No. 18-55667

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVE GALLION,

Plaintiff-Appellee,

UNITED STATES,

Intervenor-Appellee,

v.

CHARTER COMMUNICATIONS, INC., et al.,

Defendants-Appellants.

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

BRIEF FOR INTERVENOR-APPELLEE

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INTRODUCTION

The Telephone Consumer Protection Act of 1991 (TCPA) generally precludes the use of autodialers and artificial or prerecorded voices in making calls to cell phones without the recipient's prior consent. Plaintiff Steve Gallion alleges that he received an automated call from defendant Charter Communications (hereinafter Spectrum) in violation of these requirements, and he brought suit on behalf of himself and other individuals who received similar calls. Spectrum moved for judgment on the pleadings, alleging that these restrictions on automated calls violate the First Amendment. The United States intervened in these proceedings for the limited purpose of defending the constitutionality of the federal statute. The district court denied Spectrum's motion but certified its order for interlocutory review pursuant to 28 U.S.C. § 1292(b). This Court granted permission to pursue an appeal.

Spectrum renews its constitutional challenge on appeal, contending that the TCPA provision at issue is a content-based restriction on speech that fails to withstand strict scrutiny. Spectrum principally argues that a 2015 amendment to the restriction allowing the use of autodialers and artificial or prerecorded voices in connection with calls to collect government-backed debts—calls the government has always been allowed to make itself through the same means—rendered the statute content-based and subject to strict scrutiny, and that the provision does not withstand review under that standard. Contrary to Spectrum's contention, the government-debt exception is a content-neutral provision that turns largely on the relationship between

the government and the person being called. Spectrum's other arguments that the restriction is content- or speaker-based likewise lack merit.

As a content-neutral provision, the restriction on the use of autodialers and artificial or prerecorded voices is subject to intermediate scrutiny, and it readily withstands review under that standard. The restriction would also withstand strict scrutiny were that the appropriate standard of review. If the Court were to conclude otherwise, it should hold that the government-debt exception is severable from the remainder of the statute, which was in effect for roughly twenty-three years before the exception was enacted. For all of these reasons, the district court's decision should be affirmed.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1332(d)(2). ER 222. On February 26, 2018, the district court denied Spectrum's motion for judgment on the pleadings and certified that order for interlocutory review pursuant to 28 U.S.C. § 1292(b). ER 12-13. Spectrum timely filed a petition for interlocutory review in this Court on March 8, 2018, ER 18; *see* 28 U.S.C. § 1292(b), and this Court granted the petition on May 22, 2018, ER 17. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUE

Whether the TCPA's restriction on the use of autodialers and artificial or prerecorded voices in making calls to cell phones absent a consumer's prior consent, 47 U.S.C. § 227(b)(1)(A)(iii), is consistent with the First Amendment.

PERTINENT STATUTE

Pertinent portions of the TCPA are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

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

"autodialer restriction" is used as a shorthand to refer to the TCPA's limitations on the use of both autodialers and artificial or prerecorded voices.

Congress amended the statute in 2015 to provide that the autodialer restriction does not apply to calls "made solely to collect a debt owed to or guaranteed by the United States." Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a)(1)(A), 129 Stat. 584, 588. The statute also authorizes the Federal Communications Commission (FCC) to exempt additional categories of calls from the autodialer restriction in certain circumstances, to the extent consistent with the privacy interests the TCPA is meant to protect. 47 U.S.C. § 227(b)(2). Any party wishing to challenge the substance of an FCC order issued pursuant to that authority must file a petition for review in the court of appeals, which has exclusive jurisdiction over challenges to FCC rules and orders. 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a).

B. Factual and Procedural Background

Plaintiff Steve Gallion alleges that Spectrum used an autodialer and an artificial or prerecorded voice in calling his cell phone without his consent. ER 223. The call allegedly sought to inform plaintiff of "custom pricing promotions" for Spectrum services. *Id.* Plaintiff alleges that he is not a Spectrum customer and has never provided Spectrum with his cell phone number or any other information that could be construed as consent to receive such calls. ER 224.

Plaintiff filed suit in July 2017 on behalf of himself and a putative class of all persons who received such calls from Spectrum without having provided consent.

ER 224. Spectrum moved for judgment on the pleadings, arguing that the autodialer rule is unconstitutional on its face because it is a content-based restriction on speech and does not withstand strict scrutiny. The United States intervened to defend the constitutionality of the federal statute.

The district court denied Spectrum's motion and certified the issue for interlocutory review. ER 12-13. At the outset, the district court noted that, "[p]rior to the 2015 amendment and [*Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015)], the Ninth Circuit twice considered and upheld the constitutionality of the TCPA as a valid, content-neutral speech regulation under intermediate scrutiny." ER 4 (citing *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876 (9th Cir. 2014), *aff'd on other grounds*, 136 S. Ct. 663 (2016); *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995)). Although no appellate court has considered the constitutionality of the TCPA since its amendment, every district court to address the question has held that the provision remains consistent with the First Amendment. *Id.* The court found these decisions persuasive. *Id.*

The district court first held that the autodialer restriction is content-based and thus subject to strict scrutiny because, in the court's view, the exception for calls to collect government-backed debts depends on the communicative content of the call. The court acknowledged that the exception is in one sense "relationship based—it arises from a creditor-debtor relationship between the government and the recipient of the communication." ER 8. But "the debt collector initiating a telephone call often may be a third party that has no preexisting relationship with the debtor." *Id.*

Because "a private debt collection agency may call a debtor to collect a private, government-guaranteed loan but not a similar private loan," the court found a content-based component to the inquiry. *Id.* (emphasis omitted).

Applying strict scrutiny, the district court held that the autodialer restriction is narrowly tailored to further "a compelling government interest in protecting residential privacy from the nuisance of unsolicited, automated telephone calls." ER 9. The court rejected Spectrum's argument that the restriction is underinclusive, noting that the government-debt provision "is a narrow exception from liability" and "is inherently limited by the fact that such calls would only be made to those who owe a debt to the federal government." ER 11 (quotation marks omitted). Accordingly, the "government-debt exception does not do appreciable damage to the privacy interests underlying the TCPA." *Id.* (quotation marks omitted). The court also rejected Spectrum's suggestion that less restrictive alternatives, including time-of-day limitations, mandatory disclosures of a caller's identity, and do-not-call lists, would be equally effective in achieving the government's interests. ER 12.

For these reasons, the district court denied Spectrum's motion for judgment on the pleadings, but it granted Spectrum's motion to certify the order for interlocutory review pursuant to 28 U.S.C. § 1292(b). ER 13.

SUMMARY OF ARGUMENT

A.1. This Court has twice upheld the autodialer restriction, as originally enacted, against First Amendment challenge. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876 (9th Cir. 2014), *aff'd*, 136 S. Ct. 663 (2016); *Moser v. FCC*, 46 F.3d 970, 972 (9th Cir. 1995). There is no merit to Spectrum's contention that a 2015 amendment allowing the use of autodialers and artificial or prerecorded voices in making calls to collect government-backed debts transformed that valid time, place, or manner provision into a content-based restriction subject to strict scrutiny. The autodialer restriction has never applied to the government, and the amendment simply allows entities collecting debts on the government's behalf to use the same means that would be available to the government if it were making the calls itself. The exception is thus premised principally on the relationship between the government and the person being called, rather than the content of the call. That provision is at least as clearly content-neutral as the state autodialer statutes upheld in *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 304 (7th Cir.), *cert. denied*, 137 S. Ct. 2321 (2017), and *Van Bergen v. Minnesota*, 59 F.3d 1541, 1550 (8th Cir. 1995), in which the courts found a variety of exceptions not to be content-based because they "depend on the relation between the caller and the recipient, not on what the caller proposes to say," "and therefore do not establish content discrimination." *Patriotic Veterans*, 845 F.3d at 305.

While Spectrum purports to accept the validity of *Gomez* and *Moser*, which found the autodialer restriction content-neutral, it takes issue with aspects of the

statute already in effect at the time those decisions issued. Spectrum urges that the restriction is subject to strict scrutiny because it does not apply to the government. But this Court has previously evaluated the statute under intermediate scrutiny notwithstanding that limitation, and none of the authorities Spectrum cites support its contention that the statute's treatment of the government renders it speaker-based. There is likewise no merit to the contention that exemptions to the autodialer restriction enacted by the FCC—or the mere fact of the Commission's authority to enact such exemptions—somehow render the statute content-based. This Court rejected a version of that argument in *Moser*, 46 F.3d at 973.

2. Like other content-neutral restrictions on the time, place, or manner of speech, the autodialer restriction is subject to intermediate scrutiny, meaning that it must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternative channels for communication. *Moser*, 46 F.3d at 973. The restriction readily satisfies that standard. The government has a well-established interest in protecting residential and personal privacy. *See Carey v. Brown*, 447 U.S. 455, 471 (1980). And that interest is plainly furthered by the general restriction on the use of autodialers and artificial and prerecorded voices, which have been found to increase significantly the volume and nuisance of unwanted calls. *Moser*, 46 F.3d at 974-75. The highly circumscribed exception for calls to collect government-backed debts—calls the government is in any event free to make itself—does not do appreciable harm to the privacy interests furthered by the general restriction.

B. Strict scrutiny does not apply in these circumstances, but that standard would in any event be satisfied here. The residential and personal privacy interests served by the autodialer restriction are compelling. The Supreme Court has repeatedly recognized that the interest in "protecting the well-being, tranquility, and privacy of the home is certainly of the highest order." *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (quoting *Carey*, 447 U.S. at 471).

The provision is narrowly tailored because it aims squarely at the use of those technologies most likely to threaten the privacy interests Congress sought to protect. The only aspect of the statute that has changed since it was upheld by this Court in *Gomez* and *Moser* is the addition of the government-debt exception. That single, narrow exception—which additionally promotes the government's interest in safeguarding the public fisc—does not do appreciable harm to the privacy interests served by the restriction, much less allow the "unlimited proliferation" of automated calls. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015). Any further exemptions enacted by the FCC do not bear on this analysis, which concerns the constitutionality of the statute itself and not the validity of agency action. There is likewise no merit to Spectrum's contention that other measures would be equally effective in addressing the problem presented by automated calls. As Congress concluded, the suggested alternatives would still allow the overwhelming volume of unwanted calls and attendant invasion of privacy that the autodialer restriction is meant to prevent.

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

STANDARD OF REVIEW

On interlocutory appeal, this Court reviews de novo the district court's denial of a motion for judgment on the pleadings. *Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1063 (9th Cir. 2005), *aff'd*, 550 U.S. 45 (2007).

ARGUMENT

The TCPA's Restriction on the Use of Autodialers and Artificial or Prerecorded Voices Is Fully Consistent with the First Amendment.

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

1. The government-debt exception is content-neutral.

When Congress enacted the TCPA in 1991, it found that the volume of unwanted calls had increased substantially with the advent of low-cost, automated devices that were able to dial as many as one thousand phone numbers per hour and deliver a prerecorded message to the person being called. S. Rep. No. 102-178, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970. Even with the technologies

available at that time, tens of thousands of solicitors were collectively calling millions of people each day. *Id.* In addition to its concern about the volume of automated calls, "Congress determined that such calls were more of a nuisance and a greater invasion of privacy than calls placed by live persons." *Moser v. FCC*, 46 F.3d 970, 972 (9th Cir. 1995) (quotation marks omitted).

As relevant here, Congress addressed these privacy concerns in 1991 by making it unlawful "to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice" to any cell phone. *See* 47 U.S.C. § 227(b)(1)(A)(iii). This Court has twice held that this provision, as originally enacted, is properly analyzed as a content-neutral time, place, or manner restriction subject to intermediate scrutiny, and it has upheld the restriction under that standard. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876 (9th Cir. 2014); *Moser*, 46 F.3d at 973.

Spectrum argues that Congress rendered the autodialer restriction unconstitutional in 2015 when it amended the statute to permit the use of autodialers and artificial or prerecorded voices in connection with calls made to collect a debt owed to or guaranteed by the United States. 47 U.S.C. § 227(b)(1)(A)(iii). Spectrum argues that the government-debt exception is content-based, and that the statute is therefore subject to strict scrutiny.

Congress's enactment of the government-debt exception did not transform the autodialer restriction into a content-based provision. The narrow exception is

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

The government-debt amendment similarly provides an exception to the autodialer restriction based on the called party's preexisting relationship with the federal government. The government has never been subject to the TCPA's restrictions. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016) (recognizing that the "United States and its agencies . . . are not subject to the TCPA's prohibitions"). The amendment simply provides that persons making debt-collection calls on the government's behalf may use the same means that would be available to the government if it were making the calls itself. The exception is limited to calls that are germane to that government relationship.

Spectrum urges that the restriction is content-based because it distinguishes between calls to collect government-backed debts and those to collect debts not backed by the federal government. As Spectrum notes, a private bank may make two identical calls to the same consumer, one to collect a government-backed debt, and one to collect a debt not backed by the government, and the TCPA will treat the two calls differently. Br. 15-16. Spectrum's observation only underscores that the exception principally turns not on what the caller says but on the fact that the call is being made to a person who has a specified relationship with the federal government.

The district court acknowledged that the exception is in this sense "relationship based—it arises from a creditor-debtor relationship between the government and the recipient of the communication." ER 8. The court found it significant, however, that the relevant "relationship is between the debtor and the government, whereas the debt collector initiating a telephone call often may be a third party that has no preexisting relationship with the debtor." *Id.* Whether or not the government itself is making the call, the applicability of the statutory exception turns on the same preexisting relationship with the government.

Spectrum further urges that the exception is not only content-based but is also viewpoint-discriminatory because it applies only to calls to collect a government-backed debt and does not extend to other types of calls concerning such debts. Br. 16 n.5. This argument again misperceives the nature of the exception, which is premised on the preexisting relationship between the government, as creditor, and a debtor

with a loan that is past due. Congress reasonably authorized the use of autodialers and artificial or prerecorded voices only with respect to calls that directly concern that preexisting relationship and the collection of the past-due loan. That the exception is narrowly tailored highlights the absence of any First Amendment concern.

The exception at issue here is no more based on content or viewpoint than the exceptions to the state autodialer statutes that were held not to be content-based in *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 304 (7th Cir. 2017), and *Van Bergen v. Minnesota*, 59 F.3d 1541, 1550 (8th Cir. 1995). In those cases, the state laws at issue excepted from a general autodialer restriction messages (1) from school districts to students, parents, or employees; (2) to subscribers with whom the caller has a current business or personal relationship; or (3) to employees in order to advise of work schedules. The courts explained that these exceptions "depend on the relation between the caller and the recipient, not on what the caller proposes to say," "and therefore do not establish content discrimination." *Patriotic Veterans*, 845 F.3d at 305; *Van Bergen*, 59 F.3d at 1550 (same). The same is true here, where the exception is premised on the government's relationship with a debtor and allows calls germane to that relationship.

These decisions are consistent with *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), in which the Supreme Court found content-based a very different type of provision. The sign ordinance in *Reed* exempted twenty-three categories of signs from a general permit requirement and subjected them to different rules based "*entirely* on

the communicative content of the sign." *Id.* at 2227 (emphasis added). The Court held the ordinance subject to strict scrutiny on that basis. *Id.* Three of the Justices in the *Reed* majority joined a separate concurrence underscoring that the Court's opinion should not be understood to make content-based every law that requires for its enforcement consideration of a speaker's message. *Id.* at 2233 (Alito, J., concurring). To illustrate the limitations of the Court's holding, the concurrence noted, among other examples, that rules that distinguish between on- and off-premises signs—a distinction based on the relationship between a sign and its location—are not content-based even though knowledge of a sign's message may be necessary to determine how such rules apply. *Id.* There is thus no merit to Spectrum's assertion that the fact that an official might need "to examine the content of the message in order to determine if a violation has occurred" necessarily renders a provision content-based. Br. 16-17 (alteration omitted).

Since *Reed*, the courts of appeals have continued to hold that the fact that an official may need to consider the substance of a message to determine whether or how a law applies does not resolve the inquiry. Where, as here, the operation of a law does not turn solely on what is said, courts have declined to find the provision content-based. For example, in upholding under intermediate scrutiny a sign ordinance that required that event-related signs be removed within thirty days after the event to prevent them from accumulating as visual clutter, the D.C. Circuit explained that "[t]he fact that District officials may look at what a poster says to

determine whether it is 'event-related,'" and "might read a date and place on a sign to determine that it relates to a bygone" event, "does not render the District's lamppost rule content-based." *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 846 F.3d 391, 403-04 (D.C. Cir.), *cert. denied*, 138 S. Ct. 334 (2017); *see Recycle for Change v. City of Oakland*, 856 F.3d 666, 671 (9th Cir.), *cert. denied*, 138 S. Ct. 557 (2017) (reiterating that "an officer's inspection of a speaker's message is not dispositive on the question of content neutrality"). Similarly here, the need to refer to the substance of a call to confirm that it concerns the collection of a debt does not serve to make content-based an exception that is principally premised on the government's relationship with the debtor.

2. Spectrum's other arguments for applying strict scrutiny similarly lack merit.

a. There is likewise no merit to Spectrum's argument that the statute is speaker-based and therefore subject to strict scrutiny because it does not apply to the government. The autodialer restriction has never applied to government speech, and this Court has twice upheld it under intermediate scrutiny notwithstanding that limitation. *Gomez*, 768 F.3d at 876; *Moser*, 46 F.3d at 975. It is commonplace for laws to distinguish between the government and private actors. For example, in the context of restrictions that implicate speech, the government may display "directional and official" signs along designated federal highways notwithstanding that other speakers are generally precluded from displaying signs. 23 U.S.C. § 131(c)(1). And

the government is not subject to the requirements of the Fair Debt Collection Practices Act, which governs conduct and communications undertaken in collecting consumer debts. 15 U.S.C. §§ 1692a(6)(C), 1692b-1692g.

Such distinctions are also common in other areas of the law: The government is not subject to antitrust constraints, *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 744-45 (2004); it receives first priority in bankruptcy proceedings, 31 U.S.C. § 3713; and it is subject to different rules than other litigants in federal court, *see, e.g.*, Fed. R. App. P. 4(a)(1)(B). Where laws governing private conduct do apply to the federal government, moreover, they require an express waiver of sovereign immunity. *See United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued."); *see, e.g.*, 28 U.S.C. § 1346(b)(1) (Federal Tort Claims Act). And even then such laws often provide separate rules to accommodate the unique demands of government functions. *See, e.g.*, 28 U.S.C. § 2680(a) (discretionary-function exception).

This difference in treatment has never been thought to raise First Amendment concerns. To the contrary, it is well established that the First Amendment "does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009). "A government entity has the right to speak for itself. It is entitled to say what it wishes, and to select the views that it wants to express." *Id.* (alterations, citations, and quotation marks omitted). "[T]he First Amendment does not say that Congress and other government entities must abridge their own ability to speak

freely." *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017). "[W]hen the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015). Accordingly, the Supreme Court has declined to hold that the government violates the First Amendment when it chooses to operate a program to advance permissible goals. *Id.* at 2245-46.

The cases on which Spectrum relies (Br. 19-20) do not support its contention that speech restrictions that treat the government or its agents differently from private actors are subject to strict scrutiny. Spectrum cites *Reed* and *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1264-65 (11th Cir. 2005), both of which involved sign ordinances that drew a large number of distinctions among types of private speech and provided for different treatment based entirely on the content of the sign. In neither case did the court's conclusion that the law was content-based turn on whether the ordinance treated the government differently from other speakers. Similarly, in *Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir. 1998), this Court concluded that "the exemptions for 'open house' real estate signs and safety, traffic, and public informational signs [we]re content-based" and did not premise its holding on the law's applicability to the government. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514 (1981) (plurality op.), is to the same effect, as the prohibition on outdoor advertising displays at issue in that case exempted certain commercial

advertisements and signs falling into one of twelve excepted categories—including "for sale" signs and those displaying the time, temperature, or news—and the plurality's analysis turned on those differences in treatment. The Eleventh Circuit's opinion in *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1569, 1572 (11th Cir. 1993), likewise provides no support for Spectrum's position because the ordinance at issue did not distinguish between governmental and private speakers, but rather distinguished among types of private speech.

While the treatment of government speakers was relevant to the analysis in *Italian Colors Restaurant v. Becerra*, 878 F.3d 1165, 1177-78 (9th Cir. 2018), the opinion by no means suggests that such distinctions render a law content-based or otherwise subject to strict scrutiny. That case concerned a state law that generally prohibited merchants from imposing a surcharge for purchases made using a credit card, yet allowed them to provide a discount for purchases made with cash. The rule did not apply to charges imposed by an electrical, gas, or water corporation and approved by the Public Utilities Commission, and it broadly exempted the State and its municipalities from the requirement. *Id.* Applying intermediate scrutiny, the Court held that the law was not adequately tailored to serve its stated purpose of preventing consumer deception because the State had "offer[ed] no explanation why these exempt surcharges are any less harmful or deceptive than the surcharges plaintiffs seek to impose." *Id.* at 1178. That conclusion provides no support for Spectrum's

contention that a "content preference for government speakers . . . independently triggers strict scrutiny." Br. 19.

The other cases Spectrum cites are likewise unavailing. In *Beckerman v. City of Tupelo*, 664 F.2d 502, 513 (5th Cir. 1981), the Fifth Circuit held that the City's different treatment of the government and student groups compared to other marchers raised Equal Protection concerns—an issue not raised in this case. *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160 (6th Cir. 1993), and *Women Strike for Peace v. Morton*, 472 F.2d 1273 (D.C. Cir. 1972) (per curiam), are likewise Equal Protection cases, and both involved permitting schemes, raising different questions than those presented here. The Sixth Circuit in *Congregation Lubavitch* in any event held that the permitting scheme at issue was content-neutral on its face notwithstanding its differential treatment of government speakers. 997 F.2d at 1166. The court nevertheless held the provision invalid because the "statements and testimony of several city council members" showed that "in reality the ordinance [wa]s aimed at the message or content of particular symbolic speech." *Id.* No such issue is presented here.

b. Spectrum additionally contends that the autodialer restriction is content-based because Congress authorized the FCC to promulgate exemptions consistent with the privacy interests furthered by the Act. 47 U.S.C. § 227(b)(2). According to Spectrum, the exemptions promulgated by the FCC are content-based, and those

regulatory exemptions somehow alter the constitutional character of the statute enacted by Congress. How that could be so is entirely unclear.

This case concerns the facial validity of a statute, and subsequently enacted regulatory provisions have no bearing on that inquiry. There is no dispute that the FCC orders themselves are not subject to challenge in district court. *See* 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a); *Moser*, 46 F.3d at 973; *see also United States v. Dunifer*, 219 F.3d 1004, 1007 (9th Cir. 2000) (noting that these "jurisdictional limitations apply as much as to affirmative defenses as to offensive claims"). And subsequently promulgated regulations cannot serve to render content-based or otherwise call into doubt the constitutionality of a validly enacted statute. Accordingly, there is no merit to Spectrum's contention that the orders "independently demonstrate that the call restrictions are content-based and trigger the application of strict scrutiny." Br. 22.

There is likewise no basis for Spectrum's suggestion that Congress's delegation of authority to the FCC to enact such exemptions somehow renders the statute content-based. Indeed, this Court has previously rejected the premise of that argument. The TCPA provides that the FCC may exempt from the autodialer restriction "calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect." 47 U.S.C. § 227(b)(2)(C). That provision "is permissive, not mandatory," and it "in no way requires the FCC to adopt [content-based] exemptions." *Moser*, 46

F.3d at 973. Because the delegation does not exempt any communications and does not require the FCC to do so, it does not render the statute content-based.

Spectrum nevertheless insists that the delegation is improper because it does not impose "objective limitations to ensure that [the FCC's] discretion is exercised in a content-neutral manner." Br. 21. But there is no rule that Congress, in delegating authority to an administrative agency, must delineate the steps the agency must take to ensure that rules enacted pursuant to that authority are constitutional. The requirement of constitutional rulemaking is implicit in the delegation. And failure to satisfy that requirement can be challenged in a petition for review of agency action. *See* 5 U.S.C. § 706(2). With respect to the statute, the Constitution requires only that Congress provide an intelligible principle limiting the scope of the delegation—a requirement that is easily met and is in any event not challenged in this case. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 474 (2001).

The authorities Spectrum cites deal not with congressional delegation of rulemaking authority but with the need for clear and objective criteria for administering licensing schemes that impose a prior restraint on speech. Br. 21-22 (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011 (9th Cir. 2009)). The autodialer restriction does not impose a prior restraint, nor does it prohibit any speech. It simply limits the use of certain technologies in making calls. The FCC's authority to enact limited exemptions—which it must do consistent with "the privacy rights the

[TCPA] is intended to protect," 47 U.S.C. § 227(b)(2)(C)—is not analogous to the administration of a licensing scheme.

3. The statute readily withstands intermediate scrutiny.

As a content-neutral restriction on the manner in which calls may be made, the autodialer restriction is subject to intermediate scrutiny. *Moser*, 46 F.3d at 973. A law satisfies that standard if it is "narrowly tailored to serve a significant governmental interest" and leaves open "ample alternative channels for communication." *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). To withstand review, the law "need not be the least restrictive or least intrusive means" of serving the government's interests. *Ward*, 491 U.S. at 798-99.

There is no doubt that the government's interest in protecting residential and personal privacy is substantial. *See Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988); *Carey v. Brown*, 447 U.S. 455, 471 (1980). And "Congress accurately identified automated" calls and messages "as a threat to privacy." *Moser*, 46 F.3d at 974. "No one can deny the legitimacy of the [government's] goal" of "[p]reventing the phone (at home or in one's pocket) from frequently ringing with unwanted calls." *Patriotic Veterans*, 845 F.3d at 305.

This Court has held that the autodialer restriction is narrowly tailored to further that interest. *Moser*, 46 F.3d at 975. The limited exception for calls to collect government-backed debt does not cast doubt on that conclusion. By its terms, the exception allows the use of autodialers and artificial or prerecorded voices only with

respect to a narrow category of calls to collect debts that the government could itself collect through the same means. That limited exception does not undermine the effectiveness of the broader restriction or call into question the strength of the government's interest in reducing the volume and nuisance of unwanted calls.

B. The autodialer restriction would also satisfy strict scrutiny.

Even if the provision at issue were subject to strict scrutiny, it would withstand review because it is "narrowly tailored to serve a compelling interest." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1665-66 (2015). This standard is exacting, but the Supreme Court has made clear that it is not "strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995); *see Williams-Yulee*, 135 S. Ct. at 1666 (upholding a judicial solicitation ban under that standard). Like the district court in this case, ER 12, every court to consider the question has correctly held that the autodialer restriction satisfies even this demanding standard of review. *See, e.g.*, *American Ass'n of Political Consultants v. Sessions*, 323 F. Supp. 3d 737 (E.D.N.C. 2018); *Greenley v. Laborers' Int'l Union of N. Am.*, 271 F. Supp. 3d 1128 (D. Minn. 2017); *Mejia v. Time Warner Cable, Inc.*, No. 15-6445, 2017 WL 3278926 (S.D.N.Y. Aug. 1, 2017); *Holt v. Facebook, Inc.*, 240 F. Supp. 3d 1021 (N.D. Cal. 2017); *Brickman v. Facebook, Inc.*, 230 F. Supp. 3d 1036 (N.D. Cal. 2017).

1. The privacy interests furthered by the statute are compelling.

At the first step of the inquiry, the protection of residential privacy is undoubtedly a compelling governmental interest. The Supreme Court has "repeatedly

held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom." *Frisby*, 487 U.S. at 484-85; *see Carey*, 447 U.S. at 471 ("[P]rotecting the well-being, tranquility, and privacy of the home is certainly of the highest order."). This privacy interest also pertains to other intimate spaces to which cell phone use extends. *See Patriotic Veterans*, 845 F.3d at 305 (recognizing the interest in "[p]reventing the phone (at home or in one's pocket) from frequently ringing with unwanted calls"); *Gomez*, 768 F.3d at 876 (rejecting the argument "that the government's interest in privacy ends at home"). "Congress accurately identified automated telemarketing calls as a threat to privacy," *Moser*, 46 F.3d at 974, and it enacted the TCPA to protect the public from that threat. TCPA § 2(5); S. Rep. No. 102-178, at 5.

Spectrum insists that these privacy interests are not "sufficiently compelling to justify a content-based speech restriction." Br. 26 (quotation marks omitted). But in support of that point it musters only a single, out-of-circuit opinion regarding the validity of a picketing ordinance in which the strength of the governmental interest was one of several bases for finding that the law did not withstand strict scrutiny. *Kirkeby v. Furness*, 92 F.3d 655, 659 (8th Cir. 1996). Spectrum also cites *Hoye v. City of Oakland*, 653 F.3d 835, 852 (9th Cir. 2011), but that case concerned speech in a public forum and did not implicate the residential and personal privacy interests presented by unwanted calls that intrude into the home and other intimate spaces.

Contrary to Spectrum's contention, the Supreme Court has "often remarked on the unique nature of the home, the last citadel of the tired, the weary, and the sick," and has recognized the paramount importance of "[p]reserving the sanctity" of that space. *Frisby*, 487 U.S. at 484 (alteration in original; quotation marks omitted). While Spectrum dismisses the interest in "being free of unwelcome speech," Br. 27, it is well established that an "important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different." *Frisby*, 487 U.S. at 484 (citations omitted); *see also National Fed'n of the Blind v. FTC*, 420 F.3d 331, 340 (4th Cir. 2005) ("Protecting the sanctity of the family environment is important enough to actually serve as the basis for a constitutional right in many different contexts.") (collecting cases).

The Supreme Court has further observed that "[t]here simply is no right to force speech into the home of an unwilling listener." *Frisby*, 487 U.S. at 485. Yet this is precisely what Spectrum seeks to do in using an autodialer to send a large volume of prerecorded calls to individuals without their consent. Spectrum also gets it wrong when it asserts that "[a] consumer can simply turn his or her phone on silent" to avoid the intrusion. Br. 29. Disabling the phone to avoid unwanted calls interferes with the ability to be notified of wanted calls and is therefore not an option for anyone who needs to be reachable by family, friends, or colleagues.

Spectrum also cites *Carey* to support its claim that these privacy interests are not compelling. But *Carey* affirmed the general importance of residential privacy, it simply concluded that the State's broad exemption of peaceful labor picketing from the general prohibition at issue demonstrated that "Illinois itself ha[d] determined that residential privacy [wa]s not a transcendent objective" in those circumstances. 447 U.S. at 465. Here, by contrast, Congress has determined that these privacy interests are paramount. Congress originally enacted the autodialer restriction without the government-debt exception, and the restriction remained in effect for roughly twenty-three years before the law was amended to add that narrow provision. That highly circumscribed exception in no way cast doubt on the compelling nature of the privacy interests furthered by the general restriction.

2. The autodialer restriction is narrowly tailored to further those interests.

Spectrum is on no firmer ground in urging that the law is not narrowly tailored to further the government's interest in protecting residential and personal privacy. At the outset, Spectrum mistakenly focuses its analysis on the government-debt exception, rather than the autodialer restriction as a whole. Br. 31 n.15. Spectrum is challenging the validity of the autodialer restriction, and the question is whether that provision is narrowly tailored to further the government's asserted interests.

The autodialer restriction is narrowly tailored because it "aims squarely at the conduct most likely to" cause the harms Congress seeks to prevent, *Williams-Yulee*,

135 S. Ct. at 1668, and it substantially reduces the use of those technologies that Congress found to present the greatest disruption to residential and personal privacy. "There was significant evidence before Congress of consumer concerns about telephone solicitation in general and about automated calls in particular." *Moser*, 46 F.3d at 974. And "Congress considered and rejected less restrictive forms of regulation" before enacting the restriction. *Id.* at 975. Contrary to Spectrum's suggestion, the autodialer restriction is not a sweeping proscription on an entire channel of speech, but rather a limitation on the way in which calls may be placed. The restriction does not prevent Spectrum from making any calls whatsoever. It only prevents the use of certain technologies in making calls without a recipient's prior consent, based on Congress's finding that the use of such technologies greatly increases the volume and nuisance of unwanted calls and the attendant intrusion into people's private lives. *See id.*

"[U]nlike some laws [the Supreme Court] ha[s] found impermissibly underinclusive," the autodialer restriction "is not riddled with exceptions." *Williams-Yulee*, 135 S. Ct. at 1669. The statute admits of two narrow exceptions—one for emergency calls (with which Spectrum does not take issue), and one for calls to collect government-backed debts. These limited exceptions do not undermine the general efficacy of the restriction. It is well established that speech restrictions need not sweep as broadly as possible in order to be found valid. The government may permissibly "focus on [its] most pressing concerns," and the Supreme Court has often

"upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests." *Id.* at 1668 (collecting cases). Congress may, consistent with the First Amendment, "regulate a portion of these calls without banning all of them." *Moser*, 46 F.3d at 974.

In cases in which courts have found a fatal lack of tailoring, the law has typically allowed a substantial amount of speech that presents the type of harm that the statute purportedly seeks to prevent. For example, the twenty-three exceptions to the sign ordinance in *Reed* allowed the "unlimited proliferation" of signs that presented the same threat to safety and aesthetics as the signs for which the ordinance required a permit. *Reed*, 135 S. Ct. at 2231. Similarly, the state autodialer rule in *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015), applied only with respect to "calls with a consumer or political message but d[id] not reach calls made for any other purpose," thus leaving a vast swath of calls unregulated. The TCPA does not admit of such broad exceptions.

As practical matter, the significance of the government-debt exception is further limited by the fact that in many instances consumers will have consented to receive automated debt-collection calls by providing their cell phone number when applying for the debt at issue. *See In re Rules & Regulations Implementing the TCPA*, 7 FCC Rcd. 8752, 8769 (1992). The TCPA would allow the use of autodialers in making such calls regardless of the government-debt exception. While the exception allows the use of an autodialer with respect to some number of calls to which

consumers may not have consented, that number is dwarfed by the millions of automated calls that the autodialer restriction prevents on a daily basis. *See* S. Rep. No. 102-178, at 2 (noting that, even with the technologies available in 1991, consumers were receiving millions of calls each day). The autodialer restriction thus performs an essential function in protecting consumers from the deluge of unwanted calls that would result in the rule's absence. And the government-debt exception provides the additional benefit of safeguarding the public fisc.[1]

Spectrum additionally contends that the fact that the autodialer restriction does not apply to the government renders it inadequately tailored. But the provision has never applied to the government, and this Court has twice upheld it against First Amendment challenge. *Gomez*, 768 F.3d at 876; *Moser*, 46 F.3d at 975. Spectrum fails to acknowledge these decisions in erroneously asserting that "[t]his Court has already concluded this year that such a wholesale exemption for all government speakers and messages renders a speech restriction fatally underinclusive." Br. 39 (citing *Italian Colors*, 878 F.3d at 1178). Although the differential treatment of government actors was one of the reasons the Court cited for invalidating the credit-card surcharge rule at issue in *Italian Colors*, 878 F.3d at 1177-78, the tailoring analysis demanded by the

[1] The government-debt exception "create[s] conditions that allow debts to be more readily collected by the United States." *In re Rules & Regulations Implementing the TCPA*, 31 FCC Rcd. 9074, 9075 (2016). Estimates relied on by Congress indicate that the exception will save the federal government $120 million over ten years. *See Fiscal Year 2016: Analytical Perspectives of the U.S. Government* 127 tbl. 11-3, 128, https://go.usa.gov/xUtw2.

First Amendment is necessarily specific to the provision at issue, and to the particular reasons the government has advanced for the restriction. The credit-card surcharge rule and its "broad swath of exceptions," *id.*, bear no resemblance to the restriction at issue here, and the tailoring analysis cannot be exported from one context to the other. Considering the autodialer restriction and the privacy interests at stake, the *Moser* Court upheld the provision, 46 F.3d at 975, even though it did not apply to the government. That holding governs the analysis here.

There is likewise no merit to Spectrum's contention that the autodialer restriction improperly prefers commercial over noncommercial speech. Br. 40-41 (citing *Metromedia*, 453 U.S. at 513 (plurality op.); *Berger v. City of Seattle*, 569 F.3d 1029, 1055 (9th Cir. 2009) (en banc). Calls made to ensure the payment of funds owed to the federal government are not commercial communications.[2] Like measures to collect overdue taxes or unpaid fines, debt-collection calls are intended to restore to the public what is properly owed. The fact that the government has authorized third

[2] Spectrum erroneously asserts that the government has previously taken the position that calls to collect government-backed debts are commercial speech. Br. 41 n.31. But the filing Spectrum cites was discussing speech that did not relate to a government-backed debt and was not made to restore funds to the public fisc. Specifically, the government argued that calls "contacting customers to seek payment for previously purchased services to ensure that those services were not unexpectedly disconnected" are commercial speech as they "are unquestionably related to [the private company's] products, to the economic interests of [the company], and to past and future transactions between the company and its customers." U.S. Mem. of Law in Supp. of the Constitutionality of the TCPA, at 11, *Mejia v. Time Warner Cable, Inc.*, No. 15-6445 (S.D.N.Y. Mar. 3, 2017), Dkt. No. 147.

parties to make such calls does not change their basic character. Spectrum also cites exemptions promulgated by the FCC as part of its argument that the statute favors commercial speech, Br. 41, but, for the reasons explained above (*supra* p.21), those subsequently enacted regulatory provisions do not bear on the facial validity of the statute enacted by Congress. Any concerns presented by the regulations should be raised in a petition for review brought in the court of appeals in the first instance. 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a).

Spectrum is on no firmer ground in cursorily arguing that the autodialer restriction sweeps too broadly. Br. 42-43. Its argument again relies largely on regulatory exemptions not at issue in this case. *See* Br. 42 (contending that the statute is overinclusive because, by regulation, "package delivery notifications are exempt from liability, but not notifications for grocery or dry cleaning deliveries"). And there is no merit to its suggestion that "Congress effectively admitted that the call restrictions were overinclusive when it delegated to the FCC the role of creating additional content-based exemptions." *Id.* As this Court has observed, that delegation "is permissive, not mandatory," and does not require the FCC to enact any exemptions. *Moser*, 46 F.3d at 973. By authorizing the Commission to exempt certain calls if doing so would comport with the privacy interests the restriction is meant to protect, Congress sought to provide further assurance that the law does not sweep more broadly than necessary to protect those interests. Spectrum's remaining arguments that the law is overbroad ignore its practical effect. As already mentioned,

the autodialer restriction does not prohibit any calls on any subject, it only restricts the means through which calls are made. Thus, private schools, grocery stores, and dry-cleaning businesses (Br. 42) remain free to contact families, students, and customers as needed by using non-automated means or obtaining their consent.

Finally, there is no merit to Spectrum's contention that Congress could have achieved equally effective results through less restrictive means, such as time-of-day limitations, mandatory disclosure of the caller's identity, or do-not-call lists. None of these alternatives would be equally effective at preventing the onslaught of unwanted calls, and the attendant invasion of personal privacy, that result from the use of autodialers and artificial or prerecorded voices. For example, time-of-day limitations do not comparably reduce the volume of calls that consumers experience but rather designate a particular part of the day during which consumers may be inundated. Likewise, mandatory disclosure of a caller's identity would not prevent the privacy intrusion that results from unwanted calls. And do-not-call lists are not similarly effective because they place the burden on consumers to opt-out of intrusive calls, rather than permitting interested consumers to opt-in by providing consent. The fact that users may have the ability to block calls from particular numbers is likewise no answer because it puts an untenable burden on consumers to block an unlimited and ever-changing collection of numbers from countless companies and organizations.

Congress "considered and rejected less restrictive forms of regulation," *Moser*, 46 F.3d at 975, concluding, based on extensive findings, that restricting the use of

autodialers "is the only effective means of protecting telephone consumers from th[e] nuisance and privacy invasion" caused by such calls. TCPA § 2(11)-(12). "When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985); *Moser*, 46 F.3d at 974. Notably, other provisions of federal law already impose many of the restrictions Spectrum suggests. *See, e.g.*, 16 C.F.R. § 310.4(b)(1)(iii) (do-not-call rules), (c) (time-of-day restrictions), (d) (required disclosures). Congress reasonably determined that a variety of protections working in tandem are necessary to safeguard consumers from the substantial intrusion into their personal privacy that would otherwise result.

C. If the government-debt exception rendered the autodialer restriction constitutionally infirm, the proper remedy would be to sever the exception and uphold the remainder of the statute.

If the Court were to hold that the exception for calls to collect government-backed debt is inconsistent with the First Amendment, the appropriate remedy would be to sever that provision from the remainder of the autodialer restriction. The Supreme Court has made clear that "invalid portions of a statute are to be severed unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *INS v. Chadha*, 462 U.S. 919, 931-32 (1983) (quotation marks and alteration omitted). "Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of

severability." *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). "[T]he invalid part may be dropped if what is left is fully operative as a law," *id.*, and would continue to "function in a manner consistent with the intent of Congress," *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (emphasis omitted).

Here, there is no question as to the constitutionality of the autodialer restriction in the absence of the newly enacted government-debt exception. *See Moser*, 46 F.3d at 975 (upholding the restriction against a First Amendment challenge). And the restriction was in effect for roughly twenty-three years before Congress amended the TCPA by adding the government-debt exception. In light of this history, there can be no doubt that if the government-debt exception were severed from the plainly valid remainder of the statute, the autodialer restriction would continue to function independently and in a manner consistent with the intent of Congress. Although the exception itself furthers important government interests, its invalidation would not undermine the privacy interests that the autodialer restriction is meant to protect, and the statute would "remain[] complete and capable of execution." *Gresham v. Swanson*, 866 F.3d 853, 855 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 682 (2018). Congress plainly would have intended the autodialer restriction to continue to stand in the absence of the limited exception at issue—as it did for well over two decades. Accordingly, if the Court were to conclude that the government-debt exception is constitutionally infirm, it should sever that provision from the remainder of the statute.

CONCLUSION

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

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the undersigned counsel identifies the following related cases pending in this Court, each of which raises the same or closely related issues concerning the constitutionality of the TCPA's autodialer restriction:

Brickman v. Facebook, Inc., No. 17-80080

Duguid v. Facebook, Inc., No. 17-15320

Holt v. Facebook, Inc., No. 17-80086

s/ Lindsey Powell
LINDSEY POWELL

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 9,022 words, according to the count of Microsoft Word. This brief also complies with the typeface and type-style requirements of Rules 32(a)(5) and (6) because it was prepared in Garamond 14-point font, a proportionally spaced typeface.

s/ Lindsey Powell
LINDSEY POWELL

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Lindsey Powell
LINDSEY POWELL

ADDENDUM

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47 U.S.C. § 227 (excerpt) A1

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

(a) Definitions

As used in this section—

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

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

(B) to dial such numbers.

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

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

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

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

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

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

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Regulations; exemptions and other provisions

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

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

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

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

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

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

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

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

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

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

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

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

(iv) the notice includes—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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