CASE NO.: 18-55667

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEVE GALLION,

PLAINTIFF-APPELLEE,

and

UNITED STATES OF AMERICA,
Intervenor-Appellee,

v.

CHARTER COMMUNICATIONS, INC. AND SPECTRUM MANAGEMENT HOLDING COMPANY, LLC,
DEFENDANT-APPELLANTS.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
CIVIL CASE NO.: 5:17-CV-01361-CAS-KKX

ANSWERING BRIEF OF PLAINTIFF-APPELLEE STEVE GALLION

LAW OFFICES OF TODD M. FRIEDMAN, P.C.
Todd M. Friedman, Esq.
Adrian R. Bacon, Esq.
21550 Oxnard St., Suite 780
Woodland Hills, CA 91367
Phone: 877-206-4741
Fax: 866-633-0228

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INTRODUCTION

The Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* ("TCPA") is aimed at prohibiting "the use of [automatic dialing] to communicate with others by telephone in a manner that would be an invasion of privacy." *Van Patten v. Vertical Fitness Group, LLC,* 847 F.3d 1037 (9th Cir. 2017); citing *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (2009). As Senator Ernest "Fritz" Hollings, the sponsor of the TCPA, complained, "[c]omputerized calls are 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. S16, 205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings); see also *Marks v. Crunch San Diego, LLC,* 904 F.3d 1041, 1044 (9th Cir. 2018) ("*Marks*").

Congress enacted the TCPA specifically to combat the exponentially rising number of automated telemarketing calls that consumers receive on a daily basis, which interrupt their peace of mind, infringe on their privacy rights, and had, by the time the TCPA was enacted, increased to the level of both a disturbing public nuisance and a danger to public safety. *Marks* at 1043-45; S. Rep. No. 102-177, at 20 (1991). The Supreme Court has recognized that the statute reflects Congress's findings that that consumers are outraged over the proliferation of automated telephone calls and that these intrusive, nuisance calls are an invasion of privacy.

See Mims v. Arrow Fin. Servs. LLC, 565 U.S. 368, 370 (2012).[1] Stated succinctly, people want to be left alone, Congress heard their cries, and it acted.

This appeal stems from a very straightforward case. Plaintiff-Appellee Steve Gallion brought a class action complaint after allegedly receiving intrusive and invasive telemarketing calls from Charter, which Gallion alleges that Charter placed thousands of automated calls to individuals such as Gallion without their consent. Charter does not contest these allegations on appeal. Instead, Charter argues that even though its conduct is expressly prohibited by the TCPA, and even though it falls within the express considerations of Congress in enacting the law, Charter should be permitted to harass people however it wants, including in the manner in which Charter harassed Gallion, because the statute is unconstitutional. This argument has been rejected by every single court to which it has been presented.

Charter's appeal is a facial attack on the constitutionality of a statute that has already been held to be constitutional by this Court *twice*, and which the Supreme Court has observed serves a critically important governmental interest. Other federal courts unanimously agree that the TCPA is constitutional. Charter nevertheless

[1] The Federal Communications Commission ("FCC") confirmed in 2003 that "telemarketing calls are even more of an invasion of privacy than they were in 1991," and "we believe that the record demonstrates that telemarketing calls are a substantial invasion of residential privacy, and regulations that address this problem serve a substantial government interest." *Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, 18 F.C.C.R. 14014 (2003), F.C.C. Comm'n Order No. 03-153, modified by 18 F.C.C.R. 16972.

seeks to overturn the District Court's common sense Order by characterizing a single, valid exception to the TCPA as if it generated a "patchwork of prohibitions and carve-outs." DKT. NO. 7-1 Pg. 22. Yet it is well established, including by binding precedent of this Court, that the government may make content-based distinctions among different commercial messages without subjecting such statutes to strict scrutiny. And even more damaging to Charter's argument is that this Court has already held the TCPA to be a restriction on the methods by which messages may be disseminated, not a restriction on the contents of the messages. In fact, this Court has already effectively rejected Charter's fundamental contention that a narrow exception to the TCPA's time, place or manner restriction for particular types of calls suffices to make it a content-based law subject to strict scrutiny. Charter is asking this Court revisit longstanding holdings, on the pretext that the TCPA's constitutionality has been radically altered by the recent addition of an exemption which does not apply in this case and that could be severed even if it rendered the statute constitutionally suspect.

Charter tries to squeeze by binding decisions of this Court at every turn, but these issues have already been decided against Charter. Even the few district courts that have reviewed the TCPA as a content-based restriction on speech have upheld its constitutionality under strict scrutiny. No court has done what Charter asks this Court to do on appeal. Despite all of this, Charter invites this Court to go rashly

where no court has gone before. Numerous courts have analyzed the question whether the TCPA was rendered unconstitutional under the First Amendment following the Bipartisan Budget Act. Not one court has taken the view that Charter asks this Court to make. And for good reason. The TCPA is an incredibly important statute, which protects the privacy of every American from the ever-increasing annoyance of robocalls. If this law were stricken, absolute chaos would ensue.

Let us not lose the forest for the trees - Charter is free to solicit its products and deliver its message to whomever it chooses. The TCPA does not prohibit it from doing so. The TCPA merely requires that Charter first obtain consent from individuals before calling them with an autodialer or with a prerecorded voice. If Charter has not obtained consent, then it can still make the same communications, just without using an autodialer. There are plenty of other ways to market: TV ads, radio ads, mail ads, phone calls made with a non-autodialer, billboards, banner ads, email marketing, social media, partnerships with other businesses, in-store promotions, hosting events, positive customer reviews, search engine optimization and placement advertisements, and countless more. Nobody is restricting Charter's speech. Charter is simply being prohibited from setting up a boiler room and annoying people in a way that is so intrusive that Congress enacted a law prohibiting that manner of delivery if certain conditions (which are alleged by Gallion) are present. Even assuming strict scrutiny applies, it is patently absurd for Charter to

suggest that the government does not have a compelling interest in protecting consumer privacy, or that the TCPA is not narrowly tailored to serve that interest. The peace of mind of the entire nation is at stake if Charter's position is given credence. The TCPA should and must be upheld.

STATEMENT OF JURISDICTION

Plaintiff-Appellee Steve Gallion ("Gallion") commenced this action against Appellants CHARTER COMMUNICATIONS, INC. and SPECTRUM MANAGEMENT HOLDING COMPANY, LLC's ("Charter") in the United States District Court for the Central District of California.

The District Court had federal question subject matter jurisdiction, pursuant to 28 U.S.C. § 1331, over Appellant's two causes of action under the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. ("TCPA"). The district court entered an order denying Charter's Motion for Judgment on the Pleadings on February 26, 2018. (1 ER 1.) Appellant filed a Petition for Interlocutory Appeal, which was granted on May 22, 2018. Dkt. No. 9.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the District Court err in finding that the Telephone Consumer Protection Act does not violate the First Amendment?[2]

[2] Charter improperly narrows the question to "whether the TCPA [47 U.S.C. § 227(b)(1)(A)(iii)], as a content-based regulation of speech, survives strict scrutiny." However, this presupposes that the TCPA is a content-based regulation of speech,

STATEMENT OF THE CASE

I. Nature of the Case

This is an Interlocutory Appeal from a February 26, 2018 Order denying Charter's Motion for Judgment on the Pleadings. (1 ER 1.) Appellant filed a Motion for Interlocutory Appeal, which was granted on May 22, 2018. Ninth Cir. Dkt. No. 9. The facts of the underlying case as pleaded are straightforward and do not require a lengthy recitation.

On July 6, 2017, Gallion filed the operative Complaint in this action. (2 ER 221-229). The basis of Gallion's Complaint is that Charter violated the TCPA by spamming Gallion and thousands of others on a daily basis with robocalls promoting its telecommunications services using an automatic telephone dialing system and prerecorded voice. *Id*. Charter is alleged to have utilized such automated devices to call thousands of individuals, who, like Gallion, were never customers of Charter and never provided any personal information, including their cellular telephone numbers, to Charter for any purpose whatsoever. *Id*. Gallion and the class he seeks to represent never provided Charter with prior express consent to be harassed with advertisements using an automatic telephone dialing system or prerecorded voice. *Id*. In other words, this case involves exactly the conduct that Congress explicitly

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which the Ninth Circuit has previously held it is not in *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995). The question of how, if at all, the First Amendment intersects with the TCPA should be reviewed on appeal *de novo* in full. Charter cannot and should not be permitted to claim a partial victory out of the gate.

intended to prohibit: a telemarketer spamming robo-calls to unwitting consumers to sell them services they don't want, when they have not given their consent.

Charter filed a Motion for Judgment on the Pleadings. (2 ER 176-209). In doing so, Charter did not deny the allegations in Gallion's Complaint that it made such harassing and intrusive calls. *Id.* In fact, Charter did not even deny that its actions were in violation of the TCPA. *Id.* Instead, Charter's Motion for Judgment on the Pleadings argued that the TCPA as a whole is facially unconstitutional. *Id.* On January 9, 2018, the United States of America (the "government") intervened for the limited purpose of defending the TCPA's constitutionality. (2 ER 140-172). On January 12, 2018, Gallion filed an opposition. (2 ER 113-139). On January 22, 2018, Charter filed a consolidated reply. (2 ER 68-112).

II. The District Court's Order Denying Charter's Motion For Judgment On The Pleadings

The District Court denied Charter's Motion for Judgment on the Pleadings, and in doing so, upheld the constitutionality of the TCPA under the First Amendment. The Court began with a reasoned explanation of the background of the TCPA, which focused on the strong Congressional intent behind the statute, "to protect the privacy interests of residential telephone subscribers." (1. ER 1-16); citing S. Rep. No. 102–178, at 1 (1991). The District Court went on to cite to the language of the TCPA, noting that the restrictions on speech were narrowly tailored to phone calls which were made by use of "any automatic telephone dialing system

or an artificial or prerecorded voice" and only where such calls were placed without "prior express consent of the called party." *Id*.; citing 47 U.S.C. § 227(b)(l)(A)(iii). The District Court acknowledged that the Bipartisan Budget Act of 2015, Pub. L. No. 114–74, 129 Stat. 584, 588 (2015) recently added a single carve-out from liability if calls were "made solely to collect a debt owed to or guaranteed by the United States." The District Court also observed that the TCPA authorizes the FCC to promulgate rules exempting calls where doing so would "not adversely affect the privacy rights" that the law seeks to protect. See 47 U.S.C. § 227(b)(2)(B)(ii), (b)(2)(C). The TCPA also carves out an exemption for emergency calls. 227(b)(l)(A)(iii).

The District Court's analysis was straightforward and reasonable. It considered the recent amendment to the TCPA, as well as the Supreme Court's recent decision in *Reed v. Town of Gilbert*, 135 S.Ct. 2218, (2015), as well as the fact that this Court had twice upheld the constitutionality of the TCPA under the First Amendment as a "valid, content-neutral speech regulation under intermediate scrutiny." *Campbell–Ewald*, 768 F.3d at 876; *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995). The District Court then surveyed the landscape of other direct court rulings,

and found that the majority of decisions had found that the TCPA remained constitutional after the 2015 amendment.[3]

The District Court held that Section 227(b)(l)(A)(iii) is content based, diverging from *Moser* and *Campbell-Ewald*. Irrespective of this finding, and considering the Supreme Court's holding that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests" (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015)) the District Court correctly observed that even strict scrutiny would be met. Relying on the history of the TCPA, as well as longstanding U.S. Supreme Court precedent, the District Court found that protecting consumer privacy from the "nuisance of unsolicited, automated telephone calls" was a compelling government interest. The District Court noted that Congress enacted the TCPA, which was supported by extensive congressional findings, in relevant part "to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home." S. Rep. No.

[3] The District Court specifically cited *Brickman v. Facebook*, Inc., 230 F.Supp.3d 1036 (N.D. Cal. 2017); *Holt v. Facebook, Inc.*, 240 F.Supp.3d 1021 (N.D. Cal. 2017); *Mejia v. Time Warner Cable Inc*., No. 15-CV-6445 (JPO), 2017 WL 3278926 (S.D.N.Y. Aug. 1, 2017); *Greenley v. Laborers' Int'l Union of N. Am.*, 271 F.Supp.3d 1128 (D. Minn. 2017). The District Court noted that *Brickman* and *Holt* are currently on appeal before This Honorable Circuit Court. It appears that neither has been briefed at this stage.

102–178, at 1 (1991); see also *Moser*, 46 F.3d at 972 (following extensive hearings, Congress "concluded that telemarketing calls to homes constituted an unwarranted intrusion upon privacy.").

The District Court went on to find that the interest of privacy was furthered by a narrowly tailored set of restrictions under the TCPA, because the TCPA was neither too overinclusive nor too underinclusive, as the recent carve-out was narrowly limited and was being further limited by FCC regulations, and because any less restrictive alternatives to the current TCPA statute would be completely ineffective at protecting consumer privacy. Specifically regarding alternatives, The District Court logically observed that time-of-day limitations would be ineffective because the obvious and logical result of such restrictions would be that intrusive and obnoxious calls would simply be bunched up to occur at certain times of the day, which is no less intrusive. Imagine having to take one's phone off the hook for a period of four hours every day while one was inundated with robocalls. How would civilized society conduct its affairs with such interruption? Mandatory disclosure of caller identity and disconnection requirements would also not be effective because the privacy violations (being called, interrupted and annoyed) would still occur in the first place. Callers now just would just be required to tell consumers who they are, but such calls are just as invasive as calls made without such disclosures. Do not call lists would also not plausibly constitute a less restrictive alternative because

they place the burden on consumers to opt out of receiving calls, rather than requiring them to opt in (provide consent) if they are willing to receive such calls. Ultimately, none of these alternatives are as effective as the currently-enacted TCPA.

The District Court's ruling is thorough, well-reasoned, and supported by every district court and appellate decision that has reviewed the constitutionality of the TCPA, both before the 2015 Amendment and after. Charter's appeal presents no reason to deviate from precedent and reverse the District Court's sound decision.

STANDARD OF REVIEW

This Court reviews the constitutionality of a statute de novo. *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir.1993); *Moser v. F.C.C.*, 546 F.3d 970, 973 (9th Cir. 1995). Judgment on the pleadings, pursuant to Federal Rules of Civil Procedure 12(c), is proper when the moving party clearly establishes on the face of the pleadings that (1) no material issue of fact remains to be resolved; and (2) it is entitled to judgment as a matter of law. *Doleman v. Meiji Mut. Life Ins. Co.*, 727 F.2d 1480, 1482 (9th Cir. 1984). A district court may grant judgment to a defendant only when it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co.*, 132 F.3d 526, 529 (9th Cir. 1997)). "For the purposes of the motion, the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false."

Hal Roach Studios, Inc. v. Richard Feiner 7 Co. Inc., 896 F.2d 1542, 1550 (9th Cir. 1990). In deciding a motion for judgment on the pleadings, the court generally is limited to the pleadings and may not consider extrinsic evidence. See Fed. R. Civ. P. 12(c) (stating that a Rule 12(c) motion for judgment on the pleadings should be converted into a Rule 56 motion for summary judgment if matters outside the pleadings are considered by the court).

SUMMARY OF ARGUMENT

Charter claims that the District Court erred in denying its Motion for Judgment on the Pleadings and ruling that the TCPA does not violate the First Amendment. Charter is incorrect.

First, this Court has already held twice before that the TCPA is a content-neutral statute when there were already fringe exemptions to the TCPA, some of which could be described as content-based. Specifically, at the time of this Court's previous rulings, the TCPA had exceptions for emergency calls, and it provided different standards for determining whether prior express consent has been provided for marketing calls and non-marketing calls. These differences in legal treatment have existed for years, and well before this Court's most recent affirmation of its *Moser* decision that the TCPA is content neutral, in *Campbell-Ewald*, 768 F.3d 871. The only change in the statute since *Campbell-Ewald* is that Congress amended the TCPA in 2015 to also exempt calls that are made to collect government-backed debts.

If the other exemptions are minimal enough not to render the TCPA content-based, so too is the recent Bipartisan Budget Act's amendment.

Second, the Court should apply intermediate scrutiny even if the restriction is content-based because the speech at issue is commercial speech. This Court and the Supreme Court have held that content based discrimination is not of serious concern in the commercial context, and is subject to intermediate scrutiny, not strict scrutiny.

Third, even if strict scrutiny is applied, the TCPA furthers a compelling governmental interest and is narrowly tailored. Consumer privacy has been held by the Supreme Court and the Ninth Circuit to be a critically important governmental interest in other matters. The TCPA was designed to protect this interest, and does so in an effective manner. This has been reinforced numerously by the FCC, as well as recently by This Court, and the D.C. Circuit Court of Appeals. Moreover, the statute is narrowly tailored such that it is neither overinclusive nor underinclusive, and none of the less restrictive alternatives proposed by Charter would be remotely effective as a matter of basic logic to protect consumer privacy.

Fourth, even if this Court disagrees and finds that strict scrutiny applies, and that the TCPA does not meet its requirement due to the recent amendment to the TCPA, the amendment should be severed, rather than the entire law being stricken, because the TCPA has been held to be constitutional by this Court in the past, and the amendment is minor in the grand scheme of the statute and easily severable.

LEGAL ARGUMENT

I. The History Of The TCPA Demonstrates That The Statute Protects Consumers' Right To Privacy In A Fair, Targeted, Effective, and Reasonable Manner

The TCPA is "aimed at protecting recipients from the intrusion of receiving unwanted communications." *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 2007 U.S. Dist. LEXIS 11650, *11 (W.D. Wash. Feb. 16, 2007). Indeed, the U.S. Supreme Court has noted that consumers are outraged over the proliferation of automated telephone calls that are intrusive, nuisance calls, found to be an invasion of privacy by Congress. *See Mims v. Arrow Fin. Servs. LLC*, 132 S. Ct. 740, 745 (2012).[4] Congress enacted the TCPA in 1991 amidst an unprecedented increase in the volume of automated calls to consumers in America. *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037 (9th Cir. 2017); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) ("The "TCPA was enacted in response to an increasing number of consumer complaints arising from the increased number of telemarketing calls," and "consumers complained that such calls are a 'nuisance and an invasion of privacy.'") This Court recently extensively outlined the history of the

[4] The enactment of the TCPA was supported by extensive congressional findings, in relevant part stating that it was enacted "to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home." S. Rep. No. 102–178, at 1 (1991); *see also Moser*, 46 F.3d at 972 (following extensive hearings, Congress "concluded that telemarketing calls to homes constituted an unwarranted intrusion upon privacy.").

TCPA in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1044 (9th Cir. 2018). Notably, the Court observed that the exponentially rising volume of automated telemarketing calls[5] posed not only an interruption to consumers' peace of mind and an infringement of their privacy rights and a public nuisance, but also a danger to public safety:

> Recipients deemed that "automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons." S. Rep. No. 102-178, at 4. Among other reasons, "[t]hese automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party" and deprive customers of "the ability to slam the telephone down on a live human being." *Id*. at 4 & n.3 (citation omitted). Congress also noted surveys wherein consumers responded that the two most annoying things were (1) "[p]hone calls from people selling things" and (2) "phone calls from a computer trying to sell something." H.R. Rep. No. 102-317, at 9.
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> The volume of automated telemarketing calls was not only an annoyance but also posed dangers to public safety. S. Rep. No. 102-177, at 20 (1991). "Due to advances in autodialer technology," the machines could be programmed to call numbers in large sequential blocks or dial random 10-digit strings of numbers. *Id*. This resulted in calls hitting hospitals and emergency care providers "and sequentially delivering a recorded message to all telephone lines." *Id*. And because some autodialers would "not release [the line] until the prerecorded message is played, even when the called party hangs up," H.R. Rep. No. 102-317, at 10, there was a danger that the autodialers could "seize"

[5] See 137 Cong. Rec. S16,971 (daily ed. June 27, 1991) (statement of Rep. Pressler); citing a fourfold increase in telemarketing calls between 1084 and 1990, which Congress attributed to a rise in the use of automated telephone dialing systems. See also S. Rep. No. 102-178, at 2 (1991). Advertisers found these autodialers highly efficient because they could send thousands of messages to consumers at once without human intervention. H.R. Rep. No. 102-317, at 6-10 (1991).

> emergency or medical assistance telephone lines, rendering them inoperable, and "dangerously preventing those lines from being utilized to receive calls from those needing emergency services," H.R. Rep. No. 101-633, at 3 (1990). Representative Marge Roukema noted that it was "not just calls to doctors' offices or police and fire stations that pose a public health hazard." 137 Cong. Rec. H35,305 (daily ed. Nov. 26, 1991) (statement of Rep. Roukema). She recounted "the sheer terror" of a New York mother who, when she tried to call an ambulance for her injured child, "picked up her phone only to find it occupied by a computer call that would not disconnect." Id. at 35,305–06.
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> In light of these and other concerns, Senator Hollings introduced a bill to amend the Communications Act of 1934, in order to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers." S. Rep. No. 102-178, at 1. This bill became the Telephone Consumer Protection Act of 1991.

Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1043-44 (9th Cir. 2018).[6] In other words, the TCPA is an important consumer protection statute designed to prevent the exact conduct which occurred in this case: intrusive and unwanted automated

[6] This Court believed that the *Marks* decision was so important that when Crunch San Diego requested en banc review, it was denied without a single judge voting to rehear the matter. See *Marks v. Crunch San Diego, LLC*, 14-56834 Dkt. No. 119. The Ninth Circuit continued its trend of upholding the importance of consumer privacy issues under the TCPA by reversing an order granting summary judgment in the case of *Self-Forbes v. Advanced Call Center Technologies, LLC*, 2018---Fed.Appx. ----2018 WL 5414613 (9th Cir. Oct. 29, 2018) (It is unknown at the time of the filing of this Brief whether the decision will be selected for publication). What is clear is that recent trends in Ninth Circuit TCPA jurisprudence recognize that privacy and peace of mind are compelling governmental interests.

marketing calls that drive people crazy, invade recipients' privacy, and pose both a public nuisance and hazard to well-being, sanity, health and safety.[7]

The TCPA combats the threat to privacy caused by such automated calling practices, stating it is unlawful:

> **(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**...**

47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added). Where a call is made to a cellular phone, the TCPA applies regardless of the content or purpose of the call. *See* 47 U.S.C. § 227(b)(1). *See also Moser v. F.C.C.*, 46 F. 3d 970, 973 (9th Cir. 1995); *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 273 (3d Cir. 2013); *Iniguez v. The CBE Group*, 969 F.Supp.2d 1241, 1247 (E.D. Cal. 2013). A single automated call placed via an ATDS without prior express consent violates the TCPA. *Satterfield v. Simon & Schuster, Inc*., 569 F.3d 946, 956 (9th Cir. 2009).

The plain language of the TCPA itself demonstrates that the restrictions on speech under the TCPA are narrowly tailored so as to achieve Congress's compelling

[7] Congress set forth to achieve these goals by enacting a statute which would 1) significantly limit the volume of phone calls that people receive on their residential and wireless phones which they do not invite (because people do not like receiving such calls), and 2) prevent automated messages from being used to transmit messages via phone calls (because people especially do not like these types of calls).

governmental interests. The clear goal of the TCPA was to outlaw phone calls that were made by use of "any automatic telephone dialing system or an artificial or prerecorded voice"[8] and only where such calls were placed without "prior express consent of the called party." *Id*.; citing 47 U.S.C. § 227(b)(l)(A)(iii). Recently, the TCPA was amended by Congress as part of the Bipartisan Budget Act of 2015, Pub. L. No. 114–74, 129 Stat. 584, 588 (2015), which added a single carve-out from liability if calls were "made solely to collect a debt owed to or guaranteed by the United States." [9] The TCPA also had already carved out an exemption for emergency calls. 227(b)(l)(A)(iii).

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[8] In *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. Sept. 20, 2018), the Ninth Circuit analyzed the 2003, 2008 and 2015 FCC Orders, the *ACA* decision, the plain language of the statute, as well as the recent 2015 amendments to the TCPA enacted by Congress, and held:

> [W]e conclude that the statutory definition of ATDS is not limited to devices with the capacity to call numbers produced by a "random or sequential number generator," but also includes devices with the capacity to dial stored numbers automatically. Accordingly, we read § 227(a)(1) to provide that the term automatic telephone dialing system means equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers.

9 Regarding the 2015 amendment to the TCPA, the Ninth Circuit further held:

> We "presume that when Congress amends a statute, it is knowledgeable about judicial decisions interpreting the prior legislation." *Porter v. Bd. of Trs. of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064, 1072 (9th Cir. 2002). Because we infer that Congress was aware of the existing definition of ATDS, its decision not to amend the statutory

The Federal Communications Commission ("FCC") is expressly granted the authority to "prescribe regulations to implement the requirements" of the TCPA, so long as efforts to regulate the statute would "not adversely affect the privacy rights" that the law seeks to protect. 47 U.S.C. § 227(b)(2). Despite the existence of this strong statutory language, and hefty penalties for violating the TCPA, the FCC confirmed in 2003 that "telemarketing calls are even more of an invasion of privacy than they were in 1991," and "we believe that the record demonstrates that telemarketing calls are a substantial invasion of residential privacy, and regulations that address this problem serve a substantial government interest." *Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, 18 F.C.C.R. 14014 (2003), F.C.C. Comm'n Order No. 03-153, modified by 18 F.C.C.R. 16972. Things have only gotten worse since that time, according to the FCC's 2015 Order:

> Last year alone, we received more than 215,000 such complaints. The data reveal the scale of the robocall problem. The individual stories behind them reveal the costs.
>
> Consider Brian, who writes: "Robocalls are a daily occurrence on both my landline, and increasingly, on my mobile number. These interruptions impact my productivity. Each call takes me off task and further time is lost trying to pick up where I left off when the

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> definition of ATDS to overrule the FCC's interpretation suggests Congress gave the interpretation its tacit approval.

Marks, 904 F.3d 1041, 1052 (9th Cir. Sept. 20, 2018).

interruption occurred. . . . We The Consumers pay for these telephony services; these are our phones and we deserve to be allowed to control who calls us."

Or how about Peggy, who writes: "I live in a large home and have many medical issues . . . .[T]hese robocalls . . . cause me to stress out because I can't get to the phone . . . . Simply put, it's stalking. . . . It's more than just annoying, it's unethical. . . . They are invading my privacy, period."

And it's not just calls, it's text messages too. One consumer told us they received 4,700 unwanted texts over a 6-month period.

Our vehicle for helping consumers today is resolving an unprecedented number of requests for clarification. We rule on 21 separate matters that collectively empower consumers to take back control of their phones. These rulings have a simple concept: you are the decision maker, not the callers.

…

We also clarify that callers cannot skirt their obligation to get a consumer's consent based on changes to their calling equipment or merely by calling from a list of numbers. We make it clear that it should be easy for consumers to say "no more" even when they've given their consent in the past.

And if you have the bad luck of inheriting a wireless number from someone who wanted all types of robocalls, we have your back. We make it clear first that callers have a number of tools to detect that the number has changed hands and that they should not robocall you, and we provide the caller one single chance to get it wrong before they must get it right. This is critical because we have heard from consumers that getting stuck with a reassigned number can lead to horrible consequences. One consumer received 27,809 unsolicited text messages over 17 months to one reassigned number, despite their requests to stop the texts.

Some argue that we have not updated the TCPA to reflect modern calling and consumer expectations in an increasingly mobile-phone world, and this hurts businesses and other callers. Quite the contrary: we provide the clarifications that responsible businesses need to

> responsibly use robocalling equipment. Indeed, we interpret the TCPA in a commonsense way that benefits both callers and consumers.
> …
> We all love our phones, and we now carry them wherever we go. Today, we give consumers their peace back. It's simple: consumers should be able to make the decision about whether they receive automated calls. If they want them, they can consent. And if they don't consent, they should be left alone.

*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 199*1, 30 FCC Rcd. 7961, 8066-67 (2015) (Statement of Chairman Tom Wheeler). In other words, the TCPA serves an essential purpose, and without this statute, the dam which holds back the flood of intrusive calls will burst. Limiting the statute to obviously less effective means, as Charter suggests, is certainly not the answer.

II. The Ninth Circuit Has Previously Upheld The Constitutionality Of The TCPA, And Should Follow Its Prior Decisions

In *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995), this Court explained:

> Congress held extensive hearings on telemarketing in 1991. Based upon these hearings, it concluded that telemarketing calls to homes constituted an unwarranted intrusion upon privacy. The volume of such calls increased substantially with the advent of automated devices that dial up to 1,000 phone numbers an hour and play prerecorded sales pitches. S .Rep. No. 102–178, 102d Cong., 1st Sess. (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970. By the fall of 1991, more than 180,000 solicitors were using automated machines to telephone 7 million people each day. *Id.*
>
> In addition to the sheer volume of automated calls, Congress determined that such calls were "more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons" because such calls "cannot interact with the customer except in preprogrammed ways" and "do not allow the caller to feel the frustration of the called party...."

> *Id.* at 1972. Customers who wanted to remove their names from calling lists were forced to wait until the end of taped messages to hear the callers' identifying information. Prerecorded messages cluttered answering machines, and automated devices did not disconnect immediately after a hang up. *Id.* at 1972. In a survey conducted for a phone company, 75 percent of respondents favored regulation of automated calls, and half that number favored a ban on all phone solicitation. *Id.* at 1970. Although 41 states and the District of Columbia have restricted or banned intrastate automated commercial calls, many states asked for federal legislation because states may not regulate interstate calls. *Id.*

Id. at 972; see also 47 U.SC. §227(b)(1)(A)(iii); *aff'd on other grounds*, 136 S. Ct. 663 (2016).

In upholding the TCPA against a First Amendment challenge *Moser* held that the TCPA "… should be analyzed as a content-neutral time, place, and manner restriction." *Moser*, 46 F.3d at 973. Applying the constitutional standards applicable to such restrictions, this Court found the statute constitutional because "the restrictions are justified without reference to the content of the restricted speech… they are narrowly tailored to serve a significant governmental interest, and … they leave open ample alternative channels for communication of the information." *Id.* at 973 (internal quotation marks and citations omitted). The court "upheld the statute after finding that the protection of privacy is a significant interest, the restriction of automated calling is narrowly tailored to further that interest, and the law allows for 'many alternative channels of communication.'" *Campbell-Ewald*, 768 F.3d at 876 (quoting *Moser*, 46 F.3d at 974-75). The only thing that has changed since *Moser*

and *Campbell-Ewald* were decided is that Congress added a single carve out, which partially exempts calls "made solely to collect a debt owed to or guaranteed by the United States." This carve out is subject to FCC regulations narrowing and restricting its impact. See FCC 2016 Order, 31 FCC Red. at 9088–94 (issuing a proposed rule limiting the number of federal debt collection calls to three within a 30–day period and limiting call lengths to 60 seconds or less, among other restrictions.)

III. The TCPA Remains Constitutional.

Charter asks this Court to hold that its previous decisions upholding the TCPA are dead letters and that the TCPA is facially unconstitutional under the First Amendment. Every court to face this argument, both before and after the amendment of the TCPA to provide an exception for government-debt-collection calls, has rejected it.[10] A number of courts have reviewed the exact argument raised by Charter

[10] *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014); *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 497 (W.D. Mich. 2015); *Centerline Equip. Corp. v. Banner Personnel Serv., Inc.*, 545 F. Supp. 2d 768 (N.D. Ill. 2008); *Holtzman v. Caplice*, 2008 WL 2168762 (N.D. Ill. May 23, 2008); *State of Okla. ex rel. Edmondson v. Pope*, 505 F. Supp. 2d 1098 (W.D. Okla. 2007); *Italia Foods, Inc. v. Marinov Enterprises, Inc.*, 2007 WL 4117626 (N.D. Ill. Nov. 16, 2007); *Accounting Outsourcing, L.L.C. v. Verizon Wireless Personal Communications, L.P.*, 329 F. Supp. 2d 789, 805–818 (M.D. La. 2004); *Harjoe v. Herz Fin.*, 108 S.W.3d 653 (Mo. 2003); *Margulis v. P & M Consulting, Inc.*, 121 S.W.3d 246 (2003); *Stefano & Associates v. Global Lending Grp.*, 2008 WL 186638 (2008); *Phillip Randolph Enterprises, L.L.C. v. Rice Fields*, 2007 WL 129052; (N.D. Ill. Jan. 11, 2007); *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003); *Destination Ventures, Ltd. v. Fed. Communications Comm'n*, 46 F.3d 54

in its appeal, and have unanimously upheld the TCPA as constitutional.[11] As explained above, this Court has twice upheld the TCPA against First Amendment challenges on the basis of the statute's content-neutrality. *See Moser*, 46 F.3d at 974–75; *Campbell-Ewald*, 768 F.3d at 876–77. Even the handful of courts that have recently accepted the invitation to subject the TCPA to strict scrutiny have held that

(9th Cir. 1995); *Moser v. Fed. Communications Comm'n*, 46 F.3d 970 (9th Cir. 1995); *Patriotic Veterans, Inc. v. Indiana*, 2016 WL 1382137 (S.D. Ind. Apr. 7, 2016); *Wreyford v. Citizens for Transp. Mobility*, 957 F. Supp. 2d 1378 (N.D. Ga. 2013); *In re Jiffy Lube Int'l, Inc., Text Spam Litig.*, 847 F. Supp. 2d 1253 (S.D. Cal. 2012); *Pasco v. Protus IP Solutions, Inc.*, 826 F. Supp. 2d 825 (D. Md. 2011); *Maryland v. Universal Elections*, 787 F. Supp. 2d 408 (D. Md. 2011), *aff'd*, 729 F.3d 370 (4th Cir. 2013); *Kramer v. Autobytel*, 759 F. Supp. 2d 1165 (N.D. Cal. 2010); *Spafford v. Echostar Communications Corp.*, 448 F. Supp. 2d 1220 (W.D. Wash. 2006); *Minn. ex rel. Hatch v. Sunbelt Communications & Mktg.*, 282 F. Supp. 2d 976 (D. Minn. 2002); *Texas v. Am. Blast Fax, Inc.*, 121 F. Supp. 2d 1085 (W.D. Tex. 2000); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162 (S.D. Ind. 1997); *Joffe v. Acacia Mortg. Corp.*, 121 P.3d 831 (2005); *Kaufman v. ACS Sys., Inc.*, 2 Cal. Rptr. 3d 296 (2003); *Covington & Burling v. Int'l Mktg. & Research, Inc.*, 2003 WL 21384825 (2003); *State ex rel. Humphrey v. Casino Mktg. Grp., Inc.*, 491 N.W.2d 882 (1992); *Harjoe v. Herz Fin.*, 108 S.W.3d 653 (2003); *Rudgayzer & Gratt v. Enine, Inc.*, 779 N.Y.S.2d 882 (2004); *Grady v. Lenders Interactive Services*, 2004 WL 1799178 (2004); *Jemiola v. XYZ Corp.*, 802 N.E.2d 745 (2003); *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 135 S.W.3d 365 (2004); *Mainstream Mktg. Services v. Fed. Trade Comm'n*, 358 F.3d 1228 (10th Cir. 2004); *Charvat v. Telelytics, L.L.C.*, 2006 WL 2574019 (2006).

[11] *Meza v. Sirius XM Radio, Inc.*, 2018 WL 4599718 (S.D. Cal. Sept. 25, 2018); *Greenley v. Laborers' International Union of North America*, 271 F.Supp.3d 1128 (D. Minn. 2017); *Brickman v. Facebook, Inc.*, 230 F.Supp.3d 1036 (N.D. Cal. 2017); *Woods v. Santander Consumer USA Inc.*, 2017 WL 1178003 (N.D. Ala. March 30, 2017); *American Association of Political Consultants v. Sessions*, 323 F.Supp.3d 737 (E.D.N.C. 2018); *Holt v. Facebook, Inc.*, 240 F.Supp.3d 102 (N.D. Cal. 2017); *Victory Processing, LLC v. Fox*, 307 F.Supp.3d 1109 (D. Mt. 2018 (holding that privacy rights are "one of the pillars of civil society.").

it is constitutional because it is narrowly tailored to serve the compelling interest in protecting the privacy of telephone users. *See, e.g.*, *Brickman v. Facebook, Inc.*, 230 F. Supp. 3d 1036, 1046 (N.D. Cal. 2017). The unanimous agreement among the federal courts that the TCPA is constitutional rests on solid legal grounds and has received the full backing of the United States Department of Justice.[12] Charter presents no compelling argument as to how or why these numerous courts have all gotten it wrong, and this Court should follow these common-sense rulings and rule similarly.

Charter's First Amendment claim rests on its characterization of the TCPA as a content-based restriction of pure speech subject to strict scrutiny and facial invalidation because, in Charter's view, it is not narrowly tailored to serve a compelling governmental interest. Charter's contention that the statute is "content-based" does not rest on the basic prohibition at issue—placing unconsented-to calls to cell phones or residential lines using an automated dialing system or recorded voice. That prohibition is not based on the content of the calls and is, as this Court previously concluded, a classic "time, place or manner" restriction subject to no more than intermediate First Amendment scrutiny. *See Moser*, 46 F.3d at 973–74;

[12] The Justice Department, as in this case, has regularly filed briefs supporting the constitutionality of the TCPA against challenges identical to Charter's, including in *Sliwa v. Bright House Networks, LLC*, No. 2:16-cv-00235-JES-MRM, Doc. 113 (M.D. Fla., filed Nov. 2, 2017).

Campbell-Ewald, 768 F.3d at 876–77. Instead, Charter argues that the statute is not content neutral because it has an exception—for calls seeking to collect debts owed to the federal government—that Charter argues renders the entire statutory scheme content-based. Charter's argument fails at every step of its analysis.

III. Charter Fails to Demonstrate That the Statute's Allegedly Unconstitutional Application to Fully Protected Speech Is Substantial in Comparison to Its Undoubtedly Legitimate Application to Commercial Speech

First, Charter errs in seeking to invoke constitutional doctrines applicable to content-based restrictions on fully protected speech. Charter itself does not contest that its speech at issue in this case, which sought to sell its services to new subscribers, was commercial speech. It is well established, including by recent precedent of this Court, that the government may make content-based distinctions among different commercial messages without subjecting its regulations to strict scrutiny. *See Contest Promotions, LLC v. City & County of San Francisco*, 874 F.3d 597, 601 (9th Cir. 2017); *Retail Dig. Network, LLC v. Prieto*, 861 F.3d 839, 846–47 (9th Cir. 2017) (en banc); *see also Matal v. Tam*, 137 S. Ct. 1744, 1767 (2017) (Kennedy, J., concurring in the judgment) (stating that "content based discrimination" is not of "serious concern in the commercial context"); *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (noting that a content-based commercial speech regulation is subject to intermediate scrutiny). Thus, even if the statutory exceptions for government debt collection and emergency calls made the

TCPA "content-based," the statute's application to Charter's commercial messages would not be subject to strict scrutiny.

Charter tries to sidestep the point by arguing that because the statute does not limit its prohibition on unconsented-to calls to commercial messages, its supposed lack of content neutrality renders it facially invalid under the strict scrutiny applicable to fully protected speech. But Charter overlooks a critical step in any successful facial First Amendment challenge made by a speaker to whom a law could constitutionally be applied: The challenger must demonstrate that the challenged statute's unconstitutional sweep is substantial as compared to its permissible applications. *See Menotti v. City of Seattle*, 409 F.3d 1113, 1128 (9th Cir. 2005).

Charter has made no attempt to carry that burden and could not do so if it tried. The vast bulk of the TCPA's applications are to commercial speech, and as to those applications, its exception for government-debt-collection calls does not call its constitutionality into any serious question. The application of the statute to fully protected speech, by contrast, is relatively insubstantial, and the "strong medicine" of a facial challenge, *United States v. Williams*, 533 U.S. 285, 293 (2008), which here would preclude the statute's application to millions of purely commercial messages, is not necessary to vindicate interests in fully protected speech that could

adequately be addressed in challenges to specific applications of the statute to such speech.[13]

IV. The TCPA Is a Permissible Content-Neutral Time, Place, or Manner Restriction

a. The Ninth Circuit's Decisions Upholding the TCPA Remain Authoritative

Even if Charter were correct that the Court should ignore the legitimate application of the statute to commercial speech and allow a facial challenge to proceed under standards applicable to fully protected speech, Charter's arguments would fail. Charter's assertion that the TCPA is a content-based restriction on speech subject to strict scrutiny was rejected by this Court in *Moser*, 46 F.3d at 973–74, a decision this Court reaffirmed in *Campbell-Ewald*, 768 F.3d at 876–77. As this Court held in those cases, the TCPA prohibition on unconsented to calls using automated dialing systems or prerecorded voices is a restriction on the methods by which messages may be disseminated, not the contents of the messages. It is therefore subject to review under the intermediate scrutiny applicable to content-neutral time, place or manner restrictions, under which it need only directly serve a

[13] In *Moser*, where the statute was challenged by a nonprofit organization rather than an entity engaged exclusively in commercial speech, the Ninth Circuit chose not to apply commercial-speech analysis, but noted that the standard it applied was equivalent to the commercial-speech test. *See* 46 F.3d at 973. *Moser* did not hold that an exclusively commercial speaker can successfully challenge the statute on its face based on standards applicable to fully protected speech without showing substantial overbreadth.

substantial government interest. *See Moser*, 46 F.3d at 973; *Campbell-Ewald*, 768 F.3d at 876. As this Court concluded in both *Moser* and *Campbell-Ewald*—and as every other court to address the subject has agreed—the TCPA's protection of the interest in the privacy of residential and mobile telephone users easily satisfies that standard. *See Moser*, 46 F.3d at 974–75; *Campbell-Ewald*, 768 F.3d at 876–77.

Charter contends that this Court's precedents are no longer binding because of one intervening change in the statute (the 2015 addition of the exception for federal debt collection calls) as well as recent Supreme Court cases (in particular, *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015)) addressing the distinction between content-based and content-neutral laws.[14] Those developments, however, do not relieve this Court of its obligation to follow its own on-point precedents. Whether intervening developments effectively overrule or supersede this Court's precedents is typically a decision for the Court to make en banc, not for a panel. *See Lair v.*

[14] Charter argues weakly that the TCPA's provision allowing the FCC to provide for additional exceptions by regulation also makes it content-based. But this Court concluded in *Moser* that that provision is not content-based on its face, and that the validity of particular exceptions created by the FCC is outside the purview of a district court considering a constitutional challenge to the statute because FCC regulations implementing the TCPA may be challenged only in judicial review proceedings in a court of appeals. *See* 46 F.3d at 973. Charter points to no intervening circumstances that have affected the validity of this Court's ruling on that point, and recent district Court decisions have uniformly held that the FCC's exemption authority cannot be considered as a factor rendering the statute content-based. *See, e.g.*, *Brickman*, 230 F. Supp. 3d at 1045; *Greenley v. Laborers' International Union of North America*, __ F. Supp. 3d __, 2017 WL 4180159, at *13 (D. Minn. Sept. 19, 2017).

Bullock, 697 F.3d 1200, 1207 (9th Cir. 2012). Circuit precedent remains binding as long as it "can be reasonably harmonized with the intervening authority." *Id*. Applying that standard, another district court recently concluded that the analytical approach to identifying content-neutral time, place or manner restrictions reflected in this Court's decisions in *Moser* and *Campbell-Ewald* remains authoritative within this Circuit. *Gresham v. Picker*, 214 F.Supp.3d 922, 933–34 (E.D. Cal. 2014.[15]

Indeed, *Moser* and *Campbell-Ewald* already rejected Charter's fundamental contention that a narrow exception to the TCPA's time, place or manner restriction for particular types of calls suffices to make it a content-based law subject to strict scrutiny. At the time of both decisions, the TCPA already included an emergency-call exception, *see Moser*, 46 F.3d at 972, and this Court did not find that that exception took the TCPA outside the realm of content neutrality, even though Charter's argument would appear to imply that the emergency exception also is a "content-based" one. Moreover, in deciding *Campbell-Ewald*, this Court already had the benefit of the Supreme Court's definition of "content-based" in *Sorrell v. IMS*

[15] *Gresham* concerned California's TCPA analogue that, with specified exceptions, prohibits unconsented-to calls using "automatic dialing-announcing devices." This Court upheld that statute in *Bland v. Fessler*, 88 F.3d 729 (1996), concluding that the statute's exceptions did not render it content-based and employing the same time, place or manner analysis applied in *Moser*. *See id.* at 734–34. *Gresham* held that *Bland*'s approach remains binding on courts in this Circuit after *Reed*. *See* 214 F. Supp. 3d at 933–34.

Health, Inc., 564 U.S. 552, 565 (2011), which *Reed* merely reiterated, *see* 135 S. Ct. at 2227.

This Court has no basis for concluding, therefore, that *Moser* and *Campbell-Ewald* have been superseded by *Reed* to the extent that they held the TCPA to be content-neutral notwithstanding the emergency exception. Nor can the Court conclude that the subsequent addition of one more narrow exception to the statute would alter that conclusion. The exceptions do nothing to change this Court's correct view that the statute is, fundamentally, a restriction on *how* a speaker may convey a message, not the content of the message itself.

b. The Government-Debt-Collection Exception Does Not Make the TCPA "Content-Based"

Even if narrow exceptions to an otherwise content-neutral time, place or manner restriction could suffice to render the entire scheme content-based if they rested on the contents of the messages subject to the exception, the exception on which the Charter relies would not do so because it is not genuinely content-based: It does not single out particular messages, or types of messages, for preferential treatment based on their content. Rather, the government debt collection exception is more properly viewed as based on the existence of a relationship between two parties—a federal government creditor and a debtor—that justifies creating an implied-in-law consent to the placement of a call, rather than as a regulation of the

specific message of a call. *See Mey v. Venture Data, LLC*, 245 F.Supp.3d 771, 792 (N.D. W. Va. 2017). For the same reason, courts, including this Court, that have considered statutes that have similar relationship-based exceptions have rejected the argument that they are content-based both before and after *Reed*. *See Bland v. Fessler*, 88 F.3d at 733–34; *Gresham v. Picker*, 245 F. Supp. 3d at 933–34; *see also Gresham v. Swanson*, 866 F.3d 853, 855–56 (8th Cir. 2017); *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 305 (7th Cir. 2017); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1550 (8th Cir. 1995). The TCPA's government-debt-collection exception does not privilege a particular message or speaker, but a particular debtor-creditor relationship, one between a borrower and the federal government. There is nothing suspect about laws granting preferential treatment to the federal government as creditor: There are a host of such laws, including laws making such debts non-dischargeable in bankruptcy and allowing means of collection not available to other creditors. The advantages they confer on the government as compared to other creditors do not implicate First Amendment values.[16]

c. Charter's Reliance on *Reed* and *Cahaly* Is Misplaced

Charter's claim that the exception renders the law content-based rests principally on *Reed* and on a single decision of the Fourth Circuit concerning a

[16] Likewise, the application of the emergency exception rests not on what the message says, but on the circumstances that give rise to the message. It does not reflect a governmental effort to regulate the content of emergency messages.

statute materially different from the TCPA. *Reed* concerned not a generally applicable time, place, or manner restriction with two narrow exceptions, but a municipal sign code that pervasively defined applicable rules based entirely on the contents of particular types of signs. 135 S. Ct. at 2227. The *Reed* sign code's thoroughgoing reliance on a sign's content to determine the restrictions to which it was subject bears no resemblance to the TCPA's broad and neutral restriction on unconsented-to calls using particular technologies.

Charter's reliance on the Fourth Circuit's decision in *Cahaly v. Larosa*, 796 F.3d 399 (2015), is equally misplaced. Leaving aside that a decision of another circuit cannot serve as a permissible basis this Court to disregard its own binding precedent, the statute at issue in *Cahaly* was so radically different from the TCPA that the contrast serves only to emphasize the content-neutrality of the TCPA.

Cahaly involved a South Carolina statute that prohibited two types of unconsented-to "robocalls" defined by their contents: those with consumer messages and those with political messages. 796 F.3d at 402. The statute permitted all other messages. Thus, as the Fourth Circuit put it, "South Carolina's anti-robocall statute [was] content based because it ma[de] content distinctions on its face." *Id*. at 405. In *Reed*'s terms, it "applie[d] to particular speech because of the topic discussed or the idea or message expressed." *Id.* (quoting *Reed*, 135 S. Ct. at 2227. Specifically, "the anti-robocall statute applie[d] to calls with a consumer or political message but d[id]

not reach calls made for any other purpose." *Id*. Notably, the statute distinguished one type of speech subject to the highest degree of First Amendment protection—political speech—from all other forms of fully protected speech, including charitable solicitations, and subjected it to disfavored treatment. The Fourth Circuit accordingly applied strict scrutiny to affirm an injunction against the application of the statute to a political speaker whose fully protected speech was singled out for prohibition based on its political content. *See id*. at 403–05.

The TCPA could hardly be more different. Its prohibition on unconsented-to calls does not apply to particular speech "because of the topic discussed or the idea or message expressed." It broadly applies to messages of all types, subject only to narrow exceptions. *Cahaly*'s condemnation of a statute that facially singles out political speech for regulation thus has no application to the TCPA. Not surprisingly, then, no court has applied *Cahaly* to find the TCPA or similar statutes regulating unconsented-to calls using autodialing technology or recorded voices violates the First Amendment.

d. The TCPA Is Not "Viewpoint-Based"

Even further afield than its reliance on *Cahaly* is Charter's suggestion that the government-debt-collection exception is not just content-based, but viewpoint-based. "At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for

disfavor based on the views expressed." *Matal*, 137 S. Ct. at 1766 (2017) (Kennedy, J., concurring in the judgment). The TCPA's exception for government-debt-collection calls has nothing to do with disfavoring views expressed by callers: It does not turn on whether callers express opinions supporting or opposing any particular type of debt, or on the expression of views on any other subject. The applicability of the exception turns solely on the function of a call in seeking to effectuate a specific type of transaction—payment of a debt. It is not aimed at suppressing opinions.[17]

V. The TCPA Would Easily Satisfy Strict Scrutiny If It Were Applicable

As The Supreme Court has held, "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471 (1980). "One important aspect of residential privacy is protection of the unwilling listener.... Individuals are not required to welcome unwanted speech into their own homes and ... the government may protect this freedom." *Frisby v. Schultz*, 487 U.S. 474, 484–85 (1988). In *Campbell-Ewald*, this Court extended the government's interest in protecting residential privacy to cell phones, finding "no evidence that the government's interest in privacy ends at home" because "the nature of cell phones

[17] Even if the exception could be characterized as having something to do with viewpoint, "the Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about" some "course of action" on which the government has embarked. *Matal*, 137 S. Ct. at 1757.

renders the restriction ... all the more necessary to ensure that privacy" and "prohibiting calls to land lines alone would not adequately safeguard the stipulated interest in residential privacy." 768 F.3d at 876–77; *see also Patriotic Veterans*, 845 F.3d at 305 ("No one can deny the legitimacy of the state's goal: Preventing the phone (at home or in one's pocket) from frequently ringing with unwanted calls."); *cf. Riley v. California*, —– U.S. ——–, 134 S. Ct. 2473, 2494–95 (2014) ("Modem cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' ") (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886).

Even if the TCPA's exception for government-debt-collection calls rendered it content-based, its critical importance to the protection of this compelling interest in privacy would ensure its constitutionality. As numerous district courts have recently concluded, the statute survives even strict scrutiny because the interest it serves—protecting privacy—is compelling, and it is narrowly tailored to serve that interest. No court has concluded otherwise.

That the interest in protecting the privacy of telephone users against unwanted intrusions is compelling is impossible to deny. The TCPA was enacted because of consumer outrage against such breaches of privacy, and it reflected congressional findings that technological advances had subjected consumers to ever-increasing volumes of the unwanted demands on their time and attention inherent in such calls.

The Supreme Court recognized the importance and legitimacy of the interests that prompted the enactment of the statute in *Mims v. Arrow Financial Services*, 565 U.S. 368 (2012). As the Court explained, "'[A]utomated or prerecorded telephone calls' made to private residences, Congress found, were rightly regarded by recipients as 'an invasion of privacy.'" *Id*. at 372 (quoting 105 Stat. 2394, note following 47 U.S.C. § 227). The structure of the TCPA, *Mims* concluded, made "evident" the "federal interest in regulating telemarketing to 'protec[t] the privacy of individuals' while 'permit[ting] legitimate [commercial] practices.'" *Id*. at 383 (quoting 105 Stat. 2394, note following 47 U.S.C. § 227). This Court reinforced such findings in the recent *Marks* decision, as cited above.

Courts that have considered the question have been unanimous in their agreement that the privacy interests identified by Congress and the Supreme Court in *Mims* as the basis for the TCPA's restrictions on unconsented-to calls are compelling. *See Greenley*, 2017 WL 4180159, at *13; *Mejia v. Time Warner Cable, Inc.*, 2017 WL 3278926, at *16 (S.D.N.Y. Aug. 1, 2017); *Holt v. Facebook, Inc.*, 240 F. Supp. 3d 1021, 1033 (N.D. Cal. 2017); *Brickman* 230 F. Supp. 3d at 1046. As these courts have recognized, there is no serious dispute that "[t]he TCPA serves a compelling government interest." *Mejia*, 2017 WL 3278926, at *16. Indeed, the interest in protecting personal tranquility and privacy "is certainly of the highest order in a free and civilized society." *Brickman*, 230 F. Supp. 3d at 1046 (quoting

Carey v. Brown, 447 U.S. 455, 471(1980); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 775 (1994); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995)). And the interest is as applicable to cell phones as to traditional residential phones, given the ubiquity of cell phones and their use in homes as well as other locations. *See Campbell-Ewald*, 768 F.3d at 876–77. "No one can deny the legitimacy of the [TCPA's] goal: Preventing the phone (at home or in one's pocket) from frequently ringing with unwanted calls." *Greenley*, 2017 WL 4180159, at *13 (quoting *Patriotic Veterans*, 845 F.3d at 305).

The TCPA, moreover, serves the compelling interest in privacy in a narrowly tailored way. It "aims squarely at the conduct most likely" to harm the interest at issue. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015). The law focuses on unconsented-to calls that use the technologies that enable widespread and particularly intrusive abuses: automated dialing systems that allow unwanted calls to be made by the millions, and prerecorded messages that heighten consumers' annoyance at those intrusions. Thus, "Congress, in crafting this provision, carefully targeted the calls most directly raising its concerns about invasion of privacy." *Mejia*, 2017 WL 3278926, at *16; *see also Brickman*, 230 F. Supp. 3d at 1048. Again, as discussed above, Charter is free to solicit its products and deliver its message to whomever it chooses, and is not restricted in any significant way by the TCPA from doing so. All that the TCPA requires is that if Charter wants to use a

robodialer to market its goods, that it acquire consent from those to whom it places these intrusive messages, elsewise, Charter is tying up their phone lines, which are an extension of their spheres of privacy. Congress essentially put a "keep off the lawn" sign in the telecommunications "yards" of consumers, which are enforceable against trespassing robodialers. Charter simply needs to get permission, which is minimally burdensome, if it wants to autodial. If Charter cannot get permission, it can still market to such consumers through alternative perfectly legal and widely-used means, such as TV ads, radio ads, mail ads, phone calls made with a non-autodialer, billboards, banner ads, email marketing, social media, partnerships with other businesses, in-store promotions, hosting events, positive customer reviews, search engine optimization and placement advertisements, and countless more. Nobody is restricting Charter's speech. Charter's position is neither sympathetic, nor compelling.

Charter's argument that the TCPA is not sufficiently tailored to serve the compelling privacy interest rests principally on the assertion that the statutory exception renders it impermissibly underinclusive and that the supposedly content-based distinction drawn by the exception fails to serve a compelling interest. But although the government-debt-collection exception may diminish to some incremental degree the achievement of the statute's privacy-protection purposes, the statute's application to the far larger universe of calls outside the exception still

directly and substantially serves the government's compelling interest. *See Greenley*, 2017 WL 4180159, at *14; *Mejia*, 2017 WL 3278926, at *17; *Brickman*, 230 F. Supp. 3d at 1047. Thus, "the TCPA's exemptions leave negligible damage to the statute's interest in protecting privacy." *Brickman*, 230 F. Supp. 3d at 1048.

That the statute could go further does not make it fail strict scrutiny. As the Supreme Court recently held in *Williams-Yulee*, "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" 135 S. Ct. at 1668 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992). Thus, a law "need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Id*. The court has "accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests." *Id*.

Here, as in *Williams-Yulee*, even if subjected to strict scrutiny, the TCPA "raises no fatal underinclusivity concerns" because it is "aim[ed] squarely at the conduct most likely" to infringe the privacy of telephone consumers. *Id.* And it is by no means "riddled with exceptions." *Id.* at 1669. Notwithstanding its narrow exceptions, the TCPA still bans a broad swath of the most intrusive forms of robo-calling. *See Holt*, 240 F. Supp. 3d at 1033. Moreover, the government "has a good reason," *Williams-Yulee*, 135 S. Ct. at 1669, for the government-debt exception: protection of the public fisc. *See Mejia*, 2017 WL 3278926, at *16. And because

callers seeking to collect debt on behalf of the government can be held accountable to public control in other ways, the government has reason to see calls on behalf of the government and private calling activity as "implicat[ing] a different problem." *Williams-Yulee*, 135 S. Ct. at 1669. Strict scrutiny or no, the government need not be put to the "all-or-nothing choice," *Williams-Yulee*, 135 S. Ct. at 170, of including government debt collection calls in the TCPA's prohibition or forgoing regulation of robocalls altogether.[18]

Charter suggests that the statute fails strict scrutiny unless the statutory distinction between the universe of prohibited calls and the narrow set of permissible government-debt-collection calls itself serves a compelling interest. As *Williams-Yulee* makes clear, however, the determinative question is not whether a statutory exception serves a compelling interest, but whether, in light of the exception, the statute as a whole no longer sufficiently serves the compelling interest invoked to justify it. In such circumstances, the exception may "raise 'doubts about whether the government is in fact pursuing the interest it invokes,'" or "reveal that a law does

[18] Likewise, the exception for emergency situations, does not undermine the statutory objective of protecting privacy, as the circumstances in which it applies are rare and likely to be regarded by recipients of calls as justifying whatever intrusion a call may entail. Indeed, the exception for emergencies may itself serve a compelling interest, which would negate any contention that the exception could cause the statute to fail strict scrutiny. In any event, Charter, unlike some other litigants who have challenged the TCPA's constitutionality, does not contend that the emergency exception calls its constitutionality into question.

not actually advance a compelling interest." *See* 135 S. Ct. at 1668 (citation omitted). Here, by contrast, because the exception does not do "appreciable damage" to the compelling interest in privacy relative to the substantial protection the statute provides, the TCPA does not fail strict scrutiny regardless of whether the government-debt-collection exception itself serves a compelling interest. *Brickman*, 230 F. Supp. 3d at 1048 (quoting *Reed*, 135 S. Ct. at 2232).

Even if the exception had to serve a compelling interest, however, the statute would still satisfy strict scrutiny. "[O]bligations to and rights of the United States under its contracts" involve "uniquely federal interests," *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988), and "protection of the public fisc is a matter that is of interest to every citizen." *Brock v. Pierce County*, 476 U.S. 253, 262 (1986). Thus, "the federal government's interest in collecting debts owed to it supports the finding of a particularly compelling interest in exempting calls made for the purposes of collecting government debts." *Mejia*, 2017 WL 3278926, at *16. By facilitating collection of government debts, the exception directly advances that interest.

Charter also argues that there are various other "less restrictive alternatives" to the TCPA's prohibition on unconsented-to calls using autodialing equipment or recorded voices. But where the government is pursuing a compelling interest, a less restrictive alternative can cause a law to fail strict scrutiny only if it would be "at

least as effective" in vindicating the government's interest as the challenged law. *Reno v. ACLU*, 521 U.S. 844, 874 (1997). As each of the courts that have recently upheld the TCPA under strict scrutiny has concluded, the kinds of alternatives Charter propose, such as limits on the hours in which companies may intrude on the privacy of telephone users, or no-call lists for which consumers must affirmatively sign up, would fail to achieve the government's compelling interest as effectively as the TCPA because—as is evident merely from a description of the alternatives—they would continue expose consumers to large numbers of intrusive, unwanted calls. *See Greenley*, 2017 WL 4180159, at *14; *Mejia*, 2017 WL 3278926, at *17; *Holt*, 240 F. Supp. 3d at 1034; *Brickman* 230 F. Supp. 3d at 1048–49.

For instance, Charter suggests that a less restrictive alternative would be to allow for a good faith exception to the TCPA, for companies who call wrong numbers. Charter admits that over 35 million of such calls occur every year. In fact, both the FCC and the D.C. Circuit Appeal recently rejected Charter's argument, and reinforced that such a restriction would impair the privacy rights of consumers. The FCC recently found that the *number one complaint* from consumers regarding robocalls was being robodialed by a debt collector to collect from a different person.

*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 199*1, 30 FCC Rcd. 7961, 8001-04 (2015).[19] As the FCC observed:

> [A]n "intended called party" standard does nothing to protect the new subscriber to a reassigned number…Our conclusion protects consumers from often voluminous, sometimes harassing calls… By clarifying that the caller's intent does not bear on liability, we make clear that such calls are exactly the types that the TCPA is designed to stop. We agree with commenters who argue that Petitioners' position, on the other hand, would turn the TCPA's consumer protection on its head."
> …
> We emphasize that the TCPA does not prohibit calls to reassigned wireless numbers, or any wrong number call for that matter. Rather, it prescribes the method by which callers must protect consumers if they choose to make calls using an autodialer, a prerecorded voice, or an artificial voice. In other words, nothing in the TCPA prevents callers from manually dialing.

Id.; see also *ACA International v. Federal Communications Commission*, 885 F.3d 687, 706 (D.C. Cir. 2018) (upholding FCC's interpretation of "called party"). Charter is merely making the same argument from a different angle, an argument which has already been rejected as a matter of policy by the FCC, and rejected as a matter of law by the D.C. Circuit. The Ninth Circuit should reject it again.

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[19] Citing *Ex Parte* Letter from Margot Saunders, Counsel to National Consumer Law Center, to Marlene Dortch, Secretary, FCC in CG Docket No. 02-278, at 9 (filed June 6, 2014) ("[t]he Consumer Financial Protection Bureau's Annual Report for 2013 shows that 33% of debt collection complaints involved continued attempts to collect debts not owed, which include complaints that the debt does not belong to the person called" (citation omitted)). Another CFPB report suggests that in about two-thirds of these complaints the consumer says they did not owe the debt. Consumer Financial Protection Bureau's Fair Debt Collection Practices Act, Annual Report for 2014, at 12, *available at* http:// files.consumerfinance.gov/f/ 201403_cfpb_fair-debt-collection-practices-act.pdf.

Other less restrictive alternatives proposed by Charter fare no better. Time-of-day limitations would be completely ineffective because the obvious and logical result of such restrictions would be that intrusive and obnoxious calls would simply be bunched up to occur at certain times of the day, which is no less intrusive. Imagine having to take one's phone off the hook for a period of four hours every day while one was inundated with robocalls, because the practical effect of permitting robocalls during certain times of the day would be that autodialers would all be programmed by the hundreds of thousands of companies who use them to blast every number at once during those "legal" time periods. A huge chunk of the day would be reduced to complete unproductivity, interrupting the work of the nation, which relied on smart phone technology to conduct business.[20] Mandatory disclosure of caller identity and disconnection requirements would have no privacy benefit whatsoever. Once the call has been placed, picked up, and a conversation has occurred, a consumer's privacy has already been invaded. Telling that annopyed

[20] Examples of the problems this could cause are easy to come by. Imagine being a lawyer and not being able to speak to a client urgently about a time-sensitive matter before a pending deadline because your phone is being occupied by robodialers. Imagine being a doctor and not being able to call a family member who has power of attorney to make a decision for a critically ill patient during a time when robodialing had been authorized during that part of the day. Imagine being a first responder on the scene of a terrorist attack who couldn't get through to dispatch because your phone is being robodialed. If robodialing was made legal during certain times of the day, you can bet that robodialers are going to call like crazy during those times, resulting in nobody being able to accomplish anything. It is patently obvious why this is a terrible alternative being proposed by Charter.

consumer who you are cannot undo the intrusion. It's equivalent to allowing a trespasser to break into a person's house and leave a copy of their driver's license, and a note saying "if you don't want me to do it again, just let me know." Do not call lists would also not plausibly constitute a less restrictive alternative because they place the burden on consumers to opt out of receiving calls, rather than requiring them to opt in (provide consent) if they are willing to receive such calls. The FCC in its 2015 Order, and the D.C. Circuit's *ACA* ruling already rejected this argument as well. Ultimately, none of these alternatives are as effective as the currently-enacted TCPA. They don't even come close, and are obviously flawed. Charter's arguments accordingly fail.

VI. The Government-Debt-Collection Exception Is Severable

Charter's case would fail even if the government-debt-collection exception were an invalid content-based provision because the remedy would not be invalidation of the TCPA's broad, content-neutral prohibition on unconsented-to calls, but severance of the narrow exception—which would not assist Charter in avoiding liability in this case. As the Supreme Court has instructed, "invalid portions of a statute are to be severed unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *INS v. Chadha*, 462 U.S. 919, 931–32 (1983). Because the TCPA was in fact originally enacted without the government-debt-collection exception, and there is no

suggestion that the Congress that added the exception years later would have chosen to repeal the entire statute if it could not create the exception, it is apparent that the exception should be severed if it would otherwise impair the statute's constitutionality. Thus, "even assuming this newly-added exception were to be invalid, it would not deem the entire TCPA to be unconstitutional because the exception would be severable from the remainder of the statute." *Brickman*, 230 F. Supp. 3d at 1047; *see also Holt*, 240 F. Supp. 3d at 1033 n.4; *Woods v. Santander Consumer USA Inc.*, 2017 WL 1178003, at *3 n.6 (N.D. Ala. Mar. 30, 2017).

In sum, Charter's First Amendment challenge is not only meritless, but would be unavailing to Charter even if it had some theoretical basis. Although such challenges to the TCPA have become newly fashionable in light of the 2015 amendment of the statute, there is sound reason why the United States Department of Justice has persistently defended the statute, and why courts have repeatedly upheld it. This Court should do the same.

CONCLUSION

Any way you slice it, the TCPA is constitutional, and does not infringe on Charter's First Amendment rights. The notion that a restriction which prohibits harassing people, and which permits all forms of speech except those which are of the highest level of obnoxiousness could be in violation of the First Amendment is nonsensical. Charter did exactly what Congress prohibited, and there are no

reasonable, less-restrictive means that would have preserved Mr. Gallion's, or the other putative class members', rights to privacy. Telemarketers need to be held accountable for constantly annoying the American People. Irrespective of the minor revisions enacted in the 2015 Amendment to the TCPA, the statute accomplishes this goal in a fair, targeted, effective and reasonable manner. Striking the entire TCPA, as Charter proposes, would lead to telemarketing pandemonium and is clearly not the answer. Accordingly, for reasons set forth herein, this Court should affirm the District Court's order and uphold the TCPA's constitutionality..

Dated: October 30th, 2018

Respectfully Submitted,

BY: /s/ Todd M. Friedman
TODD M. FRIEDMAN
ADRIAN R. BACON
ATTORNEYS FOR
GALLION

CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached Opening Brief for the Appellee Steve Gallion complies with the type-volume limitation of Fed. R. App. P. 32(a)(5) and (6) as it is proportionately spaced, has a typeface of 14 points, and contains 12,804 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: October 30th, 2018

Respectfully Submitted,

BY: /s/ Todd M. Friedman
TODD M. FRIEDMAN
ADRIAN R. BACON
ATTORNEYS FOR
GALLION

CERTIFICATE OF SERVICE

I, Todd M. Friedman, certify that on October 30th, 2018, the Opposition to Charter's Petition Requesting Permission to Appeal, was e-filed through the CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF system sends an email notification of the filing to the parties and counsel of record listed above who are registered with the Court's EMC/ECF system. A copy of the e-filed documents were sent, via the EMC/ECF system:

Matthew A. Brill
Andrew D. Prins
Nicholas L. Schlossman
LATHAM & WATKINS LLP
555 Eleventh Street, Suite 1000
Washington, DC 20004
Telephone: (202) 637-2200

Helen B. Kim
THOMPSON COBURN LLP
2029 Century Park East, 19th Floor
Los Angeles, CA 90067
Telephone: (310) 282-2500

Counsel for Petitioners Charter Communications, Inc. and Spectrum Management Holding Company, LLC

LAW OFFICES OF TODD M. FRIEDMAN

BY: /s/ Todd M. Friedman
Todd M. Friedman, Esq.
21550 Oxnard St., Ste 780
Woodland Hills, CA 91367
Phone: (877) 206-4741
Fax: (866) 633-0228
Email: tfriedman@toddflaw.com