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Case No. 09-4525

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PHILIP J. CHARVAT,	:	
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	United States District Court
v.	:	for the Southern District of Ohio,
	:	Eastern Division
ECHOSTAR SATELLITE, LLC,	:	Case No. 2:07-cv-1000
	:	
Defendant-Appellee.	:	
	:	

**BRIEF OF THE STATES OF OHIO, ILLINOIS, MICHIGAN, AND
TENNESSEE AND THE COMMONWEALTH OF KENTUCKY AS *AMICI
CURIAE* FOR REVERSAL OR AFFIRMANCE ON ALTERNATE
GROUNDS**

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INTRODUCTION

This case features a straightforward question of statutory interpretation: Under what circumstances does an individual act “on behalf of” an entity for the purposes of subjecting that entity to liability under 47 U.S.C. § 227(c)(5) of the Telephone Consumer Protection Act (“TCPA” or “Act”)? Turning to state agency law for guidance, the district court reasoned that an individual only acts “on behalf of” an entity when the individual agrees to act for the entity’s benefit and subject to the entity’s control, that is, when the individual meets the Ohio definition of “agent.” *Charvat v. Echostar Satellite, LLC*, 676 F. Supp. 2d 668, 674–75 (S.D. Ohio 2009) (citing *Bostic v. Connor*, 524 N.E.2d 881, 883 (Ohio 1988)).

This conclusion runs afoul of the statutory text and settled law in two key respects. Both concern amici curiae States of Ohio, Illinois, Michigan, and Tennessee and the Commonwealth of Kentucky, which have the power to prosecute consumer protection cases under the TCPA through their attorneys general, see 47 U.S.C. § 227(f)(1), and thus seek clarity and uniformity in the law.

First, as the United States Supreme Court has repeatedly held, federal statutes are presumed not to incorporate or rely upon state law absent a clear congressional statement to the contrary. See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989). Indeed, Congress generally intends for federal laws to have “uniform nationwide application,” and any exceptions to this rule

should be explicitly identified. *Id.* at 43–44. The district court failed to pinpoint a clear statement of state law dependence because none exists in the TCPA. As such, the court erred in examining Ohio agency law at all.

This error is not de minimis; if adopted broadly, it would lead to a patchwork of inconsistent interpretations in this context, as States view facets of the agency relationship in varying ways. Such differences would undermine the effective enforcement of the TCPA and create contradictory legal standards for legitimate telemarketers to follow. All of this runs contrary to Congress’s goal of providing an effective national remedy to the problem of abusive telemarketing.

Second, by importing agency rules into the analysis, the district court exceeded the plain language of the TCPA and increased the standard of proof necessary to prove a violation. An agency relationship exists when the putative agent and principal (1) agree (2) that the agent will “act on the principal’s behalf *and* [(3)] subject to the principal’s control.” Restatement (Third) of Agency § 1.01 (emphasis added). The TCPA provision at issue here, though, requires only one of these criteria—acting “on behalf of” the principal entity. 47 U.S.C. § 227(c)(5); see also 47 C.F.R. § 64.1200.

The statutory language must be given its due. Under its plain meaning, a principal entity (here appellee EchoStar Satellite, LLC) is liable for the TCPA violations of others when those others acted in furtherance of the entity’s interests,

regardless of whether there was an express agreement to that effect or whether the entity exercised control over those actions.

While that evidentiary burden appears to be satisfied here, amici have not examined the sealed record in this case, and thus take no position on the factual result. Thus, the Court should reverse the district court's aberrant legal conclusions and then either (1) remand for the court to resolve the ensuing factual questions or (2) to the extent the record permits it, affirm on alternate grounds.

STATEMENT OF INTEREST OF AMICI CURIAE

The States of Ohio, Illinois, Michigan, and Tennessee and the Commonwealth of Kentucky are authorized by 47 U.S.C. § 227(f)(1) to file actions in federal district court through their attorneys general to enjoin violations of, enforce compliance with, and obtain damages for violations of the TCPA on behalf of their residents. The amici States thus have a strong interest in their citizens' privacy rights and in protecting their citizens from unwanted and harassing telemarketing calls, no matter where those calls originate. As such, they are inherently interested in how courts in this Circuit and throughout the country interpret the TCPA.

In the interest of full disclosure, amici States of Ohio and Illinois note that they are among the plaintiffs pursuing claims under the TCPA against EchoStar in an action currently being litigated in the United States District Court for the

Central District of Illinois. As the brief below demonstrates, though, amici are not concerned with EchoStar's substantive liability in this case. Rather, they offer this brief because the district court's interpretation of the applicable provisions may insulate many abusive telemarketing practices from effective enforcement and complicate the amici States' efforts to enforce these critical laws.

STATUTORY AND REGULATORY BACKGROUND

Telemarketing calls intrude on consumers' privacy and often expose consumers to harassment, exploitation, and fraud. See FTC Amended Telemarketing Sales Rule Statement of Basis and Purpose, 68 Fed. Reg. 4580, 4580–81 (Jan. 29, 2003); Pub. L. No. 102-243, § 2(5), 105 Stat. 2394, 2394 (1991) (noting that “[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety”). Congress enacted the TCPA in 1991 to address the high volume of consumer complaints about malicious forms of telemarketing, noting that the potential for abuse was growing due to the increasing number of telemarketing firms and advances in technology that made it easier and cheaper to run a telemarketing business. S. Rep. 102-178, at 2 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1969.

The TCPA addresses these concerns by placing a number of restrictions on the telemarketing industry, including limitations on the use of automatic telephone

dialing systems and artificial or prerecorded voice messages. See 47 U.S.C. § 227(b)(1), (d)(1). It grants enforcement authority to the Federal Communications Commission (“FCC”), state attorneys general, and private parties. 47 U.S.C. § 227(b)(3), (c)(5), (f)(1), (3).

The TCPA directed the FCC to promulgate regulations to carry out these provisions, and the ensuing rules are codified at 47 C.F.R. § 64.1200. Those regulations proscribe, in addition to numerous other telemarketing abuses, calls to numbers on the National Do Not Call Registry, which has been “tremendously successful in protecting consumers from unwanted telemarketing calls” and has been called “one of the most popular Federal programs in history.” H.R. Rep. No. 110-485, at 2, 4 (2007).¹

The TCPA creates a private right of action for individuals to sue both persons making improper telemarketing calls and entities “on behalf of” which such calls are made. 47 U.S.C. § 227(c)(5) (“A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may” bring an appropriate action to enjoin the action, recover damages for it, or both.). The

¹ More than 190 million consumers had signed up for the Registry as of 2009. See FTC, Biennial Report to Congress Pursuant to the Do Not Call Registry Fee Extension Act of 2007, at 3 (Dec. 2009), available at <http://www.ftc.gov/os/2010/01/100104dncbiennialreport.pdf> (last visited July 26, 2010).

regulations, which sets out the various prohibited acts, alternately use the phrases “on behalf of” and “on whose behalf” in describing this relationship. 47 C.F.R. § 64.1200(a)(3)(vi), (a)(6), (c)(2), (d)(3)–(5), (f)(6)–(8). Neither the statute nor the regulations define the phrases “on behalf of” or “on whose behalf.”

SUMMARY OF RELEVANT ASPECTS OF THE CASE

In his first amended complaint, appellant Phillip Charvat alleged that, between June 2004 and August 2007, he received thirty calls from telemarketers attempting to sell subscriptions to EchoStar satellite television programming (also known as DISH Network). *Charvat*, 676 F. Supp. 2d at 670. Many of these calls were prerecorded, and Charvat asked repeatedly to be placed on the caller’s do-not-call list. *Id.* Charvat subsequently sued EchoStar in the district court, alleging violations of the TCPA and the Ohio Consumer Sales Practices Act among other causes of action. *Id.*

Charvat did not allege that EchoStar itself placed the violative calls; instead, he claimed that numerous authorized EchoStar dealers placed the calls on EchoStar’s behalf. *Id.* at 671. These dealers contract with EchoStar “to advertise, promote, and solicit orders for DISH Network® brand programming and to install and activate the necessary satellite television equipment.” *Id.*

EchoStar moved for summary judgment, arguing that it should not be held liable because it neither made the calls nor exercised control over the dealers that

did so. *Id.* It produced contracts that labeled each dealer as an “independent contractor” and stated that the dealer “shall not under any circumstances hold itself out to the public or represent that it is an agent, employee, subcontractor or Affiliate of EchoStar or any EchoStar Affiliate” and “has no right or authority to make any representation, promise or agreement or take any action on behalf of EchoStar or an EchoStar Affiliate.” *Id.* at 674.

In reviewing this motion, the district court noted that, even though EchoStar’s dealers were independent contractors and the contracts disclaimed an agency relationship, “this fact is not necessarily dispositive with respect to the question of whether EchoStar may be held liable for the violations” under the “on behalf of” language in the statute and regulation. *Id.* The true test, according to the court, is whether the dealers qualified as Echostar’s “agents,” using an Ohio Supreme Court case as a guide: “Regardless of whether someone is labeled an independent contractor, when the hiring party retains the ‘right to control the manner or means’ by which a particular job is completed, . . . the hired party is actually an employee or agent who is acting ‘on behalf of’ the hiring party.” *Id.* at 674–75 (citing *Bostic*, 524 N.E.2d at 883). In short, the court tethered TCPA liability to Ohio agency law.

The district court then found that, while EchoStar had some control over its dealers (including the ability to control the programming offered and the prices to

be charged), Charvat failed to prove that EchoStar exercised so much control that it should be held liable for their telemarketing calls. *Id.* at 675–78. As such, the court granted EchoStar’s motion for summary judgment. *Id.* at 678–79.

ARGUMENT

I. The TCPA’s “on behalf of” liability provision, 47 U.S.C. § 227(c)(5), and its related regulations, 47 C.F.R. § 64.1200, do not incorporate state agency law, but rather ascribe liability based on business relationships that lack key agency features.

The TCPA is a broad, national law designed to provide consistent guidelines for legitimate telemarketing businesses and reliable penalties for those that prey on consumers. In reading the “on behalf of” liability provision in 47 U.S.C. § 227(c)(5) and the related regulations in 47 C.F.R. § 64.1200 through the lens of state agency law (which varies by jurisdiction), the district court both ran afoul of on-point Supreme Court precedent and significantly limited the Act’s national scope. This Court should reverse the district court’s flawed interpretative method and rely instead on the plain text of the statute.

A. Because Congress did not affirmatively premise the TCPA on state law, courts may not refer to state law in interpreting it.

State and federal laws of course occupy separate spheres. Yet, by using Ohio agency law to interpret the “on behalf of” phrase in 47 U.S.C. § 227(c)(5) and the related regulations, the district court elided this difference and defined a federal law by state-specific standards.

The Supreme Court has repeatedly reaffirmed the “general[] assum[ption]” that, “in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.” *Jerome v. United States*, 318 U.S. 101, 104 (1943); see also *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 119–20 (1983); *United States v. Turley*, 352 U.S. 407, 411 (1957); *United States v. Pelzer*, 312 U.S. 399, 402–03 (1941). This presumption makes sense. While States may take varying approaches to similar problems based on local concerns, Congress seeks to provide consistent solutions for issues affecting the country as a whole—“federal statutes are generally intended to have uniform nationwide application.” *Miss. Band of Choctaw Indians*, 490 U.S. at 43–44.

This was certainly true of the TCPA. Congress noted during its deliberations that “federal legislation is needed to . . . protect legitimate telemarketers from having to meet multiple legal standards,” H.R. Rep. No. 102-317, at 10 (1991), and observed that “[m]any States have expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls.” S. Rep. 102-178, at 3 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1970. But if courts use state-specific principles to interpret federal laws, the federal statutes will necessarily mean different things in different places, thereby subverting the very reasons for federal action in the first place. See

NLRB v. Hearst Publications, Inc., 322 U.S. 111, 123 (1944), distinguished on other grounds in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

Of course, Congress can and has incorporated state law principles into federal laws in certain limited contexts, such as when the federal act can only be accomplished through state-specific mechanisms. See *Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204, 206–10 (1946) (holding that a federal law that allowed State and local governments to tax certain governmental real property “to the same extent according to its value that other real property is taxed” incorporated the varying tax rates of each affected jurisdiction). But these circumstances are the exception, and the Supreme Court has made it clear that the Congress must specifically identify such occurrences. The district court failed to pinpoint a clear statement in either the TCPA statute or the regulations that ties “on behalf of” liability to state agency law, and with good reason—none exists.

Nor is that absence surprising. While the foundational elements of agency are largely the same across jurisdictions, States have taken varying approaches to concepts such as “apparent authority” (also called “apparent agency”). Under this theory, employers may be held liable under certain circumstances for the intentional acts of their agents outside the scope of the agents’ engagement by the employer. See Restatement (Second) of Agency § 219(2)(d). But not all States have embraced it: Vermont has adopted § 219(2)(d), *Doe v. Forrest*, 853 A.2d 48,

56–57 (Vt. 2004), while Michigan has explicitly rejected it, *Zsigo v. Hurley Med. Ctr.*, 716 N.W.2d 220, 226–27 (Mich. 2006). Thus, under the district court’s interpretation, a consumer in Michigan would be significantly more vulnerable to abusive telemarketing than a consumer in Vermont.

The legislative history of the TCPA makes clear that Congress did not intend such a patchwork-quilt approach to liability, and the plain language of the statute and the accompanying regulations confirm as much. As such, courts may not premise liability under the TCPA on state agency principles. The district court’s contrary decision should be reversed.

B. Under the plain meaning of the phrase “on behalf of” in the TCPA, an entity may be held liable for the acts of any individuals who work to further the entity’s interests.

Though the district court erred in turning to state agency law for assistance, this Court must turn to some interpretational tool to resolve the dispute at hand. The starting point, as always, is the plain language of the provision, which controls so long as the terms are clear. See *Carcieri v. Salazar*, 129 S. Ct. 1058, 1063–64 (2009). Such a review reveals that the TCPA’s “on behalf of” language makes an entity liable whenever an individual works to further the entity’s interests, regardless of whether the entity has the right to control the individual’s activities.

Under 47 U.S.C. § 227(c)(5), “[a] person who has received more than one telephone call within any 12-month period *by or on behalf of the same entity* in

violation of the regulations prescribed under this subsection may” bring an action against that larger entity for an injunction, damages, or both. (Emphasis added). The related regulation alternately uses the phrase “on behalf of” and the functionally equivalent “on whose behalf” in proscribing specific acts. 47 C.F.R. § 64.1200(a)(3)(vi), (a)(6), (c)(2), (d)(3)–(5), (f)(6)–(8). Neither the statute nor the regulation defines these phrases, and when words are not defined, courts must “give those terms their ordinary meanings.” *Mac’s Shell Serv. v. Shell Oil Prods. Co. LLC*, 130 S. Ct. 1251, 1257 (2010).

The ordinary meaning of “on behalf of” is “in the interest of,” “as a representative of,” or “for the benefit of.” Webster’s Third New International Dictionary 198 (2002). A telephone solicitation is therefore “on behalf of” an entity if the call is made in the entity’s interest, by an individual that represents the entity’s interests, or for the company’s benefit.

There is no requirement that the entity must be able to control the individual making the call, much less that the caller be the entity’s “agent” under state agency law. See *United States v. Dish Network, LLC*, 667 F. Supp. 2d 952, 963 (C.D. Ill. 2009) (“[T]he FCC Rule does not say, ‘agent’ or ‘at the direction of.’” The FCC Rule says, ‘on behalf of.’”).² Indeed, acting “on behalf of” a principal is only one of three elements generally required for an agency relationship (the others being

² As noted above, amici States of Ohio and Illinois are plaintiffs in this case.

mutual assent and the principal's ability to control the agent's work), and thus that phrase alone cannot serve as a proxy for an agency relationship. Restatement (Second) of Agency § 1; Restatement (Third) of Agency § 1.01.

The question, then, is whether the telemarketing solicitations here (made by the various independent dealers, who functioned as representatives of the company) were in EchoStar's "interest" or for its "benefit." A simple test suffices to answer this inquiry: A call is made "on behalf of" a seller of a product or service where (a) the seller stands to benefit from the fruits of the call, e.g., EchoStar would gain a customer if the telephone solicitation were successful; and (b) there is a meaningful nexus between the seller and the telemarketing campaign that results in the violative call. A meaningful nexus in this context may be described as any situation where, as a direct or indirect consequence of the seller receiving a benefit from the solicitation, the solicitor receives a direct or indirect benefit from the seller. For example, such a nexus would exist where an entity contracts with an individual to perform telemarketing services, and promises to give that individual \$100 for every consumer that agrees to purchase the entity's product as a result of the solicitation. This construction would protect innocent sellers from acts of unrelated third parties, while at the same time subjecting them to appropriate incentives to control the manner in which their services are marketed to consumers in the privacy of their own homes.

Although amici are not privy to the sealed record, the facts discussed below strongly indicate that the relationship between EchoStar and the dealers meets this test. First, EchoStar stood to gain financially from the dealers' calls, in that the calls marketed EchoStar's services to prospective customers. More specifically, if the individuals who received the calls bought the dealers' sales pitch, they would enter into contracts with, pay money to, receive programming from, and make customer service calls to *EchoStar itself*, not to the putatively independent dealer who made the sale. See *United States v. Masek*, 588 F.3d 1283, 1285–86 (10th Cir. 2009) (describing EchoStar's business model).

Indeed, the only logical reason for a company such as EchoStar to contract for the type of telemarketing services here is to create contractual relationships with new customers. And the value of these calls is beyond dispute; EchoStar's parent corporation's most recent quarterly filing with the Securities and Exchange Commission states that it and its subsidiaries "depend on third parties to solicit orders for DISH Network services that represent a significant percentage of our total gross subscriber acquisitions." Dish DBS Corp., Form 10Q (filed May 10, 2010 for period ending March 31, 2010), <http://dish.client.shareholder.com/secfiling.cfm?filingID=950123-10-46773> (last visited July 26, 2010).

As to the second element, EchoStar's contracts with the dealers create a nexus between the parties. Although the district court found EchoStar has no control over the actual marketing methods that those parties use, the court found that EchoStar maintains a close relationship with them by, among other things, reserving the right to terminate them for telemarketing violations and by requiring them to indemnify it for telemarketing liability. *Charvat v. EchoStar*, 676 F. Supp. 2d at 676. And it strongly appears that EchoStar's business model actually encourages dealers to take liberties in order to secure potential customers. As recounted in other litigation, EchoStar gives its dealers several hundred dollars every time they bring a new customer to EchoStar. See *Masek*, 588 F.3d at 1285–86 (“When [the EchoStar dealer] signed up a new EchoStar customer or opened a new account, it received . . . an incentive payment, or commission” of “approximately \$400.”). By using this commission model to encourage its dealers to line up consumers for EchoStar services, EchoStar has created a substantial nexus between itself and the telemarketing. EchoStar can therefore be held liable, under the correct factual showing, for those violations.

To be sure, this reading of the TCPA exposes entities to significantly more liability than under the district court's “agency” interpretation. But Congress clearly intended to cover more than pure agency situations here, see *Dish Network, LLC*, 667 F. Supp. 2d at 963, and it knows how to incorporate agency principles

into federal statutes when it wants to do so. See 18 U.S.C. § 666(a) (prohibiting “agent[s]” of governmental organizations from engaging in theft or bribery in various situations, where “agent” is defined in (d)(1) as “a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative.”).

Such a broad reading of these provisions makes sense. The district court’s ruling, if adopted on appeal, would allow companies to flout the law by contracting out their telemarketing activities to “fly-by-night” and “judgment proof” third-party and overseas telemarketers that are outside the reach of effective enforcement. FTC Telemarketing Sales Rule Statement of Basis and Purpose, 60 Fed. Reg. 43842, 43859 (Aug. 23, 1995). Using this method, companies could commit flagrant violations of the TCPA and reap all of the benefits from such improper actions without any fear of liability.

Other courts have read the statute in this manner to address this problem. In *Dish Network*, the Central District of Illinois noted that a colorable “on behalf of” claim existed when the complaint alleged that (1) Dish Network independently contracted with dealers and authorized them to sell products and services via telephone solicitations; (2) Dish Network allowed the dealers to mention its name in the calls; (3) Dish Network provided support to the dealers to aid in the

telemarketing process; and (4) the dealers violated the TCPA in making the telephone solicitations for Dish Network products. 667 F. Supp. 2d at 963. And in *Hooters of Augusta, Inc. v. Nicholson*, 537 S.E.2d 468 (Ga. Ct. App. 2000), the court held that “an advertiser may not avoid liability under the TCPA solely on the basis that the transmission was executed by an independent contractor.” *Id.* at 472.

This Court should follow suit. Construing “on behalf of” liability to apply in these circumstances fully effectuates the statutory and regulatory language, and falls in line with the TCPA’s broad consumer protection focus.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower Court's erroneous legal conclusions and, depending on the contents of the sealed record, either remand for further proceedings or affirm on alternate grounds.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Brief of the States of Ohio, Illinois, Michigan, and Tennessee and the Commonwealth of Kentucky as *Amici Curiae* for Reversal or Affirmance on Alternate Grounds was electronically filed with the U.S. Court of Appeals for the Sixth Circuit on the 27th day of July, 2010. Electronic service was therefore made upon all counsel of record on the same day.

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