IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 23-3826

JACOB HOWARD, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

PLAINTIFF- APPELLANT,

V.

REPUBLICAN NATIONAL COMMITTEE., A POLITICAL ACTION COMMITTEE,

DEFENDANT - APPELLEE

APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF ARIZONA
DISTRICT COURT CASE NO.: 2:23-CV-00993-SPL
(HONORABLE STEVEN P. LOGAN)

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

This district court had federal question jurisdiction over Plaintiff's TCPA claim under 28 U.S.C. § 1331. This Court has jurisdiction over the district court's final order dismissing Plaintiff's Complaint with prejudice under 28 U.S.C. § 1291.

The district court entered its order dismissing Plaintiff's Complaint on November 6, 2023 and Howard timely filed a notice of appeal on November 28, 2023.

INTRODUCTION

In this matter of first impression, this Court can affirm the voice of the People and uphold the rule of law. The Telephone Consumer Protection Act ("TCPA") protects Americans' right to privacy. 47 U.S.C. § 227(b). The district court's opinion must be reversed, so that it continues to do so.

ISSUES PRESENTED

1. Did the district court err by granting RNC's motion to dismiss, when the complaint alleged everything to state claims under 47 U.S.C. § 227(b) and this Court's long line of decisions culminating in *Trim v. Reward Zone USA LLC*, 76 F.4th 1157 (9th Cir. 2023)?

2. Did the district court err by resolving fact issues and deciding that RNC's affirmative defenses barred Howard's claim at the motion to dismiss stage, thus exempting millions of organizations (ranging in size from one of the

largest political parties in the country to *a bank account*) from § 227(b)(1)(B), without requiring any of them to prove that they are "tax-exempt nonprofit organizations"?

3. Did the district court err by deferring to an FCC "interpretation" of the TCPA that does not exist and concluding that the major questions doctrine does not apply to RNC's affirmative defense, even though the TCPA protects the public from billions of unwanted telephone calls and text messages *every month*, billions of dollars in fraud losses every year, and helps preserve national security?

4. Did the district court err by refusing to consider Howard's argument that the First Amendment and *Barr v. Am. Assoc. of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), invalidate RNC's alleged exemption from the TCPA?

STATEMENT OF THE CASE

Factual Background

Plaintiff Jacob Howard alleged these facts in his class action Complaint against the Republican National Committee (the "RNC"). "RNC purports to be a Political Action Committee."[1] (ER at 2 ¶ 7.) RNC operates under many fictitious names including "Vote.GOP" and "earlyvote.us." (*Id.* ¶ 9.) Howard and class

[1] Nowhere in the complaint does Howard state that the RNC *actually is* a Political Action Committee. Because the Court must take Howard's allegations as true, the Court must accept that the RNC purports to be a PAC, not that the RNC is, indeed, a PAC.

members have no relationship with the RNC and never gave their telephone numbers to RNC. (*Id.* ¶ 11.) On October 24, 2020, RNC placed, or caused to be placed, an automated text message to Howard's cellular telephone number. (*Id.* at 5 ¶ 24.) The cellular telephone is Howard's only residential telephone. (*Id.* at 6 ¶ 29.) The text message included a video file that was automatically downloaded to Howard's phone and contained an artificial or prerecorded voice. (*Id.* at 5 ¶ 25.) At no point in time did Howard provide RNC with his express consent to be contacted by telephone using an artificial or prerecorded voice. (*Id.* ¶ 28.) RNC's unsolicited text caused Howard actual harm, including invasion of his privacy, aggravation, intrusion on seclusion, trespass, and conversion. (*Id.* ¶ 33.)

Howard sought relief for violations of two separate subsections of the Telephone Consumer Protection Act ("TCPA") – 47 U.S.C. § 227(b)(1)(A)(iii) and § 227(b)(1)(B). (*Id.* at 9-10.)

Procedural History

RNC filed a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). After the motion was briefed, the district court dismissed Howard's complaint with prejudice. (ER at 13-22.)[2] The court did not hold a hearing and it denied Howard leave to amend. Nor did it provide Howard an opportunity to explain how amending the complaint could have cured any defect in

[2] The district court's order can be found at 2023 WL 7301861.

the complaint – for example, by simply deleting the allegation that RNC "purports to be a Political Action Committee."

SUMMARY OF THE ARGUMENT

The district court interpreted the TCPA in a way that Congress could never have intended. The court held that RNC did not violate a pair of statutes that banned, in the words of the United States Supreme Court, "nearly all robocalls to cell phones" when RNC sent an MMS text message to Plaintiff's cell phone that placed a digital video, with audible sound, on the phone. Even though the TCPA bans all "calls," including text messages sent via MMS that include a "prerecorded or artificial voice," the district court dismissed Plaintiff's complaint. That simply cannot be. The district court abdicated its responsibility to decide this case.

Moreover, under the district court's opinion, anyone who merely writes the words "tax-exempt nonprofit organization" in a motion to dismiss has a complete defense to a claim under 47 U.S.C. § 227(b)(1)(B) that approaches absolute immunity.

The district court reached these erroneous conclusions through a combination of statutory interpretation mistakes, misapplication of the Federal Rules of Civil Procedure, and unwarranted deference to an agency that didn't actually provide RNC with an affirmative defense to the TCPA.

The Court should (1) vacate the district court's opinion and remand this case back to the district court and (2) order the district court to require RNC to immediately file an answer and participate in discovery.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's dismissal of Howard's complaint without leave to amend, giving no deference to the district court. *Nayab v. Capital One Bank (USA)*, 942 F.3d 480, 487 (9th Cir. 2019).

ARGUMENT

I. RNC Violated the TCPA by Making a Text Call Using a Prerecorded or Artificial Voice

The district court committed reversible error by failing to recognize well-established Ninth Circuit case law, failing to interpret the TCPA in favor of consumers, creating new elements to state a claim, and infusing the TCPA with judicial policy choices – all to support the erroneous and illogical conclusion that a video in which a person speaks audibly somehow does not use a "prerecorded voice." That is wrong as a matter of law, logic, and common sense. This Court must vacate the district court's opinion.

A. Motion to Dismiss Standard

A court should rarely dismiss a complaint for failure to state a claim. Motions to dismiss under Rule 12(b)(6) are generally disfavored and "doubts should be resolved in favor of the pleader." *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir.

1976) (citations omitted). "Granting [a] defendant's motion to dismiss is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Morgan v. City of Rawlins*, 792 F.2d 975, 978 (10th Cir. 1986) (citing Wright & Miller, Federal Practice and Procedure § 1357 (1969)). To accomplish those goals, "the Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim." *Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381, 386 (5th Cir. 1985). Thus, dismissal of a claim "on the basis of the barebone pleadings is a precarious one with a high mortality rate." *Barber v. Motor Vessel "Blue Cat"*, 372 F.2d 626, 627 (5th Cir. 1967).

The district court failed to heed these warnings and, as a result, authored an illogical, backward opinion, which this Court must now reverse.

B. Howard Stated a Claim for a Violation of § 227(b)(1)(A)(iii)

To state a claim for relief under § 227(b)(1)(A)(iii) a plaintiff need allege only *three facts*: "(1) the defendant called a cellular telephone number (2) using . . . an artificial or prerecorded voice (3) without the recipient's prior express consent." *Self-Forbes v. Advanced Call Ctr. Techs., LLC*, 754 Fed. App'x 520, 522 (9th Cir. 2018); *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012). Howard's Complaint alleged that (1) RNC made a text call via Multimedia Messaging Service ("MMS") to Howard's cellular phone; (2) using an artificial or

prerecorded voice (the prerecorded video, which included audio); (3) without his consent. (ER at 5 ¶¶ 24-25, 28.) Taken as true, as required, that should have been the end of the district court's analysis. Accordingly, it should have denied RNC's motion to dismiss Howard's claim under § 227(b)(1)(A)(iii) and the litigation in the matter should have continued. This Court could just as easily end its analysis here and reverse the district court's opinion based upon the foregoing. This, however, is not where the district court started, much less ended.

1. An MMS Text Message Is a "Call" Within the TCPA

Howard's allegation that "Defendant placed, or caused to be placed, an automated text message to Howard's cellular telephone number" satisfies the first element of the statute. Although "call" is not defined in the TCPA, the U.S. Supreme Court and this Circuit have long recognized that a text message is a "call" within the context of the TCPA. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 156 (2016); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009) ("[W]e hold that a text message is a 'call' within the meaning of the TCPA.").

Section 227(b)(1)(A)(iii) "prohibits in plain terms 'any call,' regardless of content, that is made to a cell phone using . . . an artificial or pre-recorded voice." *Loyhayem v. Fraser Fin. & Ins. Servs., Inc.,* 7 F.4th 1232, 1234 (9th Cir. 2021). "[T]he word 'any' has an expansive meaning . . . ." *United States v. Gonzales*, 520 U.S. 1, 5 (1997). Thus, a "call" includes the mere *attempt to contact* someone by

telephone, and "a voice message or a text message are not distinguishable in terms of being an invasion of privacy." *Satterfield*, 569 F.3d at 953-54 n.3 (holding that "call" means "'to communicate with or *try to* get into communication with a person by a telephone'" and that "Congress used the word 'call' to refer to an *attempt* to communicate by telephone" (emphasis added)); *accord L.A. Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 803 n.3 (9th Cir. 2017) (reaffirming *Satterfield*); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1041-42 (9th Cir. 2017) (reaffirming *Satterfield*). Courts throughout the country agree with *Satterfield*.[3] Accordingly, RNC's MMS message to Howard's cellular phone is a call under the TCPA, and the first element of the statute is satisfied.

2. RNC's Text Call to Howard Used an Artificial or Prerecorded Voice

As this Court has acknowledged, a "'text' call [can] come via MMS . . ., which could include audio sound with an artificial or prerecorded voice." *Trim*, 76 F.4th at 1163 n.4. Howard alleged in his complaint that RNC's text call via MMS "included a video file that was automatically downloaded to Howard's phone and contained an

[3] *Melito v. Experian Marketing Solutions, Inc.*, 923 F.3d 85, 88-89 (2nd Cir. 2019); *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 269 n.2 (3rd Cir. 2013); *Ashland Hosp. Corp. v. Service Employees Intern. Union, Dist.*, 708 F.3d 737, 742 (6th Cir. 2013); *Pinkard v. Wal-Mart Stores, Inc.*, 2012 WL 5511039, *3 (N.D.Ala. Nov. 9, 2012).

artificial or prerecorded voice." (ER at 5 ¶ 25.) Thus, on its face, the second statutory element was satisfied.

The district court, however, held otherwise. Despite acknowledging that "text messages are potentially actionable under the TCPA but must include an audible component," the court somehow concluded that a video – a text call to Howard's phone via MMS, in which Ivanka Trump can be heard speaking audibly – did not include an audible component. (ER at 19-20.) The district court's erroneous conclusion was a result of numerous missteps in its statutory interpretation, reading of controlling case law, and imposition of its own policy considerations.

a. Remedial Statutes Are Interpreted in Favor of Consumers

"[T]he TCPA is a remedial statute intended to protect consumers from unwanted automated telephone calls and messages, [and] it should be construed in accordance with that purpose." *Van Patten*, 847 F.3d at 1047. Similarly, remedial statutes should "'be interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers.'" *Westinghouse Elec. Corp. v. Pac. Gas & Elec. Co.*, 326 F.2d 575, 580 (9th Cir. 1964) (quoting *Scarborough v. Atl. Coast Line R.R. Co.*, 178 F.2d 253, 258 (4th Cir. 1949)). "[U]nless the statute so requires with crystal clarity, it should not be so applied as to negative broad principles well settled in our law by a long series of decisions." *Scarborough*, 178 F.2d at 258.

The Supreme Court has expressly rejected narrow constructions of remedial statutes that further judicial policy goals. For example, in *Sedima, S.P.T.L. v. Imrex Co., Inc.,* the Court held that the federal RICO statute must be broadly construed even if it seemed as if a narrow construction "was essential to avoid intolerable practical consequences." 473 U.S. 479, 490 (1985) (footnote omitted). The Court acknowledged there were concerns over "misuse of civil RICO by private plaintiffs" but nevertheless did not allow courts to disregard Congress's words. *Id.* at 481. Rather, the Court stated that "'[t]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. *It demonstrates breadth*.'" *Id.* at 499 (emphasis added) (quoting *Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (7th Cir. 1984)); *see also Odom v. Microsoft Corp.*, 486 F.3d 541, 547 (9th Cir. 2007) (noting that "'RICO is to be read broadly'" and "[a]s Congress admonished and as the Court repeated in *Sedima*, RICO should 'be liberally construed to effectuate its remedial purposes.'" (quoting *Sedima*, 473 U.S. at 497-98)).

The Supreme Court has similarly affirmed the breadth of the TCPA and its imposition of a blanket ban on robocalls and robotexts. *See Barr*, 140 S. Ct. at 2356 (noting "Congress's decisive choice to prohibit most robocalls to cell phones" and that "the people's representatives have made crystal clear that robocalls must be restricted"). This Court has also held that, like RICO, as a remedial statute, the TCPA

must be read broadly in favor of consumers. *See Van Patten*, 847 F.3d at 1047 (citing *Gager*, 727 F.3d at 271).

Other Circuits have consistently reached the same conclusion. *See Breda v. Cellco P'ship*, 934 F.3d 1, 10 (1st Cir. 2019) ("[B]ecause the TCPA is a consumer protection statute, we must interpret it broadly in favor of consumers."); *Daubert v. NRA Grp., LLC*, 861 F.3d 382, 390 (3d Cir. 2017) ("Turning to the TCPA's purpose we reiterate that the statute is remedial in nature and 'should be construed to benefit consumers.'" (quoting *Gager*, 727 F.3d at 271)).

In this case, rather than interpreting the TCPA broadly as the remedial statute it is, the district court narrowed its breadth by adding non-existent language to the statute, imposing its own policy over Congress's words, and misapplying controlling case law.

b. The District Court Erred by Adding Language to the Statute

This Court has rejected every attempt to add to the three facts a plaintiff needs to allege to state a claim for relief in a TCPA case. *See, e.g.*, *Hall v. Smosh Dot Com, Inc.*, 72 F.4th 983, 991 (9th Cir. 2023) (holding that nothing more was required to state a claim than the plaintiff's allegations "that Defendants texted a phone number that she owned and subscribed to, contrary to the precise privacy expectations she vindicated by placing her number on the Do-Not-Call Registry."); *L.A. Lakers*, 869 F.3d at 804 (refusing to require plaintiff to allege "that the call invaded the

recipient's privacy"). There is no reason for the Court to deviate from its prior holdings here.

In addition, the Supreme Court "has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1749 (2020); *see also Sedima*, 473 U.S. at 489 n.8 (rejecting lower court's requirement of a criminal conviction before a plaintiff could bring a RICO claim). "No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute." *United States v. Goldenberg*, 168 U.S. 95, 103 (1897). The TPCA's statutory elements need no elaboration. Howard's allegations properly state a claim for relief.

The district court ignored Congress's words and instead held that, to violate the TCPA, an audio component to a text call via MMS must be "thrust upon" the plaintiff, that "the video immediately start[] playing with audio" or have "a separate audio track [which] began reading the text of the message aloud," and the message must not provide a "conscious choice of whether to engage with the audible component." (ER at 20.) In doing so, the district court created its own distinction between a voice call and a text call via MMS with an audible component. This Court

has never even hinted that a plaintiff must "engage with the audible component" of any call. In fact, it has repeatedly held the exact opposite.

A violation of the TCPA occurs when a caller *attempts to contact* the plaintiff. *Satterfield*, 569 F.3d at 953-54 (recognizing a call is defined "as 'to communicate with or try to get into communication with a person by a telephone.") In other words, the mere *receipt* of an unwanted call is enough to state a claim under the TCPA.[4] *See Chennette v. Porch.com, Inc.*, 50 F.4th 1217, 1222 (9th Cir. 2022) ("Receiving even one unsolicited, automated text message . . . is the precise harm identified by Congress."); *Hall*, 72 F.4th at 985-86; *see also Snyder*, 2023 WL 2614960, at *2 (stating that the "Ninth Circuit is clear" that "properly stating a violation of the TCPA, without more, establishes the injury in fact requirement" and rejecting out-of-circuit cases that require more); *Warnick v. Dish Network LLC*, 2014 WL 12537066, at *15-16 (D. Colo. Sept. 30, 2014) (noting that in *Satterfield*, the Ninth Circuit rejected the "argument that the term 'make' also requires the 'receipt' of a phone call").

This district court's requirement that the audible component be thrust upon the plaintiff so the recipient has no choice but to engage with it is not in the statute,

[4] Even that question is not appropriate to resolve on a motion to dismiss. *Chennette*, 50 F.4th at 1222 ("Whether each plaintiff has, in fact, received one or more such messages is a matter for proof at a later stage of proceedings.").

FCC regulations, or anywhere else. The district court just made it up. The distinction without a difference that the district court identified was not reasoned, and it was an inadequate basis for the dismissal of Howard's complaint. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) ("'[J]udicial action must be governed by *standard*, by *rule*,'" and must be "'principled, rational, and based upon reasoned distinctions' found in the Constitution or laws" (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278-79 (2004))).

The flaw in the district court's logic is shown by the fact that it conflicts with a uniform body of law holding that so-called "ringless voice mails," which refers to a technology that allows a robocaller to leave a voice message without causing the phone to ring, violate the TCPA. *See Loyhayem*, 7 F.4th at 1234-35; *Snyder*, 2023 WL 2614960, at *3; *Dickson v. Direct Energy, LP*, 69 F.4th 338, 347-49 (6th Cir. 2023); *Susinno v. Work Out World, Inc.*, 862 F.3d 346, 350 (3d Cir. 2017). There is no principled way to distinguish between ringless voice mails and text calls via MMS containing prerecorded audio. *Snyder*, 2023 WL 2614960, at *2-*3. Moreover, in today's technological world, many voicemails are automatically transcribed, thus removing the need to 'listen' to the prerecorded or artificial voice. Nevertheless, these ringless voicemails still violate the TCPA.

This Court has never required plaintiffs to allege the district court's newly created elements. It was clear error for the district court to add them and then dismiss

Howard's Complaint for not including them.[5] Consequently, this Court must now reverse.

c. The District Court Injected Its Own Policy Preferences into the TCPA and Disregarded Congress's Words

The Supreme Court has repeatedly chastised courts that ignore Congress's words and impose their own policy preferences. *See Bostock*, 140 S. Ct. at 1749; *Sedima*, 473 U.S. at 499-500. "'Whatever temptations the statesmanship of policy-making might wisely suggest,' the judge's job is to construe the statute . . . ." *Jones v. Bock*, 549 U.S. 199, 216 (2007) (quoting Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 533 (1947)). "The judge 'must not read in by way of creation,' but instead abide by the 'duty of restraint, th[e] humility of function as merely the translator of [Congress's] command.'" *Id.*

In *Bostock,* the Supreme Court rejected the argument that "[i]f we were to apply the statute's plain language . . . any number of undesirable policy consequences would follow." 140 S. Ct. at 1753. The Court characterized it as "an invitation *no court should* ***ever*** *take up*." *Id.* (emphasis added). Yet, this is exactly what the district court did.

[5] Nor did the district court allow Howard the opportunity to amend.

By engrafting new requirements into the TCPA (that appear nowhere in the statute or this Court's long-settled case law), the district court contrived elements, created its own policy considerations, and legislated from the bench.

i. The American Public Cannot and Should Not Be Directed to "Ignore" Invasions of Privacy Banned by Congress Over 30 Years Ago

The most egregious policy choice made by the district court was that Americans should just "ignore" all text calls via MMS even if they violate the TCPA. (ER at 18.)

The district court's dismissal of the TCPA's prohibitions - Congress's law designed to protect the American public – was an abdication of judicial duty. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014) ("Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created . . . ." (internal citation omitted)); *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

This abdication cannot stand. Declining to recognize a cause of action created by Congress is "treason to the constitution." *Cohens*, 19 U.S. at 404. Crafting and imposing rules that are not contained in the statute written by Congress "exceeds the proper limits on the judicial role." *Jones*, 549 U.S. at 203. "[A]dopting different and

more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts." *Id.* at 224. Yet, this is exactly what the district court did. It directed Americans to ignore the continuous onslaught of calls sent in violation of the TCPA rather than hold the violators accountable.

The district court was constitutionally obligated to decide this case. It is hard to imagine a more severe abdication of judicial responsibility that an Article III judge telling Americans to simply "ignore" violations of a law that Congress passed. That is especially true for a law like the TCPA, which enjoys virtually unanimous support from the American public. *Barr*, 140 S. Ct. at 2343 ("Americans passionately disagree about many things. But they are largely united in their disdain for robocalls.").

ii. The Problem Congress Sought to Redress Through the TCPA Is Worse Than Ever

"'[T]he modern information age has shined a spotlight on information privacy . . . ." *Nayab*, 942 F.3d at 487 (quoting *Syed v. M-I, LLC*, 853 F.3d 492, 495 (9th Cir. 2017)). That privacy is slipping away, day by day. Americans "compulsively carry cell phones with them all the time." *Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018). Cell phones are "now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *See Riley v. California*, 573 U.S. 373, 385

(2014); *see also In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 8023 ¶ 124 (July 10, 2015) (recognizing that the intrusion of privacy presented by unwanted calls may be heightened "where the calls are received on a phone that the consumer may carry at all times").

The importance of the TCPA in fighting these privacy threats cannot be understated. When Congress enacted the TCPA in 1991, "more than 300,000 solicitors called more than 18 million Americans every day." *Barr*, 140 S. Ct. at 2344 (citing TCPA § 2 ¶¶ 3, 6, 105 Stat. 2394, note following 47 U.S.C. § 227). "Consumers were 'outraged' and considered robocalls an invasion of privacy 'regardless of the content or the initiator of the message.'" *Id.* (quoting TCPA § 2, ¶¶ 6, 10).

Those figures are now dwarfed by the barrage of robocalls and robotexts Americans receive, which now total in the billions *each month* and keep increasing. *See In re Targeting and Eliminating Unlawful Text Messages*, 2023 WL 2582658 (F.C.C. Mar. 17, 2023). "Since 2015, the [FCC] has seen a more than 500% increase in unwanted text complaints . . . ." *Id.* at *2 n.8. "In 2022, Americans received over 225 billion robotexts – a 157 percent year-over-year increase, and a 307 percent increase from 2020." *Id.* at *30 (Statement of Commissioner Geoffrey Starks). "[In] February 2023, 10.7 billion spam texts were reported – nearly 39 for every person in the United States." *Id.* In May 2023, alone, Americans received 14.2 billion

robotexts. *See* Robotexts Increase While Robocalls Drop for Third Consecutive Month, available at https://www.prnewswire.com/news-releases/robotexts-increase-while-robocalls-drop-for-third-consecutive-month-according-to-robokiller-insights-301846340.html. Even *with the TCPA*, most Americans no longer answer cell phone calls from unrecognized numbers, and robocallers have largely switched to text calls.[6]

The district court's opinion tells everyone in this country to just "ignore" precisely what Congress outlawed when it passed the TCPA in 1991 – unwanted telephone-based communications that deliver a message with an audible prerecorded or artificial voice. Or, which intrudes into our daily lives. In dismissing Congress and imposing its own statutory language, the district court left the American public

[6] *See* BusinessWire, *TNS Survey: 75% of Americans Will Never Answer Calls from Unknown Numbers* (July 26, 2022), available at https://www.businesswire.com/news/home/20220726005226/en/TNS-Survey-75-of-Americans-Will-Never-Answer-Calls-from-Unknown-Numbers; Colleen McClain, *Most Americans Don't Answer Cellphone Calls from Unknown Numbers*, Pew Research Center (Dec. 14, 2020), available at https://www.pewresearch.org/short-reads/2020/12/14/most-americans-dont-answer-cellphone-calls-from-unknown-numbers/; Daisy Gonzalez-Perez, *Rise of the Robotexts: As New Rules Curbed Spam Calls, Texts Took Off*, Cronkite News, available at https://cronkitenews.azpbs.org/2022/07/21/rise-of-the-robotexts-as-new-rules-curbed-spam-calls-texts-took-off/; *see also In re Targeting and Eliminating Unlawful Text Messages*, 2023 WL 2582658, at *30 (F.C.C. Mar. 17, 2023) (Statement of Commissioner Geoffrey Starks) ("[F]ailure to act could lead [] robotexting to become pervasive that it negatively affects texting, just as robocalls have done for phone calls.").

defenseless and – even worse – powerless against a scourge that has become a plague.

iii. The District Court's Decision Conflicts with Congress's Policy of Promoting National Security by Protecting Telecommunications Systems

The district court also let judicial policymaking override Congress's repeatedly expressed policy in favor of protecting the nation's telecommunications system. The integrity and dependability of the telecommunications system, which Congress has deemed "critical infrastructure," is integral to national security. *See* 6 U.S.C. § 652(e)(1)(E); 15 U.S.C. § 7401(1); 18 U.S.C. § 2339D(c); 42 U.S.C. § 5195c(b)(2); 42 U.S.C. § 5195c; 5195c(b)(2), (d)(2)(A); 50 U.S.C. § 3021(f)(i). The district court's opinion is a nail in the coffin in the TCPA's ability to protect national telecommunications.

C. The District Court's Erroneous Reading of Case Law

1. *Chevron* Does Not Apply to Howard's First Cause of Action

The district court improperly started its opinion not with basic statutory interpretation but with an analysis of *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Chevron*, however, is irrelevant to Howard's claim that the text call via MMS violated (b)(1)(A)(iii), because there is no agency interpretation of (b)(1)(A)(iii) at issue. *See Cumbie v. Woody Woo, Inc.*, 596 F.3d

577 (9th Cir. 2010) (declining to apply *Chevron* when there was no agency interpretation to analyze).

2. The District Court Incorrectly Applied *Trim* and *DeMesa*

Trim did not find that text calls and voice calls are mutually exclusive, as the district court asserted. The distinction created by the district court stems from the court's misreading of another district court opinion, *DeMesa v. Treasure Island, LLC*, 2022 WL 1813858 (D. Nev. June 1, 2022), which was decided before this Court's decision in *Trim*. *DeMesa*, like *Trim*, involved a text message with no sound—just written words. *DeMesa* stated in dicta (unsupported by any analysis in the text of the opinion or anything in the case law, yet quoted by the district court) that the Ninth Circuit "differentiat[ed] between voice and text calls [which] militates toward a narrower definition of 'voice' – one that confirms that 'voice' and 'text' are mutually exclusive under the TCPA." *Id.* at *3. That is wrong. *Satterfield* expressly held that "a voice message or a text message are not distinguishable in terms of being an invasion of privacy," 569 F.3d at 946, so *Trim* could not make that distinction.[7] *See Hart v. Massanari*, 266 F.3d 1155, 1171-72 (9th Cir. 2001) (Ninth Circuit panels are bound by decisions of previous panels). Privacy is the *sole* goal of

[7] Thus, the second-to-last paragraph of *Trim* was dicta.

the TCPA, so there can be no reasoned distinction here. *See L.A. Lakers*, 869 F.3d at 804.

In sum, unlike in *DeMesa*, the text call via MMS in this case contained more than written words – it had audible sounds and video too. Thus, *DeMesa* does not apply, and the district court erred in relying upon it.

3. *Facebook* Does Not Apply

The district court's statement that "Congress' concern for intrusive telemarketing does not give [it] permission to define the TCPA so broadly as to find potential liability for every single video sent via text message" is false. (ER at 20.) To support its narrow interpretation the district court incorrectly relied upon *Facebook Inc. v. Duguid*, 141 S. Ct. 1163, 1172 (2021), and *ACA International v. FCC.*, 885 F.3d 687, 698 (D.C. Cir. 2018). Those cases, however, are inapplicable here, and do not support the district's court's deviation from the well-established principle that remedial statutes such as the TCPA must be broadly interpreted to effectuate the statute's purpose.

First, *Facebook* expressly stated that nothing in the decision would affect the sections of the TCPA at issue here. The TCPA "separately prohibits calls using 'an artificial or prerecorded voice' to various types of phone lines, including home phones and cell phones, unless an exception applies." 592 U.S. at 409 (citing 47

U.S.C. §§ 227(b)(1)(A) and (B)). The Court specifically said that its "decision does not affect that prohibition." *Id.*

The Supreme Court made this point *two times*. In a footnote, it said that "Congress did impose broader prohibitions elsewhere in the TCPA" and that subsections §§ 227(b)(1)(A) and (B) – the same two sections Howard relies on here – prohibits "'artificial or prerecorded voice' calls, *irrespective of the type of technology used*." *Id.* at 408 n.8 (emphasis added).

Second, the issue in *Facebook* involved the definitions section in § 227(a) – particularly, the definition of "automatic telephone dialing system" in § 227(a)(1) – which is not at issue in this case. Because § 227(a) doesn't define "call" or "artificial or prerecorded voice," the definitional section of the TCPA is largely irrelevant in this case. Its only real significance is that it confirms that the TCPA has broader prohibitions on calls that are not "telephone solicitation" or "unsolicited advertisement" calls, which are governed by § 227(a)(4) and (b)(1)(C). *See Facebook*, 592 U.S. at 408, 409 & n.8. *Facebook's* holding is limited to the definition of an ATDS – and should remain as such. *See Facebook*, 592 U.S. at 399, 409.

Third, *Facebook* did not discuss the role of consent. There is a rebuttable presumption that a person who gives his phone number to another person has given consent, although that consent is somewhat limited by the context in which it was

given. *See Van Patten*, 847 F.3d at 1045; *Fober v. Mgmt. & Tech. Consultants, LLC*, 886 F.3d 789, 792 (9th Cir. 2018).

The consent provisions in the TCPA help to police the statute and identify frivolous claims for which Congress did not provide a cause of action; and that's all the policework Congress provided for. *See Van Patten*, 847 F.3d at 1040 (unrevoked consent is a complete defense to a TCPA claim). Stated somewhat differently, the TCPA's consent provisions adequately address any overbreadth concerns and courts cannot add more requirements than Congress included in the statute. Even if there is a dramatic uptick in TCPA litigation, that is a problem – if it is one – for Congress to resolve, not Article III judges. *See Sedima*, 473 U.S. at 499-500 ("Yet this defect – if defect it is – is inherent in the statute as written, and its correction must lie with Congress.").

Fourth, *Facebook* involved an ambiguous statute. 592 U.S. at 404 n.5 ("Difficult ambiguities in statutory text will inevitably arise, despite the best efforts of legislators writing in 'English prose.'"). Here, the district court did not identify an ambiguity, and if there ever was one, it was cured by *Satterfield* and this Court's decisions setting out the three elements of a TCPA claim.

4. Even if *Facebook* Applies, the District Court Incorrectly Applied It

Facebook was concerned with an ATDS definition that "would capture virtually all modern cell phones . . . ." 592 U.S. at 405. Such a broad interpretation

"could affect ordinary cell phone owners in the course of commonplace usage . . ." thereby making "every uninvited communication from a smartphone . . ." a TCPA violation. *Id.* at 406; *ACA Int'l*, 885 F.3d at 698.

In contrast, only a small subset of uninvited text calls via MMS that violate the TCPA are at issue here. Thus, if the rationale of *Facebook* applies to text calls via MMS, a question of fact exists as to what percentage of "ordinary cell phone. . . usage" might be affected. *Facebook*, 592 U.S. at 406; *Cecere v. County of Westchester*, 814 F.Supp. 378, 380 (S.D.N.Y. 1993) ("If a party submits all of the information available to that party without discovery, and it supports an inference that a legal standard has been violated, it may be necessary to authorize at least limited discovery to develop whether or not dismissal of the complaint at that stage would constitute a miscarriage of justice."). Accordingly, Howard is entitled to conduct discovery and present expert testimony in an evidentiary hearing on the issue.

5. Consent

The last element a plaintiff needs to allege under § 227 (b)(1)(A)(iii) is lack of consent. Because lack of consent is an affirmative defense that the defendant must prove false, in practice, a plaintiff only must ultimately prove *two facts* to state a claim under § 227(b)(1)(A)(iii). *See Van Patten*, 847 F.3d at 1044 ("Express consent is not an element of a plaintiff's prima facie case but is an affirmative defense for

which the defendant bears the burden of proof."); *Grant v. Capital Mgmt. Servs., L.P.*, 449 Fed. App'x 598, 600 n.1 (9th Cir. 2011).

In sum, Howard's Complaint states a valid claim for relief and the district court erred in finding otherwise.

D. Howard Stated a Claim for Violation of § 227(b)(1)(B)

A claim under § 227 (b)(1)(B) requires a fourth element – that the plaintiff's phone was "residential."[8] Howard's Complaint clearly alleges that the phone to which RNC text called via MMS was his residential phone. (ER at 6 ¶ 29.) As such, he stated a valid claim under § 227(b)(1)(B), and the district court erred in granting the defendant's motion to dismiss. Nothing more was needed.

The Court truly need not go any further in the brief. It should be apparent that reversal is mandated.

[8] Another big difference between § 227(b)(1)(A) and (b)(1)(B) is that there are no regulatory exemptions for violations of § 227(b)(1)(A). *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1250 (11th Cir. 2014) ("47 U.S.C. § 227(b)(2)(B) does not authorize rulemaking with regard to 47 U.S.C. § 227(b)(1)(A)(iii)."); 47 U.S.C. § 227(b)(2)(B) ("the Commission . . . may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection . . ." certain types and categories of calls); *see also Perrong v. Brief Call, Inc.*, 2023 WL 6005963, at *3 (S.D.N.Y. Aug. 7, 2023) ("The tax-exempt nonprofit [organization] exemption, by its terms, is limited to calls made to a 'residential line.'"). Consent is the only affirmative defense Congress allowed. Thus, even if RNC's assertion that it falls under a TCPA exception were true, that exception does not apply to Plaintiff's claim under § 227(b)(1)(A)(iii).

II. The District Court Erred by Addressing RNC's Affirmative Defenses on a Motion to Dismiss Because There Are Unresolved Fact Questions

RNC raised its purported tax-exempt nonprofit organization status as an affirmative defense. The district court, however, declared RNC the winner before the fight even began, violating of the Federal Rules of Civil Procedure and Howard's due process rights.[9]

A. Process Matters

A court considering a motion to dismiss may not consider affirmative defenses. *ASARCO, LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014). "Dismissal under Rule 12(b)(6) on the basis of an affirmative defense is proper only if the defendant shows some obvious bar to securing relief on the face of the complaint." *Id.* "If, from the allegations of the complaint as well as any judicially noticeable materials, an asserted defense raises disputed issues of fact, dismissal under Rule 12(b)(6) is improper." *Id.* It is rare and "relatively unusual" that a complaint will be subject to dismissal on the grounds of an affirmative defense. *Id.*

Affirmative defenses must be treated "within the framework of the Federal Rules of Civil Procedure." *Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir. 2014). There are several reasons for these rules, and they all mandate reversal of the district court's judgment.

[9] Again, the district court's analysis of RNC's alleged affirmative defense only applies to Howard's residential telephone line claim under § 227(b)(1)(B). *See supra* n.8.

First, nothing in the text of Rule 12(b)(6) allows dismissal based on an affirmative defense, and the Supreme Court has held that "courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." *Jones*, 549 U.S. at 212. *Jones* is consistent with the Court's decision in *Sedima*, which similarly rejected attempts to engraft additional pleading requirements onto the RICO statutes based on policy concerns. *Sedima*, 473 U.S. at 481. Here, the district court erred by resolving the fact-dependent question of whether RNC qualifies as a tax-exempt nonprofit organization on a motion to dismiss.

Second, "Federal Rule of Civil Procedure 8 sets the framework for pleadings." *Nayab*, 942 F.3d at 493. Rule 8(a) requires the plaintiff to state a claim for relief and Rule 8(c)(1) "in turn requires the party responding to a pleading to 'affirmatively state any avoidance or affirmative defense . . . .'" *Id.* at 493. The RNC did not answer Howard's complaint but rather asserted its affirmative defenses in a motion to dismiss. Moreover, "[e]ven under the more rigid pleading standard of Federal Rule of Civil Procedure 9 . . . the pleader is not required to allege facts that are 'peculiarly within the opposing party's knowledge,'" *id.*, like RNC's tax records and other financial records.

Third, the district court did not give Howard any notice that it would effectively be treating the motion to dismiss as a motion for summary judgment.

That alone is reversible error. *See Costen v. Pauline's Sportswear, Inc.*, 391 F.2d 81, 85 (9th Cir. 1968); *Erlich v. Glasner*, 374 F.2d 681, 683 (9th Cir. 1967). More importantly, if the district court *had* treated RNC's motion as one for summary judgment, *RNC should have lost because it never produced any evidence of its affirmative defense*. *See Nayab*, 942 F.3d at 494 (failure to produce evidence to support an affirmative defense gives rise to presumption that "'it does not exist, which of itself establishes a negative.'" (quoting *United States v. Denver & Rio Grande R.R. Co.*, 191 U.S. 84, 92-93 (1903))); *cf. Trinh v. Shriners Hosps. for Children*, 2023 WL 7525228, at *5 (D. Or. Oct. 23, 2023) (noting that defendant "should raise its affirmative defense . . . in a motion for summary judgment").

Howard, in fact, would like to move toward summary judgment on RNC's affirmative defenses as soon as possible. He (and class members) are entitled to an injunction preventing RNC from engaging in the ongoing campaign of harassing text calls via MMS to class members' phones.

B. The District Court Ignored the Rules of Civil Procedure and Violated Howard's Due Process Rights

The RNC's affirmative defense to Howard's § (b)(1)(B) claim that it is a tax-exempt nonprofit organization fails on the current record.

Under the version of 47 C.F.R. § 64.1200[10] in effect at the time, an exception to liability applied to "any telephone call to any residential line using a[] . . . prerecorded voice" if the call "[i]s made by or on behalf of a tax-exempt **nonprofit** organization." (a)(3)(iv) (emphasis added). The district court prematurely and incorrectly determined that RNC is a registered political action committee. That was a factual and legal determination the district court was not allowed to make on a motion to dismiss.

Relying on 26 U.S.C. § 527(a), which provides that an entity that complies with the statute "shall be considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes,"[11] the district court concluded that it was compelled to treat RNC as a tax-exempt nonprofit organization without further inquiry, even though RNC has never even *argued* that it is nonprofit.

But language identical, or nearly identical, to § 527(a) appears in numerous other sections of the Tax Code. *See, e.g.*, 26 U.S.C. §§ 501(b), 521(a), 528(a). And the tax-exempt status of these entities is routinely subject to scrutiny by courts.

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[10] Again, Congress did not allow the FCC to promulgate any exemption from liability under 47 U.S.C. § 227(b)(1)(A). *See supra* n.8.

[11] Tax Code § 527(a) doesn't even use the word nonprofit. The phrase in that section and the phrase used in the TCPA and FCC regulations are different, despite the district court's attempt to make them mean the same thing. *Compare* 26 U.S.C. § 527(a) ("organization exempt from income taxes"), *with* 47 U.S.C. § 227(a)(4), 47 C.F.R. § 64.1200(a)(3)(iv) ("tax-exempt nonprofit organization").

Under the district court's opinion, any entity can claim refuge under 26 U.S.C. §§ 501(b), 521(a), 527(a), or 528(a) in a motion to dismiss (without presenting a scintilla of evidence or allowing the other party any discovery on the issue) and obtain immediate dismissal of any § 227(b)(1)(B) claim.

For the exemption to apply, RNC must prove both that it is a: (1) nonprofit organization (a state law concept) *and* (2) tax-exempt organization (a federal law concept). *See Zimmerman v. Cambridge Credit Counseling Corp.*, 409 F.3d 473, 478 (1st Cir. 2005) (holding that, to qualify for tax-exempt nonprofit organization exemption from Credit Repair Organizations Act, the organization must "actually operate as a nonprofit organization *and* be exempt from taxation under section 501(c)(3)"); *see also McEwen v. Nat'l Rifle Ass'n of Am.*, 2021 WL 1414273, at *4-5 (D. Me. Apr. 14, 2021) (applying *Zimmerman* to tax-exempt nonprofit organization exemption in 47 C.F.R. § 64.1200 and denying NRA's request for dismissal based on its "purported tax-exempt status"); *New Dynamics Found. v. United States*, 70 Fed. Cl. 782, 799 (Fed. Cl. Apr. 24, 2006) ("Failure to satisfy any of these requirements results in an organization being disqualified from tax exemption."). Section 527(a) only addresses the second *Zimmerman* element of "tax-exempt" status, not the first *Zimmerman* element of "nonprofit" status. 26 U.S.C. § 527(a). The burden is on RNC to establish that it meets all the statutory requirements and it has failed to do so.

C. There Is No Evidence – Not Even an Allegation – That RNC Actually Operates as a Nonprofit

The district court never concluded that RNC actually operates as a nonprofit organization. *See Zimmerman*, 409 F.3d at 478; *Baker v. Fam. Credit Counseling Corp.*, 440 F. Supp. 2d 392, 405 (E.D. Pa. 2006) ("[A] corporation must not only be organized as a non-profit, it must actually operate as one." (quoting *Polacsek v. Debticated Consumer Counseling, Inc.*, 413 F. Supp. 2d 539, 550 (D. Md. 2005))); *Medina v. Nat'l Collegiate Student Loan Tr. 2*, 2020 WL 5553858, at *6 (Bankr. S.D. Cal. Mar. 10, 2020) ("Tax exempt status does not on its own establish nonprofit . . . ."). The district court never even mentioned the issue. Its failure to address whether RNC actually operates as a nonprofit organization is reversible error because an element of RNC's defense is missing.

D. RNC Has Not Shown that It Is Tax-Exempt

Tax-exempt status confers a subsidy on the exempt entity that is subsidized by other taxpayers. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 591-92 (1983) ("[T]he very fact of the exemption . . . means that ***other taxpayers can be said to be indirect and vicarious 'donors.'***" (emphasis added)); *see also Leathers v. Medlock*, 499 U.S. 439, 450 n.3 (1991) (reaffirming that tax exemptions are subsidies).

Thus, the entity must serve the public interest by complying with the statutory requirements. *Bob Jones*, 461 U.S. at 591-92 ("The institution's purpose must not

be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred."). Accordingly, tax exemptions are construed narrowly to limit their scope. *Bingler v. Johnson*, 394 U.S. 741, 752 (1969).

Moreover, the party claiming exemption "has the burden to demonstrate that it is entitled to tax exempt status . . . . [and] must come forward with candid disclosure of the facts bearing on the exemption application." *Church of Scientology of Cal. v. Comm'r*, 823 F.2d 1310, 1317 (9th Cir. 1987). "Courts can draw inferences adverse to a taxpayer seeking exempt status where the taxpayer fails to provide evidence concerning its operations, or where the evidence is vague or inconclusive." *Kile v. Comm'r*, 739 F.2d 265, 269 n.5 (7th Cir. 1984).

Here, RNC has not come forward with any evidence showing it complies with the statute to justify its alleged tax-exempt status. Nevertheless, the district court dismissed Howard's complaint.

1. Political Organizations Under § 527

Political organizations are governed by many statutes, but they derive their tax-exempt status from 26 U.S.C. § 527. "Congress enacted 26 U.S.C. § 527 in 1975 in order to shield contributions to political organizations from taxation as income." *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1359 (11th Cir. 2003). Section 527 gives political organizations a "voluntary tax subsidy." *Id.* But § 527

is rarely enforced and it does not operate like it did in 1992 when the FCC promulgated 47 C.F.R. § 64.1200.

"As originally enacted, section 527 did not contain separate disclosure requirements, apparently in large part because the Federal Election Campaign Act . . . already established disclosure requirements for expenditures by 'political committees.'" *Mobile Republican Assembly*, 353 F.3d at 1359 (footnote omitted). The following year, the Supreme Court decided *Buckley v. Valeo*, 424 U.S. 1, 79-80 (1976), which "effectively eliminated disclosure requirements for anything other than express advocacy." *Id.* at 1360.

"In response to the spectacular increase in the use of section 527 organizations for tax-exempt political expenditures with limited public scrutiny, Congress added sections 527(i) and 527(j) in 2000." *Id.* Under those provisions, an organization must give notice to the Secretary of the Treasury and comply with certain disclosure requirements or "pay the highest corporate tax rate on 'the amount to which the failure relates.'" *Id.* (quoting 26 U.S.C. § 527(j)(1)).

a. Procedures for Forming and Operating a § 527 Political Organization

Forming a 527 political organization only requires an unreviewed electronic submission to the Secretary of the Treasury. 26 U.S.C. § 527(i). "Furthermore, it is not necessary that a political organization operate in accordance with normal corporate formalities as ordinarily established in bylaws or under state law." 26

C.F.R. § 1.527-2(a)(3)(iii). Even *a bank account* can qualify as a political organization. Rev. Rul. 79-13, 1979-1 C.B. 208, 1979 WL 50837; Rev. Rul. 79-11, 1979-1 C.B. 207, 1979 WL 50835.

In contrast, a tax-exempt nonprofit organization that qualifies under 26 U.S.C. § 501(c)(3), must not only file paperwork with the IRS, it must also receive a ruling from the IRS approving the tax exemption.[12] *See Bob Jones Univ. v. Simon*, 416 U.S. 725, 728 (1974) ("As a practical matter, an organization hoping to solicit tax-deductible contributions may not rely solely on technical compliance with the language of ss 501(c)(3) and 170(c)(2).").

While 527 organizations are not subject to the same scrutiny upon formation, "Congress has established certain requirements that must be followed in order to claim the benefit of a public tax subsidy. Any political organization uncomfortable with the disclosure of expenditures or contributions may simply decline to register under section 527(i) and avoid these requirements altogether." *Mobile Republican Assembly*, 353 F.3d at 1361. Those requirements include the establishment of a segregated bank account to receive donations that qualify as "exempt," and keeping

[12] Churches are an exception to this rule. *See Branch Ministries v. Rossotti*, 211 F.3d 137, 139 (D.C. Cir. 2000) ("Although most organizations seeking tax-exempt status are required to apply . . . for an advance determination that they meet the requirements of section 501(c)(3), id. § 508(a), a church may simply hold itself out as tax exempt and receive the benefits of that status without applying for advance recognition from the IRS." (citing 26 U.S.C. § 508(c)(1)(A)).

"records that are adequate to verify receipts and disbursements . . . and identify the exempt function activity." 26 C.F.R. § 1.527-2(b)(2).

"[S]ection 527(j)['s] disclosure requirements constitute conditions attached to the receipt of a tax subsidy . . ." *Mobile Republican Assembly*, 353 F.3d at 1362. The district court never addressed whether the RNC satisfied those conditions.

Considering all the changes to campaign finance law over the last few decades, at the time Congress passed the TCPA in 1991, it would not have understood section 527 to mean what it means today, especially after *Citizens United* fundamentally changed campaign finance law in 2010. For one, "Congress did not originally intend for 527 organizations to influence elections without limitation." Jeffrey P. Geiger, Note, *Preparing for 2006: A Constitutional Argument for Closing the 527 Soft Money Loophole*, 47 Wm. & Mary L. Rev. 309, 323 (2005). "Congress enacted § 527 in response to IRS uncertainty about how to treat political organizations for income tax purposes." *Id.* "Congress granted [the § 527] exemption on the belief that political organizations 'properly regulated' by FECA positively contribute to democratic societies." *Id.* But "Congress's intention was undermined when the Supreme Court concluded in *Buckley* that FECA's political committee definition was unconstitutional." *Id.* And, as explained below in section III(B)(4)(c), the FEC typically doesn't enforce campaign finance law.

The district court committed reversible error because it never analyzed whether Congress intended today's § 527 political organizations to be exempt from the TCPA.

b. The Organizational and Operational Tests

Congress defined "political organization" to mean "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1). The statute thus contains the typical "organized and operated" test that is familiar to all nonprofits seeking tax-exempt status. An alleged political organization must satisfy both prongs. *See, e.g.*, *Partners in Charity, Inc. v. Comm'r*, 141 T.C. 151, 163 (U.S. Tax Ct. 2013).

An "exempt function" is "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed." 26 U.S.C. § 527(e)(2).

"Whether an expenditure is for an exempt function depends upon *all the facts and circumstances*." 26 C.F.R. § 1.527-2(c)(1) (emphasis added). There are no facts

in the record regarding any expenditures because the district court dismissed Howard's complaint before he had an opportunity to conduct discovery.

i. The RNC Has Not Shown That It Meets the Organizational Test

IRS regulations define the "organizational test." 26 C.F.R. § 1.527-2(a)(2). "A political organization meets the organizational test if its articles of organization provide that the primary purpose of the organization is to carry on one or more exempt functions. A political organization is not required to be formally chartered or established as a corporation, trust, or association." *Id.* Where "an organization has no formal articles of organization, consideration is given to statements of the members of the organization at the time the organization is formed that they intend to operate the organization primarily to carry on one or more exempt functions." *Id.*

None of this was analyzed (or even mentioned) by the district court, so it erred by concluding that RNC enjoyed tax-exempt status.

ii. The RNC Has Not Shown That It Meets the Operational Test

IRS regulations also address the "operational test." 26 C.F.R. § 1.527-2(a)(3).

> A political organization does not have to engage exclusively in activities that are an exempt function. For example, a political organization may: (i) Sponsor nonpartisan educational workshops which are not intended to influence or attempt to influence the selection, nomination, election, or appointment of any individual for public office, (ii) Pay an incumbent's office expenses, or (iii) Carry on social activities which are unrelated to its exempt function, *provided these are not the organization's primary activities*. However,

> expenditures for purposes described in the preceding sentence are not for an exempt function.

Id. (emphasis added).

Typically, "[t]he operational test focuses on the actual purposes the organization advances by means of its activities, rather than on the organization's statement of purpose or the nature of its activities." *Redlands Surgical Servs., v. Cmm'r*, 113 T.C. 47, 71 (U.S. Tax Ct. 1999), *aff'd* 242 F.3d 904 (9th Cir. 2001). "Although an organization might be engaged in only a single activity, that single activity might be directed toward multiple purposes, both exempt and nonexempt. If the nonexempt purpose is substantial in nature, the organization will not satisfy the operational test." *Id.* "'The presence of a single . . . [non-exempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly . . . [exempt] purposes.'" *Id.* at 71-72 (quoting *Better Bus. Bureau, Inc. v. United States*, 326 U.S. 279, 283 (1945)).

"An organization does not operate exclusively for exempt purposes if it operates for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests." *Id.* at 74. And "[c]ases involving claims of hidden nonexempt purposes have focused on the manner in which the operations themselves are conducted, implicitly reasoning that an end can be inferred from the chosen means." *New Dynamics*, at 800 (internal quotation marks omitted).

"Whether an organization has a substantial nonexempt purpose *is a question of fact* to be resolved on the basis of all the evidence presented . . . ." *Redlands*, 113 T.C. at 72 (emphasis added). And the party claiming exemption has the burden of proof. *Id.*

Here, the district court failed to analyze whether the RNC satisfies the operational test, so it erred by concluding – without any evidence – that RNC proved its tax-exempt status.

When auditing a § 527 group, the IRS will inquire about facts Howard never had an opportunity to address – "What are the organization's activities? What is the organization's primary activity? Who determines where to spend the money? Who determines how to spend the money? Who is involved with the organization?" *See* IRS, Audit Technique Guide – Political Organizations – IRC Section 527, at 16, https://www.irs.gov/pub/irs-tege/atg_political_orgs.pdf.

The facts relevant to these questions are mostly in RNC's possession, but available evidence suggests that RNC *will not* be able to satisfy the operational test. The very text call at issue in this case may not be an exempt function. Nonpartisan activities like "get-out-the-vote campaigns" are not "influencing or attempting to influence the selection, nomination, election, or appointment of any *individual*. *See* 26 U.S.C. § 527(e)(2) (emphasis added); 26 C.F.R. § 1.527-6(b)(5).

Although some information might be available publicly, *RNC raised this issue as an affirmative defense*, so it is *RNC's burden* to produce the evidence and explain how it supports the defense. *See Nayab*, 942 F.3d at 494-95. "Holding otherwise would effectively bar meritorious claims from ever coming to light and frustrate Congress' attempt to protect consumers' privacy." *Id.* at 495. Nothing in the Federal Rules of Civil Procedure requires a plaintiff to determine whether a defendant qualifies as a tax-exempt nonprofit organization before filing a TCPA complaint. Negating the tax-exempt nonprofit organization affirmative defense before filing a complaint would require a plaintiff to hire an accountant to audit the defendant's finances—if the plaintiff could even obtain the necessary financial records. That would be the death knell of TCPA claims.

c. If the RNC is found to have Engaged in Corrupt and Illegal Activity, the District Court May Refuse to Recognize Its Alleged Tax-Exempt Status as a Defense to a TCPA Claim

The organizational and operational tests are not the only ones that RNC must satisfy to obtain a tax exemption. When a tax-exempt entity engages in illegal activity, it loses its tax-exempt status.[13] *Bob Jones*, 461 U.S. at 591 ("A corollary to

[13] The IRS incorporated the ban on illegal activity into its regulations implementing § 527. See 26 C.F.R. § 1.527-5(a)(2) ("Expenditures by a political organization that are illegal or for an activity that is judicially determined to be illegal are treated as amounts not segregated for use only for the exempt function and shall be included in the political organization's taxable income.").

the public benefit principle is the requirement, long recognized in the law of trusts, that the purpose of a charitable trust may not be illegal or violate established public policy."). That stands to reason - the public cannot be forced to subsidize illegal activity.

Here, the RNC may be making illegal expenditures and Howard is entitled to discovery before any court can determine if RNC is, in fact, entitled to tax-exempt status. Specifically, a 2019 report issued by general counsel for the FEC found reason to believe "RNC accepted excessive contributions" and that "the RNC . . . inaccurately disclosed receipts and disbursements." FEC, First General Counsel's Report at 4(Feb. 13, 2019), https://www.fec.gov/files/legal/murs/7603/7603_06.pdf. General counsel recommended that the "Commission find reason to believe that: (1) . . . the RNC . . . violated the joint fundraising regulations at 11 C.F.R. § 102.17(c)(1) and (2); (2) the RNC accepted excessive contributions in violation of 52 U.S.C. § 30116(f); and (3) . . . the RNC . . . violated the reporting requirements at 52 U.S.C. § 30104(a) and (b) and 11 C.F.R. § 104.3(a) and (b)." *Id.* at 4-5. The report stated that the RNC was doing exactly what the Court was worried about in *McCutcheon v. FEC*, 572 U.S. 185 (2014) – using the joint fundraising agreement as a mechanism to "circumvent base limits or earmarking rules." *Id.* at 215. Thus, Howard has reason to believe that RNC's FEC disclosures may not be accurate.

Courts are not supposed to resolve credibility issues on a motion for summary judgment, *Easley v. City of Riverside*, 765 Fed. App'x 282, 284 (9th Cir. 2019), much less a motion to dismiss, where the district court is obligated to take the allegations in the complaint as true. Howard was entitled to an evidentiary hearing to resolve factual questions about RNC's affirmative defense, but he didn't even get the chance to talk to the judge. Instead, the district court granted the motion to dismiss without oral argument, denied leave to amend, and did not give Howard the opportunity to supplement the record. That was reversible error.

III. The District Court's Ruling Violates Due Process, the Separation of Powers, Article III Itself, and the First and Seventh Amendments

Americans "are largely united in their disdain for robocalls." *Barr*, 140 S. Ct. at 2343. And "[d]ata from the Federal Communications Commission shows that unwanted political texts made up the largest single group of text message complaints in 2022." Alex Ford, *Billions of Political Text Messages Were Sent Last Year – And There's Little to Stop More from Coming*, NBC NEWS, Jan. 26, 2023, https://www.nbcnews.com/data-graphics/15-billion-political-text-messages-sent-2022-rcna64017

Exempting even a single organization from the TCPA has major consequences because modern technology allows the invasion of the privacy of millions of people, instantaneously, with the push of a button. So exempting a large number of robotexters from the TCPA – here, around 2 million tax-exempt nonprofit

organizations, plus anyone who merely claims (without any proof) to be a political organization under I.R.C. § 527 – spells the TCPA's demise, and the potential erosion of the nation's telecommunications system.

Again, Americans "are entitled to rely on the [TCPA] as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock*, 140 S. Ct. at 1749. It is not possible for a statute that (1) "prohibit[s] almost all robocalls to cell phones," *Barr*, 140 S. Ct. at 2344, (2) "bars both automated voice calls and automated text messages," *id.* at 2344 n.1, and (3) is not "littered with exceptions that substantially negate the restriction," *id.* at 2348, to be eviscerated by a regulatory exception hiding in a backwater of the Code of Federal Regulations. That is simply not the law Congress enacted and interpreting it that way would violate the separation of powers, the First Amendment, and the Seventh Amendment.

A. Courts Have an Affirmative Duty to Protect Against Abuse of Agency Power

"[A]dministrative law doctrines must take account of the far-reaching influence of agencies and the opportunities such power carries for abuse." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2423 (2019). That potential for abuse lurks in "all corners of the administrative state," whether the agency is granting benefits or imposing burdens. *Biden v. Nebraska*, 143 S. Ct. 2355, 2375 (2023) (quoting *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022)).

Courts "will, where possible, construe federal statutes so as 'to avoid serious doubt of their constitutionality.'" *Stern v. Marshall*, 564 U.S. 462, 477 (2011) (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986)). And deferring to an Article I agency can "raise[] serious constitutional concerns" about separation of powers. *Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1059 (9th Cir. 2020). The district court's decision does just that.

B. Howard Was Entitled to *De Novo* Review by an Article III Judge

A TCPA claim is a common law invasion of privacy claim that has "long been heard by American courts." *See Van Patten*, 847 F.3d at 1043. And "[w]hen a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' . . . the responsibility for deciding that suit rests with Article III judges in Article III courts." *Stern*, 564 U.S. at 484 (internal citation omitted) (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment)).

Accordingly, a TCPA plaintiff "has a personal right to have his case heard by an Article III judge." *Robert Ito Farm, Inc. v. Cnty. of Maui*, 842 F.3d 681, 686 (9th Cir. 2016) (citing *Dixon v. Ylst*, 990 F.2d 478, 479 (9th Cir. 1993)). A TCPA plaintiff also has a Seventh Amendment right to a jury trial, which can be imperiled by agency action. *See Jarkesy v. SEC*, 34 F.4th 446, 451 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023).

Nobody – no court, no agency, no jury – has ever reviewed RNC's affirmative defenses that (1) political organizations under § 527 automatically qualify for the tax-exempt nonprofit exemption and essentially receive absolute immunity from suit under the TCPA, and (2) RNC qualifies as a tax-exempt nonprofit organization under the Tax Code and Title 52 (which governs campaign finance). That violates the "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

C. None of the Justifications for Deference Are Present

Deference principles "give[] agencies their due, while also allowing – indeed obligating – courts to perform their reviewing and restraining functions." *Kisor*, 139 S. Ct. at 2415; *West Virginia*, 597 U.S. at 764-65 (Kagan, J., dissenting) (agreeing with majority opinion that agency action must be struck down when "an agency [is] operating far outside its traditional lane, so that it had no viable claim of expertise or experience").

1. The District Court Did Not Find Ambiguity in the Statute or the Regulatory Exemption

"If uncertainty does not exist, there is no plausible reason for deference"; so deference is only possible if the statute or regulation is ambiguous. *Kisor*, 139 S. Ct. at 2415. Additionally, "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* (quoting *Chevron*, 467 U.S. at 843 n.9). "[O]nly when that legal toolkit is empty and the interpretive

question still has no single right answer can a judge conclude that it is 'more [one] of policy than of law.'" *Id.* (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991)). "That means a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read." *Id.*

Here, the district court never even identified an ambiguity in the TCPA or the FCC regulations. And the district court failed to recognize that the interpretation of the TCPA that it adopted was not even advanced by the FCC.

2. There Is No Agency "Interpretation" to Defer to

"[T]he regulatory interpretation must be one actually made by the agency," or a "court may not defer." *Kisor*, 139 S. Ct. at 2416-17. In other words, deference is appropriate only if "the statute is ambiguous, *and an agency purports to interpret the ambiguity*." *See N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 773 (9th Cir. 2011) (emphasis added).

The district court's failure to identify an ambiguity, by definition, means that there is no evidence that the FCC purported to interpret an ambiguity in the TCPA.

3. The District Court Did Not Examine the Text, Structure, or History of the TCPA or the FCC Regulations

"If genuine ambiguity remains . . . the agency's reading must still be 'reasonable.'" *Kisor*, 139 S. Ct. at 2415 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)). "In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at

2415-16. "The text, structure, history, and so forth at least establish the outer bounds of permissible interpretation." *Id.* "And let there be no mistake: That is a requirement an agency can fail." *Id.* at 2416.

The district court indeed failed, as its opinion did not examine the text, structure, or history of the TCPA or FCC regulations.

a. Congress Did Not Give Authority to the FCC to Exempt Political Organizations from the TCPA

"Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be 'shaped, at least in some measure, by the nature of the question presented' – whether Congress in fact meant to confer the power the agency has asserted." *West Virginia*, 597 U.S. at 721 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

The TCPA provides the FCC only limited rulemaking authority. First, "[t]he Commission shall prescribe regulations to implement the requirements of" § 227(b). 47 U.S.C. § 227(b)(2). "In implementing the requirements of" § 227(b), the FCC "may, by rule or order, exempt from the requirements of [§ 227(b)(1)(B)], 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." 47 U.S.C. § 227(b)(2)(B); *see also Dickson v.*

Direct Energy, LP, 69 F.4th 338, 341 (6th Cir. 2023) ("Congress delegated authority to the Federal Communications Commission to craft exceptions to the law, provided that those exceptions did not 'adversely affect the privacy rights that [it] is intended to protect.'" (quoting 47 U.S.C. § 227(b)(2)(B)(ii)(I)).

The FCC's "power to grant exemptions must be in harmony with these concerns." *Starr*, 589 F.2d at 311. But the regulation, at least as applied by the district court, is entirely unbounded. It contains no "conditions," even though Congress expressly required them.

b. TCPA Structure

The structure of the TCPA shows that Congress enacted an exemption from the TCPA for tax-exempt nonprofit organizations in only one statute – the definition of "telephone solicitation" in § 227(a)(4). The exemption Congress enacted doesn't apply to claims under § 227(b).

The FCC did not perform any independent analysis of what Congress told it to do. It simply repeated the phrase "tax-exempt nonprofit organization" that Congress used in 227(a)(4). It made no independent findings when it promulgated the exemption – it simply cited the legislative history to the TCPA itself. *See In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, 8773-74 (Oct. 16, 1992) (footnotes omitted).

The FCC, in other words, did not draw from its expertise when it promulgated the exemption. It took the Congressional policy favoring tax-exempt nonprofit organizations in cases involving *telephone solicitations* – which are not at issue here – and imported it into another part of the TCPA, which Congress could easily have done itself if it had wanted to.

c. The FCC Has No Expertise in Tax Law or Campaign Finance Law

Perhaps most importantly, "the agency's interpretation must in some way implicate its substantive expertise. Administrative knowledge and experience largely 'account [for] the presumption that Congress delegates interpretive lawmaking power to the agency.'" *Kisor*, 139 S. Ct. at 2417 (quoting *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 153 (1991)). "So the basis for deference ebbs when '[t]he subject matter of the [dispute is] distan[t] from the agency's ordinary' duties or 'fall[s] within the scope of another agency's authority.'" *Id.* (quoting *City of Arlington v. FCC*, 569 U.S. 290, 309 (opinion of Breyer, J.)). "An agency . . . gets no 'special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.'" *Id.* at 2417 n.5 (quoting *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006)).

It is implausible that Congress intended to let the FCC – which has no experience in tax law or campaign finance law – grant a blanket exemption to all

tax-exempt nonprofit organizations, which now includes political organizations under Tax Code § 527. As its name suggests, the FCC's expertise is in *communications*, not tax or campaign finance. Deference is therefore not warranted. *See King v. Burwell*, 576 U.S. 473, 485-86 (2015) ("It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort." (citing *Gonzales v. Oregon*, 546 U.S. 243, 266 (2006))).

Even if the FCC was trying to promulgate an exemption for tax-exempt nonprofit organizations, that exemption was "subject to such conditions as the Commission may prescribe," but the FCC did not impose any "conditions." It simply parroted the phrase "tax-exempt nonprofit organization" from 47 U.S.C. § 227(a)(4). Again, that phrase appears nowhere in § 227(b), which is the statute that creates TCPA liability for text calls via MMS containing an artificial or prerecorded voice without obtaining consent. That statute, not § 227(a) or § 227(c), is what provides the basis for Howard's claims. If Congress wanted to give the FCC the authority to exempt tax-exempt nonprofit organizations from § 227(b), it would have done that in the TCPA itself. *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) (stating that courts "do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance

is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest").

4. Major Questions Doctrine

The major questions doctrine is intended to curb administrative agency overreach. It began as an exception to *Chevron*, but has matured into this clear-statement rule: when "the interpretation of [a statute presents] a question of deep 'economic and political significance' that is central to [the] statutory scheme,'" courts may not "assume that Congress entrusted that task to an agency without a clear statement to that effect." *Biden*, 143 S. Ct. at 2375. Thus, "something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims." *West Virginia v. EPA*, 597 U.S. 697, 723 (2022).

The district court did exactly what the Supreme Court has said it could not do when evaluating the major questions doctrine. It "'[p]ut on blinders' and confine[d] [itself] to the four corners of the statute." *See Biden v. Nebraska*, 143 S. Ct. at 2383 (Barrett, J., concurring). Not only did it ignore the deference principles described above, but it also misapplied the test set forth in *Biden*.

a. The Tax-Exempt Nonprofit Exemption Presents a Question of Deep Economic and Political Significance

Part I(B)(2)(c)(ii) above explains the deep economic significance of the TCPA, as does the Supreme Court's opinion in *Barr*. By any measure the exemption

involves billions, perhaps trillions of dollars, and many billions of calls. Billions of dollars cannot be said to have anything but deep economic significance.

Part I(B)(2)(c)(ii) also explains the political significance. Everyone in America hates robotexts. An exemption from the TCPA would be vehemently opposed by most Americans. After all, their representatives in Congress have been "fighting back" against robotexters and robocallers for decades. *Barr*, 140 S. Ct. at 2343. Anything with almost unanimous support in today's political climate cannot be said to have anything but political significance.

b. The Question Is Central to the TCPA's Statutory Scheme

Even the dissenting Justices in *West Virginia* would likely hold that the FCC lacked authority to promulgate the tax-exempt nonprofit organization exemption because (1) the FCC has no special expertise in tax law or campaign finance law, and (2) the exemption will inevitably swallow the rule – enacted by the people's representatives in Congress – that bans "nearly all" robotexts. *See West Virginia*, 597 U.S. at 765 (Kagan, J., dissenting).

c. Americans Are Entitled to Hold Someone Accountable

Congress found the TCPA's goals to be so important, in fact, that it authorized individuals to file suit in either state or federal court, a rare congressional occurrence. *See Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 380-81 (2012); *Cranor v. 5 Star*

Nutrition, L.L.C., 998 F.3d 686, 688 (5th Cir. 2021). But that right has all but disappeared under the district court's opinion, leaving Americans with nowhere to turn for redress or accountability.

The power wielded by the thousands of executive branch officers only "acquires its legitimacy and accountability to the public through 'a clear and effective chain of command' down from the President, on whom all the people vote." *United States v. Arthrex, Inc.*, 141 S.Ct. 1970, 1979 (2021) (quoting *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 498 (2010)). "Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" *Free Enter. Fund*, 561 U.S. at 498 (quoting The Federalist No. 70, at 476). "The diffusion of power carries with it a diffusion of accountability." *Id.* at 497.

The district court said it was deferring to the FCC. The FCC is an "independent agency."[14] The Supreme Court has recently held that "independent agencies" have inherent constitutional problems with their structure because they are

[14] 44 U.S.C. § 3502(5); *Consumers' Research, Cause Based Commerce, Inc. v. FCC*, 88 F.4th 917, 937-38 (11th Cir. 2023) (Newsom, J., concurring in the judgment) ("[T]he FCC is an independent agency, whose commissioners may be removed only for cause . . . .").

politically unaccountable.[15] *Facebook* made it even more difficult for the FCC to enforce the TCPA. *See In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 2023 WL 3946686, at *20 (June 9, 2023) (Statement of Chairwoman Jessica Rosenworcel).

The RNC's tax exemption is administered by the FEC and the IRS. The Federal Elections Commission is the only federal agency that enforces campaign finance statutes passed by Congress. *See* 52 U.S.C. § 30106. It deadlocks most of the time, so it often does not enforce the law. *See* Miriam Galston, *Outing Outside Group Spending and the Crisis of Nonenforcement*, 32 Stanford L. & Pol'y Rev. 253, 295-96 (2021); Trevor Potter, *A Dereliction of Duty: How the FEC Commissioners' Deadlocks Result in a Failed Agency and What Can Be Done*, 27 George Mason L. Rev. 483, 483 (2020) ("The result has been an administrative agency that does not administer the law, and an enforcement agency that does not enforce it. This result occurs because the statute effectively requires a bipartisan vote for any Commission action."); *see also* Arnab Datta, *Supporting the Agency "Designed to Do Nothing": Creating a Regulatory Safety Net for the FCC*, 88 Geo.

[15] *See, e.g.*, *Arthrex*, 141 S. Ct. at 1982; *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2203 (2020) (refusing to allow "significant governmental power in the hands of a single individual accountable to no one"); *Free Enter. Fund*, 561 U.S. at 483, 493, 496; *see also Cause Based Commerce*, 88 F.4th at 937-38 (Newsom, J., concurring in the judgment) (noting that FCC's USAC board members "enjoy something akin to the double-for-cause-removal protection that the Supreme Court has recently held to be unconstitutional").

Wash. L. Rev. 1259 (2020) (discussing the problem of FEC non-enforcement and non-regulation).

The IRS is not accountable either, since taxpayers lack standing to challenge a third party's tax exemption. *See, e.g.*, *Fulani v. Brady*, 935 F.2d 1324, 1326-27 (D.C. Cir. 1991).

In sum, there is no reason to apply deference principles in this case. And all the indicators supporting application of the major questions doctrine are present. The district court's opinion leaves no governmental actor accountable. The major questions doctrine is intended to prevent exactly this kind of result. *West Virginia*, 597 U.S. at 737 (Gorsuch, J., concurring).

IV. The First Amendment Bars RNC's Alleged Exemption

Congress cannot enact legislation that violates the First Amendment, nor can an administrative agency. *See Barr*, 140 S. Ct. at 2356 (invalidating TCPA exception that "favored debt-collection speech over plaintiffs' political speech). Yet the RNC argues that its political speech may be favored over all other speech. That is not the law and the district court erred by refusing to address Howard's First Amendment argument. Any content-based exemption to the TCPA – and all of the FCC's exemptions are content-based – must be severed to avoid preferring RNC's speech over others' speech. *See id.* at 2356; *see also Loyhayem*, 7 F.4th at 1234-35 nn.1 & 2 (recognizing that *Barr* invalidated "content-based exemption for calls made to

collect a debt owed to the United States" and that the "FCC has created several narrow, content-based exemptions").

The district court claimed to have resolved the First Amendment question, but it did nothing of the sort. It held, in another act of judicial abdication, that the Hobbs Act deprived the court of jurisdiction. (ER at 19.) Neither party to this lawsuit believes that the Hobbs Act applies here. And it doesn't. The courts of appeals have exclusive jurisdiction "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of - - (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1). The district court focused on whether a regulation that is more than 30 years old is "final." It obviously is, and nobody argued otherwise. That isn't the question. The issue is whether the exemption is a *rule* or an order. Only the latter are subject to § 2342(1). The TCPA specifically authorized the FCC to promulgate exemptions "by rule or order." 47 U.S.C. § 227(b)(2)(B). Rules and orders are mutually exclusive. Orders are issued after an agency adjudication, which did not occur here. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1988) (Scalia, J., concurring) (distinction between rules and orders is "the entire dichotomy upon which the most significant portions of the APA are based"). So the Hobbs Act doesn't apply. Denying Howard the right to question the constitutionality of a decades-old regulation violates due process and Article III, too, because Howard does not have

a time machine to go back and challenge the regulations in 1992, when the FCC promulgated them. *See PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2056 (2019) (judicial review must be available if party was not afforded a "prior" and "adequate" opportunity); *id.* at 2057 (Thomas, J., concurring ("A contrary view would arguably render the Hobbs Act unconstitutional."); *id.* at 2059 (Kavanaugh, J., concurring) (Hobbs Act only applies to "facial, pre-enforcement challenges").

CONCLUSION

The Court should vacate the district court's opinion and remand. To avoid further delay or confusion, the Court should clarify in the remand order that RNC must immediately file an answer to Howard's complaint and that discovery should begin in the ordinary course.

Respectfully submitted this 7th day of February, 2024.

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STATEMENT OF RELATED CASES

Case Name: Crawford v. National Rifle Association of America Political Victory Fund
Case Number: 23-3830

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

Jon L. Phelps hereby certifies pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached Opening Brief for the Appellant Jacob Howard 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 13,738 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: February 7, 2024

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CERTIFICATE OF SERVICE

Jon L. Phelps and Shannon A. Lindner hereby certify that on February 7, 2024, the Appellant's Opening Brief 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 to:

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