CASE NO. [ ]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVE GALLION,

Plaintiff-Respondent,

v.

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

Defendants-Petitioners.

On Petition For Review From The United States District Court For The Central District Of California
Case No. 5:17-cv-01361-CAS-KKx

PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

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CORPORATE DISCLOSURE STATEMENT

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

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

Respectfully submitted,

Dated: March 8, 2018

By: s/ Matthew A. Brill
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Petitioners-Defendants Charter Communications, Inc. and Spectrum Management Holding Company, LLC (collectively, "Spectrum") respectfully seek leave to file an interlocutory appeal of an order of the district court, dated February 26, 2018 (ECF No. 47, attached as A1-16), denying Spectrum's motion for judgment on the pleadings on its First Amendment defense. The district court certified that order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and this petition is timely filed within 10 days of entry of that certification.

INTRODUCTION

This interlocutory appeal involves a First Amendment challenge to a provision of the Telephone Consumer Protection Act ("TCPA") that, on its face, imposes a content-based restriction on speech. That provision has the effect of subjecting disfavored messages to the threat of crippling class action liability, while entirely exempting messages concerning favored topics from its restrictions. Understandably, then, five district court judges (including three in this Circuit) have recently found that the provision is subject to strict scrutiny under the First Amendment, "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The court below explicitly recognized that the constitutionality of the pertinent provision of the TCPA was a very close question on which "other courts could have reached the opposite result," but ultimately concluded that the provision satisfies strict scrutiny. A13. The decision below

warrants immediate review because it satisfies the criteria of 28 U.S.C. § 1292(b) and raises critical issues of national importance about the extent to which, consistent with the First Amendment, the government may discriminate against select content and speakers while pursuing a stated goal of protecting "residential privacy."

Plaintiff Steve Gallion brought this putative class action alleging that Spectrum violated Section 227(b)(1)(A)(iii) of the Communications Act of 1934, as amended by the TCPA, by placing a call to his cell phone. A1. That provision generally prohibits placing calls to cell phones using an "automatic telephone dialing system" or "artificial or prerecorded voice" without the recipient's "prior express consent." 47 U.S.C. § 227(b)(1)(A)(iii). As originally enacted in 1991, Section 227(b)(1)(A)(iii) was carefully crafted to preserve content neutrality, and this Court twice sustained the provision as a content-neutral speech restriction that was tailored to a substantial interest in residential privacy. Since that time, however, Congress amended Section 227(b)(1)(A)(iii) to explicitly exempt any call that "is made solely to collect a debt owed to or guaranteed by the United States," *id.*, and the FCC has both created and clarified the existence of additional content-based exemptions.

The district court agreed with Spectrum that the provision is content-based and therefore subject to strict scrutiny. A8. Such content-based speech restrictions are presumptively invalid, and almost always violate the First Amendment. But the district court sustained the provision, following the reasoning of four other district

court decisions finding that Section 227(b)(1)(A)(iii) is narrowly tailored to advance a compelling interest in privacy. The district court erred. The amended statute's content-based (and speaker-based) restrictions on speech are fatally underinclusive and thus invalid under the First Amendment, because the law's exceptions exempt messages that are equally or more harmful to privacy than the speech that is restricted. The statute also impermissibly privileges "commercial" debt collection messages over all other protected speech, rendering it *per se* unconstitutional.

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. But under the statute at issue, Plaintiff's sole claim turns on whether the content of Spectrum's messages falls within an exempt category of speech, and the government's purported justification for such content-based discrimination cannot satisfy strict scrutiny, as this Court's and the Supreme Court's well-established precedent makes clear.

Recognizing the high bar that strict scrutiny imposes, the district court simultaneously certified its order sustaining the provision for interlocutory review. A13. Two other district court judges have also certified this issue to this Court. This Court stayed consideration of whether to grant those petitions for review, pending the decision of *ACA International v. FCC*, No. 15-1211 (D.C. Cir.), which involves a challenge to the FCC's expansive interpretation of "automatic telephone dialing

system" and may therefore provide non-constitutional grounds terminating those cases.[1] But *ACA* cannot terminate this action because the plaintiff here also asserts liability based on, *inter alia*, Spectrum's alleged use of an "artificial or prerecorded voice," which is not at issue in *ACA*. A1. Accordingly, the amended provision's constitutionality is suitable for review by this Court now.

Spectrum respectfully submits that this Court should exercise its discretion to accept the appeal because it presents an exceptionally important constitutional issue concerning how the strict scrutiny framework should be applied to a content- and speaker-based restriction, following the Supreme Court's clarification of the relevant principles in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). This interlocutory appeal meets all requirements of § 1292(b) because it presents a "controlling question of law" that, if resolved in Spectrum's favor, will terminate this case, and therefore may "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). There is also "substantial ground for difference of opinion" as to whether this content-based law survives strict scrutiny. *Id.* And since the challenged provision was amended in 2015 to add the exemption for certain debt collection calls, no court of appeals has reviewed its constitutionality (although the Fourth Circuit struck down an analogous state law statute under strict scrutiny, as discussed

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[1] *See* Order, *Brickman v. Facebook, Inc.*, No. 17-80080 (9th Cir. Aug. 17, 2017), ECF No. 12; Order, *Holt v. Facebook, Inc.*, No. 17-80086 (9th Cir. Aug. 17, 2017), ECF No. 14.

below). Until the courts of appeals provide guidance on the constitutionality of Section 227(b)(1)(A)(iii), this issue will likely continue to be litigated in TCPA cases nationwide, imposing substantial burdens on the courts and parties.

QUESTION ON APPEAL

The district court certified the following question for review: "whether the TCPA, as a content-based regulation of speech, survives strict scrutiny." A13.

BACKGROUND

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

> It shall be unlawful for any person … to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice … to any … cellular telephone ….

47 U.S.C. § 227(b)(1)(A)(iii). In recognition of the central concern with scattershot random or sequential dialing, Congress defined the term "automatic telephone dialing system," on which liability frequently turns, as "equipment which has the

capacity … to store or produce telephone numbers to be called, using a random or sequential number generator; and … to dial such numbers." *Id.* § 227(a)(1).

Some parties challenged Section 227(b)(1)(A)(iii) under the First Amendment, but this Court rejected those challenges, identifying no content-based distinctions in the then-statutory text. Specifically, in *Moser v. FCC*, the Court held that "the statute should be analyzed as a content-neutral time, place, and manner restriction" under intermediate scrutiny. 46 F.3d 970, 973 (9th Cir. 1995). "[T]he government's significant interest in residential privacy" was undisputed. *Id.* at 974. And the statute did not suffer from impermissible "underinclusiveness" because Congress could choose to restrict only automated and prerecorded calls, while exempting manually dialed, live calls, in light of its finding that "automated" calls pose a heightened "threat to privacy." *Id.* This Court subsequently reaffirmed *Moser*, finding that the original 1991 enactment was content-neutral and tailored to a "significant interest … in residential privacy." *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876 (9th Cir. 2014), *aff'd on unrelated grounds*, 136 S. Ct. 663 (2016).

For years, the statute did not give rise to substantial litigation, as courts interpreted Section 227(b)(1)(A)(iii) according to its terms, imposing liability only where a system possessed the actual capacity to dial randomly or sequentially, or used a prerecorded voice. But all that changed in recent years, after the FCC purported to expand the scope of liability dramatically. For example, in July 2015,

the FCC found that a dialer is an "automatic telephone dialing system" even if it is *incapable* of dialing random or sequential numbers, so long as it could be *modified* to do so. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, CG Docket No. 02-278, 30 FCC Rcd 7961, ¶¶ 10, 16, 19 (2015).

As a result, the statute (as construed by the FCC) now broadly restricts messages from a wide array of legitimate businesses, nonprofits, religious organizations, and political candidates sending *targeted*, desired messages to their customers and constituents, including appointment reminders, updates on the status of purchases, political campaign messages, religious devotionals, or, here, targeted offers available to Spectrum's current and recent customers. Litigation under Section 227(b)(1)(A)(iii) has skyrocketed from a modest number of suits—less than 100 filed in 2009—to a nationwide frenzy of litigation, with approximately 4,840 TCPA suits filed in 2016, and 4,392 suits filed in 2017.[2]

Following the highly questionable regulatory establishment of what can amount to a strict-liability regime, Congress responded in November 2015 by amending Section 227(b)(1)(A)(iii) to carve out from liability calls "made solely to collect a debt owed to or guaranteed by the United States." Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a)(1)(A), 129 Stat. 584, 588 (2015). In other

[2] WebRecon LLC, *WebRecon Stats for Dec 2017 & Year in Review*, https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review (last visited Mar. 8, 2018).

words, a private debt collector may call the same consumer twice, once to collect a private, government-guaranteed loan (*e.g.*, a student loan or mortgage) and once to collect a similar private loan not guaranteed by the government, but, absent prior express consent, may place only the first call using an autodialer or prerecorded voice. Pursuant to 47 U.S.C. § 227(b)(2)(C), the FCC has established further exemptions for favored messages, including package-delivery notifications,[3] calls related to inmates' collect calls,[4] calls relating to bank transfers,[5] and healthcare-related calls.[6] And the FCC recently confirmed that governmental entities and their agents transmitting "authorized" messages are exempt by statute from the restriction. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, CG Docket No. 02-278, 31 FCC Rcd 7394, ¶¶ 10, 17 (2016). The upshot of this patchwork of prohibitions and exemptions is that the lawfulness of an autodialed or prerecorded call turns entirely on its content.

PROCEEDINGS BELOW

Plaintiff filed his complaint on July 6, 2017 on behalf of a putative class, claiming that Spectrum placed calls to cell phones without "prior express consent"

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[3] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, CG Docket No. 02-278, 29 FCC Rcd 3432, ¶ 18 (2014).

[4] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, CG Docket No. 02-278, 30 FCC Rcd 7961, ¶¶ 44-45 (2015).

[5] *Id.* ¶¶ 129-138.

[6] *Id.* ¶¶ 146-48.

to sell its services using an "automatic telephone dialing system" and an "artificial or prerecorded voice" in violation of Section 227(b)(1)(A)(iii). A1. On September 26, 2017, Spectrum moved for judgment on the pleadings, arguing that the patchwork of content- and speaker-based distinctions described above triggers strict scrutiny, and that these distinctions are not narrowly tailored to advance any compelling interest. *Id.* Spectrum also filed a Notice of Constitutional Challenge pursuant to Fed. R. Civ. P. 5.1(a), ECF No. 19, and the United States intervened on January 9, 2018, A1. Plaintiff and the government opposed Spectrum's motion. A1.

After oral argument, the district court denied Spectrum's motion, holding that (1) the exemption for messages promoting collection of government-backed debt renders the statute content-based and subject to strict scrutiny; (2) under strict scrutiny, the statute is narrowly tailored to advance a compelling interest in privacy; and (3) because the debt collection exemption triggers strict scrutiny, no additional constitutional scrutiny is required for the other challenged content- and speaker-based distinctions. A6-13 & n.1. The district court concurrently certified its order for interlocutory appeal and held that, if this Court accepts the appeal, the district court will stay proceedings below pending this Court's decision. A13, A16.

REASONS WHY THE INTERLOCUTORY APPEAL SHOULD BE ALLOWED

After certification by the district court, § 1292(b) permits this Court to allow an interlocutory appeal concerning (1) controlling questions of law that (2) offer

substantial grounds for a difference of opinion, when (3) an immediate appeal may materially advance the ultimate termination of the litigation. *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd sub nom. Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983); *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 687-88 (9th Cir. 2011). Those criteria are amply satisfied here, and the national significance of the issue strongly supports review.

A. The Certified Order Presents A Controlling Question Of Law

As the district court determined, the certified order presents a controlling question of law concerning the constitutionality of the statutory provision providing the sole basis for liability in this action. A13. "[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of the litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d at 1026. If this Court reverses the district court and holds that Section 227(b)(1)(A)(iii) does not withstand strict scrutiny, that will bring this lawsuit to an end. Indeed, the government conceded in similar proceedings that this question is controlling. *Brickman v. Facebook, Inc.*, No. 16-cv-00751-TEH, 2017 WL 1508719, at *2 (N.D. Cal. Apr. 27, 2017).

B. There Are Substantial Grounds For Difference of Opinion

Substantial grounds for difference of opinion exist "where reasonable jurists might disagree on an issue's resolution, not merely where they have already

disagreed." *Reese*, 643 F.3d at 688. The district court correctly recognized that "it is plausible that other courts could have reached the opposite result" on this "novel issue," particularly in light of the "high bar" imposed by strict scrutiny. A13. Here, there are substantial grounds for difference of opinion on the district court's holdings that (i) Section 227(b)(1)(A)(iii) withstands strict scrutiny, and (ii) the Court need not address Spectrum's challenges to the statute's other content- and speaker-based distinctions because it applied strict scrutiny to the debt collection exemption.

1. Substantial Grounds Exist To Conclude That Section 227(b)(1)(A)(iii) Does Not Withstand Strict Scrutiny

The district court correctly held that the provision's distinction between calls "to collect a debt owed to or guaranteed by the United States" and other private calls is content-based and subject to strict scrutiny. A6-8. But the district court incorrectly concluded that Section 227(b)(1)(A)(iii) survives strict scrutiny because residential privacy purportedly is a sufficiently compelling interest to justify the restriction of select calls based on their content, and because the statute's exemption of debt collection calls purportedly is "narrow" and does not cause "appreciable damage" to privacy. A9-13. Strict scrutiny, however, is "the most demanding test known to constitutional law," *City of Boerne*, 521 U.S. at 534; laws subject to it are "presumptively invalid," *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817 (2000), and "almost always violate the First Amendment," *DISH Network Corp. v. FCC*, 653 F.3d 771, 778 (9th Cir. 2011). Applying these settled principles, the

Fourth Circuit recently invalidated a similarly content based state-law restriction on autodialed calls under strict scrutiny. *Cahaly v. Larosa*, 796 F.3d 399, 405-06 (4th Cir. 2015). Here, reasonable jurists could disagree with the district court's decision upholding the statutory provision under strict scrutiny, for at least five reasons.

First, the district court held that "residential privacy" is a sufficiently "compelling" government interest to support a content-based restriction, A9-10, but the governing precedent undermines that conclusion. In *Hoye v. City of Oakland*, this Court found that "[i]n some cases, government regulation of speech with the aim of protecting the dignity and privacy of individuals has been permitted," including in cases establishing the exceptional "privacy of the home." 653 F.3d 835, 852 (9th Cir. 2011). "*But such cases do not sanction content-based restrictions*. They only accept the dignity and privacy rationale as a sufficiently strong governmental interest to justify a content-neutral time, place, and manner restriction." *Id.* at 852 (emphasis added); *see also Klein v. City of San Clemente*, 584 F.3d 1196, 1205, 1207 (9th Cir. 2009) (concluding that "privacy" was not a sufficiently strong interest to sustain *content-neutral* restrictions on residential leafletting, and adopting the California Supreme Court's holding that the government "'cannot … preserve [residential] privacy … by prohibiting all distribution [of leaflets] without prior consent'" (citation omitted)). Similarly, in *Carey v. Brown*, although the Supreme Court characterized residential privacy as an

interest "of the highest order," it expressly concluded that this interest cannot sustain *content-based* restrictions: instead, the government "may protect individual privacy by enacting … regulations applicable to all speech *irrespective of content.*" 447 U.S. 455, 470-71 (1980) (emphasis in original); *see also 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."). To the extent some district courts have discovered a new compelling interest in privacy sufficient to sustain this content-based restriction, in tension with the decisions of this Court and other courts of appeals, that is certainly a proposition on which reasonable jurists may disagree.

Second, the district court held that the provision is narrowly tailored because the exemption for debt collection calls supposedly is "narrow" and does not do "appreciable damage" to privacy. A10-11. But there is no *de minimis* exception to strict scrutiny that allows the government to favor a "limited" set of messages based on their subject matter. For example, in *Perry v. Los Angeles Police Dep't*, this Court held that a restriction on solicitations on the Venice Beach Boardwalk failed intermediate scrutiny because it contained a narrow exemption for nonprofit speakers, and there was "no evidence that those without nonprofit status are any more cumbersome upon [these interests] than those with nonprofit status." 121 F.3d 1365, 1370 (9th Cir. 1997). Here, the district court distinguished this case from the Supreme Court's recent decision in *Reed*, which invalidated a content-based sign

code "featur[ing] numerous insufficiently supported exceptions and allow[ing] the 'unlimited proliferation' of certain signs." A11. But neither the Supreme Court nor this Court has ever suggested that content-based distinctions must be "numerous" or "unlimited" in scope to render a statute underinclusive and invalid. *Id.*; *see also Carey*, 447 U.S. at 465 (invalidating residential picketing restriction, joined with a single narrow exemption for labor picketing, because "nothing in the content-based labor-nonlabor *distinction* has any bearing whatsoever on privacy" (emphasis added)). As was the case in *Reed*, the government "cannot claim that placing strict limits on [some calls] is necessary to [promote privacy] while at the same time allowing … other types of [calls] that create the same problem." 135 S. Ct. at 2231.

Third, in any event, Plaintiff and the government did not even attempt to meet their burden of identifying evidence showing that the "government-debt exception does not do 'appreciable damage' to the privacy interests underlying the TCPA." A11 (quoting *Reed*, 135 S. Ct. at 2232). Spectrum pointed to extensive evidence that these debt collection calls are "'prolific and raise *much more pervasive* privacy concerns than many other types of restricted calls.'" A11. For example, the TCPA's legislative history reflects that "[c]omplaint statistics show that unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations." H.R. Rep. No. 102-317, at 16 (1991). And in August, Senators Markey and Lee wrote to FCC Chairman Pai that "many borrowers" of

government-guaranteed loans, including "student loan borrowers, mortgage borrowers, veterans, [and] farmers" are receiving "multiple robocalls a day without … the ability to stop" "these abusive and invasive robocalls."[7] Indeed, mortgages and student loans—frequently backed by the government—are the two largest categories of consumer debt.[8] Not only did the district court decline to consider that evidence, it did not require Plaintiff and the government to fulfill *their burden* of coming forth with evidence that the debt collection exemption does not cause "appreciable damage" to the interest in residential privacy. *Reed*, 135 S.Ct. at 2232.[9]

Fourth, the statute impermissibly privileges private, "commercial"[10] debt

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[7] Letter (Aug. 4, 2017), www.markey.senate.gov/imo/media/doc/2017-08-04-DebtCollector-RoboCalls%20.pdf.

[8] Federal Reserve Bank of New York, *Report on Household Debt and Credit* 1, 3 (May 2017), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2017Q1.pdf.

[9] The district court noted that the "FCC has issued a proposed rule limiting the number of federal debt collection calls to three within a 30-day period," and stated that this exception is "limited" because "such calls would only be made to those who owe a debt to the federal government." *Id.* But these rules *are not in effect* because the relevant FCC order has not been approved by the Office of Management and Budget, and may never obtain such approval. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, CG Docket No. 02-278, 31 FCC Rcd. 9074, ¶¶ 2, 21, 59-60 (2016). In any event, those proposed rules would just mean that the provision would favor debt collection messages, without totally exempting them. That would not solve the constitutional problem.

[10] The government takes the position that debt collection calls are "commercial" speech. *See* United States of America's Mem. of Law in Supp. of the Constitutionality of the TCPA 11-12, *Mejia v. Time Warner Cable Inc.*, No. 15-cv-6445-JPO (S.D.N.Y. Mar. 3, 2017), ECF No. 147.

collection messages above all other protected speech, including core political speech. This type of discrimination is *per se* unconstitutional under this Court's precedents. *Berger v. City of Seattle*, 569 F.3d 1029, 1055 (9th Cir. 2009) ("[C]ommercial speech … is allowed and encouraged, while artistic and political speech is not. This bias in favor of commercial speech is, on its own, cause for the rule's invalidation."); *Nat'l Advert. Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988) ("[A] [restriction] is invalid if it imposes greater restrictions on noncommercial than on commercial [speech]…."); *Desert Outdoor Advert. v. City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996) (similar).[11]

Finally, Plaintiff and the government did not even attempt to meet their burden of submitting *evidence* showing that Section 227(b)(1)(A)(iii) is the least restrictive alternative capable of accomplishing its goals. *Edwards v. City of Coeur D'Alene*, 262 F.3d 856, 863 (9th Cir. 2001). The order appears to acknowledge that no such evidence is present in the record compiled by Congress and the FCC. A12. Instead, the district court stated that, "at the pleading stage, the Court finds plaintiff and the government's reliance on the analysis in *Brickman* and *Mejia*"—two recent district court decisions addressing this issue—"sufficient to demonstrate that no less

[11] In this posture, Spectrum may address all of the provision's content-based distinctions, not just those between exempt speech and the type of speech it allegedly engaged in here. *See, e.g.*, *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1268 n.15 (11th Cir. 2005); *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 481 (1989).

restrictive alternatives exist." *Id.* In doing so, the district court reproduced the same error as those prior cases, in which no evidence was presented whatsoever indicating that less restrictive alternatives were unavailable. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129-30 (1989) (finding no narrow tailoring because "the congressional record … 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 823 ("It was for the Government, presented with a plausible, less restrictive alternative, to prove the alternative to be ineffective" through record evidence that the speech restriction is the "least restrictive available means.").

2. Substantial Grounds Exist To Conclude That Constitutional Scrutiny Is Merited As To All The Challenged Distinctions

The district court determined that, because the debt collection exemption triggered strict scrutiny, "the Court need not reach defendants' alternative arguments … [that] section 227(b)(1)(A)(iii) imposes a speaker-based preference for all government messages over private messages … [and] the statute authorized the FCC to promulgate further content-based exceptions," or that the statute itself is content-based based on such exceptions. A8 n.1. That refusal to reach Spectrum's "alternative arguments" is inconsistent with precedent holding that the government must provide evidence that *each* content- or speaker-based *distinction* is narrowly tailored to advance a compelling interest. *See Perry*, 121 F.3d at 1371 (a restriction fails where "the [content-based] *distinction* … is not narrowly tailored to advance

the government's interests" (emphasis added)); *Carey*, 447 U.S. at 465 (invalidating statute because "nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy"). It does not suffice to subject one content-based distinction to scrutiny, while declining to reach others, as each distinction must be sufficiently justified. *See Desert Outdoor Advert.*, 103 F.3d at 818-21 (separately analyzing constitutionality of sign code's (i) grant of unbridled discretion to permitting officials; (ii) exemptions favoring commercial signs over noncommercial signs; and (iii) content-based restriction of noncommercial signs); *Foti v. City of Menlo Park*, 146 F.3d 629, 636-40 (9th Cir. 1998) (separately analyzing exemptions for (i) real estate and safety signs; (ii) government signs; and (iii) signs on vehicles).

If a Court's finding that one content-based distinction is justified could immunize all other content- and speaker-based distinctions in a speech restriction from review, the First Amendment would lose much of its force. This is particularly true here because the district court expressly relied on the purported "narrow[ness]" of the single debt collection exception for its finding that the statute was narrowly tailored and did not allow "appreciable damage" to privacy. A11. Indeed, the district court distinguished Section 227(b)(1)(A)(iii) from the underinclusive "ordinance in *Reed*, which featured numerous insufficiently supported exceptions," while ignoring that Spectrum in fact had identified other insufficiently supported exceptions, which the district court simply declined to reach. *Id.* Plaintiff and the

government did not even attempt to justify *those* exceptions, dispelling any lingering doubt that the provision fails narrow tailoring. *See Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1177-78 (9th Cir. 2018) (finding restriction was not narrowly tailored based on a "broad swath of exemptions," including exemption for all governmental entities, showing that the proffered "justification [for the restriction] is thin").

C. An Appeal May Materially Advance The Termination Of Litigation

Section 1292(b) provides that an interlocutory appeal need only "materially advance" the litigation. If immediate review results in the complete disposition of a matter, this criterion is met because the appeal leads to "the ultimate termination" of the action. *Reese*, 643 F.3d at 687-88. If this Court concludes that Section 227(b)(1)(A)(iii) cannot constitutionally be applied to impose liability on Spectrum, appellate review will terminate this case. Absent review, the district court and the parties face years of discovery and litigation over class certification and merits issues—which are likely to be followed by an appeal. Review now will substantially lighten, not burden, this Court's docket over time. The district court recognized as much, ordering that if this Court accepts interlocutory review, further proceedings in the district court will be stayed pending disposition of the appeal. A16.

D. The Order Below Presents An Important Question That Warrants An Immediate Appeal

In exercising its discretion, this Court should take account of the national significance of this issue, and the importance of a timely and definitive resolution.

See Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 24 (2d Cir. 1990) (the court may consider "the impact that an appeal will have on other cases"). Absent appellate guidance on Section 227(b)(1)(A)(iii)'s continuing vitality, parties will continue to re-litigate the same issue in district courts across the country, without any controlling or persuasive appellate authority, unnecessarily diverting judicial resources. Multiple defendants in district courts of this Circuit[12] and across the country[13] have asserted a similar defense, but no court of appeals has reviewed the amended provision's constitutionality. And given the important First Amendment values at stake, the Court should expeditiously resolve this issue, in light of the chilling effect that the threat of multi-million dollar liability must have on protected speech.

CONCLUSION

For the foregoing reasons, this Court should grant Spectrum's petition for interlocutory review.

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[12] *See, e.g.*, Answer 9, *Munoz. v. Kohls Dep't Stores, Inc.*, No. 17-cv-02228-JAM (E.D. Cal. Dec. 13, 2017), ECF No. 7; Answer 10, *Boykin v. Kohls Dep't Stores, Inc.*, No. 17-cv-04076-LHK (N.D. Cal. Dec. 4, 2017), ECF No. 23; Answer 14, *Sasin v. Enter. Fin. Grp., Inc.*, No. 17-cv-04022-CBM (C.D. Cal. Sept. 22, 2017), ECF No. 72; Am. Answer 14, *Pieterson v. Wells Fargo Bank, N.A.*, No. 17-cv-2306-EDL (N.D. Cal. June 9, 2017), ECF No. 77.

[13] *See, e.g.*, Answer 84-85, *Nolan v. R1 RCM, Inc.*, No. 17-cv-04904 (N.D. Ill. Feb. 27, 2018), ECF No. 58; Answer 8; Answer 16, *Kaiser-Nyman v. First Choice Payment Sols. G.P.*, No. 17-cv-05472 (N.D. Ill. Oct. 31, 2017), ECF No. 14; Answer 11, *Reynolds v. USHealth Advisors, LLC*, No. 17-cv-61125-MGC (S.D. Fla. Aug. 29, 2017), ECF No. 45; Mot. Summ. J. 14-23, *Am. Ass'n of Political Consultants, Inc. v. Sessions*, No. 16-cv-00252-D (E.D.N.C. May 19, 2017), ECF No. 31.

Dated: March 8, 2018

Respectfully submitted,

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STATEMENT OF RELATED CASES

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

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

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

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

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

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

Dated: March 8, 2018

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