because the AAA rule, we observed, "only addresses the procedure of raising an objection to arbitrability in an arbitration proceeding when the arbitration panel has the authority to decide issues of arbitrability. The provision does not itself grant the arbitration panel that authority." Id. at 939 (emphasis omitted).

The question we did not answer in Morton—and which we must now decide—is whether a contract's arbitration provision's reference to an arbitration rule that *does* grant an arbitrator the authority to decide arbitrability clearly and unmistakably supplants a court's power to rule on the issue of arbitrability. In this case, we hold it does not.

B.

Arbitration provisions are creatures of contract and must be construed as "a matter of contract interpretation." See Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999) (citing Seaboard Coast Line R.R. v. Trailer Train Co., 690 F.2d 1343, 1352 (11th Cir. 1982); R.W. Roberts Constr. Co. v. St. Johns River Water Mgmt. Dist., 423 So. 2d 630, 632 (Fla. 5th DCA 1982)); 4927 Voorhees Road, LLC v. Mallard, 163 So. 3d 632, 634 (Fla. 2d DCA 2015). "[C]ourts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 339 (2011) (citations omitted) (first citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006); and then citing Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)). " 'When interpreting a contract, the court must first examine the plain language of the contract for evidence of the parties' intent.' . . . 'Intent unexpressed will be unavailing . . . .' " Beach Towing Servs., Inc. v. Sunset Land Assocs., 278 So. 3d 857, 860 (Fla. 3d DCA 2019) (first quoting Perez-Gurri Corp. v. McLeod, 238 So. 3d 347, 350 (Fla. 3d DCA 2017); and then quoting Moore v. Stevens, 106 So. 901, 903 (Fla. 1925)). It is often observed that if there is a dispute over the scope of arbitrability in a contract, courts will generally resolve the dispute in favor of arbitration. See Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 593 (Fla. 2013). The question we are faced with, though, is not *what* the scope of arbitration is under the clickwrap agreement, but *who* should decide that issue. That question is answered from a different perspective: "[C]ourts should not assume that the parties agreed to submit issues concerning arbitrability to the arbitrator, unless there is a clear and unmistakable agreement to do so[,]" and furthermore, contractual ambiguity "is insufficient to give that authority to the

arbitrators." Romano v. Goodlette Office Park, Ltd., 700 So. 2d 62, 64 (Fla. 2d DCA 1997) (citing First Options, 514 U.S. at 944)); see also Henry Schein, 139 S. Ct. at 530; Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 69 n.1 (2010)

With that in mind, we will begin by pointing out what is conspicuously missing in the clickwrap agreement's language. The agreement itself is silent on the issue of who should decide arbitrability. Cf. Romano, 700 So. 2d at 64. And although the circuit court concluded that the AAA Rules had been "incorporated" into the parties' clickwrap agreement for purposes of determining arbitrability (which, the court then determined, precluded its authority to decide arbitrability), the agreement did not actually say that. Indeed, whatever may be gleaned from the AAA Rules (a point we will turn to shortly), those rules were referenced in the clickwrap agreement as a generic body of procedural rules, and that reference was limited to how "the arbitration" was supposed to be "administered." Plainly, the agreement's reference to the AAA Rules and AAA's administration addresses an arbitration that is actually commenced. In other words, the directive is necessarily conditional on there being an arbitration. If a claim is arbitrated, then the AAA Rules apply. But if the question were put, "Who should decide if this dispute is even subject to arbitration under this contract?" to respond, "The arbitration will be administered by the American Arbitration Association ('AAA') in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes," is not a very helpful answer and not at all clear.

Moreover, the reference to the AAA Rules was broad, nonspecific, and cursory: the clickwrap agreement simply identified the entirety of a body of procedural rules. The agreement did not quote or specify any particular provision or rule, such as

the one Airbnb now relies upon. And the AAA Rules were not attached to the agreement.[4] Instead, the agreement directed the Does to AAA's website and phone number if they wished to learn more about what was in the AAA Rules. Which strikes us as a rather obscure way of evincing "clear and unmistakable evidence" that the parties intended to preclude a court from deciding an issue that would ordinarily be decided by a court.

Assuming the clickwrap agreement's passing reference to AAA and the AAA Rules sufficiently showed an intent that those rules (whatever they may say) *could* supplant the trial court's presumed authority to decide arbitrability, there is then the added uncertainty of whether the AAA Rules, in fact, *did* so. Again, the pertinent arbitration rule Airbnb relies upon states that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or the arbitrability of any claim or counterclaim." And, again, we find something missing. This rule confers an adjudicative power upon the arbitrator, but it does not purport to make that power exclusive. Nor does it purport to contractually remove that adjudicative power from a court of competent jurisdiction. See Ajamian v. CantorCO2e, L.P., 137 Cal. Rptr. 3d 773, 790 (Cal. Ct. App. 2012) ("[T]he rule merely states that the arbitrator shall have 'the power' to determine issues of its own jurisdiction . . . . This tells the reader almost nothing, since a court *also* has the power to decide such issues, and nothing in the AAA

[4]In their brief, the Does also suggested that the hyperlink to the AAA Rules in the clickwrap agreement was inoperative, but the record appears to be silent on this point (no one proffered any evidence below as to whether or not the link worked).

rules states that the AAA arbitrator, as opposed to the court, *shall* determine those threshold issues, or has *exclusive* authority to do so . . . ."). Indeed, in most interpretive contexts, the statement, "shall have the power," does not even constitute a mandatory directive. See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984) (concluding that the phrase "Congress shall have the power" is permissive (citing Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 530 (1972))); People ex rel. Oak Supply & Furniture Co. v. Dep't of Rev., 342 N.E. 2d 53, 55 (Ill. 1976) (construing state statute that authorized state's department of revenue to issue subpoenas, concluding that "the word 'shall' is to be read as permissive—'shall have the power to' or 'may' "); Johnson v. Commonwealth ex rel. Meredith, 165 S.W.2d 820, 825 (Ky. 1942) (observing that the statutory phrase "shall have the power and the authority" is equivalent to "the permissive word, 'may' ")

In our view, the parties' "manifestation of intent," see Rent-A-Center, 561 U.S. at 69 n.1 (emphasis omitted), in the clickwrap agreement fell short of the clear and unmistakable evidence of assent that First Options requires.

C.

We recognize that our decision may constitute something of an outlier in the jurisprudence of arbitration. Several federal circuit courts of appeal have concluded that an arbitration rule that confers a general authority on an arbitrator to decide questions of arbitrability, when incorporated into an agreement, evinces a sufficiently clear and unmistakable intent to withdraw the issue from a court's consideration. See, e.g., Belnap v. Iasis Healthcare, 844 F.3d 1272, 1290 (10th Cir. 2017) ("[A]lthough this is a question of first impression in our court, a majority of our sister circuits have

concluded that a finding of clear and unmistakable intent to arbitrate arbitrability—which may be inferred from the parties' incorporation in their agreement of rules that make arbitrability subject to arbitration—obliges a court to decline to reach the merits of an arbitrability dispute regarding the substantive claims at issue."); Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1074 (9th Cir. 2013) ("Virtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association's (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. . . . We see no reason to deviate from the prevailing view . . . ." (citations omitted)); Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 675 (5th Cir. 2012) ("We agree with most of our sister circuits that the express adoption of these rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."); Terminix Int'l Co., 432 F.3d at 1332 ("By incorporating the AAA Rules, including Rule 8, into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid."); Contec Corp. v. Remote Sol. Co., 398 F.3d 205, 208 (2d Cir. 2005) ("We have held that when, as here, parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."); Apollo Computer, Inc. v. Berg, 886 F.2d 469, 473 (1st Cir. 1989) ("By contracting to have all disputes resolved according to the Rules of the ICC, however, Apollo agreed to be bound by Articles 8.3 and 8.4. These provisions clearly and unmistakably allow the arbitrator to determine her own jurisdiction when, as here, there

exists a *prima facie* agreement to arbitrate whose continued existence and validity is being questioned.").

Two of our sister district courts of appeal have followed this trend. See Reunion W. Dev. Partners, LLLP, 221 So. 3d at 1280 ("[W]hen . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." (alterations in original) (quoting Contec Corp., 398 F.3d at 208)); Glasswall, LLC v. Monadnock Constr., Inc., 187 So. 3d 248, 251 (Fla. 3d DCA 2016) ("In so holding, we note that the parties are in agreement that the majority of federal courts considering similar circumstances where the AAA's arbitration rules have been incorporated by reference into a contract likewise have found that the parties sufficiently evidenced their intent to have arbitrators, not a court, hear and decide issues of arbitrability.").

We respectfully disagree with these holdings because we do not believe they comport with what First Options requires. As the Does point out, none of these cases have ever examined how or why the mere "incorporation" of an arbitration rule such as the one before us (which the Belnap court candidly likened to "inferring" assent, 844 F.3d at 1290) satisfies the heightened standard the Supreme Court set in First Options, nor how it overcomes the "strong pro-court presumption" that is supposed to attend this inquiry. See Howsam, 537 U.S. at 86. Most of the opinions have simply stated the proposition as having been established with citations to prior decisions that did the same. Both parties identify the principal case (from which all these holdings appear to have derived) as the First Circuit's Apollo decision. But Apollo was issued

years before the Supreme Court's First Options opinion, and so the Apollo court could not have had First Options' instructions in mind when it issued its opinion. Moreover, Apollo's analysis on this point was quite limited, comprising of (1) identifying an arbitration rule that conferred a generalized power to decide arbitrability to the arbitrator, (2) observing that the rule had been incorporated into the parties' agreement, and (3) stating "[t]hese provisions clearly and unmistakably allow the arbitrator to determine her own jurisdiction when, as here, there exists a *prima facie* agreement to arbitrate." 886 F.2d at 473.[5] Apparently, the court simply deemed the requisite clarity to have been self-evident.[6]

If it was, we confess our failure to see it here. In the case at bar we have an arguably permissive and clearly nonexclusive conferral of an adjudicative power to an arbitrator, found within a body of rules that were not attached to the agreement, that itself did nothing more than identify the applicability of that body of rules if an arbitration

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[5]Apollo also cited to the First Circuit's prior case of Societe Generale de Surveillance, S.A. v. Raytheon European Management & Systems Co., 643 F.2d 863, 869 (1st Cir. 1981), as authority for its conclusion. However, the Societe Generale case was not a dispute over whether a court or an arbitrator should decide arbitrability but rather one about *which arbitrator*, in Massachusetts or in Switzerland, was authorized to preside over a commercial dispute between a French corporation and a Massachusetts corporation. The First Circuit simply concluded that a district court acted "well within its discretion" to allow the Swiss arbitrator to decide the question of its jurisdiction because the applicable rules empowered that arbitrator to do so and "[s]ince the arbitrators there are more likely to be familiar with commercial dealings in this area and with French law." Societe Generale, 643 F.2d at 869.

[6]Airbnb's argument for affirmance runs the same course. In its brief, Airbnb dismisses the absence of a more in-depth consideration of this question in Apollo because "no further analysis was required of the court in Apollo. The parties in Apollo agreed to be bound by the ICC Rules. The ICC Rules contained a delegation clause. The [c]ourt's analysis properly ended there."

is convened. That is not "clear and unmistakable evidence" that these parties agreed to delegate the "who decides" question of arbitrability from the court to an arbitrator. To the contrary, the provision Airbnb relies upon is two steps removed from the agreement itself, hidden within a body of procedural rules, and capable of being read as a permissive direction. It is at best ambiguous. We may quibble over what the precise measure of the Supreme Court's "clear and unmistakable evidence" standard should entail,[7] but it surely means evidence of intent that is not ambiguous. Cf. Romano, 700 So. 2d at 64. Otherwise, we will be treating the "who decides" issue of arbitrability no differently than any other issue of arbitration, when the Supreme Court has instructed, repeatedly, that it is a qualitatively different inquiry with a different analysis. See First Options, 514 U.S. at 944-45 ("[T]he law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable . . . for in respect to this latter question the law reverses the presumption. But, this difference in treatment is understandable." (citations omitted)).

III.

We hold that the clickwrap agreement's arbitration provision and the AAA rule it references that addresses an arbitrator's authority to decide arbitrability did not, in

[7]Cf. Richard W. Hulbert, Institutional Rules and Arbitral Jurisdiction: When Party Intent is not "Clear and Unmistakable", 17 Am. Rev. Int'l Arb. 545, 571-72 (2006) ("Courts can stop misreading arbitral institutional rules. The doctrine that has resulted is a judicial creation and judicial action could readily resolve it. If that step alone were taken, the question of party intent would be dealt with as the matter of fact it is and not a matter of law to be determined by a factitious inference from institutional rules. It might then prove to be the rare case where it would be found as a fact that the parties actually intended that the arbitrators' decision as to their jurisdiction should constitute the final and determinative decision of that issue." (footnote omitted)).

themselves, arise to "clear and unmistakable" evidence that the parties intended to remove the court's presumed authority to decide such questions. The evidence on what these parties may have agreed to about the "who decides" arbitrability question was ambiguous; therefore, the court retained its presumed authority to decide the arbitrability dispute. The circuit court did not have the benefit of our decision today and so was bound to rely upon the Fifth District's Reunion decision and the Fourth District's Younessi opinion when it entered the order below. See Conquest v. Auto-Owners Ins. Co., 637 So. 2d 40, 43 (Fla. 2d DCA 1994) ("[I]f this court has not spoken on a subject but another district has, the trial courts of this district must follow that decision." (citing Chapman v. Pinellas County, 423 So. 2d 578 (Fla. 2d DCA 1982))). Because we disagree with the conclusion those courts appeared to reach concerning what constitutes sufficient clarity and unmistakability of intent to have an arbitrator, rather than a court, resolve questions of arbitrability, we certify conflict with Reunion and Younessi to the extent they are inconsistent with our decision today.

Reversed; remanded with instructions; conflict certified.

SLEET, J., Concurs.
VILLANTI, J., Dissents with opinion.

VILLANTI, Judge, Dissenting.

I respectfully dissent from the majority's outlier determination that the clickwrap agreement used by Airbnb did not exhibit an unmistakable intent to assign the issue of arbitrability to the arbitrator. For better or worse, we, as a society, have

decided to choose the speed and convenience of the Internet over more traditional modes of communication. A fully electronic stream of commerce is now firmly embedded in our society, and we have long since crossed the point of no return. When paper is eliminated in favor of speed and convenience, it should come as no surprise that contracting parties resort to incorporating material by reference—which in this instance includes the AAA rules and specifically Rule 14(a),[8] which allows the arbitrator to decide arbitrability in the first instance. Cf. ADP, LLC v. Lynch, Nos. 2:16-01053, 2:16-01111, 2016 WL 3574328, at *4 (D.N.J. June 30, 2016) ("[C]lickwrap agreements that incorporate additional terms by reference will generally provide 'reasonable notice' that the additional terms apply."); Nathan J. Davis, Presumed Assent: The Judicial Acceptance of Clickwrap, 22 Berkeley Tech. L.J. 577, 579 (2007) ("[T]he courts have unanimously found that clicking is a valid way to manifest assent since the first clickwrap agreement was litigated in 1998.").

As an initial point, I take issue with the majority's assertion that "[p]lainly, the agreement's reference to the AAA Rules and AAA's administration addresses an

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[8]When the Does originally signed up with Airbnb, when they made their reservation, and when they stayed at the condo in Naples, the Airbnb clickwrap agreement incorporated the AAA "Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes" and required that disputes would be handled under the rules in effect at the time of the dispute. Under the Commercial Arbitration Rules, the jurisdictional provision was in Rule 7. Subsequently, after the Does stayed in Naples but before they filed suit, Airbnb amended its Terms of Service because the AAA had amended and renamed the Supplementary Procedures for Consumer Related Disputes to be the AAA Consumer Arbitration Rules. Under those rules, the jurisdictional provision is in Rule 14(a). See https://adr.org/sites/default/files/Consumer_Rules_Web_0.pdf. Hence, when the Does filed their complaint on May 15, 2018, the applicable rules were the Consumer Arbitration Rules. Regardless of which set of rules is reviewed, however, the relevant language of the two provisions is the same.

arbitration that is actually commenced. In other words, the directive is necessarily conditional on there being an arbitration." With respect to the application of Rule 14(a), this is illogical: The question of whether a claim is arbitrable must, by necessity, be determined before the commencement of arbitration. Thus, Rule 14(a) can only apply at the outset of a claim, not after the arbitration has already commenced.

I also take issue with the majority's statement, "Like the Does' clickwrap agreement, the real estate contract in Morton did 'not expressly address the question of who decides issues of arbitrability.' " (Quoting Morton, 931 So. 2d at 938). This is misleading. The rule at issue in Morton came from the Commercial Arbitration and Mediation Center for the Americas (CAMCA) Mediation and Arbitration Rules. In that case, the rule at issue said only, "[O]bjections to the arbitrability of a claim must be raised no later than thirty (30) days after notice to the parties of the commencement of the arbitration." 931 So. 2d at 939. But, as we observed in Morton, "This provision only addresses the procedure of raising an objection to arbitrability in an arbitration proceeding *when the arbitration panel has the authority to decide issues of arbitrability.* The provision does not itself grant the arbitration panel that authority." Id. (underline emphasis added). Thus, Morton is distinguishable from the instant case because in Morton, the question of who had the authority to decide issues of arbitrability was not addressed in the cited provisions of the CAMCA rules at all; whereas the referenced provision at issue in this case does address the question. Although the majority admits that Morton is distinguishable, the premise that the contract in Morton was similar to the contract in this case in that it failed to "expressly address the question of who decides issues of arbitrability" is, in my view, a false premise.

Most importantly, I take issue with the majority's attempt to minimize the scope of Rule 14(a) because, the majority says, it does not give the arbitrator the exclusive power to decide arbitrability. This ignores the obvious: the power to decide is the power to decide. To contend that the absence of the term "exclusive" (or words to that effect) in relation to the arbitrator gives exclusive power to the trial court sub silentio to make that decision is, in my view, a stretch too far. Indeed, the word "exclusive," emphasized by the majority, does not appear at all in First Options, the Supreme Court case upon which the majority hangs its hat, or in Howsam, Henry Schein, Morton, Petrofac, Terminix, Reunion, or Glasswall. Although the term is used in Rent-A-Center and Ajamian, that is only because the contracts at issue in those cases employed the word. The word is also used in Oracle America—but that case provides a particularly on-point object lesson which I think supports my view. In Oracle America, the contract provided, "Any dispute arising out of or relating to this License shall be finally settled by arbitration as set out herein, except that either party may bring any action, in a court of competent jurisdiction (which jurisdiction shall be exclusive)." 724 F.3d at 1071 (emphasis added). However, the contract also incorporated by reference the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), which contained a clause that provided either that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement" (1976 version), or that "[t]he arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of

the arbitration agreement" (2010 version).[9] Id. at 1073. Either version of the provision, concluded the court, "vest[ed] the arbitrator with the apparent authority to decide questions of arbitrability" and therefore "constitute[d] clear and unmistakable evidence that the parties intended to arbitrate arbitrability." Id. Thus, the arbitration rules incorporated into the contract by reference—although not containing the word "exclusive" or words to that effect—constituted clear and unmistakable evidence of the parties' intent to arbitrate arbitrability, despite the provision that a court would have "exclusive" jurisdiction over disputes relating to intellectual property rights or the software license at issue in that case.

In sum, the rule expressed in First Options and the other cited opinions is "clear and unmistakable," not "exclusive." These words do not mean the same thing. Here, the majority has created a new requirement that the contract must confer an "exclusive" power upon the arbitrator or arbitration panel to determine the arbitrability of an issue. This result is at odds with a substantial body of law; and I think the analysis leading to this outlier result is both hypertechnical and an unnecessary exercise in legal polemics.

I conclude that the incorporation by reference of AAA Consumer Arbitration Rule 14(a) into a contract comprises "clear and unmistakable evidence" of the parties' agreement to arbitrate arbitrability and is fully consistent with the principles announced in First Options. For this reason, I would follow our sister courts' decisions

[9]The parties disagreed as to whether the 1976 or 2010 version of the rules applied. The Ninth Circuit held that the difference in the wording between the two versions was immaterial. Oracle America, 724 F.3d at 1073.

in Reunion and Glasswall, as well as the long line of federal cases aptly cited by the majority that are in accord, and would affirm.

Third District Court of Appeal

State of Florida

Opinion filed July 8, 2020.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D19-1197 & 3D19-1721
Lower Tribunal No. 04-20174

Coral Gables Imports, Inc.,
Appellant/Appellee,

vs.

Ricardo Suarez,
Appellee/Appellant.

Appeals from the Circuit Court for Miami-Dade County, Reemberto Diaz, Judge.

Jesse Dean-Kluger, P.A., and Jesse Dean-Kluger, and Lisa J. Jerles, for appellant/appellee.

MSP Recovery Law Firm, and Christine M. Lugo, and John H. Ruiz, for appellee/appellant.

Before EMAS, C.J., and SCALES, and MILLER, JJ.

MILLER, J.

In these consolidated appeals, Ricardo Suarez and Coral Gables Imports ("CGI") both challenge the denial below of their respective motions for attorneys' fees and costs.[1] The sole issue on appeal meriting further discussion is whether the act of affixing a Summary Reporting System ("SRS")[2] closure stamp ripens a nonfinal order into a final order.[3]

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[1] We hereby consolidate the appeals of both parties for purposes of this opinion.

[2] The SRS stamp finds its origins in the development of a uniform case reporting system codified within section 25.075, Florida Statutes (2020). The procedure is intended to "assist in the administrative management of the court system and to provide a measuring tool for judicial workloads," by recording the quantity, duration, and type of case dispositions. Burke v. Esposito, 972 So. 2d 1024, 1028 (Fla. 2d DCA 2008) (Altenbernd, J., concurring). This compilation of data is regularly transmitted to the Florida Supreme Court to assist in "certification of need for additional judgeships." See Summary Reporting System (SRS) Manual (2002) ("The primary purpose of the SRS is the certification of need for additional judgeships.").

[3] On appeal, Suarez claims entitlement to prevailing party attorney's fees, premised upon the confession of judgment doctrine and FDUTPA. As the trial court tacitly rejected the asserted theory in rendering the unappealed adverse summary judgment, and, recognizing the discretionary nature of the relevant statutory provision, we find no error. See Dawson v. Wachovia Bank, N.A., 61 So. 3d 1218, 1220 (Fla. 3d DCA 2011) ("We decline to address the merits of this claim as the order granting final summary judgment on [May 9, 2019] was not appealed."); Marine Midland Bank Cent. v. Cote, 384 So. 2d 658, 659 (Fla. 5th DCA 1980) ("The parties have the right to appeal any matter by which they may be aggrieved and their failure to do so acts as an acceptance of the propriety of the matter."); see also Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398, 101 S. Ct. 2424, 2428, 69 L. Ed. 2d 103 (1981) ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.") (citations omitted); Humane Soc. of Broward Cty., Inc. v. Fla. Humane Soc., 951 So. 2d 966, 969 (Fla. 4th DCA 2007) (Under section 501.2105(1), Florida Statutes, "the legislature gave trial courts the

PROCEDURAL HISTORY

In September 2004, Suarez filed a single-count, class action lawsuit against CGI, alleging a violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). See § 501.204(1), Fla. Stat. The operative complaint alleged CGI engaged in a practice of arbitrarily and inconsistently fulfilling exotic vehicle orders, despite routinely collecting and retaining deposits for the purpose of prioritizing prospective purchasers.

After languishing on the lower court docket for several years, the case was dismissed for want of prosecution. Approximately one year later, Suarez requested and received from CGI a sum of money corresponding with his deposit.

Despite having recovered his demand, Suarez revived the litigation by successfully procuring an order vacating the dismissal.[4] CGI moved for summary judgment, and, at a hearing convened on May 1, 2019, the trial court granted the motion. The court entered a perfunctory order, simply identifying the title of the motion and writing the word "granted."

The same day, an SRS stamp was affixed to the order. The stamp reflected the following language: "Final orders as to all parties . . . the court dismisses this

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discretion to award prevailing party attorney fees to both plaintiffs and defendants.") (citation omitted).

[4] CGI appealed the order granting the motion to vacate. This court affirmed the decision of the trial court. Coral Gables Imports, Inc. v. Suarez, 219 So. 3d 101 (Fla. 3d DCA 2017).

case against any party not listed in this final order or previous order(s). This case is closed as to all parties." The trial court initialed the stamp.

Six days later, the court entered a second order, reading:

> FINAL JUDGMENT FOR DEFENDANT, CORAL GABLES IMPORTS, INC.
>
> Pursuant to the May 1, 2019 Order granting Defendant, CORAL GABLES IMPORTS, INC.'s, Motion for Summary Judgment against Plaintiff, RICARDO SUAREZ, it is ordered and adjudged as follows:
>
> 1. Plaintiff, Ricardo Suarez shall take nothing by this action and Defendant, Coral Gables Imports, Inc., shall go hence without a day.
>
> 2. This court retains jurisdiction to enter such further orders as may be proper.

Suarez did not appeal either order.

On June 6, 2019, CGI filed a motion for attorney's fees, claiming entitlement under the prevailing party provision of FDUTPA. Finding the initial summary judgment order constituted a final order "that would initiate the thirty day period for serving the fee motion under Florida Rule of Civil Procedure 1.525," the court denied the request as untimely. Paige v. Am. Sec. Ins. Co., 987 So. 2d 128, 129 (Fla. 4th DCA 2008). CGI's instant appeal ensued.

STANDARD OF REVIEW

The determination of the finality of an order is a "pure question of law and is, therefore, subject to de novo review." M.M. v. Fla. Dep't of Children & Families, 189 So. 3d 134, 137 (Fla. 2016) (citation omitted).

LEGAL ANALYSIS

Under Florida law, "[a]ny party seeking . . . attorneys' fees . . . shall serve a motion no later than [thirty] days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal, which judgment or notice concludes the action as to that party." Fla. R. Civ. P. 1.525. "Rule 1.525 establishes a bright-line time requirement." Hovercraft of S. Fla., LLC v. Reynolds, 211 So. 3d 1073, 1076 (Fla. 5th DCA 2017).

To be deemed final, "an order must demonstrate an end to the judicial labor." Hoffman v. Hall, 817 So. 2d 1057, 1058 (Fla. 1st DCA 2002) (citation omitted). "The traditional test for finality is whether the decree disposes of the cause on its merits leaving no questions open for judicial determination except for execution and enforcement," if necessary. Id. (citation omitted). While the use of discrete verbiage is "not essential," Id., the order must contain such phrases as "'hereby enters' a judgment," or "similar unequivocal language of finality." Monticello Ins. Co. v. Thompson, 743 So. 2d 1215, 1216 (Fla. 1st DCA 1999) (citations omitted).

Hence, under a reasoned body of jurisprudential precedent, in Florida, "[a]n order that merely grants a motion for summary judgment is not a final order." Libman v. Fla. Wellness & Rehab. Ctr., Inc., 260 So. 3d 515, 517 (Fla. 3d DCA 2018) (citation omitted); see Bowman v. State Farm Mut. Auto. Ins. Co., 599 So. 2d 273, 274 (Fla. 5th DCA 1992) (an order that merely grants a motion for summary

judgment is not a final order); Danford v. City of Rockledge, 387 So. 2d 967, 968 (Fla. 5th DCA 1980) ("A review of both of the orders [granting summary judgment] shows that neither of the orders contains either the traditional words of finality nor other words of similar import. Without such language, the orders are not final judgments.") (citations omitted); Rizzuto v. DiPaolo, 357 So. 2d 490, 491 (Fla. 2d DCA 1978) (holding an order that read "that defendant's motion for summary judgment is hereby granted" was not a final decision); Renard v. Kirkeby Hotels, Inc., 99 So. 2d 719, 720 (Fla. 3d DCA 1958) (finding order containing language "that defendant's motion for summary judgment be and the same is hereby granted" was not a final judgment).

In the instant dispute, the initial order did nothing more than grant the summary judgment motion. It was not a decree "which dispose[d] of the whole subject, [gave] all the relief contemplated, provide[d] with reasonable completeness for giving effect to the sentence, and [left] nothing to be done in the cause save to superintend ministerially the execution of the order." Daniels v. Truck & Equip. Corp., 139 S.E.2d 31, 35 (Va. 1964) (quoting 4 Minor's Inst. 860). Thus, it was nonfinal.

Consequently, we turn our analysis to whether affixing the SRS stamp had the effect of transforming "that which [was] not, by its nature, a final . . . order, into the same by mere appellation." Summit Petroleum, Inc. v. K.S.T. Oil & Gas Co., Inc.,

590 N.E.2d 1337, 1338 (Ohio App. Ct. 1990). It is well-established that the clerk of courts is a ministerial officer of the court and, as such, is not endowed with any discretion. Corbin v. State ex rel. Slaughter, 324 So. 2d 203, 204 (Fla. 1st DCA 1976) (citing Leatherman v. Gimourginas, 192 So. 2d 301 (Fla. 3d DCA 1966); Pan Am. World Airways v. Gregory, 96 So. 2d 669 (Fla. 3d DCA 1957)). "He [or she] has no authority to contest the validity of any act of the court for which he [or she] acts as clerk which purports to have been done in the performance of the court's judicial function." Id. (citing State v. Almand, 75 So. 2d 905 (Fla.1954)). Hence, the clerk lacks "authority to judicially determine the legal significance of a document tendered for filing." Collins v. Taylor, 579 So. 2d 332, 333 (Fla. 1st DCA 1991) (citations omitted).

Applying these principles here, the clerical designation of the document was purely ministerial, and the closure stamp did not operate to convert the otherwise nonfinal order into a final order. Nonetheless, Suarez further contends that by initialing the stamp, the lower tribunal placed a judicial imprimatur on the finalization of the order. We disagree.

"One cannot transform a nonfinal order into a final order by calling it final." Jackson v. Alverez, 831 N.E.2d 1159, 1162 (Ill. App. Ct. 2005) (citation omitted). Thus, a "trial court's assertion cannot [convert] an interlocutory order into a final order because the finality of an order is determined by its effect." In re Adoption of

E.J.W., 515 A.2d 41, 43 (Pa. Super. Ct. 1986); see Othman v. Bd. of Educ. of the Princeton City Sch. Dist., Nos. C-160878 & C-170187, at *2 (Ohio Ct. App. Dec. 20, 2017) ("However, such a stamp cannot transform a nonfinal order into [a final] order.") (citation omitted); PNC Bank, Nat'l Ass'n v. Roemer, No. 15CA28, at *6 (Ohio Ct. App. Dec. 15, 2017) ("[A]lthough the trial court included a stamp that stated, in part, 'This is a Final–Appealable Order,' a trial court's purported determination is not binding upon the appellate court.") (citation omitted); Maryland Comm'n on Human Relations v. Baltimore Gas & Elec. Co., 459 A.2d 205, 212 n.8 (Md. 1983) ("This Court has here determined that the . . . order was not a final . . . decision because it neither determined [parties'] rights nor terminated the . . . proceeding. It, therefore, lacked the characteristics necessary for finality."); see also Heritage Prop. & Cas. Ins. Co. v. Romanach, 224 So. 3d 262 (Fla. 3d DCA 2017) (acknowledging that the designation of an order as "final" based on the SRS stamp does not control the nature of the order). Accordingly, we find the language derived from the SRS stamp did not constitute "a mystical incantation which transform[ed] [the] nonfinal order into a final appealable order." Wisintainer v. Elcen Power Strut Co., 617 N.E.2d 1136, 1138 (Ohio 1993) (citation omitted).

Although we find no error in the denial of Suarez's motion for attorney's fees, because we conclude CGI filed its fee motion within thirty days of the rendition of

the executable final judgment, we reverse the denial of same and remand for further consideration.

Affirmed in part; reversed in part.