No. 20-____

IN THE

# Supreme Court of the United States

---

DISH NETWORK L.L.C.,

*Petitioner*,

*v.*

UNITED STATES, AND THE STATES OF CALIFORNIA, ILLINOIS, NORTH CAROLINA, AND OHIO,

*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

## PETITION FOR A WRIT OF CERTIORARI

---


Kelsi Brown Corkran
Eric A. Shumsky
Randall C. Smith
Melanie Hallums
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400

E. Joshua Rosenkranz
*Counsel of Record*
Peter A. Bicks
Elyse D. Echtman
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

*Counsel for Petitioner*
*(Additional Counsel Listed on Inside Cover)*

Sachi Schuricht
ORRICK, HERRINGTON &
SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5700

---

## QUESTION PRESENTED

Federal law prohibits various telemarketing practices, including calls to numbers on the National Do-Not-Call registry. The circuits are split on the basis for vicarious liability under the telemarketing laws. The Fourth and Ninth Circuits, in accordance with a declaratory ruling from the Federal Communications Commission, have held that vicarious liability under the federal telemarketing laws must be assessed in light of the four bedrock theories of common law agency: actual authority, apparent authority, respondeat superior (employment), and ratification. The Seventh Circuit, by contrast, has determined that a seller may be held vicariously liable for telemarketing violations committed by an independent company, with which the seller contracted to market its services or products, whenever that contract imposes any standards of performance on the marketer.

The question presented is:

Whether vicarious liability must be assessed in light of the four bedrock theories of common law agency, or whether a contractual term imposing performance standards on a service provider is alone a sufficient basis for imposing vicarious liability?

## CORPORATE DISCLOSURE STATEMENT

DISH Network L.L.C. is a wholly owned subsidiary of DISH DBS Corporation, a corporation with publicly traded debt, and a wholly owned indirect subsidiary of DISH Network Corporation, a corporation with publicly traded equity (NASDAQ: DISH). Based on a review of Form 13D and Form 13G filings with the Securities and Exchange Commission, no entity owns more than 10% of DISH Network Corporation's stock other than Telluray Holdings, LLC and Dodge & Cox.

## TABLE OF CONTENTS

Page

QUESTION PRESENTED ....................................... i

CORPORATE DISCLOSURE STATEMENT .......... ii

TABLE OF CONTENTS ......................................... iii

TABLE OF AUTHORITIES ......................................v

INTRODUCTION ..................................................... 1

OPINIONS BELOW .................................................. 3

JURISDICTION ....................................................... 4

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ................................ 4

STATEMENT OF THE CASE .................................. 4

REASONS FOR GRANTING THE PETITION ..... 11

I. The Circuits Are Fractured Over How To Assess Vicarious Liability Under The Telemarketing Laws ........................................ 11

A. The Fourth and Ninth Circuits address vicarious liability under the telemarketing laws based on the bedrock common law theories of agency ......................................................... 12

B. The Seventh Circuit's approach to vicarious liability is unmoored from bedrock theories of agency law .................. 15

II. The Seventh Circuit's Approach To Vicarious Liability Is Wrong ............................ 19

III. The Conflict In Authority Is Exceptionally Important And Warrants Review .................... 23

A. The conflicting standards of vicarious liability under this statutory regime will have drastic consequences.................. 23

B. The conflict disrupts the background rules around which businesses in numerous industries have structured their operations.......................................... 26

CONCLUSION....................................................... 29

## TABLE OF AUTHORITIES

**Page(s)**

### Cases

*APL Co. Pte. v. Kemira Water Sols., Inc.*,
890 F. Supp. 2d 360 (S.D.N.Y. 2012) ..................28

*Astoria Fed. Sav. & Loan Ass'n v. Solimino*,
501 U.S. 104 (1991).............................................20

*BP Expl. & Oil, Inc. v. Jones*,
558 S.E.2d 398 (Ga. Ct. App. 2001).....................27

*Brooks v. Collis Foods, Inc.*,
365 F. Supp. 2d 1342 (N.D. Ga. 2005)............................................................26, 27

*Burlington Indus., Inc. v. Ellerth*,
524 U.S. 742 (1998).......................................23, 26

*Cent. Bank of Denver v. First Interstate Bank of Denver*,
511 U.S. 164 (1994).............................................10

*Charvat v. EchoStar Satellite, LLC*,
630 F.3d 459 (6th Cir. 2010)..................................8

*Cmty. for Creative Non-Violence v. Reid*,
490 U.S. 730 (1989).............................................26

*Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*,
140 S. Ct. 1009 (2020)..........................................20

*Faragher v. City of Boca Raton*,
524 U.S. 775 (1998).......................................23, 26

*Hayman v. Ramada Inn, Inc.*,
357 S.E.2d 394 (N.C. Ct. App. 1987)...................27

*Hodgin v. UTC Fire & Sec. Americas Corp.*,
885 F.3d 243 (4th Cir. 2018).............12, 14, 15, 17

*ING Bank, FSB v. Chang Seob Ahn*,
758 F. Supp. 2d 936 (N.D. Cal. 2010)..................27

*Janus Capital Grp., Inc. v. First Derivative Traders*,
564 U.S. 135 (2011).............................................23

*Jett v. Dallas Indep. Sch. Dist.*,
491 U.S. 701 (1989).............................................23

*Jones v. Royal Admin. Servs., Inc.*,
887 F.3d 443 (9th Cir. 2018)........12, 13, 14, 16, 18

*Krakauer v. Dish Network, L.L.C.*,
925 F.3d 643 (4th Cir. 2019)................................19

*Kristensen v. Credit Payment Servs. Inc.*,
879 F.3d 1010 (9th Cir. 2018).............................15

*Little v. Howard Johnson Co.*,
455 N.W.2d 390 (Mich. Ct. App. 1990)....................27

*Meyer v. Holley*,
537 U.S. 280 (2003)....................20, 23, 26

*NMS Indus., Inc. v. Premium Corp. of Am.*,
451 F.2d 542 (5th Cir. 1971)....................17

*Schramm v. Foster*,
341 F. Supp. 2d 536 (D. Md. 2004)....................28

*Schweizer v. Keating*,
150 F. Supp. 2d 830 (D. Md. 2001)....................27

*Stone v. First Wyo. Bank N.A., Lusk*,
625 F.2d 332 (10th Cir. 1980)....................17

*In the Matter of the Joint Petition Filed by Dish Network, LLC, the United States of Am., & the States of California, Illinois., N. Carolina, & Ohio for Declaratory Ruling Concerning the Tel. Consumer Prot. Act (TCPA) Rules*,
28 F.C.C. Rcd. 6574 (2013)........8, 9, 12, 15, 18, 22

*United States v. Dish Network, L.L.C.*,
667 F. Supp. 2d 952 (C.D. Ill. 2009)....................8

*United States v. DISH Network, L.L.C.*,
No. 09-3073, 2011 WL 475067 (C.D. Ill. Feb. 4, 2011)....................8

*Vance v. Ball State Univ.*,
570 U.S. 421 (2013)....................................23, 26

*Viches v. MLT, Inc.*,
127 F. Supp. 2d 828 (E.D. Mich. 2000)....................................................27

*Wood v. Shell Oil Co.*,
495 So. 2d 1034 (Ala. 1986)................................27

*Wu v. Dunkin' Donuts, Inc.*,
105 F. Supp. 2d 83 (E.D.N.Y. 2000)....................27

**Statutes**

15 U.S.C. § 6102(a)....................................................6

28 U.S.C. § 1254(1)....................................................4

42 U.S.C. § 1981.......................................................23

47 U.S.C. § 227(b)......................................................4

47 U.S.C. § 227(b)(1)(B) .............................................7

**Regulations**

16 C.F.R. § 310.4(b)....................................................4

16 C.F.R. § 310.4(b)(1) .............................................25

16 C.F.R. § 310.4(b)(1)(iii)..........................................6

47 C.F.R. § 64.1200(a)................................................4

47 C.F.R. § 64.1200(c) ................................................4

47 C.F.R. § 64.1200(c)(2) ........................................... 7

85 Fed. Reg. 2014-01 (Jan. 14, 2020) ....................... 24

**Other Authorities**

Restatement (Third) of Agency § 1.01 (2006) ........................................................ 21

Restatement (Third) of Agency § 1.01 cmt. f(1) (2006) ........................................... 21, 22

Restatement (Third) of Agency § 2.01 (2006) ........................................................ 21

Restatement (Third) of Agency § 2.03 (2006) ........................................................ 21

Restatement (Third) of Agency § 2.03 cmt. c (2006) ........................................... 18

Restatement (Third) of Agency § 2.04 (2006) ........................................................ 21

Restatement (Third) of Agency § 4.01 (2006) ........................................................ 21

Restatement (Third) of Agency § 4.01(1) (2006) ........................................................ 17

Restatement (Third) of Agency § 4.06 (2006) ........................................................ 15

Restatement (Third) of Agency § 4.06 cmt. d (2006) ........................................... 15

U.S. Chamber Inst. for Legal Reform, *TCPA Litigation Sprawl* 3-4 (Aug. 2017), https://tinyurl.com/y694lswk..............24, 25

## INTRODUCTION

This case presents a classic circuit split: Confronted with analogous (and recurrent) factual circumstances, different circuits apply fundamentally different analytical frameworks, resulting in conflicting results. And the result the Seventh Circuit reached below is untenable. It exposes companies to essentially limitless vicarious liability under the telemarketing laws and threatens to do the same under numerous other statutory regimes that are construed to incorporate common law agency principles.

Petitioner DISH Network L.L.C., like many companies, authorizes certain independent businesses (called "retailers") to market its services. The governing contract expressly disclaims any agency relationship. DISH does not supervise these retailers' day-to-day operations, but DISH does impose certain quality-control standards on them, require that they obey all laws, and take measures to monitor and punish violations of its standards. Despite those requirements, a few of DISH's retailers committed widespread violations of the federal telemarketing laws. Although the retailers lied and sought to conceal their misconduct from DISH, the federal government joined with four states to sue DISH for the retailers' telemarketing violations.

In the Fourth and Ninth Circuits, vicarious liability under these circumstances would turn on the four bedrock theories of common law agency: The government would have needed to show that the retailers had actual authority to place the calls at issue, that they had apparent authority to place the calls, that

DISH had sufficient control over the manner and means of their performance akin to an employment relationship (respondeat superior), or that DISH subsequently ratified the retailers' actions. If the government could not satisfy one of those theories, there would be no vicarious liability.

The Seventh Circuit, however, applied a fundamentally different mode of analysis. Instead of considering the four bedrock theories of agency, it concluded that DISH could be held liable for the retailers' conduct because there was a term in the contract requiring them to comply with "Business Rules" relating to DISH's promotional programs, and reserving DISH's right to change those "Business Rules." Pet. App. 6a-7a. That means that any sort of contractual term imposing basic performance standards is sufficient to create an agency relationship and vicarious liability under the telemarketing laws.

The result is a sharp split in authority. Under the Seventh Circuit's decision, DISH is potentially liable for hundreds of millions of dollars based on telemarketing violations committed by a few rogue retailers. Yet other circuits have rejected vicarious liability under indistinguishable circumstances. The Seventh Circuit's decision also puts it at odds with a declaratory ruling by the Federal Communications Commission (FCC) explaining that vicarious liability exists in these circumstances only when common law agency requirements are satisfied.

The fracture in authority is a significant one that warrants this Court's immediate intervention. As noted, the circumstances at issue here are common

and recurrent: Companies routinely contract with independent contractors to sell their goods or services. Such marketing contracts invariably impose basic standards of performance, even as they disaffirm an agency relationship. Unless this Court grants certiorari, vicarious liability under the telemarketing laws in those circumstances will differ depending on where the plaintiff chooses to bring suit. And given the astronomical damages authorized in these suits, the plaintiff's choice of circuit could be the difference between life and death for a corporate defendant.

The ramifications of the split also extend well beyond the telemarketing laws. Quality-control provisions of the sort that provided the basis for the Seventh Circuit's agency determination are ubiquitous in the business world. And common law principles of agency are used to assess vicarious liability under numerous federal statutes, governing everything from copyright infringement to housing discrimination and securities violations. If the circuit conflict is not resolved, markedly different standards for vicarious liability will apply to myriad statutory regimes across the country.

The petition should be granted.

## OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is reported at 954 F.3d 970 and is reproduced at Pet. App. 1a-18a. The decision of the United States District Court for the Central District of Illinois determining, following a bench trial, that DISH violated the federal telemarketing

laws is reported at 256 F. Supp. 3d 810 and is reproduced at Pet. App. 19a-417a. The decision of the Seventh Circuit denying DISH's petition for rehearing en banc is unpublished but is reproduced at Pet. App. 418a-19a.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The United States Court of Appeals for the Seventh Circuit entered judgment on March 26, 2020, and denied DISH's petition for panel rehearing and rehearing en banc on June 25, 2020. Pet. App. 418a-19a. This petition is timely because it has been filed within 150 days of the denial of DISH's petition for rehearing. Order Regarding Filing Deadlines, Supreme Court of the United States, March 19, 2020.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227(b), are set forth at Pet. App. 420a-21a. The relevant regulations promulgated under the TCPA, 47 C.F.R. § 64.1200(a) & (c), are set forth at Pet. App. 421a-22a. The relevant portions of the Telemarketing Sales Rule, 16 C.F.R. § 310.4(b), are set forth at Pet. App. 422a-23a.

## STATEMENT OF THE CASE

### *DISH Builds Its Business By Contracting With Independent Marketing Firms.*

DISH was founded in 1980 to expand rural communities' access to cable television by selling satellite

dishes. A10, 1389-91.[1] During the period of rapid growth in which it developed into the national brand it is today, DISH contracted with various independent businesses (called "Order Entry Retailers" or just "retailers," because they solicited orders from customers and then entered them into DISH's computer system) to sell its services. A10, 67-68.

The contracts described these retailers as "independent contractors," expressly disclaimed any agency relationship between the parties, and prohibited the retailers from holding themselves out as DISH's agents. A71-72. The retailers secured their own space, hired their own employees, and devised their own marketing strategies. A12-14, 73. Many of them also sold the services of DISH's competitors. A71-73. DISH did not supervise their day-to-day activities, but it did impose quality-control measures and required the retailers to obey the telemarketing laws. A1297, 1372-74, 1393-98, 1449-50, 1452. If DISH suspected that a retailer had engaged in telemarketing violations, it gave clear warnings, A95-96, 113, 127, 1328, 1354-55, 1411-12, and ultimately terminated retailers who did not fall in line, A1261-62, 1330-31, 1407-08.

---

[1] These citations are to the Appendix filed in the Seventh Circuit.

***The Government And Four States Sue DISH, Seeking To Hold It Vicariously Liable For Telemarketing Violations Committed By Four Retailers.***

Despite these efforts, a small fraction of the retailers—four out of thousands—committed widespread telemarketing violations. A111-40. These rogue retailers lied about their noncompliance and concealed their unlawful conduct from DISH. A1381-83, 1405-06, 1415. When DISH found out about the violations, it responded by ousting the retailers from its national sales program. A137-38, 1211, 1261-62, 1330-31. The federal government secured judgments against the worst of the perpetrators, but then joined with four states to sue DISH for the same telemarketing violations, on the theory that DISH is vicariously liable for the retailers' misconduct. A783-811, 1167, 1198.

The telemarketing laws at issue involve a complex web of overlapping provisions, administered by multiple agencies. Pursuant to its authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act, *see* 15 U.S.C. § 6102(a), the Federal Trade Commission created the National Do-Not-Call registry. It also promulgated a regulation—called the Telemarketing Sales Rule (TSR)—declaring it "an abusive telemarketing act or practice … for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in," conduct that includes "initiating any outbound telephone call to a person" whose telephone number is on the national registry or who "has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller." 16 C.F.R. § 310.4(b)(1)(iii).

Meanwhile, the TCPA prohibits "initiat[ing] any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message." 47 U.S.C. § 227(b)(1)(B). It also grants the FCC power to engage in rulemaking, which the agency exercised in barring the "initiat[ion of] any telephone solicitation to … [a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry." 47 C.F.R. § 64.1200(c)(2).

The federal government sued DISH under the TSR, alleging that DISH was liable for "causing" the retailers to engage in conduct in violation of the rule. The states sued under the TCPA and implementing regulations, asserting that DISH was liable for "initiat[ing]" the calls because the retailers placed them on its behalf. The states also sued under various state statutes.[2]

***After Shifting Its Approach To Vicarious Liability Under The Telemarketing Laws, The District Court Finds DISH Liable.***

DISH sought dismissal of the claims, arguing that the plaintiffs failed to state a claim for vicarious liability. The district court denied DISH's motion. The court held that, to state a claim that a seller "cause[d]" a telemarketing violation under the TSR, plaintiffs must merely allege that the seller "retain[ed] the tel-

[2] The federal government also alleged that DISH directly committed some violations. *See, e.g.*, A276-84. Those violations are not at issue here.

emarketer and authoriz[ed] the telemarketer to market the seller's products and services." *United States v. Dish Network, L.L.C.*, 667 F. Supp. 2d 952, 959 (C.D. Ill. 2009). And to state a claim under the TCPA, the district court similarly held, the plaintiffs need only allege that the retailers "acted as Dish Network's representatives, or for the benefit of Dish Network, when they conducted the alleged illegal telephone solicitations." *Id.* at 963.

Meanwhile, in a different case, the Sixth Circuit determined that the FCC, as the agency charged with administering the TCPA, has primary jurisdiction to determine the scope of vicarious liability under the Act. *Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459, 466-68 (6th Cir. 2010). The district court here accordingly directed the parties to file an administrative complaint with the FCC seeking its interpretation of vicarious liability under the TCPA. *United States v. DISH Network, L.L.C.*, No. 09-3073, 2011 WL 475067, at *4 (C.D. Ill. Feb. 4, 2011).

In its declaratory ruling, the FCC rejected the district court's approach to vicarious liability under the TCPA. "[A] construction of the statute that concludes that a seller always initiates a call that is made by a third party on its behalf," the agency concluded, "would entirely collapse the distinction, reflected in our current rules, between seller and telemarketer." *In the Matter of the Joint Petition Filed by Dish Network, LLC, the United States of Am., & the States of California, Illinois, N. Carolina, & Ohio for Declaratory Ruling Concerning the Tel. Consumer Prot. Act (TCPA) Rules*, 28 F.C.C. Rcd. 6574, 6583 (2013). The FCC instead determined that a seller's liability for

telemarketing violations committed by third-party telemarketers must be assessed "under federal common law principles of agency." *Id.* at 6584. Among the "agency principles" that can supply a basis for vicarious liability, the FCC noted both "formal agency," as well as "principles of apparent authority and ratification." *Id.*

Following the FCC's declaratory ruling, the district court conducted a bench trial. Adhering to its original strict liability interpretation of "cause" under the TSR, the court found that DISH was vicariously liable for the retailers' TSR violations because "Dish retained the … Retailers … to market Dish products and services." Pet. App. 254a.

As for the TCPA violations, the court determined that DISH was vicariously liable because the retailers were DISH's agents. The district court based that determination on a provision in the contract relating to DISH's customer offers. That provision states that the "[r]etailer shall comply with all Business Rules," which the contract defines as "any term, requirement, condition, condition precedent, process or procedure associated with a Promotional Program or otherwise identified as a Business Rule" by DISH. A1296, 1281. That provision, the court determined, overrode the contract's express disaffirmance of an agency relationship and gave DISH "the authority to control all aspects of marketing of Dish Network programming." Pet. App. 261a. The court further noted that its determination that the retailers were DISH's agents supplied an alternative ground for vicarious liability under the TSR. Pet. App. 295a.

After calculating total potential penalties and statutory damages in excess of $7.8 trillion, the district court imposed a penalty of $280 million. The court chose that figure because it represented "approximately 20 percent of Dish's" annual "after-tax profits." Pet. App. 396a.

***The Seventh Circuit Affirms The Liability Finding.***

On appeal, DISH argued that the district court's determination that the retailers were DISH's agents was unmoored from any established, common law principle of agency. DISH also argued that the district court misconstrued "cause" under the TSR. Finally, DISH challenged the $280 million penalty.

The Seventh Circuit affirmed the liability determination. It began by indicating its skepticism toward the district court's and the government's interpretation of "cause" in the TSR, noting that "[t]o engage a contractor is to cause *calls*, but not necessarily *violations*." Pet. App. 4a. It sidestepped the meaning of "cause" under the TSR, however, because it concluded that the retailers were DISH's agents, which it erroneously viewed as a basis for liability under all of the telemarketing laws at issue. *See Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 184 (1994) (where drafters "chose to impose some forms of secondary liability, but not others, [it] indicates a deliberate [drafting] choice with which the courts should not interfere"). The only evidence the court pointed to in characterizing the retailers as DISH's agents was the contractual provision requiring them to comply with DISH's "Business Rules," and retaining the right

to modify those Business Rules. Pet. App. 6a-7a. The court of appeals remanded for further proceedings as to the measure of damages. Pet. App. 18a.

DISH petitioned for panel rehearing and rehearing en banc, which the Seventh Circuit denied. Pet. App. 418a-19a.

## REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision opens a deep fracture among the circuits over the proper approach to vicarious liability under the telemarketing laws: By disregarding the bedrock theories of common law agency and holding that a single contractual quality-control provision is sufficient to create a principal-agent relationship, the Seventh Circuit split with decisions of the Fourth and Ninth Circuits, as well as a declaratory ruling of the FCC. The split in authority warrants this Court's resolution: It results in inconsistent results in a common and recurrent situation. And it will have ramifications well beyond the telemarketing context, because quality-control provisions of this sort are ubiquitous in the business world and because courts apply agency law to interpret vicarious liability under numerous federal statutes.

### I. The Circuits Are Fractured Over How To Assess Vicarious Liability Under The Telemarketing Laws.

The Fourth and the Ninth Circuits, consistent with the FCC's declaratory ruling, assess agency in light of "the bedrock theories of agency: actual authority, apparent authority, ratification, and employment

(respondeat superior).” *Jones v. Royal Admin. Servs., Inc.*, 887 F.3d 443, 449 (9th Cir. 2018); *see also Hodgin v. UTC Fire & Sec. Americas Corp.*, 885 F.3d 243, 251 (4th Cir. 2018). The Seventh Circuit applies an entirely different framework. Instead of looking to those four theories, it holds that vicarious liability exists whenever a seller imposes basic standards of performance on an independent marketer. The sharp conflict in approaches to vicarious liability under the telemarketing laws results in conflicting results—to the tune of hundreds of millions of dollars—on indistinguishable facts.

### A. The Fourth and Ninth Circuits address vicarious liability under the telemarketing laws based on the bedrock common law theories of agency.

The FCC determined that “a seller is not directly liable for a violation” of the telemarketing laws “unless it initiates a call, but may be held vicariously liable under federal common law agency principles for a … violation by a third-party telemarketer.” *Dish Network, LLC*, 28 F.C.C. Rcd. at 6582. In accordance with that determination, the Fourth and Ninth Circuits have adopted a common approach to vicarious liability under the telemarketing laws, which is expressly oriented around the core theories of agency at common law.

In *Jones v. Royal Administration Services, Inc.*, a seller of vehicle service contracts engaged independent marketing companies to promote its services through direct mail and telemarketing. 887 F.3d at

446. As here, the agreement imposed various performance standards on the marketers: It "contained authorized sales and marketing methodologies with which [the marketer] was required to comply," and expressly barred the marketers from violating federal telemarketing laws. *Id.* at 446-47. Also like here, the seller took steps to monitor compliance with these standards: It assigned an employee to serve as "agent of record" for the marketer's account and to provide compliance training to the marketer's employees. *Id.* at 447. The seller's president also repeatedly visited the marketer's call center and asked about its telemarketing practices. *Id.*

The Ninth Circuit held that the "various paths" to vicarious liability in these circumstances "correspond with the bedrock theories of agency: actual authority, apparent authority, ratification, and employment (respondeat superior)." *Id.* at 449. The court noted that, on appeal, the plaintiff did not argue for liability under an apparent authority or ratification theory. *Id.* Instead, it relied on the actual authority and respondeat superior theories. *Id.*

The Ninth Circuit quickly dispensed with the actual authority theory. "Actual authority is limited to actions 'specifically mentioned to be done in a written or oral communication' or 'consistent with' a principal's 'general statement of what the agent is supposed to do.'" *Id.* at 449 (internal quotation marks omitted). But in *Jones*, as in this case, "the contract between [the seller] and [the telemarketer] expressly prohibited any act or omission that violates applicable state

or Federal law." *Id.* (internal quotation marks omitted). That precluded a finding of actual authority. *Id.* at 450.

The Ninth Circuit then proceeded to the respondeat superior theory. The court observed that the "'essential ingredient'" in that theory was the "'extent of control exercised by the principal,'" which must be akin to the control an employer normally exerts over an employee. *Id.* (alterations omitted). Assessing the ten factors used to determine whether such control exists, the court noted that the seller "exercised some amount of control" over the marketer, since it dictated the scripts and materials the marketer could use, took remedial action when it suspected the marketer was violating its rules, trained the marketer's employees, and provided some of the tools and instrumentalities that the marketer used. *Id.* at 450-53. Ultimately, however, the court concluded that the seller "did not have enough authority to control the … telemarketers' work to hold [the seller] vicariously liable as if it were an employer of the … telemarketers." *Id.* at 453. The marketing firm "was its own independent business" that operated "without the direct supervision" of the seller. *Id.*

The Fourth Circuit applied the same framework to reject vicarious liability in *Hodgin v. UTC Fire & Security Americas Corp., Inc.*—another case involving indistinguishable circumstances. In *Hodgin*, a manufacturer of home security systems was sued for telemarketing violations committed by independent companies that marketed its products. 885 F.3d at 246. The Fourth Circuit, too, held that vicarious liability must be structured around the bedrock theories

of common law agency, "including not only formal agency, but also principles of apparent authority and ratification." *Id.* at 252 (quoting *Dish Network, LLC*, 28 F.C.C. Rcd. at 6584).

There, the plaintiffs advanced only a ratification theory—arguing that the seller ratified the marketer's violations by accepting the resultant benefits (*i.e.*, sales from unlawful marketing calls). *Id.* at 251. The Fourth Circuit rejected this argument because it "ignore[d] a key element of ratification, which is that a party 'is not bound by a ratification made without knowledge of material facts' or 'knowledge of facts that would have led a reasonable person to investigate further.'" *Id.* at 253 (quoting Restatement (Third) of Agency § 4.06 & cmt. d (2006)); *see also Kristensen v. Credit Payment Servs. Inc.*, 879 F.3d 1010, 1015 (9th Cir. 2018) (rejecting vicarious liability under the TCPA where plaintiff "presented no evidence that [seller] had actual knowledge that [marketer] was sending text messages in violation of TCPA").

### B. The Seventh Circuit's approach to vicarious liability is unmoored from bedrock theories of agency law.

The Seventh Circuit here splits with the Fourth and Ninth Circuits, as well as the FCC. Unlike its sister circuits, the Seventh Circuit does not ground its analysis in any of the four bedrock theories of agency. Indeed, the words "actual authority," "apparent authority," "respondeat superior," and "ratification" appear nowhere in its decision. Instead, the Seventh Circuit's decision rests on the holding that contract-

ing parties create a principal-agent relationship sufficient to impose vicarious liability whenever one party imposes basic standards of performance on the other.

The result is a direct circuit conflict, on indistinguishable facts. The Seventh Circuit determined DISH created an agency relationship because it required that the retailers comply with its "Business Rules" relating to promotional offers. Pet. App. 6a-7a. In *Jones*, the seller likewise required that the marketer use only preauthorized "scripts and materials" and comply with other "guidelines and procedures." 887 F.3d at 451. But the Ninth Circuit concluded that these standards afforded the seller "limited control" that was insufficient for vicarious liability. *Id.*

<u>Respondeat Superior</u>: Though the Seventh Circuit, like the *Jones* Court, purported to assess the degree of "control" the seller had over the telemarketer's conduct, Pet. App. 6a, that analysis is fundamentally different. The Seventh Circuit did not ask—as the Ninth Circuit did in *Jones*—whether DISH exercised sufficient "control over 'manner and means'" of the retailers' performance such that theirs was akin to "an employer-employee relationship." 887 F.3d at 450. Nor did the Seventh Circuit assess the ten factors that courts consider to determine "whether a principal has enough authority to control the actions of its agent such that the principal may be held vicariously liable to the same extent as an employer may be held liable for the conduct of its employee"—factors like "the skill required," "whether the employer supplies tools and instrumentalities," and "whether payment is by time or by the job." *Id.* at 450. Instead, the Seventh Circuit's conclusion that DISH had "complete control

over the order-entry retailers' performance" rested exclusively on the "Business Rules" provision in the contract: Because DISH obligated the retailers to comply with its Business Rules, and also retained the power to modify its Business Rules, the retailers were its agents and it was vicariously liable for their conduct. Pet. App. 6a-7a.

Ratification: The Seventh Circuit's analysis likewise bears no similarity to the Fourth Circuit's ratification analysis in *Hodgin*. The Seventh Circuit suggested elsewhere in its opinion (rejecting DISH's lack of knowledge defense) that DISH could be held to constructively know about the retailers' violations. Pet. App. 13a. But that suggestion provides no basis for vicarious liability because it started from the premise that the retailers were DISH's agents: DISH may be treated as if it knew about the violations, the court determined, because the "retailers knew that they were making millions of calls," and the "knowledge of the agent is imputed to the principal." Pet. App. 13a. Ratification, by contrast, "is the affirmance of a prior act done by another, whereby the act is given effect *as if* done by an agent acting with actual authority." *Hodgin*, 885 F.3d at 252 (quoting Restatement (Third) of Agency § 4.01(1)) (emphasis added). The knowledge required for ratification is "full, actual knowledge of the facts" at issue, not "constructive or imputed knowledge." *NMS Indus., Inc. v. Premium Corp. of Am.*, 451 F.2d 542, 544 (5th Cir. 1971); *see also Stone v. First Wyo. Bank N.A., Lusk*, 625 F.2d 332, 344 (10th Cir. 1980) ("[T]he knowledge required as a basis for ratification must be actual rather than constructive[.]"). The Seventh Circuit, then,

was not applying anything that looks even remotely like common law ratification.

Actual/Apparent Authority: Finally, the Seventh Circuit plainly did not apply established theories of actual or apparent authority. The court generally asserted that "DISH's agents … acted within their authority to sell TV service using phone calls, and those acts benefitted DISH." Pet. App. 11a. Actual authority, however, is "limited to actions specifically mentioned to be done in a written or oral communication or consistent with a principal's general statement of what the agent is supposed to do." *Jones*, 887 F.3d at 449 (internal quotation marks omitted). Here, though the retailers of course had authority to market DISH's services, DISH's contracts forbade the retailers from violating the telemarketing laws, and DISH took steps to identify and punish retailers that did not abide. That precludes a finding of actual authority. *See id.* (rejecting actual authority theory where "it is undisputed that the contract between [the seller] and [the telemarketer] expressly prohibited 'any act or omission that violates applicable state or Federal law, including but not limited to "robo-calling"'").

Meanwhile, apparent authority exists only when a third party's "beliefs about an actor's authority to act as an agent" of the principal are "reasonable and … traceable to a manifestation of the principal." *Dish Network, LLC*, 28 F.C.C. Rcd. at 6586 (quoting Restatement (Third) of Agency § 2.03 cmt. c). Here, the court never found—and no evidence would support a finding—that DISH somehow did something that would lead a third-party consumer to think the retailers had authority to violate the telemarketing laws.

Thus, the Seventh Circuit's decision recognizes a distinct basis for vicarious liability under the telemarketing laws, wholly apart from the four bedrock theories of agency recognized at common law. And its decision presents a pure question of law. Despite the court's general observation that "the existence of an agency relation is a question of fact," Pet. App. 5a, the court's imposition of vicarious liability hinges exclusively on the contract between DISH and the retailers, the interpretation of which the court acknowledged presented a purely "legal question," Pet. App. 6a.

The legal character of the court's decision is apparent from the contrast between it and another decision from the Fourth Circuit. That decision, which followed a jury trial, likewise affirms a liability finding against DISH, but on a diametrically opposed rationale: Where the Seventh Circuit here ignored the bedrock theories of agency law and found DISH liable based wholly on the contract, the Fourth Circuit affirmed the liability finding because the jury was properly instructed on principles of "traditional agency law," and there was sufficient evidence "beyond the contract" to find DISH "manifest[ed] assent" to an agency relationship *despite* the "contractual disclaimer" of agency. *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 659-61 (4th Cir. 2019).

## II. The Seventh Circuit's Approach To Vicarious Liability Is Wrong.

By extending vicarious liability under the telemarketing laws beyond what would be contemplated by established theories of agency law, the Seventh

Circuit's approach contravenes legislative intent, thwarts defendants' legitimate expectations, and undermines the purpose of the telemarketing laws by distorting parties' incentives.

The approach to vicarious liability adopted by the Fourth Circuit, the Ninth Circuit, and the FCC is consistent with a fundamental rule of statutory construction: Statutes that are silent on the question of vicarious liability "permit[] an inference that Congress intended to apply *ordinary* background tort principles." *Meyer v. Holley*, 537 U.S. 280, 286 (2003); *see also Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1016 (2020) ("we generally presume that Congress legislates against the backdrop of the common law"); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (same). The Seventh Circuit's approach, by contrast, violates the principle that congressional silence "cannot show that it intended to apply an unusual modification of those rules." *Meyer*, 537 U.S. at 281. Specifically, "unusually strict rules" of vicarious liability apply "only where Congress has specified that such was its intent." *Id.* Because the telemarketing laws say nothing to indicate a congressional intent to apply unusually strict rules of liability, the Seventh Circuit's determination to do so contravenes congressional intent.

In violating congressional intent, the Seventh Circuit's approach also disrupts parties' legitimate expectations. The core of agency law is mutual consent: An agency relationship arises "when one person (a 'principal') manifests assent to another person (an

'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01. The bedrock theories of agency all involve this consent, since all hinge on some act by the principal that indicates its willingness for the agent to act on its behalf. *See id.* § 2.01 (actual authority derives from "the principal's manifestations to the agent"); *id.* § 2.03 (apparent authority derives from "principal's manifestations" to a third party); *id.* § 2.04 (respondeat superior derives from the fact that the agent is "acting within the scope of their employment"); *id.* § 4.01 (ratification requires either a "manifest[ation of] assent" or other "conduct that justifies a reasonable assumption that the person so consents").

Here, however, there is no manifestation by DISH that would lead anyone to believe that DISH had consented to the retailers' acting as its agents. On the contrary, DISH's agreement with each retailer expressly disaffirmed any agency relationship.

In the absence of any manifestation of consent that the retailers serve as DISH's agents, the Seventh Circuit based its decision on a contractual clause narrowly requiring that the retailers comply with its rules relating to "Promotional Program[s]." Pet. App. 6a. But such provisions are ubiquitous in business contracts: "In many agreements to provide services, the agreement between the service provider and the recipient specifies terms and conditions creating contractual obligations that, if enforceable, prescribe or delimit the choices that the service provider has the right to make." Restatement (Third) of Agency § 1.01

cmt. f(1). And it is black-letter law that merely "setting standards in an agreement for acceptable service quality does not of itself create a right of control" that subjects one contracting party to vicarious liability for the acts of another. *Id*. In disregarding the bedrock theories of agency in imposing vicarious liability, therefore, the Seventh Circuit thwarted DISH's legitimate expectations.

The result distorts the incentives of parties that contract with independent marketers, undermining the basic purpose of the federal telemarketing laws. Basing vicarious liability under the telemarketing laws on long-established common law agency principles give sellers an incentive to "monitor and police TCPA compliance by third-party telemarketers": If a seller becomes aware that an independent marketer is engaged in illegal telemarketing, it must take steps to penalize the marketer, or risk being construed as having ratified the marketer's conduct. *Dish Network, LLC*, 28 F.C.C. Rcd. at 6588. The Seventh Circuit's approach, however, has the opposite effect. Because a seller's decision to impose basic performance standards on a telemarketer *results in* vicarious liability, this approach gives sellers a perverse incentive *not* to impose any quality control standards on their telemarketers. The Seventh Circuit's decision turns the fundamental purpose of the federal telemarketing laws on its head.

## III. The Conflict In Authority Is Exceptionally Important And Warrants Review.

### A. The conflicting standards of vicarious liability under this statutory regime will have drastic consequences.

This Court has repeatedly granted certiorari to resolve conflicts like the one presented here. *See, e.g.*, *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013) (scope of vicarious liability under Title VII); *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 137 (2011) (scope of liability under Securities and Exchange Commission Rule 10b-5); *Meyer*, 537 U.S. at 282 (scope of vicarious liability under the Fair Housing Act); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998) (scope of vicarious liability for hostile work environment under Title VII); *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998) (same); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 705 (1989) (scope of vicarious liability under 42 U.S.C. § 1981).

The split in authority at issue here is especially significant given the frequency and gravity of actions under the telemarketing laws. The circumstances presented here are extremely common. Sellers routinely contract with independent firms to market their products or services. And the contracts that cement those relationships typically require that the marketer comply with basic performance standards, even as they disaffirm any agency relationship. And, like the agreement at issue here, they typically contemplate future changes in those standards and

guidelines. Pet. App. 6a-7a. Just as the agreement between DISH and the retailers required the retailers to comply with "Business Rules" that DISH could amend, for instance, the agreement at issue in *Jones* allowed the seller to engage in ongoing direction of the telemarketer and required the telemarketer to comply with any written guidelines and procedures provided by the seller.[3]

Because the Seventh Circuit's approach vastly expands vicarious liability beyond the approach adopted in other circuits, it means that—unless the conflict in authority is resolved—defendants will face dramatically different potential liability, depending simply on where the suit is brought. That inconsistency is particularly intolerable because of several distinctive features of the telemarketing laws. Because the telemarketing laws provide for high statutory penalties—now as high as $43,280 *per call*, 85 Fed. Reg. 2014-01 (Jan. 14, 2020)—telemarketing suits are extremely lucrative for plaintiffs' lawyers. The result is that a cottage industry has developed around the telemarketing laws, with thousands of new cases filed each year, affecting nearly every industry. *See* U.S. Chamber Inst. for Legal Reform, *TCPA Litigation Sprawl* 3-4 (Aug. 2017), available at https://tinyurl.com/y694lswk. Plaintiffs' firms operating in this area routinely "'spread[] the risk' of their arguments by filing actions in multiple districts to see how those cases develop under the different caselaw in play in various circuits." *Id*. at 17. The Seventh Cir-

[3] See Opening Brief 25, *Jones v. Royal Admin. Servs.*, No. 15-17328 (9th Cir. Apr. 4, 2016).

cuit's decision effectively imposes strict liability for violations of the telemarketing laws committed by independent marketing companies.

The Seventh Circuit exacerbated that erroneous holding by joining it with another error: Though the TSR expressly addresses sellers' vicarious liability for telemarketers' violations, and provides that a seller is only liable for such a violation when the seller "cause[s] a telemarketer to engage in" abusive telemarketing, 16 C.F.R. § 310.4(b)(1), the Seventh Circuit held that agency provides a wholly separate basis for vicarious liability under the TSR. Pet. App. 5a. The combination of these two errors will—if not corrected—prompt plaintiffs' firms to file a flood of cases in districts within the Seventh Circuit. Indeed, the Northern District of Illinois is already a center for telemarketing litigation. U.S. Chamber, *supra*, at 10, 16-17, 19-24.

Furthermore, because of the extraordinary amount of potential damages at stake in telemarketing suits, they nearly always result in *in terrorem* settlements. *Id*. at 9. As a consequence, a decision like the Seventh Circuit's will inflict significant costs on businesses—which they will be forced to pass along to customers—but without resulting in a further opportunity for this Court to address the split in authority. Under these circumstances, it is untenable to allow even an incipient circuit split to persist.

### B. The conflict disrupts the background rules around which businesses in numerous industries have structured their operations.

The Seventh Circuit's erroneous holding has ramifications well beyond the telemarketing context. As noted, *supra* 20-21, courts look to longstanding principles of agency law in construing vicarious liability under a wide range of federal statutes—governing everything from copyright, *see Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 732 (1989); to employment discrimination, *see Vance*, 570 U.S. at 424; *Ellerth*, 524 U.S. at 754; *Faragher*, 524 U.S. at 780; to housing, *see Meyer*, 537 U.S. at 282. If the Seventh Circuit's decision is treated as what it incorrectly claims to be—an application of "basic principles of agency law," Pet. App. 14a—the result will be a vast expansion in vicarious liability across myriad areas of law.

The disorder that the conflict sows will be pervasive because quality-control provisions, like the provision DISH imposed on the retailers, are ubiquitous in the business world and are crucial to a wide range of industries. Consider, for instance, franchises like gas stations, hotels, convenience stores, and restaurants. Franchise agreements routinely impose quality-control requirements—often quite "numerous," relating to everything from the "appearance and operation" of the franchise to its "days and hours of operation" and "staffing ratios"—and allow the franchisor to conduct inspections to monitor compliance. *Brooks v. Collis Foods, Inc.*, 365 F. Supp. 2d 1342, 1350 (N.D. Ga.

2005). Such routinely amendable quality-control provisions are essential to "protect[ing] the franchisor's national identity and professional reputation." *Id*. (citation omitted). Yet courts have repeatedly found that such provisions do not transform the franchisee into the franchisor's agent, such that the franchisor could be held liable for the franchisee's conduct. *Id*. at 1350-51; *see also Viches v. MLT, Inc.*, 127 F. Supp. 2d 828, 832 (E.D. Mich. 2000); *Wu v. Dunkin' Donuts, Inc.*, 105 F. Supp. 2d 83, 90-94 (E.D.N.Y. 2000), *aff'd*, 4 F. App'x 82 (2d Cir. 2001); *Wood v. Shell Oil Co.*, 495 So. 2d 1034, 1037 (Ala. 1986); *BP Expl. & Oil, Inc. v. Jones*, 558 S.E.2d 398, 402 (Ga. Ct. App. 2001); *Little v. Howard Johnson Co.*, 455 N.W.2d 390, 394 (Mich. Ct. App. 1990); *Hayman v. Ramada Inn, Inc.*, 357 S.E.2d 394, 397 (N.C. Ct. App. 1987).

Or consider the relationship between securities issuers and brokers. Brokers solicit prospective investors for securities issuers, and are typically required to comply with various standards in doing so, including requirements that they make certain disclosures and only use approved sales materials. *See Schweizer v. Keating*, 150 F. Supp. 2d 830, 840 (D. Md. 2001). Yet "[t]he reservation of some control over the manner in which work is done" does not create an agency relationship that subjects the issuer to vicarious liability for the broker's violations of the securities laws. *Id.*; *see also ING Bank, FSB v. Chang Seob Ahn*, 758 F. Supp. 2d 936, 941-42 (N.D. Cal. 2010) (the exercise of "supervisory and even prescriptive control" is a routine part of business-to-business contracts and does not necessarily "indicate agency").

The same rule applies to contracts with carriers in the shipping context. Merely because a contract "dictated certain contractual obligations that [a shipper] was to perform related to the shipment … in and of itself does not establish an agency relationship." *APL Co. Pte. v. Kemira Water Sols., Inc.*, 890 F. Supp. 2d 360, 369 (S.D.N.Y. 2012); *see also Schramm v. Foster*, 341 F. Supp. 2d 536, 545 (D. Md. 2004) (contractual provisions requiring that carrier follow "driving directions" and load and unload the shipment in a certain manner are insufficient to create an agency relationship).

In recognizing a form of vicarious liability that has no basis in bedrock theories of common law agency, the Seventh Circuit has thrown into doubt the background principles around which numerous businesses have structured their operations. Businesses cannot operate effectively in the uncertainty caused by the use of two dramatically different standards for vicarious liability in different circuits, especially when the risk of a lawsuit in the wrong circuit carries an astronomically high price tag. This Court should intervene to resolve the conflict.

**CONCLUSION**

This Court should grant the petition.

Respectfully submitted,

E. Joshua Rosenkranz
*Counsel of Record*
Peter A. Bicks
Elyse D. Echtman
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Kelsi Brown Corkran
Eric A. Shumsky
Randall C. Smith
Melanie Hallums
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400

Sachi Schuricht
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5700

November 23, 2020