CASE NO.: 18-80031

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEVE GALLION,

PLAINTIFF-RESPONDENT,

V.

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

CHARTER-PETITIONERS.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
CIVIL CASE NO.: 5:17-CV-01361-CAS-KKX

STEVE GALLION'S OPPOSITION TO CHARTER'S PETITION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(B)

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Respondent-Plaintiff STEVE GALLION ("Gallion") hereby files the following Answer in Opposition to Petitioner-Charter CHARTER COMMUNICATIONS, INC. and SPECTRUM MANAGEMENT HOLDING COMPANY, LLC's ("Charter") request for leave to file an interlocutory appeal from the Honorable Christina A. Snyder's February 26, 2016 Order pursuant to 28 U.S.C. § 1292(b).

I. INTRODUCTION

The Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* ("TCPA") is "aimed at protecting recipients from the intrusion of receiving unwanted communications." *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 2007 U.S. Dist. LEXIS 11650, *11 (W.D. Wash. Feb. 16, 2007). That is exactly the type of conduct at issue in this case, and the type of conduct that the Honorable District Court upheld as being rendered unlawful by the valid and constitutional TCPA statute at issue in this purported appeal. As the Supreme Court has recognized, the statute reflects Congress's findings that that consumers are outraged over the proliferation of automated telephone calls and that these intrusive, nuisance calls are an invasion of privacy. *See Mims v. Arrow Fin. Servs. LLC*, 565 U.S. 368, 370 (2012). Congress enacted the TCPA in 1991 amidst an unprecedented increase in the volume of

telemarketing calls to consumers in America. The TCPA directly combats the threat to privacy caused by such automated marketing practices.[1]

Charter filed a Motion for Judgment on the Pleadings that did not contest Gallion's claims that Charter made precisely such intrusive and invasive telemarketing calls to thousands of individuals such as Gallion without their permission or consent. Instead, Charter's Motion facially attacked the constitutionality of the statute specifically directed at the conduct that gave rise to this cause of action—a statute that has already been held to be constitutional by the Ninth Circuit *twice*. In fact, there is unanimous agreement among the federal courts that the TCPA is constitutional, and not a single decision that has been issued to date of which Gallion is aware, where a court found the TCPA to be unconstitutional.

[1] *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (observing that the "TCPA was enacted in response to an increasing number of consumer complaints arising from the increased number of telemarketing calls," and that "consumers complained that such calls are a 'nuisance and an invasion of privacy.'"). The Federal Communications Commission ("FCC") confirmed in 2003 that "telemarketing calls are even more of an invasion of privacy than they were in 1991," and "we believe that the record demonstrates that telemarketing calls are a substantial invasion of residential privacy, and regulations that address this problem serve a substantial government interest." *Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, 18 F.C.C.R. 14014 (2003), F.C.C. Comm'n Order No. 03-153, modified by 18 F.C.C.R. 16972.

Charter's Appeal offers no legitimate basis to overturn the District Court's common sense Order. Charter seeks to characterize a single, valid exception to the TCPA as if it generated a "patchwork of content- and speaker-based restrictions on speech." However, it is well established, including by binding Ninth Circuit precedent, that the government may make content-based distinctions among different commercial messages without subjecting its regulations to strict scrutiny. And even more damaging to Charter's argument is that the Ninth Circuit has already held the TCPA to be a restriction on the methods by which messages may be disseminated, not a restriction on the contents of the messages. In fact, the Ninth Circuit has already effectively rejected Charter's fundamental contention that a narrow exception to the TCPA's time, place or manner restriction for particular types of calls suffices to make it a content-based law subject to strict scrutiny. In sum, there is no split in authority on any of the issues raised in Charter's brief. It is simply asking the Ninth Circuit revisit longstanding holdings, under the guise of a recent amendment to the TCPA which does not even impact the issues in the case at bar.

Charter tries to squeeze between binding Ninth Circuit decisions at every turn, but these issues have already been decided against Charter. Even the few district courts that have been swayed by similar arguments that the

TCPA must now be viewed as content-based have upheld its constitutionality even under strict scrutiny. No court has done what Charter seeks on appeal. Despite all of this, Charter invites the Honorable Ninth Circuit to go rashly where no court has gone before. As discussed below, none of the alleged "errors" meet the heightened standards for interlocutory review. Thus, Charter's petition should be denied.

II. STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 1292(b),

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order...That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Certification for an interlocutory appeal is only warranted if the Court determines that (i) there are substantial grounds for a difference of opinion; (ii) the issue to be appealed involves a controlling question of law; and, (iii) an immediate appeal of the issue may materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 1292(b); *VIA Techs., Inc. v. SonicBlue Claims, LLC*, 2011 WL 2437425, at *1 (N.D. Cal. June 17, 2011) (citing *In re Cement Antitrust Litig.*, 673 F.2d at 1026); *Dynamic Random*

Access Memory Antitrust Litigation, 2008 U.S. Dist. LEXIS 118398, at *31-32 (N.D. Cal. March 28, 2008) (Hamilton, J.).

Section 1292(b) is 'to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation.'" *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). As "[t]he requirements of § 1292(b) are jurisdictional," the statutory prerequisites for granting certification must be met before an appeal can be heard. *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). The party seeking review of the district court's order has the burden of showing that the statutory prerequisites exist. *See Assn'n of Irritated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1087 (2008); and, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). Moreover, as Section 1292(b) provides "a departure from the normal rule that only final judgments are appealable," it "must be construed narrowly." *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n. 6 (9th Cir. 2002). Interlocutory appeal is "applied sparingly and only in exceptional cases." *United States v. Woodbury*, 263 F.3d 784, 788 n.11 (9th Cir. 1959).

III. ARGUMENT

Charter presents the following question on appeal: "whether the TCPA, as a content-based regulation of speech, survives strict scrutiny." Charter's Petition, page 5.

However, Charter fails to adequately acknowledge the actual test under applicable procedure for interlocutory review. First, there is no substantial grounds for a difference of opinion on this issue. Not a single court to date has agreed with the position being advanced by Charter. Second, the Ninth Circuit already decided this issue in the case of *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995), and upheld the ruling in *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014). Charter has presented no compelling reason that the Ninth Circuit's Orders need be disturbed.

While there is a controlling question of law at issue couched within Charter's request for permission to appeal, it is not a question that requires the Ninth Circuit's input, especially given that the Ninth Circuit is already reviewing this issue. *See Brickman v. Facebook, Inc.*, No. 17-80080 (9th Cir. Aug. 17, 2017), and *Holt v. Facebook, Inc.*, No. 17-80086 (9th Cir. Aug. 17, 2017). An appeal of this case would simply prolong Mr. Gallion's case, and

the rights of the class he seeks to represent, which is Charter's ultimate goal. Accordingly, Charter's Motion should be denied.[2]

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1. THE 2015 FCC AMENDMENT DOES NOT INVALIDATE THE REASONING OR APPLICATION OF *MOSER*

Despite statements to the contrary, Charter asserts that there exists "a significant unsettled question concerning the impact of the 2015 Amendment to the TCPA, on longstanding precedent in the Ninth Circuit and elsewhere. The precedent should not be disturbed, and therefore, an appeal would be fruitless. As a starting point, in *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995), the Ninth Circuit explained:

> Congress held extensive hearings on telemarketing in 1991. Based upon these hearings, it concluded that telemarketing calls to homes constituted an unwarranted intrusion upon privacy. The volume of such calls increased substantially with the advent of automated devices that dial up to 1,000 phone numbers an hour and play prerecorded sales pitches. S .Rep. No. 102–178, 102d Cong., 1st Sess. (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970. By the fall of 1991, more than 180,000 solicitors were using automated machines to telephone 7 million people each day. *Id.*
>
> In addition to the sheer volume of automated calls, Congress determined that such calls were "more of a nuisance and a greater

[2] Charter's numerous references to the 2015 FCC Order are rendered moot by the ACA Appeal, which was just decided last week. *See ACA International et. al. v. FCC et. al.*, Case No. 15-1211 (D.C. Cir. Mar. 16, 2018). Accordingly, Gallion ignores these arguments as they are largely irrelevant at this stage to the Motion at bar.

> invasion of privacy than calls placed by 'live' persons" because such calls "cannot interact with the customer except in preprogrammed ways" and "do not allow the caller to feel the frustration of the called party...." *Id.* at 1972. Customers who wanted to remove their names from calling lists were forced to wait until the end of taped messages to hear the callers' identifying information. Prerecorded messages cluttered answering machines, and automated devices did not disconnect immediately after a hang up. Id. at 1972. In a survey conducted for a phone company, 75 percent of respondents favored regulation of automated calls, and half that number favored a ban on all phone solicitation. *Id.* at 1970. Although 41 states and the District of Columbia have restricted or banned intrastate automated commercial calls, many states asked for federal legislation because states may not regulate interstate calls. *Id.*

Id. at 972. To combat such intrusive calls, the TCPA was enacted making it unlawful, in relevant part:

> (A) 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—. . .
>
> (iii) 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.SC. §227(b)(1)(A)(iii); *see also Moser*, 46 F.3d at 972; *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876 (9th Cir. 2014) (holding that "there is no evidence that the government's interest in privacy ends at home..."), *aff'd on other grounds*, 136 S. Ct. 663 (2016).

In upholding the TCPA against a First Amendment challenge, the Ninth Circuit held that the TCPA "… should be analyzed as a content-neutral time, place, and manner restriction." *Moser*, 46 F.3d at 973. Applying the constitutional standards applicable to such restrictions, the Ninth Circuit found the statute constitutional because "the restrictions are justified without reference to the content of the restricted speech… they are narrowly tailored to serve a significant governmental interest, and … they leave open ample alternative channels for communication of the information." *Id.* at 973 (internal quotation marks and citations omitted). The court "upheld the statute after finding that the protection of privacy is a significant interest, the restriction of automated calling is narrowly tailored to further that interest, and the law allows for 'many alternative channels of communication.'" *Gomez*, 768 F.3d at 876 (quoting *Moser*, 46 F.3d at 974-75).

Moser remains authoritative. Even if the Charter were correct that there is a legitimate dispute as to whether courts should ignore the application of the statute to commercial speech and allow a facial challenge to proceed under standards applicable to fully protected speech, Charter's arguments would fail. Charter's assertion that the TCPA is a content-based restriction on speech subject to strict scrutiny was rejected by the Ninth Circuit in *Moser*, 46 F.3d at 973–74, a decision reaffirmed by the Ninth Circuit in *Campbell-Ewald*, 768

F.3d at 876–77. As the Court held in those cases, the TCPA prohibition on unconsented to calls using automated dialing systems or prerecorded voices is a restriction on the methods by which messages may be disseminated, not the contents of the messages. It is therefore subject to review under the intermediate scrutiny applicable to content-neutral time, place or manner restrictions, under which it need only directly serve a substantial government interest. *See Moser*, 46 F.3d at 973; *Campbell-Ewald*, 768 F.3d at 876. As the Ninth Circuit concluded in both *Moser* and *Campbell-Ewald*—and as every other court to address the subject has agreed—the TCPA's protection of the interest in the privacy of residential and mobile telephone users easily satisfies that standard. *See Moser*, 46 F.3d at 974–75; *Campbell-Ewald*, 768 F.3d at 876–77.

Charter contends that those Ninth Circuit decisions are no longer binding on this Court because of one intervening change in the statute (the 2015 addition of the exception for federal debt collection calls) as well as recent Supreme Court cases (in particular, *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015)) addressing the distinction between content-based and content-neutral laws.[3] Those developments, however, do not relieve this Court of its

[3] Charter argues weakly that the TCPA's provision allowing the FCC to provide for additional exceptions by regulation also makes it content-based. But the Ninth Circuit concluded in *Moser* that that provision is not content-

obligation to follow on-point precedents of the Ninth Circuit. Whether intervening developments effectively overrule or supersede the court of appeals' precedents is typically a decision for the court of appeals itself to make en banc, not for district courts. *See Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012). Circuit precedent remains binding as long as it "can be reasonably harmonized with the intervening authority." *Id*. Applying that standard, another district court recently concluded that the analytical approach to identifying content-neutral time, place or manner restrictions reflected in the Ninth Circuit's decisions in *Moser* and *Campbell-Ewald* remains authoritative within this Circuit. *Gresham v. Picker*, 214 F. Supp. 3d 922, 933–34 (E.D. Cal. 2016).[4]

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based on its face, and that the validity of particular exceptions created by the FCC is outside the purview of a district court considering a constitutional challenge to the statute because FCC regulations implementing the TCPA may be challenged only in judicial review proceedings in a court of appeals. *See* 46 F.3d at 973. Charter point to no intervening circumstances that have affected the validity of the Ninth Circuit's ruling on that point, and recent decisions have uniformly held that the FCC's exemption authority cannot be considered as a factor rendering the statute content-based. *See, e.g.*, *Brickman*, 230 F. Supp. 3d at 1045; *Greenley v. Laborers' International Union of North America*, __ F. Supp. 3d __, 2017 WL 4180159, at *13 (D. Minn. Sept. 19, 2017).

[4] *Gresham* concerned California's TCPA analogue that, with specified exceptions, prohibits unconsented-to calls using "automatic dialing-announcing devices." The Ninth Circuit upheld that statute in *Bland v. Fessler*, 88 F.3d 729 (1996), concluding that the statute's exceptions did not render it content-based and employing the same time, place or manner analysis applied in *Moser*. *See id.* at 734–34. *Gresham* held that *Bland*'s approach remains

Indeed, *Moser* and *Campbell-Ewald* already rejected Charter's fundamental contention that a narrow exception to the TCPA's time, place or manner restriction for particular types of calls suffices to make it a content-based law subject to strict scrutiny. At the time of both decisions, the TCPA already included an emergency-call exception, *see Moser*, 46 F.3d at 972, and the Ninth Circuit did not find that that exception took the TCPA outside the realm of content neutrality, even though Charter's argument would appear to imply that the emergency exception also is a "content-based" one. Moreover, in deciding *Campbell-Ewald*, the Ninth Circuit already had the benefit of the Supreme Court's definition of "content-based" in *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 565 (2011), which *Reed* merely reiterated, *see* 135 S. Ct. at 2227.

This Court has no basis for concluding, therefore, that the Ninth Circuit would regard *Moser* and *Campbell-Ewald* to be superseded by *Reed* to the extent that they held the TCPA to be content-neutral notwithstanding the emergency exception. Nor can the Court conclude that the subsequent addition of one more narrow exception to the statute would alter that conclusion. The exceptions do nothing to change the court of appeals' correct

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binding on courts in the Ninth Circuit after *Reed*. *See* 214 F. Supp. 3d at 933–34.

view that the statute is, fundamentally, a restriction on *how* a speaker may convey a message, not the content of the message itself.

A. THE GOVERNMENT-DEBT-COLLECTION EXCEPTION DOES NOT MAKE THE TCPA "CONTENT-BASED"

Even if narrow exceptions to an otherwise content-neutral time, place or manner restriction could suffice to render the entire scheme content-based if they rested on the contents of the messages subject to the exception, the exception on which the Charter rely would not do so because it is not genuinely content-based: It does not single out particular messages, or types of messages, for preferential treatment based on their content. Rather, the government debt collection exception is more properly viewed as based on the existence of a relationship between two parties—a federal government creditor and a debtor—that justifies creation an implied-in-law consent to the placement of a call, rather than as a regulation of the specific message of a call. *See Mey v. Venture Data, LLC*, 245 F.Supp.3d 771, 792 (N.D. W. Va. 2017). For the same reason, courts, including the Ninth Circuit, that have considered statutes that have similar relationship-based exceptions have rejected the argument that they are content-based both before and after *Reed*. *See Bland v. Fessler*, 88 F.3d 729, 733-34 (9th Cir. 1996); *Gresham v. Picker*, 245 F. Supp. 3d at 933–34; *see also Gresham v. Swanson*, 866 F.3d 853, 855–

56 (8th Cir. 2017); *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 305 (7th Cir. 2017); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1550 (8th Cir. 1995). The TCPA's government-debt-collection exception does not privilege a particular message or speaker, but a particular debtor-creditor relationship, one between a borrower and the federal government. There is nothing suspect about laws granting preferential treatment to the federal government as creditor: There are a host of such laws, including laws making such debts non-dischargeable in bankruptcy and allowing means of collection not available to other creditors. The advantages they confer on the government as compared to other creditors do not implicate First Amendment values.[5]

Based upon the above, Charter's Petition should be denied since the 2015 Amendment to the TCPA has no effect upon the ruling in *Moser*. Thus, *Moser* remains the law in the Ninth Circuit.

2. THERE ARE NOT GROUNDS FOR A SUBSTANTIAL DIFFERENCE OF OPINION.

Charter's argument that substantial grounds for a difference of opinion exist is seriously flawed for two reasons: 1) pursuant to the discussion above, binding Ninth Circuit authority controls; and, (B) as discussed below, there is

[5] Likewise, the application of the emergency exception rests not on what the message says, but on the circumstances that give rise to the message. It does not reflect a governmental effort to regulate the content of emergency messages.

no substantial difference of opinion in how courts have analyzed the constitutionality of the TCPA post-Amendment and Post *Reed*.

A. Charter's Reliance on *Reed* and *Cahaly* Is Misplaced

Charter's claim that the exception renders the law content-based rests principally on *Reed* and on a single decision of the Fourth Circuit concerning a statute materially different from the TCPA. *Reed* concerned not a generally applicable time, place, or manner restriction with two narrow exceptions, but a municipal sign code that pervasively defined applicable rules based entirely on the contents of particular types of signs. 135 S. Ct. at 2227. The sign code's thoroughgoing reliance on a sign's content to determine the restrictions to which it was subject bore no resemblance to the TCPA's broad and neutral restriction on unconsented-to calls using particular technologies.

Charter's reliance on the Fourth Circuit's decision in *Cahaly v. Larosa*, 796 F.3d 399 (2015), is equally misplaced. Leaving aside that a decision of another circuit cannot serve as a permissible basis for a district court in the Ninth Circuit to disregard binding precedents of its own court of appeals, the statute at issue in *Cahaly* was so radically different from the TCPA that the contrast serves only to emphasize the content-neutrality of the TCPA.

Cahaly involved a South Carolina statute that prohibited two types of unconsented-to "robocalls" defined by their contents: those with consumer

messages and those with political messages. 796 F.3d at 402. The statute permitted all other messages. Thus, as the Fourth Circuit put it, "South Carolina's anti-robocall statute [was] content based because it ma[de] content distinctions on its face." *Id*. at 405. In *Reed*'s terms, it "applie[d] to particular speech because of the topic discussed or the idea or message expressed." *Id.* (quoting *Reed*, 135 S. Ct. at 2227. Specifically, "the anti-robocall statute applie[d] to calls with a consumer or political message but d[id] not reach calls made for any other purpose." *Id*. Notably, the statute distinguished one type of speech subject to the highest degree of First Amendment protection—political speech—from all other forms of fully protected speech, including charitable solicitations. The Fourth Circuit accordingly applied strict scrutiny to affirm an injunction against the application of the statute to a political speaker whose fully protected speech was singled out for prohibition based on its political content. *See id*. at 403–05.

The TCPA could hardly be more different. Its prohibition on unconsented-to calls does not apply to particular speech "because of the topic discussed or the idea or message expressed." It broadly applies to messages of all types, subject only to narrow exceptions. *Cahaly*'s condemnation of a statute that facially singles out political speech for regulation thus has no application to the TCPA. Not surprisingly, then, no court has applied *Cahaly*

to find the TCPA or similar statutes regulating unconsented-to calls using autodialing technology or recorded voices violates the First Amendment. In sum, *Cahaly* involves a completely different statute than the TCPA, and thus provides no basis to conclude that there is a substantial difference in opinion as to how courts would decide the constitutionality of the TCPA, which is all that matters in the motion at bar.

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B. Courts Nationwide Have Uniformly Uphgeld the TCPA as Constitutional

In addition to *Moser* and *Campbell-Ewald* discussed *supra*, all of the more recent court decisions on the constitutionality of the TCPA have squarely upheld the decision, again reinforcing the notion that there is no substantial difference of opinion as to whether the TCPA is constitutional. The basic reason for these unanimous holdings is because the interest in protecting the privacy of telephone users against unwanted intrusions is compelling is impossible to deny. The TCPA was enacted because of consumer outrage against such breaches of privacy, and it reflected congressional findings that technological advances had subjected consumers to ever-increasing volumes of the unwanted demands on their time and attention inherent in such calls. The Supreme Court recognized the importance and legitimacy of the interests that prompted the enactment of the statute in

Mims v. Arrow Financial Services, 565 U.S. 368 (2012). As the Court explained, "'[A]utomated or prerecorded telephone calls' made to private residences, Congress found, were rightly regarded by recipients as 'an invasion of privacy.'" *Id*. at 372 (quoting 105 Stat. 2394, note following 47 U.S.C. § 227). The structure of the TCPA, *Mims* concluded, made "evident" the "federal interest in regulating telemarketing to 'protec[t] the privacy of individuals' while 'permit[ting] legitimate [commercial] practices.'" *Id*. at 383 (quoting 105 Stat. 2394, note following 47 U.S.C. § 227).

Following this strong policy, courts have upheld the TCPA even after *Reed* and the recent Amendment to the TCPA. For instance, several recent decisions have concluded that the approach underlying *Moser* and *Campbell-Ewald* decisions remains binding circuit law in the wake of the Supreme Court precedents Charter invoke. *See Gresham v. Picker*, 214 F. Supp. 3d 922 (E.D. Cal. 2016); *Bland v. Fessler*, 88 F.3d at 733–34; *Gresham v. Swanson*, 866 F.3d 853, 855–56 (8th Cir. 2017); *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 305 (7th Cir. 2017); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1550 (8th Cir. 1995).

While a handful of courts that have accepted the invitation to subject the TCPA to strict scrutiny, all of them have unanimously held that it is constitutional because it is narrowly tailored to serve the compelling interest

in protecting the privacy of telephone users. *See, e.g.*, *Brickman v. Facebook, Inc.*, 230 F. Supp. 3d 1036, 1046 (N.D. Cal. 2017). For instance, courts that have considered the question have been unanimous in their agreement that the privacy interests identified by Congress and the Supreme Court in *Mims* as the basis for the TCPA's restrictions on unconsented-to calls are compelling. *See Greenley*, 2017 WL 4180159, at *13; *Mejia v. Time Warner Cable, Inc.*, 2017 WL 3278926, at *16 (S.D.N.Y. Aug. 1, 2017); *Holt v. Facebook, Inc.*, 240 F. Supp. 3d 1021, 1033 (N.D. Cal. 2017); *Brickman*, 230 F. Supp. 3d at 1046. As these courts have recognized, there is no serious dispute that "[t]he TCPA serves a compelling government interest." *Mejia*, 2017 WL 3278926, at *16. Indeed, the interest in protecting personal tranquility and privacy "is certainly of the highest order in a free and civilized society." *Brickman*, 230 F. Supp. 3d at 1046 (quoting *Carey v. Brown*, 447 U.S. 455, 471(1980); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 775 (1994); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995)). And the interest is as applicable to cell phones as to traditional residential phones, given the ubiquity of cell phones and their use in homes as well as other locations. *See Campbell-Ewald*, 768 F.3d at 876–77. "No one can deny the legitimacy of the [TCPA's] goal: Preventing the phone (at home

or in one's pocket) from frequently ringing with unwanted calls." *Greenley*, 2017 WL 4180159, at *13 (quoting *Patriotic Veterans*, 845 F.3d at 305).

The unanimous agreement among the federal courts that the TCPA is constitutional rests on solid legal grounds and has even received the full backing of the United States Department of Justice.[6] What is important to the Motion at bar is not whether the Ninth Circuit agrees with Gallion's view of the law surrounding the TCPA and its constitutionality, but rather that the Ninth Circuit surveys the case law surrounding this constitutional doctrine as applied to the current landscape of the TCPA and sees that there simply aren't any cases supporting Charter's view. That alone warrants a denial of the interlocutory review request, because there can be no substantial difference of opinion where all courts agree. Thus, Charter's Petition should be denied.

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[6] The Justice Department, as in this case, has regularly filed briefs supporting the constitutionality of the TCPA against challenges identical to Charter's, most recently in *Sliwa v. Bright House Networks, LLC*, No. 2:16-cv-00235-JES-MRM, Doc. 113 (M.D. Fla., filed Nov. 2, 2017).

IV. CONCLUSION

Gallion respectfully requests that the Court deny Charter's petition for an interlocutory appeal of Judge Snyder's February 26, 2018 Order.

Dated: March 19th, 2018

Respectfully Submitted,

BY: /s/ Todd M. Friedman
TODD M. FRIEDMAN
ADRIAN R. BACON
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I, Todd M. Friedman, certify that on March 19th, 2018, the Opposition to Defendant's Petition Requesting Permission to Appeal, was e-filed through the CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF system sends an email notification of the filing to the parties and counsel of record listed above who are registered with the Court's EMC/ECF system. A copy of the e-filed documents were sent, via the EMC/ECF system:

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