

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991
Broadnet Teleservices LLC
Petition for Declaratory Ruling
National Employment Network Association
Petition for Expedited Declaratory Ruling
RTI International
Petition for Expedited Declaratory Ruling
CG Docket No. 02-278

DECLARATORY RULING

Adopted: June 8, 2016

Released: July 5, 2016

By the Commission: Commissioner Rosenworcel concurring and issuing a statement; Commissioner Pai approving in part, dissenting in part and issuing a statement; Commissioner O’Rielly issuing a statement.

I. INTRODUCTION

1. With this declaratory ruling, we grant to the extent described below three petitions for declaratory ruling filed by Broadnet Teleservices LLC (Broadnet), National Employment Network Association (National Employment), and RTI International (RTI). These petitions request clarification of how the Telephone Consumer Protection Act (TCPA) applies to autodialed or prerecorded- or artificial-voice phone calls, including text messages, made by the government and government contractors. As explained more fully below, we clarify that the TCPA does not apply to calls made by or on behalf of the federal government in the conduct of official government business, except when a call made by a contractor does not comply with the government’s instructions. The TCPA continues to apply to non-governmental activities including, as we explain below, to political campaign events conducted by federal officeholders.

II. BACKGROUND

2. In 1991, Congress enacted the TCPA to address certain calling practices that can invade

1 Petition of Broadnet Teleservices LLC for Declaratory Ruling, CG Docket No. 02-278 (filed Sept. 16, 2015) (Broadnet Petition).

2 National Employment Network Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Aug. 19, 2014) (National Employment Petition).

3 RTI International Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Sept. 29, 2014) (RTI Petition).

4 The TCPA is codified at section 227 of the Communications Act of 1934, as amended. See 47 U.S.C. § 227.

consumer privacy, threaten public safety, and impose on wireless consumers costs for each call they receive.<sup>5</sup> In relevant part, the TCPA makes it unlawful for “any *person* within the United States, or any *person* outside the United States if the recipient is within the United States,” to place autodialed or prerecorded- or artificial-voice calls<sup>6</sup> to wireless telephone numbers, except with the prior express consent of the called party or in an emergency, or unless the call is solely to collect a debt owed to or guaranteed by the United States.<sup>7</sup> The TCPA is codified within the Communications Act, which defines “person” to “include[] an individual, partnership, association, joint-stock company, trust, or corporation.”<sup>8</sup> Three petitions seek clarification of the term “person” as used in the TCPA.

3. *RTI*. RTI asks the Commission to clarify that the term, as it is used in the TCPA, does not include the federal government<sup>9</sup> and that the TCPA therefore does not restrict research survey calls made by or on behalf of the federal government.<sup>10</sup> RTI is a nonprofit organization that conducts research<sup>11</sup> and whose largest client is the federal government.<sup>12</sup> RTI asserts that its calling methods comply with standards of the National Institute of Science and Technology and with Federal Information Processing Standards.<sup>13</sup> It notes that for one survey conducted on behalf of the Centers for Disease Control and Prevention (CDC), the researchers told interview subjects they were calling on behalf of CDC to perform a research survey and that both the federal Office of Management and Budget and RTI’s institutional review board approved the survey protocol.<sup>14</sup> RTI seeks clarification that the TCPA does not apply to research survey calls made by or on behalf of the federal government because the TCPA restricts calls made by a “person,” and federal government agencies fall outside the definition of “person” in the Communications Act.<sup>15</sup>

4. We sought comment on the RTI Petition on November 19, 2014.<sup>16</sup> Supporting commenters argue that the definition of “person” does not include calls made by or on behalf of the

---

<sup>5</sup> See 47 U.S.C. § 227; S. Rep. No. 102-178, 1st Sess., 102nd Cong., at 2, 4-5 (1991).

<sup>6</sup> The Commission has concluded that the TCPA’s protections against unwanted calls to wireless numbers encompass both voice calls and text messages, including short message service (SMS) texts, if the call is made to a telephone number assigned to such service. See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003) (*2003 TCPA Order*); see also *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (noting that text messaging is a form of communication used primarily between telephones and is therefore consistent with the definition of a “call”).

<sup>7</sup> 47 U.S.C. § 227(b)(1) (emphasis added).

<sup>8</sup> 47 U.S.C. § 153(39).

<sup>9</sup> RTI Petition at 1-2; RTI Reply Comments on RTI Petition at 4. A list of all commenters on the RTI Petition is provided in Appendix C.

<sup>10</sup> RTI Petition at 1. RTI asserts that “on behalf of” should be interpreted based on federal common law principles of agency. *Id.* at 11-12.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> See 47 U.S.C. § 153(39) (“The term ‘person’ includes an individual, partnership, association, joint-stock company, trust, or corporation.”); RTI Petition at 5.

<sup>16</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by RTI International*, CG Docket No. 02-278, Public Notice, 29 FCC Rcd 13916 (2014).

federal government,<sup>17</sup> that research surveys by or on behalf of the federal government advance important congressional objectives and might be required by federal law,<sup>18</sup> and that timeliness and cost reasons necessitate the use of autodialers to reach the desired population and to gather the required random sample of the population.<sup>19</sup> Three members of Congress filed in support of the petition, stating: “The goal of the TCPA has never been to impede communications from the federal government, especially those that gather data for important government research.”<sup>20</sup> Opposing commenters argue that surveys can be conducted by other means,<sup>21</sup> that declaring a contractor of the federal government to be outside the definition of “person” opens the TCPA for abuse,<sup>22</sup> and that Congress did not carve out an exception for research survey calls by the government and so the Commission may not.<sup>23</sup>

5. *National Employment.* National Employment asks the Commission to clarify that “calls can be made through a public or private intermediary or associated third party that ‘stands in the shoes’ of the federal government” without violating the TCPA.<sup>24</sup> National Employment represents individual providers of employment services to beneficiaries receiving Social Security Disability Insurance and Supplemental Security Income payments due to a qualifying disability.<sup>25</sup> National Employment states that the Social Security Administration (SSA) contracts with public and private employment services providers (called “Employment Networks” or “ENs”) that are required to “contact program-eligible beneficiaries to inform them about their options for returning to self-supporting employment.”<sup>26</sup> National Employment adds that the SSA approves a Blanket Purchase Agreement with each EN, and that the Agreement “specifically requires ENs to contact beneficiaries and discuss the work incentives and other questions they may have about returning to work.”<sup>27</sup> National Employment asks the Commission to confirm that Employment Networks under contract with SSA have a mandate to contact program-eligible beneficiaries and are thus exempt from the TCPA’s restrictions on calls to wireless numbers.<sup>28</sup>

6. We sought comment on the National Employment petition on September 19, 2014.<sup>29</sup> Two comments were filed on the petition, both by the same commenter. He argues that the calls

---

<sup>17</sup> RTI Reply Comments on RTI Petition at 5-6; Broadnet Comments on RTI Petition at 2.

<sup>18</sup> RTI Reply Comments on RTI Petition at 6-7; *see also* MRA Comments on RTI Petition at 3-4.

<sup>19</sup> MRA Comments on RTI Petition at 6; *Ex Parte* Letter from Lisa Kaseser, Director, Office of Legislation and Public Policy, NICHD/NIH, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1 (filed Dec. 3, 2015); *Ex Parte* Letter from Laura H. Phillips, on behalf of Consortium of Social Science Associations, the Council of Professional Associations of Federal Statistics, and NORC at the University of Chicago, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2 (filed Oct. 19, 2015).

<sup>20</sup> Letter from Reps. David Price, G.K. Butterfield, and Renee Ellmers, U.S. Congress, to Tom Wheeler, Chairman, FCC, CG Docket No. 02-278, at 1 (Jan. 8, 2015) (letter is misdated as Jan. 8, 2014) (Congressional Letter).

<sup>21</sup> Biggerstaff Reply Comments on RTI Petition at 1.

<sup>22</sup> *Id.* at 4.

<sup>23</sup> Shields Comments on RTI Petition at 3.

<sup>24</sup> National Employment Petition at 1. A list of all commenters on the National Employment Petition is provided in Appendix B.

<sup>25</sup> National Employment Petition at 1 n.1.

<sup>26</sup> *Id.* at 2-3.

<sup>27</sup> *Id.* at 3.

<sup>28</sup> *Id.* at 2.

<sup>29</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by National Employment Network Association*, CG Docket No. 02-278, Public Notice, 29 FCC Rcd 11268 (2014).

Petitioner would like to make are not emergency calls and that federal agencies are not above the law, which requires prior express consent.<sup>30</sup> He also argues that these calls are to Social Security recipients, who are among the poorest of the population, who often have per-minute calling plans, and who are most in need of TCPA protections.<sup>31</sup>

7. *Broadnet.* Broadnet asks the Commission to declare that federal, state, and local governments, and their officers acting on official government business, are not “persons” for purposes of the TCPA.<sup>32</sup> Broadnet is the provider of TeleForum, a technology platform that enables members of government to communicate with citizens.<sup>33</sup> For example, a member of Congress may use TeleForum to host a telephone town hall meeting on a particular topic.<sup>34</sup> To organize telephone tele-town hall meetings, Broadnet is concerned that it must have the prior express consent of the called party if it makes a call to a wireless number.<sup>35</sup> It argues that it is difficult for members of government to obtain and track this consent,<sup>36</sup> and that the need for consent limits wireless consumers’ ability to participate in government.<sup>37</sup> It asks the Commission to confirm that the TCPA does not apply to government-to-citizen communications when such calls are made for official purposes.<sup>38</sup> It asserts that federal, state, and local government entities do not meet the definition of “person” for TCPA purposes when the government and government officials are acting for official purposes.<sup>39</sup> It also asks that the Commission confirm that the TCPA does not apply to service providers working on behalf of government entities and officials.<sup>40</sup>

8. We sought comment on the Broadnet petition on September 29, 2015.<sup>41</sup> Supporting commenters argue: allowing all levels of government to use autodialers without consent will foster public safety,<sup>42</sup> the TCPA’s important purposes are not furthered by subjecting governmental entities to its restrictions,<sup>43</sup> and government should be permitted to use the most cost-efficient method of communicating with the public.<sup>44</sup> Several child support collection agencies filed supporting comments, stating that the inability to use autodialers to communicate with clients and persons required to pay child support could result in an inability of state and local governmental child-support agencies to obtain child support collections throughout the country and could negatively impact the families and children that rely

---

<sup>30</sup> Shields Comments on National Employment Petition at 1-2.

<sup>31</sup> *Id.* at 4.

<sup>32</sup> Broadnet Petition at 2. A list of all commenters on the Broadnet Petition is provided in Appendix A. We do not address in this Declaratory Ruling whether robocalls by or on behalf of state or local governments are subject to the TCPA’s consumer protections. We expect to address that question in a future order.

<sup>33</sup> Broadnet Petition at 2.

<sup>34</sup> *Id.* at 3-4.

<sup>35</sup> See 47 CFR § 64.1200(a)(1).

<sup>36</sup> Broadnet Petition at 4 n.12.

<sup>37</sup> *Id.* at 5.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 7.

<sup>40</sup> *Id.* at 8.

<sup>41</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on a Petition for Declaratory Ruling Filed by Broadnet Teleservices, LLC*, CG Docket No. 02-278, Public Notice, 30 FCC Rcd 10654 (2015).

<sup>42</sup> American Gas Comments on Broadnet Petition at 2.

<sup>43</sup> American Power Comments on Broadnet Petition at 3.

<sup>44</sup> CSS Comments on Broadnet Petition at 1.

on child support for income.<sup>45</sup> Compliance, they argue, will be costly and time-consuming, taking funds and resources away from child-support enforcement.<sup>46</sup> Opposing commenters argue: granting the exemption would open a loophole for other callers;<sup>47</sup> government callers have other means of contact besides autodialers;<sup>48</sup> called parties should be allowed to decide which calls they receive;<sup>49</sup> and even if the Commission defines “person” to exclude the federal government, this should not include contractors acting on the government’s behalf.<sup>50</sup>

9. Our consideration of these requests for clarification is informed by *Campbell-Ewald Co. v. Gomez*, a January 20, 2016 decision of the Supreme Court of the United States.<sup>51</sup> Therein, the Court stated: “The United States and its agencies, it is undisputed, are not subject to the TCPA’s prohibitions because no statute lifts their immunity.”<sup>52</sup> While the Court indicated that a government contractor may be eligible for “derivative immunity” when it acts under authority validly conferred on it by the federal government, the Court emphasized that derivative immunity cannot shield a contractor when it “violates both federal law and the Government’s explicit instructions.”<sup>53</sup>

### III. DISCUSSION

10. The TCPA, as codified in section 227 of the Communications Act, makes it unlawful for any “person” within the United States, or any “person” outside the United States if the recipient is within the United States, to place certain calls to wireline and wireless telephone numbers, absent prior express consent, an emergency, or other exceptions.<sup>54</sup> RTI and Broadnet ask the Commission to clarify that the term “person,” as used in section 227(b)(1), does not include the federal government.<sup>55</sup> We find merit in these requests and therefore clarify that the term “person,” as used in section 227(b)(1) and our rules implementing that provision, does not include the federal government or agents acting within the scope of their agency under common-law principles of agency.<sup>56</sup> Based on this clarification, as supported by the Supreme Court’s recent decision in *Campbell-Ewald Co. v. Gomez*, we grant the three Petitions before us to the extent indicated below.

11. Specifically, in response to the Broadnet Petition, we find that robocalls to organize tele-

---

<sup>45</sup> Grubbs Comments on Broadnet Petition at 1; CSPS Comments on Broadnet Petition at 1; DCSS Comments on Broadnet Petition at 1; CSDA Comments on Broadnet Petition at 1.

<sup>46</sup> Grubbs Comments on Broadnet Petition at 1; CSPS Comments on Broadnet Petition at 1; CSDA Comments on Broadnet Petition at 1; CSS Comments on Broadnet Petition at 1.

<sup>47</sup> Luster Comments on Broadnet Petition at 2; *Ex Parte* Letter from Robert Biggerstaff, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2 (filed Dec. 18, 2015) (Biggerstaff *Ex Parte*).

<sup>48</sup> Biggerstaff Reply Comments on Broadnet Petition at 6; Luster Comments on Broadnet Petition at 3.

<sup>49</sup> Luster Comments on Broadnet Petition at 1.

<sup>50</sup> Biggerstaff Reply Comments on Broadnet Petition at 3.

<sup>51</sup> 136 S. Ct. 663 (2016).

<sup>52</sup> *Id.* at 672.

<sup>53</sup> *Id.* at 673-74.

<sup>54</sup> 47 U.S.C. § 227(b)(1) (emphasis added).

<sup>55</sup> RTI Petition at 1-2; RTI Reply Comments on RTI Petition at 4; Broadnet Petition at 1.

<sup>56</sup> We note that our rules refer not only to “person” but also to “entity.” 47 C.F.R. 64.1200(a) (“No person or entity may....”). Section 227(b)(1), by contrast, refers only to “person” and does not mention “entity.” Because we interpret the term “person” in section 227(b)(1) to exclude the federal government, we clarify that the reference to “entity” in our rules does not somehow expand the scope of 227(b)(1) to encompass the federal government or its agents.

town halls, when made by federal legislators or agents acting under authority validly conferred by the federal government, are not subject to the TCPA's robocall consent requirement, as long as the robocalls are conducted in the legislators' official capacity and not, for example, as part of a campaign for re-election.<sup>57</sup> Similarly, we find that the TCPA does not restrict the kind of research survey calls described by RTI or the Social Security-related informational calls described by National Employment, provided those calls are lawfully made by the federal government or by agents acting under authority validly conferred on them by the federal government.<sup>58</sup> We emphasize that in each of these scenarios, a call placed by a third-party agent will be immune from TCPA liability only where (i) the call was placed pursuant to authority that was "validly conferred" by the federal government, and (ii) the third party complied with the government's instructions and otherwise acted within the scope of his or her agency, in accord with federal common-law principles of agency.<sup>59</sup> We also emphasize that this Declaratory Ruling focuses only on calls placed by the federal government or its agents, and does not address calls placed by state or local governments or their agents.<sup>60</sup>

**A. The Term "Person" in Section 227(b)(1) Does Not Include the Federal Government or Agents Validly Authorized to Make Calls on Its Behalf**

12. As the Supreme Court has explained, there is a "longstanding interpretive presumption" that "the word 'person' does not include the sovereign . . . [except] upon some affirmative showing of statutory intent to the contrary."<sup>61</sup> No commenter has made a showing of statutory intent to the contrary, and no such intent is articulated in the legislative history of the TCPA.<sup>62</sup> Indeed, had Congress wanted to

<sup>57</sup> See Broadnet Petition. The record here does not provide a basis for a comprehensive analysis for distinguishing robocalls made in an official versus non-official capacity. In evaluating a particular set of facts, however, we would look for guidance to House or Senate rules and/or campaign laws. Funds appropriated by Congress for the use of House and Senate offices may only be used for official purposes, not for personal or political purposes. Both the House and the Senate have written guidelines discussing how these official, "representational" funds may be used, including funds used for organizing tele-town halls. See, e.g., H. Comm. on House Administration, 114<sup>th</sup> Congress, *Members' Congressional Handbook*. Moreover, "legal and ethical problems arise when these allowances are used for other than official expenses, such as when they are converted to personal or campaign use." H. Comm. on Standards of Official Conduct, 108<sup>th</sup> Congress, 2<sup>nd</sup> Session, *House Ethics Manual* (2008) at 323. We will therefore defer to the two chambers' written rules and precedents for determining whether calls were made in an official capacity, conferring if necessary with the Senate Committee on Rules and Administration and the House Committee on House Administration.

<sup>58</sup> See RTI Petition; National Employment Petition.

<sup>59</sup> See *Campbell-Ewald*, 136 S. Ct. at 672-73 & n.7; *infra* at paras. 16, 21 (discussing federal common-law principles of agency).

<sup>60</sup> See *supra* n. 32. As noted above, the issue of whether the TCPA's prohibitions apply to calls placed by or on behalf of state or local governments remains pending before us.

<sup>61</sup> *Vt. Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000) (citing, *inter alia*, *United States v. United Mine Workers of Am.*, 330 U.S. 258, 275 (1947); *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941)).

<sup>62</sup> Although the TCPA's application is not limited to commercial calls, the legislative history indicates that Congress was particularly focused on telemarketing and nowhere suggests that the TCPA was intended to apply to federal government calls. See, e.g., Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, §§ 2(1), (8), 105 Stat. 2394, 2394 (codified at 47 U.S.C. § 227 *note*) (congressional findings regarding "commercial telemarketing solicitations" and "use of the telephone to market goods and services to the home and other businesses"); S. Rep. No. 102-178, at 1-3 (1991) (discussing consumer complaints about telemarketing); H.R. Rep. No. 102-317, at 7 (1991) (discussing "use of the telephone to market property, goods and services to businesses customers, as well as individual consumers"). We note that although the TCPA's legislative history suggests a perceived need to expressly carve out calls made by certain government entities, in context the focus seems to be limited to state or

(continued....)

subject the federal government to the TCPA, it easily could have done so by defining “person” to include the federal government. That Congress chose not to include such a definition, or (as discussed below) any other language indicating an intent to “lift” the sovereign immunity that presumptively applies to the United States and its agencies, is conclusive evidence that Congress intended the federal government not to be included within the persons covered by the prohibitions in section 227(b)(1).<sup>63</sup>

13. We emphasize that our interpretation of “person” as excluding the federal government is limited to the specific statutory provision before us: section 227(b)(1) of the Communications Act. We make no finding here with respect to the meaning of “person” as used elsewhere in the TCPA or the Communications Act.<sup>64</sup> Indeed, some uses of the word “person” within the original text of the Communications Act of 1934 have been construed to include the federal government,<sup>65</sup> and we do not question those interpretations here. But we do find that a different interpretation reasonably applies to the word “person” when it appears in section 227(b)(1) for at least two reasons.

14. *First*, by 1991, when Congress enacted the TCPA, the Supreme Court had long applied the modern presumption that the word “person” *excludes* the government unless stated otherwise.<sup>66</sup>

(Continued from previous page) \_\_\_\_\_

local entities and not the federal government. *See* S. Rep. 102-178, at 5 (Oct. 8, 1991); H.R. Rep. 102-317, at (Nov. 15, 1991); Cong. Rcd. S 18784 (Nov. 27, 1991).

<sup>63</sup> We note “the well-settled presumption that Congress understands the state of existing law when it legislates.” *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) (citation omitted); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (“We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.”) (citation omitted).

<sup>64</sup> We thus reject suggestions that a decision to interpret the word “person” in section 227(b)(1) to exclude the federal government means that we must adopt an identical interpretation of “person” in all other sections of the Communications Act. *See* Biggerstaff Reply Comments to RTI Petitions at 4; Biggerstaff Reply Comments to Broadnet Petition at 3, 4; Biggerstaff *Ex Parte* at 1-2. Although there is a canon of statutory construction that a term should be given the same meaning throughout a statute, the canon itself has an important exception where the term refers to different subject matters in each part of the statute at issue. This exception was discussed in some detail in *United States ex rel. Long v. SCS Business & Technical Institute, Inc.*, 173 F.3d 870, 881 n.15 (D.C. Cir. 1999). At issue in that case was the meaning of the term “person” as it is used in two different provisions of the False Claims Act, 31 U.S.C. §§ 3729(a) and 3730(b)(1). The Court explained that giving the same meaning to “person” in these two provisions would raise “potentially insurmountable difficulties,” given the different contexts in which the term is used, and given that the provisions were adopted at different times by different Congresses, in 1863 and 1986, respectively. Furthermore, while section 3 of the Communications Act defines “person” to “include[] an individual, partnership, association, joint-stock company, trust, or corporation,” 47 U.S.C. § 153(39), it is silent as to whether the federal government also is subsumed within that definition. We thus believe we have flexibility to interpret the term “person” to include, or not to include, the federal government, as is appropriate with respect to any given provision of the Communications Act. Interpreting section 3’s definition of “person” in this flexible manner is not only reasonable, but in our view the best reading of that provision, given the backdrop of the modern interpretative presumption regarding personhood described below.

<sup>65</sup> In 1937, the Supreme Court held in *Nardone v. United States* that the government qualifies as a “person” under the wiretap restrictions in Section 705 of the Communications Act, 47 U.S.C. § 605, giving significant weight to the then-prevailing “principle . . . that the sovereign is embraced by general words of a statute intended to prevent injury and wrong.” 302 U.S. 379, 384 (1937). *Cf. Graphnet Systems, Inc.*, 73 F.C.C.2d 283, 292 ¶¶ 24-25 (1979) (observing that the Act’s exclusion in section 305, 47 U.S.C. § 305, of federally owned and operated radio stations from the Act’s licensing requirements of Section 301 and the radio regulatory authority of section 303, 47 U.S.C. §§ 301 and 303, is a factor supporting the view that the statutory design of the Communications Act was to construe the term “person” broadly to include “all save those specifically excluded elsewhere in the Act”); *Policies & Rules Concerning Operator Service Providers*, 6 FCC Rcd 2744, 2753 ¶ 17 (1991) (reaffirming *Graphnet Systems*).

<sup>66</sup> *See, e.g., Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 (1989); *Wilson v. Omaha Tribe*, 442 U.S. 653, 667 (1979); *United Mine Workers*, 330 U.S. at 275; *Cooper Corp.*, 312 U.S. at 604.

Indeed, when Congress enacted Title VI of the Communications Act in 1984, it specifically defined “person” within that title to *include* any “governmental entity”—an elaboration that would not have been necessary if the term “person” were ordinarily presumed to include the government.<sup>67</sup> In short, Congress enacted the TCPA in 1991 against the background principle that its use of the word “person” in that statute would *not* be presumed to include the government.<sup>68</sup>

15. *Second*, if a statutory requirement does not expressly apply to government entities, the government generally will not be subject to the statute unless “the inclusion of a particular activity within the meaning of the statute would not interfere with the processes of government.”<sup>69</sup> Here, however, subjecting the federal government to the TCPA’s prohibitions *would* significantly constrain the government’s ability to communicate with its citizens. If the federal government were prohibited from making autodialed or prerecorded- or artificial- voice calls to communicate with its citizens, it would impair—in some cases, severely—the government’s ability to communicate with the public and to collect data necessary to make informed public policy decisions.<sup>70</sup> For example, Congress has statutorily mandated that federal agencies conduct a variety of phone surveys to collect data needed to conduct public policy.<sup>71</sup> Similarly, the government would face a significant obstacle if it could not make autodialed or prerecorded- or artificial-voice calls to communicate with participants in federal programs such as Social Security.<sup>72</sup> The TCPA’s legislative history lacks any indication that Congress sought to impede these important government communications, as opposed to telemarketing and other calls by private entities.<sup>73</sup>

16. We also clarify that the term “person” in section 227(b)(1) does not include a contractor when acting on behalf of the federal government, as long as the contractor is acting as the government’s agent in accord with the federal common law of agency. We note that in the *DISH Declaratory Ruling*, the Commission clarified that “the prohibitions contained in [the TCPA] incorporate the federal common

---

<sup>67</sup> See 47 U.S.C. § 522(15) (enacted by Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779).

<sup>68</sup> For this reason, there is no merit to the suggestion that Congress’s decision expressly to exempt the federal government in older provisions of the Communications Act (such as sections 301 and 305) should be construed as evidence that section 227(b)(1) applies to the government. See Biggerstaff Reply Comments on RTI Petition at 3 (discussing section 301 and 305); Biggerstaff Reply Comments on Broadnet Petition at 2 (same); Shields Comments on RTI Petition at 3 (“If Congress had intended for survey calls made on behalf of the federal government to be exempt from the TCPA it would have carved out an appropriate exemption. Congress did not do so.”); Shields RTI Reply Comments at 1 (same point). The fact that Congress did not expressly carve out the federal government from section 227(b)(1) is consistent with the interpretative presumption, prevailing when the TCPA was enacted in 1991, that the word “person” should not be presumed to include the federal government. Nor are we suggesting that, understood in context, post-1991 congressional enactments would necessarily lead to the same kind of interpretation we reach in this Declaratory Ruling. That issue is not before us now, and we decline to address it in the absence of a question or controversy regarding a particular post-1991 provision and a record that is germane to that provision.

<sup>69</sup> *Graphnet Systems*, 73 F.C.C.2d at 292 ¶ 26 (citing 3 J.G. Sutherland, *Statutes and Statutory Construction* § 62.02, at 72 (4th ed. 1974)).

<sup>70</sup> See, e.g., Congressional Letter at 1.

<sup>71</sup> See, e.g., RTI Petition at 4-5, 9-10 (discussing a variety of federal statutes requiring survey research by federal agencies).

<sup>72</sup> See, e.g., National Employment Petition at 2-3 (discussing the Social Security Administration’s Ticket to Work Program).

<sup>73</sup> See *supra* note 62.

law of agency,<sup>74</sup> and held that federal common law principles of agency allow a seller to be held vicariously liable under the TCPA for calls placed on its behalf by third-party telemarketers.<sup>75</sup> To be sure, the *DISH Declaratory Ruling* involved the application of agency principles to support liability, whereas here we are presented with issues of non-liability. But as the *DISH Declaratory Ruling* observed,<sup>76</sup> the Commission has repeatedly applied agency principles in the other direction—allowing a third party calling on behalf of a principal to invoke a privilege or exemption belonging to the principal.<sup>77</sup> And we believe it makes sense to apply those principles here as well. Indeed, subjecting contractors operating on behalf of the government to liability under the TCPA, even though the federal government itself would not be liable, would be difficult to reconcile with the *DISH Declaratory Ruling*. There, the Commission ruled that a principal can be held vicariously liable for telephone calls placed by third-party agents acting within the scope of their actual authority. If the TCPA applied to contractors calling on behalf of the federal government, this rule would potentially allow the government to be held *vicariously* liable for conduct in which the TCPA *allows* the government to engage. That would be an untenable result.<sup>78</sup>

17. Based on the federal common law of agency, we clarify that a government contractor who places calls on behalf of the federal government will be able to invoke the federal government’s exception from the TCPA when the contractor has been validly authorized to act as the government’s agent and is acting within the scope of its contractual relationship with the government, and the government has delegated to the contractor its prerogative to make autodialed or prerecorded- or artificial-voice calls to communicate with its citizens.<sup>79</sup> This clarification accords with the Commission’s

<sup>74</sup> *DISH Network, LLC*, Declaratory Ruling, 28 FCC Rcd 6574, 6587 ¶ 35 (2013) (*DISH Declaratory Ruling*) (addressing analogous issue of vicarious liability), *pet. for review dismissed*, *DISH Network, LLC v. FCC*, 552 Fed. App’x 1 (D.C. Cir. 2014).

<sup>75</sup> 28 FCC Rcd at 6584-93, ¶¶ 28-48.

<sup>76</sup> *DISH Declaratory Ruling*, 28 FCC Rcd at 6589, ¶ 38.

<sup>77</sup> See *2003 TCPA Order*, 18 FCC Rcd at 14083 ¶ 118 (“recogniz[ing] that companies often hire third party telemarketers to market their services and products” and holding that “those telemarketers may rely on the seller’s [established business relationship] to call an individual consumer to market the seller’s services and products”); *Request of ACA Int’l for Clarification & Declaratory Ruling*, Declaratory Ruling, 23 FCC Rcd 559, 565, ¶ 10 (2008) (*ACA Declaratory Ruling*) (“[c]alls placed by a third party [debt] collector on behalf of [a] creditor are treated as if the creditor itself placed the call,” and thus the third-party debt collector operating as an agent of the creditor can place automated calls to debtors who have given prior express consent to the creditor). Likewise, in the *State Farm Declaratory Ruling*, the Commission approved of a bureau ruling “that State Farm’s ‘exclusive agents’ may rely on the ‘established business relationship’ (EBR) exemption of the Telephone Consumer Protection Act . . . to make telephone solicitations on behalf of State Farm to consumers on the national do-not-call list.” *Request of State Farm Mut. Auto. Ins. Co. for Clarification & Declaratory Ruling*, Declaratory Ruling, 20 FCC Rcd 13664, 13664, ¶ 1, 13667 ¶ 6 (CGB 2005) (*State Farm Declaratory Ruling*) (footnotes omitted); see *DISH Declaratory Ruling*, 28 FCC Rcd at 6589, ¶ 38 & n.120.

<sup>78</sup> *Cf. Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988) (“It makes little sense to insulate the Government against financial liability . . . when the Government produces . . . equipment itself, but not when it contracts for the production.”).

<sup>79</sup> This follows from the agency-law rule that when a principal is privileged to take some action, an agent may typically exercise that privilege on the principal’s behalf. See Restatement (Third) of Agency § 7.01 cmt. e (2006) (“A privilege may be created by law . . . to protect the rights of . . . the state. . . . Most privileges held by a principal may be delegated to an agent.”); see also Restatement (Second) of Agency § 345 (1958) (“An agent is privileged to do what otherwise would constitute a tort if his principal is privileged to have an agent to do it and has authorized the agent to do it.”). We note that, consistent with *Campbell-Ewald*, an agent generally will not be deemed to have acted within the scope of his or her agency where the agent does not adhere to instructions from the federal government. See *infra* paras. 20-21. We are not persuaded by the argument that because federal contractors meet the definition of “person” under section 3 of the Communications Act, the plain and unambiguous meaning of that text must control our decisions in this declaratory ruling. The terms defined in section 3 apply only “unless the

(continued....)

longstanding administrative precedent under the *2003 TCPA Order*, the *ACA Declaratory Ruling*, and the *State Farm Declaratory Ruling*.<sup>80</sup> Each of these rulings addresses a situation where the caller would violate the TCPA if calling on its own behalf, but is exempt from liability because it is calling on behalf of a principal and the principal would not be liable if it had placed the calls itself.

18. Our clarification comports with congressional intent and advances the public interest. As noted, there is no evidence in the text or legislative history of the TCPA that Congress intended to restrict federal government communications, and we agree with members of Congress that “[t]he goal of the TCPA has never been to impede communications from the federal government, especially those that gather data for important government research.”<sup>81</sup> We also agree that if tele-town hall meetings on behalf of the federal government, or other government-to-citizen communications, were subject to the TCPA’s consent requirement, wireless consumers would be less able to participate in government and make their views known to their representatives.<sup>82</sup> The unfortunate upshot would be inimical to democratic participation in government.

19. We also find credible commenters’ claims that allowing the federal government to use autodialers without consent will foster public safety<sup>83</sup> and save resources by allowing government to use the most cost-efficient method of communicating with the public.<sup>84</sup> The federal government and its agencies generally lack the capacity and expertise to conduct large-scale telecommunications operations using their own facilities; federal agencies are not often experienced at operating call centers. Instead, to

(Continued from previous page) \_\_\_\_\_

context otherwise requires[.]” 47 U.S.C. § 153. We find that the legal and factual context of this proceeding triggers the “otherwise requires” caveat to section 3. Specifically, in order to make meaningful our finding that the federal government is not subject to section 227(b)(1), we find it necessary also to find that the definition of “person” under section 227(b)(1) does not include a contractor acting as an agent of the federal government. In the absence of such a finding, many activities of the federal government would effectively be prohibited or restricted. *See infra* para. 19. Taking this factual context into account, along with the legal context noted above, we find that section 3’s definition of “person” is not controlling under section 227(b)(1) with respect to contractors acting as agents of the federal government.

<sup>80</sup> *2003 TCPA Order*, 18 FCC Rcd at 14014; *ACA Declaratory Ruling*, 23 FCC Rcd at 559; *State Farm Declaratory Ruling*, 20 FCC Rcd at 13664. One commenter argues that even if the Commission interprets “person” to exclude the federal government, this interpretation should not include contractors acting on the government’s behalf because “rights imbued to the sovereign do not flow to agents.” Biggerstaff Reply Comments on Broadnet Petition at 3 (citing *Richardson v. McKnight*, 521 U.S. 399 (1997); Biggerstaff Reply on RTI at 5 (also citing *Richardson*). We reject this argument. In interpreting section 227(b)(1), our focus is not on the “rights” of the sovereign, but rather on the reasonable meaning of the word “person” construed against the backdrop of the prevailing interpretive presumption that “person” does not include the federal government. We then simply apply agency principles to find that when a contractor lawfully stands in the shoes of the federal government, that contractor also is not a “person” under section 227(b)(1). The *Richardson* decision is not germane. That decision addressed whether a prison guard working for a private firm under contract with a state penal system was entitled to qualified immunity. To the extent we focus on immunity in this item, we do so with respect to *derivative* immunity in our discussion of *Campbell-Ewald* below, and not qualified immunity. Further, the *Richardson* Court emphasized that its holding was limited to the narrow facts before it: “[W]e have answered the immunity question narrowly, in the context in which it arose.” *Richardson*, 521 U.S. at 413. We do not find the unique context at issue in *Richardson* to be closely analogous to the factual scenarios raised in the Petitions.

<sup>81</sup> Congressional Letter at 1.

<sup>82</sup> Broadnet Petition at 5.

<sup>83</sup> American Gas Comments on Broadnet Petition at 2.

<sup>84</sup> CSS Comments on Broadnet Petition at 1.

efficiently conduct these activities, the government usually must act through third-party contractors.<sup>85</sup> If the TCPA were interpreted to forbid third-party contractors from making autodialed or artificial- or prerecorded-voice calls on behalf of the government, then, as a practical matter, it would be difficult (and in some cases impossible) for the government to engage in important activities on behalf of the public.<sup>86</sup> For instance, if contractors working on behalf of the Social Security Administration were “persons” under the TCPA, they would find it more difficult and costly to inform disabled or injured Americans of incentives that allow them to attempt to return to work without risking benefits.<sup>87</sup> We can discern no legal or policy rationale that would justify making it more difficult for the federal government to inform citizens of ways to leave poverty behind or to otherwise contact citizens for similar benevolent purposes.

### **B. Our Interpretation of “Person” Is Supported by *Campbell-Ewald* and the Record in These Proceedings**

20. Our decision to clarify the meaning of “person” within section 227(b)(1), as described above, finds strong support in the Supreme Court’s recent decision indicating that both the federal government, as well as contractors lawfully authorized to make calls on behalf of the federal government, are immune from TCPA liability and hence are not subject to its prohibitions.<sup>88</sup> In *Campbell-Ewald Co. v. Gomez*, the plaintiff alleged that Campbell-Ewald—a government contractor conducting a recruitment campaign for the United States Navy—violated the TCPA by sending automated text messages to recipients who had not agreed to receive them.<sup>89</sup> The Court stated that “[t]he United States and its agencies . . . are not subject to the TCPA’s prohibitions because no statute lifts their immunity.”<sup>90</sup> The Court further indicated that a government contractor may be eligible for “derivative immunity” when it acts under authority validly conferred on it by the federal government.<sup>91</sup> Ultimately, however, the Court determined that Campbell-Ewald was not entitled to derivative immunity because the record revealed that the company had exceeded its authority by sending messages that the government had *not* authorized it to send.<sup>92</sup> Specifically, the alleged text messages violated the Navy’s “explicit instructions” to “send text messages only to individuals who had ‘opted in’ to receive solicitations” and Campbell-Ewald’s promise “to use only an opt-in list.”<sup>93</sup> Because these messages were unauthorized, Campbell-Ewald could not claim to be acting on behalf of the government.

21. By stating that “no statute . . . lifts” the sovereign immunity of the federal government, *Campbell-Ewald* supports our interpretation of “person” in section 227(b)(1).<sup>94</sup> If Congress had wanted to “lift” the government’s immunity, it would have done so by other means – by, for example, defining

---

<sup>85</sup> See, e.g., National Employment Petition at 3, 4-7 (arguing that third-party contractors offer “the most cost-effective means of disseminating information” to participants in some federal programs).

<sup>86</sup> See, e.g., National Employment Petition at 3; RTI Petition at 9-11; Broadnet Petition at 3-4; RTI Reply Comments on RTI Petition at 7.

<sup>87</sup> See National Employment Petition at 3-8.

<sup>88</sup> *Campbell-Ewald*, 136 S. Ct. at 673-74.

<sup>89</sup> *Id.* at 666-67.

<sup>90</sup> *Id.* at 672.

<sup>91</sup> *Id.* at 673.

<sup>92</sup> *Id.* at 673-74.

<sup>93</sup> *Id.*; see also *id.* at n.7.

<sup>94</sup> While we agree that sovereign immunity “already provides ample protection for government entities from suit,” Luster Comments on Broadnet Petition at 4, that fact does not bar us from independently interpreting the term “person” in section 227(b)(1) of the Communications Act, as we do in section A above.

“person” to include the federal government. That Congress did not do so in the TCPA or any other statute reinforces our view that “person,” as used in section 227(b)(1), does not include the federal government.<sup>95</sup> By indicating that agents enjoy derivative immunity to the extent they act under authority “validly conferred” by the federal government and in accord with the government’s instructions, *Campbell-Ewald* also supports our clarification that the term “person,” as used in section 227(b)(1), does not include agents acting within the scope of their agency in accord with federal common-law principles of agency.<sup>96</sup>

22. Our interpretation of section 227(b)(1) also finds strong support in the record, as described above. We are not persuaded by commenters’ arguments to the contrary. For instance, the relief granted in this item is strictly limited to the federal government and its agents under a single provision of the Communications Act, and nothing in this order opens a “loophole” for parties making calls outside of this specific framework.<sup>97</sup> We also find no relevance to claims that certain laws not

---

<sup>95</sup> We therefore agree with Broadnet that *Campbell-Ewald* provides an independent basis for resolving key legal issues regarding the application of the TCPA to the federal government and those acting on its behalf. *See Ex Parte* Letter from Joshua M. Bercu, outside counsel to Broadnet Teleservices LLC, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1-3 (filed Feb. 29, 2016); *see also* Luster Comments on Broadnet Petition at 2-3, 4 (urging FCC to resolve Broadnet’s petition by relying on sovereign immunity law and the Supreme Court’s opinion—not yet adopted at that time—in *Campbell-Ewald*).

<sup>96</sup> While the *Campbell-Ewald* Court held that federal contractors do not share the Government’s unqualified immunity from liability and litigation, we disagree that that this holding makes no sense if federal contractors are not persons. The Court in *Campbell-Ewald* was not presented with the question, and thus did not decide, whether such contractors are “persons” within the meaning of the TCPA. Instead, the Court granted certiorari and ruled only on the question of whether and when government contractors share in the government’s sovereign immunity. We do not address that separate issue in this item. Moreover, the Court’s holding applies to all “federal contractors” as an undifferentiated category, whereas this declaratory ruling applies to a specific subcategory of federal contractors: those acting as agents of the federal government under the federal common law of agency. We find no contradiction between the Court’s statement that federal contractors do not *categorically* share the Government’s unqualified immunity and our narrow finding that *some* federal contractors (those acting as agents of the federal government) are not “persons” under section 227(b)(1). In stressing that no immunity applied because the contractor in that case “violate[d] . . . the Government’s explicit instructions,” *see Campbell-Ewald*, 136 S. Ct at 672-74, the Court implied that a contractor who complies with the government’s instructions and thereby acts within the scope of his validly conferred agency *would* be immune from liability. Similarly, this item does not mean that Congress’s recent decision to except calls “made solely to collect a debt owed to or guaranteed by the United States” from the prior express consent requirement, *see* Bipartisan Budget Act of 2015 § 301, Pub. L. No. 114-74, 129 Stat. 584, 588 (Budget Act), was unnecessary. First, at the time Congress enacted that amendment the Commission had not yet determined whether federal government contractors are subject to the TCPA, so the amendment was not redundant or pointless, but instead served to guarantee that callers covered by the amendment would be excepted from the consent requirement no matter how the Commission eventually resolved the question in this proceeding. Second, the Commission has not yet completed its congressionally mandated rulemaking to determine the scope and contours of the Budget Act amendment, *see* Budget Act § 301(b), 129 Stat. at 588 (directing “the Federal Communications Commission, in consultation with the Department of the Treasury, [to] prescribe regulations to implement the amendments made in this section” by August 2, 2016); 47 U.S.C. § 227(b)(2) (authorizing the Commission to “prescribe regulations to implement the requirements of this subsection”), so we lack a record about the interplay between today’s ruling and the Budget Act amendments until the Budget Act rulemaking proceeding has been completed.

<sup>97</sup> Luster Comments on Broadnet Petition at 2-3. For instance, our decision today does not give agents of government callers a green light to make “multi-use” robocalls or text messages, in which some portion of the call would be performed on behalf of the federal government while the remaining portion of the call would be performed on behalf of a non-governmental client. To qualify for the relief provided in this order, the entirety of a call must be relate to federal government activity; otherwise, it is subject to TCPA liability. *See* Biggerstaff Reply Comments on RTI Petition at 5. In that situation, the portion of the call that was performed on behalf of a non-government client would be subject to section 227(b)(1).

codified in the Communications Act (such as job discrimination laws and child labor laws) apply to the federal government.<sup>98</sup> Whether the federal government is bound by these or other laws is not relevant to our analysis here, which focuses solely on section 227(b)(1) of the Communications Act. Nor are certain policy arguments relevant to our legal analysis. The fact that federal agencies could choose to make calls “to any phone they want by making live calls rather than robot calls” has no bearing on whether Congress intended to exclude the federal government from the class of “persons” to whom section 227(b)(1) applies.<sup>99</sup> Likewise, while it is true, as one commenter pointed out, that our *2015 TCPA Declaratory Ruling and Order* emphasized the need to “empower consumers to decide which robocalls and text messages they receive,”<sup>100</sup> that goal was intended to apply only to calls that are covered by the TCPA and not to exempt calls, such as emergency calls or (as clarified herein) calls made by the federal government or its agents. And, while we do not believe that our action today will lead to extreme results – such as an “explosion” of unwanted calls accompanied by “chaos and abuse”<sup>101</sup> – we believe that we have reached the best interpretation of Congress’s intent to exempt the federal government from the prohibitions in section 227(b)(1), even if that interpretation might lead to more unwanted calls than would otherwise be the case.

#### IV. ORDERING CLAUSES

23. For the reasons stated above, IT IS ORDERED, pursuant to sections 1-4, and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, and sections 1.2 and 64.1200 of the Commission’s Rules, 47 C.F.R. §§ 1.2, 64.1200, that the Petition for Declaratory Ruling filed by Broadnet Teleservices LLC IS GRANTED to the extent indicated herein and OTHERWISE REMAINS PENDING.

24. IT IS FURTHER ORDERED, pursuant to sections 1-4, and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, and sections 1.2 and 64.1200 of the Commission’s Rules, 47 C.F.R. §§ 1.2, 64.1200, that the Petition for Expedited Declaratory Ruling filed by National Employment Network Association IS GRANTED to the extent indicated herein and IS OTHERWISE DENIED.

25. IT IS FURTHER ORDERED, pursuant to sections 1-4, and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, and sections 1.2 and 64.1200 of the Commission’s Rules, 47 C.F.R. §§ 1.2, 64.1200, that the Petition for Expedited Declaratory Ruling filed by RTI International IS GRANTED to the extent indicated herein and IS OTHERWISE DENIED.

26. IT IS FURTHER ORDERED that this Declaratory Ruling shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

---

<sup>98</sup> Shields Comments on National Employment Petition at 2; Shields Comments on RTI Petition at 3-4.

<sup>99</sup> Biggerstaff Reply Comments on Broadnet Petition at 6; *see also* Luster Comments on Broadnet Petition at 3. Had Congress wanted to limit the government to making live calls, it could have done so.

<sup>100</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7964 ¶ 1 (2015) (quoted in Luster Comments on Broadnet Petition at 1).

<sup>101</sup> Biggerstaff Reply Comments on RTI Petition at 3, 4.

Secretary

## APPENDIX A

## List of Commenters on the Broadnet Petition

| <u>Commenter</u>   | <u>Abbreviation</u> |
|--|---------------------|
| American Public Gas Association                          | American Gas        |
| American Public Power Association                        | American Power      |
| <b>Robert Biggerstaff</b>                                | <b>Biggerstaff</b>  |
| <b>Broadnet Teleservices LLC</b>                         | <b>Broadnet</b>     |
| <b>California Department of Child Support Services</b>   | <b>DCSS</b>         |
| <b>Child Support Directors Association of California</b> | <b>CSDA</b>         |
| <b>Child Support Payment Services</b>                    | <b>CSPS</b>         |
| <b>Child Support Service</b>                             | <b>CSS</b>          |
| <b>Darryll Grubbs</b>                                    | <b>Grubbs</b>       |
| <b>Information Systems Manager</b>                       | <b>Info Systems</b> |
| Frederick Luster   | Luster              |

(bold - reply comments only)

**APPENDIX B**

**List of Commenters on the National Employment Petition**

| <u>Commenter</u> | <u>Abbreviation</u> |
|------------------|---------------------|
| Joe Shields*     | Shields             |

\* filing both comments and reply comments

## APPENDIX C

## List of Commenters on the RTI Petition

| <u>Commenter</u>                | <u>Abbreviation</u> |
|---------------------------------|---------------------|
| <b>Robert Biggerstaff</b>       | <b>Biggerstaff</b>  |
| Representative G.K. Butterfield |                     |
| Representative Renee Ellmers    |                     |
| Representative Robert E. Latta  |                     |
| Marketing Research Association  | MRA                 |
| Representative David Price      |                     |
| <b>RTI International</b>        | <b>RTI</b>          |
| Joe Shields*                    | Shields             |

\* filing both comments and reply comments (bold - reply comments only)

**STATEMENT OF  
COMMISSIONER JESSICA ROSENWORCEL,  
CONCURRING**

Re: *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Broadnet Teleservices LLC Petition for Declaratory Ruling; National Employment Network Association Petition for Expedited Declaratory Ruling; RTI International Petition for Expedited Declaratory Ruling, Declaratory Ruling, CG Docket No. 02-278*

No matter the source, consumers are frustrated by robocalls. In fact, robocalls represent the single largest category of complaints the Commission receives. Month after month complaints pile in to this agency with consumers justifiably angry with calls for services that they do not want, did not sign up for, and do not need.

Nonetheless, in light of the Supreme Court's recent opinion in *Campbell-Ewald v. Gomez*, the Commission here finds that one class of callers—the federal government and those calling on its behalf—fall outside of the Telephone Consumer Protection Act. This outcome is apparently compelled by the doctrine of sovereign immunity. Our decision also recognizes that government has legitimate reasons for reaching out to citizens, including providing information about government programs and promoting greater civic engagement and debate.

While these considerations are important, I concur because this declaratory ruling does not fully consider the impact of recent changes in the Telephone Consumer Protection Act that are presently before this agency.

In last year's Bipartisan Budget Act, Congress modified the Telephone Consumer Protection Act to make clear that calls "made solely to collect a debt owed to or guaranteed by the United States" were not subject to the consent requirements for robocalls that otherwise apply under the law. At the same time, Congress instructed the Commission to conduct a rulemaking within nine months to consider regulations that "may restrict or limit the number and duration" of such calls.

This rulemaking began last month. It is still ongoing. So our actions here have an odd result. In effect, we prejudge the outcome of our narrower proceeding under the Bipartisan Budget Act by here providing a blanket exemption from the Telephone Consumer Protection Act to the federal government and its agents. Moreover, I am concerned that our decision risks trampling on the will of Congress. After all, if the federal government is truly outside the scope of the Telephone Consumer Protection Act, it is unclear why Congress would need to have specifically provided a debt-related exception to the law in the first place.

Finally, I am concerned that this decision gives short shrift to consumer frustration with robocalls. This frustration is real—and going forward I hope the Commission will redouble its efforts to decrease these calls—no matter who makes them.

**STATEMENT OF COMMISSIONER AJIT PAI,  
APPROVING IN PART AND DISSENTING IN PART**

Re: *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Broadnet Teleservices LLC Petition for Declaratory Ruling; National Employment Network Association Petition for Expedited Declaratory Ruling; RTI International Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278.

The Telephone Consumer Protection Act (TCPA) restricts “any person” from using certain automated telephone equipment.<sup>1</sup> The three petitions at issue begin by asking whether the federal government is a “person” for purposes of the TCPA. They next ask whether federal contractors are “persons.”

I agree with the Commission that the federal government is not a “person” for purposes of the TCPA.<sup>2</sup> The “longstanding interpretive presumption” is that “the word ‘person’ does not include the sovereign” absent a clear “affirmative showing of statutory intent to the contrary.”<sup>3</sup> And nothing in the statute here evinces a contrary intent. Indeed, Congress expressly defined a “governmental entity” as a “person” in other provisions of the Communications Act, but not for the TCPA.<sup>4</sup>

But I part ways with the Commission’s conclusion that federal contractors are not persons under the TCPA. *First*, every private federal contractor is either an “individual, partnership, association, joint-stock company, trust or corporation,” which just happens to be the statutory definition of “person” for the TCPA.<sup>5</sup> And so every federal contractor is, by definition, a person.

*Second*, the express language of the TCPA confirms that Congress intended federal contractors to be persons under the law. A recent amendment to the TCPA exempted calls “made solely to collect a debt owed to or guaranteed by the United States” and authorized the Commission to “restrict or limit the number and duration” of such calls.<sup>6</sup> The debt collectors who are apt to make such calls are typically federal contractors. For why would anyone without a federal contract (if not part of the federal government itself) make calls solely to collect debt owed to the United States? But if federal contractors were not persons under the law, this exemption would be pointless (and the statutory language mere surplusage).<sup>7</sup>

*Third*, there is no longstanding interpretive presumption that federal contractors are not persons. There is no recently created interpretive presumption that federal contractors are not persons. Indeed, there appears to be no interpretive presumption whatsoever regarding federal contractors. Thus, the plain and unambiguous meaning of the text must control.

---

<sup>1</sup> Communications Act § 227(b).

<sup>2</sup> *Order* at para. 14.

<sup>3</sup> *Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 781 (2000).

<sup>4</sup> Compare Communications Act § 602(15) (“[T]he term ‘person’ means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity” for purposes of Title VI of the Communications Act.), with Communications Act § 3(39) (“The term ‘person’ includes an individual, partnership, association, joint-stock company, trust, or corporation.”).

<sup>5</sup> Communications Act § 3(39).

<sup>6</sup> Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 584.

<sup>7</sup> See, e.g., *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697 (1995) (emphasizing “[a] reluctance to treat statutory terms as surplusage”).

*Fourth*, a recent decision of the Supreme Court involving the TCPA confirms that federal contractors are persons. In *Campbell-Ewald Co. v. Gomez*, the Court asked, “Do federal contractors share the Government’s unqualified immunity from liability and litigation?” It then answered, “We hold they do not.”<sup>8</sup> That Socratic exchange makes no sense at all if federal contractors are not persons. Were federal contractors entirely beyond the ambit of the TCPA, a discussion about immunity would be a *non sequitur*.<sup>9</sup>

The Commission offers two responses to all of this. Initially, it cites the federal common law of agency, arguing that a contractor who places calls on behalf of the federal government can “invoke the federal government’s exception from the TCPA.”<sup>10</sup> But whatever that common law may have to say about a federal contractor’s derivative immunity from suit (more on that later), it has nothing to do with whether the statutory term “person” includes federal contractors. After all, a person calling on behalf of someone else or acting as someone else’s agent is still a person. And it is odd to suggest that a contractor’s status as a “person” could switch on or off depending on one’s behavior or relationship with the federal government.<sup>11</sup>

Next, the *Order* cites the “record”<sup>12</sup> and concludes that “no legal or policy rationale . . . would justify making it more difficult for the federal government to inform citizens . . . or to otherwise contact citizens for . . . benevolent purposes.”<sup>13</sup> But just last month, the FCC proposed rules to make it more difficult for federal contractors to make calls to collect federal debts.<sup>14</sup> Presumably, the Commission had *some* legal and/or policy rationale for doing so. And once again, insofar as the proper interpretation of the statutory term “person” includes federal contractors—which it does—Congress’s purpose trumps any Commission reasoning.

One last point. I do not doubt that federal contractors are entitled to some form of derivative immunity from suit.<sup>15</sup> And I do not doubt that the federal common law of agency is relevant to that determination. But it is not the Commission’s place to define the proper contours of the federal common

---

<sup>8</sup> 136 S. Ct. 663, 672 (2016).

<sup>9</sup> Or to put it another way, the whole point of derivative immunity is that a person—in this case, a federal contractor—may be temporarily shielded from liability because of its relationship with the sovereign *despite* being otherwise liable under the law. *Contra Order* at note 79 (“[I]n order to make meaningful our finding that the federal government is not subject to section 227(b)(1), we find it necessary also to find that the definition of ‘person’ under section 227(b)(1) does not include a contractor acting as an agent of the federal government.”); *contra also Order* at para. 21 & note 96.

<sup>10</sup> *Order* at para. 17; *see also Order* at para. 16.

<sup>11</sup> For example, at one point the *Order* claims that a federal contractor is not a person only when “the entirety of a call [relates] to federal government activity,” so that if some portion of the call is “performed on behalf of a non-governmental client,” it would be “subject to section 227(b)(1).” *Order* at note 96. In other words, a federal contractor’s status as a “person” can change mid-call. And the *Order* does not even attempt to reconcile this reading with the actual prohibitions of the statute, which prohibit a person from “mak[ing] any call” and “initiat[ing] any telephone call,” not remaining on the line after a call has been made or initiated. Communications Act § 227(b)(1)(A), (B).

<sup>12</sup> *Order* at para. 22.

<sup>13</sup> *Order* at para. 19.

<sup>14</sup> *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Notice of Proposed Rulemaking, FCC 16-57 (May 6, 2016).

<sup>15</sup> *See Brady v. Roosevelt Steamship Co.*, 317 U.S. 575, 583 (1943) (“[G]overnment contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States.”).

law of immunity or its application to federal contractors.<sup>16</sup> The federal common law of immunity is a general body of law that covers numerous agencies. It extends to defense, healthcare, the environment, telecommunications, and much more. We cannot opine—at least not with any authority afforded judicial deference<sup>17</sup>—on its scope or meaning, particularly as we announce its incipient application to the TCPA only today.

And we *need* not opine given that a petitioner has expressly asked us not to do so.<sup>18</sup> Instead, we should leave the issue of the precise scope of a federal contractor’s derivative immunity—how it applies, to whom it applies, and myriad other questions—in the capable hands of Congress and the courts.

For these reasons, I approve in part and dissent in part.

---

<sup>16</sup> See *The Joint Petition Filed by DISH Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules, et al.*, CG Docket No. 11-50, Declaratory Ruling, 28 FCC Rcd 6574, 6601 (2013) (Statement of Commissioner Ajit Pai, Approving in Part and Dissenting in Part).

<sup>17</sup> See, e.g., *Chevron, U.S.A. Inc. v. Nat’l Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (deference applies only “[w]hen a court reviews an agency’s construction of the statute which it administers”); *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649–50 (1990) (same). Similarly, *Skidmore* deference makes sense only when an agency’s “specialized experience” in a particular field gives its arguments added weight. *U.S. v. Mead Corp.*, 533 U.S. 218, 234–35 (2001) (citing *Skidmore v. Swift*, 323 U.S. 134, 139 (1944)).

<sup>18</sup> RTI Petition at 1 n.5 (“RTI requests only that the Commission confirm that the TCPA does not apply to research survey calls made by or on behalf of the federal government because, *inter alia*, the term ‘person,’ as defined in 47 U.S.C. § 153(39) does not include the United States. RTI does not request that the Commission opine on issues of sovereign immunity.”).

**STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

*Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Broadnet Teleservices LLC Petition for Declaratory Ruling; National Employment Network Association Petition for Expedited Declaratory Ruling; RTI International Petition for Expedited Declaratory Ruling, CG Docket No. 02-278*

I support the relief provided in this Declaratory Ruling, which exempts most calls made by or on behalf of the federal government, including tele-town halls, from the Telephone Consumer Protection Act (TCPA). It is frustrating, however, that Federal agencies will be exempt but the Commission leadership left unanswered whether state or local agencies may be subject to TCPA lawsuits. Why is the Commission willing to say the Export-Import Bank is exempt but not the California Health & Human Services Agency, the Carson City Public Guardian, or the New York Department of Education? Such arbitrary line drawing leaves state and local governments, and the people they serve, exposed to predatory TCPA lawsuits that divert tax dollars away from serving the public.

The same justifications used in the Declaratory Ruling to exempt federal government calls would apply to state and local government calls. For instance, the item notes that “allowing the federal government to use autodialers without consent will foster public safety and save resources by allowing government to use the most cost-efficient method of communicating with the public.” State and local governments may also be budget constrained and have equally valid and urgent reasons to contact their citizens. It is interesting that the same Commission that is willing to abuse the statute to “help” municipalities, against my wishes, would not even answer the question of whether they can make calls without the threat of costly litigation hanging over them.

In addition, the Declaratory Ruling notes that “the government would face a significant obstacle if it could not make autodialed or prerecorded- or artificial-voice calls to communicate with participants in federal programs such as Social Security.” The item even goes so far as to state that it can “discern no legal or policy rationale that would justify making it more difficult for the federal government to inform citizens of ways to leave poverty behind or to otherwise contact citizens for similar benevolent purposes.” I am surprised that a Commission majority that just voted to expand outreach to low-income households to encourage every possible recipient to sign up for Lifeline, including by directing USAC to work with state agencies on outreach, would be reluctant to provide relief for state agencies that want to conduct that outreach through phone calls or texts.

When I pushed Commission leadership to resolve the state and local issue, I was told that more research would be needed because it could open the door to unwanted calls from a whole host of agencies—even the dog catcher! I did not find that excuse to be persuasive when contemplating the multitude of beneficial state and local agencies helping our fellow citizens on a daily basis or even in the narrow universe of animal control services. First, if I had a missing dog that was found, I would want to receive that call—even if by autodialer. I would also want to know if there was an outbreak of rabies, and in other scenarios when autodialing or sending texts to residents of a potentially impacted area makes sense, which just so happens is justified under the law. Second, I find it hard to believe that state or local agencies would waste time setting up systems to autodial random residents. If it does happen, fire those employees rather than using TCPA as an arbiter of state and local government actions. Third, even if I receive a stray call now and then, that should not constitute a harm to be remedied through TCPA litigation.

The Declaratory Ruling does not even commit to a timeframe for addressing state and local government calls. The Commission should at least provide an answer so that all impacted parties can plan or act accordingly, or seek appropriate remedy. Instead, leaving the issue in regulatory limbo for the

foreseeable future will potentially expose state and local governments to liability while doing nothing to assist consumers. In fact, some states or localities may simply be forced to discontinue calls, to the detriment of consumers that would have benefitted from such outreach. That is a terrible outcome.