IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS, INC., *et al.*, Plaintiffs, v. JEFFERSON B. SESSIONS, III, in his official capacity as Attorney General of the United States, FEDERAL COMMUNICATIONS COMMISSION, Defendants.	Case No. 5:16-CV-252 (JCD)

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs have raised a facial challenge to the constitutionality of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA"). As relevant here, § 227(b)(1)(A)(iii) of the TCPA prohibits the use of automated dialing systems to make a call or send a text message to a cell phone user without the user's prior express consent, unless the call or message is initiated for an emergency purpose or to collect a debt owed to or guaranteed by the United States. Plaintiffs claim that this statute and related FCC orders constitute content-based restrictions of speech, and ask this Court to be the first to hold that the TCPA is unconstitutional. Plaintiffs' challenge is contrary to longstanding First Amendment precedent and should be rejected.

Multiple courts throughout the country have considered the constitutionality of the TCPA and have consistently upheld it under the First Amendment. Indeed, Plaintiffs do not and cannot dispute that the only provision of the TCPA that actually applies to their conduct is undoubtedly a constitutional, content-neutral time, place, and manner restriction, which limits only one method of communication absent consumer consent. Nevertheless, Plaintiffs ask the Court to reach beyond the statute's text to consider various FCC orders exempting certain calls from the provision at issue, and to decide based on those agency orders whether the statute itself is content based. That analysis is misguided because the FCC's orders are not part of the statute itself, which, as the Court has made clear, is the only law that is subject to challenge in this case. Insofar as Plaintiffs challenge the FCC's statutory authority to create exemptions, that authority itself is plainly valid and not content based, as every court to consider the question has held.

In contrast to the FCC orders, the government-debt exception is now part of the statute. But that exception has no effect on Plaintiffs and is severable from the remainder of the statute, meaning that an order invalidating it could not provide Plaintiffs with any redress. The remainder

of the statute has been universally affirmed as constitutional by every court to have considered the question. The Supreme Court's recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and the Fourth Circuit's application of it to a distinguishable state robocall statute in *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015), do not undermine that precedent. *See Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 304 (7th Cir. 2017) (holding that *Cahaly* and *Reed* did not make the numerous decisions upholding the TCPA obsolete).

Even if the Court were to depart from this line of precedent and conclude that strict scrutiny ought to apply, the narrow statutory provision at issue should be upheld, as two other district courts have concluded post-*Reed*. *See Brickman v. Facebook, Inc.*, No. 16-cv-00751, 2017 WL 386238 (N.D. Cal. Jan. 27, 2017); *Holt v. Facebook, Inc.*, No. 16-cv-2266, 2017 WL 1100564 (N.D. Cal. Mar. 9, 2017).[1] Congress made extensive findings about the Act's purpose of protecting consumer privacy, an interest the Supreme Court has already acknowledged as substantial. Section 227(b)(1)(A)(iii) is narrowly tailored to protect that interest, prohibiting only the sorts of automated communications that Congress found problematic — and only in the absence of consumer consent — and no more. As such, the TCPA survives even heightened scrutiny.

DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

1. The facts alleged in this paragraph are immaterial to the facial constitutional challenge at issue and therefore require no response.

[1] The courts in *Brickman* and *Holt* determined that the TCPA is a content-based restriction meriting strict scrutiny because of two exceptions to its general prohibition, for emergencies and for the collection of government-backed debt; the courts nevertheless found that the statute survived strict scrutiny. While Defendants agree with the latter conclusion, they disagree with the former, because those exceptions do not render the TCPA content based. *See infra* Section II. The district courts have certified the orders for interlocutory appeal. *See* Order, *Brickman*, No. 16-cv-00751, Dkt. 99 (Apr. 27, 2017); Order Granting Mot. to Certify and Staying Case, *Holt*, No. 16-cv-2266, Dkt. 86 (May 2, 2017).

2. The facts alleged in this paragraph are immaterial to the facial constitutional challenge at issue and therefore require no response.

3. The facts alleged in this paragraph are immaterial to the facial constitutional challenge at issue and therefore require no response.

4. The facts alleged in this paragraph are immaterial to the facial constitutional challenge at issue and therefore require no response.

5. The facts alleged in this paragraph are immaterial to the facial constitutional challenge at issue and therefore require no response.

6. The facts alleged in this paragraph are immaterial to the facial constitutional challenge at issue and therefore require no response.

7. The facts alleged in this paragraph are immaterial to the facial constitutional challenge at issue and therefore require no response.

Because Plaintiffs challenge the constitutionality of the TCPA on its face, Defendants do not set forth any material facts. The relevant statutory background is detailed below.

BACKGROUND

"Voluminous consumer complaints about abuses of telephone technology — for example, computerized calls dispatched to private homes — prompted Congress to pass the TCPA." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 370-71 (2012). The ubiquity of cell phones only aggravates such problems. *See Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876-77 (9th Cir. 2014). "People keep their cellular phones on their person at nearly all times: in pockets, purses, and attached to belts. Unlike other modes of communication, the telephone commands our instant attention." *Joffe v. Acacia Mortg. Corp.*, 121 P.3d 831, 842 (Ariz. Ct. App. 2005), *cert. denied*, 549 U.S. 1111 (2007) (mem.). *See also Mey v. Venture Data, LLC*, No. 5:14-cv-123, 2017 WL

1193072, at *7 (N.D. W. Va. Mar. 29, 2017) ("When it enacted the TCPA, Congress repeatedly emphasized the nuisance aspect of robocalls, showing that it considered the interruptions that they cause and the time they cause consumers to waste to be one of the harms it sought to remedy. . . . 'They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed.'" (quoting 137 Cong. Rec. 30,821-30,822 (1991) (testimony of Senator Hollings))).

As pertinent here, the statute makes it unlawful

> to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States.

47 U.S.C. § 227(b)(1)(A)(iii).[2] The TCPA defines an "automatic telephone dialing system" ("autodialer" or "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." *Id.* § 227(a)(1). The TCPA provides for a private right of action under which persons and entities may obtain injunctive or monetary relief for violations of the Act, including statutory damages of $500 per violation, with a possibility of trebling for knowing or willful conduct. *Id.* § 227(b)(3). The statute applies to both phone calls and text messages. *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14,014, 14,115 (July 3, 2003); *see also Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 949 (9th Cir. 2009).

The TCPA exempts calls made "for emergency purposes," 47 U.S.C. § 227(b)(1)(A), (B), which includes any calls "made necessary in any situation affecting the health and safety of

[2] Congress added the final clause of this provision in November 2015 as part of the Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 584, 588.

consumers." 47 C.F.R. § 64.1200(f)(4); *see also* S. Rep. No. 102-178, at 10 (1991) ("In general, any threat to the health or safety of the persons in a residence should be considered an emergency."). Examples of calls that might be made for emergency purposes include notifications of impending or current power outages, 137 Cong. Rec. H11,310, H11,313 (daily ed. Nov. 26, 1991); 137 Cong. Rec. S18,784 (daily ed. Nov. 27, 1991), or of natural disasters or health-related evacuations, 137 Cong. Rec. H11,313. The statute also allows the FCC to exempt calls where doing so would "not adversely affect the privacy rights" that the TCPA seeks to protect. *See* 47 U.S.C. § 227(b)(2)(B)(ii), (b)(2)(C). Such orders may be challenged only under the exclusive review procedures set forth in the Hobbs Act, which Plaintiffs here do not invoke. *See infra* at 14 & n.5.

Plaintiffs filed suit on May 12, 2016, naming as the Defendant Loretta Lynch, in her official capacity as Attorney General of the United States,[3] and on August 8, 2016, Plaintiffs amended their complaint, adding the FCC as a Defendant. Plaintiffs allege that they are various nonprofit and for-profit organizations involved in making calls for political reasons, including conducting political polls and soliciting political donations. First Amended Compl. ¶¶ 8–12. Plaintiffs are free under the TCPA to make these calls to residential phone lines without seeking prior express consent, insofar as the calls do not include advertising or telemarketing or are not made for a commercial purpose. *See* 47 C.F.R. § 64.1200(a)(3)(ii), (iii). Plaintiffs contend that, but for the TCPA, they or their members would also make these calls using autodialers or prerecorded voices to persons' cell phones without their consent. *Id.* Plaintiffs contend that the TCPA violates the First Amendment because they claim it is a content-based regulation of speech that cannot survive strict scrutiny. Pls.' Br. 14–23.

[3] The Court later substituted Attorney General Sessions. *See* Order at 5, ECF No. 26.

On September 2, 2016, Defendants moved to dismiss Plaintiffs' amended complaint for lack of subject-matter jurisdiction, arguing that the Court lacked jurisdiction to consider the FCC orders Plaintiffs cited in the Complaint because the Hobbs Act vests exclusive jurisdiction in the courts of appeals to consider direct or indirect challenges to orders of that agency. *See* Defs.' Mot. to Dismiss at 3–6, ECF No. 23. Defendants also argued that because the statutory government-debt exception is severable and its invalidation would grant Plaintiffs no relief, Plaintiffs lacked standing. *Id.* at 7–9. On March 15, 2017, the Court denied the motion based on its understanding that the Plaintiffs "do not seek to show that the FCC's orders delineating or interpreting exceptions to the autodialing ban are void or invalid." Order at 4, ECF No. 26. As for standing, the Court relied on the Fourth Circuit's decision invalidating a state robocall statute in full rather than severing the ban from its exemptions to hold that Plaintiffs had standing to proceed with this lawsuit. *Id.* On May 19, 2017, Plaintiffs filed their motion for summary judgment.

ARGUMENT

I. THE TCPA IS A VALID, CONTENT-NEUTRAL REGULATION OF SPEECH

As the Seventh Circuit recently observed, every appellate court to consider the question has held that the TCPA is a valid time, place, and manner regulation that fully comports with the First Amendment. *See Patriotic Veterans*, 845 F.3d at 306 (collecting cases); *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *affirmed on other grounds*, 136 S. Ct. 663 (Jan. 20, 2016); *Van Bergen v. Minnesota*, 59 F.3d at 1549–56; *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995). In *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995), for instance, the Ninth Circuit upheld the TCPA against a First Amendment challenge, holding that the statute is a content-neutral time, place, and manner restriction. *Id.* at 973. Applying intermediate scrutiny, as directed by Supreme Court precedent, *see Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), the Ninth Circuit held that, in light of the evidence before Congress at the time of its enactment, the statute was a valid response to the

"unwarranted intrusion upon privacy" of telemarketers. *Id.* at 972. The court went on to conclude that the statute was not under-inclusive. *Id.* at 974.

The Ninth Circuit reaffirmed this reasoning in *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *aff'd on other grounds*, 136 S. Ct. 663 (Jan. 20, 2016). The court recognized that *Moser* had rightly treated the TCPA as a content-neutral time, place and manner restriction, *id.* at 876, and further determined that the Act serves a significant government interest in protecting privacy. *Id.* at 876–77. The *Campbell-Ewald* court also found § 227(b)(1)(A)(iii) to be narrowly tailored and to leave open ample alternative channels for the communication of information. *Id.* Rejecting appellant's contention that "the government's interest only extends to the protection of residential privacy, and that therefore the statute is not narrowly tailored to the extent that it applies to cellular text messages," the court observed that "there [wa]s no evidence that the government's interest in privacy ends at home," but that, "to whatever extent the government's significant interest lies exclusively in residential privacy, the nature of cell phones renders the restriction of unsolicited text messaging all the more necessary to ensure that privacy." *Id.* at 876. Numerous district courts have similarly upheld the TCPA against constitutional challenge. *See, e.g.*, *Mey v. Venture Data, LLC*, No. 5:14-cv-123, 2017 WL 1193072 (N.D. W.V. Mar. 29, 2017); *Strickler v. Bijora, Inc.*, No. 11-cv-3468, 2012 WL 5386089, at *5 (N.D. Ill. Oct. 30, 2012); *Wreyford v. Citizens for Transp. Mobility, Inc.*, 957 F. Supp. 2d 1378, 1380-82 (N.D. Ga. 2013).

Notwithstanding this overwhelming unanimity of precedent, Plaintiffs argue that, in light of the Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and the Fourth Circuit's decision addressing a state robocall statute in *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015), the TCPA should be viewed as content based and unconstitutional. Citing the TCPA's exceptions for calls "made solely to collect a debt owed to or guaranteed by the United States," 47

U.S.C. § 227(b)(1)(A)(iii), as well as the FCC's orders exempting some calls that do not adversely affect the "privacy rights this section is intended to protect," *id.* § 227(b)(2)(C), Plaintiffs argue that the TCPA, like the ordinance in *Reed* and the state robocall statute in *Cahaly*, "is a content-based restriction of speech subject to strict scrutiny." Pls.' Br. 14. But neither the Court's reasoning in *Reed* nor the Fourth Circuit's decision in *Cahaly* support that result.

At issue in *Reed* was a municipal sign ordinance that "identifie[d] various categories of signs based on the type of information they convey[ed], then subject[ed] each category to different restrictions." 135 S. Ct. at 2224. A church wishing to advertise the time and location of its services, *id.* at 2225, challenged a provision of the ordinance aimed at "temporary directional signs" — a category that included "signs directing the public to a meeting of a nonprofit group," *id.* at 2224. The Supreme Court concluded that the ordinance was content based and could not survive strict scrutiny. *Id.*

The Supreme Court explained that, in view of its precedent, "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227 (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 564-65 (2011); *Carey v. Brown*, 447 U.S. 455, 462 (1980); *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)). It noted that a reviewing court must "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* (quoting *Sorrell*, 564 U.S. at 566). The Court observed that "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id.* But, either way, "[b]oth are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.*

The Town of Gilbert's sign code was facially content based, the Court reasoned, because whether a particular restriction applied "depend[ed] entirely on the communicative content of the sign." *Id.* Consequently, the government's justifications for the code did not alter the appropriate standard of review. *Id.* In applying strict scrutiny, the Court assumed for the sake of argument that the Town's two proffered interests — preserving aesthetic appeal and promoting traffic safety — were compelling, but it held that the ordinance failed the tailoring inquiry because its distinctions were "hopelessly underinclusive." *Id.* at 2231. As the Court observed, the ordinance in that case distinguished among signs based on their message notwithstanding that the different types of signs would implicate to the same extent the government's stated interests in aesthetics and safety. *See id.*

In holding the ordinance invalid, the Court made clear that it was applying long-settled doctrine, not impliedly overruling generations of First Amendment jurisprudence. *See id.* at 2226–28. The ruling Plaintiffs seek, however, would fly in the face of that approach. Their expansive interpretation of *Reed* would uproot decades of settled First Amendment case law that *Reed* did not purport to question, and it would unnecessarily threaten important statutes that, like the TCPA, have long been held to be constitutional under the First Amendment. *See Campbell-Ewald*, 768 F.3d 871; *Moser v. FCC*, 46 F.3d 970. Nothing in *Reed* supports (let alone compels) that result.

First, the lines drawn by the TCPA in no way resemble the lines drawn by the ordinance invalidated in *Reed*. The sign code at issue in *Reed* purported to impose general limits on the display of outdoor signs, but was in fact riddled with twenty-three different exemptions. *Reed*, 135 S. Ct. at 2224. For example, political signs were subject to one rule, while other "ideological" signs were subject to another, both in terms of size and as to when they were allowed, and "Temporary Directional Signs Relating to a Qualifying Event" were subject to still other

requirements. *Id.* at 2224–25. Thus, the ordinance in *Reed* was problematic, even under the Court's settled precedents, because it "distinguish[ed] among speech instances that are similarly likely to raise the legitimate concerns to which it responds," which the Supreme Court has taken as a sign that a statute is being put to an "invidious use," *Hill v. Colorado*, 530 U.S. 703, 723–24 (2000). The ordinance aimed to maintain the town's aesthetic appeal and to promote traffic safety, *Reed*, 135 S. Ct. at 2231, but it distinguished between signs (political, ideological, etc.) that seemed equally likely to detract from the town's beauty or create traffic hazards, *see, e.g.*, *id.* at 2231–32; *id.* at 2239 (Kagan, J., concurring in the judgment).

The TCPA operates in an entirely different fashion. Congress enacted the TCPA "to protect the privacy interests of residential telephone subscribers." S. Rep. No. 102-178, at 1. As a result, as relevant here, the Act prohibits one narrow category of calls (including text messages) to wireless numbers — *viz.*, those made using an automatic telephone dialing system or an artificial or pre-recorded voice and directed at a cell phone belonging to a recipient who has not previously consented to receive the calls. 47 U.S.C. § 227(b)(1)(A)(iii). The provision Plaintiffs challenge here is thus concerned with the manner in which calls are made and received, and it does not differentiate among calls depending on whether they are ideological, political, or commercial in nature. *Id.*[4]

[4] That the TCPA exempts emergency calls does not render the statute content based, as the Plaintiffs appear to recognize in declining to challenge this exception. It is well established that a municipality can prohibit individuals from ringing the doorbells of unconsenting residents (or using sound trucks to convey an amplified message) after a certain hour, even if that ban limits the hours available for First Amendment activity. *See Hynes v. Mayor of Borough of Oradell*, 425 U.S. 610, 616–17 (1976) ("[T]he Court has consistently recognized a municipality's power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing."); *Ward*, 491 U.S. at 791; *Klein v. City of Laguna Beach*, 533 F. App'x 772, 774 (9th Cir. 2013) (concluding a city's ban on sound amplifications within a certain distance of the local high school for a short period of time following the school day was a valid time, place, and manner regulation);

Further distinguishing this case from *Reed*, which involved speech in the most traditional public fora — the public streets — a court considering the constitutionality of the TCPA must balance an important countervailing factor against First Amendment concerns: the privacy of unwilling listeners. *See, e.g.*, *Hill*, 530 U.S. at 714–16; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 320 (1974). In *Hill*, the Court highlighted "the significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication." *Id.* at 715–16. It observed that "[t]he recognizable privacy interest in avoiding unwanted communication" is strongest "in the confines of one's own home, or when persons are powerless to avoid it." *Id.* at 716; *see also Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 736 (1970). In contrast to *Reed*, where countervailing concerns about unwilling listeners inside of the home were not present, *see Carey*, 447 U.S. at 460 ("[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." (citation and alteration omitted)), the privacy concerns here are significant. The TCPA restricts only calls made and messages sent without consent, *see* 47 U.S.C. § 227(b)(1)(A), and it was enacted to address the same weighty privacy interests that the Court has repeatedly seen fit to balance against a speaker's First Amendment rights, *see Erznoznik*, 422 U.S. at 208.

Occupy Sacramento v. City of Sacramento, 878 F. Supp. 2d 1110, 1117 (E.D. Cal. 2012) ("Here, § 12.72.090 does not make reference to prohibiting any kind of speech or expression, its prohibition against remaining in the parks after certain hours merely regulates the hours that *anyone* can remain in City parks."). A law of this sort would not be rendered unconstitutional or even constitutionally suspect simply because "emergency" communications (i.e. sirens or official responses to an emergency at a private residence) were excluded from the statute's reach. The TCPA's reach is no different.

The state statute at issue in *Cahaly* likewise involved a provision that bears little resemblance to the TCPA. The South Carolina statute in that case prohibited only those robocalls that were "for the purpose of making an unsolicited consumer telephone call" or were "of a political nature including, but not limited to, calls related to political campaigns." S.C. Code Ann. 16–17–446(A). The Fourth Circuit thus explained that strict scrutiny applied because "the anti-robocall statute applies to calls with a consumer or political message but does not reach calls made for any other purpose." *Cahaly*, 796 F.3d at 405. In making such a distinction, the state statute "raise[d] the specter of impermissible content discrimination," *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 449 (2002), in a manner quite unlike the TCPA. And in fact, in upholding the TCPA or other similar state robocall statutes, multiple courts have distinguished the decision in *Cahaly* on precisely these grounds. *See, e.g.*, *Patriotic Veterans*, 845 F.3d at 305 (upholding Indiana robocall statute and distinguishing *Cahaly*); *Mey*, No. 5:14-cv-123, 2017 WL 1193072, at *17 (upholding the TCPA as content neutral and describing *Cahaly* as "easily distinguishable"); *Gresham v. Picker*, 214 F. Supp. 3d 922, 934 (E.D. Cal. 2016) (upholding California robocall statute and distinguishing *Cahaly*); *Soundboard Ass'n v. FTC*, No. 17-cv-150, 2017 WL 1476116, at *13 (D.D.C. Apr. 24, 2017) (upholding FTC robocall regulation and distinguishing *Cahaly*).

If there were any doubt about the impact of *Reed* on the continuing vitality of precedent affirming the constitutionality of the TCPA, that doubt was put to rest by the Seventh Circuit's recent decision in *Patriotic Veterans*. In that recent case, the Seventh Circuit upheld an Indiana anti-robocall statute against a First Amendment challenge after *Reed* and, in so doing, approvingly cited Ninth and Eighth Circuit opinions rejecting similar challenges to the TCPA before *Reed*. *See Patriotic Veterans*, 845 F.3d at 304 (holding that Indiana anti-robocall statute is content-neutral and survives intermediate scrutiny, and citing *Moser*, *Campbell-Ewald*, and *Van Bergen*); *id.* at

305–06 ("Preventing automated messages to persons who don't want their peace and quiet disturbed is a valid time, place, and manner restriction. Other circuits' decisions, which we have cited, spell out the reasoning. . . . *[T]hese decisions have not been called into question by Reed.*") (emphasis added). The Seventh Circuit rejected the notion that *Reed* or the Fourth Circuit's analysis in *Cahaly* "made these decisions obsolete and [therefore] dooms both state and federal anti-robocall statutes as instances of content discrimination." *Id.* at 304. Nor did it accept the argument that the three exceptions to the prohibition in the Indiana law necessitated the application of strict scrutiny; instead, the Seventh Circuit noted that exceptions based on "who may be called, not what may be said" do not strip a statute of its content neutrality and, even if one exception were content-based, a party could not challenge that exception unless it was directly affected by it. *Id.* at 305. As the Court explained, "[f]ederal law severely limits unsolicited calls to cell phones, 47 U.S.C. § 227(b)(1)(A)(iii). . . . [and this law] ha[s] been sustained against constitutional challenge." *Id.* at 306. The Supreme Court's decision in *Reed* is not to the contrary.

Plaintiffs also appear to argue that strict scrutiny should apply because the speech they would like to engage in is political in nature. Pls.' Br. 14. But as was true in *Patriotic Veterans*, "[n]othing in the statute, including the three exceptions, disfavors political speech." *Patriotic Veterans*, 845 F.3d at 305. Unlike the statute in *Cahaly*, the TCPA's reach is not limited to political and consumer speech. Instead, the statute is principally concerned with the manner in which calls are made and received. It forbids the use of autodialers "to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party)." 47 U.S.C. § 227(b)(1)(A). The Court should therefore apply intermediate scrutiny and uphold the statute, consistent with the many other courts to have considered this issue.

II. THE COURT SHOULD NOT CONSIDER THE FCC ORDERS OR THE GOVERNMENT-DEBT EXEMPTION IN ASSESSING THE VALIDITY OF THE TCPA'S AUTODIALER RESTRICTIONS.

A. The FCC Orders do not call into question the constitutionality of the TCPA.

As the Court recognized, the FCC orders exempting certain calls are only relevant insofar as they are indicative of the constitutionality of the statute itself. Order at 4.[5] Plaintiffs claim that "[t]he history of the FCC and Congress' creation of, and ability and intent to continue to create, content-based exemptions to the cell phone call ban demonstrates that it is unconstitutional." Pls.' Br. in Supp. of Mot. for Summ. J. at 13, ECF No. 31 ("Pls.' Br."). But because these exemptions do not call into question the constitutionality of the statute itself, they need not be considered here.

As an initial matter, many of the "exemptions" Plaintiffs cite are not actually exemptions at all. While several of the "exemptions" highlighted by Plaintiffs were orders issued by the FCC pursuant to its statutorily granted authority to exempt from § 227(b)(1)(A)(iii)'s consent requirement certain calls for which the called party is not charged, 47 U.S.C. § 227(b)(2)(C), in other instances, the FCC's orders interpret and clarify the TCPA's operation without exercising the agency's exemption authority. For example, the FCC order allowing calls by a wireless carrier to its customer when the customer is not charged followed from the FCC's conclusion that these carriers had implicit consent from their customers and therefore "need not obtain additional consent." *In the Matter of Rules and Regs, Implementing the Tel. Consumer Prot. Act of 1991*, 7

[5] The validity of the FCC orders is not at issue in this case. Order at 4. To the extent Plaintiffs believe that such orders are content based and unconstitutional, the orders can be challenged in a proceeding before the Court of Appeals, as provided for under the Hobbs Act. 47 U.S.C. § 402(a). *See Moser v. FCC*, 46 F.3d 970, 973 (9th Cir. 1995) (noting that constitutional challenge to the TCPA "does not reach the regulations which are outside the jurisdiction of the district court" and that a separate proceeding for petition of review of the regulations was pending in the Court of Appeals); *Woods v. Santander Consumer USA Inc.*, No. 2:14-cv-2104, 2017 WL 1178003, at *5 n.8 (N.D. Ala. Mar. 30, 2017) (declining to address FCC orders in challenge to the constitutionality of the TCPA "because the Court lacks jurisdiction to do so").

FCC Rcd. 8752, 8775 (Oct. 16, 1992). Similarly, the "exemption" for calls that "rely on a representation from an intermediary that they have obtained the requisite consent from the consumer," represents the FCC's interpretation of how consent may be obtained. *In the Matter of GroupMe, Inc. / Skype Communications S.A.R.L.*, 29 FCC Rcd. 3442, 3444 (Mar. 27, 2014). And the "exemption" for calls from federal government officials conducting official business merely recognized that the TCPA does not apply to the government because Congress did not define "person" in the TCPA to include the federal government. *In re Rules and Regs. Implementing the Tel. Consumer Prot. Act. of 1991*, 31 FCC Rcd. 7394, 7400 (July 5, 2016) , *pets. for reconsideration pending*, CG Docket No. 02-278; *see also Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016) (recognizing that the "United States and its agencies . . . are not subject to the TCPA's prohibitions because no statute lifts their immunity").[6]

More importantly, Plaintiffs nowhere explain how the agency's exercise of its delegated authority to promulgate exceptions to the autodialer provision under § 227(b)(2)(C) could call into question the constitutionality of the autodialer provision itself, which is an entirely separate part of the statute. As the Fourth Circuit has explained, agencies "lack[] power even by a regulation adopted after strict compliance with the Administrative Procedure Act . . . to repeal, modify, or nullify a statute." *Dalton v. United States*, 816 F.2d 971, 974 (4th Cir. 1987). For this reason, where agency regulations are deemed unconstitutional, courts invalidate the regulations but leave in place the statute pursuant to which the regulation was promulgated. *See Educ. Media Co. at Va.*

[6] Under the FCC's July 2016 order, Plaintiffs' contention that the TCPA would restrict a call from "a congresswoman to her constituents announcing a 'telephone town hall,'" Pls.' Br. 5, is incorrect. The FCC considered precisely this factual circumstance and found "that robocalls to organize tele-town halls, when made by federal legislators or agents acting under authority validly conferred by the federal government, are not subject to the TCPA's robocall consent requirement . . ." 31 FCC Rcd. at 7398–99

Tech. v. Insley, 731 F.3d 291, 294 (4th Cir. 2013) (ruling Virginia regulation unconstitutional but leaving statute intact); *see also Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 525 (D.C. Cir. 2010) (holding regulations unconstitutional but suggesting agency could make new rules to remedy constitutional infirmity). The suggestion that some of the agency's exemptions may be content based thus provides no grounds for invalidating the TCPA itself.

To the extent Plaintiffs argue that the mere existence of the FCC's authority to create exemptions somehow renders the TCPA content based, that is also incorrect for several reasons. First, the provision authorizing the FCC to exempt certain calls from the TCPA's reach *allows* but does not *require* such exemptions. The Ninth Circuit recognized as much in rejecting a similar argument involving the TCPA's provision regulating prerecorded calls to residential lines in *Moser v. FCC*, 46 F.3d 970, 973 (9th Cir. 1995). There too, the appellees insisted that "they expressly challenge the statute and only the statute," but claimed that the statute could not be considered content neutral because the FCC orders distinguished between commercial and noncommercial speech. *Id.* The Ninth Circuit disagreed, explaining that the TCPA "in no way requires the FCC to adopt such exemptions by regulation, order, or otherwise." *Id.* Based on the permissive nature of the regulatory authority and the fact that the appellees' challenges "d[id] not reach the regulations which are outside the jurisdiction of the district court," the Court declined to consider the FCC regulations in determining what level of scrutiny to apply to the statute. *Id.*

Moreover, it is simply not the case that any regulation the FCC may promulgate will be content based. For example, the FCC could create exceptions based on the relationship between the parties making and receiving a call, which would not require the application of strict scrutiny. *See Brickman v. Facebook, Inc.*, No. 16-cv-751, 2017 WL 386238, at *6 (N.D. Cal. Jan. 27, 2017). Thus, "[t]he mere possibility that the FCC could create a content-based exception at some later

time does not render [its ability to promulgate] exception[s] to be content-based itself." *Id.; accord Holt v. Facebook, Inc.*, No. 16-cv-2266, 2017 WL 1100564, at *8 (N.D. Cal. Mar. 9, 2017). Because Plaintiffs cannot challenge the FCC orders in this Court and have no plausible argument that the grant of authority to create them undermines the constitutionality of the statute, the Court should not countenance Plaintiffs' repeated citation to the orders and should focus instead on the statute itself.

B. The government-debt exception is constitutional and in any event severable from the remainder of the TCPA.

The only exemption that Plaintiffs highlight that has its source in the statutory text is the 2015 amendment to the TCPA, which exempts calls "made solely to collect a debt owed to or guaranteed by the United States." Pub. L. No. 114-74 § 301(a), 129 Stat. 588. As explained in Defendants' motion to dismiss, even if found to be invalid, this provision would be severable from the remainder of the statute. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 931-32 (1983) ("[T]he invalid portions of a statute are to be severed 'unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.'" (citation omitted)); *see also Woods v. Santander Consumer USA, Inc.*, No. 2:14-cv-02104, 2017 WL 1178003, *3 n.6 (N.D. Al. Mar. 30, 2017) ("Here, there is no evidence that Congress would not have enacted the TCPA without the exception for government debt. To the contrary, Congress did enact the TCPA without the exception for government debt, and the version of the TCPA without the exception has been upheld as a valid time, place, or manner restriction by several courts throughout the country."). Because of the provision's plain severability, even if this Court were to

agree with the Plaintiffs that the government-debt exception is unconstitutional, that decision would have no impact on the remainder of the statute.[7]

The Fourth Circuit's decision in *Cahaly* is not to the contrary. *See Cahaly v. Larosa*, 796 F.3d 399, 402 (4th Cir. 2015). In *Cahaly*, the constitutionally problematic portion of the statute was in fact the general ban calls with consumer or political messages and not its exceptions, which the court recognized as being "based on the express or implied consent of the called party." *Cahaly*, 796 F.3d at 402. The court held that the statute was content based not because of these exceptions but because the statute "applies to calls with a consumer or political message but does not reach calls made for any other purpose." *Id.* at 405. Thus, the court had no cause to consider whether the exceptions should be severed from the ban. Here, by contrast, Plaintiffs do not dispute that the TCPA's autodialer provision applies to "any call" rather than only to political or consumer calls. 47 U.S.C. § 227(b)(1)(A). It is the government-debt exception alone that Plaintiffs point to in their First Amendment challenge, and that exception was enacted decades after the remainder of the TCPA, making its severability from the autodialer provision beyond question. *See Woods*, 2017 WL 1178003 at *3 n.6 ("Even if the Court were to examine the TCPA as amended in November 2015 and find that the government-debt exception is invalid, the Court would 'not deem the entire TCPA to be unconstitutional because the [government-debt] exception [is] severable from the remainder of the statute.'" (quoting *Brickman v. Facebook Inc.*, 2017 WL 386238, at *8) (alteration in original)).

[7] In denying Defendants' Motion to Dismiss, the Court explained that it "does not lack the power to grant plaintiffs the relief they seek," but also noted that "the question of plaintiffs' success on the merits and the appropriate relief is a question for another day." Order at 5. Thus, the Court reserved judgment on the severability of the government-debt exception and its impact on the remainder of the statute.

Indeed, multiple courts have endorsed this very analysis in similar circumstances. In *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995), for example, the Eight Circuit in addressing the validity of a state robocall statute declined to consider a particular provision of the statute on the ground that, "[e]ven assuming, without deciding, that this single provision is content-based, it does not apply to [the plaintiff] and is not before the court in this case." *Id.* at 1551. Similarly, in *Patriotic Veterans v. Zoeller*, 845 F.3d 303, 305 (7th Cir. 2017), – a decision issued after this Court ruled on the Motion to Dismiss – the Seventh Circuit addressed exemptions in a state robocall statute and made clear that "[p]otential problems with how [the statutory exemptions] in subsection (a)(3) affects other persons do not give plaintiff standing to complain about [the general prohibition on robocalls] in subsection (b), its target in this suit." Because the proper remedy in this case would be to sever the government-debt exception, the exception cannot render the remainder of the TCPA is impermissibly content based.

Even if the recently added exception for calls made to collect government-backed debt were properly before the Court, it would not render the statute content based. First, this exception turns "not on what the caller proposes to say," but instead "on the relation between the caller" — the owner or servicer of a government-backed debt, or someone acting on their behalf — "and the recipient," — the debtor or guarantor responsible for paying that debt. *Patriotic Veterans*, 845 F.3d at 305. Because the exception "concern[s] who may be called, not what may be said," it "do[es] not establish content discrimination." *Id.*[8] Second, the government frequently subjects its

[8] Although the *Brickman* court concluded, without much analysis, that the exception makes no explicit reference to the relationship of the parties, it failed to consider the statutory phrase "solely to collect a debt," 47 U.S.C. § 227(b)(1)(A)(iii), necessarily implies that relationship; by its very nature, debt collection entails communicating with those who have a legal relationship to the debt. Indeed, when promulgating implementing regulations, the FCC recently clarified that for a call to be made "to collect" a government-backed debt under this provision, the call must "be

own conduct or speech to different requirements than those applicable to private actors, and such provisions have never been thought to raise First Amendment concerns. *See, e.g.*, *Sheriff v. Gillie*, 136 S. Ct. 1594 (2016) (discussing governmental immunity under FDCPA); *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016) (discussing governmental immunity under TCPA). There is no doubt that the TCPA does not apply to the government itself, *see id.* at 672 ("The United States and its agencies, it is undisputed, are not subject to the TCPA's prohibitions because no statute lifts their immunity."), and the exemption applies to those who are collecting debts that the government could undoubtedly collect in the same manner itself without running afoul of the First Amendment.

III. THE TCPA IN ANY EVENT SATISFIES STRICT SCRUTINY.

If the Court were to hold that strict scrutiny applies, which it should not, it should nevertheless reject Plaintiffs' constitutional challenge. The statutory provision at issue here is a modest one, aimed at addressing a significant problem about which Congress made ample findings, and the narrow exceptions that allegedly render the TCPA content-based are consistent with its aims. Indeed, two district courts in the Northern District of California — the only courts to find the statute content based after *Reed* — recently held that the statute nevertheless survives strict scrutiny, rejecting many of the same contentions that Plaintiffs raise here. *See Brickman*, 2017 WL 386238, at *6–9; *Holt*, 2017 WL 1100564, at *7-11.[9]

made to the debtor or another person or entity legally responsible for paying the debt." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 31 FCC Rcd. 9074, 9083 ¶ 21 (2016). Thus, this exception is a valid, relationship-based carve-out from a content-neutral restriction.

[9] Plaintiffs claim that other courts that have addressed the constitutionality of the TCPA did not address the exemptions it challenges here. Pls.' Br. 7 n.3. This statement ignores *Brickman* and *Holt*, which specifically address the government-debt exception and the FCC's ability to promulgate further exemptions to the statute, *see Brickman*, 2017 WL 386238, at *6–9; *Holt*, 2017 WL 1100564, at *7-11, as well as *Moser*, which also addressed the FCC's authority to issue orders, *see Moser*, 46 F.3d at 973.

Under strict scrutiny, the government bears the burden of showing that the Act furthers a compelling government interest and is narrowly tailored to that interest. *Reed*, 135 S. Ct. at 2231. The Supreme Court recently reaffirmed that strict scrutiny is *not* "strict in theory, but fatal in fact," and that a law regulating speech can be upheld even under this most exacting form of review. *See Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015) (citation omitted) (upholding, under strict scrutiny, state ban on campaign donation solicitation by candidates for judicial office).

Motivated by increasing consumer complaints about telemarketing calls, Congress enacted the TCPA "to protect the privacy interests of residential telephone subscribers." S. Rep. No. 102-178, at 1. The Senate Committee on Commerce, Science, and Transportation, in its report, explained that it "believe[d] that Federal legislation [wa]s necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services." *Id.* at 5. The House Committee on Energy and Commerce likewise concluded that "all too frequently [unsolicited telemarketing] represents more of a nuisance than an aid to commerce." H.R. Rep. No. 102-317, at 18 (1991).

Congress made extensive findings before it legislated and included those findings in the Act. Congress explained that "[t]he use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques." Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(1), 105 Stat. 2394, 2394 (codified at 47 U.S.C § 227 Note). At the time, Congress explained, more than 30,000 businesses actively directed telemarketing to business and residential consumers; more than 300,000 solicitors called over 18 million Americans daily; and total sales generated through telemarketing in the United States totaled $435 billion in 1990, more than four times the total for 1984. *Id.* § 2(2)-(4). Automated dialing and calling systems, combined with falling long-distance

telephone rates, made it inexpensive for companies to engage in these practices. *See* S. Rep. No. 102-178, at 2-4. But, Congress observed, unrestricted telemarketing could "be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety." Pub. L. No. 102-243, § 2(5). Indeed, "[m]any consumers [we]re outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers." *Id.* § 2(6). And, although many states "ha[d] statutes restricting various uses of the telephone for marketing . . . telemarketers c[ould] evade their prohibitions through interstate operations," necessitating federal legislation. *Id.* § 2(7).

Congress thus explained that "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices." *Id.* § 2(9). Evidence compiled by Congress "indicate[d] that residential telephone subscribers consider[ed] automated or prerecorded telephone calls, *regardless of the content or the initiator of the message*, to be a nuisance and an invasion of privacy." *Id.* § 2(10) (emphasis added). These automated calls were considered to be "more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons." S. Rep. No. 102-178, at 4. Consequently, Congress determined that "[b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." Pub. L. No. 102-243, § 2(12). In keeping with its aim to limit calls that were considered a nuisance or invasion of privacy, Congress further concluded that "the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion

of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution." *Id.* § 2(13).

Plaintiffs do not dispute that "protection of residential privacy is a compelling governmental interest." Pls.' Br. 19. And for good reason. The Supreme Court has repeatedly emphasized that the government's profound interest "in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey*, 447 U.S. at 471; *see also Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 775 (1994); *Ward*, 491 U.S. at 796; *Frisby v. Schultz*, 487 U.S. 474, 484–85 (1988) ("[W]e have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom."); *Rowan*, 397 U.S. at 738. These cases recognize that the government's interest in protecting the public's privacy is not merely substantial, but is in fact compelling. *Cf. Cahaly*, 796 F.3d at 405 (assuming government interest in protecting residential privacy and tranquility is compelling); *see also Patriotic Veterans*, 845 F.3d at 305-06 ("No one can deny the legitimacy of the state's goal: Preventing the phone (at home or in one's pocket) from frequently ringing with unwanted calls. Every call uses some of the phone owner's time and mental energy, both of which are precious. Most members of the public want to limit calls, especially cell-phone calls, to family and acquaintances, and to get their political information (not to mention their advertisements) in other ways.").

Although they recognize the compelling interest at stake, Plaintiffs contend that the TCPA "is not related to this interest" because the FCC and Congress have created exemptions from the TCPA's ban on autodialed calls. Pls.' Br. 19. This argument lacks any basis in law or fact. The TCPA is indisputably related to privacy interests because it serves as a means to prevent the very calls that Congress deemed invasive of those interests. And in authorizing the FCC to promulgate

rules exempting certain calls, Congress instructed the agency to do so only when the exemption included conditions that are "in the interest of the privacy rights this section is intended to protect." 47 U.S.C. § 227(b)(2)(C). The fact that the exemptions may recognize other interests in addition to privacy, such as the interest in receiving time-sensitive, health-related communications, does not mean that the TCPA no longer furthers the government's interest in privacy.

Section 227(b)(1)(A)(iii) is also narrowly tailored. Like other provisions upheld under strict scrutiny, section 227(b)(1)(A)(iii) "restricts a narrow slice of speech." *Williams-Yulee*, 135 S. Ct. at 1670. It restricts only the use of an autodialer or prerecorded voice to make calls or send text messages to wireless numbers, and only where the recipient has not consented to receive the communication. There is not a single message that the TCPA prohibits a speaker from disseminating; instead, it is only the manner in which a message is communicated that is regulated. *Cf. id.* (Florida's "Canon 7C(1) leaves judicial candidates free to discuss any issue with any person at any time."). Messages like Plaintiffs' political surveys could be communicated via calls from a live operator, text messages sent through non-ATDS means, or e-mails — or, of course, by using an auto-dialer after obtaining a called party's consent. In regulating in this manner, Congress was careful to prohibit only those calls and texts that raise its concern about the added intrusion and annoyance brought about by autodialed calls or texts to wireless numbers, *see* H.R. Rep. No. 102-317, at 5-6, 10; S. Rep. No. 102-178, at 4–5, and no more.

Plaintiffs contend that the statute is underinclusive because it restricts the calls Plaintiffs would like to make while allowing other types of calls. Pls.' Br. 21. Plaintiffs' argument again depends in substantial part on exemptions set forth by regulation, which, for the reasons already discussed, have no bearing on the validity of the statute and are not themselves at issue here. The only statutory exemption to which Plaintiffs point – the government-backed debt exemption – is

narrowly tailored to serve the government's compelling interest, and does not support the claim that the TCPA is underinclusive. As the courts in *Brickman* and *Holt* explained, that exception is "limited by the fact that such calls would only be made to those who owe a debt to the federal government." *Brickman*, 2017 WL 386238, at *8. Moreover, "the government-debt exception to the TCPA does not present a First Amendment problem because it merely carves out an exception for something the federal government is already entitled to do, and government speech is exempt from First Amendment scrutiny." *Id.; accord Holt*, 2017 WL 1100564 at *9. [10]

Plaintiffs also contend that the statute is overinclusive because it prohibits "prerecorded calls consumers desire, expect, or benefit from" and "restricts ATDS or political prerecorded calls but permits less protected speech." Pls.' Br. 21. Putting aside Plaintiffs' apparent suggestion that the TCPA *should* distinguish between types of speech, *cf. Cahaly*, 796 F.3d at 402 (finding state anti-robocall statute singling out calls "of a political nature" unconstitutional); *Patriotic Veterans*, 845 F.3d at 306 ("That exception, if created, would be *real* content discrimination"), Plaintiffs' contention misunderstands the nature of the privacy interest at stake. It is not the content of the message that causes it to be intrusive but rather the manner of its dissemination — via ATDS

[10] Although Plaintiffs do not purport to challenge the emergency exception, it too would survive strict scrutiny. The exception furthers Congress's clear desire to promote privacy and minimize intrusion in a manner that did not compromise "the health and safety of the consumer." Pub. L. No. 102-243, § 2(12). It is well established that protecting health and safety is a compelling interest. *See Simopoulos v. Virginia*, 462 U.S. 506, 519 (1983) (recognizing a state's compelling interest in protecting a woman's health and safety); *United States v. Israel*, 317 F.3d 768, 771–72 (7th Cir. 2003) (recognizing the government's compelling interest in "prevent[ing] harm to the public health and safety"). And because the exception is limited only to calls or texts for emergency purposes, it is also narrowly tailored to ensure that Congress's precise aim is carried out. *See, e.g.*, *Brown v. City of Pittsburgh*, 586 F.3d 263, 273-76 (3d Cir. 2009) (finding ordinance exempting emergency workers from ban on congregating within fifteen feet of hospital narrowly tailored); *see also Brickman*, 2017 WL 386238 at *7 ("Emergency calls by their statutory definition would only be allowed under limited circumstances, for a limited time, and for limited purposes."); *Holt*, 2017 WL 1100564 at *9 (same).

technology to someone who has not consented to receive such messages. *See* Pub. L. No. 102-243 § 2(10) ("[R]esidential telephone subscribers consider[ed] automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy."). Should persons desire to receive the calls Plaintiffs make, they are welcome to opt into programs that use ATDS technology to disseminate such messages. *Cf. Patriotic Veterans*, 845 F.3d at 306 (noting that "the national government and states such as Indiana have adopted limits on a particular calling technology, the robocall, that many recipients find obnoxious because there's no live person at the other end of the line. The lack of a live person makes the call frustrating for the recipient but cheap for the caller, which multiples the number of these aggravating calls in the absence of legal controls."). The TCPA, like the state anti-robocall statute in *Patriotic Veterans*, is aimed at "[p]reventing automated messages to persons who don't want their peace and quiet disturbed" while still allowing "plenty of ways to spread messages: TV, newspapers and magazines (including ads), websites, social media (Facebook, Twitter, and the like), calls from live persons, and even recorded spiels if a live operator first secures consent." *Id.* Thus, to the extent that consumers agree that the calls Plaintiffs make are desirable, expected, or beneficial, they can consent to such messages. Meanwhile, the TCPA protects those who may disagree from unwanted intrusion.

Finally, Plaintiffs assert that less-restrictive alternatives could achieve the same protection of privacy. Plaintiffs rely on *Cahaly*, in which the plaintiff proffered three alternatives to the robo-call prohibition in the state statute: time-of-day limitations, mandatory disclosure of the caller's identity, and do-not-call lists. However, the only courts that have evaluated the TCPA under strict scrutiny have concluded that none of these proposed alternatives are viable substitutes for the TCPA's restrictions. *See Brickman*, 2017 WL 386238, at *9; *Holt*, 2017 WL 1100564, at *9-10.

These courts noted that the Fourth Circuit in *Cahaly* only found the proposed alternatives to be plausible substitutes because the state government in that case "did not contest these three alternatives and 'therefore failed to demonstrate that no less restrictive alternative was available.'" *Brickman*, 2017 WL 386238, at *8 (alterations omitted); *accord Holt*, 2017 WL 1100564, at *9-10. But where the government disputed the efficacy of the alternatives, the courts agreed that they were insufficient. As those courts made clear, time-of-day limitations may reduce the span of time in which callers can intrude on individuals' privacy, but leaving open a window for calling necessarily means that the limitation would not be as effective in protecting privacy as the TCPA. *See Brickman*, 2017 WL 386238, at *8 (explaining that "[l]ess restrictive alternatives must be *at least as effective* in achieving the legitimate purpose that statute was enacted to serve" (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997))). Similarly, although mandatory disclosure of the caller's identity may allow an individual to identify the caller or texter, such a requirement does not prevent the call or text from intruding on the individual's privacy. *See Mey*, 2017 WL 1193072 at *7 ("When it enacted the TCPA, Congress repeatedly emphasized the nuisance aspect of robocalls, showing that it considered the interruptions that they cause and the time they cause consumers to waste to be one of the harms it sought to remedy. . . . 'They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed.'" (quoting 137 Cong. Rec. 30,821-30,822 (1991) (testimony of Senator Hollings))). Finally, a do-not-call list would merely transfer the onus from callers who, under the current Act, can avoid TCPA liability by gaining consent, to the recipient, who, under Plaintiffs' proposal, would have to affirmatively opt out of receiving calls; in the end, the statute would have the potential to reach the same amount of speech, making it no less restrictive.

Plaintiffs' claim that Congress failed to consider alternatives is belied by the congressional findings laid out upon the TCPA's enactment. There, Congress noted its finding that the TCPA's autodialing provision with its consent requirement "is the only effective means of protecting telephone consumers from th[e] nuisance and privacy invasion" of automated and prerecorded calls. Pub. L. 102-243 § 2(12). Congress further explained that "[t]echnologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer." *Id.* § 2(11). "When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985). *See also Mey*, 2017 WL 1193072, at *7 (noting that in enacting the TCPA, "Congress was also mindful of protecting consumers from the burdens they face when dealing with unwanted calls. . . . Courts should give weight to Congress's identification of these harms.").

Thus, the TCPA survives strict scrutiny, should the district court here find that standard of review appropriate.

CONCLUSION

For the foregoing reasons, the Court should uphold the constitutionality of § 227(b)(1)(A)(iii) and grant Defendants Motion for Summary Judgment.

Dated: June 19, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Motion was filed electronically through the Eastern District of North Carolina Electronic Filing System. Notice of this filing will be sent by operation of the court's Electronic Filing System to all registered users in this case. All counsel to have filed a notice of appearance are registered users.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS, INC.,	)	
DEMOCRATIC PARTY OF OREGON, INC.,	)	
PUBLIC POLICY POLLING, LLC,	)	
TEA PARTY FORWARD PAC, and	)	**Civil Action No. 5:16-cv-00252-D**
WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE,	)	
Plaintiffs	)	
vs.	)	
JEFFERSON SESSIONS, in his official capacity as Attorney General of the United States and	)	
FEDERAL COMMUNICATIONS COMMISSION, a federal agency,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE AND REPLY TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Please consider once more two telephone calls. The first is from the Democratic Party urging residents of a given district to vote in the upcoming election. A volunteer makes the call using an automatic telephone dialing system ("ATDS") to a voter, but the volunteer doesn't know that the number called is a cell phone. The second is from a debt collector to a debtor concerning a defaulted government-backed mortgage. This call is also placed using an ATDS, and the only number available is a cell phone number.

The first call is banned by the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(1)(A)(iii) (the "cell phone call ban"). The second call is not.[1] The exempt debt collection call has a significant effect on the privacy of the recipient, but it seems likely that the first call would be more welcomed by the recipient. The TCPA cell phone call ban is therefore a content-based restriction of speech, subject to strict scrutiny under the First Amendment. It cannot withstand strict scrutiny and is therefore unconstitutional.

II. ARGUMENT

When Congress passed the TCPA, it gave the Federal Communications Commission ("FCC") power to create exemptions to its restrictions, including to the TCPA cell phone call ban. Since 1992, the FCC has created seven exemptions to the TCPA cell phone call ban.

Congress also has the power to create exemptions to the cell phone call ban. It has done so, for example by including an exemption for any entity placing calls solely collecting debt owed to or guaranteed by the federal government.

[1] See discussion of *Brickman v. Facebook, Inc*., 2017 U.S. Dist. LEXIS 11849 (N.D. Cal. Jan. 27, 2017) ("*Brickman*") and the cell phone call ban debt collection exemption, *infra* at B1.

By creating this exemption based on the content of the speech, Congress has caused the TCPA cell phone call ban to be a content-based restriction of speech. The FCC, in including exemptions based on the content of speech and the identity of speakers, has also caused the cell phone call ban to be a content-based restriction of speech.

Further, because Congress and the FCC have the power to create future content-based exemptions, the TCPA cell phone call ban cannot be cured of its unconstitutionality by striking those exemptions. Congress and the FCC would still have the power, which they have used and likely intend to use in the future, to create content-based exemptions. Under this Circuit's ruling in *Cahaly v. LaRosa*, 796 F.3d 399 (4th Cir. 2015) ("*Cahaly*"), the cell phone call ban cannot withstand strict scrituny and is therefore unconstitutional.

A. Defendants cannot distinguish *Reed*, as it is undisputed that the exemptions apply based on the content of speech.

Defendants attempt to distinguish *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) ("*Reed*") by claiming that "the lines drawn by the TCPA in no way resemble the lines drawn by the ordinance invalidated in *Reed*." Defs.' Brief at 9. That statute was "riddled" with 23 exemptions (here we have seven). *Id.* The statute also applied different rules based on the content of signs, e.g. "political" signs subject to one rule, "ideological" signs to another. *Id.*

The TCPA cell phone call ban, Defendants argue, is different because it was designed by Congress to protect residential "privacy interests" instead of aesthetic ones. *Id.* at 10.

The language of *Reed* does not tolerate such an argument and gives no indication that its analysis hinges on the differences between residential "privacy interests" and "aesthetic interests". Rather, under *Reed*, if a statute draws distinctions based on the content of the speech regulated, it is content-based and thus subject to strict scrutiny. Because the TCPA cell phone call ban draws distinctions based on the message a speaker conveys (or the identity of the speaker), and not just

the relationship between the speaker and the recipient, it is a content-based restriction on free speech subject to strict scrutiny. *Reed* at 2227. The purpose behind the statute, of course, is relevant to whether the statute passes strict scrutiny—not whether *Reed* applies or not. *Reed* noted:

> a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem "entirely reasonable" will sometimes be "struck down because of their content-based nature."

Id. at 2231 (citing *City of Ladue* v. *Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring)).

The rule is the same in this Circuit:

> In evaluating the content neutrality of a sign regulation restricting speech, we focus on the Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). We recently observed that this decision conflicted with, and therefore abrogated, our Circuit's previous formulation for analyzing content neutrality, in which we had held that "[t]he government's purpose is the controlling consideration."

Cent. Radio Co. v. City of Norfolk, 811 F.3d 625, 632 (4th Cir. 2016) (quoting *Cahaly* at 405).

Defendants claim "[t]he TCPA restricts only calls made and messages sent without consent, *see* 47 U.S.C. § 227(b)(1)(A) …." Defs.' Brief at 11. This is wrong. Defendants' error is the entire point of this lawsuit—the content-based exceptions to the TCPA specified in the complaint show that some calls are banned without consent, but some calls from favored speakers or with favored content are allowed with or without consumer consent. Hence, the statute is content-based.

1. Congress has given the FCC the power to create content-based exemptions.

The authority granted by Congress to the FCC to create exemptions, including content-based exemptions, is found in the TCPA at 47 U.S.C. § 227(b)(2):

> The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission— …

> (C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

Id.

Severing the existing exemptions will not prevent the FCC from adopting new content-based exemptions in the future.

2. The FCC has exercised its power to create content-based exemptions.

Defendants attempt to argue that the FCC's content-based exemptions "are not actually exemptions at all." Defs.' Brief at 14. But whether by FCC order, interpretation, or otherwise, some speakers' calls are exempt based on the speakers' identity or the content of the calls, and some are not. The provisions of the First Amendment are not so easily evaded. Governmental restraint on speech need not fall into familiar or traditional patterns to be subject to constitutional limitations. *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 256 (1974) (citing *Grosjean v. American Press Co*., 297 U.S. 233, 244-45 (1936)).

The FCC has created exemptions that favor certain speakers over others, including:

- calls made by wireless carriers in the wireless carrier exemption, *see* 77 Fed. Reg. at 34235;
- calls made by intermediaries in the intermediary consent exemption, *see* 29 FCC Rcd at 3444; and
- calls made by federal government officials in the official federal government business exemption, *see* 31 FCC Rcd at 7400.

Ptfs.' Brief in Support of Motion for Summ. J., Dkt. 31 (May 19, 2017) ("Ptfs.' Brief") at 18.

The FCC has also created exemptions that favor certain messages with certain content over others, including:

- package delivery notifications in the package delivery exemption , *see* 29 FCC Rcd at 3439;
- healthcare-related calls in the HIPAA exemption, *see* 30 FCC Rcd at 8030-31;
- fraud, security and money transfer notifications in the bank and financial exemption, *see id*. at 8023; and
- official federal government business in the official federal government business exemption, *see* 31 FCC Rcd at 7400.

Ptfs.' Brief at 17.

There is no reason to believe the FCC will refrain from creating future content-based exemptions, by order, interpretation, or otherwise.

3. Congress believes it has the power to create content-based exemptions.

Congress, similarly, believes it has the power to create content-based exemptions favoring certain speakers or messages.

Despite claims of Defendants, the debt collection exemption is not limited to calls to debtors of government or government backed debts. Pub. L. No. 114-74, 129 Stat. 584 (Nov. 2, 2015) at § 301(a), *Brickman* at *26.

Congress knew how to limit the TCPA's application in some respects to calls to certain people. For example, the "established business relationship" is part of an exemption to the national "do-not-call" list. It is specifically limited to a relationship between a caller and a specific residential subscriber.

> The term "established business relationship", for purposes only of subsection (b)(1)(C)(i), shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that--
>
> > (A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and
> >
> > (B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)[)].

47 U.S.C. § 227(a)(2).

The FCC's regulation then specifies that an established business relationship means:

> a prior or existing relationship formed by a <u>voluntary two-way communication between a person or entity and a residential subscriber</u> with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party…

47 C.F.R. § 64.1200(f)(5) (emphasis added).

The debt collection exemption contains no such limitation to calls to a specific person (e.g. the debtor) and could apply to any call to any person, so long as the call is made solely to collect a government or government backed debt, e.g. employment verification, asset location, etc. There are likely tens of thousands of companies that issue government backed debt, including small business loans, student loans, mortgages, etc. These companies' collection calls are allowed, while other debt collectors' calls are banned, as are the fully-protected political calls placed by Plaintiffs.

4. Severing the existing exemptions does not cure this problem.

Severance of the content-based exemptions as Defendants' argue is not a suitable cure for the cell phone call ban's unconstitutionality. *See* Defs.' Brief at 17-20. Severance does not solve

the problem of the FCC and Congress's existing and actualized ability to create future content-based exemptions.

Congress's ability to amend the TCPA is ongoing. Congress has amended the TCPA six times since it was first passed in 1991, Pub. L. No. 102-243 (Dec. 20, 1991), most recently creating the debt collection exemption to the cell phone call ban as part of the Bipartisan Budget Act of 2015 Pub. L. No. 114-74 (Nov. 2, 2015). As explained, Congress has given the FCC power to create future exemptions. *See* 47 U.S.C. § 227(b)(2).

Severance of the existing content-based exemptions would not cure the cell phone call ban's unconstitutionality and contradicts long-standing First Amendment jurisprudence that more speech, rather than less speech, is the goal of this constitutional protection. *See Whitney v. Cal*., 274 U.S. 357 (1927). "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Id*. at 377.

The proper remedy is to allow more speech and speakers by striking the cell phone call ban and allowing the FCC or Congress to use other narrowly tailored, or content-neutral, means to protect residential privacy.

B. Defendants rely on TCPA cases which did not consider its exemptions or are otherwise distinguishable.

1. Other cases involved challenges to the whole statute, not merely the cell phone call ban.

Although Defendants rely on some cases which comment on the constitutionality of the TCPA, they involved challenges to other sections of the law, predate *Reed*, or did not consider the exemptions to the cell phone call ban involved in this case.

a. *Gomez v. Campbell-Ewald Co.*

While *Gomez v. Campbell-Ewald*, 768 F.3d 871 (9th Cir. 2014) ruled the TCPA was a reasonable time, place, and manner restriction, the case did not consider the exemptions to the cell phone call ban highlighted in this matter. Nor did the case apply the logic of *Reed* to the TCPA as it had not been decided at the time of the 9th Circuit's decision and because the exemptions were not discussed. *Id*. at 873.

b. *Moser v. Fed. Commc'n Comm'n*.

Moser v. Fed. Commc'n Comm'n, 46 F.3d 970 (9th Cir. 1995) involved a challenge to the general ban on most prerecorded telephone calls to residential telephone lines found in the TCPA. *See* 47 U.S.C. § 227(b)(1). Calls by tax exempt nonprofit organizations were exempt from the ban based on FCC regulations adopted on September 17, 1992. *Id*. at 973. *Moser* concluded the restriction was content-neutral, but the case predates *Reed* and considered a restriction that did not have voluminous content-based and speaker identity based exemptions that post-dated its decision but which are found in this case.

c. *Brickman v. Facebook, Inc.*

Defendants rely extensively on *Brickman* to the extent it ruled the government debt collection exemption may be severable, but Defendants simultaneously disagree with *Brickman*, claiming the exemption is limited because "such calls would only be made to those who owe a debt to the federal government." Defs.' Brief at 18, 25 (citing *Brickman* at *8).

This ignores the text of the exemption. Congress inserted the language "unless such call is made solely to collect a debt owed to or guaranteed by the United States" after "charged for the call" in the cell phone call ban. Pub. L. No. 114-74 amending 47 U.S.C. § 227(b)(1).

In no way is this language limited to calls to debtors or calls by the Government. Calls could be made to acquaintances of debtors, employers, or numerous other persons from whom

private debt collectors must collect government debt. Defendant's discussion at n. 8 belies the plain language of the statute, which is not limited to calls to the debtor or "those who have a legal relationship to the debt." Defs.' Brief at 19, n.8. Many calls could have a sole purpose to collect a debt, yet not be to the debtor.

Brickman did not consider any of the FCC enacted content-based exemptions to the TCPA when it concluded "the TCPA's exemptions leave negligible damage to the statute's interest in protecting privacy." *Id*. at *27. To the contrary, the exemptions show substantial favoring of commercial speech over Plaintiffs' fully protected speech, allowing thousands of commercial debt collectors to place calls to debtors and other persons relating to collection of that debt, allowing package shippers to call any recipient of packages regardless of relationship with the sender of the package or the shipper, and allowing cell phone companies to contact customers for any purpose, including sales, political advocacy, etc. The exemptions show favoring of some debt collection calls over others despite them having an identical effect on residential privacy. The exemptions show that wireless carriers can contact their customers for sales purposes, or any other purposes, while other companies cannot make similar sales calls to their customers.

Surely these calls cause at least the same, if not more, intrusion into consumers' privacy than a 'get out the vote' or political polling call.

When Congress intended the communication to involve a relationship solely with a customer, it defined it as such, e.g. established business relationship. 47 U.S.C. § 227(a)(2).

Nor is the government debt exemption solely related to government speech as Defendants argue. Defs.' Brief at 25. Government backed debt includes mortgages and student loans, as well as debts owed directly to the government, such as taxes. Numerous corporate entities issue and

own mortgages and student loans, and those who call seeking to collect those debts are not government actors such that the speech is government speech.

Further, simply because a debt is backed by the government, it does not necessarily follow that collection calls by a commercial entity collecting that debt are "government speech". Such an argument would mean that any marketer of student loans or government backed mortgages was exempt from the TCPA, the Telemarketing Sales Rule ("TSR"), or Federal Trade Commission jurisdiction, etc. This simply cannot be the case. *See* e.g. *United States v. Mortgage Investors Corp. of Ohio*, No. 13-cv-01647 (M.D. Fla. July 17, 2013) (lawsuit against seller of Veterans Administration guaranteed loans), attached hereto as Exhibit A.

Finally, the TCPA cell phone call ban is underinclusive, and therefore not narrowly tailored to further residential privacy. Because the debt collection exemption applies to collectors of government backed debt and not collectors of other debt, the TCPA cell phone call ban cannot be narrowly tailored to further residential privacy. For example, one debt collection call to collect a defaulted Federal Housing Authority loan would be legal, but another, from the exact same lender to the same debtor collecting a defaulted conventional loan would be illegal. This underinclusive dichotomy shows the true purpose of the ban is to favor some speech over other speech—the very ill strict scrutiny and First Amendment jurisprudence exist to combat.

2. Other district court cases relied upon by Defendants are distinguishable from this challenge.

a. *Mey v. Venture Data, LLC*

The ruling in *Mey v. Venture Data, LLC*, 2017 WL 1193072 (N.D. W.V. Mar. 29, 2017), is based on an erroneous assumption and is distinguishable from this case.

First, the court concluded that "[t]he TCPA is a permissible content-neutral regulation on its face" based on the incorrect notion that the statute "broadly limits 'any person' from using an

[ATDS] or an artificial or prerecorded voice 'to make any call' to a cellular telephone line." *Id*. at *17. Addressing the statutory exemptions, the court held that all three exceptions[2] were not content-based but based on the relationship of the speaker and the recipient of the message. *Id*.

But this is incorrect. The TCPA exempts calls made "solely to collect a debt owed to or guaranteed *by the United States*." 47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added). If this exemption were based only on the relationship of the speaker and the recipient of the message, it would include all calls to collect a debt, not just those owed to or guaranteed by the United States. The debt collection exemption favors calls from some speakers that include certain content, i.e. government-back debt only, while prohibiting calls from other debt collectors.

The court's argument that *Cahaly* is distinguishable similarly fails. *Mey* relies on the fact that the South Carolina statute expressly makes facial content distinctions, *see* S.C. Code Ann. § 16-17-446(A), and by contrast, states that the TCPA does not "target" political speech or any other type of speech on its face. *Mey*, 2017 WL 1193072 at *17. But the statutory exemption for calls made "solely to collect a debt owed to or guaranteed *by the United States*" shows this is incorrect. *See United States v. Playboy Entm't Group*, 529 U.S. 803, 812 (2000) ("Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles.").

Similarly, *Mey* fails to address the FCC's exemptions that favor certain messages with certain content, i.e. calls made by wireless carriers, package delivery companies, third-party-intermediaries, health care companies, financial institutions, certain debt collectors, and calls relating to federal government business. *See* 77 Fed. Reg. at 34235; 29 FCC Rcd at 3439; 29 FCC

[2] The TCPA generally applies to all calls with three exceptions: (1) calls "for emergency purposes;" (2) calls made "with the prior express consent of the called party;" and (3) calls made "to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A).

Rcd at 3444; 30 FCC Rcd at 8030-31; 30 FCC Rcd at 8023; 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii); 31 FCC Rcd at 7400.

Finally, the court ruled on the constitutionality of the TCPA as applied to the facts specific to the *Mey* case. *Mey*, 2017 WL 1193072 at *16-18. Here, Plaintiffs challenge the constitutionality of the cell phone call ban on its face. Thus, *Mey* is distinguishable from this case.

b. *Strickler v. Bijora, Inc.*

Strickler v. Bijora, Inc., 2012 U.S. Dist. LEXIS 156830 (N.D. Ill. Oct. 30, 2012) is distinguishable as it involved the question of whether the cell phone call ban applied to text messages and if so, whether that application was unconstitutional. *Id*. at *17.

c. *Wreyford v. Citizens for Transp. Mobility, Inc.*

Wreyford v. Citizens for Transp. Mobility, Inc., 957 F. Supp. 2d 1378 (N.D. Ga. 2013) also evaluated the TCPA cell phone call ban as a content-neutral time, place, and manner restriction relying on *Moser*. *Id*. at 1380.

d. *Woods v. Santander Consumer USA Inc.*

Woods v. Santander Consumer USA Inc., 2017 U.S. Dist. LEXIS 47256 (N.D. Ala. Mar. 30, 2017) reviewed the TCPA cell phone call ban as a content-neutral restriction on speech. It did not consider the exemptions to the cell phone call ban. *Id*. at *6.

3. Other cases relied upon by Defendants, however, have nothing to do with the TCPA.

a. *Patriotic Veterans, Inc. v. Zoeller.*

Patriotic Veterans, Inc. v. Zoeller, 845 F.3d 303 (7th Cir. 2017) involved a challenge to Indiana's prerecorded telephone call statute by a nonprofit political group. Although the statute had exemptions, they all hinged on the relationship between the caller and the recipient of the call rather than the content of the message. *Id*. at 304.

b. *Van Bergen v. Minnesota*.

Van Bergen v. Minn., 59 F.3d 1541 (8th Cir. 1995) involved a challenge to a Minnesota law regulating the use of prerecorded messages by a candidate for Minnesota governor. Although the case discussed preemption by the TCPA, it did not question or review its constitutionality. *Id.* at 1545-46.

III. CONCLUSION

Plaintiffs respectfully request that this Court declare the TCPA cell phone call ban to be an unconstitutional, content-based restriction of speech, enjoin its enforcement, and grant such other relief as the Court deems just and proper.

Dated: July 5, 2017

Respectfully Submitted,

/s/ *Charles George*

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EXHIBIT A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. CASE NO.: 8:13-cv-1647-T-23TGW

MORTGAGE INVESTORS CORPORATION OF OHIO, INC.,

Defendant.
_____/

ORDER

The United States sues (Doc. 1) and alleges violations of Sections 13(b), 19, and 16(a)(1) of the Federal Trade Commission Act (FTC Act), 15 U.S.C. §§ 53(b), 57b, and 56(a)(1). The parties move for a stipulated judgment and permanent injunction. The motion (Doc. 2) is **GRANTED**.

FINDINGS

The complaint alleges that Mortgage Investors Corporation of Ohio, Inc., participated in deceptive and unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, the Telemarketing Sales Rule (TSR), 16 C.F.R. Part 310, and the Mortgage Acts and Practices - Advertising Rule (MAP Rule), 16 C.F.R. Part 321, codified as Mortgage Acts and Practices (Regulation N), 12 C.F.R.

Part 1014, while telemarketing, advertising, marketing, promoting, offering for sale, or selling mortgage credit products. Except as specifically stated in this order, Mortgage Investors neither admits nor denies the allegations of the complaint. For the purpose of this action, Mortgage Investors admits the facts necessary to establish personal jurisdiction. Mortgage Investors waives any claim under the Equal Access to Justice Act, 28 U.S.C. § 2412, about the prosecution of this action through the day of this order and agrees to bear its own costs and attorney fees.

DEFINITIONS

"Assisting others" includes, but is not limited to, (a) performing customer service functions, including receiving or responding to consumer complaints; (b) formulating or providing, or arranging for the formulation or provision of, commercial communication about a mortgage credit product; and (c) providing names of, or assisting in the generation of, potential customers.

"Commercial Communication" means a written or oral statement, illustration, or depiction designed to effect a sale or to create an interest in purchasing goods or services, whether the Commercial Communication appears on or in a label, package, package insert, radio, television, cable television, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, film, slide, audio program transmitted over a telephone system, telemarketing script, on-hold

script, upsell script, training material provided to telemarketing firms, program-length commercial (infomercial), the internet, cellular network, or any other medium.

"Mortgage Investors" means Mortgage Investors Corporation of Ohio, Inc., whether doing business as Mortgage Investors Corporation, AmeriGroup Mortgage Corporation, Veterans Information Department, Veterans Home Loans, or another assumed name, and the successor or assign of any of the above.

"Do Not Call Request" means a person's statement that he or she wishes neither to receive telephone calls initiated to induce the purchase of a good or a service nor to receive telephone calls initiated to solicit charitable contributions.

"Entity-Specific Do Not Call List" means a list of telephone numbers created to comply with Do Not Call Requests.

"Established Business Relationship" means a relationship between the seller and a person based on (a) the person's purchase, rental, or lease of the seller's goods or services or a financial transaction between the person and seller within eighteen months immediately preceding the telemarketing call or (b) the person's inquiry or application regarding a product or service offered by the seller within three months immediately preceding a telemarketing call.

"Express Agreement to Call" means a written agreement that has not been rescinded by the consumer and that clearly evidences the consumer's consent to receive calls made by or on behalf of a specific party and contains both the telephone number to which calls may be placed and the consumer's signature (which may

include an electronic or a digital signature, if state or federal law recognizes the form of signature).

"Mortgage Credit Product" means a form of credit secured by real property or a dwelling and offered or extended to a consumer primarily for personal, family, or household purposes.

"National Do Not Call Registry" means the National Do Not Call Registry maintained by the Federal Trade Commission (Commission) under 16 C.F.R. § 310.4(b)(1)(iii)(B).

"Outbound Telephone Call" means a telephone call initiated by a telemarketer to induce the purchase of a good or a service or to induce a charitable contribution.

"Person" means any natural person, organization, or other legal entity, and includes a corporation, partnership, proprietorship, association, co-operative, or other business entity.

"Telemarketing" means a plan, program, or campaign involving more than one interstate phone call and conducted either to induce the purchase of a good or a service or to induce a charitable contribution.

PROHIBITION AGAINST ABUSIVE TELEMARKETING PRACTICES

Mortgage Investors; Mortgage Investors' officers, agents, servants, employees, and attorneys; and any other person in active concert or participation in connection with telemarketing, who receive actual notice of this order, are enjoined from:

A. Denying or interfering with a person's right to be placed on an Entity-Specific Do Not Call List (1) by failing to place on an Entity Specific Do Not Call List the telephone number of any person who makes a Do Not Call Request or (2) by requiring any person who makes a Do Not Call Request to repeat the request to a sales manager or other person who attempts to deliver a sales solicitation before complying with the request;

B. Initiating an Outbound Telephone Call to a person who made a Do Not Call Request;

C. Initiating an Outbound Telephone Call to a telephone number on the National Do Not Call Registry unless (1) Mortgage Investors has obtained an Express Agreement to Call the number listed with the National Do Not Call Registry or (2) Mortgage Investors has an Established Business Relationship with the person and that person has not made a Do Not Call Request to Mortgage Investors; or

D. Aiding or abetting another's accomplishing the acts prohibited in paragraphs A through C of this section.

PROHIBITION AGAINST MISREPRESENTATIONS

Mortgage Investors; Mortgage Investors' officers, agents, servants, employees, and attorneys; and any other person in active concert or participation who receive actual notice of this order are enjoined from misrepresenting or assisting others in misrepresenting, expressly or by implication, a material fact while advertising,

marketing, promoting, offering for sale, or selling a Mortgage Credit Product. A material fact includes (1) a term or rate for a Mortgage Credit Product; (2) the closing cost or fee of a Mortgage Credit Product; (3) any savings associated with the Mortgage Credit Product or the length of time that the savings will be available; (4) the variability of interest, payments, or another term of a Mortgage Credit Product; (5) a comparison of a rate or payment for a term that is less than the full term of the Mortgage Credit Product; (6) an association of the Mortgage Credit Product or the provider of the product with any other person or program, including misrepresenting that a Mortgage Credit Product or the provider of that Mortgage Credit Product is affiliated with a governmental entity, including the U.S. Department of Veterans Affairs.

CIVIL PENALTY

Mortgage Investors is ordered to pay the judgment to the Treasurer of the United States. Mortgage Investors must pay within fourteen days after entry of the judgment and by an electronic-fund transfer in accord with instruction provided by the United States or the Commission.

ADDITIONAL MONETARY PROVISIONS

Mortgage Investors relinquishes dominion and all legal and equitable right, title, and interest in the assets transferred under this order and may not seek the

return of an asset. In a subsequent civil litigation by or on behalf of the United States or the Commission to enforce the right to a payment or judgment under this order, the facts alleged in the complaint will be accepted without further proof. Mortgage Investors' must submit the applicable 31 U.S.C. § 7701 Taxpayer Identification Number (Employer Identification Number) to the Commission, which may use the number for collecting and reporting a delinquent amount.

ORDER ACKNOWLEDGMENTS

Within seven days after entry of this order, Mortgage Investors must submit to the Commission a sworn acknowledgment of receipt of this order.

For five years after entry of this order, Mortgage Investors must deliver a copy of this order (1) to all principals, officers, directors, managers, and members; (2) to all employees, agents, and representatives who participate in the telemarketing, advertising, marketing, promoting, offering for sale, or selling of a Mortgage Credit Product; and (3) to any business entity resulting from any change in structure as set forth in the section titled "Compliance Reporting." Delivery must occur within fourteen days of entry of this order for current personnel. For all others, delivery must occur before the others assume responsibility.

From each individual or entity to which Mortgage Investors delivers a copy of this order, Mortgage Investors must obtain within thirty days a signed and dated acknowledgment of receipt of this order.

COMPLIANCE REPORTING

A year after entry of this order, Mortgage Investors must submit a compliance report, sworn under penalty of perjury, (1) identifying the primary physical, postal, and e-mail address and telephone number, which the Commission and the United States may use to communicate with Mortgage Investors; (2) identifying Mortgage Investors' businesses by their names, telephone numbers, and physical, postal, e-mail, and internet addresses; (3) describing the activities of each business, including each good and service offered and the means of advertising, marketing, and selling; (4) describing whether and how Mortgage Investors complies with each section of this order; and (5) providing a copy of each order acknowledgment required by this order, unless the acknowledgment was previously submitted to the Commission.

For ten years after entry of this order, Mortgage Investors must submit a sworn compliance notice within thirty days of a change in (1) a designated point of contact or (2) the structure of Mortgage Investors or an entity that Mortgage Investors owns controls that may affect a compliance obligation under this order.

Mortgage Investors must submit to the Commission a notice of the filing of a bankruptcy petition, insolvency proceeding, or a similar proceeding by or against Mortgage Investors within thirty days of the filing.

A submission to the Commission required by this order to be sworn under penalty of perjury must comply with 28 U.S.C. § 1746 by concluding, "I declare under penalty of perjury under the laws of the United States of America that the

foregoing is true and correct. Executed on _____." The submission must include the date, signatory's full name, title, and signature.

Unless otherwise directed by the Commission in writing, a submission to the Commission must be e-mailed to DEbrief@ftc.gov or sent by overnight courier to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin, "U.S. v. Mortgage Investors Corporation of Ohio, Inc., Matter No. 1223084."

RECORDKEEPING

Mortgage Investors must create the below records for ten years after entry of this order and must retain each record for five years after the record's creation. Specifically, for Telemarketing or a Commercial Communication about a Mortgage Credit Product, Mortgage Investors must create and retain (1) accounting records showing the revenue from goods or services sold, the cost incurred in generating the revenue, and the resulting net profit or loss; (2) for each person (whether an employee or otherwise) providing services, personnel records showing the person's name, addresses, telephone numbers, job title, dates of service, and (if applicable) the reason for termination; (3) records of each consumer complaint, whether received directly or indirectly, and any response to the complaint; (4) records necessary to demonstrate full compliance with each provision of this order, which provisions include each

required submission to the Commission; and (5) a copy of each unique Commercial Communication about a Mortgage Credit Products.

COMPLIANCE MONITORING

Within thirty days of receipt of a reasonable written request from a representative of the Commission or the United States, Mortgage Investors must (1) submit additional compliance reports or other requested information, which must be sworn under penalty of perjury; (2) appear for depositions; and (3) produce documents for inspection and copying. The Commission and the United States are also authorized to obtain discovery, without further leave of court, using any of the procedures prescribed by Rules 29, 30 (including telephonic depositions), 31, 33, 34, 36, 45, and 69, Federal Rules of Civil Procedure.

For matters concerning this order, the Commission and the United States are authorized to communicate directly with Mortgage Investors through its General Counsel or, if Mortgage Investors has no General Counsel, with any of Mortgage Investors' executive officers. Mortgage Investors must permit representatives of the Commission and the United States to interview any employee or other person affiliated with Mortgage Investors who has agreed to such an interview. The person interviewed may have counsel present.

* * *

Jurisdiction is retained to construe, modify, and enforce this injunction. The Clerk is directed (1) to enter as a civil penalty a judgment in favor of the United States and against Mortgage Investors Corporation of Ohio, Inc., for $7,500,000; (2) to terminate any pending motion; and (3) to close the case.

ORDERED in Tampa, Florida, on July 17, 2013.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS, INC., *et al.*, Plaintiffs, v. JEFFERSON B. SESSIONS, III, in his official capacity as Attorney General of the United States, FEDERAL COMMUNICATIONS COMMISSION, Defendants.	Case No. 5:16-CV-252 (JCD)

REPLY IN SUPPORT OF
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs ask this Court to become the first to part with the overwhelming precedent across circuits upholding the constitutionality of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA"). However, Plaintiffs' opposition provides little basis for such an extraordinary holding. In their opposition, Plaintiffs do not dispute that the TCPA's prohibition of the use of automated dialing systems to make a call or send a text message to a cell phone user without the user's prior consent is content neutral. Nor do Plaintiffs address Defendants' argument that a contrary conclusion would not require invalidation of the statute, because the TCPA would survive strict scrutiny. Plaintiffs instead focus on certain exemptions to the prohibition either promulgated by the Federal Communications Commission ("FCC") or enacted by Congress. But as this Court made clear, the validity of the FCC orders is not at issue in this case. And Plaintiffs do not contest that the government-debt exception is severable from the portion of the TCPA that actually governs their conduct.

With no basis for challenging the TCPA's autodialer provision and no argument that the exemptions are not severable, Plaintiffs make the extraordinary claim that the Court should strike down the entirety of the autodialer provision because otherwise Congress and the FCC would still be able to promulgate content-based, unconstitutional exemptions in the future. Plaintiffs are entitled to no such relief, as such a holding would turn the doctrine of severability on its head and fly in the face of precedent making clear that where an invalid provision is severable, the concededly constitutional portions of the statute should remain in effect.

Setting aside Plaintiffs' unsupported claim that the statute as a whole must fall due to the ability of Congress to make laws and the FCC to give effect to those laws in the future, what remains is a statute that has been upheld by every court to consider its constitutionality.

Plaintiffs may quibble with each of these cases on various grounds, but this unanimity of precedent cannot be brushed aside merely because the facts of a case may not be identical in every respect to the present dispute. The TCPA's constitutionality has been reaffirmed under both intermediate and strict scrutiny, both before and after the Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). The same result should apply here.

ARGUMENT

I. THE TCPA IS A VALID, CONTENT-NEUTRAL REGULATION OF SPEECH

Although Plaintiffs spend much of their reply brief attempting to distinguish prior cases upholding the constitutionality of the TCPA, they nowhere dispute that the autodialer provision itself is a content neutral time, place, and manner regulation that fully comports with the First Amendment. *See Gomez v. Campbell-Ewald*, 768 F.3d 871, 873 (9th Cir. 2014), *aff'd on other grounds*, 136 S. Ct. 633 (Jan. 20, 2016); *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995).[1] The Seventh Circuit recently reaffirmed this point in an analogous context and explained that neither the Supreme Court's decision in *Reed*, nor the Fourth Circuit's application of that decision in *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015), calls that conclusion into question. *See Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 305–06 (7th Cir. 2017) ("Preventing automated messages to persons who don't want their peace and quiet disturbed is a valid time, place, and manner restriction. Other circuits' decisions, which we have cited, spell out the reasoning. . . . *[T]hese decisions have not been called into question by* Reed.") (emphasis added); *id.* at 304 (rejecting

[1] Plaintiffs argue that *Campbell-Ewald* and *Moser* are irrelevant because they were decided before *Reed* or did not consider the various exemptions that Plaintiffs have highlighted here. Pls.' Reply. 8–9 (ECF No. 36). But for the reasons described *infra*, the exemptions Plaintiffs point to do not affect the constitutionality of the autodialer provision and therefore need not be considered in this case. Thus, both *Campbell-Ewald* and *Moser* have continued relevance to this case.

arguments that *Reed* or *Cahaly* "made these decisions obsolete and [therefore] doom[] both state and federal anti-robocall statutes as instances of content discrimination").

Like the state statute upheld in *Patriotic Veterans* – and unlike the ordinance in *Reed* – the autodialer provision of the TCPA does not depend on "what message may be conveyed." *Patriotic Veterans*, 845 F. 3d at 306. It focuses instead on the method of the call, restricting the use of an autodialer to make calls to cell phones without the consent of the called party. 47 U.S.C. § 227(b)(1)(A). As such, and as numerous courts have held, it is a quintessential time, place, and manner regulation that furthers the government's interest in privacy and leaves open ample alternative channels of communication. *See Moser*, 46 F.3d at 973; *Campbell-Ewald*, 768 F.3d at 876; *Mey v. Venture Data, LLC*, No. 5:14-cv-123, 2017 WL 1193072 (N.D. W.V. Mar. 29, 2017); *Woods v. Santander Consumer USA Inc.*, No. 2:14-cv-2104, 2017 WL 1178003, at *5 (N.D. Ala. Mar. 30, 2017); *Strickler v. Bijora, Inc.*, No. 11-cv-3468, 2012 WL 5386089, at *5 (N.D. Ill. Oct. 30, 2012); *Wreyford v. Citizens for Transp. Mobility, Inc.*, 957 F. Supp. 2d 1378, 1380–82 (N.D. Ga. 2013). *See also Patriotic Veterans*, 845 F.3d at 305–06; *Van Bergen v. Minn.*, 59 F.3d 1541, 1549–56 (8th Cir. 1995).[2]

[2] Plaintiffs' half-hearted attempt to "distinguish" the overwhelming weight of authority upholding the constitutionality of the TCPA's autodialer provision is unavailing. Even if the cited cases are not identical to this one, those cases demonstrate, and reaffirm, that the statute's core provision – or state analogs much like it – are content-neutral time, place, and manner restrictions. For example, in *Van Bergen*, the Eighth Circuit upheld Minnesota's anti-robocall statute, which it described as "virtually identical" to the TCPA, under intermediate scrutiny. *Van Bergen*, 59 F.3d at 1548 (citation omitted). In *Patriotic Veterans*, the Seventh Circuit upheld an Indiana statute, "which contains a similar limit" to the TCPA. *Patriotic Veterans*, 845 F.3d at 304. In so doing, the court relied explicitly on cases upholding the TCPA and rejected the plaintiff's contention that *Reed* and *Cahaly* "made these decisions obsolete and dooms both state and federal anti-robocall statutes as instances of content discrimination." *Id.* And each of the district court cases similarly affirmed that the TCPA itself is a content neutral restriction that survives intermediate scrutiny. *See Mey*, 2017 WL 1193072, at *17; *Woods*, 2017 WL 1178003, at *5; *Strickler*, 2012 WL 5386089, at *5; *Wreyford*, 957 F. Supp. 2d at 1380–82. Plaintiffs' arguments do not demonstrate

II. THE FCC ORDERS AND GOVERNMENT-DEBT EXEMPTION DO NOT CALL INTO QUESTION THE VALIDITY OF THE TCPA'S AUTODIALER RESTRICTION

Unable to attack the validity of the autodialer provision on its own terms, Plaintiffs instead allege that the existence of concededly severable exemptions to the autodialer provision somehow "cause the [autodialer provision] to be a content-based restriction of speech." Pls.' Reply 3. This argument has no legal basis and should be rejected.

First, as three separate courts have recognized, the FCC's ability to promulgate exemptions to the autodialer provision does not render the statute itself unconstitutional. In *Moser*, for example, the Ninth Circuit rejected the plaintiff's argument that the applicable level of scrutiny should be affected by the FCC's ability to create exemptions distinguishing between commercial and noncommercial speech. *Moser*, 46 F.3d at 973. Because the TCPA "in no way requires the FCC to adopt such exemptions by regulation, order, or otherwise," and because such exemptions could be challenged on their own through a separate process, the Ninth Circuit held that these exemptions were irrelevant to the constitutional challenge. *Id.* Similarly, in *Brickman v. Facebook, Inc.*, No. 16-cv-751, 2017 WL 386238 (N.D. Cal. Jan. 27, 2017) and *Holt v. Facebook, Inc.*, No. 16-cv-2266, 2017 WL 1100564 (N.D. Cal. Mar. 9, 2017), the courts rejected constitutional challenges to the FCC's ability to promulgate exemptions to the autodialer provision, explaining that the FCC could promulgate content-neutral exemptions pursuant to such authority, and that "[t]he mere possibility that the FCC could create a content-based exception at some later time" does not render the statute itself unconstitutional. *Brickman*, 2017 WL 386238, at *6; *accord Holt*, 2017 WL 1100564, at *8.

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that the differences between the facts of these cases and the present one are in any sense meaningful.

Moreover, even if the FCC issued a content-based exemption using its authority under 47 U.S.C. § 227(b)(2)(C), the exemption would not automatically be invalid; it would instead be subject to a constitutional challenge in the court of appeals as provided for in the Hobbs Act, *see* 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1), and would then be judged under the appropriate level of scrutiny. *Cf., e.g.*, *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015) (upholding state ban on campaign donation solicitation by candidates for judicial office under strict scrutiny).

Accordingly, to the extent one or more of the FCC-promulgated "exemptions"[3] Plaintiffs point to is a content-based restriction that would not withstand strict scrutiny, such an exemption could be invalidated by the court of appeals on an individual basis. But Plaintiffs fail to show that the invalidation of these agency enactments on a case-by-case basis renders unconstitutional the entirety of the statute pursuant to which they were issued. Indeed, Plaintiffs have no response to the numerous authorities making clear that where agency regulations are deemed unconstitutional, courts invalidate the regulations but leave in place the authorizing statute. *See* Defs.' Br. 15–16 (ECF No. 33). Rather than dispute this well-established proposition, Plaintiffs claim that the ability to challenge any allegedly offending regulations directly would not

[3] As explained in Defendants' opening brief, several of the "exemptions" Plaintiffs point to are not exemptions promulgated pursuant to 47 U.S.C. § 227(b)(2)(C), but are instead clarifications of the statute's reach. Though Plaintiffs contend that these clarifications nevertheless exempt calls "based on the speakers' identity or the content of the calls," Pls.' Reply 5, that is incorrect. These orders respond to specific inquiries regarding how the consent requirement might apply to specific calls made by specific callers. The fact that the FCC has responded to questions involving certain callers does not limit the consent requirement's reach only to, for example, wireless carriers or intermediaries. Similarly, the "exemption" for calls made by federal government officials is not a content-based exemption. It is simply the FCC's recognition that the statute does not purport to waive the government's sovereign immunity, as the Supreme Court has recognized. *See Campbell-Ewald*, 136 S. Ct. at 672 ("The United States and its agencies . . . are not subject to the TCPA's prohibitions because no statute lifts their immunity.").

sufficiently redress their injury because of the FCC's "existing and actualized ability to create future content-based exemptions." Pls.' Reply 8. But once again the validity of such hypothetical future exemptions would be subject to challenge under the Hobbs Act, and if found unconstitutional, such exemptions would be struck while the statute remained in place. Moreover, invalidating a congressionally-enacted statute based on the possibility of future unconstitutional agency action would run afoul of the "presumption to which administrative agencies are entitled—that they will act properly and according to the law." *FCC v. Schreiber*, 381 U.S. 279, 296 (1965).

Similarly, Plaintiffs do not dispute that the government-debt exception is severable from the remainder of the TCPA, nor could they plausibly. "[T]here is no evidence that Congress would not have enacted the TCPA without the exception for government debt. To the contrary, Congress did enact the TCPA without the exception for government debt, and the version of the TCPA without the exception has been upheld as a valid time, place, or manner restriction by several courts throughout the country." *Woods v. Santander Consumer USA, Inc.*, No. 2:14-cv-02104, 2017 WL 1178003, at *3 n.6 (N.D. Al. Mar. 30, 2017) (citations omitted); *see Brickman*, 2017 WL 386238, at *8 ("[E]ven assuming this newly-added exception were to be invalid, it would not deem the entire TCPA to be unconsitutitonal because the exception would be severable from the remainder of the statute."). Rather, Plaintiffs contend that severing the exception is insufficient because "Congress's ability to amend the TCPA is ongoing," meaning that Congress could enact future unconstitutional exemptions. By that measure, however, this Court could never provide adequate relief in cases of constitutional challenges to statutes because Congress could always enact a new statute that may have the same constitutional defect as before. The Court cannot rule based on speculation regarding what Congress may do in the future. It can

only resolve the controversy actually present before it. And in so doing, the Court should "limit the solution to the problem," *United States v. Under Seal*, 819 F.3d 715, 721 (4th Cir. 2016) (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006)), and leave in place the portions of a statute that Congress would have enacted independently of any invalid portions. *See INS v. Chadha*, 462 U.S. 919, 931 (1983). The Court should reject Plaintiffs' attempt to subvert this well-settled severability analysis by reaching out to invalidate concededly content neutral and constitutional portions of the TCPA.[4]

As Defendants explained in their opening brief, because the government-debt exception is plainly severable and its invalidation would have no effect on Plaintiffs, it need not be considered in this case at all. *See* Defs.' Br. 17–19. But even if considered here, the exception does not render the statute content based. Contrary to Plaintiffs' contention, the FCC has recognized that because calls made pursuant to the exception must be made "solely to collect a debt," the exception is limited to "calls made to the debtor or another person or entity legally responsible for paying the debt." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 31 FCC Rcd. 9074, 9083 ¶ 21 (July 5, 2016), *petitions for reconsideration pending*, CG Docket No. 02-278. Thus, in limiting the exception to calls made "solely to collect a debt," 47 U.S.C. § 227(b)(1)(A)(iii), the FCC recognized that the exception is based on the relationship of the parties—the owner or servicer of the government-backed debt, and the debtor

[4] Plaintiffs appear to contend that the severability analysis should change because this case involves speech and the First Amendment's goal is "more speech." Pls.' Reply. 8. But they cite no case supporting a different severability analysis in free speech cases. And indeed, the Supreme Court has recognized that the categories of content-neutral and content-based restrictions may mean that a broader speech restriction is constitutional while a narrower one is not. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992) ("Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government."). There is thus no reason to think that the severability analysis would not apply equally here.

or guarantor responsible for paying it. Such relationship-based exemptions have been upheld as content neutral. *See Patriotic Veterans*, 845 F.3d at 305. Moreover, the exemption applies only to those who are collecting debts owed to the government that the government could collect itself in the same manner, as the government is not subject to the TCPA. *See Brickman*, 2017 WL 386238, at *8.

III. THE TCPA IN ANY EVENT SATISFIES STRICT SCRUTINY.

In addition to avoiding any discussion of the constitutionality of the provision of the TCPA that actually applies to their speech, Plaintiffs' opposition fails to respond to Defendants' argument that the TCPA would satisfy strict scrutiny. As Defendants explained in their opening brief, every court to consider a First Amendment challenge to the TCPA has concluded that it is constitutional, including two courts that evaluated the statute under strict scrutiny. *See Brickman*, 2017 WL 386238, at *6–9; *Holt*, 2017 WL 1100564, at *7-11. Despite Plaintiffs' attempts to distinguish these cases, the unanimity of precedent makes clear that, regardless of the standard applied, the TCPA is constitutional.

As recognized by the courts in *Brickman* and *Holt* in upholding the TCPA under strict scrutiny, the TCPA "serves a compelling government interest in promoting residential privacy." *Brickman*, 2017 WL 386238, at *7; *accord Holt*, 2017 WL 1100564, at *8. The courts further held that the TCPA is narrowly tailored, rejecting claims that the statute is underinclusive, overinclusive, or that there exist alternatives that would be as effective in protecting privacy. *Brickman*, 2017 WL 386238, at *7–9; *Holt*, 2017 WL 1100564, at *9–10. Plaintiffs do not take issue with the asserted compelling interest, and though they claimed the ban was overinclusive in their opening brief, *see* Pls.' Br. 21 (ECF No. 31), they have not pressed that argument in their reply. Nor have they responded to Defendants' explanations as to why the proposed less-

restrictive alternatives would not be "at least as effective in achieving the legitimate purpose th[e] statute was enacted to serve."[5] *See Brickman*, 2017 WL 386238, at *8 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997)) (rejecting proposed alternatives including time-of-day limitations, mandatory disclosure of the caller's identity, and do-not-call lists); *accord Holt*, 2017 WL 1100564, at *9–10. In an attempt to distinguish *Brickman*, Plaintiffs argue that the statute is underinclusive, focusing on the FCC exemptions and the government-backed debt exemption. Pls.' Reply 10–11. But as already explained, the statute itself does not contain the FCC-promulgated exemptions that Plaintiffs believe demonstrate underinclusivity, and the validity of the specific exemptions is not at issue in this case. Similarly, for reasons already explained, the government debt exemption need not be considered, but to the extent that it is, the exemption is limited in scope and "leave[s] negligible damage to the statute's interest in protecting privacy." *Brickman*, 2017 WL 386238 at *8; *accord Holt*, 2017 WL 1100564 at *9.

In sum, the TCPA is a narrow limitation on speech that does not prohibit Plaintiffs from communicating any particular message. Indeed, the TCPA even allows for Plaintiffs to disseminate their messages by way of autodialer, so long as they obtain consent. The statute is narrowly tailored to limit only the kind of calls and texts that cause the intrusion into residential privacy that spurred the statute's enactment. Given this careful tailoring, the availability of numerous alternative means for Plaintiffs to communicate their messages, and the lack of equally

[5] Because Plaintiffs have failed to address these arguments, the Court should treat the points as conceded. *See Feldman v. Law Enforcement Assocs. Corp.*, 955 F. Supp. 2d 528, 536 (E.D.N.C. 2013) (finding that plaintiff had conceded that summary judgment was appropriate on various claims where he "failed to respond to the arguments raised" in defendants' motion for summary judgment); *Stenlund v. Marriott Int'l, Inc.*, 172 F. Supp. 3d 874, 887 (D. Md. 2016) ("In failing to respond to [defendant's] argument, Plaintiff concedes the point."); *Kissi v. Panzer*, 664 F. Supp. 2d 120, 123 (D.D.C. 2009) ("Because the plaintiff's opposition fails to address the defendants' arguments, the Court may treat the defendants' motion as conceded.").

effective alternatives for protecting residential privacy, the TCPA survives strict scrutiny. *See* Defs.' Br. 20–28.

CONCLUSION

For the foregoing reasons, the Court should uphold the constitutionality of § 227(b)(1)(A)(iii) and grant Defendants Motion for Summary Judgment.

Dated: July 20, 2017

Respectfully submitted,

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