No. _____

In the
Supreme Court of the United States

CHARTER COMMUNICATIONS, INC. AND SPECTRUM MANAGEMENT HOLDING COMPANY, LLC,
Petitioners,

v.

STEVE GALLION
Respondent,

and

THE UNITED STATES OF AMERICA,
Respondent-Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Telephone Consumer Protection Act (TCPA) imposes liability of up to $1,500 per call for any call made without prior express consent to a cell phone using an automatic telephone dialing system or an artificial or prerecorded voice. These broad prohibitions on speech, however, contain a host of exceptions, including for calls made "to collect a debt owed to or guaranteed by the United States" and calls made by governmental entities, along with various additional content-based exceptions created by the Federal Communications Commission (FCC). 47 U.S.C. § 227(b)(1)(A)(iii), (b)(2)(B).

In the decision below, the Ninth Circuit held that the TCPA's restrictions on speech were content-based and not narrowly tailored to any compelling government interest. Accordingly, the court held that the statute violated the First Amendment. But instead of holding the statute invalid for its unconstitutional prohibitions of speech, the court invoked the extraordinary "remedy" of rewriting the statute to prohibit *more* speech. Specifically, the Ninth Circuit purported to cure the constitutional defect by "severing" the government-debt-collection exception from the statute, while leaving all of the statute's speech restrictions intact. In the name of the First Amendment, the Ninth Circuit thereby judicially *expanded* the TCPA's abridgment of speech.

The question presented is:

Whether the TCPA's prohibitions on calls made using an automatic dialing system or an artificial or prerecorded voice are unconstitutional content-based restrictions of speech, and if so whether the Ninth Circuit erred in "remedying" that constitutional

violation by broadening the prohibitions to abridge more speech.

RULE 29.6 STATEMENT

Spectrum Management Holding Company, LLC is a limited liability company wholly owned by Charter Communications Holdings, LLC. Charter Communications Holdings, LLC is a limited liability company owned by CCH II, LLC and Advance/Newhouse Partnership. CCH II, LLC is a limited liability company owned by Charter Communications, Inc., Coaxial Communications of Central Ohio LLC, Insight Communications Company LLC, NaviSite Newco LLC, and TWC Sports Newco LLC. Coaxial Communications of Central Ohio LLC, Insight Communications Company LLC, NaviSite Newco LLC, and TWC Sports Newco LLC are all directly or indirectly wholly owned subsidiaries of Charter Communications, Inc. Charter Communications, Inc. is a publicly held company. Based on publicly available information, Defendants-Appellants are aware that Liberty Broadband Corporation owns 10% or more of Charter Communications, Inc.'s stock. Liberty Broadband Corporation is also a publicly held company.

LIST OF RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), Petitioners state that there are no proceedings directly related to the case in this Court.

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PETITION FOR A WRIT OF CERTIORARI

This case involves a question of far-reaching importance regarding the validity of a major federal statute and the correct application of fundamental principles of First Amendment law.

The Telephone Consumer Protection Act (TCPA) is one of the most frequently litigated statutes in the federal courts, with over 12,000 new cases—including thousands of class actions—filed in the last three years alone. And because of the statute's severe penalty scheme imposing damages of up to $1,500 per call or text message, TCPA cases can threaten jury awards in the billions of dollars. This statute and its sweeping restrictions on speech are, however, riven with content-based exceptions designed to protect certain kinds of speech that the government favors—including a vast exception for calls from private debt collectors seeking to recover government-backed debt.

The Ninth Circuit correctly held that the TCPA violates the First Amendment in light of this facially content-based distinction between ordinary calls and those made to collect government-backed debt. The court explained that the statute fails strict scrutiny because it is not narrowly tailored to any compelling governmental interest. But instead of striking down the unconstitutional restrictions on speech, it invoked the extraordinary "remedy" of severing the government-debt exception from the statute and thus *expanding* the statute's prohibitions on speech. In other words, despite recognizing that the TCPA violated the First Amendment, the Ninth Circuit provided no relief to petitioners for their successful First Amendment challenge, and instead rendered

unlawful speech that Congress intentionally freed from regulation.

The Ninth Circuit's severability analysis squarely contradicts this Court's precedent, which calls for invalidating the *restriction* when a content-based regulation of speech is held to violate the First Amendment. *See, e.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015). It also conflicts with decisions of several courts of appeals, including the Third Circuit's ruling in *Rappa v. New Castle County*, which held, in virtually identical circumstances, that a court could not solve a First Amendment violation by abridging more speech. 18 F.3d 1043, 1072-73 (3d Cir. 1994) (Becker, J., joined by Alito, J.).

This case thus not only involves the invalidation of a federal statute—a posture where this Court "usual[ly]" grants review, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2298 (2019)—it also implicates a circuit conflict on a vital question of First Amendment law with broad implications in numerous contexts. This case easily satisfies this Court's criteria for certiorari.

OPINIONS AND ORDERS BELOW

The Ninth Circuit's opinion below is available at 772 F. App'x 604 and reproduced at App. 1a-3a. Its order denying rehearing en banc is reproduced at App. 29a-30a. The district court issued its ruling on February 26, 2018, and its ruling, as well as its order granting interlocutory appeal, is reported at 287 F. Supp. 3d 920 and reproduced at App. 4a-28a.

JURISDICTION

The Ninth Circuit issued its opinion on July 8, 2019 and denied Charter's petition for rehearing en banc on September 16, 2019. Charter filed this

petition for certiorari timely. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are reproduced at App. 31a-41a.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The TCPA prohibits calls to cellphones involving the use of either an "automatic telephone dialing system" (ATDS) or an "artificial or prerecorded voice," unless they are made with the prior express consent of the recipient. 47 U.S.C. § 227(b)(1)(A). An ATDS is defined as "equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator; and . . . to dial such numbers." *Id.* § 227(a)(1).

The statute creates a private right of action that carries substantial penalties. *Id.* § 227(b)(3). A violation of the statute is subject to an automatic $500 statutory penalty per call, with treble damages available "[i]f the court finds that the defendant willfully or knowingly" committed the violation. *Id.*

2. The TCPA provides several exceptions to its broad general ban on speech. *First*, the statute exempts calls "made solely to collect a debt owed to or guaranteed by the United States." *Id.* § 227(b)(1)(A)(iii). Under this exception, private debt-collectors are permitted to make calls without consent using autodialing or prerecorded/artificial voice technology so long as the call is for the collection of a government-backed debt. A call to discuss the collection of a debt that is not government-backed, or

to discuss something other than "collect[ing]" a government-backed debt (such consolidating or refinancing such a debt) is prohibited. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, CG Docket No. 02-278, 31 FCC Rcd. 7394, 7398, 7403-04 ¶¶ 10, 17 (2016) (clarifying that the provision exempts government "agents" discussing "authorized" content).

Second, the TCPA exempts calls "made for emergency purposes." 47 U.S.C. § 227(b)(1)(A). The Federal Communications Commission (FCC) has defined the term "emergency" to mean calls "made necessary in any situation affecting the health and safety of consumers." 47 C.F.R. § 64.1200(f)(4).

Third, the statute implicitly exempts all calls made by governmental entities—including state and local governmental entities—by limiting its coverage to a "person," 47 U.S.C. § 227(b)(1), which is defined as any "individual, partnership, association, joint-stock company, trust, or corporation," *see id.* § 153(39).

Fourth, the statute provides that the FCC "may, by rule or order, exempt from" liability any "calls to a telephone number assigned to a cellular telephone service that are not charged to the called party." *Id.* § 227(b)(2)(C). Under this provision the FCC has exempted numerous categories of calls on the basis of content, including calls relating to bank transfers, health care, and package delivery.[1]

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[1] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-278, 30 FCC Rcd. 7961, 8024-28, 8031-32 ¶¶ 129-38, 146-48 (2015); *Cargo Airline Association Petition for*

3. When the TCPA was enacted in 1991, Congress primarily sought to address an emerging but relatively narrow range of autodialing equipment, which often tied up specialized and emergency lines by dialing numbers randomly or sequentially. *See* S. Rep. No. 102-178, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969.

For almost 20 years after its enactment the TCPA lay relatively dormant. But litigation under the statute has exploded in the last decade. Between 2009 and 2016 there was an almost 50-fold increase in the number of cases filed, from fewer than 100 in 2009 to 4,840 in 2016.[2] The statutory damages available with little burden to prove individualized harm has made the TCPA a magnet for putative class actions, where jury awards have now gone as high $1.6 billion and claimed damages are sometimes in the hundreds of billions. *See* Marissa A. Potts, *"Hello, It's Me [Please Don't Sue Me!]": Examining the FCC's Overbroad Calling Regulations Under the TCPA*, 82 Brook. L. Rev. 281, 302-03 (2016). It is no exaggeration to say that the TCPA is today one of the most frequently litigated statutes in the U.S. Code.

TCPA suits have sought to penalize messages from a wide array of businesses, nonprofits, religious organizations, and political candidates. Indeed, political campaigns are now routinely defendants in

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Expedited Declaratory Ruling, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Order, CG Docket No. 02-278, 29 FCC Rcd. 3432, 3436-38 ¶ 1-18 (2014).

[2] *WebRecon Stats for Dec 2017 & Year in Review*, WebRecon LLC, https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review/ (last visited Oct. 22, 2019).

TCPA class actions. *See, e.g.*, *Shamblin v. Obama for Am.*, No. 8:13-cv-2428-T-33TBM, 2015 WL 1754628, at *1 (M.D. Fla. Apr. 17, 2015); *Thorne v. Donald J. Trump for President, Inc.*, No. 16-cv-4603 (N.D. Ill. Apr. 25, 2016). And enormous TCPA liability can be triggered by routine, even mundane messages, such as appointment reminders, updates on the status of purchases, religious devotionals, or security notifications.

B. Factual and Procedural Background

Respondent Steve Gallion initiated this putative class action on July 6, 2017, alleging that petitioners Charter Communications, Inc. and Spectrum Management Holding Company, LLC violated the TCPA by calling his cell phone one time. App. 4a. He also alleged that he did not give prior consent, and that the call featured an "artificial or prerecorded voice," such that it fell within Section 227(b)(1)(A)(iii). *Id.* Petitioners answered the complaint with affirmative defenses, one of which was that the TCPA's content-based prohibitions on calls violate the First Amendment. *Id.* at 5a. The United States intervened on January 9, 2018, to defend the TCPA's constitutionality. *Id.*

Consistent with almost every court to have considered the issue, the district court concluded that the TCPA's prohibitions are content-based, and thus subject to strict scrutiny. *Id.* at 9a-10a. The court held that the statute survived strict scrutiny, however, because in the court's view the abridgement of speech is narrowly tailored to the government's interest in residential privacy. But the court nonetheless certified for the Ninth Circuit's review the question "whether the TCPA, as a content-based

regulation of speech, survives strict scrutiny." *Id.* at 24a.

On appeal, the Ninth Circuit considered this case in tandem with *Duguid v. Facebook, Inc.*, which raised the same First Amendment question. 926 F.3d 1146 (9th Cir. 2019). Unlike this case, *Duguid* also involved a statutory question regarding the scope of the TCPA's prohibition on calls made using an ATDS.

The Ninth Circuit decided *Duguid* in a published opinion. In addressing Facebook's constitutional challenge, the court first held that because the government-debt-collection exception "'target[s] speech based on its communicative content,' the exception is content-based and subject to strict scrutiny." *Id.* at 1153 (alteration in original) (citation omitted). The court also concluded that the provision fails strict scrutiny because the exception is "insufficiently tailored to advance the government's interests in protecting privacy or the public fisc." *Id.* at 1156.

After holding the statute unconstitutional, the Ninth Circuit turned to the question of remedy. The court proceeded on the premise that it was the government-backed debt collection *exception*, and not the underlying *prohibitions*, that violated the First Amendment—even though the exception itself does not abridge any speech. Relying on the broad severability clause in Section 708 of the Communications Act of 1934, 47 U.S.C. § 608, the court found that the "unconstitutional" "exception" was severable from the rest of the statute, and the remainder of the statute was constitutional. *Duguid*, 926 F.3d at 1156-57. Accordingly, although the Ninth Circuit agreed with Facebook that the government-backed debt collection exception caused the TCPA

unconstitutionally to "favor[]" one type of "speech" over another based on its content, the court provided Facebook no relief. *Id.* at 1153. To the contrary, the Ninth Circuit purported to cure the violation of the First Amendment by *broadening* the TCPA's speech restrictions to abridge speech that Congress had intentionally freed from regulation. *Id.*

Two weeks later, the panel affirmed the decision of the district court in this case in an unpublished opinion, relying on *Duguid*. App. 2a-3a. The Ninth Circuit stated that "[c]onsistent with *Duguid*," "we hold that the 2015 amendment to the TCPA, which excepts calls 'made solely to collect a debt owed to or guaranteed by the United States,' is a content-based speech regulation that fails strict scrutiny, and thus is incompatible with the First Amendment." *Id.* at 2a. But the court nonetheless affirmed the district court's denial of petitioners' motion for judgment on the pleadings on the ground that "in *Duguid*, [the court] severed the 'debt-collection exception' and left intact the remainder of the statute." *Id.*

The court noted that, unlike Facebook, petitioners cited additional content-based "exceptions to the TCPA," including "several" established pursuant to FCC orders. *Id.* at 3a. But the court reasoned that "the FCC's regulatory exceptions [were] not before th[e] court" because "[t]he proper venue to challenge an FCC order is *directly* in a court of appeals [pursuant to the Hobbs Act], not in the district court." *Id.* In this respect as well, the Ninth Circuit appeared to analyze the constitutionality of the exceptions *standing alone*, rather than assess whether the existence of those exceptions casts doubt on the validity of the TCPA's underlying speech restrictions.

Petitioners requested rehearing en banc, which the Ninth Circuit denied. *Id.* at 29a-30a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit held that the TCPA imposes content-based restrictions on speech that are not narrowly tailored to further a compelling government interest. It thus concluded that the TCPA speech restrictions violate the First Amendment. But the Ninth Circuit then went badly astray, holding that the proper constitutional remedy in this circumstance is to sever the exception and thus *extend* the restrictions to cover speech Congress intended to free from regulation. App. 2a; *Duguid v. Facebook*, 926 F.3d 1146, 1156-57 (9th Cir. 2019).

Review is warranted because the Ninth Circuit's sweeping and extraordinary severability holding threatens to destabilize vital and long-established First Amendment principles. That holding departs from this Court's settled First Amendment precedent, creates a circuit conflict with the Third Circuit and other courts of appeals, and will have far-reaching effects on speech throughout the nation's largest judicial circuit. This Court's urgent intervention is required.

A. The Ninth Circuit's Severability Holding Conflicts With This Court's Precedent And With The Text And Purpose Of The First Amendment.

The Ninth Circuit's new severability rule is deeply misguided and conflicts with an unbroken line of this Court's precedent, which recognizes that the appropriate remedy for a statute that impermissibly restricts speech on the basis of content is to strike

down the restriction, not to expand it by eliminating one or more exceptions.

1. The decision below is in irreconcilable conflict with this Court's recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). In *Reed*, this Court addressed a township "Sign Code" with a basic structure similar to the TCPA: it contained a blanket "prohibit[ion]" on "the display of outdoor signs anywhere within the Town," but narrowed the prohibition with a series of "exemptions" based on "whether a sign convey[ed] a particular "message." *Id.* at 2224, 2227. As this Court explained, the "Sign Code [was] content based" because the existence of the various exemptions meant the prohibition on the display of outdoor "sign[s] . . . depend[ed] entirely on the communicative content of the sign." *Id.* at 2227. As the Ninth Circuit did here, this Court thus subjected the statute to strict scrutiny and concluded that the exceptions from the Code's blanket ban rendered the Sign Code "hopelessly underinclusive." *Id.* at 2231. That underinclusivity cast doubt on the veracity and weight of the township interests that the speech restrictions purportedly were intended to serve. For example, the fact that the township permitted numerous larger and more distracting ideological and political signs undermined its asserted rationale that size limits on directional signs were necessary for traffic safety. *See id.*

Having held that the statute failed strict scrutiny, the Court—unlike the Ninth Circuit here—then invalidated the Sign Code's *restrictions* on speech. The Court did not suggest that the First Amendment problem could be cured by simply "[e]xcis[ing] the . . . exception[s]." *Duguid*, 926 F.3d at 1157.

Reed aligns with an unbroken line of this Court's First Amendment precedent. For decades this Court has developed a robust jurisprudence addressing content-based restrictions on speech. If the Ninth Circuit's approach were correct, the "remedy" of severing the exceptions and restoring a statute to content neutrality should have been considered—and necessarily *always* should be considered in such cases. Yet, not once has this Court ever hinted that severing the exceptions would be an appropriate remedy in these circumstances. Instead, in every case when this Court has held a broad prohibition on speech impermissibly content-based, it has struck down the restriction, not the exception. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 805 (2011); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563-64, 580 (2011); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190 (1999); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488-91 (1995); *City of Ladue v. Gilleo*, 512 U.S. 43, 53 (1994); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31 (1993); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 233 (1987); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 795 (1978).

2. The Ninth Circuit's contrary approach reflects a fundamental misunderstanding of this Court's First Amendment jurisprudence, and cannot be reconciled with the text and settled understanding of the First Amendment. The First Amendment prohibits laws "*abridging* the freedom of speech." U.S. Const. amend. I (emphasis added). It serves to promote speech and "rests on the assumption that the widest possible dissemination of information from diverse

and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). Almost by definition, the First Amendment cannot compel a court to *suppress* speech that Congress intentionally freed from regulation or to fashion judge-made penalties for speaking.

In holding otherwise, the Ninth Circuit improperly focused only on whether the government-backed debt collection exception, standing alone, was unconstitutional. But that was the wrong inquiry. As this Court has explained, "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992)). Instead, the underinclusiveness inquiry in the free-speech context is a judicial tool used to determine whether, in prohibiting specified speech, "the government is in fact pursuing the interest it invokes." *Brown*, 564 U.S. at 802. When a law "leaves appreciable damage to [a] supposedly vital interest unprohibited," it "cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon [protected] speech." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (citation omitted); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 520 (1981) ("[E]xceptions to the general prohibition are of great significance in assessing the strength of the city's interest in prohibiting billboards.").

In other words, a content-based exception to a general prohibition is not itself unconstitutional; it is evidence that the statute's *restriction* on speech violates the First Amendment. It is obviously no remedy at all to "sever" the evidence while leaving the

violation in place—indeed, to enlarge the scope of the constitutional violation. The only appropriate remedy for the First Amendment violation is to strike down the unjustified speech restriction itself.[3]

3. The Ninth Circuit's novel "severability" rule also raises serious practical and prudential concerns.

As a practical matter, severing a speech-promoting exception (and leaving intact the restriction) means "individuals would lose much of their incentives to challenge [unconstitutional] statutes." *Rappa v. New Castle Cty.*, 18 F.3d 1043, 1073 (3d Cir. 1994). After all, parties burdened by a speech restriction would have no reason to challenge it if the sole "remedy" were to impose the same burden on others. The overall impact therefore would be to insulate unconstitutional statutes from judicial review.

Severing exceptions to unconstitutional content-based prohibitions on speech also threatens the separation of powers, because it encourages—indeed requires—judges to "blue-pencil" laws enacted by elected officials. This Court has previously admonished lower courts not to "repair" "statute[s]" "through judicial decree," where the "appropriate remedy" is simply "to enjoin the speech restriction." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S.

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[3] This is fundamentally different from determining appropriate remedies for violations of the Equal Protection Clause, which prohibits the unequal treatment in and of itself. In the equal protection context, a challenger's rights generally can be vindicated either by severing the statute's exceptions so that its benefits or restrictions apply to the entire class, or striking the statute down so its benefits or restrictions apply to no one. *See, e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698-99 (2017).

803, 823 (2000). But that is exactly the error the Ninth Circuit committed here.

Indeed, the Ninth Circuit did not undertake a "severability" analysis at all. Severability doctrine asks a court to isolate an unconstitutional provision from the rest of a statute and inquire whether the other (constitutional) parts of the law can survive without it. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). But a speech-promoting exception *in isolation* is obviously not unconstitutional. It is only when the exception is assessed in the context of the rest of the statute (i.e. the restrictions) that the First Amendment is even implicated. What the Ninth Circuit did therefore was not "severability" but a crude rewriting of the statute to remove text that did not itself violate the First Amendment, and fashion a new law that prohibits more speech than the act it declared unconstitutional. That is precisely the kind of judicial legislation—under the guise of "severability"—that one member of this Court recently identified as deeply troubling. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1487 (2018) (Thomas, J., concurring) (noting that purported severability often "invites courts to rely on their own views about what the best statute would be").

Finally, severability is particularly inappropriate in cases like this one where the First Amendment is being invoked as a defense to liability in an enforcement action. Even if an unconstitutional statute could be "saved" prospectively by severance, it would be fundamentally unfair to apply that remedy retroactively, imposing penalties for violations of a statute that was concededly unconstitutional—and thus "void"—when the alleged liability was incurred.

See Ex parte Siebold, 100 U.S. 371, 376 (1879) ("An unconstitutional law is void, and is as no law."). Imposing after-the-fact liability for speech that was entirely lawful when uttered is irreconcilable with this Court's precedent and fundamental due-process principles. *See Grayned v. City of Rockford*, 408 U.S. 104, 107 n.2 (1972) (noting that, in a constitutional challenge to a content-based speech restriction courts "must consider the facial constitutionality of the ordinance *in effect when [the defendant] was arrested and convicted*" (emphasis added)); *cf. Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 n.24 (2017) (noting that a "defendant convicted under a law classifying on an impermissible basis may assail his conviction without regard to the manner in which the legislature might subsequently cure the infirmity").

B. The Ninth Circuit's Severability Ruling Conflicts With The Decisions Of Other Courts Of Appeals.

1. The Ninth Circuit's decision also sharply conflicts with decisions of other courts of appeals, which faithfully apply this Court's precedent to strike down restrictions—not exceptions—to statutes that unconstitutionally restrict speech based on content. *See, e.g.*, *Willson v. City of Bel-Nor*, 924 F.3d 995, 1000, 1004 (8th Cir. 2019); *Rappa*, 18 F.3d at 1074; *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1572 (11th Cir. 1993); *Beckerman v. City of Tupelo*, 664 F.2d 502, 513 (5th Cir. 1981); *Matthews v. Town of Needham*, 764 F.2d 58, 61 (1st Cir. 1985) (Rosenn, Breyer, and Torruella, JJ.). In such cases, courts have recognized that the exceptions "betray[] the frailty of any potential state interests" and thus render the underlying restriction unconstitutional. *Dana's R.R.*

Supply v. Att'y Gen., 807 F.3d 1235, 1250 (11th Cir. 2015).

The clearest conflict is between the Ninth Circuit's ruling and the Third Circuit's decision in *Rappa*. There, the Third Circuit addressed a Delaware ordinance prohibiting most signs near state highways but exempting "signs advertising local industries, meetings, buildings, historical markers and attractions." 18 F.3d at 1047. After holding that the statute was an unconstitutional content-based speech restriction, the court considered whether the exceptions could be severed in light of the Delaware Code's express severability clause—which stated that "[i]f any provision of the Code . . . is held invalid, such invalidity shall not affect the provisions or application of this Code . . . that can be given effect without the invalid provisions or application." *Id.* at 1072 (citation omitted).

Although the Third Circuit recognized that "the rest of the statute could surely function independently" if the exceptions were severed, it nonetheless concluded that severance would be inappropriate. *Id.* The court explained that the "severability inquiry here has a constitutional dimension," because eliminating the exception "would . . . restrict *more* speech than [the law] currently does." *Id.* at 1072-73. Noting that "no court ha[d] ever mandated the issuance of an injunction" in those circumstances, the Third Circuit held "that the proper remedy for content discrimination generally *cannot* be to sever the statute so that it restricts more speech than it did before—at least absent quite specific evidence of a legislative preference for elimination of the exception." *Id.* at 1073 (emphasis added). Thus, the court explained, "[a]bsent a severability clause

much more specific than [the clause at issue], we refuse to assume that the Delaware legislature would prefer us to sever the exception and restrict more speech than to declare [the restriction] invalid." *Id.*

The Third Circuit's holding in *Rappa* directly conflicts with the decision below. The Ninth Circuit here singularly relied on a severability clause in Section 708 of the Communications Act, which is virtually identical to the one in *Rappa*. *See* 47 U.S.C. § 608 ("If any provision of this chapter . . . is held invalid, the remainder of the chapter . . . shall not be affected thereby."). Under the Third Circuit's rule, such a general severability clause does not constitute the requisite "specific evidence" required to impose a judicial remedy that "restrict[s] more speech."[4] The Ninth Circuit's decision to give a remote severability clause virtually irrebuttable effect conflicts squarely with the governing rule in the Third Circuit, and warrants this Court's review.

2. Although the vast majority of circuits, and *every* decision of this Court, have rejected the Ninth Circuit's erroneous "severability" analysis, the decision below is not entirely alone. The Fourth Circuit too recently considered the constitutionality of the TCPA's content-based speech restrictions, in *American Association of Political Consultants, Inc. v.*

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[4] Section 708's severability clause is an especially weak basis for severing the exception here because it was enacted in 1934, *57 years before* the TCPA became law. *See* 47 U.S.C. § 608. As the Ninth Circuit itself has astutely noted elsewhere, a generalized severability clause enacted long before the unconstitutional provision at issue says little about the relevant congressional intent as to the specific provision. *W. States Med. Ctr. v. Shalala*, 238 F.3d 1090, 1097-98 (9th Cir. 2001), *aff'd sub nom. Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002).

FCC, 923 F.3d 159 (4th Cir. 2019). The Fourth Circuit concluded that the government-backed debt collection exception rendered the TCPA impermissibly content-based and unconstitutional, but, like the Ninth Circuit, also held that extending the ban by severing the exception was the appropriate remedy. *Id.* at 171. The Seventh and Eighth Circuits also have countenanced severing exceptions from state anti-robocall statutes in recent cases evaluating First Amendment challenges. *See Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 305 (7th Cir. 2017); *Gresham v. Swanson*, 866 F.3d 853, 854-55 (8th Cir. 2017); *see also Perrong v. Liberty Power Corp.*, No. 18-712 (NM), 2019 WL 4751936, at *6-7 (D. Del. Sept. 30, 2019).

These cases all arise in the context of robocalls, which are doubtless an unpopular form of speech. But the fact that certain speech is perceived as irritating or distasteful does not diminish its protection under the First Amendment. *See Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). And the reasoning of these decisions is, in any event, in no way limited to the robocall context. Rather, the same severability "cure" could apply to any statute that distinguishes speech based on content and exempts favored speech. There is no reason for this Court to wait until courts inevitably apply this misguided approach in other contexts. Review is warranted immediately.

C. The Question Presented Is Exceptionally Important.

The question presented is exceptionally important for several reasons. This case involves the invalidation of a federal statute on constitutional

grounds, which is ordinarily alone a sufficient basis for this Court's review. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2298 (2019). Review of the Ninth Circuit's severability ruling is more important still, because if not reversed it will have far-reaching consequences for the application of core First Amendment principles to innumerable speech-restrictive laws.

First, the Ninth Circuit's ruling alters the appropriate mode of analysis for addressing constitutional challenges to content-based laws, whether at the federal, state, or local level. As the extensive case-law arising from local ordinances demonstrates, such laws are ubiquitous across the nation and at every level of government. That is unsurprising given the strong incentives that governments have to exempt favored speech from general prohibitions. Under the Ninth Circuit's new rule, however, even where the exceptions demonstrate that speech restrictions are not justified by a sufficiently compelling governmental interest, the court can rescue the unconstitutional restrictions by rewriting the statute to eliminate its speech-promoting exceptions.

Indeed, the rule in the Ninth Circuit now is that whenever there is a broad severability provision—which is very frequently the case—a court *must* sever an unconstitutionally content-based law's exceptions and leave its restrictions in place. If not corrected, that extraordinary holding will practically eviscerate this Court's jurisprudence regarding content-based laws in the Ninth Circuit. Severability provisions, after all, are commonplace in legislation, and it is hard to imagine how any content-based speech restriction could *ever* be struck down under the severability framework now established by the Ninth

Circuit. Instead, such speech restrictions when successfully challenged will simply be extended.

Second, as a result, litigants in the Ninth Circuit will have no incentive to challenge unconstitutionally content-based laws. Why engage in months or years of costly litigation when, as here, even a successful First Amendment challenge will likely offer no practical relief? *Rappa*, 18 F.3d at 1073 ("[I]f courts were to sever exceptions from content discriminatory statutes, individuals would lose much of their incentives to challenge such statutes, because those whose speech is banned would often not benefit from the remedy."). And, knowing that no sensible litigant would embark on such an endeavor, governments (especially local governments more insulated from public scrutiny) will feel emboldened to enact self-serving content-based exceptions to general speech prohibitions. The effect will be to chill speech in a vast array of contexts, many of which will elude judicial review entirely.

Finally, even leaving aside these broader effects, the consequences of the Ninth Circuit's decision on the TCPA alone are sufficient to warrant review. TCPA actions are now brought with staggering frequency—with approximately four *thousand* new suits filed each year.[5] And recent jury awards for even a single class action have reached well over a *billion* dollars—with claimed damages sometimes in the hundreds of billions. *See, e.g.*, *Golan v.*

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[5] *WebRecon Stats for Dec 2018: 2018 Ends With A Whimper*, WebRecon LLC, https://webrecon.com/webrecon-stats-for-dec-2018-2018-ends-with-a-whimper/ (last visited Oct. 22, 2019) (indicating that 3,803 TCPA cases were filed in 2018 and 4,380 in 2017).

FreeEats.com, Inc., 930 F.3d 950, 962-63 (8th Cir. 2019) (affirming reduction of $1.6 billion in statutory damages).

The constitutionality of the TCPA's draconian liability provisions thus implicates fundamental First Amendment rights in thousands of cases. The Ninth Circuit agreed that the speech restrictions that lie at the heart of each of these thousands of suits violated the First Amendment. Yet, it held that no party sued under this unconstitutional statute can ever get relief. And, further, by severing the statute's government-backed debt collection exception in an enforcement suit seeking liability for *past* calls, the court opened the door to class action liability for vast numbers of private parties who placed calls to collect government-backed debt in reliance on that express statutory exception. Whatever the correct constitutional rule, the practical impacts of the Ninth Circuit's holding warrant this Court's intervention. It must be this Court—not the Ninth Circuit—that has the last word on a question of this enormous practical significance and constitutional magnitude.

D. This Case Is An Ideal Vehicle To Review The Question Presented.

This case is an ideal vehicle to review the question presented because it arises from concrete factual circumstances and involves no threshold issue with the potential to obstruct this Court's review.

The plaintiff in this case alleges that he received a call with an automated or prerecorded voice, and seeks statutory damages for himself and a class on that basis. The question presented was the only issue certified for interlocutory appeal, and was the sole basis for the decision below. This case thus raises the

question presented in the clearest and most straightforward manner possible.

In the Ninth Circuit, this case was coordinated for argument with *Duguid*, and Facebook has also petitioned this Court for review. But there are two reasons why this Court should consider this case in tandem with the Facebook petition.

First, the Facebook petition involves a threshold question of statutory interpretation that may prevent this Court from even reaching the constitutional question. Specifically, the Facebook petition involves an independent statutory challenge to the Ninth Circuit's construction of the ATDS term. That statutory question certainly warrants independent review, but if the Court were to decide it in Facebook's favor, it likely would have no occasion to address the broader question of the TCPA's constitutionality. In order to ensure its ability to address the constitutional issue (including with respect to calls, like those alleged here, that involve a prerecorded voice message but not an ATDS), this Court should grant this case in tandem.

Second, Facebook framed its First Amendment challenge differently. Whereas Facebook relied *only* on the government-backed debt collection exception, petitioners here relied on the TCPA's other content-based exceptions as well, including the exception for calls made by governmental entities and the numerous content-based exceptions created by the FCC. Granting this petition in tandem with the Facebook petition would thus permit this Court to consider all of the statute's various content-based exceptions—which is important because the *number* of exceptions may be a material consideration in deciding whether "severing" exceptions is a valid or

practical remedy. *See* CA9 Intervenor-Appellee U.S. Br. 29 (seeking to distinguish *Reed* based on the number of exceptions at issue).

In short, this case represents a straightforward and optimal vehicle for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1, 2019

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Steve GALLION, Plaintiff-Appellee,

v.

UNITED STATES of America, Intervenor-Appellee,

v.

Charter Communications, Inc.; Spectrum Management Holding Company, LLC, Defendants-Appellants.

No. 18-55667

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Argued and Submitted March 11, 2019 San Francisco, California

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Filed July 8, 2019

MEMORANDUM**

772 F. App'x 604

Charter Communications, Inc., and Spectrum Management Holding Company, LLC, (hereinafter "Charter") appeal the district court's denial of their Federal Rule of Civil Procedure 12(c) motion for judgment on the pleadings, which raises a First Amendment challenge to the Telephone Consumer Protection Act ("TCPA") in Steve Gallion's putative class action alleging TCPA violations. The district court held that the TCPA is constitutional, denied Charter's Rule 12(c) motion, and granted Charter's motion for interlocutory review. The parties are

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

familiar with the facts, and we do not recite them here. We have jurisdiction under 28 U.S.C. § 1292(b), and we affirm.

On interlocutory appeal, we review 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, 127 S.Ct. 1513, 167 L.Ed.2d 422 (2007). We review de novo the constitutionality of the TCPA. *Moser v. FCC*, 46 F.3d 970, 973 (9th Cir. 1995). Charter has standing to challenge the TCPA's government-debt exception provision as underinclusive. *Maldonado v. Morales*, 556 F.3d 1037, 1044 (9th Cir. 2009).

Consistent with *Duguid v. Facebook, Inc.*, No. 17-15320, 926 F.3d 1146, 2019 WL 2454853 (9th Cir. June 13, 2019), we hold that the 2015 amendment to the TCPA, which excepts calls "made solely to collect a debt owed to or guaranteed by the United States," is a content-based speech regulation that fails strict scrutiny, and thus is incompatible with the First Amendment. However, in *Duguid*, we severed the "debt-collection exception" and left intact the remainder of the statute. In light of *Duguid*, we affirm the district court's denial of Charter's Rule 12(c) motion for judgment on the pleadings, albeit on different grounds.

Charter's arguments that other provisions of the TCPA (the delegation to the Federal Communications Commission ("FCC") and the claimed government speakers' preference) are unconstitutional also fail. These provisions were part of the pre-2015 TCPA challenged and upheld as constitutional in *Moser*, 46 F.3d at 973, 975, and *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876–77 (9th Cir. 2014), *aff'd on other*

grounds, —— U.S. ——, 136 S. Ct. 663, 672, 193 L.Ed.2d 571 (2016). Because we conclude in *Duguid* that the unconstitutional debt-collection exception is severable, the TCPA is restored to its pre-2015 status and is constitutional under our precedents. *Duguid*, 926 F.3d at 1156–57, 2019 WL 2454853 at *8 ("Excising the debt-collection exception preserves the fundamental purpose of the TCPA and leaves us with the same content-neutral TCPA that we upheld—in a manner consistent with *Reed*—in *Moser* and *Gomez*.").

Charter also challenges several FCC orders promulgating exceptions to the TCPA. But the FCC's regulatory exceptions are not before this court. The proper venue to challenge an FCC order is *directly* in a court of appeals, not in the district court. 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a); *see Moser*, 46 F.3d at 973.

We do not reach Charter's argument that severing the unconstitutional portion of the TCPA raises retroactivity concerns because Charter raised this argument for the first time in its Reply Brief and later in a Rule 28(j) letter. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.")

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT,
C.D. CALIFORNIA

Steven GALLION

v.

CHARTER COMMUNICATIONS INC. et al.

Case No. 5:17–cv–01361–CAS(KKx)

|

Signed 02/26/2018

287 F.Supp.3d 920

Proceedings: (IN CHAMBERS)—DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS (Dkt. 18, filed September 26, 2017)

DEFENDANT'S MOTION TO STAY CASE (Dkt. 25, filed October 13, 2017)

Present: The Honorable CHRISTINA A. SNYDER

I. INTRODUCTION

On July 6, 2017, plaintiff Steve Gallion filed this putative class action against defendants Charter Communications, Inc., Spectrum Management Holding Company, LLC, and Does 1–10 alleging violations of the Telephone and Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. Dkt. 1 ("Compl."). Plaintiff alleges that defendants placed a call to his cellular phone without his "prior express consent" to sell or solicit their services using an "automatic telephone dialing system" and an "artificial or prerecorded voice" in violation of 47 U.S.C. § 227(b)(l)(A)(iii). Plaintiff asserts claims for negligent and willful or knowing violations of the TCPA and seeks statutory damages on behalf of

himself a nationwide class of similarly situated consumers.

On September 26, 2017, defendants filed the instant motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), raising a facial First Amendment challenge to the TCPA. Dkt. 18 ("MJP"). On January 9, 2018, the United States of America (the "government") intervened for the limited purpose of defending the TCPA's constitutionality. Dkt. 38 ("Gov't Mot."). On January 12, 2018, plaintiff filed an opposition. Dkt. 39 ("MJP Opp'n"). On January 22, 2018, defendants filed a consolidated reply. Dkt. 42 ("MJP Reply").

On October 13, 2017, defendants filed a motion to stay the proceedings in this case pending the later of (1) decision of the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in ACA Int'l v. Fed. Commc'ns Comm'n, No. 15–211 (D.C. Cir.) ("ACA International"), or (2) the decision of this Court on the motion for judgment on the pleadings. Dkt. 25 ("Stay Mot."). On October 23, 2017, plaintiff filed an opposition, dkt. 29 ("Stay Opp'n"); and defendants filed a reply on October 30, 2017, dkt. 32 ("Stay Reply"). On February 5, 2018, the Court held a hearing on the motions. Having carefully considered the parties' arguments, the Court finds and concludes as follows.

II. BACKGROUND

The Telephone Consumer Protection Act of 1991, Pub. L. No. 102–243, 105 Stat. 2394–2402 (1991), was enacted by Congress "to protect the privacy interests of residential telephone subscribers." S. Rep. No. 102–178, at 1 (1991). Section 227(b)(1)(A)(iii) of the TCPA provides, in relevant part:

> It shall be unlawful for any person . . . 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 telephone number assigned to a . . . cellular telephone service ... unless such call is made solely to collect a debt owed to or guaranteed by the United States.

47 U.S.C. § 227(b)(l)(A)(iii). Congress added the final clause of this provision, the government-debt exception, as part of the Bipartisan Budget Act of 2015, Pub. L. No. 114–74, 129 Stat. 584, 588 (2015). The TCPA also authorizes the FCC to promulgate rules exempting calls where doing so would "not adversely affect the privacy rights" that the law seeks to protect. See 47 U.S.C. § 227(b)(2)(B)(ii), (b)(2)(C). Consumers who receive calls prohibited by section 227(b)(l)(A)(iii) may recover the greater of their actual monetary loss or $500 per violation and treble damages where a violation is willful or knowing. Id. § 227(b)(3).

An "automatic telephone dialing system" ("ATDS") is defined as "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." Id. § 227(a)(1). On July 10, 2015, the FCC issued an Omnibus Declaratory Ruling and Order addressing, among other issues, the definition of ATDS. In re Rules & Regs. Implementing the TCPA of 1991, 30 F.C.C.R. 7961, 7974 (July 10, 2015). Finding that Congress intended a broad definition of ATDS, the FCC interpreted the term "capacity" to include equipment that lacks the

"present ability" to dial randomly or sequentially. Id. at 2974. In other words, "capacity" was broadly interpreted to include equipment that had potential or future capacity to store, produce, and dial random or sequential numbers. Id. After the FCC issued its ruling, nine companies filed petitions for review, which were consolidated into a single appeal to the D.C. Circuit in ACA International. The petitioners are requesting that the D.C. Circuit vacate the FCC's interpretation of the term "capacity" as used in the definition of an ATDS pursuant to the court's authority under the Hobbs Act, 28 U.S.C. § 2342. Oral argument took place on October 19, 2016, but no decision has been issued.

III. LEGAL STANDARDS

A. Motion for Judgment on the Pleadings

Under Rule 12(c) of the Federal Rules of Civil Procedure, a party may move for judgment on the pleadings at any time after the pleadings are closed, so long as the motion is filed in sufficient time that it will not delay trial. "For the purposes of the motion, the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false." Hal Roach Studios, Inc. v. Richard Feiner and Co. Inc., 896 F.2d 1542, 1550 (9th Cir. 1990). "Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." Id.

In deciding a motion for judgment on the pleadings, the court generally is limited to the pleadings and may not consider extrinsic evidence.

See Fed. R. Civ. P. 12(c) (stating that a Rule 12(c) motion for judgment on the pleadings should be converted into a Rule 56 motion for summary judgment if matters outside the pleadings are considered by the court). A district court may, however, consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, a district court may consider a document if the complaint "necessarily relie[s]" on it, and the authenticity of the document is not challenged. Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998).

B. Motion to Stay Case

A district court "has broad discretion to stay proceedings as an incident to its power to control its own docket." Clinton v. Jones, 520 U.S. 681, 706–07, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997) (citing Landis v. North Am. Co., 299 U.S. 248, 57 S.Ct. 163, 81 L.Ed. 153 (1936)). When considering whether to stay proceedings, courts consider (1) the possible damage which may result from the granting of a stay; (2) the hardship or inequity which a party may suffer in being required to go forward; and (3) the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay. Lockyer v. Mirant Corp., 398 F.3d 1098, 1110 (9th Cir. 2005) (citation omitted). However, "if there is even a fair possibility that the stay . . . will work damage to someone else, the stay may be inappropriate absent a showing by the moving party of hardship or inequity." Dependable Highway Exp., Inc., v. Navigators Ins. Co., 498 F.3d 1059, 1066 (9th Cir. 2007) (internal

quotation marks and citation omitted). The party seeking a stay bears the burden of establishing its need. Clinton, 520 U.S. at 708, 117 S.Ct. 1636 (citing Landis, 299 U.S. at 255, 57 S.Ct. 163).

IV. DISCUSSION

A. Motion for Judgment on the Pleadings

Defendants move for judgment on the pleadings on the ground that section 227(b)(l)(A)(iii) of the TCPA violates the First Amendment because it contains content- and speaker-based restrictions on speech and fails strict scrutiny. Defendants' facial constitutional challenge is based primarily on the 2015 amendment to the TCPA establishing a government-debt exception and the Supreme Court's recent decision in Reed v. Town of Gilbert, —— U.S. ——, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015). Prior to the 2015 amendment and Reed, the Ninth Circuit twice considered and upheld the constitutionality of the TCPA as a valid, content-neutral speech regulation under intermediate scrutiny. See Gomez v. Campbell–Ewald Co., 768 F.3d 871, 876 (9th Cir. 2014), aff'd on other grounds, —— U.S. ——, 136 S.Ct. 663, 193 L.Ed.2d 571 (2016); Moser v. FCC, 46 F.3d 970 (9th Cir. 1995).

No appellate court has since considered the constitutionality of the TCPA. However, four district courts—including two in the Northern District of California—have addressed the issue and held that section 227(b)(l)(A)(iii) is content based in light of the government-debt exception and Reed but nevertheless upheld the law under strict scrutiny. See Brickman v. Facebook, Inc., 230 F.Supp.3d 1036 (N.D. Cal. 2017); Holt v. Facebook, Inc., 240 F.Supp.3d 1021 (N.D. Cal. 2017); Mejia v. Time

Warner Cable Inc., No. 15-CV-6445 (JPO), 2017 WL 3278926, at *14 (S.D.N.Y. Aug. 1, 2017); Greenley v. Laborers' Int'l Union of N. Am., 271 F.Supp.3d 1128 (D. Minn. 2017). Both Brickman and Holt are currently pending on interlocutory appeal to the Ninth Circuit. For the following reasons, the Court finds these decisions persuasive and accordingly denies defendants' motion.

i. Defendants' Standing

As a threshold matter, the government argues that defendants lack "standing" to challenge the TCPA because the government-debt exception is severable. Gov't Mot. at 8. Consequently, the government contends that invalidating the exception would have no effect on defendants' liability under the TCPA, and therefore defendants' "injuries would not be redressed." Id. at 9; see Brickman, 230 F.Supp.3d at 1047 (finding that "even assuming this newly-added exception were to be invalid, it would not deem the entire TCPA to be unconstitutional because the exception would be severable from the remainder of the statute.") (citing INS v. Chadha, 462 U.S. 919, 931–32, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) ("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.")).

The Court doubts whether the requirements of injury in fact, causation, and redressability under Article III apply here because "the issue of standing in civil litigation normally arises in the context of the plaintiff's standing to sue, and not in the defendant's standing to defend against suit." Yellow Pages Photos, Inc. v. Ziplocal, LP, 795 F.3d 1255, 1265 (11th Cir. 2015); see 13A Charles Alan Wright & Arthur R.

Miller, Federal Practice and Procedure § 3531 (3d ed. 2014) (noting that the party focused upon is "almost invariably the plaintiff" and that "ordinarily the role of defendants is considered only in determining whether they have caused the injury complained of and whether an order directed to them will redress that injury"). Indeed, all of the cases cited by the government involve the issue of whether plaintiffs have standing to challenge a severable statute on First Amendment grounds. See Gov't Mot. at 9.

The court in Mejia also rejected this standing argument, finding that a TCPA defendant whose liability would not be eliminated by striking down the government-debt exception nonetheless had standing to challenge the statute's "underinclusiveness—that is, imposing liability for [defendant's] calls but not for analogous calls placed for the purposes of debt collection." 2017 WL 3278926, at *12 (citing Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 7–8, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989) (rejecting similar standing argument because it would "effectively insulate underinclusive statutes from constitutional challenge")). The Ninth Circuit has also "long held that plaintiffs have standing to challenge exceptions" to laws regulating speech "as underinclusive when the exception does not apply to the plaintiff." Maldonado v. Morales, 556 F.3d 1037, 1044 (9th Cir. 2009). Here, defendants' primary argument is that section 227(b)(l)(A)(iii) is underinclusive. See MJP at 18–22. Accordingly, defendants have standing to challenge the TCPA.

ii. Whether Section 227(b)(l)(A)(iii) is Content Based

The Supreme Court in Reed affirmed that "[c]ontent-based laws—those that target speech based

on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." 135 S.Ct. at 2226. In that case, the town of Gilbert, Arizona passed an ordinance prohibiting the display of outdoor signs without a permit, but exempted 23 categories of signs including ideological signs, political signs, and temporary directional signs. Id. at 2224. The ordinance imposed different size, placement, and time restrictions depending on the category. Id. at 2224–25. In analyzing the ordinance's constitutionality, the Court explained that courts must first determine whether the law is content neutral on its face. Id. at 2228. The Court explained that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." Id. at 2227. Such is the case "regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." Id. at 2228 (internal quotation marks and citation omitted).

Applying these principles, the Court held that the ordinance was content based because its restrictions "depend entirely on the communicative content of the sign." Id. Even assuming the town's asserted interests in preserving its aesthetic appeal and promoting traffic safety were compelling governmental interests, the Court held that the ordinance failed strict scrutiny because it was "hopelessly underinclusive." Id. at 2231. Specifically, the Court found that temporary direction signs were "no greater an eyesore" than ideological or political ones; that the ordinance allowed "unlimited

proliferation" of large ideological signs while strictly limiting the number and size of smaller signs; and that the town offered no reason to believe that directional signs posed a greater threat to traffic safety than ideological or political signs. Id. at 2231–32.

In light of Reed, defendants argue that strict scrutiny applies to the TPCA because section 227(b)(1)(A)(iii) both (1) draws facial distinctions based on the content of the message, and (2) discriminates among favored and disfavored speakers. MJP at 3–13. Defendants' primary argument is that, by virtue of the government-debt exception, section 227(b)(l)(A)(iii) facially discriminates based on a call's content because it imposes liability for autodialed and prerecorded calls placed by private actors without the recipient's prior express consent "unless" the calls are "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). In other words, "a private debt collection agency may call the same consumer twice in a row, once to collect a private, government-guaranteed loan and once to collect a similar private loan not guaranteed by the government, but, absent prior express consent, may place only the first call using an autodialer or prerecorded voice." MJP at 4. Defendants argue that "this is a prototypical, 'facial' content-based restriction that 'draws distinctions based on the message a speaker conveys' and is subject to strict scrutiny, regardless of Congress's motive, content-neutral justification or lack of animus toward the ideas expressed." MJP at 4 (quoting Reed, 135 S.Ct. at 2227–28).

Plaintiff and the government argue that the government-debt exception does not trigger strict scrutiny because it is "relationship based, rather than content based." Gov't Mot. at 10. Plaintiff explains that the "exception is more properly viewed as based on the existence of a relationship between two parties—a federal government creditor and a debtor—that justifies creation of an implied-in-law consent to the placement of the call, rather than as a regulation of the specific message of a call." MJP Opp'n at 11. Plaintiff and the government rely on Mey v. Venture Data, LLC, 245 F.Supp.3d 771 (N.D. W. Va. 2017), which upheld the TCPA under intermediate scrutiny—reasoning that section 227(b)(l)(A)(iii)'s exceptions for emergency calls, calls made with the prior consent of the recipient, and calls made to collect government-backed debt are each "are based on the relationship of the speaker and recipient of the message rather than the content of the message." Id. at 792 (citation omitted); see also Patriotic Veterans, Inc. v. Zoeller, 845 F.3d 303, 304–05 (7th Cir. 2017) (exceptions to the Indiana anti-robocall statute for "[m]essages from school districts to students, parents, or employees," were not content based because they "depend on the relation between the caller and the recipient, not on what the caller proposes to say."); Van Bergen v. State of Minn., 59 F.3d 1541, 1550 (8th Cir. 1995) (holding that Minnesota's anti-robocall statute with "central provision" that "applies to all callers, with three exceptions ... based on relationship rather than content" was not content based). The government maintains that like the exceptions in Patriotic Veterans and Van Bergen, the government-debt exception is a "relationship-based carve-out from a

content-neutral restriction, and therefore does not render the TCPA content based." Gov't Mot. at 11.

Plaintiff and the government's theory that the government-debt exception is relationship rather than content-based has been considered and rejected by Brickman, 230 F.Supp.3d at 1045 and Greenley, 271 F.Supp.3d at 1148-49. The Court agrees with the reasoning of these decisions. First, "[t]he plain language of the exception makes no reference whatsoever to the relationship of the parties." Brickman, 230 F.Supp.3d at 1045. In contrast, the state statutes at issue in Patriotic Veterans and Van Bergen "expressly exempted calls from regulation based on a caller's relationship to the recipient, not content." Id. The court in Greenley noted that the decision relied upon by plaintiff and the government, Mey, 245 F.Supp.3d 771, "provides no written analysis to support the conclusion that the TCPA's exceptions are content-neutral." Greenley, 271 F.Supp.3d at 1148-49. The court in Greenley also recognized that the government-debt exception "in one sense it *is* relationship based—it arises from a creditor-debtor relationship between the government and the recipient of the communication." 271 F.Supp.3d at 1148-49. However, "that 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. Defendants indicate, for example, that a private debt collection agency may call a debtor to collect a private, government-guaranteed loan *but not* a similar private loan. MJP at 4. "This content-based component effectively elevates government-debt communications above other communications, such as messages that pertain

to private debts or messages that do not pertain to debts at all." Greenley, 271 F.Supp.3d at 1148-49.

Accordingly, the Court agrees with these recent district court opinions in concluding that, under Reed, the debt-collection exception "require[s] a court to examine the content of the message in order to determine if a violation of the TCPA has occurred," rendering section 227(b)(1)(A)(iii) content-based on its face and therefore subject to strict scrutiny.[1] Brickman, 230 F.Supp.3d at 1045; see also Holt, 240 F.Supp.3d at 1032; Mejia, 2017 WL 3278926, at *14; Greenley, 271 F.Supp.3d at 1149-50

iii. Application of Strict Scrutiny to Section 227(b)(l)(A)(iii)

Because section 227(b)(l)(A)(iii) imposes a content-based restriction on speech, it is invalid under the First Amendment unless it survives strict scrutiny, "which requires the [g]overnment to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." Reed, 135 S.Ct. at 2231 (citation omitted). Although "it is the rare case" where a speech restriction can satisfy strict scrutiny, the Supreme Court has sought to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" Williams–Yulee v. Florida Bar, —— U.S.

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[1] Because the Court concludes that the TCPA is content-based on its face in light of the government-debt exception and Reed, the Court need not reach defendants' alternative arguments and counter-arguments raised by plaintiff and the government. Defendants also contend that: (1) section 227(b)(l)(A)(iii) imposes a speaker-based preference for all government messages over private messages; (2) the statute regulates substantially more than commercial speech; and (3) the statute authorizes the FCC to promulgate further content-based exceptions. See MJP at 5–13.

——, 135 S.Ct. 1656, 1665–66, 191 L.Ed.2d 570 (2015) (international quotation marks and citations omitted).

a. Compelling Government Interest

The Court agrees with plaintiff, the government, and the consensus view among district courts that the TCPA serves a compelling government interest in protecting residential privacy from the nuisance of unsolicited, automated telephone calls. See Brickman, 230 F.Supp.3d at 1045–46; Holt, 240 F.Supp.3d at 1033; Mejia, 2017 WL 3278926, at *16; Greenley, 271 F.Supp.3d at 1149-50. Congress enacted the TCPA, which was supported by extensive congressional findings, in relevant part "to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home." S. Rep. No. 102–178, at 1 (1991); see also Moser, 46 F.3d at 972 (following extensive hearings, Congress "concluded that telemarketing calls to homes constituted an unwarranted intrusion upon privacy.").

"The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." Carey v. Brown, 447 U.S. 455, 471, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). "One important aspect of residential privacy is protection of the unwilling listener. . . . Individuals are not required to welcome unwanted speech into their own homes and . . . the government may protect this freedom." Frisby v. Schultz, 487 U.S. 474, 484–85, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). In Gomez, the Ninth Circuit extended the government's interest in protecting residential privacy to cell phones, finding "no evidence that the government's interest in privacy ends at home"

because "the nature of cell phones renders the restriction . . . all the more necessary to ensure that privacy" and "prohibiting calls to land lines alone would not adequately safeguard the stipulated interest in residential privacy." 768 F.3d at 876–77; see also Patriotic Veterans, 845 F.3d at 305 ("No one can deny the legitimacy of the state's goal: Preventing the phone (at home or in one's pocket) from frequently ringing with unwanted calls."); cf. Riley v. California, —— U.S. ——, 134 S.Ct. 2473, 2494–95, 189 L.Ed.2d 430 (2014) ("Modem cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'") (quoting Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886))).

In addition to arguing that "there is no compelling 'privacy' interest in the context of consumers' receipt of mobile phone calls," defendants maintain that the TCPA fails strict scrutiny because section 227(b)(1)(A)(iii)'s government-debt exception does not serve a compelling interest. MJP at 14–17. The Court agrees with the government that this frames this inquiry too narrowly. The question is whether the TCPA as a whole serves a compelling government interest, not whether each provision of the statute does so independently. See Gov't Mot. at 18. Even so, the court in Mejia reasoned that "the federal government's interest in collecting debts owed to it supports the finding of a particularly compelling interest in exempting calls made for the purposes of collecting government debts." 2017 WL 3278926, at *16 (citing Clearfield Trust Co. v. United States, 318 U.S. 363, 366, 63 S.Ct. 573, 87 L.Ed. 838 (1943)); see also Valot v. Se. Local Sch. Dist. Bd. of Educ., 107 F.3d 1220, 1227 (6th Cir. 1997) ("Protecting the public fisc

ranks high among the aims of any legitimate government.").

Accordingly, the Court finds that the TCPA serves a compelling government interest in promoting and protecting residential privacy. See Brickman, 230 F.Supp.3d at 1045–16; Holt, 240 F.Supp.3d at 1033; Mejia, 2017 WL 3278926, at *16; Greenley, 271 F.Supp.3d at 1149-50.

b. Narrow Tailoring

In order to withstand strict scrutiny, a law that serves a compelling government interest also must be narrowly tailored to achieve that interest. Reed, 135 S.Ct. at 2231. "If a less restrictive alternative would serve the [g]overnment's purpose, the legislature must use that alternative." United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). Relatedly, the restriction cannot be overinclusive by "unnecessarily circumscrib[ing] protected expression." Republican Party of Minn. v. White, 536 U.S. 765, 775, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (citation omitted). Nor can the restriction be underinclusive by "leav[ing] appreciable damage to [the government's] interest unprohibited." Reed, 135 S.Ct. at 2232 (quoting White, 536 U.S. at 780, 122 S.Ct. 2528). Nevertheless, strict scrutiny requires that a content-based restriction "be narrowly tailored, not that it be 'perfectly tailored.'" Williams–Yulee, 135 S.Ct. at 1671 (quoting Burson v. Freeman, 504 U.S. 191, 209, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992)). Here, defendants argue that the TCPA cannot survive strict scrutiny because the law is both "hopelessly underinclusive and overinclusive," and because there are less restrictive means of achieving the government's interest. MJP at 18–24.

The Supreme Court has recognized that although "underinclusivity raises a red flag, the First Amendment imposes no freestanding 'underinclusiveness limitation.'" Williams–Yulee, 135 S.Ct. at 1668. After all, "[i]t is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech." Id. (emphasis in original). However, underinclusiveness "can raise doubts as to whether the government is pursuing an interest it invokes or whether the statute furthers a compelling interest." Brickman, 230 F.Supp.3d at 1045 (citing Williams–Yulee, 135 S.Ct. at 1668).

Defendants argue that the government-debt exception renders the TCPA "hopelessly underinclusive" under Reed: "[a] statutory scheme that contains a sweeping prohibition on all autodialed and prerecorded voice calls by private parties, but nevertheless permits *equally or much more intrusive* calls to be placed by the government, its agents, and by private actors collecting private, government-backed debts . . . does not rationally serve any privacy interest at all." MJP at 19. Defendants cite a variety of sources, including a letter from two senators to the FCC chairman, for the proposition that private debt-collection calls relating to government-backed loans are "prolific and raise *much more pervasive* privacy concerns than many other types of restricted calls." Id. at 19–20. Accordingly, defendants argue that the government-debt exception "inflicts more than just 'appreciable damage' to subscribers' privacy interests." Id. at 20 (citing Reed, 135 S.Ct. at 2232).

In contrast to the ordinance in Reed, which featured numerous insufficiently supported exceptions and allowed the "unlimited proliferation"

of certain signs, see 135 S.Ct. at 2231–32, the TCPA's "government debt carve-out is a narrow exception from liability in furtherance of a compelling interest." Mejia, 2017 WL 3278926, at *17. As the government indicates, the exception is cabined by the TCPA's express grant of authority to the FCC to "restrict or limit the number and duration of calls made . . . to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(2)(H). This provision allows "the FCC to craft limits on the exception to balance the need for privacy with the need to protect the public fisc." Gov't Mot. at 21. The FCC has issued a proposed rule limiting the number of federal debt collection calls to three within a 30–day period and limiting call lengths to 60 seconds or less, among other restrictions. See FCC 2016 Order, 31 FCC Red. at 9088–94. In addition, the exception is inherently "limited by the fact that such calls would only be made to those who owe a debt to the federal government." Brickman, 230 F.Supp.3d at 1047. The Court agrees with the reasoning in Mejia and Brickman, and accordingly finds that the narrow, FCC-regulated government-debt exception does not do "appreciable damage" to the privacy interests underlying the TCPA. Reed, 135 S.Ct. at 2232.

Defendants additionally argue that the TCPA is overinclusive because there are a "host of less restrictive alternatives" that would allow the government to achieve its interests, such as time-of-day limitations, mandatory disclosures of a caller's identity, and do-not-call lists. MJP at 23–24. These alternatives would not, however, "be at least as effective in achieving the legitimate purpose that statute was enacted to serve." Reno v. Am. Civil Liberties Union, 521 U.S. 844, 874, 117 S.Ct. 2329,

138 L.Ed.2d 874 (1997). As the court explained in Brickman:

> Time-of-day limitations would not achieve the same privacy objectives because even though such a restriction may designate the span of time in which callers can intrude on an individual's privacy, it would also designate a time for intrusive phone calls. Mandatory disclosure of a caller's identity and disconnection requirements would also not be as effective in achieving residential privacy because these would not prevent the privacy intrusion from the phone call in the first place. Do-not-call lists would also not be a plausible less restrictive alternative because placing the burden on consumers to opt-out of intrusive calls, rather than requiring consumers to opt-in, would obviously not be as effective in achieving residential privacy.

Brickman, 230 F.Supp.3d at 1048–49; accord Holt, 240 F.Supp.3d at 1034; Greenley, 271 F.Supp.3d at 1150-51; see also Mejia, 2017 WL 3278926, at *17 ("these alternatives do not fully foreclose the possibility that autodialier or prerecorded voice calls will be made to non-consenting consumers (even if they would keep such calls short, in a narrow window of time, or fully disclosed), and thus may not sufficiently further Congress's compelling interests in privacy, while also ensuring the collection of government debt.")

Notwithstanding these authorities, defendants maintain that plaintiff and the government have failed to meet their burden of "advancing *evidence* that no less restrictive alternative is available." MJP

at 18; MJP Reply at 30–31. Defendants rely primarily on Cahaly v. Larosa, 796 F.3d 399 (4th Cir. 2015), a case in which the Fourth Circuit struck down a state anti-robocall statute on summary judgment because, assuming the state's interest in residential privacy was compelling, the government failed to prove the statute was narrowly tailored. Id. at 405–06. However, here, at the pleading stage, the Court finds plaintiff and the government's reliance on the analysis in Brickman and Mejia sufficient to demonstrate that no less restrictive alternatives exist. See Holt, 240 F.Supp.3d at 1034.

In conclusion, the Court finds that section 227(b)(1)(A)(iii)'s government-debt exception facially renders the TCPA a content-based restriction on speech under Reed; however, the TCPA furthers a compelling government interest in protecting privacy and is narrowly tailored to achieve that interest. See Brickman, 230 F.Supp.3d at 1045–49; Holt, 240 F.Supp.3d at 1033–4; Mejia, 2017 WL 3278926, at *14–17; Greenley, 271 F.Supp.3d at 1148-51. Accordingly, defendants' facial First Amendment challenge fails, and the motion for judgment on the pleadings is **DENIED.**

At the hearing on February 5, 2018, defendants moved to certify this order for interlocutory review pursuant to 28 U.S.C. § 1292(b). A district court may certify under section 1292(b) if the following three requirements are met: "(1) there is a controlling question of law, (2) there are substantial grounds for difference of opinion, and (3) an immediate appeal may materially advance the ultimate termination of the litigation." In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982). In both Brickman and Holt, the courts granted the defendant's motions

to certify the question of whether the TCPA, as a content-based regulation of speech, survives strict scrutiny. See Brickman v. Facebook, Inc., No. 16-cv-00751-TEH, 2017 WL 1508719 (N.D. Cal. Apr. 27, 2017); accord Holt v. Facebook, Inc., No. 16–cv–02266–JST (N.D. Cal. May 2, 2017). The Court agrees that (1) the constitutionality of the TCPA is a controlling question of law; (2) there are substantial grounds for difference of opinion because it is plausible that other courts could have reached the opposite result given that the question presented is a novel issue and strict scrutiny imposes a high bar; and (3) immediate appeal would advance the ultimate termination of the litigation. See Brickman, 2017 WL 1508719, at *2–4. Accordingly, the Court **GRANTS** defendants' motion for interlocutory review.

B. Motion to Stay Case

Defendants move to stay this action pending a final decision by the D.C. Circuit in ACA International. Stay Mot. at 1. Numerous district courts have considered whether to stay TCPA actions pending the outcome of ACA International, and the majority have also determined that a stay is warranted. For example, in Fontes v. Time Warner Cable Inc., No. CV14-2060-CAS( ), 2015 WL 9272790 (C.D. Cal. Dec. 17, 2015), this Court stayed a TCPA action concerning pre-recorded phone calls allegedly made from an ATDS. Id. at *1. The Court found a "legitimate possibility that the [D.C. Circuit] Court of Appeals may overturn" the FCC's final order, and because the issues in ACA International, including the definition of an ATDS, "could potentially be dispositive of the outcome in" that case, "the Court [found] that it is prudent to await further guidance from the D.C. Circuit." Id. at *4. The Court

determined that a stay could save "substantial efforts by the parties" and avoid "the risk of wasting the resources of the Court." Id. at *5. Similarly, here, after balancing the interests of judicial economy against potential prejudice to the parties, the Court concludes that a stay is appropriate.

i. Simplifying Issues and Promoting Judicial Economy

The Court agrees with defendants that a stay will simplify the issues in this case and conserve judicial resources. The D.C. Circuit's decision in ACA International will significantly impact this case by clarifying the controlling legal standard regarding what constitutes an ATDS. While an opinion of the D.C. Circuit is normally not binding authority on this Court, it has exclusive jurisdiction over the FCC's final order under the Hobbs Act, 28 U.S.C. § 2342, and therefore the decision will be dispositive on numerous issues including the scope of liability based on the use of an ATDS. See Gage v. Cox Commc's, Inc., No. 2:16-cv-02708-KJD-GWF, 2017 WL 1536220, at *2 (D. Nev. Apr. 27, 2017). Plaintiff contends that ACA International is inapposite because the TCPA is worded disjunctively and therefore an individual may be held liable for either "using any automatic telephone dialing system *or* an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added). Plaintiff argues that because the complaint alleges defendants also used an "artificial or prerecorded voice," plaintiff is not required to prove that defendants used an ATDS, and accordingly ACA International is "wholly irrelevant." Stay Opp'n at 7. However, the D.C. Circuit's decision will significantly impact one ground for defendants' potential liability in this putative class action and will at least define

the scope of discovery regarding ATDS. Accordingly, the Court finds that these savings in judicial resources militate in favor of granting a stay.

ii. Potential Prejudice to the Non–Moving Party

The Court further finds that the potential prejudice to plaintiff is not substantial, particularly because, in all likelihood, the stay will be brief. This Court granted a similar stay in Fontes nearly two years ago when the D.C. Circuit had just set a briefing schedule in ACA International. Briefing concluded in February 2016 and the D.C. Circuit heard oral arguments in October 2016. It is thus reasonable to expect that the decision will be issued soon.[2] Plaintiff contends that further appeals of ACA International could delay his case "for years." Stay Opp'n at 9. However, defendants are only requesting a stay until a decision is issued by the D.C. Circuit panel in the current appeal; defendants are not seeking a stay through en banc review or a potential appeal to the Supreme Court. Stay Reply at 9. Accordingly, the Court expects that the duration of the stay will be short. Plaintiff further argues that he will be prejudiced due to "diminished memory and lack of available witnesses," including because of "company turnover" at defendants' offices. Stay Opp'n at 8, 15. Plaintiff posits that defendants "may have hired a

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[2] According to the latest statistics, the median time between oral argument and a final disposition for civil appeals in the D.C. Circuit is 127 days. See Administrative Office of the United States Courts, Judicial Business of the United States Courts, Table B–4A (September 30, 2016) available at http://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_0930.2016.pdf.

lead generator" to place calls to class members, and because these companies "typically go out of business and disappear quickly," there is a risk of losing evidence. Id. at 10–11. Notwithstanding the lack of evidentiary support for these assertions, the Court finds that these concerns are largely mitigated by the anticipated short duration of the stay.

iii. Hardship or Inequity to the Proponent of the Stay

Although, as plaintiff emphasizes, being required to defend a suit is not, by itself, sufficient to merit a stay, see Lockyer, 398 F.3d at 1112, "the burden of proceeding with this litigation potentially unnecessarily is nonetheless a factor in favor of granting a stay . . . in conjunction with the savings to judicial resources . . . that the Court may consider, even if it is not dispositive." Reynolds v. Geico Corp., No. 2:16-cv-01940-SU, 2017 WL 815238, at *5 (D. Or. Mar. 1, 2017) (citing Small v. GE Capital, Inc., No. EDCV 15–2479 JGB (DTBx), 2016 WL 4502460, at *3 (C.D. Cal. June 9, 2016) ("[F]urther litigation absent a ruling may be unnecessary and will require both parties and the court to spend substantial resources."). The Court finds that these substantial savings in judicial resources outweigh any potential prejudice to plaintiff in waiting for a decision from the D.C. Circuit.

In conclusion, the Court finds that the aforementioned factors weigh in favor of granting a stay. The D.C. Circuit's decision in ACA International may limit the scope of defendants' liability, and at the very least, will determine the scope of discovery and conserve both the parties' and this Court's resources by clarifying the law. Although the possibility of prejudice to plaintiff weighs against

a stay, the Court finds that the countervailing factors tip the balance, particularly because the duration of the stay is expected to be short. Accordingly, defendants' request for a stay is **GRANTED.**

At the hearing on February 5, 2018, plaintiff indicated that defendants have disclosed the identity of a third party that placed calls at issue in this case. Plaintiff requests a limited exception to the stay to allow plaintiff to issue a subpoena to the third party. However, because plaintiff has not made a sufficient showing that there is a risk of losing evidence, the Court declines to grant plaintiff an exception to the stay.

V. CONCLUSION

For the foregoing reasons, the Court **DENIES** defendants' Rule 12(c) motion for judgment on the pleadings. However, the Court **GRANTS** defendants' motion to certify the Court's order for interlocutory review pursuant to 28 U.S.C. § 1292(b). The Court also **GRANTS** defendants' motion to stay.

Accordingly, this action is hereby **STAYED** pending a ruling by the D.C. Circuit Court of Appeals in ACA International, No. 15–1211. If the Ninth Circuit grants defendants permission to appeal this Court's order, proceedings in this Court shall be **STAYED** pending a decision on that appeal.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
SEP 16, 2019
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

STEVE GALLION, Plaintiff-Appellee, v. UNITED STATES OF AMERICA, Intervenor-Appellee, CHARTER COMMUNICATIONS, INC.; SPECTRUM MANAGEMENT HOLDING COMPANY, LLC, Defendants-Appellants.	No. 18-55667 D.C. No. 5:17-cv-01361-CAS-KK Central District of California, Riverside ORDER

Before WALLACE, SILER,* and McKEOWN, Circuit Judges.

The panel has voted to deny the petitions for panel rehearing, filed by Appellants Charter Communications, Inc. and Spectrum Management

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Holding Company, LLC (Dkt No. 58) and Appellee United States of America (Dkt No. 61).

The full court has been advised of the petitions for rehearing and rehearing en banc, filed by Appellants Charter Communications, Inc. and Spectrum Management Holding Company, LLC (Dkt No. 58) and Appellee United States of America (Dkt No. 61), and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for panel rehearing and the petitions for rehearing en banc are denied.

U.S. CONST. AMEND. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

47 U.S.C. § 227

Title 47. Telecommunications
Chapter 5. Wire or Radio Communication
Subchapter II. Common Carriers
Part I. Common Carrier Regulation

§ 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)).[1]

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[1] So in original. Second closing parenthesis probably should not appear.

(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.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3

times the amount available under subparagraph (B) of this paragraph.

* * *