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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**
**SAN FRANCISCO DIVISION**

CHRISTINE HOLT, *individually and on behalf of all others similarly situated,*

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No.: 3:16-cv-02266-JST

# UNITED STATES OF AMERICA'S MEMORANDUM IN SUPPORT OF THE CONSTITUTIONALITY OF THE TELEPHONE CONSUMER PROTECTION ACT OF 1991

Am. Complaint Filed: July 22, 2016
Judge: Hon. Jon S. Tigar
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## INTRODUCTION

Defendant Facebook, Inc., has raised a facial and as-applied First Amendment 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 generally prohibits the use of automated dialing systems to make a call or send a text message to a cellphone 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. 47 U.S.C. § 227(b)(1)(A)(iii). Plaintiff claims that Facebook violated the Act by sending her automated text messages, without her consent, inviting her to post to or otherwise interact with the social media site. In response, Facebook claims that because of the recently-added government-debt exception, the emergency-purposes exception, and various Orders of the Federal Communications Commission, and in light of the Supreme Court's recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), § 227(b)(1)(A)(iii) must be viewed as a content-based regulation of speech and held unconstitutional under strict scrutiny.

As a threshold matter, this Court should resolve all nonconstitutional issues before addressing the constitutionality of the TCPA. Facebook has moved to dismiss the Complaint on the nonconstitutional ground that Plaintiff has failed to adequately allege the use of an automated dialing system. Although the United States takes no position on that issue, its resolution may obviate the need to reach the constitutional question. Accordingly, the Court "should not decide federal constitutional questions where a dispositive nonconstitutional ground is available." *Hagans v. Lavine*, 415 U.S. 528, 547 (1974).

If the Court does reach the constitutional challenge, it should be rejected for several reasons. As a preliminary matter, Facebook's challenges to the government-debt exception and the FCC's orders are not properly before this Court because none have any effect on Facebook (or Plaintiff). Moreover, Congress divested district courts of jurisdiction over suits that would result in the invalidation of FCC orders. Ignoring those orders, the Ninth Circuit has already upheld against a First Amendment challenge the very provision of the TCPA at issue in this case, *see Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *cert. granted on other grounds,* 135 S. Ct. 2311 (2015), and *aff'd,* 136 S. Ct. 663 (2016), *as revised* (Feb. 9, 2016), as well as another TCPA provision

1 that is not meaningfully different, *see Moser v. FCC*, 46 F.3d 970, 972–74 (9th Cir. 1995). Each
2 time, the Ninth Circuit reasoned that the Act is a permissible content-neutral, time, place, and manner
3 restriction. The Supreme Court's decision in *Reed*, which applied longstanding First Amendment
4 principles to a local sign ordinance that bears no resemblance to the TCPA, does not permit (much
5 less require) the Court to revisit that conclusion. Moreover, *Reed* left unchanged the degree of
6 scrutiny accorded commercial speech — a standard under which application of the TCPA to the
7 messages at issue here plainly passes muster.

8 Finally, even if the Court concludes, contrary to Ninth Circuit precedent, that strict scrutiny
9 ought to apply, the narrow statutory provision at issue should be upheld. Congress made extensive
10 findings about the Act's purpose of protecting consumer privacy, an interest the Ninth Circuit has
11 already acknowledged as substantial. Section 227(b)(1)(A)(iii) is narrowly tailored to protect that
12 interest, prohibiting only the sorts of automated communications that Congress found most
13 problematic and no more.

14 **BACKGROUND**

15 "Voluminous consumer complaints about abuses of telephone technology — for example,
16 computerized calls dispatched to private homes — prompted Congress to pass the TCPA." *Mims v.*
17 *Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012). The ubiquity of cell phones only aggravates
18 such problems. *See Campbell-Ewald Co.*, 768 F.3d at 876–77. "People keep their cellular phones
19 on their person at nearly all times: in pockets, purses, and attached to belts. Unlike other modes of
20 communication, the telephone commands our instant attention." *Joffe v. Acacia Mortg. Corp.*, 121
21 P.3d 831, 842 (Ariz. Ct. App. 2005), *cert. denied*, 549 U.S. 1111 (2007) (mem.). As pertinent here,
22 the statute makes it unlawful "to make any call (other than a call made for emergency purposes or
23 made with the prior express consent of the called party) using any automatic telephone dialing system
24 or an artificial or prerecorded voice . . . to any telephone number assigned to a paging service, cellular
25 telephone service, specialized mobile radio service, or other radio common carrier service, or any
26 service for which the called party is charged for the call, unless such call is made solely to collect a
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debt owed to or guaranteed by the United States" 47 U.S.C. § 227(b)(1)(A)(iii).[1] 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 voice calls and text messages. *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14115 ¶ 165 (2003); *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 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. S18784 (daily ed. Nov. 27, 1991), or of natural disasters or health-related evacuations, 137 Cong. Rec. H11,313.

The present case is a putative class action against Facebook seeking damages for alleged violations of the TCPA. Plaintiff alleges that Facebook sent "unsolicited text messages" to her cell phone that encourage her to "post status updates to Facebook." First Amended Complaint ("FAC"), ECF No. 29, ¶ 44. Plaintiff further alleges that she does not use Facebook and did not consent to receive these text messages. *Id.* ¶ 46. Plaintiff seeks to represent two classes of plaintiffs: (1) those who received text messages from Facebook and did not consent, and (2) those who received text messages from Facebook after expressly requesting that Facebook cease sending the text messages. *See id.* ¶ 51.

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[1] 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, 587.

In its motion to dismiss, Facebook contends, among other things, that the TCPA violates the First Amendment. *See* Def.'s Mot. to Dismiss, ECF No. 36, at 15-21. Relying heavily on *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and pointing to the government-debt exception, the emergency-purposes exception, and various FCC orders, Facebook argues that the TCPA is "plainly content-based" and subject to strict scrutiny, which Facebook contends the Act must fail. *See* Def.'s Mot. 17.

On August 16, 2016, Facebook filed a Notice of Constitutional Question pursuant to Federal Rule of Civil Procedure 5.1. *See* ECF No. 51. By operation of Federal Rule of Civil Procedure 5.1(c), the deadline for the United States to intervene is October 17, 2016.

## ARGUMENT

### I. THE COURT SHOULD RESOLVE ALL NONCONSTITUTIONAL ARGUMENTS PRIOR TO ADDRESSING THE CONSTITUTIONALITY OF THE TCPA.

As an initial matter, this Court should not address the constitutionality of the TCPA until it resolves all other issues in Facebook's Motion to Dismiss. "[P]rior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981); *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1474 (9th Cir. 1994) ("[I]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." (citation omitted)). In addition to its constitutional arguments, Facebook has moved to dismiss the Complaint on nonconstitutional grounds. Facebook has argued that Plaintiff has failed adequately to allege the use of an automatic telephone dialing system, as required by the statute. *See* Def.'s Mot. 7–15. In order to avoid unnecessary constitutional adjudication, the Court should first address this issue.[2]

[2] The United States has intervened solely for the purpose of defending the constitutionality of the TCPA and therefore this brief takes no position on the merits of these issues.

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## II. MANY OF FACEBOOK'S ARGUMENTS CONCERN ISSUES THAT SHOULD NOT, AND INDEED CANNOT, BE DECIDED IN THIS CASE.

The Court lacks jurisdiction to consider much of what Facebook seeks to place at issue in its Motion to Dismiss. First, in arguing that the TCPA is content based, Facebook relies in large part on the government-debt exception, which Congress added to the statute in late 2015. *See* Def.'s Mot. 17. But that exception, even if found to be invalid, would be severable from the remainder of the statute, particularly given how recently it was added. *See 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)). Thus, even if the Court were to agree with Facebook that the government-debt exception is content-based and fails strict scrutiny, that would do nothing to redress Facebook's injuries, as that provision is not the basis for Plaintiff's claims against Facebook. Facebook lacks standing to challenge the government-debt exception, and the Court should decline to consider it in this case. *See, e.g.*, *Matter of Extradition of Lang*, 905 F. Supp. 1385, 1399 (C.D. Cal. 1995) ("[R]edressability cannot be shown here because the unconstitutional portion of the extradition statute can be severed from the remainder."); *Cache Valley Elec. Co. v. Utah Dep't of Transp.*, 149 F.3d 1119, 1123 (10th Cir. 1998) (holding that because the disputed portion of a program was severable from the remainder, plaintiff lacked standing); *Klaver Constr. Co. v. Kan. Dep't of Transp.*, 211 F. Supp. 2d 1296, 1304-05 (D. Kan. 2002) (same).

Moreover, although Facebook cites FCC orders implementing the TCPA as examples of content-based restrictions, *see, e.g.*, Def.'s Mot. 17, those orders are not properly before the Court. As Facebook acknowledges, *id.* at 7, the orders it points to were issued pursuant to 47 U.S.C. § 227(b)(2)(B)(ii) and § 227(b)(2)(C), which allow the FCC to exempt calls where doing so would "not adversely affect the privacy rights" that the TCPA seeks to protect. Even assuming for the sake of argument that such orders create content-based exemptions that do not withstand strict scrutiny, it would not follow from such a finding that § 227(b)(1)(A)(iii) — a separate provision — is likewise unconstitutional. Rather, the holding in those circumstances would be limited to finding the orders themselves be unconstitutional. Unconstitutional agency action cannot call into doubt an otherwise

valid Act of Congress. To accept Plaintiffs' contrary suggestion would be to accept the incorrect proposition that, when an agency issues an order or regulation pursuant to a statute, the agency is in fact amending the statute — something the agency has no power to do. *See, e.g.*, *Dalton v. United States*, 816 F.2d 971, 974 (4th Cir. 1987) (Agency "lacks power even by a regulation adopted after strict compliance with the Administrative Procedure Act . . . to repeal, modify, or nullify a statute.").

Further, this Court lacks jurisdiction to entertain Facebook's challenges to the FCC orders. The Communications Act of 1934 establishes the exclusive mechanism for challenging the validity of final orders issued by the FCC. Section 402(a) of that statute specifies that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter . . . shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28 [of the United States Code]." 47 U.S.C. § 402(a). The cross-referenced chapter of the U.S. Code, also known as the Administrative Orders Review Act or Hobbs Act, provides in relevant part that "[t]he court of appeals (other than the United States Court of Appeals for the Federal Circuit) has *exclusive* jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the Federal Communications Commission made reviewable by [47 U.S.C. § 402(a)]." 28 U.S.C. § 2342(1) (emphasis added). "This procedural path created by the command of Congress 'promotes judicial efficiency, vests an appellate panel rather than a single district judge with the power of agency review, and allows uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress to enforce the TCPA.'" *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014) (quoting *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010)).

Although Facebook's primary purpose in challenging the statute's constitutionality may not be to challenge the FCC orders directly, the fact that the validity of those orders forms the basis for its constitutional argument is sufficient to invoke the exclusive jurisdiction of the court of appeals. In *Mais*, for example, appellant Gulf Coast Collection Bureau had been sued under the same TCPA provision at issue here. *Id.* at 1113. The Bureau argued that its calls fell within the statutory exemption for "prior express consent," as the term had been interpreted in an FCC order. *Id.* In ruling for the plaintiff, the district court concluded that the FCC's interpretation was at odds with the

statutory text. *Id.* The court of appeals reversed, reasoning that it was irrelevant that plaintiff's "primary intent" in bringing this lawsuit was not to challenge the FCC orders. *See id.* at 1119. Nor did it matter that plaintiff's claim did "not necessarily depend on invalidation of the agency's ruling." *Id.* Rather, "Hobbs Act jurisdictional analysis looks to the 'practical effect' of a proceeding, not the plaintiff's central purpose for bringing suit." *Id.* at 1120 (quoting *B.F. Goodrich Co. v. Nw. Indus., Inc.,* 424 F.2d 1349, 1353–54 (3d Cir. 1970)); *see also Baros v. Tex. Mexican Ry. Co.*, 400 F.3d 228, 238 (5th Cir. 2005). The Eleventh Circuit recognized, as many other courts have, that "[t]he district courts lack jurisdiction to consider claims to the extent they depend on establishing that all or part of an FCC order subject to the Hobbs Act is 'wrong as a matter of law' or is 'otherwise invalid.'" *Mais*, 768 F.3d at 1120 (quoting *Self v. Bellsouth Mobility, Inc.*, 700 F.3d 453, 462 (11th Cir. 2012)); *see also Am. Bird Conservancy v. FCC*, 545 F.3d 1190, 1193-94 (9th Cir. 2008) (holding that the plaintiff "cannot elude the Communications Act's exclusive review provision by disguising its true objection"); *Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1307 (11th Cir. 2015); *United States v. Any & all Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000); *Morse v. Allied Interstate, LLC*, 65 F. Supp. 3d 407, 412 (M.D. Pa. 2014). Regardless of which party placed the FCC order at issue, the district court lacked jurisdiction to issue a decision with the "practical effect" of invalidating the FCC order. *Mais*, 768 F.3d at 1120.

The same is true here. Facebook's attempts to point to the FCC orders as indications of the content-based nature of the TCPA must be disregarded. The practical effect of the Court ruling that an FCC order violates the First Amendment would be to invalidate that order, and Congress has provided that such challenges lie in the exclusive jurisdiction of the court of appeals.

## III. BINDING NINTH CIRCUIT PRECEDENT REQUIRES THIS COURT TO UPHOLD THE TCPA AS A VALID CONTENT-NEUTRAL RESTRICTION.

The Ninth Circuit has twice addressed the constitutionality of this or a substantially similar provision of the TCPA and twice rebuffed First Amendment challenges to the statute, holding each time that the Act withstands intermediate scrutiny. *See Campbell-Ewald*, 768 F.3d 871; *Moser*, 46 F.3d 970. That should be the beginning and the end of the Court's analysis, as that precedent remains

binding on this Court.[3] Facebook nevertheless contends that the Supreme Court's recent decision in *Reed* represents a sea change in the Court's First Amendment jurisprudence and impliedly overturns this binding precedent. But *Reed* does not purport to overturn the Supreme Court precedent that was the basis for the Ninth Circuit's decisions. *Reed*, 135 S. Ct. at 2226–28; *see also Agostini v. Felton*, 521 U.S. 203, 237 (1997) (advising lower courts to "leav[e] to this Court the prerogative of overruling its own decisions" (citation omitted)). The Court in *Reed* confronted an ordinance markedly different from the statute in question here, and in holding the ordinance invalid the Court applied long-settled precedents without signaling a shift in First Amendment doctrine. What is more, the speech at issue here is commercial speech, subject to the same intermediate standard of review under which the Ninth Circuit upheld the TCPA in *Campbell-Ewald* and *Moser*, and *Reed* plainly had nothing to say about commercial speech.

Accordingly, *Reed* should not be read in such an expansive manner as to permit this Court to disregard Ninth Circuit precedent on this, or other, settled issues.

A. The Ninth Circuit Has Already Rejected Identical First Amendment Challenges to the TCPA.

The constitutional challenge that Facebook presents is foreclosed by circuit precedent. In *Moser*, 46 F.3d 970, the Ninth Circuit rejected a First Amendment challenge to 47 U.S.C. § 227(b)(1)(B), an adjacent provision of the TCPA that makes it unlawful "to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(B); *Moser*, 46 F.3d at 972. Like § 227(b)(1)(A)(iii), that provision contains an exception for a "call [that] is initiated for emergency purposes." *Id.* The court of appeals held that § 227(b)(1)(B) is a content-neutral time, place, and manner restriction because it "regulates all automated telemarketing calls without regard

[3] Facebook argues that these cases are inapplicable because they did not consider the exceptions the FCC has promulgated. Def.'s Mot. 18. Indeed, the FCC in *Moser* objected that the suit challenged one of its regulatory exceptions, which could only be reviewed in lawsuits originating in the court of appeals. Based on the plaintiff's insistence that they challenged "only the statute," the court held that the suit did "not reach the regulations which are outside the jurisdiction of the district court" and thus declined to consider the regulations. *Moser*, 46 F.3d at 973. For the reasons explained above, the validity of the regulatory exceptions is likewise not properly before this Court and the Ninth Circuit's precedent therefore remains relevant and binding.

1 to whether they are commercial or noncommercial." *Moser*, 46 F.3d at 973. Applying intermediate
2 scrutiny, as directed by Supreme Court precedent, *see Ward v. Rock Against Racism*, 491 U.S. 781,
3 791 (1989), the Ninth Circuit held that this provision is consistent with the First Amendment.
4 In reaching that conclusion, the court of appeals noted that there was "significant evidence
5 before Congress of consumer concerns about telephone solicitation in general and about automated
6 calls in particular," to which it owed a high degree of deference. *Moser*, 46 F.3d at 974 (citing
7 *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985)). The court explained
8 that "Congress held extensive hearings on telemarketing" and based on evidence brought forth in
9 those hearings and surveys of customers who had dealt with them, Congress "concluded that
10 telemarketing calls to homes constituted an unwarranted intrusion upon privacy." *Id.* at 972. In light
11 of this evidence and the deference due it, the court held that "Congress accurately identified
12 automated telemarketing calls as a threat to privacy," and that "Congress could regulate a portion of
13 these calls without banning all of them." *Id.* at 974. The court of appeals also rejected the contention
14 that the statute was underinclusive. *Id.* (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 50 (1994)).
15 More recently, in *Campbell-Ewald*, 768 F.3d 871, the Ninth Circuit reaffirmed its reasoning
16 in *Moser* and upheld the constitutionality of § 227(b)(1)(A)(iii), the very provision at issue here. The
17 court recognized that *Moser* had rightly treated the TCPA as a content-neutral time, place and manner
18 restriction, 768 F.3d at 876, and further concluded that the Act serves a significant government
19 interest, promoting, at a minimum, the government's interest in protecting privacy. *Id.* at 876–77.
20 The *Campbell-Ewald* court also found § 227(b)(1)(A)(iii) to be narrowly tailored and to leave open
21 ample alternative channels for the communication of information. 768 F.3d at 876–77. Rejecting
22 appellant's contention that "the government's interest only extends to the protection of residential
23 privacy, and that therefore the statute is not narrowly tailored to the extent that it applies to cellular
24 text messages," the court observed that "there [wa]s no evidence that the government's interest in
25 privacy ends at home," but that, "to whatever extent the government's significant interest lies
26 exclusively in residential privacy, the nature of cell phones renders the restriction of unsolicited text
27 messaging all the more necessary to ensure that privacy." *Id.* at 876.
28 In accordance with the Ninth Circuit's decisions, district courts around the country have

unanimously upheld § 227(b)(1)(A)(iii) against First Amendment challenges, each time treating it as content neutral and finding that it is narrowly tailored to addresses concerns about threats to consumer privacy, nuisance to call recipients, and potential costs associated with unsolicited calls made to cellular telephones. *See Wreyford v. Citizens for Transp. Mobility, Inc.*, 957 F. Supp. 2d 1378, 1380 (N.D. Ga. 2013); *Strickler v. Bijora, Inc.*, No. 11 CV 3468, 2012 WL 5386089, at *5–6 (N.D. Ill. Oct. 30, 2012); *Abbas v. Selling Source, LLC*, No. 09 CV 3413, 2009 WL 4884471, at *7–8 (N.D. Ill. Dec. 14, 2009). *See also Joffe*, 121 P.3d at 841–43 (upholding the TCPA in state court).

### B. Nothing in *Reed* Requires This Court To Adopt the Radical Reconception of First Amendment Jurisprudence That Facebook Urges.

This Court may depart from *Moser* and *Campbell-Ewald* only if *Reed* "undercut[s] the theory or reasoning underlying" these precedents "in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). That high bar is not met here because *Reed* dealt with a very different situation than the one presented in those cases, and it did not overrule the precedents on which they rely. The Ninth Circuit's decisions in *Moser* and *Campbell-Ewald* therefore remain binding.

1. Facebook argues that, in light of *Reed*, the TCPA should be viewed as content based and unconstitutional. Facebook points to the TCPA's exception for calls made "for emergency purposes," 47 U.S.C. § 227(b)(1)(A)(iii), and argues that the FCC "has closely scrutinized the content of the messages in order to determine" if this exception applies. Def.'s Mot. 17. According to Facebook, the TCPA's purportedly content-based distinction between emergency and all other calls triggers strict scrutiny. *Id.* at 18. To the contrary, *Reed* did not purport to overrule existing precedent or radically alter First Amendment jurisprudence so as to require 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

1 scrutiny. *Id.*

2 The Supreme Court explained that, in view of its precedent, "Government regulation of
3 speech is content based if a law applies to particular speech because of the topic discussed or the idea
4 or message expressed." *Id.* at 2227 (citing *Sorrell v. IMS Health, Inc*., 564 U.S. 552, 564–65 (2011);
5 *Carey v. Brown*, 447 U.S. 455, 462 (1980); *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95
6 (1972)). It noted that a reviewing court must "consider whether a regulation of speech 'on its face'
7 draws distinctions based on the message a speaker conveys." *Id*. (quoting *Sorrell*, 564 U.S. at 566).
8 The Court observed that "[s]ome facial distinctions based on a message are obvious, defining
9 regulated speech by particular subject matter, and others are more subtle, defining regulated speech
10 by its function or purpose." *Id*. But, either way, "[b]oth are distinctions drawn based on the message
11 a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.*

12 The Town of Gilbert's sign code was facially content based, the Court reasoned, because
13 whether a particular restriction applied "depend[ed] entirely on the communicative content of the
14 sign." *Id.* Consequently, the government's justifications for the code did not alter the appropriate
15 standard of review. *Id.* The Supreme Court dismissed as immaterial the fact that the municipality
16 had not sought to silence disfavored messages, *id.* at 2227–28, and emphasized that the viewpoint
17 neutrality of the regulation did not affect the appropriateness of strict scrutiny, *id.* at 2229–30. In its
18 application of strict scrutiny, the Court assumed for the sake of argument that the Town's two
19 proffered interests — preserving aesthetic appeal and promoting traffic safety — were compelling,
20 but it held that the ordinance failed the tailoring inquiry because its distinctions were "hopelessly
21 underinclusive." *Id.* at 2231.

22 The Court made clear that it was only applying long-settled doctrine, not impliedly overruling
23 generations of First Amendment jurisprudence. *See id.* at 2226–28. The ruling Facebook seeks,
24 however, would fly in the face of that approach. Its expansive interpretation of *Reed* would uproot
25 decades of settled First Amendment case law that *Reed* did not purport to question, and it would
26 unnecessarily threaten important statutes, like the TCPA, that have long been held to be constitutional
27 under the First Amendment, *see Campbell-Ewald*, 768 F.3d; *Moser v. FCC*, 46 F.3d 970. Nothing
28 in *Reed* supports (much less compels) that result; *Reed* does not "undercut the theory or reasoning

1 underlying [*Moser* and *Campbell-Ewald*] in such a way that the cases are clearly irreconcilable,"
2 *Miller*, 335 F.3d at 900, and thus the Act should continue to be subject to — and upheld under —
3 intermediate scrutiny.

4 First, the lines drawn by the TCPA in no way resemble the lines drawn by the ordinance
5 invalidated in *Reed*. The sign code at issue in *Reed* purported to impose general limits on the display
6 of outdoor signs, but was in fact riddled with twenty-three different exemptions. *Reed*, 135 S. Ct. at
7 2224. For example, political signs were subject to one rule, while other "ideological" signs were
8 subject to another, both in terms of size and as to when they were allowed, and "Temporary
9 Directional Signs Relating to a Qualifying Event" were subject to still other requirements. *Id.* at
10 2224–25. Thus, the ordinance in *Reed* was problematic, even under the Court's settled precedents,
11 because it "distinguish[ed] among speech instances that are similarly likely to raise the legitimate
12 concerns to which it responds," which the Supreme Court has taken as a sign that a statute is being
13 put to an "invidious use," *Hill v. Colorado*, 530 U.S. 703, 723–24 (2000). The ordinance aimed to
14 maintain the town's aesthetic appeal and to promote traffic safety, *Reed*, 135 S. Ct. at 2231, but it
15 distinguished between signs (political, ideological, etc.) that seemed equally likely to detract from
16 the town's beauty or add to its traffic, *see, e.g.*, *id.* at 2231–32; *id.* at 2239 (Kagan, J., concurring in
17 the judgment).

18 The TCPA operates in an entirely different fashion. Congress enacted the TCPA "to protect
19 the privacy interests of residential telephone subscribers." S. Rep. No. 102-178, at 1. As a result, as
20 relevant here, the Act prohibits one narrow category of calls (including text messages) to wireless
21 numbers: those made using an automatic telephone dialing system or an artificial or pre-recorded
22 voice and directed at a cell phone belonging to a recipient who has not previously consented to
23 receive the calls. 47 U.S.C. § 227(b)(1)(A)(iii). The statute does not differentiate among calls
24 depending on whether they are ideological, political, or commercial in nature. *Id.*

25 That the TCPA exempts emergency calls does not render the statute content based. It is well
26 established that a municipality can prohibit individuals from ringing the doorbells of unconsenting
27 residents (or using sound trucks to convey an amplified message) after a certain hour, even if that
28 ban limits the hours available for First Amendment activity. *See Hynes v. Mayor of Borough of*

1 *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); *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.[4]

Similarly, were the recently added exception for calls made to collect government-backed debt properly before the Court, it would not render the statute content based because the government frequently subjects its 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 simply acts to protect those who are collecting debts that the government could undoubtedly collect in the same manner itself without running afoul of the First Amendment.

Second, unlike in *Reed*, which involved speech in the most traditional public fora — the

[4] Prior to *Reed*, of course, no one would have thought that an exception for speech made "for emergency purposes" rendered a statute content based. *See Campbell-Ewald*, 768 F.3d at 987, 876–77; *Moser*, 46 F.3d at 972–74. Indeed, the application of the exception turns on the context of an emergency and the resulting urgency that creates the need for an emergency communication. *Reed* should not be read to upset this commonsense understanding.

1 public streets — a court considering the constitutionality of the TCPA must balance an important
2 countervailing factor against First Amendment concerns: the privacy of unwilling listeners. *See,*
3 *e.g.*, *Hill*, 530 U.S. at 714–16; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975); *Lehman*
4 *v. City of Shaker Heights*, 418 U.S. 298, 320 (1974). In *Hill*, the Court highlighted "the significant
5 difference between state restrictions on a speaker's right to address a willing audience and those that
6 protect listeners from unwanted communication." *Id.* at 715–16. It observed that "[t]he recognizable
7 privacy interest in avoiding unwanted communication" is strongest "in the confines of one's own
8 home, or when persons are powerless to avoid it." *Id.* at 716; *see also Rowan v. U.S. Post Office*
9 *Dep't,* 397 U.S. 728, 736 (1970). In contrast to *Reed*, where countervailing concerns about unwilling
10 listeners inside of the home were not present, *see Carey*, 447 U.S. at 460 ("Streets, sidewalks, parks,
11 and other similar public places are so historically associated with the exercise of First Amendment
12 rights that access to them for the purpose of exercising such rights cannot constitutionally be denied
13 broadly and absolutely." (citation and alteration omitted)), the privacy concerns here are significant.
14 The TCPA restricts only calls made and messages sent without consent, *see* 47 U.S.C.
15 § 227(b)(1)(A), and it was enacted to address the same weighty interests that the Court has repeatedly
16 seen fit to balance against a speaker's First Amendment rights, *see Erznoznik*, 422 U.S. at 208.

17 2. The Supreme Court's decision in *Reed* does not alter the analysis for a second reason: this
18 case involves commercial speech, which *Reed* does not address. As Facebook recognizes,
19 commercial speech is subject to a "lower level of scrutiny." Def.'s Mot. 15. And as the Ninth Circuit
20 made clear in *Moser*, this standard of review is "essentially identical" to the intermediate scrutiny
21 standard that has previously been applied to uphold the constitutionality of the TCPA. 46 F.3d at
22 973; *see also Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989). Facebook does not
23 argue that *Reed* alters this analysis. *Reed* concerned signs directing parishioners to the location of a
24 church service, 135 S. Ct. at 2225, and thus the Court had no reason to opine on the protection
25 afforded commercial speech. Courts within and without the Ninth Circuit have recognized that
26 "*Reed* does not concern commercial speech, and therefore does not disturb the framework which
27 holds that commercial speech is subject only to intermediate scrutiny as defined by the *Central*
28 *Hudson* test." *Contest Promotions, LLC v. City & Cty. of S.F.*, No. 15-CV-00093-SI, 2015 WL

4571564, at *4 (N.D. Cal. July 28, 2015); *see also Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1246 (11th Cir. 2015); *CTIA-The Wireless Ass'n v. City of Berkeley, Cal.*, 139 F. Supp. 3d 1048, 1061 (N.D. Cal. 2015); *Cal. Outdoor Equity Partners v. City of Corona*, No. CV 15-03172 MMM AGRX, 2015 WL 4163346, at *9–10 (C.D. Cal. July 9, 2015); *Chiropractors United for Research & Educ., LLC v. Conway*, No. 3:15-CV-00556-GNS, 2015 WL 5822721, at *5 (W.D. Ky. Oct. 1, 2015).

The text messages at issue here are properly considered commercial speech. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–68 (1983) (setting forth commercial speech factors); *see also Dex Med. W. Inc. v. City of Seattle*, 696 F.3d 952, 958 (9th Cir. 2012). Although Facebook's texts are not advertisements in the traditional sense, they plainly reference Facebook's most prominent product — a user account — and explicitly request that the recipient interact with the Facebook platform by posting a message. *Cf. Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1250-51 (N.D. Cal. 2014) (finding plausibly to be advertisements e-mails sent by LinkedIn reminding the recipient that an existing user "would like to connect on LinkedIn," and asking the recipient "How would you like to respond?"). Moreover, Facebook undeniably had an economic motivation for sending the messages. Facebook's business model requires many active users in order to generate revenue through the sale of targeted advertising. *See Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 790 (N.D. Cal. 2011). Inviting a user to post or otherwise interact with its website is thus an explicit attempt to generate revenue by encouraging them "to use the service again." *See, e.g.*, *L.A. Taxi Coop. v. Uber Techs., Inc.*, 114 F. Supp. 3d 852, 864 (N.D. Cal. 2015) (Tigar, J.) (concluding information on a receipt describing Uber's "Safe Rides Fee" was commercial because it ultimately aimed to attract customers)

In short, the speech at issue here is commercial speech subject to the *Central Hudson* framework. And the Ninth Circuit has already upheld § 227(b)(1)(A)(iii) using a form of scrutiny materially indistinguishable from the *Central Hudson* standard that is applied to commercial speech, *see Fox*, 492 U.S. at 477; *Moser*, 46 F.3d at 973. That is yet another reason that Facebook's as-

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applied challenge should fail.[5]

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*Reed* thus does not compel this Court to reach a conclusion contrary to existing Ninth Circuit case law.[6] Intermediate scrutiny, to which the TCPA has traditionally been subjected, is properly

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[5] To the extent that Facebook is raising a facial challenge to the statute, that challenge also fails. Under the First Amendment, there are two circumstances in which facial challenges may succeed. First, a statute is facially unconstitutional if a party can establish "that no set of circumstances exists under which [the challenged statute] would be valid or that the statute lacks any plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472 (2010). As the above analysis shows, Facebook cannot prevail under this test because the TCPA is constitutional in its application to commercial speech. In order to prevail, then, Facebook must proceed under the second test, which requires Facebook to show that the statute is overbroad, such that "a substantial number of its applications are unconstitutional in relation to the statute's plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008). The Supreme Court has emphasized that "the overbreadth doctrine is 'strong medicine' [that should be] employed . . . with hesitation, and then 'only as a last resort.'" *L.A. Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 39 (1999) (citations omitted).

Although the TCPA does not distinguish between commercial and noncommercial speech, a great many of its applications are in fact to commercial speech, like the speech at issue here. Facebook "bears the burden of demonstrating, from the text of [the law] and from actual fact, that substantial overbreadth exists." *Gospel Missions of Am. v. Los Angeles*, 419 F.3d 1042, 1050 (9th Cir. 2005) (citation omitted) (alteration in original). But aside from claiming that its own speech is not commercial — an assertion that is incorrect, as explained above — Facebook makes no attempt to satisfy this burden. Absent such a demonstration, Facebook's overbreadth challenge cannot succeed. *See id.*; *see also Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 802–03 (1984) (refusing to entertain overbreadth challenge where plaintiffs "failed to identify any significant difference between their claim that the ordinance is invalid on overbreadth grounds and their claim that it is unconstitutional when applied to [them]").

[6] Nor do post-*Reed* decisions require a different approach. To be sure, a smattering of courts has used *Reed* to invalidate or enjoin enforcement of various statutes. *See, e.g.*, *Cahaly v. Larosa*, 796 F.3d 399, 402 (4th Cir. 2015) (South Carolina's anti-robocall statute, which singled out, among other things, calls "of a political nature"); *Norton v. City of Springfield, Ill.*, 806 F.3d 411 (7th Cir. 2015) (panhandling ordinance); *Rideout v. Gardner*, 123 F. Supp. 3d 218 (D.N.H. 2015) (a New Hampshire statute that prohibited photographing marked ballots). *But see Citizens for Free Speech, LLC v. Cty. of Alameda*, 114 F. Supp. 3d 952, 969 (N.D. Cal. 2015) (Breyer, J.) (suggesting *Reed*'s application is limited to ordinances that impose "temporal or geographic restrictions on different categories of . . . signs"). But, for the reasons set forth above, the TCPA context is distinct. Insofar as the statute at issue in *Cahaly*, for example, might at first glance seem similar to the TCPA, upon inspection the two bear little resemblance to one another. That statute "prohibit[ed] only those robocalls that [we]re for the purpose of making an unsolicited consumer telephone call or [we]re of a political nature including, but not limited to, calls relating to political campaigns." 796 F.3d at 402. So it too "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.

1 employed here, and binding circuit precedent requires this Court to conclude that the statute readily
2 satisfies that standard of review, *see Campbell-Ewald Co.*, 768 F.3d at 876–77.

3 **IV. THE TCPA SATISFIES STRICT SCRUTINY.**

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

11 Motivated by increasing consumer complaints about telemarketing calls, Congress enacted
12 the TCPA "to protect the privacy interests of residential telephone subscribers." S. Rep. No. 102-
13 178, at 1. The Senate Committee on Commerce, Science, and Transportation, in its report, explained
14 that it "believe[d] that Federal legislation [wa]s necessary to protect the public from automated
15 telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce,
16 and a disruption to essential public safety services." *Id.* at 5. The House Committee on Energy and
17 Commerce likewise concluded that "all too frequently [unsolicited telemarketing] represents more
18 of a nuisance than an aid to commerce." H.R. Rep. No. 102-317, at 18 (1991).

19 Congress made extensive findings before it legislated and included those findings in the Act.
20 Congress explained that "[t]he use of the telephone to market goods and services to the home and
21 other businesses is now pervasive due to the increased use of cost-effective telemarketing
22 techniques." Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(1), 105 Stat.
23 2394, 2394 (1991) (codified at 47 U.S.C. § 227 Note). At the time, Congress explained, more than
24 30,000 businesses actively directed telemarketing to business and residential customers; more than
25 300,000 solicitors called over 18 million Americans daily; and total United States sales generated
26 through telemarketing totaled $435 billion in 1990, more than four times the total for 1984. *Id.*
27 § 2(2)–(4). Automated dialing and calling systems, combined with falling long distance telephone
28 rates, made it inexpensive for companies to engage in these practices. *See* S. Rep. No. 102-178, at

1 2, 4. But, Congress observed, unrestricted telemarketing could "be an intrusive invasion of privacy
2 and, when an emergency or medical assistance telephone line is seized, a risk to public safety." Pub.
3 L. No. 102-243, § 2(5). Indeed, "[m]any consumers [we]re outraged over the proliferation of
4 intrusive, nuisance calls to their homes from telemarketers." *Id.* § 2(6). And, although many states
5 "ha[d] statutes restricting various uses of the telephone for marketing . . . telemarketers c[ould] evade
6 their prohibitions through interstate operations," necessitating federal legislation. *Id.* § 2(7).

7 Congress thus explained that "[i]ndividuals' privacy rights, public safety interests, and
8 commercial freedoms of speech and trade must be balanced in a way that protects the privacy of
9 individuals and permits legitimate telemarketing practices." *Id.* § 2(9). Evidence compiled by
10 Congress "indicate[d] that residential telephone subscribers consider[ed] automated or prerecorded
11 telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an
12 invasion of privacy." *Id.* § 2(10). These automated calls were considered to be "more of a nuisance
13 and a greater invasion of privacy than calls placed by 'live' persons." S. Rep. No. 102-178, at 4.
14 Consequently, Congress determined that "[b]anning such automated or prerecorded telephone calls
15 to the home, except when the receiving party consents to receiving the call or when such calls are
16 necessary in an emergency situation affecting the health and safety of the consumer, is the only
17 effective means of protecting telephone consumers from this nuisance and privacy invasion." Pub.
18 L. No. 102-243, § 2(12). In keeping with its aim to limit calls that were considered a nuisance or
19 invasion of privacy, Congress further concluded that "the Federal Communications Commission
20 should have the flexibility to design different rules for those types of automated or prerecorded calls
21 that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls,
22 consistent with the free speech protections embodied in the First Amendment of the Constitution."
23 *Id.* § 2(13).

24 It is with good reason, therefore, that Facebook assumes for the sake of argument that the
25 TCPA was motivated by a compelling government interest. Def.'s Mot. 19. The Supreme Court has
26 repeatedly emphasized that the government's profound interest "in protecting the well-being,
27 tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."
28 *Carey*, 447 U.S. at 471; *see also Ward*, 491 U.S. at 796; *Rowan*, 397 U.S. at 738; *Nat'l Coal. of*

*Prayer, Inc. v. Carter*, 455 F.3d 783, 790 (7th Cir. 2006). And the Ninth Circuit has made clear that such an interest is directly furthered by the regulation of calls and texts directed at cell phones, reasoning in *Campbell-Ewald* that "the nature of cell phones renders the restriction of unsolicited text messaging all the more necessary to ensure [residential] privacy." 768 F.3d at 876. After all, the court explained, most cellular users likely keep their phones with them at home, and, in fact, in many households have replaced landlines with cell phones. *Id.* at 876–77. "As a consequence, prohibiting automated calls to land lines alone would not adequately safeguard the stipulated interest in residential privacy." *Id.* at 877. The Court should thus recognize as compelling the government's interest in protecting residential privacy.

Section 227(b)(1)(A)(iii) is also narrowly tailored. As with other provisions upheld under strict scrutiny, § 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 artificial voice to make calls or send text messages, and only where the recipient has not consented to receive the communication. There is not a single message that a speaker is prohibited from disseminating; instead, only the manner in which a message is communicated is regulated. *Cf. id.* (Florida's "Canon 7C(1) leaves judicial candidates free to discuss any issue with any person at any time."). A message like Facebook's status update texts could be communicated via Facebook's own messaging system, a text sent by other means, or an e-mail. Facebook could also send alerts through its mobile application. 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, *see* H.R. Rep. No. 102-317, at 5, 10; S. Rep. No. 102-178, at 4–5, and no more.

Similarly, the emergency exception itself, to which Facebook points as a reason the TCPA must be considered content based, is narrowly tailored to serve a compelling interest. Importantly, it was 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. Lafley*, 656 F.3d 936, 940–41 (9th Cir. 2011) (recognizing the

government's compelling interest in protecting the health and safety of prison inmates). 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).[7]

Facebook nevertheless maintains that, even if a compelling government interest is furthered when the TCPA is used to impose liability for spam text advertisements, the application of the statute to its status update notifications would render it overinclusive, reaching "messages well outside the scope of Congress's concern, such as notifications that people who signed up for those accounts actually want to receive." Def.'s Mot. 20. But, as explained above, Congress was concerned with protecting individuals' privacy by banning autodialed calls and texts to which they did not consent. To the extent that those receiving the text messages "actually want to receive" the status notifications, Facebook should have no trouble obtaining consent, which would place its messages beyond the reach of the statute. As Facebook has not argued that Plaintiff consented to the messages at issue here, however, application of the TCPA would not extend the scope of the statute beyond the concerns motivating Congress.

Finally, the "less restrictive alternatives" Facebook proposes are not viable substitutes for the TCPA's restrictions. 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 Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) (explaining that a burden on speech is "unacceptable if less restrictive alternatives would be *at least as effective* in achieving the legitimate purpose that the statute was enacted to serve" (emphasis added)). Similarly, while mandatory disclosure of the

[7] Even if it could be properly considered here, the government-debt exception would also withstand strict scrutiny. In providing an exception for entities acting to recover funds guaranteed by the United States, the exception serves the government's compelling interest in protecting the public fisc. *See Valot v. Southeast Local School Dist. Bd. of Educ.*, 107 F.3d 1220, 1227 (6th Cir. 1997) ("Protecting the public fisc ranks high among the aims of any legitimate government."). The exception's application only to those attempting to collect on debts owed to or guaranteed by the United States is evidence of its narrow tailoring to further that interest.

caller's identity may allow an individual to identify the caller or texter, such regulation does not prevent the call or text from intruding on the individual's privacy. Finally, a do-not-call list would merely switch the onus from callers who, under the current Act, can avoid TCPA liability by gaining consent, to the recipient, who, under Facebook's proposal, would have to affirmatively opt out of receiving calls. In the end, the statute would still reach the same amount of speech.

## CONCLUSION

For the foregoing reasons, should the Court reach the question, it should conclude that § 227(B)(1)(A)(iii) is constitutional.

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Respectfully submitted,

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