No. 18-55667

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVE GALLION,

Plaintiff-Appellee,

and

UNITED STATES OF AMERICA,

Intervenor-Appellee,

v.

CHARTER COMMUNICATIONS, INC. and SPECTRUM MANAGEMENT HOLDING COMPANY, LLC,

Defendants-Appellants.

On Appeal From The United States District Court For The
Central District Of California
Case No. 5:17-cv-01361-CAS-KKx
Honorable Christina A. Snyder

OPENING BRIEF OF DEFENDANTS-APPELLANTS CHARTER COMMUNICATIONS, INC. AND SPECTRUM MANAGEMENT HOLDING COMPANY, LLC

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

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

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants-Appellants Charter Communications, Inc. and Spectrum Management Holding Company, LLC make the following disclosures.

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 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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

AGENCY MATERIALS

RULES AND REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

This interlocutory appeal involves a First Amendment challenge to a provision of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* ("TCPA") that, on its face, imposes a content-based restriction on speech. That provision generally prohibits placing calls to cell phones using an "automatic telephone dialing system" or "artificial or prerecorded voice" without the recipient's "prior express consent," *id.* § 227(b)(1)(A)(iii), and makes violators strictly liable for $500-$1,500 per call, *id.* § 227(b)(3). Importantly, however, these restrictions do not apply universally to all calls; instead, the statute exempts large swaths of government-preferred speech, with the effect that speakers of disfavored messages face the threat of crippling class action liability while speakers conveying the government's preferred messages face no restriction or liability at all.

As a result, six district courts, including in this case, have recently found that Section 227(b)(1)(A)(iii) is a content-based restriction on speech that is subject to strict scrutiny under the First Amendment, "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The district court below was plainly correct in making that threshold determination. But, while it recognized that the constitutionality of the content-based Section 227(b)(1)(A)(iii) was a very close question on which "other courts could have reached the opposite result," the court then erred in concluding that the provision survives strict scrutiny

because it purportedly advances a compelling government interest in privacy and is narrowly tailored to that end. ER12-13.

Privacy obviously is an important interest, and there is no question that the government may sometimes restrict speech to protect privacy and tranquility. Even-handed, nondiscriminatory limitations on sound trucks, megaphones, protestors on the doorstep, and even telephone calls thus are upheld where they safeguard privacy in an appropriately tailored manner. But the First Amendment cannot tolerate a speech regulation based loosely on "privacy" if it prefers favored speakers and messages—particularly where, as here, those messages are just as destructive of "privacy" as the messages that are prohibited (or even more so). If the government could constitutionally justify these sorts of *content-based* speech restrictions based on a purported "compelling" interest in "privacy," the government would become the arbiter of whether messages are desirable or undesirable to listeners, which would be anathema to the First Amendment.

Plaintiff Steve Gallion brought this putative class action alleging that Defendants Charter Communications, Inc. and Spectrum Management Holding Company, LLC (collectively, "Spectrum") violated the TCPA's Section 227(b)(1)(A)(iii) by placing a single call to his cell phone to promote Spectrum services. ER1. Based on this one allegedly unauthorized call, Plaintiff seeks to

recover millions of dollars in purported "damages" on behalf of himself and a putative class.

As originally enacted in 1991, the call restrictions at issue here were designed to preserve content neutrality, and this Court twice sustained the statute as imposing a content-neutral and reasonable time, place, and manner restriction. *Moser v. FCC*, 46 F.3d 970, 973 (9th Cir. 1995); *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876 (9th Cir. 2014), *aff'd on unrelated grounds*, 136 S. Ct. 663 (2016). Since that time, however, Congress amended the statute to exempt any call that "is made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). Courts and the Federal Communications Commission ("FCC") have also recently clarified that calls made by governmental entities and their private contractors are categorically exempt from the call restrictions. And the FCC has promulgated numerous other content-based exemptions for favored content pursuant to Section 227(b)(2)(C) of the Communications Act, as amended by the TCPA. As the Supreme Court recently clarified in *Reed v. Town of Gilbert*, such preferences render the call restrictions content-based and subject to strict scrutiny. 135 S. Ct. 2218, 2227-30 (2015). No court of appeals has yet evaluated the constitutionality of the call restrictions in light of these important developments (although the Fourth Circuit has held unconstitutional, under strict scrutiny, an analogous state law statute, *Cahaly v. Larosa*, 796 F.3d 399, 408 (4th Cir. 2015)).

Under the well-established precedent of both this Court and the Supreme Court, the presumptively unconstitutional, content-based call restrictions do not survive strict scrutiny. In fact, given the extremely demanding standard of review and the complete absence of evidence justifying a selective, discriminatory restriction on speech, it is not a close question. In particular, the district court erred by identifying a new "compelling" interest in privacy sufficient to justify a *content-based* speech restriction. The district court also applied a watered down version of strict scrutiny that did not properly account for the fact that the statute's content-based carve-outs render it both fatally underinclusive and overinclusive. The statute is fatally underinclusive because it exempts large swaths of highly intrusive speech, dramatically undermining the government's purported privacy interest, while also impermissibly privileging commercial speech over all other protected speech. And the statute also is impermissibly overinclusive because, even under the government's own theory that it may properly exempt certain favored messages, the call restrictions cover far more speech than necessary and thus do not represent the least restrictive means of fulfilling the government's asserted privacy interest.

With strict scrutiny correctly applied, the speech restriction does not come close to passing constitutional muster. The interlocutory order of the district court concluding otherwise should be reversed and the case remanded with instructions to enter judgment in Spectrum's favor.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331. *See* ER1, ER227. The district court denied Spectrum's motion for judgment on the pleadings based on its First Amendment affirmative defense on February 26, 2018, and concurrently certified that order for immediate interlocutory appeal, finding that it satisfied the criteria of 28 U.S.C. § 1292(b). ER12-13. Spectrum timely filed with this Court a petition for interlocutory review on March 8, 2018, ER18, 28 U.S.C. § 1292(b), and this Court granted Spectrum's petition on May 22, 2018, ER17. Spectrum timely perfected its appeal by paying the fees required by Federal Rule of Appellate Procedure 5(d) on May 24, 2018. *See* ER236. This Court has jurisdiction under 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUES

The district court certified the following question for review: "whether the TCPA [47 U.S.C. § 227(b)(1)(A)(iii)], as a content-based regulation of speech, survives strict scrutiny." ER13.

STATEMENT OF ADDENDUM

The full text of the relevant constitutional provisions, statutory provisions, and rules are set forth in the addendum filed concurrently with this brief. *See* 9th Cir. R. 28-2.7.

STATEMENT OF THE CASE

A. The Original 1991 Statute Targeted a Narrow Problem in a Manner Deemed To Be Content-Neutral

When Congress enacted 47 U.S.C. § 227(b)(1)(A)(iii) in 1991, it sought to target a particular problem—telemarketing robocalls that used specialized machines dialing random or sequential phone numbers, or that used prerecorded/artificial messages. Pub. L. No. 102-243, § 2, ¶¶ 1, 12, 105 Stat. 2394, 2394-95 (1991). Congress found that "residential telephone subscribers consider automated or prerecorded telephone calls, *regardless of the content or the initiator of the message*, to be a nuisance and an invasion of privacy." *Id.* § 2, ¶ 10 (emphasis added). Congress therefore enacted comprehensive restrictions on the particular types of calls it deemed problematic:

> 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 … cellular telephone ….

47 U.S.C. § 227(b)(1)(A)(iii). As a result, before placing such a call, a caller must first obtain the "prior express consent" of the "called party," either orally or in writing, before they may speak. *See Fober v. Mgmt. & Tech. Consultants, LLC*, 886 F.3d 789, 794 (9th Cir. 2018). And in recognition of the central concern with scattershot random or sequential dialing, Congress defined the term "automatic telephone dialing system" ("ATDS"), on which liability frequently turns, 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." 47 U.S.C. § 227(a)(1).

Some parties challenged the call restrictions under the First Amendment, and this Court rejected those challenges, identifying no content-based distinctions in the then-applicable statutory text. Specifically, in *Moser*, the Court held that "the statute should be analyzed as a content-neutral time, place, and manner restriction" under intermediate scrutiny, and that the call restrictions satisfied such scrutiny. 46 F.3d at 973. This Court subsequently reaffirmed *Moser*, finding that the original 1991 enactment was content-neutral and tailored to a "significant interest … in residential privacy." *Gomez*, 768 F.3d at 876. As the district court recognized below, neither *Moser* nor *Gomez* addressed the issues raised by Spectrum here. ER4 (noting that "the Ninth Circuit twice … upheld" the call restrictions in *Moser* and *Gomez* "[p]rior to the 2015 amendment and *Reed*," but since those developments "[n]o appellate court has since considered the constitutionality of the TCPA").

B. The Government Later Broadened Liability While Exempting Favored Speakers and Messages

For years, the statute did not give rise to substantial litigation, as courts interpreted the call restrictions according to their terms, imposing liability only where a system possessed the actual capacity to dial randomly or sequentially, or used a prerecorded or artificial voice. But all that changed in recent years, after the

FCC purported to expand the scope of liability dramatically. For example, in July 2015 the FCC found that a dialer is an "automatic telephone dialing system" even if it is *incapable* of dialing random or sequential numbers, so long as it could be *modified* to do so. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-278, 30 FCC Rcd 7961, 7971-72, 7974-76 ¶¶ 10, 16, 19 (2015) ("2015 FCC Order"). Under the construction adopted by the FCC, even calls placed from a consumer smartphone could trigger liability. *ACA Int'l v. FCC*, 885 F.3d 687, 698 (D.C. Cir. 2018). Litigation under the call restrictions skyrocketed from a modest number of suits—less than 100 filed in 2009—to a nationwide frenzy of litigation, with approximately 4,840 TCPA suits filed in 2016, and 4,392 suits filed in 2017.[1]

Following this dramatic expansion of liability under the TCPA, both Congress and the FCC responded by carving out favored messages, speakers, and even industries from the call restrictions. In November 2015, Congress amended the call restrictions to carve out from liability calls placed by private parties "made solely to collect a debt owed to or guaranteed by the United States." Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a)(1)(A), 129 Stat. 584, 588 (2015). Following suit, the FCC confirmed that the statute also categorically exempts from the

[1] WebRecon LLC, *WebRecon Stats for Dec 2017 & Year in Review*, https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review (visited Aug. 23, 2018).

restrictions both governmental entities and "agents" transmitting government "authorized" messages. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, CG Docket No. 02-278, FCC 16-72, 31 FCC Rcd 7394, 7398, 7403-04 ¶¶ 10, 17 (2016) ("July 2016 FCC Order"). Under 47 U.S.C. § 227(b)(2)(C), the FCC also established further regulatory exemptions for favored messages, including package-delivery notifications,[2] calls relating to bank transfers,[3] and healthcare-related calls.[4] The upshot of this patchwork of prohibitions and carve-outs is that the lawfulness of an autodialed or prerecorded call to a cell phone now turns entirely on its content.

C. The D.C. Circuit Vacated the FCC's Overbroad "Interpretation" of the Statute, but the Constitutional Deficiencies Remain

In *ACA International v. FCC*, a unanimous panel of the D.C. Circuit set aside the FCC's interpretation of the term "ATDS." 885 F.3d 687, 700-01 (D.C. Cir. 2018). The D.C. Circuit held that the FCC's determination in its July 2015 Order that equipment could be an ATDS based on its "potential functionalities," *id.* at 695, was an "unreasonable, and impermissible, interpretation" of the TCPA, *id.* at 697. But the D.C. Circuit's ruling does nothing to cure the call restrictions' constitutional

---

[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Cargo Airline Association Petition for Expedited Declaratory Ruling*, Order, CG Docket No. 02-278, FCC 14-32, 29 FCC Rcd 3432, 3437-38 ¶ 18 (2014).

[3] 2015 FCC Order, 30 FCC Rcd at 8024-28 ¶¶ 129-38.

[4] *Id.* at 8031-32 ¶¶ 146-48.

infirmities, as the call restrictions remain riddled with content- and speaker-based exemptions. And because the statute restricts the use not only of any "ATDS," but also any "artificial or prerecorded voice," the statute still broadly restricts messages from a wide array of legitimate businesses, nonprofits, religious organizations, and political candidates sending *targeted*, desired messages to their customers and constituents, including appointment reminders, updates on the status of purchases, political campaign messages, religious devotionals, or, here, targeted offers available to Spectrum's current and recent customers. *See* 47 U.S.C. § 227(b)(1)(A)(iii).

D. The District Court Held That the Statute Complies with the First Amendment Despite Recognizing It Poses Serious Constitutional Questions

Plaintiff filed his complaint on July 6, 2017 on behalf of a putative class, claiming that Spectrum placed a single call to him without "prior express consent" to sell its services using an ATDS and an "artificial or prerecorded voice" in violation of the call restrictions in Section 227(b)(1)(A)(iii). ER1; *see also* ER223-24 ¶¶ 9-14. Spectrum answered the complaint on September 7, 2017, asserting affirmative defenses including that the content-based call restrictions violate the First Amendment. ER215. On September 26, 2017, Spectrum moved for judgment on the pleadings, arguing that the patchwork of content- and speaker-based distinctions described above triggers strict scrutiny, and that, in light of these

distinctions, Section 227(b)(1)(A)(iii) does not advance a compelling government interest and is not narrowly tailored. ER176-209. Spectrum also filed a Notice of Constitutional Challenge pursuant to Federal Rule of Civil Procedure 5.1(a), ER173-75, and the United States intervened on January 9, 2018 to defend the constitutionality of the call restrictions, ER1, ER143-72. Plaintiff and the government filed oppositions to Spectrum's motion, ER1, ER113-39, ER143-72, but neither of them requested that the district court convert Spectrum's motion for judgment on the pleadings into one for summary judgment so that they could submit additional record evidence.

After oral argument, the district court denied Spectrum's motion. The court held that (1) the exemption for messages promoting collection of government-backed debt renders the call restrictions content-based and subject to strict scrutiny; but (2) under strict scrutiny, the statute advances a compelling government interest in privacy and is narrowly tailored to that end; and (3) because the debt collection exemption triggers strict scrutiny, no additional constitutional scrutiny is required for the other challenged content- and speaker-based distinctions. ER6-13 & n.1. The district court concurrently certified its order for interlocutory appeal and stayed further proceedings pending disposition of the interlocutory appeal. ER13, ER16.

SUMMARY OF THE ARGUMENT

I. Strict scrutiny applies to the call restrictions because they are content- and speaker-based speech restrictions.

A. The district court correctly held that strict scrutiny applies to the call restrictions because they favor private debt collection messages over all other private speech. The district court failed to recognize, however, that strict scrutiny also is triggered by the call restrictions' wholesale exemption of all government speakers and government "authorized" messages, as well as the statute's authorization for the FCC to create further content-based preferences (and the call restrictions' additional content-based preferences resulting from that authorization).

B. The district court correctly recognized that strict scrutiny applies irrespective of whether Spectrum's calls consist of "commercial" or "non-commercial" speech. That is because the statute applies to all speech without distinction and is substantially overbroad.

II. The call restrictions cannot be applied to impose liability on Spectrum because the government and Plaintiff did not meet their burden of proving that the call restrictions survive strict scrutiny.

A. The call restrictions' content-based distinctions do not serve a "compelling" government interest, because "residential privacy" is not sufficiently compelling to justify *content-based* speech restrictions. And even assuming that interest could be "compelling" in the abstract, there is no record evidence that the call restrictions, in light of their numerous content-based preferences, actually advance such an interest.

B. There also is no record evidence that the call restrictions' content-based distinctions are narrowly tailored to any compelling interest.

1. The call restrictions exempt vast amounts of speech that is just as intrusive as (and often *more* intrusive than) the prohibited speech, fatally undermining the government's purported privacy interest. And the call restrictions also privilege commercial speech over other forms of core First Amendment speech, like political speech. Each of these defects independently renders the call restrictions fatally underinclusive under well-established case law.

2. The call restrictions also are significantly overinclusive. Accepting *arguendo* the government's own theory that it is constitutionally permissible to exempt speech that the government deems non-offensive to recipients' privacy, the call restrictions sweep far too broadly because, despite the content preferences, the statute continues to restrict lots of speech that is similar in kind to that which is exempted. Moreover, it is obvious that the government has numerous less restrictive means available to protect residential privacy than Section 227(b)(1)(A)(iii)'s strict liability regime, which chills a substantial amount of speech because even the best-intentioned speakers cannot guarantee compliance with the statutory requirements.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(c) provides that a party may bring a motion for judgment on the pleadings after the pleadings are closed if there will be no delay to the trial. A party seeking judgment on the pleadings must show that, taking all the allegations in the pleadings as true, the party is entitled to judgment as a matter of law. *Owens v. Kaiser Found. Health Plan, Inc*., 244 F.3d 708, 713 (9th Cir. 2001). "In an interlocutory appeal, [this Court] review[s] *de novo* the district court's denial of a motion for judgment on the pleadings." *Metrophones Telecomms., Inc. v. Glob. Crossing Telecomms., Inc*., 423 F.3d 1056, 1063 (9th Cir. 2005), *aff'd*, 550 U.S. 45 (2007); *see also Doe v. United States*, 419 F.3d 1058, 1061-62 (9th Cir. 2005).

ARGUMENT

I. UNDER THE FIRST AMENDMENT, STRICT SCRUTINY APPLIES TO THE CALL RESTRICTIONS

The Supreme Court held in *Reed* 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," and that such laws are subject to strict scrutiny "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227-28 (2015) (citation omitted). Moreover, because "[s]peech restrictions based on the identity of the speaker are all too often simply a

means to control content," the Court also held that "laws favoring some speakers over others demand strict scrutiny" and are presumptively unconstitutional where "the legislature's speaker preference reflects a content preference." *Id.* at 2230 (citations omitted). Indeed, the Supreme Court has long been "deeply skeptical of laws that 'distinguis[h] among different speakers.'" *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2378 (2018) (citation omitted).

As explained below, the call restrictions in 47 U.S.C. § 227(b)(1)(A)(iii) are subject to strict scrutiny under *each* of the two separate grounds identified in *Reed*, because they are both content- and speaker-based. And that strict scrutiny applies regardless of whether Spectrum's speech is allegedly "commercial."

A. The Call Restrictions Are Both Content- and Speaker-Based

The call restrictions impose both content-based and speaker-based restrictions on speech, for at least three reasons.

1. As the District Court Correctly Found, Strict Scrutiny Applies Because the Call Restrictions Discriminate in Favor of Private, Commercial Debt Collection Messages.

On their face, the call restrictions discriminate based on a call's content. The call restrictions impose liability for any autodialed or prerecorded/artificial call placed by a private actor, without the called party's prior express consent, "unless such call is 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 bank or debt collection

agency may call the same consumer twice, once to ask the consumer to pay back a private, government-guaranteed loan (*e.g.*, a private student loan or mortgage) 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/artificial voice. Given that the subject matter of the call is the only basis for determining whether the statutory restrictions apply, these are prototypical, "facial" content-based restrictions that "draw[] distinctions based on the message a speaker conveys" and therefore trigger strict scrutiny. *Reed*, 135 S. Ct. at 2227-28 (stating that content-based distinctions are "obvious" where they "defin[e] regulated speech by particular subject matter").[5] The district court below—joining five others[6]—therefore correctly concluded that "under *Reed*, the debt-collection exception 'require[s] a court to examine the content of the message in order to

---

[5] Moreover, because such calls "*to collect* a debt owed to or guaranteed by the United States" necessarily include only those calls that would promote and enhance the collection of such a debt—but not (for example) those calls concerning consolidating, contesting, or discharging such debts—the restriction even discriminates among viewpoints, based on "the opinion or perspective of the speaker," thus establishing a "more blatant" and "egregious form of content discrimination." *Reed*, 135 S. Ct. at 2230 (citation omitted).

[6] *Am. Ass'n of Political Consultants v. Sessions*, No. 5:16-CV-252-D, 2018 WL 1474075, at *3-4 (E.D.N.C. Mar. 26, 2018); *Greenley v. Laborers' Int'l Union of N. Am.*, 271 F. Supp. 3d 1128, 1145 (D. Minn. 2017); *Mejia v. Time Warner Cable Inc.*, Nos. 15-CV-6445 (JPO), 15-CV-6518 (JPO), 2017 WL 3278926, at *14 (S.D.N.Y. Aug. 1, 2017); *Holt v. Facebook Inc.*, 240 F. Supp. 3d 1021, 1032 (N.D. Cal. 2017); *Brickman v. Facebook, Inc.*, 230 F. Supp. 3d 1036, 1043-44 (N.D. Cal. 2017).

determine if a violation ... has occurred,' rendering [the statute] content-based on its face and therefore subject to strict scrutiny." ER8 (citation omitted).

2. Strict Scrutiny Also Applies Because the Call Restrictions Discriminate in Favor of All Government Speakers and Government-"Authorized" Messages

The call restrictions are subject to strict scrutiny for the separate and independent reason that they impose a speaker-based preference for government messages (and other government-"authorized" messages) over private messages. The call restrictions apply to "any *person* within the United States," 47 U.S.C. § 227(b)(1) (emphasis added), but the statute unambiguously excludes all government entities from the definition of a "person." *See* 47 U.S.C. § 153(39) (defining "person" as "includ[ing] an individual, partnership, association, joint-stock company, trust, or corporation," without referencing the government); *Seitz v. City of Elgin*, 719 F.3d 654, 656 (7th Cir. 2013) (finding that similar statutory definition of "person" did not include governmental entities); July 2016 FCC Order ¶ 10 (acknowledging that the term "person," as used in Section 227(b)(1), "does not include the federal government"). As a result, municipalities, counties, and all other governmental entities are not "persons" subject to the call restrictions. *See Lambert v. Seminole Cty. Sch. Bd.*, No. 6:15-cv-78-Orl-18DAB, 2016 WL 9453806, at *2 (M.D. Fla. Jan. 21, 2016) ("[T]he plain meaning of the TCPA's liability provision excludes governmental entities," including school boards, based on the definition of

a "person."); *cf. Gomez*, 136 S. Ct. at 672 ("The United States and its agencies … are not subject to the TCPA's prohibitions …."). Likewise, government agents communicating "authorized" messages are also exempt. *See* July 2016 FCC Order ¶¶ 1, 10, 11 (acknowledging that liability under Section 227(b)(1) does not attach to the government's agents conveying "authorized" messages).

This preference for governmental entities and their agents "reflects a content preference" for favored content—government messages, and other government-approved messages—over all other speech, including, for example, anti-government political speech. *See id.* ¶ 18 (concluding based on legislative history that Congress did not wish to interfere with "'communications from the federal government,'" including messages that promote "democratic participation in government" (citation omitted)); *id.* ¶ 15 (observing that "[t]he TCPA's legislative history lacks any indication that Congress sought to *impede* … government communications, *as opposed to telemarketing and other calls by private entities*" (emphases added)); *id.* ¶ 19 (acknowledging that Congress's intent was to restrict only private speakers from accessing "the most cost-efficient method of communicating with the public").

The additional exemption of government agents acting within the scope of their agency only compounds the blatant preference for government-approved messages. Because in that case a private speaker's liability depends on whether its *message* is "authorized" by the government and compliant with "the government's

instructions," *id.* ¶¶ 1, 17—which can only be determined by reviewing the message's content—it is all the more clear that the TCPA's nominally "speaker-based" preference for the government and its agents reflects a content-based preference for government messages (and other government "authorized" messages), regardless of the speaker's identity.

Under well-established precedent, the call restrictions' content preference for government speakers and messages independently triggers strict scrutiny. *See Reed*, 135 S. Ct. at 2230; *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1264 (11th Cir. 2005) (concluding that a "sign code's exemption[]" of "government … organization[s]" rendered its restrictions "plainly content based" and subject to strict scrutiny); *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1569-71 (11th Cir. 1993) (similar); *Beckerman v. City of Tupelo*, 664 F.2d 502, 513-14 (5th Cir. 1981) (applying strict scrutiny to a restriction on private parades that did not apply equally to "governmental agencies"); *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1165-67 (6th Cir. 1993) (applying heightened scrutiny to restrictions on private displays in a public square that did not apply equally to the government, finding that "distinction between public and private displays" plainly "content-based"); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514 (1981) (plurality) (applying strict scrutiny where the sign code at issue exempted many types of signs, including "signs erected in discharge of any governmental function"); *see also*

Women Strike for Peace v. Morton, 472 F.2d 1273, 1274, 1279 (D.C. Cir. 1972) (per curiam) (concluding that under the Equal Protection Clause the National Park Service could not restrict private speakers on the Ellipse while exempting itself and organizations it co-sponsored); *id.* at 1290, 1293 (Wright, J., concurring) (concluding this restriction was subject to strict scrutiny because such a "preference" for the "official voice" reflects "the kind of blatant government censorship which the framers of the First Amendment intended to outlaw forever").[7] Indeed, this Court has long been "troubled by the wholesale exemption for government speech" from speech restrictions, *Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998), and recently applied heightened scrutiny[8] where such wholesale exemptions for

---

[7] Multiple district courts in this Circuit have followed suit. *See Citizens for Free Speech, LLC v. Cty. of Alameda*, 194 F. Supp. 3d 968, 984 (N.D. Cal. 2016) (applying strict scrutiny to sign code that exempted government signs, as "the County's preference for official public signs reflects a preference for that content"); *Watters v. Otter*, 986 F. Supp. 2d 1162, 1176-1178 (D. Idaho 2013) (applying strict scrutiny where speech restrictions at the State Capitol provided exemption for "State Events" "controlled by any state of Idaho agency, board, … or elected official," as it provided a "wholesale exemption" for "favored" government messages); *Khademi v. S. Orange Cty. Cmty. Coll. Dist.*, 194 F. Supp. 2d 1011, 1030 & n.18 (C.D. Cal. 2002) (applying strict scrutiny to college speech code "to the extent that [it] exempt[s] [State] contractors," and warning that a separate "wholesale exemption" for the State's own speech was potentially subject to such scrutiny as well); *see also A.N.S.W.E.R. Coal. v. Kempthorne*, 537 F. Supp. 2d 183, 196-97, 205 (D.D.C. 2008); *Bonita Media Enters., LLC v. Collier Cty. Code Enf't Bd.*, No. 2:07-CV-411-FTM-29DNF, 2008 WL 423449, at *7 (M.D. Fla. Feb. 13, 2008); *Nichols Media Grp., LLC v. Town of Babylon*, 365 F. Supp. 2d 295, 316 (E.D.N.Y. 2005).

[8] Intermediate scrutiny, rather than strict scrutiny, applied in *Italian Colors* because, unlike here, the restriction there applied *solely* to commercial speech. *See*

government messages were present. *See Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1178 (9th Cir. 2018).[9]

3. Strict Scrutiny Also Applies Because the Statute Permits the FCC To Create Unlimited Additional Content-Based Exemptions to the Call Restrictions

The call restrictions are content-based for the additional reason that the statute, on its face, expressly allows the FCC to establish additional content-based exemptions, and the FCC has done so. Specifically, the statute provides that the FCC "may, by rule or order, exempt from the [call restrictions] calls to a telephone number assigned to a cellular telephone service that are not charged to the called party." 47 U.S.C. § 227(b)(2)(C). A law that delegates to an executive official or agency the power to determine whether speech is prohibited or permitted without also providing objective limitations to ensure that discretion is exercised in a content-neutral manner, as here, is content-based and must be justified (if at all) under strict scrutiny. *See, e.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980) (applying intermediate scrutiny where the restriction "restricts only commercial speech").

[9] Below, the government argued that the call restrictions' exemption of all government messages is merely a reflection of the government's sovereign immunity. ER160-62. But "sovereign immunity" cannot possibly explain this exemption, as it exempts messages from *all* governmental entities, including municipalities, counties, and other entities lacking sovereign immunity. *See Alden v. Maine*, 527 U.S. 706, 756 (1999) (sovereign immunity "does not extend to … a municipal corporation or other governmental entity which is not an arm of the State").

U.S. 750, 756, 769 (1988); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1042 (9th Cir. 2009).

And here, the FCC has used that delegation to establish a plethora of such content-based exemptions for favored messages, including for package-delivery notifications, calls relating to banking transfers, and healthcare-related calls. *See supra* nn.2-4. These exemptions independently demonstrate that the call restrictions are content-based and trigger the application of strict scrutiny. *See Long Beach Area Peace Network*, 574 F.3d at 1043 (noting that "[g]ranting waivers to favored speakers … would of course be unconstitutional," and "this abuse must be dealt with … when a pattern of unlawful favoritism appears"); *Reed*, 135 S. Ct. at 2227-28.[10]

[10] The government argued below that the district court must close its eyes to these clear content-based preferences because the Hobbs Act allegedly shields them from review. *See* ER165. But the text of the Hobbs Act does not preclude the Court's consideration of these preferences. *See* 28 U.S.C. § 2342(1) (reserving to the courts of appeals "exclusive jurisdiction to *enjoin, set aside, suspend … or to determine the validity* of" FCC orders (emphasis added)). For purposes of this appeal, Spectrum *accepts* that the FCC's orders have been validly promulgated pursuant to the FCC's statutory authority; Spectrum only seeks to prevent the imposition of liability under the fatally underinclusive call restrictions, which are marred with numerous content-based exceptions. And to extent the government argues that the Hobbs Act forecloses Spectrum from challenging its liability under an unconstitutional statute, that interpretation would render the Hobbs Act invalid under the Due Process Clause. *See Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) ("Due Process" means "an opportunity to present every available defense"); ER218 (answer raising this affirmative defense).

B. Strict Scrutiny Applies Regardless of Whether Spectrum's Speech Is "Commercial" or "Non-commercial"

Below Plaintiff argued that, notwithstanding that the call restrictions are content- and speaker-based, the district court should apply *Central Hudson* intermediate scrutiny because Spectrum's speech is allegedly "commercial." ER125-26. The government, for its part, conceded that review under *Central Hudson* would be inappropriate, as it had not "sought to argue that the TCPA is constitutional because it regulates solely commercial speech." *See* ER162-63 (arguing that the "TCPA's application to commercial speech" "does not alter" the level of scrutiny (capitalization altered)).[11]

The district court rightly declined to apply less-searching *Central Hudson* intermediate scrutiny to the call restrictions. *See* ER8. That standard is inapplicable where a speech restriction is not limited to commercial speech but instead restricts all forms of speech, as do the call restrictions here. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 877 (1997) (applying strict scrutiny where "[t]he scope of the [restriction] is not limited to commercial speech or commercial entities" but instead "embrace[s] all nonprofit entities and individuals"); *Solantic*, 410 F.3d at 1269 n.15 ("Because

[11] The government sought below "solely to defend the TCPA as a valid, content-neutral time-place-and-manner restriction." ER163. But in doing so, the government overlooked that, following *Reed*, it is abundantly clear that the statute is content- and speaker based and therefore cannot be justified as such a time-place-and-manner restriction.

the sign code does not regulate commercial speech as such, but rather applies without distinction to signs bearing commercial and noncommercial messages, the *Central Hudson* test has no application here" (applying strict scrutiny)). Likewise, the call restrictions are substantially overbroad on their face because they impose liability on any private actor that does not convey a government-favored message (including those entities communicating political speech and other core protected speech). Thus, even if *Central Hudson* could be applicable in some circumstances to laws that regulate both commercial and non-commercial speech, under the overbreadth doctrine, Spectrum would be permitted to "assert the speech rights of third parties with noncommercial speech interests" and therefore receive the benefit of strict scrutiny. *Dimmitt*, 985 F.2d at 1569-71 (applying strict scrutiny); *Bd. of Trs. v. Fox*, 492 U.S. 469, 481-82 (1989) (finding that a commercial speaker may assert the First Amendment rights of noncommercial speakers).[12] In any event, the call restrictions could not even survive review under *Central Hudson*.

[12] To the extent this Court disagrees, Spectrum preserves for *en banc* and/or Supreme Court review the question whether the First Amendment permits commercial speech to be subjected to lesser constitutional scrutiny than other forms of constitutionally protected speech. Spectrum recognizes, however, that at this stage of the proceedings prior contrary panel precedent binds this Court. *See Contest Promotions, LLC v. City & Cty. of S.F.*, 874 F.3d 597, 601 (9th Cir. 2017) (noting that this Court has "rejected the notion that *Reed* altered *Central Hudson*'s longstanding intermediate scrutiny framework").

II. THE GOVERNMENT AND PLAINTIFF FAILED TO SHOW THAT THE CALL RESTRICTIONS WITHSTAND STRICT SCRUTINY

Strict scrutiny is "the most demanding test known to constitutional law," *City of Boerne*, 521 U.S. at 534; laws subject to it are "presumptively invalid," *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 817 (2000), and "almost always violate the First Amendment," *DISH Network Corp. v. FCC*, 653 F.3d 771, 778 (9th Cir. 2011). To overcome this heavy presumption of invalidity, the government (or plaintiff) must carry the burden of proving that the content-based restriction is narrowly tailored to advance a compelling government interest. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011) (Once the "moving party" makes "a colorable claim that its First Amendment rights … are threatened with infringement, ... the burden shifts to the government to justify the restriction."); *Reed*, 135 S. Ct. at 2230-31. To sustain this burden, the government must "proffer … *evidence*" that the government's asserted interests are actually compelling in this specific factual context. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 962 (9th Cir. 2009) (emphasis added), *aff'd sub nom. Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011); *see also Edenfield v. Fane*, 507 U.S. 761, 768 (1993). Critically, such evidence must justify the "content-based ... distinction[s]" in addition to the general speech restriction. *Carey v. Brown*, 447 U.S. 455, 465 (1980). Then, the government must prove through evidence that the restriction is narrowly tailored to its interests. *Nader v. Brewer*, 531 F.3d 1028, 1037

(9th Cir. 2008) (the government necessarily fails to prove narrow tailoring when it "does not provide any evidence"); *Playboy Entm't Grp.*, 529 U.S. at 822; *Edenfield*, 507 U.S. at 771-72.

With those principles in mind, it is clear that Spectrum is entitled to judgment in its favor because the call restrictions neither advance a compelling government interest nor are narrowly tailored.[13] Indeed, the government has failed to adduce *any* evidence to justify imposing content-based restrictions on calls to mobile telephones.

A. The Call Restrictions Do Not Advance a "Compelling" Government Interest

As a threshold matter, the call restrictions are not justified by any interest that this Court or the Supreme Court has identified as compelling. The district court held that the call restrictions advance a "compelling government interest in promoting and protecting residential privacy." ER9-10. But while insulating individuals from annoying phone calls may be a laudable goal, it is not the sort of interest that is sufficiently "compelling" to justify a content-based speech restriction.

---

[13] Under *Central Hudson* intermediate scrutiny, a speech restriction must be "tailored … to serve a substantial state interest in order to survive First Amendment scrutiny." *Edenfield*, 507 U.S. at 767. Such tailoring requires that the "challenged regulation advances [its] interests in a direct and material way," and that the "the extent of the restriction on protected speech is in reasonable proportion to the interests served." *Id.* For the same reasons discussed below, the call restrictions fail even *Central Hudson* review.

Tellingly, neither the government, Plaintiff, nor the district court has identified a single case in which this Court or the Supreme Court ever held that "privacy" is a sufficiently "compelling" interest to satisfy strict scrutiny. For good reason. Because "privacy" in this context amounts to being free of unwelcome speech, recognizing such an interest as compelling would open the door to the government's exercise of breathtaking power to pick and choose which messages are "desirable" or "undesirable," "welcome" or "unwelcome," turning the First Amendment on its head. Unsurprisingly then, as the Eighth Circuit observed, "[t]he Supreme Court has never held that [residential privacy] is a compelling interest … and we do not think that it is." *Kirkeby v. Furness*, 92 F.3d 655, 659 (8th Cir. 1996); *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2548 (2014) (Scalia, J., concurring in the judgment with Kennedy and Thomas, JJ.) ("Suffice it to say that if protecting people from unwelcome communications … is a compelling state interest, the First Amendment is a dead letter." (internal quotation marks and citation omitted)).

This Court's precedent is in accord. In *Hoye v. City of Oakland*, for example, this Court invalidated a content-based restriction on anti-abortion protestors' highly "intrusive" speech directed at patients entering abortion clinics. 653 F.3d 835, 852 (9th Cir. 2011). The Court noted that "[i]n some cases, government regulation of speech with the aim of protecting the dignity and privacy of individuals has been permitted," including in cases establishing the exceptional "privacy of the home."

Id. (citing *Frisby v. Schultz*, 487 U.S. 474, 484-87 (1988)). "*But such cases do not sanction content-based restrictions*. They only accept the dignity and privacy rationale as a sufficiently strong governmental interest to justify a content-neutral time, place, and manner restriction." *Id.* (emphasis added); *see also Moser*, 46 F.3d at 970, 974 (finding it undisputed that, under the TCPA, privacy is a "significant interest" sufficient to support content-neutral call restrictions); *Gomez*, 768 F.3d at 871, 876 (similar).

This Court's holding in *Hoye* aligns with well-established Supreme Court precedent. For example, in *Carey*, the Supreme Court found that an "interest in promoting the privacy of the home" was an interest "of the highest order in a free and civilized society," but nevertheless was *not* sufficiently compelling to justify a *content-based* restriction on highly intrusive residential picketing that also exempted labor picketing. 447 U.S. at 465. By contrast, such an interest was sufficiently *substantial* to support a content-neutral restriction. *Id.* at 470 (noting that the government "may protect individual privacy by enacting … regulations applicable to all speech *irrespective of content*" (emphasis in original)); *Frisby*, 487 U.S. at 484 (upholding a content neutral residential picketing restriction).

The selective application of the speech restrictions at issue here—they apply to calls to mobile phone numbers—further underscores that the asserted privacy interest is not compelling. Unlike a protest in front of the home, the intrusion from

an unwanted mobile call can be avoided or minimized. A consumer can simply turn his or her phone on silent, decline to take calls from unknown numbers, or preemptively and automatically block calls from hundreds of known spam callers using readily available, free call-blocking applications on their phones.[14] *Compare Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 541-42 (1980) (while "residents of a neighborhood" might be "disturbed by the raucous broadcasts from a passing sound truck," "customers who encounter an objectionable billing insert" in the mail can simply "avert[] their eyes" or transfer the "insert from envelope to wastebasket"). Thus, the weight of the privacy interest at stake falls short of the interest in preventing intrusive picketing outside the home—a location long privileged in the law as deserving of special solitude—recognized in *Carey* as only "substantial." And if the government cannot clear the "compelling" hurdle for such a content-based picketing law, it certainly cannot do so here for cell phone privacy, even if it could otherwise establish that such an interest is "substantial." *Cf. Gomez*, 768 F.3d at 876-77 (concluding government has a "significant interest" in preventing

---

[14] *See, e.g.*, Sam Koch, *5 Best iOS Apps To Detect and Block Annoying Calls on iPhone*, Mashtips, https://mashtips.com/ios-apps-block-calls/ (last updated July 25, 2018) ("There are a bunch of excellent iPhone call blocker apps" that "are powered by the community to identify the fraud and spam calls from the blacklist database" which "can ignore or handle the call itself without bothering you."); Joe Fedewa, *8 Best Apps for Blocking Calls on Android*, Phandroid, https://phandroid.com/best-blocking-calls-apps-android/ (last updated Feb. 20, 2018) (discussing similar applications for Android operating system).

unwanted cell phone calls sufficient to support a "content-neutral time, place, and manner restriction").

Finally, even assuming this sort of privacy interest could be "compelling" in the abstract, the government and Plaintiff below failed to discharge their burden to show with *evidence* that privacy is actually compelling in this specific factual context. *Video Software Dealers Ass'n*, 556 F.3d at 962. The district court entirely overlooked that the party defending a content-based restriction must advance evidence that the *distinctions* drawn by the law serve such a compelling interest. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993) (concluding that city ordinance was unconstitutional where "the [content-based] distinction bears no relationship *whatsoever* to the particular interests that the city has asserted"); *Carey*, 447 U.S. at 464-65 ("[N]othing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy."); *Serv. Emps. Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1321 (9th Cir. 1992) ("'[T]he crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment.'" (citation omitted)); *Harwin v. Goleta Water Dist.*, 953 F.2d 488, 490 (9th Cir. 1991) (collecting cases demonstrating that "discrimination in the First Amendment context is permissible only when the government can show that the discrimination is itself necessary to serve … [the] governmental interest"); *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1009-10

(9th Cir. 2003) (same).[15] The lack of any such evidence is unsurprising, because it is obvious that the content-based distinctions at issue here do not further any privacy interest; they instead directly undermine that interest by allowing a large volume of intrusive calls to collect government-backed debt (among other unrestricted calls). *See Nat'l Advert. Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988) (The government's "allowance of some billboards [is] evidence that its interests in traffic safety and aesthetics … [fall] shy of 'compelling.'"); *cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993) ("Where [the] government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.").[16]

---

[15] The district court mistakenly found that the relevant inquiry was *not* whether the "government-debt exception … serve[s] a compelling interest," as Spectrum had argued, but "whether the *TCPA as a whole* serves a compelling government interest." ER9-10 (emphasis added).

[16] Below the government also argued that the government-backed debt collection exemption "serves the government's compelling interest in protecting the public fisc." ER167-68. The district court did not reach that question, although it noted that another district court had done so. ER10. Such an interest is plainly insufficient to support the content-based call restrictions for at least three independent reasons. First, an interest in raising revenue cannot justify such a *content-based* speech restriction. *See Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231-32 (1987); *Serv. Emps. Int'l Union*, 955 F.2d at 1320 & n.12; *Worrell Newspapers of Ind., Inc. v. Westhafer*, 739 F.2d 1219, 1223 n.4 (7th Cir. 1984) ("[T]he Supreme Court has rejected several interests as not sufficiently compelling to justify an infringement on

B. The Government and Plaintiff Failed To Identify Evidence Demonstrating That the Content-Based Call Restrictions Are Narrowly Tailored

The government and Plaintiff also provided no evidence below to show that the call restrictions are "narrowly tailored" to a compelling interest in light of their various content-based distinctions. *Perry v. Los Angeles Police Dep't*, 121 F.3d 1365, 1370 (9th Cir. 1997). To survive narrow tailoring analysis, a speech regulation generally cannot be underinclusive, meaning that it cannot leave "appreciable damage to [the government's] interest unprohibited." *Reed*, 135 S. Ct. at 2232 (citation omitted); *Republican Party v. White*, 536 U.S. 765, 780 (2002). A statute's underinclusiveness is an often-fatal defect because it "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint," and frequently reveals that the law does not actually advance a compelling interest. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011). Nor can the restriction be *overinclusive*, meaning that it

---

the First Amendment," including "a state's interest in raising revenue."), *aff'd*, 469 U.S. 1200 (1985). Second, there is no record evidence that the exemption actually promotes the collection of government revenue: in fact, the Congressional Budget Office ("CBO") reviewed the government-backed debt exemption and identified no material financial impact arising from it. CBO, Estimate of the Budgetary Effects of H.R. 1314, the Bipartisan Budget Act of 2015, at 1, 4 (Oct. 28, 2015), https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/costestimate/hr1314.pdf (discussing Section 301 of the Budget Act of 2015). Finally, such an interest cannot possibly justify the call restrictions' numerous other carve-outs for government-"authorized" messages and FCC-favored messages.

cannot "unnecessarily circumscribe protected expression." *White*, 536 U.S. at 775. The call restrictions here fail both modes of narrow tailoring analysis and are therefore unconstitutional; the district court erred in concluding otherwise.

1. The Call Restrictions Are Underinclusive for at Least Two Independent Reasons

The call restrictions are underinclusive both because they (i) exempt large swaths of intrusive speech that is equally or more harmful to the government's purported privacy interest than the speech that is restricted, and (ii) privilege commercial speech over all other protected speech. Each of these grounds alone is sufficient to render the restrictions invalid.

i. *The Call Restrictions Exempt Large Swaths of Intrusive Speech, Fatally Undermining the Government's Purported Privacy Interest*

Congress found that "[e]vidence … indicates that residential telephone subscribers consider automated or prerecorded telephone calls, *regardless of the content or the initiator of the message*, to be a nuisance and an invasion of privacy." Pub. L. No. 102-243, § 2, ¶ 10, 105 Stat. 2394, 2394 (1991) (emphasis added); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, CG Docket No. 02-278, FCC 16-99, 31 FCC Rcd 9074, 9078 ¶ 9 (2016) (noting that during consideration of rules governing government-backed debt collection calls, the FCC received 12,500 comments expressing "*general* dislike for robocalls" (emphasis added)). The call restrictions

are not narrowly drawn to advance the government's identified privacy interest because large gaps in the statute's coverage seriously undermine its effectiveness as a supposed privacy measure. The call restrictions explicitly exempt several broad categories of intrusive speech, including calls that promote the collection of government-backed debt, other calls authorized by the government, and various types of calls favored by the FCC, including calls relating to package deliveries and banking and healthcare transactions. *See supra* nn.2-4. By exempting a vast amount of government-favored speech that engenders the same risks as prohibited speech (and often greater risks), the restriction "is wildly underinclusive … which … is alone enough to defeat it." *Brown*, 564 U.S. at 802.

The government-backed debt collection exception vividly demonstrates the call restrictions' serious underinclusiveness. Although the burden was on the government to identity evidence to prove narrow tailoring (which it did not), Spectrum nonetheless below identified extensive evidence that government-backed debt collection calls are prolific and raise *much more pervasive* privacy concerns than many other types of restricted calls. ER202-03 & n.9, ER102-05 (collecting sources). Mortgages and student loans—largely backed by the government—are the two largest categories of consumer debt.[17] For example, there are over $188 billion in

[17] Center for Microeconomic Data, Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit* at 1, 3 (May 2018),

private, federally guaranteed student loans outstanding through the Federal Family Education Loans ("FFEL") program, approximately $66 billion of which are in default, impacting 4 million student borrowers.[18] "The vast majority of student loan debt collection activities" "are outsourced to [private collection agencies]," which frequently seek to collect the debt through "automated dialing process" to cell phones.[19] And of $850 billion in outstanding private, government-guaranteed mortgages, at last report 11.4% were in default (574,716 mortgages),[20] the servicers and collectors of which likewise frequently make autodialed calls to cell phones.[21] Because of the government-debt exemption, all of these collection calls are exempt from the call restrictions.

---

https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2018Q1.pdf.

[18] Office of the U.S. Department of Education, Portfolio by Loan Status (DL, FFEL, ED-Held FFEL, ED-Owned), https://studentaid.ed.gov/sa/about/data-center/student/portfolio (last visited Aug. 23, 2018) (follow "Portfolio by Loan Status" hyperlink).

[19] Letter from National Council Higher Education Loan Programs to FTC at 2, 12 (Apr. 7, 2011), https://www.ftc.gov/sites/default/files/documents/public_comments/ftc-workshop-debt-collection-2.0-protecting-consumers-technology-changes-project-no.p114802-00008%C2%A0/00008-58349.pdf.

[20] Office of the Comptroller of the Currency, *OCC Mortgage Metrics Report: Disclosure of National Bank Mortgage Loan Data, Third Quarter 2015* at 4, 9, 14 (Dec. 2015), https://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/mortgage-metrics/mortgage-metrics-q3-2015.pdf.

[21] *See* Letter from Senators Mike Lee (R-Utah) and Edward J. Markey (D-Mass.) to Ajit Pai (FCC Chair) at 1 (Aug. 4, 2017), https://www.markey.senate.gov/imo/media/doc/2017-08-04-DebtCollector-RoboCalls%20.pdf .

Not surprisingly, the Bureau of Consumer Financial Protection, which has supervisory authority over collectors of "mortgage and student loan debt" "guaranteed by the federal government," has reported that it "receives more complaints about debt collection than any other single industry (around 80,000 per year)."[22] Likewise, in August 2017, Senators Markey and Lee wrote to FCC Chairman Pai that "many borrowers" of government-guaranteed loans are receiving "multiple robocalls a day without … the ability to stop" "these abusive and invasive robocalls."[23] More recently, on June 15, 2018, Representatives Eshoo and LoBiondo and Senators Markey and Lee wrote that "it appears that many borrowers [of government-guaranteed debt] and their relatives may be receiving multiple robocalls a day without providing consent or having the ability to stop" these "invasive communications" and "abusive" robocalls.[24] This follows a call from 25 state Attorneys General to "stop th[is] barrage of debt collection robocalls," as the call restrictions "now permit[] citizens to be bombarded by unwanted and previously illegal robocalls" that can lawfully "harass citizens simply because the debt has a

---

[22] Letter from Consumer Financial Protection Bureau to FCC at 2, 4 (June 6, 2016), https://ecfsapi.fcc.gov/file/60002112663.pdf.

[23] Letter at 1, *supra* note 21.

[24] Letter from Senator Edward J. Markey *et al*. to Ajit Pai (FCC Chair) at 1-2 (June 15, 2018), https://www.markey.senate.gov/imo/media/doc/Letter%20--%20Federal%20Debt%20Collectors%206-15-18.pdf.

nexus to the federal government."[25] The Attorneys General noted that "debt collection calls" are at the "the top of the list" of consumer complaints they receive.[26] *See also* H.R. Rep. No. 102-317, at 16 (1991), 1991 WL 245201 (congressional finding in the TCPA House Report that "[c]omplaint statistics show that unwanted *commercial* calls are a *far bigger problem* than unsolicited calls from political or charitable organizations" (emphases added)).

Thus, although the burden is on the *government* to establish through *evidence* that the call restrictions and their content-based preference for government-backed debt collection calls are narrowly tailored and do not undermine the government's privacy interest, *Nader*, 531 F.3d at 1037, the record evidence is directly to the contrary. Specifically, Spectrum identified unrebutted evidence demonstrating that this preference exempts calls that are likely the most problematic from a "privacy" perspective, while restricting less burdensome speech, including desired communications between a service provider and its current and former customers (like here), and political speech and nonprofit speech. This renders the call restrictions fatally underinclusive. *Perry*, 121 F.3d at 1370 (finding that restriction on solicitations was fatally underinclusive, as "there is no justification for

---

[25] Letter from Chris Koster *et al*. to Senators John Thune and Bill Nelson at 1 (Feb. 10, 2016), https://media.dojmt.gov/wp-content/uploads/HANGUP-Act.pdf.

[26] *Id.*

[restricting] only those individuals with no nonprofit affiliation" absent any "evidence that those without nonprofit status are any more cumbersome upon fair competition or free traffic flow than those with nonprofit status"); *Discovery Network, Inc.*, 507 U.S. at 424 ("[T]he distinction [between commercial and noncommercial news racks] bears no relationship *whatsoever* to the particular interests that the city has asserted" and "is therefore an impermissible means of responding to the city's admittedly legitimate interests"); *Reed*, 135 S. Ct. at 2231 ("The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while … allowing … other types of signs that create the same problem."); *Italian Colors*, 878 F.3d at 1178 (finding that restriction on credit card surcharges was underinclusive and failed intermediate scrutiny, because the government "offers no explanation why the[] exempt surcharges are any less harmful or deceptive than the [restricted] surcharges").

The statute's preference for government-"authorized" speech and FCC-favored speech undermine the government's purported interest in privacy in a similar way. The government provided no argument, much less any evidence, justifying the content-based preferences for these calls, which can likewise be just as intrusive as other prohibited calls. Because these content-based preferences apply only when the callers lack the prior express consent of the called party to place the call (as the call restrictions do not apply in the first place to calls made with prior

express consent), these out-of-the-blue, unexpected messages necessarily disturb the privacy of the recipients (at least on the government's asserted view that the "prior express consent" requirement has the purpose and effect of protecting recipients' privacy, *see* ER150, 154-55). And these sorts of calls are likely to be voluminous, in contrast to the single call alleged in this case, rendering appreciable damage to the government's purported interest in privacy. The wholesale exemption of government-approved messages exempts tens-of-thousands of governmental entities,[27] at all levels of government (as well as their agents). This Court has already concluded this year that such a wholesale exemption for all government speakers and messages renders a speech restriction fatally underinclusive. *See Italian Colors*, 878 F.3d at 1178 (invaliding under even *Central Hudson* intermediate scrutiny California's speech restriction on retailers' ability to charge "surcharges" for credit card payments, largely because "[t]he state has … broadly exempted itself and its municipalities from the coverage of [the restriction]"); *see also Solantic*, 410 F.3d at 1267 (distinction favoring government signs was not narrowly tailored because "the government would be free to erect an equally distracting … sign" where private parties could not); *Congregation Lubavitch*, 997 F.2d at 1166 (finding no narrow

[27] *See, e.g.*, News Release, U.S. Census Bureau, *Census Bureau Reports There Are 89,004 Local Governments in the United States* (Aug. 30, 2012), https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html.

tailoring on similar grounds); *see also supra* at 19-21 (collecting additional cases). And the further exemptions adopted by the FCC pursuant to Section 227(b)(2)(C) have similar effects: There are hundreds of millions of packages delivered each year,[28] hundreds of millions of medical appointments each year,[29] hundreds of millions of banking transactions,[30] and so on that are exempt from the statute's restrictions, when such calls are placed without the "prior express consent" of the "called party." *See also supra* nn.2-4.

ii. *The Call Restrictions Impermissibly Privilege Commercial Speech over All Other Protected Speech*

The call restrictions are also fatally underinclusive for the independent reason that they privilege commercial speech above all other protected speech. For example, the call restrictions privilege private, "commercial" debt collection

---

[28] Kevin Breuniger, *UPS expects to ship 750 million packages this holiday season while adding peak shipping charges*, CNBC (Oct. 26, 2017), https://www.cnbc.com/2017/10/26/ups-expects-to-ship-750-million-packages-this-holiday-season.html.

[29] Centers for Disease Control and Prevention, National Center for Health Statistics, *Ambulatory Care Use and Physician Office Visits*, https://www.cdc.gov/nchs/fastats/physician-visits.htm (last visited Aug. 23, 2018).

[30] *Waiting days for your transactions to clear will be a thing of the past, thanks to these financial players*, TechCrunch, https://techcrunch.com/sponsored/international-realtime-payments-closer-than-you-think/ (last visited Aug. 23, 2018) ("The Clearing House, the oldest banking association in the U.S. … processes over 65 million transactions" each day.).

messages,[31] and messages about package deliveries and banking and healthcare transactions. As a result, "[c]ommercial speech … is allowed and encouraged, while artistic and political speech is not." *Berger v. City of Seattle*, 569 F.3d 1029, 1055 (9th Cir. 2009). Under this Court's precedent, "[t]his bias in favor of commercial speech is, on its own, cause for the rule's invalidation." *Id.* (invalidating law that prohibited speakers from engaging in "speech activities" in public space, except commercial "concessionaires and licensees"). This Court has repeatedly recognized that a speech restriction "is invalid if it imposes greater restrictions on noncommercial than on commercial [speech]." *Nat'l Advert. Co.*, 861 F.2d at 248; *see also Desert Outdoor Advert. v. City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996) (similar). These decisions follow *Metromedia*, in which a plurality of the Supreme Court recognized that the government "may not conclude that the communication of commercial information … is of greater value than the communication of noncommercial messages." 453 U.S. at 513.

2. The Call Restrictions Also Are Fatally Overinclusive

The call restrictions are fatally overinclusive as well, in at least two respects.

---

[31] The government has taken the position in separate proceedings defending the constitutionality of the call restrictions that calls to debtors, to remind them of their debts and seek payment of outstanding amounts, are "commercial" speech. U.S. Mem. of Law in Supp. of the Constitutionality of the Telephone Consumer Protection Act of 1991 at 11-12, *Mejia v. Time Warner Cable, Inc.*, No. 8:15-cv-6445-JPO, (S.D.N.Y. Mar. 3, 2017), ECF No. 147.

i. *Under the Government's Own Theory, the Call Restrictions Cover Far More Speech Than Is Necessary*

If the government is correct that it is constitutionally permissible to have a general speech restriction that is riddled with content-based exceptions for speech deemed by the government to be important or valuable to the listener, it would mean that the call restrictions here are impermissibly overinclusive. There are many types of speech that are just as important or valuable to speakers and listeners as speech exempt from the call restrictions. For example, the call restrictions exempt government-guaranteed debt collection calls, yet impose severe, speech-chilling liability on other important commercial messages, such as bill payment reminders and promotional offers to customers. Likewise, package delivery notifications are exempt from liability, but not notifications for grocery or dry cleaning deliveries. And while the exemption for governmental entities and agents allows public schools to efficiently contact parents or teachers without fear of liability, *Lambert*, 2016 WL 9453806, at *2, it would be equally valuable to parents of children at private, parochial, and charter schools to receive the same communications on the same terms.

Congress effectively admitted that the call restrictions were overinclusive when it delegated to the FCC the role of creating additional content-based exemptions. 47 U.S.C. § 227(b)(2)(C) (providing that the FCC "may, by rule or order, exempt from the [call restrictions] calls to a telephone number assigned to a

cellular telephone service that are not charged to the called party"). Congress cannot, however, shirk its constitutional obligation to ensure its speech prohibition is narrowly tailored by giving an administrative agency unbridled discretion to tailor that prohibition at a later date. *See Long Beach Area Peace Network*, 574 F.3d at 1042 (invalidating grant of unbridled discretion where city council "reserved authority to waive" speech restriction for favored speakers).

ii. *The Call Restrictions Are Not the Least Restrictive Means of Fulfilling the Government's Interest*

The party defending the speech restriction must also demonstrate—again, through *evidence*—that the government has "cho[sen] the least restrictive means to further [its] articulated interest." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *id.* at 129-30 ("[T]he congressional record presented to us contains no evidence as to how effective or ineffective the [alternative] regulations were or might prove to be."); *Edwards v. City of Coeur D'Alene*, 262 F.3d 856, 863-66 (9th Cir. 2001). Plaintiff and the government did not even attempt below to meet this burden. Indeed, the district court's order appears to acknowledge that no such evidence was presented below or exists in the record compiled by Congress and the FCC, yet nonetheless concluded that the statute was not overbroad. ER12. That constitutes reversible error.[32]

[32] *See also Playboy Entm't Grp., Inc.*, 529 U.S. at 822-23 ("It was for the Government, presented with a plausible, less restrictive alternative, to prove the

It is obvious that the government's interest in privacy could be advanced through less restrictive means. Notably, the call restrictions and the broader statutory framework unnecessarily impose a *strict liability* regime. For example, a caller purportedly may be held liable even when the caller believed in good faith that it had consent to contact the recipient, but inadvertently reached another party, as frequently occurs when the intended recipient's cell phone number has been reassigned to a new owner. *See, e.g.*, *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 641 (7th Cir. 2012) ("Consent to call a given number must come from its current subscriber" and therefore "any consent previously given[] lapses when [a] Cell Number is reassigned."). Indeed, "[a]pproximately 35 million numbers are disconnected and made available for reassignment to new consumers each year," and yet "callers lack guaranteed methods to discover all reassignments" in light of the absence of any comprehensive database of such reassignments. *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Further Notice of Proposed Rulemaking, 83 Fed. Reg. 17,631, 17,632 (Apr. 23, 2018) (proposing to

---

alternative to be ineffective" through record evidence that the speech restriction is the "least restrictive available means."). Here, the district court stated that, "at the pleading stage, the Court finds plaintiff and the government's reliance on the analysis in *Brickman* and *Mejia*"—two recent district court decisions addressing this issue—"sufficient to demonstrate that no less restrictive alternatives exist." ER12. In doing so, the district court replicated the same error present in those prior cases, in which no evidence whatsoever was presented indicating that less restrictive alternatives were unavailable.

establish a federal database of such reassignments); Dissenting Statement of Commissioner Ajit Pai, 2015 FCC Order, 30 FCC Rcd at 8077 ("[N]o authoritative database … exists to 'track all disconnected or reassigned telephone numbers' or 'link[] all consumer names with their telephone.'" (citation omitted)). Such unavoidable, strict liability chills the speech even of callers that would otherwise be exempt from liability, because if they place more than a modest volume of calls they will inevitably reach an unintended party and be subject to liability. *See Reno*, 521 U.S. at 876 (concluding speech is severely burdened in similar circumstances). In *Reno*, the Supreme Court observed that this burden was particularly acute because there was no "existing technology" providing an "effective method" to avoid liability. *Id.* That is exactly the case here; as is well recognized, there is no technology available to identify reassigned numbers reliably. *See supra* at 44-45. As a result, "even the most well-intentioned and well-informed business will sometimes call a number that's been reassigned to a new person," Dissenting Statement of Commissioner Ajit Pai, 2015 FCC Order, 30 FCC Rcd at 8077,[33] which

[33] *See also id.* at 8081 (explaining that a restaurateur attempted to contact his employee concerning food safety issues, but the phone number was unknowingly reassigned to an individual who "never asked Rubio's to stop texting him—at least not until he sued Rubio's in court for nearly half a million dollars"); Comments of Edison Electric Institute and National Rural Electric Cooperative Association at 4 n.8, CG Docket Nos. 02-278, 18-152 (June 13, 2018), https://ecfsapi.fcc.gov/file/10613795116820/EEI NRECA TCPA Comments.pdf (explaining that an electric cooperative "was sued by the new subscriber of a phone

"chills important communications from legitimate businesses … that are initiated via modern technology," Comments of Retail Industry Leaders Association at 2, CG Docket Nos. 02-278, 18-152 (June 13, 2018), https://ecfsapi.fcc.gov /file/10614232873363/RILA TCPA Comments.pdf.[34]

The government can reasonably regulate calls to wireless numbers without such severe chilling of speech. There are a host of less restrictive alternatives that would allow the government to prevent abuses. In invalidating a state-law analog to the TCPA's call restrictions, the Fourth Circuit correctly identified numerous such alternatives, such as do-not-call lists, time-of-day limitations, and mandatory disclosure of caller's identity. *See Cahaly v. Larosa*, 796 F.3d 399, 405-06 (4th Cir. 2015); *see also Gresham v. Rutledge*, 198 F. Supp. 3d 965, 972 (E.D. Ark. 2016) (similar). Indeed, "[a] sampling of [regulations] employed" by the government in like circumstances "demonstrates that less restrictive alternatives … are readily available." *Edwards*, 262 F.3d at 866; *see also Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 826 (9th Cir. 2013) ("the availability of obvious less-restrictive alternatives renders a speech restriction overinclusive"). To take just one example,

number previously assigned to a coop member" who "waited 13 months to initiate a lawsuit," accruing further calls in the meantime).

[34] The statute also purports to penalize mere use of an ATDS for non-exempt calls, potentially including when those calls go unanswered, do not ring, or are blocked or rejected by the recipient, and therefore infringe no privacy interest.

there is the "obvious" alternative of adopting either nationwide or caller-specific "do-not-call" lists of persons who do not wish to receive autodialed and prerecorded calls—a measure the FCC *has already adopted* to restrict the dialing of live telemarketing calls. *See* 47 C.F.R. § 64.1200(c)-(d). The government also can establish stiffer penalties and undertake more aggressive enforcement efforts for violations of do-not-call lists. The FCC previously found that such a "do-not-call list alternative is the most effective and efficient means to permit telephone subscribers to avoid unwanted telephone solicitations." *Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, Report and Order, CC Docket No. 92-90, FCC 92-443, 7 FCC Rcd 8752, 8765 ¶ 23 (1992). And the FCC adopted its nationwide do-not-call list rules as "the most effective and efficient manner to protect consumer privacy needs." *Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, Report and Order, CG Docket No. 02-278, FCC 03-153, 18 FCC Rcd 14,014, 14,042 ¶ 40 (2003).

Notably, a do-not-call list almost certainly would be *more effective* than the call restrictions at issue, as it would provide callers with a universal list of individuals who do not wish to receive calls, and a *technologically feasible* alternative to allow both callers and recipients to avoid transmission of unwanted calls. This Court has emphasized that allowing a listener to "opt out" from receiving unwanted speech is an equally effective alternative to broad restrictions intended to protect residential

privacy. For example, in *Klein v. City of San Clemente*, this Court expressly recognized that allowing listeners to "opt out" of unwanted speech—whether by posting "'No Solicitations' signs" on their homes or "opt[ing] out of car leafletting" by posting a sign—is an "obvious" less restrictive alternative to mandatory restrictions on leafletting. 584 F.3d 1196, 1201, 1204-05 (9th Cir. 2009) (recognizing that the mere fact that some individuals might prefer not to receive certain speech "cannot justify an across-the-board restriction" on leafletting, given that many individuals "may want to receive [challenger's] speech"); *see also Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 966 (9th Cir. 2012) (Yellow Pages' "private opt-out programs" provided a "clear alternative" to a mandatory government permitting regime intended to protect residential privacy); *Berger*, 569 F.3d at 1038 (noting that "homeowner's privacy interests can be adequately protected by 'No Solicitation' signs") (collecting cases); *Playboy Entm't Grp.*, 529 U.S. at 814-15, 822-24. Absent *evidence* discounting these obvious alternatives, *Playboy Entm't Grp.*, 529 U.S. at 814-15, 822-24, the Court should follow the Fourth Circuit in concluding that less restrictive alternatives are available, in place of the content-based call restrictions. *See Cahaly*, 796 F.3d at 405-06.

CONCLUSION

For the reasons set forth above, the interlocutory order of the district court should be reversed and the case remanded with instructions for the district court to enter judgment in Spectrum's favor.

Dated: August 30, 2018

Respectfully submitted,

By: s/ Matthew A. Brill

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

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

STATEMENT OF RELATED CASES

Petitioners certify, pursuant to Ninth Circuit Rule 28-2.6, that they are aware of the following related cases pending in this Court.

Duguid v. Facebook, Inc., No. 17-15320 (9th Cir.).

Brickman v. Facebook, Inc., No. 17-80080 (9th Cir.).

Holt v. Facebook, Inc., No. 17-80086 (9th Cir.).

These three cases are "related" to this matter because they "raise the same or closely related issues." Ninth Circuit Rule 28-2.6(c).

Among the issues raised in those cases, one issue is whether the content-based 47 U.S.C. § 227(b)(1)(A)(iii) survives strict scrutiny on its face or as applied to the text messages at issue there.

Here, Petitioners Charter Communications, Inc. and Spectrum Management Holding Company, LLC raise the closely related issue of whether 47 U.S.C. § 227(b)(1)(A)(iii) constitutionally may be applied to impose liability on them for the alleged telephone calls at issue here.

Dated: August 30, 2018

Respectfully submitted,

By: s/ Matthew A. Brill

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

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-55667

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☑ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [11,533] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: s/ Matthew A. Brill

Date: August 30, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

(Rev.12/1/16)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 30, 2018.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: August 30, 2018

By: s/ Matthew A. Brill

Matthew A. Brill
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
Telephone: (202) 637-2200

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

ADDENDUM

ADDENDUM TABLE OF CONTENTS

47 U.S.C. § 227

Title 47—Telecommunications
Chapter 5—Wire or Radio Communications

§ 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.

* * *

(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—

* * *

(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 . . . .

* * *

(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—

* * *

(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 . . . .

* * *

(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.

* * *

47 U.S.C. § 153

Title 47—Telecommunications
Chapter 5—Wire or Radio Communications
Subchapter 1—General Provisions

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires—

(39) Person

The term ‘‘person’’ includes an individual, partnership, association, joint-stock company, trust, or corporation.

28 U.S.C. § 2342

Title 28—Judiciary and Judicial Procedure
Part VI—Particular Proceedings
Chapter 158—Orders of Federal Agencies; Review

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47;

47 C.F.R. § 64.1200

Title 47—Telecommunications
Chapter 1—Federal Communications Commission (Continued)
Subchapter B—Common Carrier Services (Continued)
Part 64—Miscellaneous Rules Relating to Common Carriers
Subpart L—Restrictions on Telemarketing, Telephone Solicitation, and Facsimile Advertising

§ 64.1200. Delivery restrictions.

* * *

(c) No person or entity shall initiate any telephone solicitation to:

(1) Any residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), or

(2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal Government. Such do-not-call registrations must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator. Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if:

(i) It can demonstrate that the violation is the result of error and that as part of its routine business practice, it meets the following standards:

(A) Written procedures. It has established and implemented written procedures to comply with the national do-not-call rules;

(B) Training of personnel. It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

(C) Recording. It has maintained and recorded a list of telephone numbers that the seller may not contact;

(D) Accessing the national do-not-call database. It uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process.

NOTE TO PARAGRAPH (c)(2)(i)(D): The requirement in paragraph 64.1200(c)(2)(i)(D) for persons or entities to employ a version of the national do-not-call registry obtained from the administrator no more than 31 days prior to the date any call is made is effective January 1, 2005. Until January 1, 2005, persons or entities must continue to employ a version of the registry obtained from the administrator of the registry no more than three months prior to the date any call is made.

(E) Purchasing the national do-not-call database. It uses a process to ensure that it does not sell, rent, lease, purchase or use the national do-not-call database, or any part thereof, for any purpose except compliance with this section and any such state or federal law to prevent telephone solicitations to telephone numbers registered on the national database. It purchases access to the relevant do-not-call data from the administrator of the national database and does not participate in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers; or

(ii) It has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed; or

(iii) The telemarketer making the call has a personal relationship with the recipient of the call.

(d) No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(1) Written policy. Persons or entities making calls for telemarketing purposes must have a written policy, available upon demand, for maintaining a do-not-call list.

(2) Training of personnel engaged in telemarketing. Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list.

(3) Recording, disclosure of do-not-call requests. If a person or entity making a call for telemarketing purposes (or on whose behalf such a call is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name, if provided, and telephone number on the do-not-call list at the time the request is made. Persons or entities making calls for telemarketing purposes (or on

whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the telemarketing call is made, the person or entity on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request. A person or entity making a call for telemarketing purposes must obtain a consumer's prior express permission to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a telemarketing call is made or an affiliated entity.

(4) Identification of sellers and telemarketers. A person or entity making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be

contacted. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(5) Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(6) Maintenance of do-not-call lists. A person or entity making calls for telemarketing purposes must maintain a record of a consumer's request not to receive further telemarketing calls. A do-not-call request must be honored for 5 years from the time the request is made.

(7) Tax-exempt nonprofit organizations are not required to comply with 64.1200(d).

U.S. Constitution

Amendment I (1791)

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.

U.S. Constitution

Amendment V (1791)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CERTIFICATE OF SERVICE

I, Matthew A. Brill, hereby certify that I electronically filed the Addendum of Defendants-Appellants Charter Communications, Inc. and Spectrum Management Holding Company, LLC with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 30, 2018, which will send notice of such filing to all registered CM/ECF users.

s/ *Matthew A. Brill*
Matthew A. Brill