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., et al.,

Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit, tax-exempt organization incorporated in the District of Columbia. It has no parent corporation, and no publicly held corporation owns a 10 percent or greater interest in it.

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly participates in litigation raising issues of concern to the nation's business community, including in cases concerning the scope of liability under the Telephone Consumer Protection Act (TCPA) (*see, e.g., ACA International* v. *FCC*, 885 F.3d 687 (D.C. Cir. 2018) (Chamber of Commerce as petitioner)), and the First Amendment rights of businesses (*see, e.g.*, *Matal* v. *Tam*, 137 S. Ct. 1744 (2017); *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015)).*

* Counsel for all parties have informed *amicus curiae* that the parties consent to the filing of this brief. *Amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

The most fundamental command of the First Amendment is that the government must treat speech evenhandedly regardless of its content. The Telephone Consumer Protection Act (TCPA) prohibits the use of an automatic telephone dialing system (ATDS) to call cell phones, and exposes violators to stiff penalties. Yet the Act grants exemptions for certain calls; whether a caller may use an ATDS turns on what it intends to say.

Appellants contend that this statute violates the First Amendment because it cannot satisfy strict scrutiny. The Chamber does not seek to discuss the constitutional arguments addressed by Appellants, but instead addresses the question of remedy.

The Chamber respectfully submits that, if the Court agrees with Appellants, it should declare only that the TCPA's restriction on using ATDS equipment to call cell phones is unconstitutional. It should not invalidate the exemptions granted to certain calls in order to protect speech. Only the invalidation of the restriction would comport with the Supreme Court's precedents, account for the judiciary's lack of authority to blue-pencil statutes, and resolve the constitutional defects in the statute.

ARGUMENT

The TCPA defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). It prohibits the use of an ATDS to call "any emergency telephone line," "any guest room or patient room," and any "cellular telephone service" or other wireless line—unless the caller first secures the express consent of the called party. § 227(b)(1)(A). Only the prohibition on using an ATDS to call cell phones—§ 227(b)(1)(A)(iii)—is at issue here.

Appellants argue that § 227(b)(1)(A)(iii) violates the Constitution because it contains content-based exemptions yet fails strict scrutiny. *See* Dkt. 7-1 at 14–49. This brief explains that, if the Court agrees, then the appropriate remedy for the constitutional defect in 47 U.S.C. § 227(b)(1)(A)(iii) is to level up—to declare this provision of the statute invalid, so that all speakers, not just certain ones, are freed from the abridgement of speech. The appropriate remedy is *not* to level down—to strike down the content-based exemptions, so that no speaker may use ATDS equipment to call cell phones.

First, the Supreme Court has ruled that the appropriate remedy for a speech restriction with an impermissible content-based exemption is to set aside the restriction, not to set aside the exemption. For example, in *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972), and *Carey* v. *Brown*, 447 U.S. 455 (1980), the Supreme Court confronted ordinances that prohibited school picketing (*Mosley*) and residential picketing (*Carey*)—each containing a content-based exemption for picketing on labor issues. In each case, the Court ruled that the ordinance violated the Constitution. Each time, the Court remedied the violation by invalidating the entire picketing ordinance, not by invalidating just the content-based exemption for labor picketing. *See Mosley*, 408 U.S. at 102 (invalidating ordinance prohibiting picketing outside schools, not just exemption for labor picketing); *Carey*, 447 U.S. at 471 (same with respect to picketing outside residences).

Similarly, in *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987), a state applied its general sales tax to magazines, but granted exemptions to religious, trade, professional, and sports magazines. The Supreme Court ruled that this taxing scheme violated the Constitution.

The Court resolved the constitutional problem by invalidating the application of a state's general sales tax to magazines, not just the content-based tax exemptions for religious, trade, professional, and sports magazines. *Id.* at 234.

These decisions reflect the well-established principle that courts must employ remedies that "create incentives to raise [constitutional] challenges." *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 n.5 (2018) (punctuation omitted). In a free-speech case, only leveling up—eliminating the restriction on speech—creates such an incentive. A speaker would have little incentive to challenge a discriminatory restriction on speech, if the only remedy it could obtain is the expansion of that restriction to cover more speech.

These decisions also reflect the reality that the invalidation of an exemption can itself raise new constitutional problems. When a court invalidates an exemption, it retroactively imposes liability on speakers who reasonably relied on that exemption while it was on the books. Such retroactive liability clashes with the principle that the government must give speakers "fair notice" *before* restricting their speech. *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Leveling up is thus the

only remedy that solves the constitutional problems created by the defective statute without creating new problems to take their place.

These precedents require invalidation of the ATDS restriction, rather than invalidation of its content-based exemptions. That is the only course that preserves an incentive to raise challenges to content-discriminatory laws such as the TCPA. A litigant such as Charter Communications would have little reason to bring such a challenge, if all it could get is the application of the TCPA to even more callers.

Second, invalidating the restriction is particularly appropriate here because of the sheer number of exemptions at issue. Courts, unlike Congress, lack the "editorial freedom" to "blue-pencil" a statutory or regulatory scheme. *Free Enterprise Fund* v. *PCAOB*, 561 U.S. 477, 509–10 (2010). The simple remedy of invalidating § 227(b)(1)(A)(iii) is consistent with this limit on judicial authority. The more complex remedy of invalidating the exemptions is not.

The exemptions to § 227(b)(1)(A)(iii) are scattered across the United States Code and Code of Federal Regulations. The statute exempts any call "made solely to collect a debt owed to or guaranteed by the United States." § 227(b)(1)(A)(iii). In addition, the statute empowers the Federal

Communications Commission to "exempt [calls] from the requirements of [§ 227(b)(1)(A)(iii)]," and, more broadly, to issue regulations implementing the Act. § 227(b)(2). The Commission has exercised this authority on many occasions. For example, it has exempted "package delivery notifications." *Cargo Airline Association Petition*, 29 FCC Rcd 5056, 5056 (2014). It has also exempted certain calls regarding "financial and healthcare issues"—for example, "calls regarding money transfers" and "exam reminders." *Rules and Regulations Implementing the TCPA*, 30 FCC Rcd 7961, 8023, 8026, 8030 (2015). It has allowed schools to make automated calls "closely related to the school's mission, such as notification of an upcoming teacher conference or general school activity." *Rules and Regulations Implementing the TCPA*, 31 FCC Rcd 9054, 9061 (2016). And it has allowed "utility companies" to make automated calls on "matters closely related to the utility service, such as a service outage." *Id.*

Any effort to invalidate these exemptions would require the Court to "blue-pencil" a complex statutory and regulatory scheme. *Free Enterprise Fund* v. *PCAOB*, 561 U.S. at 510. Indeed, such an effort would set off a kind of remedial chain-reaction. If the Court were to invalidate a

regulatory exemption, it would also have to consider whether that exemption, in turn, is severable from other provisions of the relevant regulation. This complex task of rewriting the statute and a host of federal regulations is incompatible with the judiciary's limited role in our legal system. The only proper remedy is to hold that the statutory restriction itself invalid.

Finally, invalidating the restriction is appropriate here because constitutional defects are inherent in the restriction itself—not solely in the exemptions.

Appellants argue that the TCPA's restriction in § 227(b)(1)(A)(iii) does not advance a compelling interest. Dkt. 7-1 at 26–31. A compelling interest is "a state interest of the highest order." *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1666 (2015). But "a law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon … speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *The Florida Star* v. *BJF*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in the judgment) (citation omitted); *see Williams-Yulee*, 135 S. Ct. at 1668 ("Underinclusiveness can … reveal that a law does not actually advance a compelling interest"). The

various exemptions from the restriction themselves suggest that the Federal Government does not consider the goals advanced by the restriction to be of paramount importance. In granting these exemptions, the Federal Government has determined that protecting people from autodialed calls is *not* a transcendent objective. Rather, the Federal Government has concluded—rightly—that other interests, such as facilitating health care, are even more important. Once the Federal Government has made that judgment, it strains credulity to say that § 227(b)(1)(A)(iii) serves an interest of the highest order after all.

Further, appellants argue that the restriction in § 227(b)(1)(A)(iii) is not narrowly tailored to any compelling interest because it targets far more than the exact source of the evil sought to be remedied. A law is narrowly tailored if it targets "no more than the exact source of the 'evil' it seeks to remedy." *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988). The "exact source" of the problem that the TCPA seeks to remedy is calls that are autodialed. But § 227(b)(1)(A)(iii), as interpreted by this Court, does not simply prohibit calls that are autodialed. Because the statute prohibits calls made with equipment that "has the *capacity*" to autodial (47 U.S.C. § 227(a)(1) (emphasis added)), this Court has suggested that "a system

need not actually store, produce or call randomly or sequentially generated telephone numbers" in order to trigger the TCPA's restrictions; "it need only have the capacity to do it" (*Satterfield* v. *Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009)). Under the interpretation suggested in *Satterfield*, the TCPA may reach far beyond autodialed calls, to restrict all calls made from devices that have the ability to autodial, even if the ability is never used and even if the particular call at issue is placed manually. It is not narrowly tailored to any compelling interest.

Only the invalidation of the restriction would cure these constitutional problems. The invalidation of the exemptions would not.

CONCLUSION

For these reasons, this Court should declare that the TCPA's restriction on using ATDS equipment to call cell phones violates the First Amendment.

Dated: September 6, 2018

Respectfully submitted,

/s/ Shay Dvoretzky

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1. The brief is 1895 words long, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016.

Dated: September 6, 2018

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CERTIFICATE OF SERVICE

I certify that on September 6, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all registered parties.

Dated: September 6, 2018

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