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

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

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INTRODUCTION

Plaintiff and the government fail to justify the TCPA's content-based restrictions for calls to mobile numbers. They spend much of their briefs arguing that the restrictions are content-neutral. Yet they acknowledge that over the past two years, in the wake of the Supreme Court's clarification of the relevant principles in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), six district court judges have found that Section 227(b)(1)(A)(iii) is content-based and subject to strict scrutiny. This Court likewise should conclude that the call restrictions are subject to strict scrutiny.

The call restrictions cannot survive that exacting standard because they unconstitutionally discriminate against protected speech without sufficient justification. While Plaintiff and the government claim that the restrictions are supported by a compelling interest in "privacy in the home," that asserted interest is not "compelling," especially in this context. Indeed, Plaintiff and the government cannot identify a single case in which the Supreme Court or any court of appeals has ever held that such a "privacy" interest is sufficiently "compelling" to justify a *content-based* speech restriction. In any event, Congress's decision to authorize a massive volume of autodialed or prerecorded calls to mobile numbers without consent (for example, in service of collecting government-issued or -backed debt) undermines any claim that protecting consumers from such calls is a compelling governmental objective.

Plaintiff and the government also argue that these restrictions survive strict scrutiny because any burden on speech purportedly is limited, while the content-based exceptions Spectrum has identified supposedly are "narrow" and do not result in "appreciable damage" to privacy. But they have it exactly backwards: the call restrictions are extraordinarily broad and apply to all forms of protected speech, including core political speech. Just since Spectrum filed its opening brief, new putative class actions under the TCPA have been filed against Beto O'Rourke's Senate campaign, supporters of Justice Kavanaugh, at least one state legislator's PAC, and the Humane Society, just to name a few. *See infra* at 13-14. No wonder then that the American Association of Political Consultants filed an *amicus* brief supporting Spectrum in this appeal. The content-based exceptions also cause much more than just "appreciable damage" to privacy, fatally undermining any claim that the statute advances that interest. Nor did Plaintiff or the government identify any evidence to prove, as they must, that less restrictive alternatives are not available (in fact, they are). And contrary to the argument that the unconstitutional debt collection exemption can simply be "severed," that remedy is unavailable in the *defensive* posture of this challenge, and plainly would be inappropriate even if it were available.

To be clear: Spectrum is not challenging Congress's power to restrict robocalls or protect residential privacy. There are a number of constitutionally

permissible ways for Congress and the FCC to address legitimate concerns about these issues. The government's telemarketing do-not-call restrictions and targeted efforts to preemptively block scammers and spammers that "spoof" their originating phone numbers are just some of the many content-neutral tools the government has available and is actively employing, and are not at issue in this case.[1]

Because the call restrictions do not come close to passing constitutional muster, the district court's interlocutory order concluding otherwise should be reversed and the case remanded with instructions to enter judgment in Spectrum's favor.

ARGUMENT

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

Contrary to Plaintiff and the government's arguments, this Court's decisions in *Moser* and *Campbell-Ewald* upholding the pre-2015 version of the TCPA do not apply to the current statute, as recently amended and clarified, much less control the outcome of this appeal. The present-day speech restrictions are subject to strict

[1] Nor is Spectrum arguing for a right to "harass people," as Plaintiff asserts (at 2). Spectrum generally places calls so it can communicate with customers about important aspects of their service, and it does so with consent. This case, which seeks to hold Spectrum liable for millions of dollars based on a *single* "win-back" call that apparently was received by someone other than the intended recipient, illustrates how Section 227(b)(1)(A)(iii) has spawned a cottage industry of abusive, "gotcha" lawsuits.

scrutiny because they are both content- and speaker-based. *See Reed*, 135 S. Ct. at 2227-28, 30. And strict scrutiny applies regardless of whether Spectrum's speech is considered "commercial."

A. Circuit Law Does Not Preclude Spectrum's Constitutional Challenge

In arguing that strict scrutiny does not apply to the call restrictions, Plaintiff (at 21-26) and the government (at 11, 16, 21, 23) point to *Moser* and *Campbell-Ewald*, in which this Court sustained the original 1991 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). But those cases do not address (and predate the promulgation or clarification of) the content-based preferences that Spectrum challenges, and thus do not control the Court's decision. Indeed, this Court presumably would not have granted Spectrum's petition for interlocutory review if they did. *See Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (explaining that the presence of a reasonably debatable question is a prerequisite to this Court's grant of discretionary interlocutory review).

This appeal centers on Spectrum's arguments that Section 227(b)(1)(A)(iii) is content-based because of its preferential treatment of messages (i) that promote collection of government-backed debts; (ii) from governmental entities; and (iii) that concern FCC-favored topics. These issues were not before the Court in *Moser* or

Campbell-Ewald. Nor could they have been. Most significantly, the government-backed debt collection exception—the most significant content-based distinction—was not enacted until 2015, after both cases were decided.[2] Therefore, as the district court correctly recognized, neither *Moser* nor *Campbell-Ewald* addressed (or could have addressed) the issues raised by Spectrum, and those decisions cannot be binding precedent here. ER4; *see also Morales-Garcia v. Holder*, 567 F.3d 1058, 1064 (9th Cir. 2009) (where an issue is neither "raised [n]or discussed" in an opinion, such "non-litigated issues are not precedential holdings binding future decisions.").

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

Contrary to Plaintiff's (at 28-35) and the government's (at 10-23) claims, the call restrictions impose both content-based and speaker-based restrictions on speech that trigger strict scrutiny, 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

Plaintiff (at 24 n.11 & 37) and the government (at 24) acknowledge that six recent district court decisions each held that the government-backed debt collection exception renders the call restrictions content-based and subject to strict scrutiny. But Plaintiff (at 31-32) and the government (at 10-16) nonetheless urge this Court

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[2] In addition, the courts and the FCC had not yet clarified that the call restrictions exempt government speakers and messages, and the FCC had not yet promulgated its exemptions for favored speech. *See* Opening Brief at 8-9 & nn.2-4.

to conclude that the call restrictions are content-neutral, because they purportedly contain only a "relationship-based" debt collection exception that supposedly turns "on the relationship between the government and the person being called."[3]

But liability plainly depends on the content of a call, not any "relationship" between the call recipient and the government purportedly created by a government-guaranteed debt. For example, a private debt servicer or collector is exempt from liability if it makes an autodialed call to a mobile number to collect a private, government-guaranteed debt (like a private student loan or mortgage). But if the same caller contacted the same recipient who has the *exact same relationship* to the same government-backed debt, but instead called to tell her about (i) income-based repayment plans that could reduce her monthly payments, (ii) public service loan forgiveness programs, or (iii) legal protections for individuals who are unable to make debt payments, liability would ensue. Liability turns not on the purported "relationship" between the government and the call recipient, but on what the caller wishes to say about that alleged debt-based relationship. Given that the "subject matter" of the call is the only basis for determining whether the call restrictions apply, these are prototypical, "facial" content-based restrictions that "draw[] distinctions based on the message a speaker conveys" and therefore trigger strict

[3] Plaintiff and the government appear to have abandoned their earlier contention that this exemption turns on the relationship between *the caller* and the recipient.

scrutiny. *Reed*, 135 S. Ct. at 2227-28 (explaining that subject-matter-based distinctions trigger strict scrutiny without regard for whether they were motivated by animus against disfavored content).

That is far afield from the "relationship-based" exemptions other courts have upheld as content-neutral, based on the relationship between the call recipient and the *caller*. *Cf. Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 304 (7th Cir. 2017) (finding that exemptions pertaining to "[m]essages from school districts to students, parents, or employees" and persons "with whom the caller has a current business or personal relationship" "depend on the relation between the caller and the recipient, not on what the caller proposes to say"); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1550 (8th Cir. 1995) (similar). That the call restrictions here are not "relationship based" is particularly clear given that they purport to categorically exempt *wrong-number* calls placed without "prior express consent" to collect a government-backed debt, even where the call recipient lacks any debt-based "relationship" whatsoever with the government. *See* 47 U.S.C. § 227(b)(1)(A)(iii). Such inadvertent wrong-number calls are commonplace: Plaintiff himself states (at 43) that "the number one complaint from consumers regarding robocalls was being robodialed by a debt collector to collect from a different person." Unsurprisingly then, courts, including the district court here, have consistently rejected the theory

that the government-backed debt exception is "relationship based." *See* ER7-8 (collecting citations).

The government also claims (at 12) that the debt collection exemption "simply provides that persons making debt-collection calls on the government's behalf may use the same means that would be available to the government if it were making the calls itself." As with the government's other attempts to invoke its "immunity" from the call restrictions, that is wrong: the government does not even suggest what principle could give private entities the right to place calls without "prior express consent" just because the government allegedly is immunized to do so itself.

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

The government (at 16-20) also argues that the call restrictions may privilege government messages over all private messages without any First Amendment scrutiny. But Spectrum has identified over a dozen cases reaching the opposite result, recognizing that the First Amendment does not permit the government to privilege its own messages while simultaneously suppressing private messages in the same medium, unless the government can justify such discrimination under strict scrutiny. Opening Brief at 19-20 & n.7.

The government's attempts to distinguish those authorities are unavailing (and in many cases, misleading). To the extent some older decisions relied on Equal

Protection principles to condemn discrimination in favor of government messages, those decisions are equally applicable under the First Amendment. *See, e.g.*, *Harwin v. Goleta Water Dist.*, 953 F.2d 488, 490 n.3 (9th Cir. 1991). Nor does the government square its view that such speaker-based discrimination is *per se* constitutional and unreviewable, with this Court's recent holding that a speech restriction on credit card surcharges was fatally underinclusive based on its wholesale exemption of the government's own messages. *See Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1178 (9th Cir. 2018); *see also Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998) (observing that this Court "is troubled by the wholesale exemption for government speech" from speech restrictions).

Of course, there is no question that "government speech" is often treated differently under the First Amendment, because when the government speaks, "[i]t is entitled to say what it wishes." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009); *see also Oberwetter v. Hilliard*, 639 F.3d 545, 554 (D.C. Cir. 2011) (in nonpublic forums, like jails, courthouses, and airports, "the government may … favor its own expression"). But those cases do not grant the government free reign to restrict private speech while exempting itself. On the government's novel theory, it would be permissible to legislate: "No yard signs except government-provided signs." Or, "No displays in the town square except government-provided displays." Perhaps recognizing the Orwellian potential of the government's proposed rule,

courts have applied strict scrutiny in condemning these exact possibilities. *See* Opening Brief at 19-20 & n.7. The Supreme Court has warned that "the government-speech doctrine … is susceptible to dangerous misuse," and has already demarcated the presumptive "outer bounds" of that doctrine. *Matal v. Tam*, 137 S. Ct. 1744, 1758, 1760 (2017). The Court should not accept the government's invitation to go further.

The government also suggests (at 17) that the exemption of all government messages is simply a reflection of the government's sovereign immunity. But sovereign immunity cannot justify the statute's broad preference for government-approved messages, because the statute's text exempts messages from *all* governmental entities, including tens of thousands of municipalities, counties, and other entities *that have no claim to sovereign immunity*. *See* Opening Brief at 21 n.9 & 39. Even with respect to the federal government and the states, equal treatment of speakers and messages would not require any government entity to waive its sovereign immunity or to restrict its own speech whenever it restricts private speech. The government has multiple options available to eliminate this unconstitutional discrimination without waiving its sovereign immunity—for example, by (i) imposing a uniform restriction on *all* autodialed and prerecorded messages from all speakers, without granting any private right of action for damages or injunctive relief against the government; (ii) privileging government messages only when that preference is

narrowly tailored to a compelling interest—as with a host of public safety applications; or (iii) eliminating the restrictions that uniquely target disfavored, private messages. Indeed, in *Italian Colors*, this Court found that an anti-surcharging restriction was fatally underinclusive based on its exemption for California and its subdivisions, 878 F.3d at 1178, notwithstanding that California obviously possesses sovereign immunity.

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

The government argues (at 20-23) that the call restrictions' preferences for calls concerning package deliveries, banking transactions, healthcare appointments, and other favored subjects cannot be reviewed here because Spectrum did not bring its challenge in the court of appeals in the first instance, pursuant to the Hobbs Act. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1).[4]

But the Hobbs Act cannot preclude Spectrum's challenge to the *statutory* authorization for the FCC to promulgate such content-based exemptions. *See* 47 U.S.C. § 227(b)(2)(C) (authorizing exemptions); 28 U.S.C. § 2342(1) (limiting jurisdictional exclusivity to actions challenging the validity of an agency order).

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[4] The Supreme Court has granted *certiorari* on the question of the scope and effect of the Hobbs Act. *See PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, No. 17-1705, 2018 WL 3127423 (U.S. Nov. 13, 2018). Spectrum briefs this issue under existing Circuit authority, recognizing that the Supreme Court might later alter the applicable legal standard.

Spectrum contends that the unbounded discretion to impose content-based distinctions under Section 227(b)(2)(C) cannot validly be vested in an administrative agency. *See, e.g.*, *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1042 (9th Cir. 2009) (unbridled discretion doctrine applies to "legislative," "executive," and "administrative" actors). And that doctrine is not limited to the context of permitting and prior restraints, as the government argues (at 22). *See Hopper v. City of Pasco*, 241 F.3d 1067, 1079 (9th Cir. 2001) (invalidating policy granting officials discretion to remove controversial artwork from public space).

Moreover, although Spectrum's constitutional challenge is aimed at the statute, the FCC's array of blatantly content-based regulatory distinctions further underscore that liability under the TCPA depends entirely on the subject matter of the call, thus confirming that strict scrutiny applies. None of the authorities the government cites (at 21) holds that, where a statute is marred by content-based distinctions implemented by regulation, a court must blind itself to those distinctions.

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

Plaintiff argues (at 26-28) that strict scrutiny should not apply because Spectrum's speech supposedly is "commercial," and Spectrum has not shown substantial overbreadth. Plaintiff's argument about "overbreadth" is beside the point, because even if he were right, the call restrictions are subject to strict scrutiny

for independent reasons aside from their overbreadth. *See* Opening Brief at 23-24; *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 945 n.2 (9th Cir. 2011) (because ordinance did "not limit its reach to the commercial context," "we cannot, and do not, decide the Ordinance's validity under the Supreme Court's 'commercial speech' case law"); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 877 (1997). Even the government essentially acknowledges (at 23) that Spectrum may raise a challenge to the call restrictions' application to both commercial and noncommercial speech.

Plaintiff also is plainly wrong as to overbreadth: contrary to his claim (at 27) that Spectrum has failed to show the call restrictions' "unconstitutional sweep is substantial as compared to [their] permissible applications," it is difficult to imagine more substantial overbreadth than a statute that restricts *all* private speech other than select categories of favored content. For example, speakers have been repeatedly subjected to potential liability under the TCPA for engaging in core political speech, including the current and former Presidents' campaigns,[5] and, within just the last two months, Beto O'Rourke's Senate campaign,[6] Justice Kavanaugh's supporters,[7]

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[5] *Thorne v. Donald J. Trump For President, Inc.*, No. 1:16-cv-04603 (N.D. Ill. Apr. 25, 2016), ECF No. 1; *Shamblin v. Obama for Am.*, No. 8:13-CV-2428-T-33TBM, 2015 WL 1754628, at *2 (M.D. Fla. Apr. 17, 2015).

[6] *Syed v. Beto for Texas*, No. 3:18-cv-2791 (N.D. Tex Oct. 19, 2018), ECF No. 1.

[7] *Wijesinha v. Faith & Freedom Coal., Inc.*, No. 1:18-cv-24134-CMA (S.D. Fla. Oct. 8, 2018), ECF No. 1.

at least one state legislator's PAC,[8] and even the Humane Society.[9] Anyone who attempts to place a substantial volume of calls to consumers for *any reason* is bound to be hit with a TCPA lawsuit eventually, especially given that even the most rigorous efforts to obtain prior express consent will not prevent lawsuits when a single inadvertent call to a reassigned mobile number is enough to give rise to a multimillion dollar putative class demand, and there are no technological means to avoid such inadvertent calls. *See infra* at 28-29. Review therefore is warranted under strict scrutiny irrespective of the characterization of Spectrum's speech. *See Bd. of Trs. v. Fox*, 492 U.S. 469, 481-82 (1989).

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

"Content-based regulations are presumptively invalid," *Hoye v. City of Oakland*, 653 F.3d 835, 853 (9th Cir. 2011), and "almost always violate the First Amendment," *DISH Network Corp. v. FCC*, 653 F.3d 771, 778 (9th Cir. 2011). Plaintiff and the government have failed to carry their burden to sustain the call restrictions under strict scrutiny by proving through evidence that the content-based

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[8] *Norton v. 1863 PAC, Ltd.*, No. 3:18-CV-173 (N.D.W.Va. Oct. 19, 2018), ECF No. 1.

[9] *Righetti v. Humane Soc'y of the United States*, No. 4:18-cv-06562-DMR (N.D. Cal. Oct. 26, 2018), ECF No. 1.

call restrictions are narrowly tailored to advance a compelling government interest. *See Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011).[10]

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

The government argues (at 24) that "the protection of residential privacy is undoubtedly a compelling governmental interest." Tellingly, however, neither the government nor Plaintiff identifies a single case in which the Supreme Court or any court of appeals has ever held that such a "privacy" interest can justify a *content-based* speech restriction. That is unsurprising: to Spectrum's knowledge, there is no such case. *Cf. Kirkeby v. Furness*, 92 F.3d 655, 659 (8th Cir. 1996) ("[T]he Supreme Court has never held that [residential privacy] is a compelling interest … and we do not think that it is."). Instead, in its two principal decisions on this issue, the Supreme Court held that residential privacy is a "significant government interest" sufficient to support a *content-neutral* residential picketing restriction, *Frisby v. Schultz*, 487 U.S. 474, 484 (1988), but it recognized that residential privacy was *not* sufficient to support a *content-based* residential picketing restriction containing a single narrow exemption for labor-related picketing, as the government "may protect individual privacy by enacting … regulations applicable to all speech *irrespective of content*." *Carey v. Brown*, 447 U.S. 455, 465, 470 (1980)

[10] As Spectrum explained in its Opening Brief (at 26 n.13), for the same reasons set forth below, the call restrictions would fail even intermediate scrutiny.

(emphasis in original); *see also Perry v. L.A. Police Dep't*, 121 F.3d 1365, 1369 (9th Cir. 1997) (confirming that *Carey* identified a "substantial interest in protecting residential privacy"). This Court already has observed that *Frisby* and cases like it recognizing the interest in the "tranquility[] and privacy of the home" "do not sanction content-based restrictions," but instead "only accept the dignity and privacy rationale as a sufficiently strong governmental interest to justify a content-neutral time, place, and manner restriction." *Hoye*, 653 F.3d at 852.

The government says (at 27) that this statute is different, because "Congress has determined that these privacy interests are paramount." But the very existence of the government-backed debt collection exception (and other content- and speaker-based exemptions) establishes that Congress could not have regarded privacy as a compelling interest. *See, e.g.*, *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). Moreover, the government's paean to "preserving the sanctity" of the home (at 26 (quoting *Frisby*, 487 U.S. at 484)) badly misses the mark, as the statute itself makes clear that the heightened restrictions on calls to mobile numbers were not grounded in concerns about residential privacy. In particular, Congress enacted different, *less restrictive* rules for calls to "residential

telephone line[s]," allowing unlimited use of an automatic telephone dialing system ("ATDS") for such calls, in contrast to the sweeping ATDS restriction applicable to calls to mobile numbers. *Compare* 47 U.S.C. § 227(b)(1)(B), *with id.* § 227(b)(1)(A)(iii). And unsolicited calls to a *residential* landline "using an artificial or prerecorded voice" are impermissible only insofar as the call constitutes an "advertisement" or "telemarketing," 47 C.F.R. § 64.1200(a)(3), whereas *any* prerecorded/artificial call to a mobile number is prohibited without express consent (apart from the content-based exemptions discussed above). 47 U.S.C. § 227(b)(1)(A)(iii). The 1991 House Report explains why Congress imposed far greater restrictions on calls to *mobile* telephones than on calls to residential telephones: It was concerned in the former case about the "additional fees" historically charged for "receiving unsolicited calls" on mobile telephones. H.R. Rep. No. 102-317, at 24 (1991), 1991 WL 245201. But no one contends that *that* interest is compelling, nor could they.

Finally, even assuming such a privacy interest could be "compelling" in the abstract, Plaintiff and the government ignore the black-letter requirement that the party defending a content-based restriction advance *evidence* that the *distinctions* drawn by the law serve such a compelling interest in the specific factual context. *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 461-62 (1980) (under strict scrutiny, "the justifications offered for any distinctions [the restriction] draws must be carefully scrutinized"); *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.'"). The lack of any such evidence is unsurprising, because it is obvious that the content-based distinctions at issue here directly undermine any interest in privacy, even on the government's own theory, by allowing a large volume of unconsented-to calls.

Plaintiff suggests in passing (at 42) that the debt collection exemption might also be justified by a "compelling interest in … collecting government debts." By contrast, the government appears to have abandoned that contention on appeal. *Cf.* ER167-68 (raising that argument below). Such an interest cannot possibly justify the exemption for calls concerning *private*, government-guaranteed debts. The government will never collect any revenues from such debtors. At most, it might avoid *paying out* funds pursuant to a guarantee on a defaulted private loan—but no one argues *that* interest is "compelling." In any event, it is well-established that Plaintiff's asserted interest in raising revenue cannot justify a *content-based* speech restriction. *See Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231-32 (1987) ("interest in raising revenue" failed to justify sales tax on publications "based solely

on their content"); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586 (1983) (similar); *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 135-36 (1992) ("raising revenue for police services" is "an important government responsibility," but "it does not justify a content-based permit fee"); *Serv. Emps. Int'l Union*, 955 F.2d at 1320 & n.12 (collecting cases); *Worrell Newspapers of Ind., Inc. v. Westhafer*, 739 F.2d 1219, 1224 n.4 (7th Cir. 1984) ("[T]he Supreme Court has rejected several interests as not sufficiently compelling to justify an infringement on the First Amendment," including "a state's interest in raising revenue."), *aff'd*, 469 U.S. 1200 (1985).[11]

Moreover, even assuming such an interest could sometimes be compelling, Plaintiff and the government identified no evidence below that the exemption actually is necessary to collect government revenue. Certainly the government and private entities were doing so successfully prior to 2015. There is no legislative history available that could show otherwise. *See, e.g.*, Pub. L. No. 114-74, § 301(a)(1)(A), 129 Stat. 584, 588 (2015). Plaintiff's attempted "post hoc rationalization[]" of a purported "compelling" government interest is therefore impermissible. *Bourgeois v. Peters*, 387 F.3d 1303, 1322-23 (11th Cir. 2004).

[11] The same holds true under the Equal Protection Clause. *See Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 263 (1974) (finding that fiscal concerns cannot justify invidious discrimination); *Graham v. Richardson*, 403 U.S. 365, 375 (1971).

Moreover, the Congressional Budget Office ("CBO") reviewed the exemption and identified no material budget impact arising from it.[12] Given the lack of any evidence that the debt collection exception has resulted in any additional government revenues or savings,[13] it appears this "special exemption" from liability for private debt collection messages instead serves to "bestow[] regulatory largesse upon favored industries" by allowing private debt collectors and issuers to place calls without recipients' consent. Dissenting Statement of Commissioner Pai, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, CG Docket No. 02-278, 31 FCC Rcd 9074, 9123 ¶ 13 (2016). Such largesse is far from "compelling."

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[12] 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).

[13] On appeal, the government says for the first time (at 30 n.1) that "[e]stimates relied on by Congress indicate that the exception will save the federal government $120 million over ten years," citing to a February 2015 Office of Management and Budget ("OMB") budget document. The government does not explain how OMB derived its projection or cite any evidence of any such "reliance" by Congress. That is unsurprising: eight months later, before the debt-collection exemption was enacted, the nonpartisan CBO reviewed that exemption and identified no material budgetary effects. *See supra* n.12. Moreover, the government did not provide this information below, so there is no evidentiary record concerning the disagreement between CBO and OMB, nor whether OMB's *forecast* has been borne out in the years since.

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

Plaintiff and the government 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. That deficiency warrants judgment in Spectrum's favor. *See Perry*, 121 F.3d at 1370.

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

Plaintiff and the government fail to rebut Spectrum's showing that the call restrictions are fatally underinclusive on the independent grounds that they (i) exempt large swaths of intrusive speech that is equally or more harmful to the government's purported privacy interest than the restricted speech, and (ii) privilege commercial speech over all other protected speech.

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

The government begins (at 27) by mischaracterizing the "narrow tailoring" test, arguing that the *content-based distinctions* need not be tailored to the asserted privacy interest as long as "the autodialer restriction as a whole" is sufficiently tailored. As shown above, Plaintiff and the government must justify the statute's *differential treatment*; it does not suffice to show that the restrictions would be justified in the *absence* of content-based distinctions. *See supra* at 17-18 (collecting

cases). Yet Plaintiff and the government fail utterly to explain how exempting unconsented-to calls to promote the collection of government-backed debt (even apart from the other content- and speaker-based distinctions), while discriminating against other calls on the basis of their subject matter, constitutes a narrowly tailored means of protecting residential privacy.

The government instead claims (at 27-28) that the call restrictions "aim[] squarely at the conduct most likely" to cause the harms Congress seeks to prevent, *i.e.* automated calling. But there is no evidence that remotely supports the assertion that the prohibited calls are any more likely to harm privacy than the calls the government has exempted. To the contrary, Spectrum has identified extensive evidence showing that the call restrictions broadly *exempt* many of the *most intrusive* autodialed and prerecorded calls, particularly unconsented-to debt collection calls. *See* Opening Brief at 34-40; ER202-03 & n.9; ER102-05. That showing stands unrebutted. Indeed, Plaintiff appears to agree with Spectrum: he argues (at 43) that "the number one complaint from consumers regarding robocalls [i]s being robodialed by a debt collector" without consent, further admitting (at 39) that the restrictions' content-based exemptions "may diminish" "the achievement of the statute's privacy-protection purposes." *Amicus curiae* EPIC also acknowledges (ECF No. 33 at 10) that the debt-collection exception "cuts against the privacy interests of telephone subscribers" and "hurts consumers."

The government argues (at 27-29) that it is not dispositive that the exemptions allow such harm to the asserted privacy interest, citing *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1665-68 (2015). But while the government is right (at 28) that "speech restrictions need not sweep *as broadly as possible* in order to be found valid" under strict scrutiny (emphasis added), that misses the critical point that a restriction must sweep broadly enough to avoid undercutting the interest the government claims to be advancing. *Williams-Yulee* itself makes clear that the government's argument here is unavailing. There, the Supreme Court held that a restriction on direct judicial fundraising was narrowly tailored because the exempt speech (*i.e.*, indirect campaign committee fundraising) posed a "categorically different and [less] severe risk" of harm than the restricted speech. *Id.* at 1669. But here, the restrictions *exempt* speech that poses an identical or greater risk to privacy than the restricted speech. That is the *opposite* of narrow tailoring.

The government also wrongly argues (at 28) that it is sufficient that these harmful exceptions supposedly "do not undermine the general efficacy of the restriction," which "substantially reduces the use of [the relevant] technologies." But "[u]nderinclusivity creates a First Amendment concern" not only when exemptions so thoroughly compromise a restriction that it no longer serves its purposes at all, but also "when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest

in a comparable way." *Williams-Yulee*, 135 S. Ct. at 1670 (emphasis in original); *Carey*, 447 U.S. at 465 (invalidating statute because there was "nothing inherent in the nature of [exempt] labor picketing that would make it any less disruptive of residential privacy than [the restricted] picketing…."). The call restrictions "cannot be defended on the ground that partial prohibitions may effect partial relief;" instead, to show narrow tailoring, the government must "demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly" to similarly situated speech. *Fla. Star v. B. J. F.*, 491 U.S. 524, 540 (1989).

Relatedly, the government argues (at 29) that a speech restriction fails narrow tailoring only where it has "numerous" "broad" exemptions that permit a "substantial amount of speech that presents the type of harm that the statute purportedly seeks to prevent," and that the exemptions here are only few and "narrow." But that mischaracterizes both the law and the facts. A speech restriction is fatally underinclusive where its "leaves *appreciable damage* to th[e] supposedly vital interest unprohibited.'" *Reed*, 135 S. Ct. at 2232 (emphasis added). Plaintiff and the government have never identified any evidence, beyond their own say-so, to show that the content-based exemptions do no "appreciable damage" to privacy, and Spectrum has shown just the opposite. *See* Opening Brief at 34-40.

Nor is it necessary for "numerous" exceptions to exist to cause "appreciable damage" to the asserted governmental interest. For example, in *Carey*, the Supreme

Court invalidated a restriction on residential picketing based on a single, narrow exemption for labor picketing: Although the restriction undoubtedly still protected privacy in the vast majority of cases, it failed strict scrutiny because "nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy." 447 U.S. at 465. Likewise, in *Perry*, this Court acknowledged that a restriction on solicitations on the Venice Beach Boardwalk clearly "would aid" the government's goals, but the restriction still failed even intermediate scrutiny because it contained *one* narrow exemption for nonprofit speakers without any "evidence that those without nonprofit status [were] any more cumbersome upon fair competition or free traffic flow than those with nonprofit status." 121 F.3d at 1370. And in *Italian Colors*, California's anti-surcharging statute applied to essentially all credit and debit card transactions and contained only narrow exceptions for payments to government entities and utilities; while that speech restriction continued to apply to almost all surcharged payments, the statute still failed even intermediate scrutiny because there was "no explanation why these exempt surcharges are any less harmful or deceptive than the surcharges plaintiffs seek to impose." 878 F.3d at 1178.[14] Here, by contrast, the exemptions for government-backed debt collection calls,

[14] *Italian Colors* confirms that the call restrictions are fatally underinclusive and would fail narrow tailoring even under the intermediate scrutiny applicable to a content-neutral restriction on commercial speech, based on the call restrictions' exemption of government messages standing alone.

government messages, and FCC-favored content are substantially broader than the narrow exemptions disapproved of in those cases, as these TCPA exemptions permit unrestricted, unconsented-to calls to millions of borrowers, additional unsolicited calling from tens-of-thousands of governmental entities, and unconsented-to calls relating to millions of package deliveries, banking transactions, healthcare appointments, and so on. *See* Opening Brief at 38-40.

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

The government apparently accepts (at 31) that the call restrictions may not privilege commercial speech over noncommercial speech, but argues that "[c]alls made to ensure the payment of funds owed to the federal government are not commercial communications." Whether or not that is correct, it proves far too little, because the debt-collection exemption goes much further than simply exempting calls to collect money owed to the government (like an IRS debt); it also exempts a huge volume of private debt-collection calls placed by private parties concerning private debts (like student loans and mortgages) that just happen to be guaranteed by the government. The government has conceded elsewhere that private debt collection messages are "commercial" speech. U.S. Mem. of Law in Supp. of the Constitutionality of the TCPA 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. That the exempt private debts here might be "guaranteed" by the government in the event that some

of them later default cannot convert such private debt collection messages into "noncommercial" speech; as the government has explained, private callers placing such debt collection calls remain motivated by their "economic interests" and propose a "future transaction[]" (*i.e.*, a payment). *Id*.

2. The Call Restrictions Also Are Fatally Overinclusive

Plaintiff and the government fail to rebut Spectrum's showing that the call restrictions are also fatally overinclusive.

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

Plaintiff and the government have no good answer to Spectrum's showing (Opening Brief at 42-43) that the call restrictions are impermissibly overinclusive because there are many types of restricted speech that are just as important or valuable to speakers and listeners as speech exempt from the call restrictions. They offer no explanation as to why (for example) public schools may send unconsented-to messages, but private, parochial, and charter schools may not; why package deliveries are exempt from liability, but not grocery or dry cleaning deliveries. 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). Plaintiff and the government do not show otherwise.

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

Finally, Plaintiff and the government do not come close to undermining Spectrum's showing (Opening Brief at 44-46) that the statute sweeps far more broadly than necessary by imposing a strict liability regime with which full compliance is impossible. While the government says (at 32) that calls can still be made through "non-automated means or obtaining [the recipient's] consent," in reality, "[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). As a result, the Chairman of the FCC has recognized that "even the most well-intentioned and well-informed business will sometimes call a number that's been reassigned to a new person" without the recipient's consent. Dissenting Statement of Then-Commissioner Ajit Pai, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-278, 30 FCC Rcd 7961, 8077 (2015) ("2015 FCC Order"). Such strict liability severely chills speech by legitimate businesses, political speakers, and noncommercial entities that are merely trying to reach their own customers and constituents via modern technology. *See Reno*, 521 U.S. at 876

(concluding speech is severely burdened where compliance is technologically impossible). Plaintiff's counsel effectively acknowledges (at 43) that they seek to impose multi-million dollar putative class liability for such unavoidable, inadvertent "wrong number" calls, even where a party has a "good faith" belief it is calling with prior express consent. Private speakers that do not benefit from the content-based exemptions have good reason to be chilled.

The government's suggestion (at 33) that callers can simply give up on using modern technology to reach their customers and constituents, and instead place all calls and text messages through a manually dialed, live operator telephone (*i.e.*, every flight delay text alert, every cable installation appointment reminder, every get-out-the-vote message, every daily bible verse) at the cost of millions or billions of dollars, is no answer at all: The FCC has admitted that such burdens "significantly constrain" and "severely" "impair" the "ability to communicate with the public" by posing a "significant obstacle" "imped[ing]" the free dissemination of information, and increasing the cost of speech. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, CG Docket No. 02-278, 31 FCC Rcd 7394, 7401-04, ¶¶ 15, 19 (2016). The government cannot simply wave off its own findings, given that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc. v. Members of N.Y.*

State Crime Victims Bd., 502 U.S. 105, 115 (1991); *see also U.S. v. Playboy Entm't Grp.*, 529 U.S. 803, 812 (2000) ("The government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."). Moreover, the government's proposed "alternative channels" for communication, inadequate though they are, are irrelevant to the review of the *content-based* call restrictions. *Reno*, 521 U.S. at 879; *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 541 (1980).

The government further claims (at 33) that such content-based strict liability is the "least restrictive alternative" available because "[n]one of the[] [available] alternatives would be equally effective at preventing the onslaught of unwanted calls, and the attendant invasion of personal privacy." But the party defending a speech restriction must demonstrate 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). Plaintiff and the government did not even attempt to meet this burden below. On appeal, the government quotes (at 34) a single congressional finding that "[b]anning such automated or prerecorded telephone calls to the home … is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." (quoting Pub. L. No. 102-243, § 2, ¶ 12, 105 Stat. 2394 (1991)). But such a conclusory recital does not satisfy the government's heavy evidentiary burden to

demonstrate that such content-based strict liability is actually the least restrictive alternative capable of meeting the restrictions' goals. *See Sable Commc'ns*, 492 U.S. 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."); *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 alternative to be ineffective," which must be based on more than "anecdote and supposition"); *id.* (rejecting "conclusory statement" by legislator that alternatives would be ineffective because they "put[] the burden of action on the subscriber, not the cable company," as that "tells little about the relative efficacy of [the alternatives], other than offering the unhelpful, self-evident generality that voluntary measures require voluntary action").

For example, all telemarketing calls are subject to the FCC's "do-not-call" restrictions, which require telemarketers to honor both a national do-not-call list, as well as do-not-call requests made directly to them, irrespective of the dialing technology that they use. 47 C.F.R. § 64.1200(c)-(d). And the FCC is currently pursuing intensive efforts to put an end to scammers' placing mass calls from fake, "spoofed" telephone numbers, often originating overseas, which create the true "boiler room" problem that vexes consumers—not calls from legitimate callers trying to reach their own customers and constituents. *See Advanced Methods to*

Target and Eliminate Unlawful Robocalls, Report and Order and Further Notice of Proposed Rulemaking, CG Docket No. 17-59, 32 FCC Rcd 9706, ¶ 1 (2017).

In invalidating a state-law analog to the TCPA's call restrictions, the Fourth Circuit correctly identified numerous less-restrictive 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). Indeed, this Court has explained that allowing a listener to "opt out" from receiving unwanted speech (as with a "do not call" list) is an equally effective alternative to broad, preemptive restrictions intended to protect residential privacy. *See, e.g., Klein v. City of San Clemente*, 584 F.3d 1196, 1201, 1204-05 (9th Cir. 2009); *Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 966 (9th Cir. 2012). Plaintiff and the government have not met their burden of proving otherwise. Indeed, the government's adoption of far *narrower* restrictions for calls to *residential* landlines (*supra* at 16-17) reinforces that less restrictive options are available.

III. THE CALL RESTRICTIONS CANNOT BE "SEVERED" TO IMPOSE LIABILITY ON SPECTRUM HERE

Plaintiff (at 46-47) and the government (at 34-35) argue that the government-backed debt collection exception, if invalid, should simply be severed from the statute, and the judicially amended statute should be applied retroactively to impose liability on Spectrum for its single alleged call to Plaintiff on July 6,

2017.[15] *See* ER1. That would be unprecedented and impermissible.

"Severability" is not a concept that could apply in this posture, given that Spectrum is a *defendant* raising the First Amendment as a defense to its potential liability. Spectrum is not a plaintiff in a declaratory judgment action where the Court might attempt to "fix" the statute prospectively by excising its constitutional infirmities. The government cites no authority holding that a court can use severance to cure an invalid statute in order to impose retrospective liability on a *defendant* under the newly rewritten statute. Indeed, doing so—when Spectrum could not be held liable under the then-governing statute when it placed the single call at issue—would raise serious retroactivity concerns. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 268 (1994) (noting the "requirement that *Congress* first make its intention clear" before applying a statute retroactively (emphasis added)).

As a matter of law, a party facing liability under a speech restriction that is later found to be fatally underinclusive cannot be held liable thereunder, *regardless* of how the legislature or a court might subsequently cure the constitutional infirmity. In *Grayned v. City of Rockford*, for example, the defendant participated in a civil rights demonstration and was convicted of violating a local "antipicketing"

[15] Plaintiff and the government do not argue that the exemption for all government messages or the authorization of the FCC's content preferences (and the resulting exemptions) could be "severed." Nor could they.

ordinance that exempted "peaceful picketing of any school involved in a labor dispute." 408 U.S. 104, 107 (1972). The defendant successfully challenged his conviction based on the statute's underinclusiveness. *Id*. It was irrelevant to the Court's decision whether the legislature likely would have cured the constitutional infirmity by excising the labor-dispute exemption. In fact, the legislature had done just that subsequent to the defendant's conviction. *Id*. & n.2. "Necessarily," the Court observed, "we must consider the facial constitutionality of the ordinance in effect when [the defendant] was arrested and convicted." *Id*.

By contrast, on the government's theory (at 34-36), the speech restriction in *Grayned* simply should have been "severed" to remove the content-based exemption, and the protestor would stand convicted under the judicially amended statute. Obviously, that is not the law. Indeed, if the government were right that a party who is sued under an unconstitutional but "severable" statute would remain liable under a newly "severed" version of the statute, defendants would have no reason to challenge such unconstitutional provisions, largely immunizing them from review. That result also would be improper with respect to callers who previously placed government-backed debt collection calls under the exception, but would purportedly face liability through retrospective application of the "severed" statute.

But even if the concept of severability could apply to a First Amendment *defense*, the government's approach—severing just the exemption, rather than the

entire prohibition—would be contrary to the remedy consistently applied in constitutional litigation, which provides for "extension" of the right abridged rather than "nullification" of the special exception, absent a "clear[] express[ion]" of a congressional preference for nullification. *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984); *see also Carey*, 447 U.S. at 459 n.2 (affirming lower court's conclusion that "the labor dispute exception [from a general ban on picketing] was not severable" given that severance would *expand liability* under the statute); *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 102 (1972) (similar). The government's theory would be particularly perverse if applied in the First Amendment context, because it would effectively "requir[e] the [Government] to restrict more speech than it currently does." *Rappa v. New Castle Cty*, 18 F.3d 1043, 1072-73 (3d Cir. 1994) (Becker & Alito, JJ.). Thus, in *Rappa*, the Third Circuit concluded that, in the First Amendment context, the "severability inquiry … has a constitutional dimension" and therefore "the proper remedy for content discrimination generally cannot be to sever the statute so that it restricts more speech than it did before." *Id*. Indeed, in all of its many underinclusiveness cases, the Supreme Court has *never* expanded the speech restriction as a remedy, but instead has always struck the restriction down. *See* ER204-205 & n.11 (collecting citations).

Here, the available evidence of congressional intent also precludes severance of the debt collection exemption. As originally enacted by Congress in 1991, the

TCPA was intended to combat a particular problem—eliminating robotic dialing by telemarketers of random or sequential telephone numbers (555-0000, 555-0001, and so on) and/or using one-size-fits-all prerecorded spam messages. *See* Pub. L. No. 102-243, § 2, ¶¶ 1, 10, 105 Stat. 2394 (1991). It was only in July 2015 that the FCC—not Congress—expanded potential liability to encompass a far broader range of computerized equipment that is presently unable to dial random or sequential numbers, bolstering a national wave of TCPA litigation. *See* 2015 FCC Order, 30 FCC Rcd at 7974-76, ¶¶ 16, 19. Almost immediately, in November 2015, Congress chose to carve out from liability calls promoting the collection of private, government-guaranteed debts. *See* Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a)(1)(A), 129 Stat. 584, 588 (2015). In light of that history, there is no indication that Congress *ever* intended to subject calls promoting collection of government-guaranteed debt to liability, or that Congress would now prefer to do so, rather than to limit liability for other autodialed calls.

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: November 29, 2018

Respectfully submitted,

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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 November 29, 2018.

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