FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CG Docket No. 18-152
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
	)	
Telephone Consumer Protection Act of 1991	)	DA 18-493
	)	

Craig Cunningham's and Craig Moskowitz's Comments Regarding the Consumer and Governmental Affairs Bureau's May 14, 2018 Request for Comments on the Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision

I am the attorney for Craig Cunningham ("Mr. Cunningham") and Craig Moskowitz ("Mr. Moskowitz"). I am submitting these comments on behalf of Mr. Cunningham and Mr. Moskowitz in response to the Consumer and Governmental Affairs Bureau's May 14, 2018 request for comments on interpreting the Telephone Consumer Protection Act in light of the D.C. Circuit's ACA decision. In particular, these comments will focus on whether the TCPA should be interpreted as binding on private persons or entities who contract with federal, state or local governments. For the reasons discussed below, the TCPA must be so interpreted.[1]

The TCPA's prohibitions apply to "any person within the United States, or any person outside the United States if the recipient is within the United States. . . ." 47 U.S.C. § 227(b)(1). While the term "person" is not defined in the TCPA itself, 47 U.S.C. § 153(39) provides that "[f]or the purposes of this chapter [of which the TCPA is a part], unless the context otherwise requires— . . . . [t]he term 'person' includes an individual, partnership, association, joint-stock

[1] Mr. Cunningham and Mr. Moskowitz adopt all the arguments that have been submitted and will be submitted by the National Consumer Law Center on all the questions raised by the Consumer and Governmental Affairs Bureau May 14, 2018 request for comments. Those arguments are incorporated herein by reference.

company, trust, or corporation." 47 U.S.C. § 153(39). This definition contains no exception for individuals or entities that contract with federal, state, or local governments, and so, under the plain meaning rule, the restrictions of the TCPA apply to those individuals and entities. *E.g.*, *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply. . . ."); *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951) ("[O]ur problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort."); *Broadnet*, 31 FCC Rcd. 7394, 7416 (rel. July 5, 2016) (Pai, Commissioner, concurring in part and dissenting in part) ("[E]very 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. And so every federal contractor is, by definition, a person.").

In its July 5, 2016 ruling in *Broadnet*, the Commission rejected that reasoning concerning persons who enter into contracts with the federal government. The Commission relied on the fact that 47 U.S.C. 153(39) contains a caveat in the definition of "person" that says that that definition applies "unless the context otherwise requires" (hereinafter the "Context Clause"):

> 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.

Broadnet, 31 FCC Rcd. at 7402 n.79.

Respectfully, that ruling by the Commission was incorrect. The Commission's reliance on "the legal and factual context of this proceeding" — which are factors other than the text of 47 U.S.C. § 227(b)(1) or the text of other related congressional Acts — to read out federal contractors from the term person in 47 U.S.C. § 227(b)(1), was improper under controlling precedent. Specifically, in *Hubbard v. United States*, 514 U.S. 695 (1995), the Supreme Court considered a similar context clause that stated that a particular definition of a word applied "'unless the context shows that such term was intended to be used in a more limited sense.'" *Id.* at 700 (quoting 18 U.S.C. § 6). The Court ruled that

> the proper method of analyzing a statutory term's "context" to determine when a presumptive definition must yield. . . . requires a court to examine "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts...." Review of other materials is not warranted. "If Congress had meant to point further afield, as to legislative history, for example, it would have been natural to use a more spacious phrase, like 'evidence of congressional intent,' in place of 'context.'"

Id. (quoting *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199, 200 (1993)) (internal citations omitted). *Accord Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1081 (Fed. Cir. 2001) (same); *American Bankers Association v. Securities and Exchange Commission*, 804 F.2d 739, 753 (D.C. Cir. 1986) (interpreting context clause that read "unless the context otherwise requires," and holding that "[w]e read the context clause as meaning only that if in the case of a frequently occurring statutory term, its immediate context suggests that a literal application of the statutory definition would produce absurd consequences or run counter to the obvious thrust of the section, the agency may appropriately modify the definition.") Under these controlling precedents, it is plain that the Commission erred when it relied on the extra-textual "legal and factual context of this proceeding" to read out federal contractors from the term person in 47 U.S.C. § 227(b)(1). For the same reasons, the

Commission may not rely on the "context clause" to rule that the TCPA does not apply to entities that contract with state or local governments.

The Commission's concern in *Broadnet* — that "[i]f 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[,]" *Broadnet*, 31 FCC Rcd. at 7402 ¶ 16 — was misplaced. Sovereign immunity would prevent the federal government from being held liable under the TCPA under vicarious liability principles. *E.g.*, *Logue v. United States*, 412 U.S. 521, 527 (1973).

To the extent that the Commission in Broadnet relied on *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18 (1940) and *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016) to support its conclusion that TCPA does not apply to federal government contractors, that reliance was also misplaced. First, those cases concerned the concept of derivative sovereign immunity, not the statutory interpretation of the TCPA and are therefore inapposite. *Broadnet*, 31 F.C.C. Rcd. at 7416 (Pai, Commissioner, concurring in part and dissenting in part) ("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").

Second the defense described in Yearsley v. W.A. Ross Const. Co., 309 U.S. 18 (1940) can only immunize private government contractors from lawsuits for state-law violations. See Boyle v. United Technologies Corp., 487 U.S. 500, 506 (1988) ("In Yearsley. . .we rejected an attempt by a landowner to hold a construction contractor liable **under state law** for the erosion

of 95 acres caused by the contractor's work in constructing dikes for the Government." [emphasis added]); Adkisson v. Jacobs Engineering Group, Inc., 790 F.3d 641, 646 (6th Cir. 2015) ("[T]he Supreme Court has cast Yearsley in terms of preemption, explaining that the "'uniquely federal' interest" in the performance of government contracts justified displacing state-law liability.") (quoting Boyle, 487 U.S. at 505-06), cert. denied, 136 S. Ct. 980 (2016). For this reason alone, Yearsley does not support a finding that the TCPA does not apply to federal contractors.

Third, *Yearsley* immunity depends on three requirements, the first of which is that federal legislation, passed by Congress, authorize the specific conduct at issue. 309 U.S. at 20-21; *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 673 (2016) (recognizing that *Yearsley* listed as one condition of immunity that work was "performed pursuant to the Act of Congress,'" and quoting *Yearsley*). The *Yearsley* Court found that the contractor's building dikes on the Missouri River — which was what was specifically required in the statute authorizing that construction — "inevitabl[y]" caused the damage to the plaintiff's property, i.e., no matter how the contractor had constructed the dikes ordered by Congress, the dikes would have caused that damage. 309 U.S. at 20. *Yearsley* went on to hold that where a federal statute specifically authorizes particular work to be performed, which "inevitabl[y]" causes damages that are recoverable under state law, and a contractor, in accordance with a government contract, does that work as directed, the contractor has a defense to state law liability. *Id*. at 20-21. Since *Yearsley*, the Supreme Court has not altered this requirement of specific federal authorization of the conduct for which a contractor seeks immunity. Thus, the fact that an entity has a contract with the federal government is, in and of itself, insufficient to immunize the entity from liability under the TCPA.

Fourth, a federal administrative agency lacks any power to validly confer any authority upon a private contractor to engage in conduct that violates federal law – a prerequisite to

invoking *Yearsley* immunity. *Yearsley*, 309 U.S. at 20; *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 673 (2016) (contrasting cases where authority was validly conferred and thereby deserving of *Yearsley* immunity with "cases in which a Government agent had 'exceeded his authority' or the authority 'was not validly conferred'; in those circumstances, the [*Yearsley*] Court said, the agent could be held liable for conduct causing injury to another.") (citation omitted); *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2241 (2014) ("An agency may not reorder federal statutory rights[, including private causes of action under federal law,] without Congressional authorization"); *Brown v. Gardner*, 513 U.S. 115, 117-22 (1994) (invalidating agency regulation that created nonstatutory defense to private right of action established by federal statute); *Little v. Barreme*, 6 U.S. 170, 176-79 (1804) (holding that even the President could not, through an order to a naval officer, authorize that officer to violate federal law or shield that officer from being held liable for individual damages for those illegal actions.); *U.S.. ex rel. Howard v. Lockheed Martin Corp.*, 14 F. Supp.3d 982, 1015 (S.D. Ohio 2014) ("It is clear that a government contracting officer cannot waive compliance with or authorize a contractor to violate federal law or regulation"); 48 C.F.R. § 1.602-1(b) (Federal Acquisition Regulation providing that federal contracting officers may not enter into a contract "unless all requirements of law, executive orders, [and] regulations . . . have been met"). Accordingly, a federal contract with a private entity directing that entity to take actions that violate the TCPA cannot immunize that entity from TCPA liability.

Fifth, it is well settled that provisions in contracts that violate federal law are unenforceable, even where one of the parties to the contract is the federal government itself. *E.g., Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982) ("There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases

controlled by the federal law.") (citing cases); *Office of Personnel Management v. Richmond*, 496 U.S. 414, 420 (1990) ("'Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.'") (citation omitted); *American Airlines, Inc. v. Austin*, 75 F.3d 1535, 1538 (Fed. Cir. 1996) ("[g]enerally, a provision in a government contract that violates or conflicts with a federal statute is invalid or void"); *Texas Instruments Inc. v. United States*, 922 F.2d 810, 815 (Fed. Cir. 1990) ("[A]n agent of the Government may not bind the Government to an agreement when such an act is directly forbidden by U.S. law or regulations"). Consistent with the rule that contracts directing violations of federal law are unenforceable, federal agencies lack authority to enter into such contracts, and therefore such a contract cannot possibly immunize a contractor from TCPA liability. *E.g., Sutton v. United States*, 256 U.S. 575, 578-79 (1921) (Secretary of War lacked authority to enter into contract that violated federal law).

Sixth, "an agent's liability for torts committed by him cannot be avoided by pleading the direction or authorization of his principal. The agent is himself liable whether or not he has been authorized or even directed to commit the tort." *Larson*, 337 U.S. at 694. Indeed, "the principle that an agent is liable for his own torts is an ancient one and applies even to certain acts of public officers or public instrumentalities." *Id*. at 686 (internal quotation marks omitted); *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922) ("An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts.") (citations omitted). Accordingly, the federal government's direction to a private contractor to take actions that violate the TCPA cannot immunize that private contractor against TCPA lawsuits.

Seventh, the courts have specifically recognized that any party contracting with a federal government agency must determine for itself, and cannot assume, that the agency has authority to enter into the contract. *E.g., Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 383-84 (1947) (holding that because federal agencies and their representatives lack authority to enter into a contract that violates federal law, "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority). Accordingly, for the above reasons as well, neither a federal administrative agency nor any other governmental actor may immunize private contractors with the federal government from liability under the TCPA.

Campbell-Ewald is in complete accord with the above. In *Campbell-Ewald* the U.S. Navy did not direct the contractor-defendant to take any actions that violated the TCPA. Quite the contrary, the Navy explicitly instructed the contractor to send text messages only to persons who had provided prior express consent to receive them — an instruction that complied with the TCPA. 136 S. Ct. at 667, 672, 673. The Supreme Court held that because the defendant had not in fact followed the Navy's instructions, the defendant could be held liable for violating the TCPA. *Id.* at 672-74. The Court nowhere ruled upon, one way or another, the underlying legal issue of whether the *Yearsley* defense should cover an instance in which a federal agency has directed a private contractor to engage in actions that violate federal law.

That *Campbell-Ewald* Court did not state in its decision that the *Yearsley* defense is inapplicable to federal law violations, does not mean that the Court implicitly held that the *Yearsley* defense can be used to absolve a government contractor of liability for violating federal law when directed to do so by a federal agency. The Supreme Court has repeatedly admonished that when an issue "is neither noted nor discussed in a federal decision, the decision does not

stand for the proposition [that the issue has been decided one way or another]." *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 144-45 (2011); *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) (holding that *stare decisis* is not applicable unless the issue was "squarely addressed" in the prior decision), *superseded by statute on other grounds as stated in Zappulla v. New York*, 391 F.3d 462 (2d Cir. 2004).

In *Arizona Christian*, for example, the Court observed that it had previously issued substantive rulings in First Amendment Establishment Clause cases brought by taxpayers about government tax benefits. 563 U.S. at 144. Nevertheless, the Court had no compunction about ruling that taxpayers did not have standing to bring cases about tax benefits in the first place because "the jurisdictional defect was neither noted nor discussed" in the prior decisions. *Id*. Likewise, because in *Campbell-Ewald* the Supreme Court did not discuss whether the *Yearsley* defense may immunize government contractors who violate federal law, this Court cannot read *Campbell-Ewald* to hold that it does.

Any argument that it would have made no sense for the Supreme Court in *Campbell-Ewald* to consider, as it did, *Yearsley's* applicability to the TCPA claim at issue if it had concluded that *Yearsley* was restricted to state law claims, would be meritless. The Supreme Court, as other courts, routinely decides cases on one ground, and leaves open the question of whether the decision could be justified on another ground. *E.g.*, *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 752 n.4 (2017) ("In reaching these conclusions, we leave for another day a further question about the meaning of [the statute at issue]"); *Wood v. Allen*, 558 U.S. 290, 304-05 (2010) ("Because the resolution of this case does not turn on them, we leave for another day the questions of how and when [28 U.S.C] § 2254(e)(1) applies in challenges to a state court's factual determinations under [28 U.S.C.] § 2254(d)(2)."). In fact, because, as discussed

above, *Yearsley* requires specific federal statutory authorization to immunize a contractor from even state law liability, it is plain that mere contractual directions from a federal agency to a private contractor cannot immunize the private contractor from TCPA liability.

In any event, as Chairman Pai has stated "it is not the Commission's place to define the proper contours of the federal common law of immunity or its application to federal contractors. 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—on its scope or meaning, particularly as we announce its incipient application to the TCPA only today. . . .[W]e 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" *Broadnet*, 31 F.C.C. Rcd. at 7416 (Pai, Commissioner, concurring in part and dissenting in part).

In short, neither *Campbell-Ewald* nor *Yearsley* constitute precedent holding that the *Yearsley* defense protects private entities that contract with federal, state, or local governments, or their agencies, against TCPA liability, and certainly do not support interpreting the TCPA as inapplicable to contractors with federal, state, or local governments.[2]

For all the above reasons, the Commission should rule that the entities that contract with federal, state, or local governments or their agencies are persons within the meaning of the

[2] Although the Fourth Circuit recently held in *Cunningham v. General Dynamics Information Technology, Inc.*, 888 F.3d 640 (4th Cir. 2018) that a private entity that contracted with the federal government was immune from TCPA liability, that decision did not address most of the legal arguments discussed above. In any event, that decision was inconsistent with the controlling Supreme Court and other case law discussed above and was wrongly decided.

TCPA, and can be held liable under the TCPA even if the entities' contracts with those governmental bodies direct the entities to take actions that violate the TCPA.

Respectfully,

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