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 IN SUPPORT OF THE PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

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. The Chamber regularly participates in litigation raising issues of concern to the nation's business community, including cases about the scope of liability under the Telephone Consumer Protection Act (TCPA) (*e.g., ACA International* v. *FCC*, 885 F.3d 687 (D.C. Cir. 2018) (Chamber as petitioner)), and the First Amendment rights of businesses (*e.g.*, *Matal* v. *Tam*, 137 S. Ct. 1744 (2017); *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015)). The Chamber participated as an *amicus curiae* in this case. *See* Dkt. 12.*

* 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 Chamber agrees with Appellants that rehearing is warranted here to correct the panel's erroneous severability ruling. The panel recognized that the First Amendment requires the government to treat speech evenhandedly regardless of its content. For that reason, the panel found unconstitutional a content-based exception to the Telephone Consumer Protection Act's (TCPA) prohibition (accompanied by stiff penalties) on the use of an automatic telephone dialing system (ATDS) to call cell phones. But the panel wrongly held that the proper remedy was to strike the exception, rather than to invalidate the TCPA's restriction on using ATDS equipment to call cell phones.

That remedy does not follow Supreme Court precedent, account for the judiciary's lack of authority to blue-pencil statutes, or resolve the constitutional defects the panel found in the statute. The First Amendment "severability inquiry … has a constitutional dimension." *Rappa* v. *New Castle County*, 18 F.3d 1043, 1072 (3d Cir. 1994) (Becker, J., joined by Alito, J.). Without specific evidence of contrary legislative intent, the remedy is to restrict *less* speech, not *more* speech, as it did here. *See id.* at 1072–73; *Ballen* v. *City of Redmond*, 466 F.3d 736, 745 (9th Cir. 2006).

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.

Following *Duguid* v. *Facebook, Inc.*, 926 F.3d 1146, 1154–56 (9th Cir. 2019), the panel here held that an exemption under § 227(b)(1)(A)(iii) for calls "made solely to collect a debt owed to or guaranteed by the United States" is a content-based speech regulation that fails strict scrutiny. Dkt. 55-1 at 2–3. But the panel refused to extend any remedy to Appellants. *Id.* at 3–4. Instead, the panel noted that the panel in *Duguid* had severed the exemption and left the ATDS prohibition intact. *Id.* at 3. To reach that result, the *Duguid* panel reasoned in just two conclusory paragraphs that Congress would have preferred eliminating the exception to invalidating

the prohibition. 926 F.3d at 1156–57. The *Duguid* panel pointed to a general severability clause, 47 U.S.C. § 608, and also observed that the TCPA had existed for two decades before Congress enacted the exemption in 2015. 926 F.3d at 1156–57.

The panel's reasoning is flawed, for six reasons. The appropriate remedy for the constitutional defect in § 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.

1. 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); *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); and *Carey* v. *Brown*, 447 U.S. 455 (1980), the Supreme Court confronted ordinances that prohibited school picketing (*Mosley* and *Grayned*) 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); *Grayned*, 408 U.S. at 107 (following *Mosley* to hold that "Appellant's conviction under this invalid ordinance must be reversed"); *Carey*, 447 U.S. at 471 (invalidating ordinance prohibiting picketing outside residences, not just exemption for labor picketing).

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) (citation and

punctuation omitted). In a free-speech case, only leveling up—eliminating the restriction on speech—creates that incentive. A speaker would have little incentive to challenge a discriminatory restriction on speech if the only remedy the speaker could obtain were the expansion of that restriction to cover more speech. *Accord Rappa*, 18 F.3d at 1073.

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

2. Indeed, the panel's approach contravenes the observations of this Court and the Third Circuit that a remedy for a First Amendment violation should not restrict *more* speech. In *Rappa*, the Third Circuit confronted an exemption from an anti-sign ordinance for signs advertising local industries and meetings. 18 F.3d at 1051–52, 1072. The court concluded that the exemption was impermissibly content-based and struck it down. *Id.* at 1068. The court also concluded that the exemption could not be severed from the anti-sign ordinance. "Eliminating the offending

exception," the court explained, "would mean that we would be requiring the State to restrict *more* speech than it currently does." *Id.* at 1072–73. The Third Circuit found that approach incompatible with *Mosley*, despite a general severability provision, and "refuse[d] to strike down the exception in part because of the special status of speech in our constitutional scheme, a scheme which generally favors more speech." *Id.* at 1073.

This Court, too, has taken that approach. In *Ballen*, the Court refused to sever exemptions from a general ban on portable signs. 466 F.3d at 745. The Court explained that, among other things, "severing the Ordinance would subject activity that is currently authorized by the legislature to civil and criminal sanctions." *Id.*

3. The panel in *Duguid* mistakenly relied on the general language in 47 U.S.C. § 608 as "unambiguous[ly] … endorsing severability." 926 F.3d at 1156. That clause provides: "If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby." 47 U.S.C. § 608. As the Third Circuit explained in *Rappa*, however, such a general severability clause is ineffective in the speech context. Delaware had a similar

provision: "If any provision of the Code or amendments hereto, or the application thereof to any person, thing or circumstance is held invalid, such invalidity shall not affect the provisions or application of this Code or such amendments that can be given effect without the invalid provisions or application, and to this end the provisions of the Code and such amendments are declared to be severable." 18 F.3d at 1072 (citation omitted). The court nonetheless explained that, "absent quite specific evidence of a legislative preference for elimination of an exception" to a speech restriction, it could not assume that the "legislature would prefer [the court] to sever the exception and restrict more speech." *Id.* at 1073.

Nothing here warrants a different result. Section 608's terms are general, not specific. They are not even specific to the TCPA or speech, let alone to § 227(b)(1)(A)(iii). In fact, the clause was enacted long before the TCPA as part of the Communications Act of 1934, Pub. L. No. 73-416, sec. 608, 48 Stat. 1064, 1105 (1934). And beyond one technical renumbering, the clause has not been modified or reenacted since—despite the intervening decisions in *Rappa*, *Mosley*, *Grayned*, and *Ragland* and other cases that would have given Congress extra reason to be particularly careful in 2015 to make its intent clear. In short, there is no reason to

think that the general terms of § 608 say anything about Congress' later intent about the TCPA's speech restrictions. Indeed, § 608 says nothing about later amendments at all—although the clause in *Rappa* did, and it was inadequate all the same. 18 F.3d at 1072.

The *Duguid* panel's related reasoning—that the TCPA has been in place "for more than two decades," so the exception was not "integral," 926 F.3d at 1156—suffers from the same flaw. The more reasonable inference is that Congress enacted the exemption in § 227(b)(1)(A)(iii) precisely because the statute was *not* functioning properly without it. But either way, given the "constitutional dimension" to the inquiry, *Rappa*, 18 F.3d at 1072, the Court is not free to speculate about Congress' intent in the absence of a specific directive to preserve a prohibition on speech.

4. Invalidating the restriction is also 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 Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 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). The statute also 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 many times. For example, it has exempted "package delivery notifications." *In re Cargo Airline Ass'n Petition for Expedited Declaratory Ruling*, 29 FCC Rcd. 5056, 5056 (2014). It has also exempted certain calls about "financial and healthcare issues"—for example, "calls regarding money transfers" and "exam confirmations and reminders." *In re Rules & 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." *In re Rules & 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 the exemptions to the restriction in § 227(b)(1)(A)(iii) would require the Court to "blue-pencil" a complex statutory and regulatory scheme. *Free Enter. Fund*, 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.

The panel below reasoned that "the FCC's regulatory exceptions are not before this court," because a party must challenge an FCC order "*directly* in a court of appeals, not in the district court." Dkt. 55-1 at 3 (citing the Hobbs Act, 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a)). But that reasoning only compounds the panel's error. Nothing in the Hobbs Act prevents the Court from considering the effect of the FCC's exemptions on the overall statutory scheme as part of assessing whether the statutory restriction is content-based. A court does not "determine the validity" of an FCC order—what the Hobbs Act prevents, 28 U.S.C. § 2342(1)—when it

determines the constitutionality of a statute. Awareness is not invalidation. This Court undoubtedly has jurisdiction to assess the constitutionality of the restriction in § 227(b)(1)(A)(iii), and the Hobbs Act does not demand that the Court shut its eyes to the existence and effect of the FCC's exemptions.

5. Invalidating the restriction in § 227(b)(1)(A)(iii) is the correct approach here because constitutional defects are inherent in the restriction itself—not solely in the exemptions. The *Duguid* panel mistakenly "focus[ed its] analysis on the content-based differentiation—the debt-collection exception—*not*" on the restriction overall. 926 F.3d at 1155. But that blinkered characterization ignores the other exceptions that define the restriction. As the description above indicates, the FCC has carved various content-based exceptions into the restriction. Thus, the *Duguid* panel was wrong to conclude that "[e]xcising the debt-collection exception … leaves [the court] with the same content-neutral TCPA that [it previously] upheld." *Id.* at 1157. The portion of the TCPA the Court must actually assess is a restriction that, because of several content-based exceptions, is itself content-based: It favors some speech over others. As Appellants

explained (Dkt. 7-1 at 8–9), given the exemptions, whether an autodialed call is lawful turns on its content.

Because the restriction in § 227(b)(1)(A)(iii) is content-based, the government must show, as Appellants argued (Dkt. 7-1 at 8–9, 26–31), that it is narrowly tailored to advance a compelling interest. *See generally Duguid*, 926 F.3d at 1154. A compelling interest is "a state interest of the highest order." *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1666 (2015) (citation omitted). 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." *Florida Star* v. *B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in the judgment) (citation and quotation marks omitted); *see Williams-Yulee*, 135 S. Ct. at 1668 ("Underinclusiveness can … reveal that a law does not actually advance a compelling interest."). As Appellants explain (Reh'g Pet. 9–10), the various exemptions from the restriction themselves suggest that the Federal Government does not consider the goals advanced by the restriction to be paramount. In granting these exemptions, the Federal Government has determined that pro-

tecting people from autodialed calls is *not* a transcendent objective. Rather, the Federal Government has concluded—rightly—that other interests, such as facilitating healthcare, 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.

Appellants also pointed out 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.

6. Finally, the severability inquiry should not permit liability to be imposed under an unconstitutional statute. As Appellants explain (Reh'g Pet. 12–14), Supreme Court precedent exempts defendants from application of unconstitutional statutes, even if "the legislature likely would have cured the constitutional infirmity by excising the [particular] exemption" in question. *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1699 n.24 (2017) (discussing *Grayned*, 408 U.S. at 107 & n.2, and *Welsh* v. *United States*, 398 U.S. 333, 361–64 (1970) (Harlan, J., concurring in the result)). An unconstitutional statute should not be applied retroactively in a way that would cause the defendant "to go remediless." *Welsh*, 398 U.S. at 362 (Harlan, J., concurring in the result).

The decisions discussed above reflect that principle. 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. And that is why, as the Supreme Court explained in *Morales-Santana*, "a defendant convicted under a law classifying on an impermissible basis may assail his conviction without regard to the manner in which the legislature might subsequently cure the infirmity." 137 S. Ct. at 1699 n.24; *see also id.* at 1701 (leveling down would apply "prospectively").

CONCLUSION

For these reasons, the Court should grant panel rehearing or rehearing en banc and hold that the unconstitutional debt-collection exception in 47 U.S.C. § 227(b)(1)(A)(iii) is not severable from the TCPA's restriction on using ATDS equipment to call cell phones.

Dated: August 19, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the alternative length limit permitted by Ninth Circuit Rule 29-2(c)(2). The brief is 3,267 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: August 19, 2019

/s/ Shay Dvoretzky
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CERTIFICATE OF SERVICE

I certify that on August 19, 2019, 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: August 19, 2019

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