No. 19-575

IN THE

Supreme Court of the United States

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

Petitioners,

v.

STEVE GALLION,

Respondent,

and

THE UNITED STATES OF AMERICA,

Respondent-Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

STEVEN P. LEHOTSKY
TARA S. MORRISSEY
U.S. CHAMBER LITIGATION CENTER
1615 H St., N.W.
Washington, DC 20062

SHAY DVORETZKY
Counsel of Record
JEFFREY R. JOHNSON
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents an underlying membership of three million businesses and professional organizations of every size, in every economic 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 files *amicus* curiae briefs in cases that raise issues of concern to the nation's business community, including in cases concerning the scope of liability under the Telephone Consumer Protection Act, *see, e.g.*, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (the Chamber as petitioner), and the First Amendment rights of businesses, *see, e.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). It participated as *amicus* below.

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[1] Pursuant to Rule 37.2(a), counsel for all parties received timely notice of the Chamber's intent to file this brief, and consented in writing. No counsel for any party authored this brief in any part, and no person or entity other than *amicus*, *amicus*'s members, or *amicus*'s counsel made a monetary contribution to fund the preparation or submission of this brief.

The Court now confronts three petitions arising out of 47 U.S.C. § 227(b)(1)(A)(iii), the section of the Telephone Consumer Protection Act of 1991 that prohibits the use of an "automatic telephone dialing system" (or ATDS) to "make any call" to "any telephone number assigned to a … cellular telephone service" without the recipient's "prior express consent." [2] That is no coincidence. With shocking frequency, businesses find themselves sued under this once-obscure provision because they used ordinary equipment to place ordinary calls to their regular customers. In these lawsuits, plaintiffs' lawyers seek to leverage widespread judicial disagreement about the scope of the law, relatively low barriers to class certification, and significant statutory damages into seven- or eight-figure payouts. It often works.

These cases give the Court a chance to end this scourge. In 2015, Congress amended subsection 227(b)(1)(A)(iii) to exclude calls "made solely to collect a debt owed to or guaranteed by the United States." The Ninth Circuit held that this exemption rendered the TCPA unconstitutionally content-based. But if so, then the Ninth Circuit should have done what this Court always does when confronted with similar circumstances: open up *more* speech by striking down the prohibition, not restrict more speech by severing the exemption. This Court should grant certiorari and bring the Ninth Circuit's First Amendment jurisprudence back into line.

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[2] *See* Pet. i; *Facebook, Inc. v. Duguid*, No. 19-511 (U.S.); *Barr v. Am. Ass'n of Political Consultants, Inc.*, No. 19-631 (U.S.).

SUMMARY OF ARGUMENT

I. Congress passed the ATDS provision to tackle a specific problem. In the late 1980s, telemarketers often used equipment that randomly or sequentially generated and then dialed numbers, usually to leave a prerecorded message. This undirected dialing caused unique harms: random dialing put telemarketers in contact with numbers they would or could never reach on purpose (like emergency-service lines, hospital rooms, or unlisted wireless numbers), and sequential dialing knocked out nascent wireless and pager networks by tying up blocks of consecutive numbers.

The ATDS provision worked, effectively eliminating random and sequential dialing machines. But the FCC then began to suggest that, contrary to its earlier views, the statute might sweep in any equipment that automatically dialed from a list. Armed with these suggestions—and with the idea that courts *could not* review the legality of the FCC's interpretation in light of the Hobbs Act—the plaintiffs' bar began filing suit after suit against businesses, alleging that their ordinary communications, placed from ordinary equipment, violated the TCPA.

The D.C. Circuit wiped away some of the FCC's worst confusions. But the tide of meritless TCPA litigation will continue to rise until this Court intercedes. To begin, courts remain divided over the scope of the statute—does it cover only equipment that randomly or sequentially generates numbers, or does it also cover anything that dials from a list?

That disagreement makes it impossible for businesses—which *must* reach out to customers accustomed to rapid, personalized communications—

to structure their affairs. They can't just refrain from using random or sequential dialing equipment, because some jurisdictions think that the statute sweeps farther. They can't just avoid equipment that dials from a list, because that test covers nearly every modern device—including smartphones. And they can't hope to dodge these questions by securing recipients' prior express consent; millions of wireless numbers are reassigned every year, so a call or text intended for a consenting recipient may well land on the phone of a non-consenting one.

No matter what businesses do, then, they are likely to get sued. And those lawsuits are unusually tough to fight off. The TCPA provides statutory damages of $500 *per call or text*. Because businesses often call or text each consumer more than once, and because district courts may relatively easily certify ATDS classes, callers face a perfect storm: class actions alleging hundreds of millions or billions in damages under a statute whose proposed scope is subject to widespread judicial disagreement. The result is predictable—widespread settlement, often in the seven or eight figures, for calls and texts that bear no resemblance to those the statute exists to prevent. Unless this Court acts, the TCPA litigation machine will continue humming for the foreseeable future.

II. This case provides the Court with one way to do just that. In 2015, Congress exempted calls made solely to collect government-owned or government-backed debt from the TCPA's reach. Charter (and others) challenged the post-amendment TCPA as a content-based restriction on speech. In assessing that argument, the Ninth Circuit focused on the exemption—not the TCPA's general prohibition—and

concluded that the exemption violated the First Amendment. It purportedly "remedied" that violation by striking the exemption, not the prohibition.

Whatever the merits of Charter's First Amendment argument—thoroughly addressed in Charter's petition, and so not addressed here—the Ninth Circuit's backwards remedial conclusion is wrong. The remedy for a First Amendment violation is to allow more speech, not less. If the TCPA's government-debt exemption violates the First Amendment, then that violation must be remedied by invalidating the ATDS restriction, not severing the exemption.

That approach makes sense. Those who successfully challenge content-based restrictions should get something for their trouble. But the Ninth Circuit's rule leaves challengers liable for speech proscribed by an unconstitutional statute. And legislatures, not courts, should decide what speech, if any, is restricted.

Finally, once courts start blue-penciling speech codes, they won't know where to stop. For example, the TCPA and its implementing regulations contain a host of similar exemptions; federal courts should not decide which are "important" enough to keep.

ARGUMENT

I. THE ATDS PROVISION HAS BECOME A TREMENDOUS SOURCE OF MERITLESS LITIGATION

To understand the stakes of this case (and the related petitions before this Court), it is worth tracing the history of the ATDS litigation that is now sweeping the federal courts.

A. Congress Targeted Random and Sequential Dialing Machines

1. In the 1980s and early 1990s, telemarketers used random and sequential dialing machines to engage in a particularly aggravating form of telemarketing. These machines caused problems far beyond the aggravation inherent in receiving an unwanted telephone call. For instance, because they dialed unthinkingly, they often reached numbers that no telemarketer would ever dare to dial on purpose—like the "exam rooms, patient rooms, offices, labs, emergency rooms, and x-ray facilities" of a hospital or the dedicated, unlisted pager number of a would-be transplant recipient.[3] And because they dialed sequentially, they would often overload then-nascent wireless and pager networks (which hosted batches of sequential numbers), leaving customers unable to "make []or receive calls, including emergency notifications to medical personnel."[4]

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[3] *S. 1462, The Automated Telephone Consumer Protection Act of 1991: Hearing Before the Subcomm. on Commc'ns of the Senate Commerce, Sci., & Transp.*, 102d Cong. 43, 110 (1991) (statements of Michael Jacobsen and Michael J. Frawley).

[4] *S. 1462, The Automated Telephone Consumer Protection Act of 1991; S. 1410, the Telephone Advertising Consumer Protection*

To stop these specific harms, Congress enacted the ATDS provision. In keeping with the provision's history, Congress defined an ATDS as equipment that "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) (emphasis added). And in keeping with the provision's purpose, Congress limited protection against ATDS calls to those numbers susceptible to their unique harms, such as "emergency telephone line[s]," "guest room[s] [and] patient room[s]" at a health care facility, and numbers "assigned to a paging service[] [or] cellular telephone service." *Id.* § 227(b)(1)(A)(i)–(iii).

Notably, Congress did not protect residential lines—the most prevalent at the time—from ATDS calls. Instead, it banned "artificial [and] prerecorded voice" calls to both residential and specialized numbers. 47 U.S.C. § 227(b)(1)(A) (specialized); *see id.* § 227(b)(1)(B) (residential). It also empowered residential subscribers to opt out of receiving telemarketing calls and penalized those callers who failed to comply with such requests. *See id.* § 227(c)(5).

2. Contemporary sources recognized the limited but important scope of the ATDS provision. In the FCC's initial rulemaking under the TCPA, for instance, it explained that equipment with "speed dialing," "call forwarding," and "delayed message" functions do not

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Act; and S. 857, Equal Billing for Long Distance Charges: Hearing Before the Subcomm. on Commc'ns of the Senate Commerce, Sci., & Transp., 102d Cong. 45 (1991) (statement of Thomas Stroup).

qualify as ATDSs, "because the numbers called are not generated in a random or sequential fashion."[5] Just a few years later, the FCC reiterated this understanding, declaring that the ATDS provision does not apply to calls "directed to [a] specifically programmed contact number[]" rather than "to randomly or sequentially generated telephone numbers."[6]

The ATDS provision fulfilled the measure of its creation. According to Westlaw, there were just seventeen lawsuits between 1991 and 2003 that mentioned the term "automatic telephone dialing system." Indeed, by 2003, the FCC could remark that, "*[i]n the past*, telemarketers may have used dialing equipment to create and dial 10-digit telephone numbers arbitrarily," but they no longer did so.[7]

B. The FCC Creates Uncertainty About the Provision's Scope, and Chaos Ensues

Beginning in 2003, the FCC opened the door to expansive TCPA liability. The FCC started to suggest that the ATDS provision covered equipment with other, more mundane features: maybe the capacity to dial "at random, in sequential order, or from a database of numbers"; maybe the capacity to "store or produce telephone numbers"; or maybe the capacity to

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[5] *In re Rules & Regs. Implementing the TCPA*, 7 FCC Rcd. 8752, 8776 (1992).

[6] *In re Rules & Regs. Implementing the TCPA*, 10 FCC Rcd. 12391, 12400 (1995).

[7] *In re Rules & Regs. Implementing the TCPA*, 18 FCC Rcd. 14014, 14092 (2003) ("2003 TCPA Order") (emphasis added).

"dial numbers without human intervention."[8] But the FCC also seemed to recognize the statutory test as well.[9] At the same time, the FCC also increased the importance of the ATDS provision by holding that text messages qualify as "calls" within the meaning of the Act.[10]

In 2015, the FCC followed its earlier orders—which "left significant uncertainty about the precise functions an [ATDS] must have the capacity to perform," *ACA Int'l*, 885 F.3d at 701—with an even less comprehensible position.[11] The FCC "appear[e]d to be of two minds" on the central interpretive question: must the "device[] *itself* have the ability to generate random or sequential telephone numbers to be dialed," or "is it enough if the device can call from a database of telephone numbers generated elsewhere?" *ACA Int'l*, 885 F.3d at 701. Because the FCC "espouse[d] both competing interpretations in the same order," it "fail[ed] to satisfy the requirement of reasoned decisionmaking," and the D.C. Circuit set it aside. *Id.* at 703.

Much of the damage, however, had already been done. Armed with the FCC's prior statements and the circuit courts' muscular interpretation of the Hobbs Act—namely, the view that federal courts must defer

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[8] *Id.* at 14091–92.

[9] *See id.* at 14092.

[10] *See id.* at 14115.

[11] *See In re Rules & Regs. Implementing the TCPA*, 30 FCC Rcd. 7961 (2015) ("2015 TCPA Order"), *vacated in relevant part by ACA Int'l*, 885 F.3d at 692.

without question to the FCC's views in private litigation—the plaintiffs' bar had already transformed the ATDS provision from a once-a-year issue into a mainstay of federal litigation. For example, the number of TCPA suits filed between 2009 and 2016 jumped from fewer than one hundred to nearly 5,000.[12] (For perspective, in 2018, federal prisoners filed 5,734 motions under 28 U.S.C. § 2255.[13])

Few if any of these plaintiffs alleged that the defendant randomly or sequentially dialed her number. Instead, they sought damages against companies that simply used computer-assisted dialing to contact their customers. In this way, the ATDS provision strayed far from its text and purpose.

C. Meritless ATDS Litigation Continues To Plague the Federal Courts

The D.C. Circuit's decision will not stem this tide of meritless ATDS litigation; indeed, in the first three months of this year alone plaintiffs filed nearly 3,000 cases.[14] As explained below, the rush will continue unless this Court intervenes.

1. Modern businesses must communicate with their customers, and they must do so in a rapid, efficient

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[12] *See* WebRecon LLC, WebRecon Stats for Dec 2017 & Year in Review, https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review/.

[13] *See* Fed. Judicial Ctr., Federal Judicial Caseload Statistics 2019 Tables, tbl. C-3 (Mar. 31, 2019), *available at* https://www.uscourts.gov/federal-judicial-caseload-statistics-2019-tables.

[14] *See* WebRecon LLC, WebRecon Stats for Oct 2019: Litigation Up Across the Board, https://webrecon.com/webrecon-stats-for-oct-2019-litigation-up-across-the-board/.

manner. This isn't (just) because businesses *want* to contact their customers. Instead, customers have come to expect—indeed, demand—routine communications like reminder notifications, confirmation texts, promotional offers, and so on. But businesses now face impossible choices when doing so.

Most fundamentally, businesses have no idea whether the kinds of equipment they may use for these communications will trigger liability. There is a circuit split over the most basic question of all: what makes a piece of equipment an ATDS in the first place? *Compare Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018) (upholding summary judgment because the equipment did not "generat[e] random or sequential telephone numbers"), *with Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018) (reversing summary judgment because the equipment "store[d] numbers and dial[ed] them automatically"). District courts are just as divided on the topic.[15]

The disagreement does not stop there. The Ninth Circuit has held that courts are now free to construe the TCPA for themselves, without regard to whatever the FCC said in its pre-2015 orders. *See Marks*, 904

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[15] *Compare, e.g.*, *Thompson-Harbach v. USAA Fed. Savings Bank*, 359 F. Supp. 3d 606, 625 (N.D. Iowa 2019) ("[A]n ATDS must have the capacity to generate or store telephone numbers, either randomly or sequentially, and then to dial those numbers."), *with, e.g.*, *Espejo v. Santander Consumer USA, Inc.*, 2019 WL 2450492, at *7–8 (N.D. Ill. June 12, 2019) ("Congress intentionally defined an ATDS to have the capability to make calls from a pre-existing list, rather than exclusively calling numbers generated randomly or sequentially.").

F.3d at 1049. But a host of district courts in other circuits have disagreed.[16] According to these courts, the FCC's pre-2015 statements remain valid—and *binding* under the Hobbs Act—despite the D.C. Circuit's decision in *ACA International*.[17]

This disagreement makes it essentially impossible to avoid litigation while placing the calls and texts that customers demand. Obviously, businesses cannot avoid litigation by eschewing equipment that generates random or sequential numbers. In some jurisdictions (like the Ninth Circuit), courts have held that the statute sweeps farther, and in others (like many district courts), courts have held that the FCC has unreviewably expanded it.

Callers also can't hope to escape litigation by avoiding equipment that has the capacity to store and dial numbers automatically. That test sweeps in a tremendous amount of equipment. For example, nearly every iPhone has a feature called "Do Not Disturb." When activated, it automatically texts all incoming callers or a select list of them, such as the user's contacts or favorites list.[18] The Ninth Circuit

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[16] *See, e.g.*, *Reyes v. BCA Fin. Servs., Inc.*, 312 F. Supp. 3d 1308, 1320–21 (S.D. Fla. 2018); *see also Espejo*, 2019 WL 2450492, at *5 ("[C]ourts across the country are split as to whether *ACA International* also invalidated the FCC's 2003 and 2008 Orders.").

[17] Even this last point will now lead to additional litigation. In *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019), this Court left open the possibility that the Hobbs Act does not prohibit courts from assessing the legality of the FCC's interpretations under *Chevron*'s ordinary framework.

[18] *See* Apple, How To Use Do Not Disturb While Driving, https://apple.co/2w8nurH; *see also* Nick Douglas, Lifehacker, *Add*

has already held that an indistinguishable system—one that automatically texts security warnings when someone accesses an account from a new device—qualifies as an ATDS. *See Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1151 (9th Cir. 2019); *see also Marks*, 904 F.3d at 1053 (holding that a texting platform very similar to group texting qualifies). If smartphones count as ATDSs, businesses will struggle to find any calling equipment that does not.

Finally, callers can't even dodge these problems by securing the "prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). "[T]here is no dispute that millions of wireless numbers are reassigned [from one subscriber to another] each year." *ACA Int'l*, 885 F.3d at 705. "In the event of a reassignment, the caller might initiate a phone call (or send a text message) based on a mistaken belief that the owner of the receiving number has given consent, when in fact the number has been reassigned to someone else from whom consent has not been obtained." *Id.* In that case, the circuits have concluded that the caller is liable, *even if* it could not possibly have known about the reassignment. *See Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014); *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. 2012).[19]

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an Auto-Responder to Do Not Disturb, https://bit.ly/2NDKQxg (May 7, 2018) (explaining how to configure the feature to autoreply generally, not just while driving).

[19] The FCC has established a reassigned number database, but it will not launch until January 2020 at the earliest, *see In re Advanced Methods To Target and Eliminate Unlawful Robocalls*, GC Docket No. 17-59, 2019 WL 4392267 (FCC Sept. 12, 2019), and its effectiveness and cost remain far from clear.

As things stand, then, the TCPA presents business with a series of unsavory options. They can refrain from making calls or texts, frustrating customers and missing opportunities. They can secure consent, but that consent will not matter when they accidentally call reassigned numbers. They can use equipment that lacks a random or sequential generator, but they will face liability in some jurisdictions (and may face it in others) as a result. Or they can *try* to avoid equipment that stores and automatically dials numbers, but they may not be able to do so, and will likely face lawsuits about whether they succeeded anyway. It is hard to imagine a more perfect recipe for litigation.

2. Other factors make this situation worse. To begin, the statute offers a hefty bounty against those found liable: at least $500 *per call or text*, with no statutory cap and with treble damages for "willful[] or knowing[] violat[ions]." 47 U.S.C. § 227(b)(3). Given the number of calls and texts that businesses often need or want to send and the number of people to whom they send them, $500 a pop quickly adds up to eye-watering numbers. Indeed, the statute's aggregated damages are so astonishing that courts have struck them down as grossly disproportionate. *See Golan v. FreeEats.com, Inc.*, 930 F.3d 950 (8th Cir. 2019) (affirming reduction of $1.6 billion award to $32.4 million).

Plaintiffs' lawyers can also more plausibly threaten to certify massive classes in ATDS cases. Callers use the same equipment to place the calls or texts in question, so would-be class representatives have a ready-made common issue. And because some callers do not try to secure consent (because they do not think they use ATDSs) or secure that consent through standardized channels, would-be class representatives

also often have a stronger-than-average argument regarding predominance.

Of course, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id.* And that is precisely what has happened in TCPA land. According to one recent report, the settlements submitted for court approval *in 2018 alone* totaled at least *$171 million*.[20]

Because of these incentives, plaintiffs' firms have gone to extraordinary lengths to capitalize on the TCPA gold rush. One, for instance, created an app called "Block Calls Get Cash," promising users that they could "laugh all the way to the bank."[21] And plaintiffs themselves have been just as creative. A Pennsylvania resident acquired "at least thirty-five cell phones" with numbers from an economically depressed region in Florida, hoping that creditors would call the (now-reassigned) numbers so that she could sue. *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 788 (W.D. Pa. 2016). Another plaintiff "had several different phone numbers at his home to

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[20] JDSupra, *Happy Halloween TCPALand!: More Ghoulish TCPA Statistics to Freak You Out*, https://www.jdsupra.com/legalnews/happy-halloween-tcpaland-more-ghoulish-85348/ (Nov. 1, 2018).

[21] 2015 TCPA Order, 30 FCC Rcd. at 8091 n.108 (statement of Commissioner O'Rielly dissenting in part and approving in part).

get a higher volume of telemarketing calls." *Fitzhenry v. ADT Corp.*, 2014 WL 6663379, at *4 (S.D. Fla. Nov. 3, 2014) (internal quotation marks and alterations omitted). Indeed, *34%* of the plaintiffs who filed TCPA lawsuits in October 2019 had filed at least one previous lawsuit.[22] It has gotten so bad that several companies now offer services to scrub professional TCPA plaintiffs from a company's communications. *See, e.g.*, Contact Compliance Center, Litigator Scrub®, https://www.dnc.com/litigator-scrub.

II. THIS COURT SHOULD INVALIDATE THE ATDS PROVISION IF IT CONCLUDES THAT THE EXEMPTIONS ARE CONTENT-BASED

Something must be done about spiraling TCPA litigation. In fact, Congress has already agreed—at least when it comes to certain types of communications. The Treasury Department's Financial Management Service had long complained to the FCC that the FCC's orders had "create[d] confusion regarding the scope and applicability of the autodialer ban to debt collection calls," confusion which "negatively impacted collections government-wide."[23] In November 2015,

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[22] WebRecon, LLC, WebRecon Stats for Oct 2019: Litigation Up Across the Board, https://webrecon.com/webrecon-stats-for-oct-2019-litigation-up-across-the-board/.

[23] Letter from Rita Bratcher, Financial Management Service, U.S. Department of the Treasury, to Kevin Martin, FCC, CC Docket No. 02-278, at 2 (filed Jan. 26, 2007), *available at* https://ecfsapi.fcc.gov/file/6518723834.pdf.; *see also, e.g.*, Letter from Scott Johnson, Financial Management Service, U.S. Department of the Treasury, to Marlene Dortch, FCC, CC Docket No. 02-278, at 2 (filed May 20, 2010) (raising similar concerns), *available at* https://ecfsapi.fcc.gov/file/7020544285.pdf.

Congress exempted ATDS calls to wireless numbers if "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). This change "ma[d]e it easier for owners of debts owed to or guaranteed by the United States and their contractors to … collect the debts" without fear of litigation.[24]

The Chamber takes no position on whether this exemption renders the TCPA content-based and unconstitutional. But it strongly agrees with Charter that, if it does, then the proper remedy is to invalidate the ATDS prohibition, not to sever the exemption. That is the course of action that this Court has followed in case after case. And that is a course of action that will bring an end to the plague of meritless TCPA litigation now swamping the federal courts.

1. This Court has often confronted a broad, content-neutral speech restriction coupled with a content-based exemption. Every time, it did what the Ninth Circuit would not: it struck down the challenged prohibition, not the speech-permitting exemption.

Take *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972), and *Grayned v. City of Rockford*, 408 U.S. 104 (1972), decided the same day. Two municipalities banned picketing near schools, but exempted "the peaceful picketing of any school involved in a labor dispute." *Mosley*, 408 U.S. at 93; *Grayned*, 408 U.S. at 107. Mosley sued because he wished to continue protesting outside a school that he believed "practice[d] black discrimination," 408 U.S. at

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[24] *In re Rules & Regs. Implementing the TCPA*, 31 FCC Rcd. 9074, 9076–77 (2016).

93, while Grayned sought to overturn his conviction for protesting for equal rights, *see* 408 U.S. at 105.

This Court agreed with Mosley and Grayned that the ordinances "ma[de] an impermissible distinction between labor picketing and other peaceful picketing." *Mosley*, 408 U.S. at 94; *see Grayned*, 408 U.S. at 107. But rather than do what the Ninth Circuit did here, this Court then held that the *content-neutral ordinances*, not the content-based exemption, had to go. *See Mosley*, 408 U.S. at 102; *see Grayned*, 408 U.S. at 107 (reversing Grayned's conviction because it came "under [an] invalid ordinance").

Indeed, in *Grayned*, the municipality had *already* "delete[d] the labor picketing proviso" by the time the case reached this Court. 408 U.S. at 107 n.2. It did not matter. "This amendment and deletion ha[d], of course, no effect on [Grayned's] personal situation," because the Court had to "consider the facial constitutionality of the ordinance in effect when [he] was arrested and convicted." *Id.* (internal quotation marks omitted).

The same should have been true here. Gallion's putative class seeks to hold Charter liable for calls placed after the TCPA had been amended to include the content-based exemption. *See* Pet. 14–15. But rather than assess the constitutionality of the actual TCPA "in effect when" Charter sent the challenged texts, the Ninth Circuit concluded that Charter may somehow be held retroactively liable for violating the TCPA's newly rewritten, now-content-neutral restriction. *See* Pet. App. 3a. That approach cannot be squared with *Mosley* or *Grayned*. Nor are those cases outliers. *See, e.g.*, *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (invalidating the application of a

state sales tax to magazines rather than striking the content-based exemptions to that tax); *Carey v. Brown*, 447 U.S. 455 (1980) (invalidating a residential antipicketing ordinance rather than striking its labor-dispute exemption); Pet. 10–11 (collecting other cases).

2. In addition to being compelled by precedent, striking the prohibition rather than severing the exemption makes sense. To begin, courts generally deploy remedies that "create incentives to raise [constitutional] challenges." *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018) (internal quotation marks and alterations omitted). But under the Ninth Circuit's approach, the prize for *successfully* challenging an unjustified content-based scheme is, well, nothing.

In fact, it's worse than that. In the Ninth Circuit, the reward for defeating a content-based scheme is a *broader prohibition on speech*. Given the "special status of speech in our constitutional scheme," *Rappa v. New Castle County*, 18 F.3d 1043, 1073 (3d Cir. 1994), courts should leave it to legislatures to craft any restrictions that meet the high bar for speech prohibitions, not draft them themselves. *See id.* ("[A]bsent quite specific evidence of a legislative preference for elimination of an exception," courts should not assume that the "legislature would prefer" to "restrict more speech.").

Once courts get into the business of blue-penciling speech codes, it will be difficult to divine any principled place to stop. The ATDS provision offers a great example. In addition to adding a content-based exemption directly into the statute, Congress empowered the FCC to exempt speech it preferred. *See* 47 U.S.C. § 227(b)(2). The FCC has liberally deployed

that power, exempting "package delivery notifications,"[25] calls about "financial and healthcare issues" like "money transfers" and "exam reminders," [26] calls "closely related to [a] school's mission, such as notification of an upcoming teacher conference or general school activity,"[27] and calls by "utility companies" on "matters closely related to the utility service, such as a service outage."[28]

Who's to say whether these exemptions are "severable" under the Ninth Circuit's approach? The general saving clause (incorporated into the telecommunications laws decades ago) might not help; it applies, at most, where a court invalidates "a[] provision *of this chapter*," not a regulation. 47 U.S.C. § 608 (emphasis added). History doesn't help either. While these exemptions (like the debt-collection exemption) are rather recent, that can't be enough to demonstrate that they are severable. After all, Congress conferred upon the FCC *ongoing* power to craft exemptions, not just exemptions promulgated in or around 1991.[29]

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[25] *In re Cargo Airline Ass'n Pet. for Expedited Declaratory Ruling*, 29 FCC Rcd. 5056, 5056 (2014).

[26] *In Re Rules & Regs. Implementing the TCPA*, 30 FCC Rcd. 7961, 8023, 8026, 8030 (2015).

[27] *In Re Rules & Regs. Implementing the TCPA*, 31 FCC Rcd. 9054, 9061 (2016).

[28] *Id.*

[29] The Ninth Circuit held that, because of the Hobbs Act, it lacked jurisdiction to consider Charter's challenges to the exemptions that the FCC has created. *See* Pet. App. 3a. Whether or not that was correct after this Court's decision in *PDR Network*,

In the end, then, a court determining whether to strike these exemptions must compare the importance of the exempted speech with the purported harms of ATDS calls. That is no business for federal courts.

CONCLUSION

The Court should grant certiorari and reverse the decision below.

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Respectfully submitted,

STEVEN P. LEHOTSKY
TARA S. MORRISSEY
U.S. CHAMBER LITIGATION CENTER
1615 H St., N.W.
Washington, DC 20062

SHAY DVORETZKY
Counsel of Record
JEFFREY R. JOHNSON
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

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this Court can and should bear in mind the other exemptions when determining what to do with the debt-collection exemption.