UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

J.T. HAND, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

BEACH ENTERTAINMENT KC, LLC, d/b/a SHARK BAR,

THE CORDISH COMPANIES, INC.

ENTERTAINMENT CONSULTING INTERNATIONAL, LCC

Defendants.

Case No.: 4:18-cv-00668-NKL

DEFENDANTS' RESPONSE SUGGESTIONS IN OPPOSITION TO THE UNITED STATES OF AMERICA'S SUGGESTIONS IN SUPPORT OF THE CONSTITUTIONALITY OF THE TELEPHONE CONSUMER PROTECTION ACT OF 1991

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Defendants[1] respectfully submit this opposition to the United States of America's (the "Government") Suggestions in Support of the Constitutionality of the Telephone Consumer Protection Act of 1991 (Dkt. 103) (the "Govt. Br.") and state:

INTRODUCTION

The Government's arguments as to the constitutionality of the TCPA fail for several reasons. As to the First Amendment challenge, the Government contends that the TCPA's distinctions are relationship, not content, based such that they do not trigger strict scrutiny review. But numerous courts, including two Circuit Courts of Appeals, have specifically rejected the argument that the ATDS restrictions are content-neutral. The same result for the do-not-call restrictions is compelled by Supreme Court precedent clarifying that statutes are subject to strict scrutiny where speaker-based preferences reflect content-based preferences. These content-based restrictions fail strict scrutiny review. Moreover, the Government's position that the ATDS restrictions should be severed conflicts with Congressional intent for them to work in tandem with the exceptions, Supreme Court precedent, and prudential concerns. Because the Government relies on its same unavailing arguments opposing Defendants' First Amendment challenge in response to Defendants' Equal Protection challenge, the Government's argument fails on that front, too. Finally, the Government's own cited authorities buttress Defendants' vagueness challenge to the statutory ATDS definition. This Court should invalidate the TCPA entirely.

[1] Terms not defined herein maintain the meanings defined in Defendants' moving and reply briefs.

ARGUMENT

I. THE TCPA VIOLATES THE FREE SPEECH CLAUSE

A. The ATDS Restrictions Render the TCPA Unconstitutional

1. *The ATDS restrictions are content based and subject to strict scrutiny*

The Government's argument that the TCPA is not subject to strict scrutiny review because the exemptions are based on who is speaking as opposed to what the speaker says is meritless. (Govt. Br. 6-8.) Speaker-based distinctions trigger strict scrutiny when "the legislature's speaker preference reflects a content preference." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015). As the Supreme Court has cautioned, "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.* (quoting *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010)). This is the case with the TCPA.

"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. An "obvious" example of a content-based regulation is one that "defin[es] regulated speech by particular subject matter." *Id.* The government-debt exception fits squarely within that definition: it 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). Thus whether one will be penalized turns solely on the content of what the person says. A person will not be punished for discussing the collection of government-backed debt, but the person will be punished if he changes the "topic discussed" from that collection. Because whether a call qualifies under the exception depends on what the caller says to the called party, the statute clearly "draws distinctions based on the [call's] communicative content." *Reed*, 135 S. Ct. at 2228.

The government resists this, arguing that the government-debt exception is a "primarily

relationship-based exception" because it turns "principally on the relationship between two parties." (Govt. Br. 8-10.) This simply has no basis in law or the statutory text. "It is obvious from the text that the debt-collection exception's applicability turns entirely on the content of the communication—*i.e.*, whether it is 'solely to collect a debt owed to or guaranteed by the United States.' The identity and relationship of the caller are irrelevant." *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1153 (9th Cir. 2019) (citation omitted). The provision exempts any "call . . . made solely to collect a debt owed to or guaranteed by the United States," regardless of who makes that call—a government employee, a private person on behalf of the government, or anyone else as long as the "topic discussed" is government-debt collection. Conversely, even someone with the particular "relationship" the Government identifies in its hypothetical—a private debt-collector working to collect government-backed debt (Govt. Br. 9)—would only be exempted from liability because the subject matter of the call is the "collect[ion of] a debt owed to" the government. "Some 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." *Reed*, 135 S. Ct. at 2227. The cases the Government relies on reinforce the distinction between the government-debt exception and the "relationship-based" exception the Government argues.

For example, *Van Bergen v. State of Minnesota*, 59 F.3d 1541 (8th Cir. 1995), and *Patriotic Veterans Inc. v. Zoeller*, 845 F. 3d 303 (7th Cir. 2017), addressed state statutes with the type of exemptions *not* found in the TCPA. Both statutes exempted: (1) "[m]essages *from* school districts *to* students, parents, or employees"; and (2) "[m]essages *to* subscribers with whom the caller has a current business or personal relationship." *Van Bergen*, 59 F.3d at 1546; *Zoeller*, 845 F. 3d at 304 (emphasis added). As the Eighth and Seventh Circuits recognized, these exemptions—unlike the TCPA's—address only "who may be called, not what may be said." *Zoeller*, 845 F. 3d at 305;

Van Bergen, 59 F.3d at 1550 (reaching same conclusion). As to a third exemption in the statutes—for "[m]essages advising employees of work schedules"—both courts acknowledged that the exemption likely was content based but declined to decide its constitutionality on alternative grounds. *Van Bergen*, 59 F.3d at 1550; *Zoeller*, 845 F. 3d at 305. The Government's reliance on *Mey v. Venture Data, LLC*, 245 F. Supp. 3d 771 (N.D. W. Va. 2017) similarly is of no help to it. (Govt. Br. 9). "[T]he *Mey* decision provides no written analysis to support the conclusion that the TCPA's exceptions are content-neutral." *Greenley v. Laborers' Int'l Union of N. Am.*, 271 F. Supp. 3d 1128, 1148 (D. Minn. 2017). In addition, "the legal authority that *Mey* cites [(the *Zoeller* district court opinion)] in support of the proposition that the TCPA's exceptions are relationship-based is a decision addressing Indiana's analog to the TCPA, which has different exceptions than the TCPA." *Id.* Here, the *Reed* framework applies. Under that framework, it is clear that the restrictions are content-based.

The Government's cases further highlight how Congress could have enacted a "relationship-based" exception by exempting calls from government-debt collectors to a specific type of recipient. Instead Congress enacted an exception that turns on what the caller discusses, not the caller's relationship to the called party. "If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017); *see also Duguid*, 926 F.3d at 1153 (explaining that "permitting third-party debt collectors to place calls on the government's behalf using the same means as the government itself can use—'cannot transform a facially content-based law into one that is content neutral'" (quoting *Reed*, 135 S. Ct. at 2228)).

2. *The ATDS restrictions fail strict scrutiny*

i. *The ATDS restrictions do not further a compelling interest*

The Government offers residential privacy as a compelling interest. (Govt. Br. 10-11.) But neither this Court nor the Supreme Court has ever held that this interest is sufficiently "compelling" to survive strict scrutiny. *See Kirkeby v. Furness*, 92 F.3d 655, 659 (8th Cir. 1996) (noting that the Supreme Court has never held that residential privacy is a compelling interest and "we do not think it is") The Government's attempt to distinguish binding Eighth Circuit precedent fails.

The Government relies on two cases in which the Supreme Court addressed laws prohibiting picketing in residential areas. *See Carey v. Brown*, 447 U.S. 455, 470 (1980); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988). First, the "boisterous and threatening conduct" on a person's doorstep at issue in *Carey*, 447 U.S. at 470, is obviously more intrusive into "residential privacy" than a text message that could also be received outside the home. Indeed, the Eleventh Circuit recently explained the *de minimis* impact into one's privacy from a TCPA-noncompliant text message was so insignificant as to not constitute injury in-fact warranting federal jurisdiction. *See Salcedo v. Hanna*, No. 17-14077, 2019 WL 4050424 (11th Cir. Aug. 28, 2019). Second, the Supreme Court did not find residential privacy to be a "compelling interest" in either *Carey* or *Frisby*. *Carey*, 447 U.S. at 470-71 (finding privacy of the home to be "an important value" when assessing content-neutral time, place, and manner ordinance); *Frisby*, 447 U.S. at 479-82 (applying intermediate scrutiny to a content-neutral time, place, and manner ordinance); *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2548 (2014) (Scalia, J., concurring) ("Suffice it to say that if protecting people from unwelcome communications . . . is a compelling state interest, the First Amendment is a dead letter."). The Government's line of cases "do not sanction *content-based* restrictions" on "speech with the aim of protecting the dignity and privacy of individuals." *Hoye v. City of Oakland*, 653 F.3d 835, 852 (9th Cir. 2011) (emphasis added). Instead, those cases "only accept

the dignity and privacy rationale as a sufficiently strong governmental interest to justify a *content-neutral time, place, and manner restriction*." *Id.* (emphasis added). Residential privacy is not a "sufficiently strong" interest for a content-based restriction to survive strict scrutiny. *Id.*

Established Eighth Circuit precedent is clear that residential privacy is not a compelling interest. *See Kirkeby*, 92 F.3d at 659. The Government also tries to distinguish *Kirkeby* by claiming that it dealt with a challenge to an ordinance that restricted speech in a public forum. (Govt. Br. 10-11.) Forum designations, however, are significant when assessing a speech ordinance which regulates speech on government property. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-45 (1983). The Government fails to address that *Kirkeby* involved an impermissible content-based restriction and is controlling. *Kirkeby*, 92 F.3d at 659.[2]

ii. *The ATDS restrictions are not narrowly tailored*

The Government argues the government-debt exception does not render the ATDS restrictions underinclusive by wrongly contending that exception "is a narrow carve-out from the autodialer restriction's otherwise sweeping prohibition." (Govt. Br. 13.) But "[t]his gloss-over approach is at odds with *Reed*, which directs that the tailoring inquiry focus on the content-based differentiation—here, the debt-collection exception." *Duguid*, 926 F.3d at 1155. It also ignores that the exception is *part of the statute itself.*

The government-debt exception counters the Government's asserted interest in residential privacy because calls to collect government-backed debt are—all else being equal—just as

[2] The Government's reliance on *Greenley* is misleading because the Minnesota district court had no occasion to assess the level of the interest asserted. There, "both Greenley and the United States argue[d]—and [the defendant] d**[**id] not dispute—that the TCPA serves a compelling interest in protecting residential privacy." *Greenley*, 271 F. Supp. 3d at 1150. The decision does not upend binding Eighth Circuit precedent. Separately, the Government's footnoted reference to commercial speech jurisprudence is off base. (Govt. Br. 7 n. 5.) Commercial speech is "speech proposing a commercial transaction," *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562 (1980), which not all calls subject to the ATDS restriction do, and the Government bears the burden of establishing and justifying this, *id.* at 570. This doctrine is inapplicable.

intrusive as any other unwanted calls. *See* Pub. L. No. 102-243, § 2 at ¶ 13. Moreover, the potential number of intrusive yet exempted calls belies the Government's assertion that it is a "narrow carve-out." By the end of fiscal year 2016, the government had either guaranteed or was owed by over 41 million borrowers nearly eighty-percent of all outstanding student loan debt, *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 31 F.C.C. Rcd. 9074, 9077 n.28 (2016), which is but one type of guaranteed by or owed to the government, *id.* at 9077-78. Indeed, the exception has been estimated to place tens of millions of people at risk of receiving such otherwise prohibited calls. *See id.* at 9078 ¶ 9. The Government's assertion that the exception "is 'limited by the fact that such calls would only be made to those who owe a debt to the federal government'" (Govt. Br. 13), is puzzling in context.

The Government also fails to rebut overinclusiveness concerns. First, the Government's argument that parties may communicate without using an ATDS (Govt. Br. 12) is inapposite because whether a restriction leaves open alternate channels of communication is only relevant under intermediate scrutiny, not the strict scrutiny that is applicable here. *Perry Educ. Ass'n*, 460 U.S. at 45. Second, the Government's insistence that less restrictive alternatives would not be as effective to achieve the TCPA's purpose (Govt. Br. 12) fails because the consequences of the government-debt exception show the Government is not pursuing total elimination of autodialed calls. *Cf. Carey*, 447 U.S. at 465 (finding "the generalized classification which the [picketing] statute draws suggests that Illinois itself has determined that residential privacy is not a transcendent objective" because it still permitted other types of picketing equally disruptive to that interest). Finally, as the Government incorrectly argues it did do, it "could have accomplished the same goal in a content-neutral manner by basing the exception 'on the called party's preexisting relationship with the federal government.'" *Duguid*, 926 F.3d at 1156 (quoting *Reed*, 135 S. Ct.

at 2232). "And the TCPA's potentially expansive application to everyday consumer communications—a small fraction of which implicate residential and personal privacy—further emphasizes its over-inclusiveness." *Id.*; *see also Salcedo*, 2019 WL 4050424 (autodial message insufficient intrusion to confer standing).

3. *The ATDS restrictions are not severable*

Like the decisions it relies on, *AAPC* and *Duguid*, the Government focuses its cursory severability argument on the restrictions operating before the government-debt exception existed. (Govt. Br. 5.) But even if a statute will operate after severance, severability focuses on Congressional intent, *Minn. v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 191 (1999), and courts look to the current version of a statute for that intent. *See I.N.S. v. Phinpathya*, 464 U.S. 183, 199-200 (1984) (post-amendment version "central to the question" of statutory interpretation).

The Fourth and Ninth Circuits did not examine the TCPA's legislative history when they incorrectly severed the government-debt exemption, relying instead on historical operation. *See AAPC,* 923 F.3d at 171; *Duguid*, 926 F.3d at 1156. They should have considered that after the FCC issued its now-invalid ATDS-definition interpretation, Congress authorized the exemption. *See* Pub. L. No. 114-74, § 301(a)(1)(A). Additionally, before enacting the TCPA, Congress found that "while the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for [certain calls]." Pub. L. No. 102-243, § 2 at ¶ 13. Thus, Congress intended the restrictions to work in tandem with the government-debt exemption, and thus it cannot be severed.

Furthermore, the Government relies on the Communication Act's severance provision, 47

U.S.C. § 608, but that is a mere general severance provision—of the kind courts have found do not constitute the "specific evidence" needed to sever an exemption resulting in increased restriction. *See Rappa v. New Castle Cty.*, 18 F.3d 1043, 1073 (3d Cir. 1994). Section 608 was also enacted in its original form nearly sixty years before the TCPA. 47 U.S.C. § 608; 47 U.S.C. § 227. Telecommunication technology, and Congressional intent regarding it, has significantly changed in that time. Even more obviously, government-backed debt has ballooned.

Separately, the Government's argument misunderstands the issue and runs headlong into decades of Supreme Court precedent. "[T]he First Amendment imposes no freestanding "'underinclusiveness limitation.'" *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015). Rather, a law's underinclusiveness suggests the law does not actually advance a compelling interest or that the government is not actually pursuing the interest it invokes. *Id.* That is, underinclusiveness does not mean the government should penalize more speech to cure the defect; it suggests the law itself is invalid as to the speech it does penalize. The issue is not the that the government-debt exception itself is a First Amendment violation—it is that the exception reflects that Congress lacks a compelling interest in eliminating unwanted calls and that the ATDS restrictions are not narrowly tailored to the government's actual interests. The appropriate remedy is to strike down the ATDS restrictions, not enlarge their scope. Time and again, when confronting unconstitutional content-based statutory restrictions on speech, the Supreme Court has invalidated the restrictions—not the exemptions.[3] This furthers "[t]he preferred First Amendment remedy of

[3] *See, e.g.*, *Reed*, 135 S. Ct. at 2232; *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 805 (2011); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563-64, 580 (2011); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190 (1999); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488-91 (1995); *City of Ladue v. Gilleo*, 512 U.S. 43, 53-59 (1994); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31 (1993); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 233 (1987); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591-93 (1983); *Carey*, 447 U.S. at 471; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 795 (1978); *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp't Relations Comm'n*, 429 U.S. 167, 176-77 (1976); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 102 (1972).

more speech, not enforced silence." *Brown v. Hartlage*, 456 U.S. 45, 61 (1982).

This also furthers the well-established principle that judicial remedies create incentives to raise constitutional challenges. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n. 5 (2018). But the Government's proposed solution would eliminate any incentive to challenge restrictions because the "remedy" would only be further restrictions. And, contrary to the Government's suggestion (Govt. Br. 6), invalidating the exemption would raise retroactivity constitutional concerns for the universe of speakers who reasonably relied on the exemption when it was valid.

B. The Do-Not-Call Restrictions Render the TCPA Unconstitutional

1. *The Do-Not-Call restrictions are subject to strict scrutiny*

The Government argues *Fraternal Order of Police, N.D. State Lodge v. Stenehjem*, 431 F.3d 591 (8th Cir. 2005), "squarely forecloses Defendants' argument that the exemption for nonprofits triggers strict scrutiny." (Govt. Br. 7.) The Government is wrong.

First, *Stenehjem* is outdated. The *Reed* framework controls the analysis here. *See AAPC*, 923 F.3d at 165. *Stenehjem*, however, well-preceded *Reed* and thus did not apply the framework governing this motion. *Cf. Duguid*, 926 F.3d at 1153 ("The government's argument that the debt-collection exception is relationship-based as opposed to content-based is foreclosed by *Reed*.").

Second, the challenged statute in *Stenehjem*, and the nature of the challenge brought, are distinguishable from this motion. *Stenehjem* did not involve a challenge to the TCPA. The state statute in *Stenehjem* exempted telephone solicitations made by charitable organizations if made by a charitable organization's volunteer or employee—*i.e.*, it "distinguishes between 'in-house' charitable solicitors and professional charitable solicitors." *Stenehjem*, 431 F.3d at 596. Explaining the exemption was content neutral, the court highlighted that the distinction was purely a speaker-based one: "the message would be identical regardless of who conveyed it." *Id.* at 596.

Here, by contrast, the messages covered and exempted are not identical such that the

distinction turns purely on the identity of the speaker. For-profit and non-profit entities are distinguished by law and, by definition, pursue differing objectives. That the content of the communications or the viewpoints they advocate for would differ is apparent.

Moreover, the distinctions in the do-not-call provisions favoring non-profit entities and their agents cannot "be justified without reference to the content of the speech." *Reed*, 135 S. Ct. at 2229. As the Government acknowledges, the stated goal of the TCPA is to protect residential privacy. That goal, however, does nothing to justify exempting non-profits from restrictions relating to internal do-not-call procedures and liability for do-not-call violations. *See* § 227(a)(4)(c) (carving out an exception where the TCPA does not apply to a "call or message by a tax exempt nonprofit organization"); 47 C.F.R. § 64.1200(d)(7); 47 C.F.R. § 64.1200(f)(14)(iii). Without reference to the content of the non-profit speech, the exemptions for non-profits cannot be justified because they are directly opposed to the TCPA's goal while other entities are restrained without any unique justification.

To illustrate, *Stenehjem* relied on *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). There, the challenge was to a city regulation requiring music performers in a park to use sound-amplification equipment and a sound technician provided by the city. *Id.* at 784. The regulation's purpose was to regulate the volume of music so the performances were satisfactory to the audience without intruding upon those nearby. *Id.* That purpose justified the restriction without reference to the content of the performers' speech. *Id.* at 791-92. No distinctions were made—*all* performers were subject to the same regulation. *Id.* at 784. Any "effect on some speakers or messages but not others" was merely "incidental." *Id.* at 791.

Here, the do-not-call provisions *directly*, not incidentally, effect some, but not all, speakers and their messages. Non-profits are explicitly exempted even though the harm they pose by

violating the do-not-call restrictions is the same harm as any other entity. Thus, no justification exists unless the content of the non-profit entities' speech compared to that of other entities is the justification. Indeed, the Government argues that the provisions are narrowly tailored because of the speech at issue—*i.e.*, that non-profit speech is less intrusive and was intentionally given preferential treatment above other speech. (Govt. Br. 12 n.10.) The Government's "aversion to what the disfavored speakers have to say" therefore renders the TCPA's speaker-based preferences subject to strict scrutiny review. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 657 (1994).

2. *The Do-Not-Call restrictions fail strict scrutiny*

The Government devotes a footnote to addressing whether the do-not-call restrictions are narrowly tailored. (Govt. Br. 12 n.10.) The Government argues both that *Gresham v. Rutledge,* 198 F. Supp. 3d 965 (E.D. Ark. 2016) suggests the TCPA's do-not-call provisions are narrowly tailored because of the existence of a do-not-call list, and that exempting nonprofits does not render the provisions under-inclusive because, based on a snippet of legislative history, commercial calls are more prevalent than calls from nonprofits. (*Id.*)

Gresham, however, struck down a state-law TCPA analogue. Moreover, the decision *Gresham* cited when mentioning a do-not-call list, *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015), struck down another state-law TCPA analogue that was discriminatory just as the TCPA provisions at issue here are—and here, those provisions carry through to the do-not-call provisions, unlike as contemplated in *Cahaly*. Both *Gresham* and *Cahaly* struck down laws that were underinclusive because they permitted "unlimited proliferation" of certain types of speech—just as the do-not-call exemptions do here. *Gresham*, 198 F. Supp. 3d at 972; *Cahaly*, 796 F.3d at 406.

The Government's argument based on the relative number of calls made by commercial entities and nonprofits is puzzling. That there may not have been as many nonprofit calls as

commercial calls in 1991 does not justify exempting those nonprofit calls, which each raise the same residential privacy concerns commercial calls do. The inquiry is on the tailoring of the content-based distinction, not the TCPA at large. *Duguid*, 926 F.3d at 1155.

II. THE TCPA VIOLATES THE EQUAL PROTECTION CLAUSE

The Government references its First Amendment arguments to address Defendants' Equal Protection challenge (Govt. Br. 14), which fail for the reasons discussed (*see* Part I).

III. THE ATDS DEFINITION IS UNCONSTITUTIONALLY VAGUE

The Government argues the ATDS definition is not unconstitutionally vague because it uses "words of common understanding." (Govt. Br. 15.) The Government's cited authority belies this argument.

The Government's reliance on *Van Bergen* for this point misses the mark. (Govt. Br. 14.) *Van Bergen* addressed a wholly inapposite challenge to a different statute. As discussed, the challenge in *Van Bergen* centered on its distinction between in-house and professional charitable solicitors—not the definition of the calling equipment triggering the statute. As such, the *Van Bergen* plaintiffs challenged the distinction-related terms "caller," "message," and "commercial solicitation" as vague—the definition of an ATDS was not at issue. *Van Bergen*, 59 F.3d at 1551 n.6. And there is no indication that the agency enforcing the state statute, or the courts interpreting it, had difficulty defining that state statute's terms.[4]

Here, neither the FCC nor the courts have reached a "common understanding" of what device constitutes an ATDS. In *ACA International v. Federal Communications Commission*, the D.C. Circuit, striking down the FCC's inconsistent ATDS interpretations, explained "it might be

[4] The Government's footnoted reliance on *Sussinno v. Work Out World, Inc.*, is also misplaced because *Sussinno* dealt with a completely different vagueness challenge. (Govt Br. 14 n.13.) In *Sussino*, an amicus argued "that to impose liability under § 227(b)(1) where the cell phone's owner isn't charged for the call constitutes a violation of due process." 862 F.3d 346, 349 n.1 (3d Cir. 2017).

permissible for the Commission to adopt *either* interpretation" of the ATDS definition reached by varying circuits. 885 F.3d 687, 703 (D.C. Cir. 2018) (emphasis added). Thus, the court, rather than assuaging vagueness concerns, acknowledged two fundamentally different interpretations of the ATDS definition could be reached, which they have.

Since *ACA International*, courts have defined an ATDS in conflicting ways, further demonstrating the term's vagueness. *See, e.g.*, *Marshall v. CBE Grp., Inc.*, No. 2:16-cv-02406-GMN-NJK, 2018 WL 1567852, at *5-6 (D. Nev. Mar. 30, 2018) (relying on *ACA International* and concluding that predictive dialer was not an ATDS); *Swaney v. Regions Bank*, No.: 2:13-cv-0544-JHE, 2018 WL 2316452, at *1 (N.D. Ala. May 22, 2018) (equipment was ATDS because it had the "capacity" to send text messages without human intervention).

This conflict renders the Government's reliance on *Marks* particularly misplaced. (Govt. Br. 15.) First, in *Marks*, the Ninth Circuit noted that the definition of an ATDS could not be derived from "a straightforward interpretation based on the plain language alone" because "the statutory text is ambiguous on its face." *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1051 (9th Cir. 2018). Second, *Marks* reflects that the very definition of an ATDS varies depending on the jurisdiction in which a claim is brought. *Compare Marks*, 904 F.3d at 1052 (concluding ATDS definition does not require generation of numbers) *with Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018) (reaching opposite conclusion); *see also Snow v. Gen. Elec. Co.*, No. 5:18-CV-511-FL, 2019 WL 2500407, at *6 (E.D.N.C. June 14, 2019) (discussing disarray among courts).[5]

This division reflects why the Government's other cited authorities are inapposite to this challenge. *Grayned v. City of Rockford*, 408 U.S. 104 (1972), concerned subjective terms of

[5] The competing interpretations among varying courts in tension now across the country render the Government's references to the state of the TCPA twenty years ago irrelevant. (Govt. Br. 15.)

degree delegated to interpretation by authorities; *Powell v. Ryan*, 855 F.3d 899 (8th Cir. 2017), was an as-applied challenge to unwritten time, place, and manner state-fair rule subject to lesser scrutiny and involving subjective interpretation of degree by law enforcement applying "impede the flow of people" to challenger blocking sidewalk. These decisions concern subjective interpretations of degree made by law enforcement applied to the facts at issue; none of the decisions concern dispositive dueling judicial interpretations of statutory text regardless of the facts presented or issues of degree. The definition of ATDS is unconstitutionally vague.

CONCLUSION

For the foregoing reasons and as set forth in their Motion, Defendants respectfully request that the Court grant their Motion to Dismiss.

Dated: September 9, 2019

By: */s/ Jacqueline M. Sexton*

W. James Foland #25022
Jacqueline M. Sexton #53262
Foland, Wickens, Roper,
Hofer & Crawford, P.C.
1200 Main Street, Suite 2200
Kansas City, MO 64105
(816) 472-7474
jfoland@fwpclaw.com
jsexton@fwpclaw.com

Lauri A. Mazzuchetti (*pro hac vice*)
Whitney M. Smith (*pro hac vice*)
Glenn T. Graham (*pro hac vice*)
KELLEY DRYE & WARREN LLP
One Jefferson Road
Parsippany, New Jersey 07054
(973) 503-5900
lmazzuchetti@kelleydrye.com
wsmith@kelleydrye.com
ggraham@kelleydrye.com

Attorneys for Defendants Beach Entertainment KC, LLC d/b/a Shark Bar, The Cordish Companies, Inc., and Entertainment Consulting International, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of September, 2019, a true and correct copy of the above and foregoing document was filed with the Court's CM-ECF system which will provide notice to all counsel of record.

/s/ *Jacqueline M. Sexton*

Attorneys for Defendants
Beach Entertainment KC, LLC d/b/a Shark Bar, The Cordish Companies, Inc., and Entertainment Consulting International, LLC