No. 18-55667

IN THE 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 Interlocutory Appeal under 28 U.S.C. § 1292(b) from an Order of the United States District Court for the Central District of California
No. 5:17-cv-01361-CAS-KK
Hon. Christina A. Snyder, U.S.D.J.

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF APPELLEE, INTERVENOR-APPELLEE, AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen, Inc., is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen, Inc., is a nonprofit consumer advocacy organization that appears on behalf of its nationwide members and supporters before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has long supported the interest of consumers in being free from the unwanted intrusions of telemarketers who use devices such as autodialers and recorded messages to besiege consumers on their cell phones and home phones. In addition, Public Citizen has long been involved in First Amendment cases, particularly those involving the development of commercial-speech doctrine. Public Citizen has become increasingly concerned that commercial actors are invoking the First Amendment to support claims that legitimate regulations of their business practices are content-based speech restrictions subject to strict scrutiny, and it has filed

[1] All parties have consented to the filing of this brief. The brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money that was intended to fund this brief's preparation or submission; and no person other than the amicus curiae, its members, or its counsel contributed money intended to fund the brief's preparation or submission.

numerous amicus curiae briefs in the Supreme Court, this Court, and other courts contesting such assertions. This case presents another manifestation of the same phenomenon, threatening a highly significant consumer protection statute. Public Citizen therefore submits this brief to assist this Court in determining whether to turn away from its own case law and take the unprecedented step of holding that the Telephone Consumer Protection Act (TCPA) violates the First Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

As this Court has recognized, "[u]nsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients." *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017). Congress enacted the TCPA to restrict such practices based on its "specific findings that 'unrestricted telemarketing can be an intrusive invasion of privacy' and [is] a 'nuisance.'" *Id.*; *accord Mims v. Arrow Fin. Serv., Inc.*, 565 U.S. 368, 372 (2012). In the TCPA, "Congress identified unsolicited contact as a concrete harm, and gave consumers a means to redress this harm." *Van Patten*, 847

F.3d at 1043. The statute thus "establishes the substantive right to be free from certain types of phone calls and texts absent consumer consent." *Id*.

This Court has upheld the TCPA against First Amendment challenges twice, first in *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995), and then in *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876 (9th Cir. 2014), *aff'd on other grounds*, 136 S. Ct. 663 (2016). In this case, defendants-appellants Charter Communications and Spectrum Management Holding Co. (Spectrum), again attempt to mount a First Amendment challenge to the TCPA's prohibition on unconsented-to, autodialed calls to cell phones. Spectrum's principal submission is that an amendment to the TCPA postdating this Court's decision in *Gomez* transformed the TCPA from the valid, content-neutral time, place, or manner regulation this Court held it to be in *Moser* and *Gomez* into a content- and speaker-based prohibition aimed, not at protecting consumers against the serious privacy harms identified by Congress and recognized by this Court, but at suppressing messages disapproved of by the government.

Spectrum's implausible assertion fails on numerous grounds. The features of the statute on which Spectrum relies do not make the TCPA content- and speaker-based. Indeed, if Spectrum's arguments were correct, *Moser* and *Gomez* would have been decided the other way, because the statute already had features functionally identical to those on which Spectrum relies. Far from being consistent with this Court's precedents, Spectrum's argument is a frontal assault on them.

Spectrum's argument also rests on denigration of the importance of the compelling interest in personal privacy served by the TCPA and on a fundamental mischaracterization of that interest. Contrary to Spectrum's assertion, the interest served by the TCPA is not shielding consumers from particular disfavored messages, but on preventing the harm of intrusions into their homes, or their pockets, to which they did not consent. The TCPA, notwithstanding its exceptions, is directly and narrowly tailored to serve that interest by prohibiting the countless intrusions that would take place absent the law.

In any event, Spectrum's characterization of the statute as content-based, even if correct, would not render application of the TCPA to commercial speech of the type engaged in by Spectrum subject to the strict scrutiny Spectrum advocates. Because its own commercial-speech activities can legitimately be subjected to content-based restrictions that serve substantial government interests, Spectrum seeks to assert the rights of others engaged in fully protected speech to demonstrate the facial unconstitutionality of the statute. But because the statute's "plainly legitimate sweep," *Americans for Prosperity Found. v. Becerra*, 903 F.3d 1000, 1020 (9th Cir. 2018), is overwhelming in comparison to any claimed unconstitutional applications to fully protected speech, Spectrum cannot succeed in invoking the facial overbreadth doctrine on which it necessarily relies.

In sum, as Judge Easterbrook recently observed, this Court's decisions in *Gomez* and *Moser* have not been made "obsolete." *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 304 (7th Cir. 2017). This Court should adhere to its holdings in those cases and reject

Spectrum's First Amendment attack on an important consumer-protection statute.

ARGUMENT

I. The TCPA is not content-based.

A. Spectrum's arguments fail to distinguish *Moser* and *Gomez*.

The provision of the TCPA at issue here does not limit the messages that may be conveyed to consumers. Rather, it regulates conduct by limiting the *manner* in which telemarketers can convey their messages, by prohibiting the use of autodialers and prerecorded messages in calls to cell phones without the called party's consent. 47 U.S.C. § 227(b)(1)(A)(iii).[2] Spectrum acknowledges that this Court held the TCPA to be a valid time, place, or manner restriction in both *Moser* and *Gomez*, but argues that this Court should now disregard those precedents because the statute became content- and speaker-based (and hence subject to strict scrutiny) as a result of a 2015 amendment

[2] Spectrum's arguments that the statute is content- and speaker-based would apply equally to the statute's similar prohibition on calls to residential phones using artificial or prerecorded voices. 47 U.S.C. § 227(b)(1)(B).

exempting calls made for the purposes of "collect[ing] debt[s] owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). Spectrum also relies on the FCC's promulgation of regulations providing additional exemptions to the Act, as well as on the Act's inapplicability to calls made by governmental entities, *see Campbell-Ewald v. Gomez*, 136 S. Ct. 663, 672 (2016), as further indications that it is content- and speaker-based.

As an initial matter, none of these arguments distinguishes this Court's precedents in *Moser* and *Gomez*. If, as Spectrum argues, the Act's exemption of calls for government-backed-debt-collection purposes renders it content-based, its exemption for calls made for emergency purposes—which has existed from the statute's inception—should have the same effect. Yet in *Moser,* this Court held it to be content-neutral, despite expressly recognizing that the statute exempts emergency communications. *See* 46 F.3d at 972, 973. Spectrum makes no attempt to explain how the debt-collection exemption transforms the statute into a content-based regulation when the emergency exemption—which

Spectrum does not mention except in quoting the statute, Spectrum Br. 6—did not.

Likewise, even while asserting that the Court must consider *regulatory* exemptions in a *facial challenge* to the statute, *see id.* 21–22, Spectrum fails to acknowledge that this Court rejected precisely that argument in *Moser*. Specifically, Spectrum's argument that the Act's language authorizing exemptions makes it content-based on its face, *see id.* at 21, fails to distinguish *Moser*, both because that authority also existed when *Moser* was decided, and because Spectrum's argument does not account for the Court's express statement that that "permissive" language did not affect the statute's facial constitutionality. *See Moser*, 46 F.3d at 973.

As for Spectrum's assertion that the Court should consider the FCC's various exercises of its authority to create exemptions, *Moser* also rejected that argument. When *Moser* was decided, the FCC had already exempted certain noncommercial calls from the TCPA, but this Court declined to consider that regulatory exemption as an indication that the statute was not content-

neutral, *see id.* at 973, and indeed held that it lacked jurisdiction to do so, as challenges to the constitutionality of the implementing regulations were "outside the jurisdiction of the district court," *id.* *Moser*'s holding reflects not only the Hobbs Act's jurisdictional limits on challenges to the validity of the FCC's implementing regulations, *see* 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a), but also the more general principle that a court considering a facial challenge should not "invalidate a statute that is constitutional as written when only its implementation is [allegedly] defective," *Hoye v. City of Oakland*, 653 F.3d 835, 848 (9th Cir. 2011).

To the extent that the statute is inapplicable to governmental entities, that limitation also distinguishes neither *Moser* nor *Gomez*. The TCPA's applicability only to "persons," and the limitations on that statutory term, have existed since the Act's inception. Moreover, the Act's inapplicability to the federal government and its agencies was specifically called to this Court's attention in *Gomez* as the basis for the claim of "derivative" immunity that this Court, and the Supreme Court, rejected. *See Gomez*, 768 F.3d at 879–82; *Campbell-Ewald*, 136 S. Ct. at 672 ("The

United States and its agencies, it is undisputed, are not subject to the TCPA's prohibitions because no statute lifts their immunity."); *Gomez v. Campbell-Ewald Co.*, 2013 WL 655237, at *4 (C.D. Cal. Feb. 22, 2013) ("[T]he Navy cannot be sued for violation of the TCPA."). Spectrum has made no effort to explain how its argument that the TCPA's exclusion of liability for government entities justifies this Court in disregarding its precedents upholding the statute as a neutral time, place, or manner restriction in the face of that identical circumstance.

B. The exemption for collection of government-backed debt does not make the TCPA content-based.

Even leaving *Moser* and *Gomez* aside, Spectrum's attempt to portray the TCPA as pervasively content-based because of the exemption for calls to collect government debt fails. Contrary to Spectrum's assertions, the TCPA's strictures are not applicable only to "speakers of disfavored messages," Spectrum Br. 1, nor do they "appl[y] to particular speech because of the topic discussed or the idea or message expressed," *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227–28 (2015). Nor is "the subject matter of the call …

the only basis for determining whether the statutory restrictions apply," as Spectrum asserts. Spectrum Br. 16. Rather, the applicability of the statute depends in the first instance on the manner of contacting the called party (through an autodialer and/or a recorded message) and the presence or absence of consent, regardless of the idea the caller wishes to convey. And the determination whether the exemption for debt-collection calls applies rests on the function of the call in connection with a debtor-creditor relationship between the called party and the federal government, not on the content of its message. As the Seventh Circuit has held, such a statute does not disfavor any particular type of speech and, in that way, "entail[] content discrimination"; rather, it disfavors "robocalls" without consent. *Patriotic Veterans*, 845 F.3d at 305.

Spectrum is also wrong that determining whether the debt-collection exception applies necessarily requires a court to examine a message's content. Spectrum Br. 16–17. Here, for example, Spectrum does not claim to have authority to collect debt owed to or guaranteed by the federal government, to have

been engaged in that activity when it sent its messages, or to have targeted its messages at persons owing such debt. No examination of Spectrum's message, therefore, is necessary to determine that it could not qualify for the exemption, and the same is true of the vast bulk of telemarketing messages. Only persons engaged in the activity of collecting debts owed to the federal government, and sending messages to persons who owe such debts, are even potentially eligible for the exemption. A message whose sender and recipient lack those characteristics—which are not dependent on the ideas expressed in the message—falls outside the exemption without regard to any examination of the content of the message.

In any event, that examination of a message's content may in some cases be useful, or even necessary, to determining the applicability of the statutory exemption does not by itself make the exemption content-based. In particular, where a statute applies to or exempts conduct carried out for a particular purpose (here, the use of an autodialer or recorded message for the purpose of collecting debts owed to or guaranteed by the federal

government), the possibility that the actor's speech may be examined to determine the purpose of the conduct does not render the statute content-based. For example, in *Recycle for Change v. City of Oakland*, 856 F.3d 666 (9th Cir.), *cert. denied*, 138 S. Ct. 557 (2017), this Court held that a municipal ordinance prohibiting unattended donation collection boxes (UDCBs) that accepted items for the purpose of distribution, resale, or recycling was not content-based, even though an enforcement officer would have to examine messages associated with a box to determine the purpose for which it collected items. As the Court explicitly stated, "that an officer must inspect a UDCB's message to determine whether it is subject to the Ordinance does not render the Ordinance *per se* content based." *Id*. at 670.

Recycle for Change rejected any suggestion that its holding was in tension with *Reed*, *see id*. at 671 n.2. and noted that it was strongly supported by Supreme Court's holding in *Hill v. Colorado*, 530 U.S. 703 (2000). There, the Supreme Court held that a law prohibiting approaching persons near the entrance of health care facilities "for the purpose of … engaging in oral protest,

education, or counseling with such other person" was a content-neutral time, place, or manner restriction notwithstanding that speech might be examined to determine whether the purpose of the approach fell within the law's proscription. *Hill* explained that "[i]t is common in the law to examine the content of a communication to determine the speaker's purpose" and that the Supreme Court has "never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Id*. at 721. This Court applied the same principle in *Hoye v. City of Oakland*, *see* 653 F.3d at 844–47, and, subsequent to *Reed*, in *March v. Mills*, 867 F.3d 46, 60 (9th Cir. 2017).

At bottom, the TCPA remains content neutral because it neither "'target[s] speech based on its communicative content' [n]or 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *Recycle for Change*, 856 F.3d at 670 (quoting *Reed*, 135 S. Ct. at 2226–27). Moreover, the TCPA is a law that can "be 'justified without reference to the content of the regulated speech,'" and was not "adopted by the government

'because of disagreement with the message [the speech] conveys.'" *Id.* (quoting *Reed*, 135. S. Ct. at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The justifications for the Act rest on the impact of unwanted telemarketing calls on the privacy of recipients, regardless of their contents, and there is no reason to think that the TCPA was adopted based on agreement or disagreement with the particular messages callers using autodialers or recorded messages convey. *See March*, 867 F.3d at 61–63. Moreover, the debt-collection provision's "narrow exception" to the TCPA's proscription of autodialed calls "is a far cry from those regulations previously found by the Supreme Court to be content-based." *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 433 (9th Cir. 2008) (holding a content-based exception to an otherwise content-neutral school uniform rule did not call strict scrutiny into play).

Spectrum goes so far as to suggest that the government-backed-debt-collection exemption is not only content-based, but also "discriminates among viewpoints, based on 'the opinion or perspective of the speaker.'" Spectrum Br. 16 n.5. That suggestion

is wholly unfounded. The argument rests on the assertion that because the government-backed-debt-collection exemption applies only to calls for the purpose of collecting debts, the statute discriminates against calls expressing other "viewpoints" about government-backed debt. *See id.* But debt collection is a regulable form of activity, not the expression of a "viewpoint" about debt. If Spectrum's argument were correct, the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*, which regulates the manner in which debt collectors may contact consumers in connection with attempts to collect a debt, would likewise be subject to strict scrutiny because it disfavors pro-debt-collection "viewpoints" as compared to other communications about debts, to which the FDCPA does not apply. In reality, the TCPA, like the FDCPA, does not seek to suppress or favor expressions of opinion about debt. Rather, the TCPA provides that a specific form of activity (collection of government-backed debt) may be carried out through particular conduct (the use of an autodialer to place a telephone call to a cell phone).

In any event, Spectrum does not claim any desire to use autodialers to contact debtors and express opinions about government-backed debt, so the claimed discrimination has no effect on it. *See Patriotic Veterans*, 845 F.3d at 305 (holding that a provision permitting robocalls to employees only to inform them about work schedules did not harm a plaintiff who did not wish to make robocalls to its employees on matters other than work schedules). And Spectrum does not allege that any substantial number of persons wish to use autodialers to contact debtors to express "viewpoints" about government-backed debt. Thus, even if the claim of viewpoint discrimination had any reasonable basis, it would not render the statute substantially overbroad, and the tenuous claim that the statute would be unconstitutional if applied to prevent expression of conflicting "viewpoints" about debt can be left for an as-applied challenge should such a quixotic challenger appear. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615–16 (1973) (absent substantial overbreadth, First Amendment challenges to a statute should be made on an as-applied basis).

C. That the TCPA may not impose liability on government entities does not subject it to strict scrutiny.

Spectrum is also fundamentally wrong in asserting that the TCPA's imposition of liability on "persons," a term that generally does not include government entities, and its failure to waive the sovereign immunity of the federal government, transforms it into a "speaker-based" restriction subject to strict scrutiny. *See* Spectrum Br. 16–17.[3] Spectrum invokes *Reed*, 135 S. Ct. at 2230, as support for its assertion that the Act's "preference for government speakers and messages independently triggers strict scrutiny," Spectrum Br. 19, but it does not adequately come to grips with what *Reed* actually said, which is "that 'laws favoring some speakers over others demand strict scrutiny *when the legislature's speaker preference reflects a content preference*.'" 130 S. Ct. at

[3] The extent to which the statute applies to federal government agents or contractors has not been definitively resolved, as the FCC's July 2016 Declaratory Order on the subject remains subject to a petition for reconsideration. Moreover, there is little case law on the Act's application to local government entities or persons acting on their behalf. This Court need not resolve any uncertainty on the subject to reject Spectrum's argument.

2230 (emphasis added; quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994)). Here, there is no reason to believe that whatever limitations on the statute's application to government speakers arise from the TCPA's use of the term "persons" to define the scope of liability and its failure to waive the federal government's sovereign immunity reflect a content preference for "government messages" over "anti-government political speech," as Spectrum asserts. Spectrum Br. 18.

Spectrum's argument posits a facile dichotomy between pro-government and anti-government messages that has nothing to do with what the TCPA regulates. Government speakers at different levels in our federal system, as well as non-governmental persons and entities, may speak on a wide range of subjects reflecting a wide range of viewpoints. Non-governmental speakers may express views that are in perfect conformity with those of government speakers, while different government speakers may at times express different and even conflicting messages. Thus, to the extent the TCPA does not cover governmental speakers, that circumstance does not reflect a preference for any particular

message on any particular subject; and its coverage of non-governmental speakers has nothing to do with whether their messages are pro-government, anti-government, or indifferent to government.

Moreover, there are any number of reasons other than content preference for excluding government entities from the scope of a statute that imposes liability on private actors. Imposition of liability on government entities ultimately affects the interests of taxpayers. It also implicates concerns about federal sovereign immunity, *see United States v. Bormes*, 568 U.S. 6 (2012), Eleventh Amendment immunity of state governments, *see Coleman v. Ct. of App. of Md.*, 566 U.S. 30 (2012), and federalism concerns that may counsel against interference with state government functions even where Eleventh Amendment immunity is not at issue, *see Gregory v. Ashcroft*, 501 U.S. 452 (1991). In addition, governmental entities are accountable to the citizenry in ways that private entities are not, and that accountability may reduce the likelihood that they will engage in unrestrained telemarketing activities to which citizens strongly

object. Particularly given the absence of a legislative record indicating that governmental entities were responsible for the deluge of invasive calls that prompted passage of the TCPA, there is no reason to think that limitations on its application to government entities reflected an invidious preference for the content of government messages as opposed to content-neutral considerations.

In addition, Spectrum's assertion that this Court's case law reflects a deep suspicion of any statute that distinguishes between private and governmental actors where First Amendment interests are invoked is mistaken. Spectrum relies principally on a line of dicta in *Foti v. City of Menlo Park*, 146 F.3d 629 (9th Cir. 1998), and on an aspect of the holding in *Italian Colors Restaurant v. Becerra*, 878 F.3d 1165 (9th Cir. 2018). *Foti*, however, stated only that the Court was "troubled" by an issue that it declined to address because it had not been properly developed either below or in this Court. Nothing in that brief discussion suggests a per se ruling that any distinction between government and non-

government speakers renders a statute content-based and subject to strict scrutiny.

Italian Colors similarly provides no support for Spectrum's position. The Court in that case did not rely on the exclusion of government entities from the statute at issue (which prohibited businesses from calling higher prices for credit card users "surcharges") either as a basis for concluding that the statute was content-based or as a ground for invoking strict scrutiny. Indeed, as Spectrum acknowledges, *see* Specturm Br. 20–21 n.8, the Court did not even apply strict scrutiny in *Italian Colors*.

Instead, the Court pointed to the exception for government entities as one reason why a justification offered by the government to support the law was unconvincing. Specifically, the government argued that communicating the difference between cash and credit card prices as a "surcharge" was "misleading." 878 F.3d at 1176–77. However, the government—which did not claim any interest in misleading consumers or any legitimate entitlement to do so—itself reserved the authority to describe credit card pricing as a surcharge, and permitted other entities

(such as utilities) to do so as well. The government's reservation of the right to do what it said would be "misleading" if done by others "suggest[ed]" to the Court "that this justification [was] thin," *id.* at 1178, and that the many exceptions permitting the allegedly misleading speech "would undermine any ameliorative effect," *id*. at 1177.

The same cannot be said here. That the statute may not apply to some autodialed messages from government entities does not diminish the credibility of Congress's finding that autodialed telemarketing message (and calls using recorded messages) are intrusive and harmful to consumers. Unlike in *Italian Colors*, the TCPA's inapplicability to government calls does not significantly undermine the statute's ameliorative effect, given the huge range of calls that *are* subject to the statute's prohibition—and that would inevitably be unleashed on consumers if the statute were struck down. The reasoning of *Italian Colors* is thus wholly inapplicable here, and the decision does not support Spectrum's

assertion that any exclusion of governmental speech from liability under the TCPA renders the TCPA subject to strict scrutiny.[4]

II. The privacy interests served by the statute are compelling.

Spectrum's position depends not only on its erroneous assertion that the TCPA is subject to strict scrutiny, but also on its claim that the statute does not serve compelling interests in protecting personal and residential privacy. Spectrum's contention that those interests are not compelling runs squarely up against the Supreme Court's repeated statements that such interests are "*of the highest order*." *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (emphasis added; quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)).

Spectrum appears to argue that, however important the interest recognized in *Frisby* and *Carey* might be, it cannot,

[4] That this Court's decisions do not support the principle that excluding government entities from liability under the TCPA makes the statute subject to strict scrutiny is underscored by the recent nonprecedential panel opinion in *Gresham v. Picker*, 705 F. App'x 554 (9th Cir. 2017), in which the panel noted that a provision excluding calls by governmental entities from California's anti-robocalling statute "involves government speech and thus would not trigger strict scrutiny." *Id.* at 556 n.2.

consistent with First Amendment principles, encompass an interest in "being free of unwelcome speech." Spectrum Br. 27. Again, that argument is directly at odds with what the Supreme Court said in *Frisby*. As the Court there explained, an "important aspect" of the privacy interest it recognized is "protection of the unwilling listener." *Frisby*, 487 U.S. at 484. Although citizens who venture into public fora cannot expect the government to protect "speech they do not want to hear," *id.*, *Frisby* explained that the matter is different when intrusions into private spaces are concerned. In such spaces, citizens enjoy "an ability to avoid intrusions," which "the State may legislate to protect." *Id.* at 484–85. Thus, "individuals are not required to welcome unwanted speech into their own homes and … the government may protect this freedom." *Id.* at 485.

Despite the Supreme Court's rejection of its position that a privacy interest in being free from unwelcome messages is inimical to the First Amendment, Spectrum invokes the Eighth Circuit's decision in *Kirkeby v. Furness*, 92 F.3d 655, 659 (8th Cir. 1996), as support for the proposition that residential privacy is not a

compelling interest. That decision, however, was later disapproved by the Eighth Circuit, *see Veneklase v. City of Fargo*, 248 F.3d 738, 745–46 (2001) (en banc); *Thorburn v. Austin,* 231 F.3d 1114, 1118–19 (8th Cir. 2000), which ultimately held that the interest in residential privacy was sufficient to protect "the specific target" of the type of speech at issue in *Kirkeby* "from being forced to listen." *Veneklase*, 248 F.3d at 746.[5]

Spectrum further argues that regardless of whether the interest in residential and personal privacy is compelling, it is not "*sufficiently* compelling" to justify a restriction that is content-based to any degree under any circumstances. Spectrum Br. 28

[5] This trilogy of Eighth Circuit cases concerned bans on residential picketing, defined as picketing "for the purpose of persuading … or to protest." *Veneklase*, 248 F.3d at 741, 745. *Kirkeby* held that such a statute was content-based because determining the picketing's purpose required examining the content of the picketer's message, and that the interest in residential privacy insufficient to justify such a restriction. Rejecting *Kirkeby*'s reasoning, *Veneklase* and *Thorburn* held the purpose inquiry not to be content-based (a holding equally applicable here, *see supra* at 11–13) and the privacy interest sufficient to justify the restriction. Although *Veneklase* and *Thorburn* did not specifically disavow *Kirkeby*'s statement about whether residential privacy is a compelling interest—because they did not have to reach the issue—they significantly undermine the authority of *Kirkeby* on any point.

(emphasis added). Spectrum relies on this Court's decision in *Hoye*, which struck down the *viewpoint*-discriminatory enforcement of an ordinance involving anti-abortion advocacy on public sidewalks, and the Supreme Court's decision in *Carey v. Brown*, 447 U.S. 455, which held unconstitutional a residential picketing statute that was content-based (and, indeed, viewpoint discriminatory) because it excepted labor picketing. But neither decision went nearly so far as Spectrum claims. Both, after all, concerned speech in the quintessential public forum—public streets and sidewalks. Neither involved actual intrusions into private enclaves, and in *Hoye* the speech at issue did not even have effects within private spaces.

Indeed, following the descriptive passage Spectrum cites, *see* Spectrum Br. 27–28 (quoting *Hoye*, 653 F.3d at 852), *Hoye* summarized the principle that it derived from applicable precedent as follows: "regulations of *public speech* designed to protect listeners in *public fora* from *substantively offensive* speech are fundamentally incompatible with content-neutrality." 653 F.3d at 853 (emphasis added). As that passage makes clear, what *Hoye*

condemns are viewpoint-discriminatory content restrictions in public fora. *See also* 653 F.3d at 851. *Hoye* by no means holds that the interest in privacy is insufficient to justify restrictions on actual intrusions into private sanctums merely because the restrictions may arguably be characterized, in a highly formal sense, as involving some inquiry into content.

Spectrum's assertions that the TCPA is not adequately tailored to serve the compelling interest in privacy are as misguided as its argument that the privacy interest is not compelling. Spectrum's claims that the interest can be protected in some way short of a prohibition on autodialed calls and recorded messages were already rejected by this Court in *Moser*, 46 F.3d at 975, and are convincingly refuted by the appellees. And its fundamental claim that the exclusion for government-backed-debt-collection calls renders the statute so underinclusive that it does not sufficiently advance the compelling interest in privacy fails to come to grips with the Supreme Court's holding in *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), that a statute does not fail strict scrutiny merely because it "conceivably could

have restricted even greater amounts of speech in service of [its] stated interests." *Id.* at 1668. That the statute permits intrusive calls for the purpose of collecting federally backed debt does not suggest that its prohibition on the far greater volume of intrusive telemarketing that does *not* fall within the exception fails to serve compelling privacy concerns. A statute without the exception might well be a *better* statute from the standpoint of privacy, but that does not mean that the statute as it stands is unconstitutional.[6]

III. Spectrum, a commercial speaker that can permissibly be subjected to content-based regulation, has not shown that the statute's potential application to the fully protected speech of others renders it substantially overboard.

Even if Spectrum's assertions that the TCPA is content-based and lacks a compelling justification did not lack merit, this Court should not invalidate the statute on its face at Spectrum's

[6] Because Congress's purposes would be better served by excising the government-backed-debt-collection exception than by invalidating the entire statute, we agree with both appellees that severance would be the appropriate remedy if the exception were found to amount to unconstitutional content-based discrimination. The Court should have no occasion to go even that far, however.

behest, because content-based regulation may permissibly be applied to Spectrum's commercial speech, and Spectrum has not shown that the flaws it sees in the statute as applied to fully protected speech would render it substantially overbroad—if they genuinely existed.

There can be no serious dispute that the Spectrum text messages at issue were commercial speech. Although it acknowledges only that its messages were "*allegedly* 'commercial,'" Spectrum Br. 15 (emphasis added), Spectrum itself characterizes them as "targeted offers available to Spectrum's current and recent customers," *id.* at 10—speech that is undoubtedly commercial. *See*, *e.g.*, *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1272 (9th Cir. 2017) (advertising proposing a commercial transaction is commercial speech). Spectrum concedes, moreover, that under this Court's recent precedents, content-based restrictions on commercial speech are not subject to strict scrutiny, but face only intermediate scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). *See* Spectrum Br. 24 n.12 (citing

Contest Promotions, LLC v. City & Cty. Of S.F., 874 F.3d 597, 601 (9th Cir. 2017)); *see also Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 732 (9th Cir. 2017).

Spectrum's argument thus depends on its attempt to mount a facial challenge in which it can "'assert the speech rights of third parties with noncommercial speech interests' and therefore receive the benefit of strict scrutiny." Spectrum Br. 24 (quoting *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1569–71 (11th Cir. 1993), and citing *Bd. of Trustees v. Fox*, 492 U.S. 469, 481–82 (1989)). Such a challenge, however, requires a demonstration that the allegedly unconstitutional application of the statute to non-commercial speech is sufficient to render the statute substantially overbroad. *See Fox*, 492 U.S. at 483–84; *see also*, *e.g.*, *Broadrick*, 413 U.S. at 611–18; *Klein v. San Diego County*, 463 F.3d 1029, 1038 (9th Cir. 2006). The need for "breathing space" for First Amendment rights, *Broadrick*, 413 U.S. at 611, in some cases allows a person "whose own speech or expressive conduct may validly be prohibited or sanctioned … to challenge a statute on its face because it also threatens others not before the court,"

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985); *see Foti*, 146 F.3d at 635. But the drastic remedy of "invalidating a statute on its face and so prohibiting [the government] from enforcing the statute against conduct that it is admittedly within its power to proscribe" is reserved for instances in which the statute's overbreadth is "not only … real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. Where the statute's legitimate sweep dwarfs is potentially unconstitutional applications, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Id.* at 615–16.

Here, it is self-evident that the vast bulk of telemarketing that is subject to restriction under the TCPA constitutes commercial speech, and the constitutionality of restricting such speech does not turn on whether the restriction may be in some sense content-based. As Justice Kennedy stated in his concurring opinion in *Matal v. Tam*, 137 S. Ct. 1744 (2017), "content based discrimination" is not "of serious concern in the commercial

context." *Id.* at 1767. If the TCPA were properly characterized as content-based, and the statute lacked a compelling justification, its application to some pure speech would be problematic, but Spectrum has neither demonstrated, nor attempted to demonstrate, that such applications are substantial when weighed against the overwhelming volume of commercial telemarketing subject to the Act. Even viewing the case on Spectrum's own terms, then, Spectrum has not succeeded in demonstrating that any potentially unconstitutional applications of the statute are substantial in relation to the plainly legitimate scope of its application to the vast quantity of commercial marketing, like Spectrum's, that would be unleashed on consumers if the TCPA were struck down on its face.

CONCLUSION

For the foregoing reasons, as well as those set forth in the briefs of the appellees, this Court should affirm the order of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rules of Appellate Procedure 32(a)(7)(B) and 29 as follows: The type face is fourteen-point Century Schoolbook font, and the word count, as determined by the word-count function of Microsoft Word 2016, is 5,962, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I certify that on November 7, 2018, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in the case, including all parties required to be served.

/s/ Scott L. Nelson
Scott L. Nelson