No. 21-70099

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH MOSER,
dba Marketing Support Systems,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of
the Federal Communications Commission

BRIEF FOR RESPONDENTS

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Citation	Citation & Order, *Kenneth Moser dba Marketing Support Systems*, DA 19-1250, 2019 WL 6837860 (EB rel. Dec. 13, 2019), *reprinted at* SER-161–167
Commission / FCC	Respondent Federal Communications Commission
Moser	Petitioner Kenneth Moser, doing business as Marketing Support Systems
Notice	Notice of Apparent Liability for Forfeiture, *Kenneth Moser dba Marketing Support Systems*, FCC 19-135, 34 FCC Rcd 12753, 2019 WL 6837865 (rel. Dec. 13, 2019), *reprinted at* SER-142–160
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TCPA	Telephone Consumer Protection Act of 1991, Pub. L. 102-243, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227)

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BRIEF FOR RESPONDENTS

INTRODUCTION

Kenneth Moser targeted tens of thousands of Californians in a mass robocalling campaign about a political candidate. These robocalls were "spoofed," meaning that Moser altered the caller identification information to display someone else—a business rival—as the calls' originator. Under the Truth in Caller ID Act of 2009, Moser's spoofing was unlawful and subject to a civil penalty. *See* 47 U.S.C. § 227(e)(1), (5)(A).

The FCC investigated Moser's robocalling campaign; gave him notice and six months in which to respond in writing; disclosed the material evidence on which it intended to rely; and ultimately found him liable. In line with its statutory authority and agency precedent, the Commission imposed a $9,997,750 forfeiture penalty—an amount well below the statutory maximum for the number of unlawful calls that Moser placed. *See* Forfeiture Order, *Kenneth Moser dba Marketing Support Systems*, FCC 20-163, 35 FCC Rcd 13415, 2020 WL 6822443 (rel. Nov. 19, 2020) (SER-3–27) (*Order*). Moser has not paid the forfeiture.

Moser (proceeding *pro se*) now challenges the *Order*. But this Court lacks jurisdiction: Under longstanding Ninth Circuit precedent, the "exclusive" original forum for challenging unpaid forfeiture orders is federal district court. *See Dougan v. FCC*, 21 F.3d 1488, 1490–91 (9th Cir. 1994). On the merits, Moser's claims fare no better. Moser does not deny that he made tens of thousands of spoofed robocalls. Instead, he raises a mix of factual and legal arguments that are barred because he did not present them to the agency, that fail as a matter of law, or both. The Court should dismiss the petition for review for lack of jurisdiction, or alternatively deny the petition on the merits.

JURISDICTIONAL STATEMENT

The Commission had jurisdiction to adopt the November 19, 2020 forfeiture *Order* under 47 U.S.C. § 227(e)(5)(A). On January 15, 2021, Moser filed a petition for review of the *Order* and invoked this Court's jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). As explained in Part I of the Argument, the Court lacks jurisdiction because a special judicial review scheme vests exclusive jurisdiction in federal district court. *See* 47 U.S.C. §§ 227(e)(5)(A)(ii), 504(a).

STATEMENT OF THE ISSUES

1. Whether the Court lacks jurisdiction because 47 U.S.C. §§ 227(e)(5)(A)(ii) and 504(a) vest exclusive original jurisdiction over Moser's claims in federal district court?

2. Whether substantial evidence supports the Commission's findings that Moser violated the Truth in Caller ID Act by knowingly spoofing a business rival's telephone number with intent to harm that rival, to harm consumers, and wrongfully to obtain something of value?

3. Whether Moser is liable under the Truth in Caller ID Act for placing spoofed robocalls, even if he did not create the pre-recorded message?

4. Whether the Commission lawfully imposed a forfeiture penalty amount to which Moser did not object at the agency and that is not grossly disproportional to the scope and severity of his unlawful conduct?

5. Whether the First Amendment allows the Commission to apply content-neutral time, place, and manner rules to robocalls about political candidates?

6. Whether the Commission satisfied Moser's due process rights by giving him notice of apparent liability, a six-month opportunity to respond in writing, and the material public documents on which the FCC relied?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the statutory addendum bound with this brief.

STATEMENT OF THE CASE

A. STATUTORY AND REGULATORY FRAMEWORK

1. The TCPA's Regulation of Robocalls

The Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. 102-243, 105 Stat. 2394, 2395, regulates "abuses of telephone technology." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 371 (2012). Some of those abuses involve robocalling, i.e., placing "artificial or

prerecorded telephone messages." *See, e.g.*, 47 U.S.C. § 227(d)(3)(A). As relevant here, the TCPA regulates robocalls in two ways.

First, "the TCPA prohibited almost all robocalls to cell phones." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2344 (2020) (plurality opinion). Convinced that robocalls were "rightly regarded … as an invasion of privacy," *Mims*, 565 U.S. at 372 (cleaned up), Congress made it unlawful "to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using … an artificial or prerecorded voice … to any telephone number assigned to a … cellular telephone service." 47 U.S.C. § 227(b)(1)(A)(iii).

Second, Congress directed the FCC to adopt rules that require robocalls to "state clearly … the business, individual, or other entity initiating the call [and] the telephone number or address of such business, other entity, or individual." *Id.* § 227(d)(3)(A). These rules require disclosure of the person responsible for the call at the beginning of the message and disclosure of that person's telephone number during or after the message. *See* 47 C.F.R. § 64.1200(b)(1), (2).

2. The Truth in Caller ID Act of 2009

The Truth in Caller ID Act of 2009, Pub. L. 111-331, 124 Stat. 3572, prohibits "the manipulation of caller-identification information." *Mims*, 565 U.S. at 373 n.2. The Act targets "spoofing," a practice in which telemarketers misrepresent their caller identification information to call recipients. *See, e.g.*, *Teltech Sys., Inc. v. Bryant*, 702 F.3d 232, 234 (5th Cir. 2012). Subject to certain exceptions, it is generally "unlawful for any person within the United States … in connection with any voice service … to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value." 47 U.S.C. § 227(e)(1). Congress charged the FCC with implementing the spoofing ban, *id.* § 227(e)(3), and the FCC has enacted rules to prohibit spoofed calls. *See* 47 C.F.R. § 64.1604.

3. Civil Forfeiture Penalties for Spoofing

The FCC is authorized to impose civil forfeiture penalties where the Commission finds a spoofing violation. *See* 47 U.S.C. § 227(e)(5)(A). Penalties are generally capped at $11,905 per violation. *Id.*

§ 227(e)(5)(A)(i); 47 C.F.R. § 1.80(b)(4).[1] To determine a penalty amount, the Commission considers "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(10). The Commission's rules further refine these factors. *See* Report & Order, *Forfeiture Policy Statement & Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd. 17087 (1997). In general, the Commission identifies a base penalty and then considers criteria warranting an upward or downward adjustment. *See id.* at 17100–01 ¶27. These criteria include the egregiousness of the violator's conduct and any prior history of violations. *See* 47 C.F.R. § 1.80, Table 3 to Paragraph (b)(10).

Absent a formal hearing, the FCC must issue a written notice of apparent liability to the violator and give the violator an opportunity to

[1] This reflects an inflation adjustment applied to the $10,000 penalty specified in the statute. *See* Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 114-74, tit. VII, § 701, 129 Stat. 584, 599 (providing for annual inflation adjustments); FCC, *Annual Adjustment of Civil Monetary Penalties to Reflect Inflation*, 86 Fed. Reg. 3830-01 (Jan. 15, 2021) (implementing the adjustment).

contest the proposed penalty.[2] *See* 47 U.S.C. §§ 227(e)(5)(A)(iii), 503(b)(4). The notice identifies the rules allegedly violated, the conduct underlying the penalty, and the date of the offense. *See id.* § 503(b)(4).

Once the violator has had an opportunity to respond, the Commission may issue a final forfeiture order if warranted. But the order is not self-executing; the forfeiture penalty is recoverable only "pursuant to section 504(a)" of title 47. *See id.* § 227(e)(5)(A)(ii). Section 504(a) authorizes recovery only "in a civil suit in the name of the United States" in federal district court, with "a trial de novo" on any applicable defenses. *Id.* § 504(a).

B. MOSER'S MASS SPOOFING SCHEME

1. The Complaint and Investigation

In May 2018, a large-scale robocalling campaign targeted California voters with "a prerecorded voice message that graphically described an alleged sexual assault" involving a candidate in an upcoming State Assembly primary election. *See Order* ¶6 (SER-6). The candidate alerted the California Secretary of State and alleged, among

[2] The Commission may proceed with or without a formal hearing, with each option subject to different procedural rules. *Compare* 47 U.S.C. § 503(b)(3) (formal hearing) *with id.* § 503(b)(4) (no formal hearing).

other things, that the robocalls fraudulently used inaccurate caller identification information. *See* Letter from Thomas Hiltachk to Alex Padilla (June 1, 2018) (SER-170). The Secretary of State referred the complaint to appropriate state and federal agencies, including the FCC. *See Order* ¶5 (SER-5); Letter from Steven Reyes to Galena West et al. (June 2, 2018) (SER-168–169).

The FCC's Enforcement Bureau investigated the complaint and found that Petitioner Kenneth Moser (doing business as Marketing Support Systems) "made 47,610 robocalls in a two-day robocalling campaign, including repeated calls to the same recipients." *Order* ¶5 (SER-5). Each robocall violated the TCPA and the FCC's rules by failing to include the required disclosures about the call's initiator. *Id.* ¶6 (SER-6). And over 11,000 of the robocalls were made to cell phones without the subscribers' prior express consent, further violating federal law. *See id*.

The robocalls were also spoofed. Each of the 47,610 robocalls used false caller identification information to display an originating phone number registered to HomeyTel Network. *Id.* ¶5 (SER-5–6). Moser had no affiliation with HomeyTel and was not authorized to use its phone

number. *See id.* In fact, HomeyTel is "a long-time business rival" with which Moser has a "long and contentious relationship." *Id.* ¶2 (SER-4). Because of the spoofing, HomeyTel faced "immediate backlash," including numerous complaints from call recipients and a litigation threat from the targeted candidate. *Id.* ¶17 (SER-11–12).

2. The *Notice of Apparent Liability*

In December 2019, the FCC issued Moser a Notice of Apparent Liability for a $9,997,750 forfeiture penalty for willful and repeated violations of the Truth in Caller ID Act. *See* Notice of Apparent Liability for Forfeiture, *Kenneth Moser dba Marketing Support Systems*, FCC 19-135, 34 FCC Rcd 12753 ¶37, 2019 WL 6837865 (rel. Dec. 13, 2019) (SER-155) (*Notice*). The Commission disclosed its tentative findings, including that Moser made over 47,000 spoofed robocalls in a two-day period in May 2018. *See id.* ¶¶6–11 (SER-144–147). The Commission then explained the bases for finding that Moser (1) knowingly spoofed HomeyTel's telephone number, *id.* ¶¶14–15 (SER-147); (2) intended to harm HomeyTel and the call recipients, *id.* ¶¶17–25 (SER-148–151); and (3) intended wrongfully to obtain something of value from the spoofing, *id.* ¶¶26–28 (SER-151–152).

The Commission also explained the basis for its proposed forfeiture amount. *See id.* ¶¶29–36 (SER-152–155). After citing the relevant factors from the statute and its rules, *id.* ¶29 (SER-152–153), the Commission proposed a base forfeiture of $1,000 per unlawful spoofed call, *id.* ¶30 (SER-153). The Commission did not apply the base amount to all of the spoofed calls, but only to the subset of unlawful calls that the Enforcement Bureau analyzed to confirm unlawfulness.[3] *See id.* ¶31 (SER-153). In Moser's case, that was 5,713 calls (thus setting the base forfeiture at $5,713,000). *Id.*

After setting a proposed base forfeiture, the Commission considered applicable aggravating and mitigating factors. As the Commission explained, "the totality of the circumstances" merited "a significant upward adjustment." *Id.* ¶32 (SER-153). The Commission noted that, unlike the typical spoofing campaign, Moser intentionally targeted a business rival, which made his intent to harm rise "beyond

[3] During its investigation, the Bureau obtained Moser's call records, *Order* ¶5 & n.19 (SER-5); used an industry-standard software database to identify the robocalls made to cell phone numbers, *id.* ¶6 & n.26 (SER-6); and then contacted certain of those call recipients to confirm that they were the subscribers of the called numbers, received the robocalls, and had not given Moser or his client permission to robocall them, *id.* ¶25 (SER-15).

that which the Commission has typically seen." *Id.* ¶33 (SER-153–154). And this was not an isolated violation: The Enforcement Bureau found that in November 2016 Moser targeted HomeyTel in a different spoofed robocalling campaign. *Id.* ¶34 (SER-154). Because Moser's "pattern of conduct" was "egregious" and "highly culpable," the Commission proposed a 75% upward adjustment to the base penalty, yielding the $9,997,750 proposed forfeiture. *Id.* ¶35 (SER-154).

3. Moser's Admission of Key Facts

After receiving "substantial extensions of time," *Order* ¶47 (SER-23), Moser filed a response to the *Notice* in June 2020 and raised multiple factual and legal arguments against the proposed forfeiture. *See* Moser Response (SER-28–42). He also made several important admissions.

First, Moser admitted that he conducted an extensive robocalling campaign on May 30 and 31, 2018. *See id.* at 5 (SER-32). Although he disputed the FCC's conclusion that over 47,000 calls were made, his own records showed "31,086 attempted calls." *Id.*

Second, Moser admitted that he was paid to make the robocalls and to keep his client "anonymous." *See id.* at 4 (SER-31).

Third, Moser admitted that he knowingly selected HomeyTel's phone number to display as the calls' origin. *Id.* at 5 (SER-32). Moser explained that his client wanted "to remain anonymous" and directed Moser "not to use any identifying caller ID." *Id.* Moser conceded as "true" that he knew the phone number used for the robocalling campaign belonged to HomeyTel. *Id.* at 6 (SER-33) (referring to *Notice* ¶15 & n.37 (SER-147)). In fact, Moser selected HomeyTel's number because HomeyTel "had a past history of making hard hitting political calls." *Id.* at 2 (SER-29). Although Moser "was aware of the specific caller ID that was used," he argued that he understood HomeyTel to be defunct. *Id.* at 11 (SER-38).

Fourth, Moser also admitted as "true" that he is "well acquainted" with HomeyTel and its founder and that he had previously sued them for TCPA violations. *Id.* at 7 (SER-34) (citing *Notice* ¶¶10–11 (SER-146–147)).

C. THE *ORDER* ON REVIEW

The Commission affirmed the proposed forfeiture. *Order* ¶10 (SER-8). The Commission first found that Moser knowingly spoofed HomeyTel's number. *Id.* ¶¶11–13 (SER-8–9). The evidence, "including

Moser's own admissions," *id.* ¶11 (SER-8), established that Moser knowingly selected and displayed a phone number that was inaccurate (because the calls did not originate from HomeyTel) and misleading (because recipients could not trace the calls to Moser or his client). *See id.* ¶¶11–12 (SER-8–9).

The Commission next found that Moser intended to harm HomeyTel. In support, the Commission found (1) that Moser had previously spoofed HomeyTel's number, *id.* ¶17 (SER-11); (2) that it was reasonably foreseeable that recipients would direct complaints to HomeyTel, *id.* (SER-12); (3) that Moser intentionally selected HomeyTel's number, *id.* ¶18 (SER-12); and (4) that Moser had a contentious history with HomeyTel and its founder, *id.*

The Commission found unpersuasive Moser's defense that he believed that HomeyTel was no longer in business. *See id.* Evidence in the record showed that HomeyTel publicly engaged in business activity well after 2015, when Moser claimed HomeyTel went "defunct." *Compare id.* ¶18 & nn.86–87 (SER-12) *with* Moser Response at 3 (SER-30). Moreover, Moser indicated that he called HomeyTel's number and reached voicemail, which suggested that he knew or should have known

that the number was still in service. *Order* ¶18 & n.85 (SER-12) (citing Moser Response at 11 (SER-38)). But even if Moser had not intended to harm HomeyTel, the Commission found that he intended to harm the current or future subscriber of the number by associating the number with thousands of robocalls that Moser knew were likely to cause controversy. *See id.* ¶19 & n.93 (SER-12–13) (citing Moser's knowledge that his client feared "retribution" and "reprisal").

The Commission also found intent to harm consumers. Under agency precedent, spoofing in conjunction with otherwise illegal robocalling is evidence of intent to cause harm. *Id.* ¶20 (SER-13). Apart from spoofing, Moser's robocalling campaign was illegal because (1) none of the calls included the disclosures required under the Commission's rules, *see id.* ¶¶21–23 (SER-13–15); and (2) over 11,000 of the calls were made to cell phones without the subscribers' prior express consent, *see id.* ¶¶24–28 (SER-15–16).

The Commission further found that Moser engaged in spoofing with the intent wrongfully to obtain something of value. *See id.* ¶¶29–34 (SER-16–19). Most simply, Moser admitted that a client paid him to conduct the campaign, and Moser made spoofed calls to meet the client's

request for anonymity. *Id.* ¶34 (SER-18–19); *e.g.*, Moser Response at 4, 5 (SER-31, 32). Moreover, Moser spoofed HomeyTel's number to evade potential TCPA liability for the campaign's unlawful tactics. *See Order* ¶33 (SER-18).

Given these facts, the Commission found Moser liable for the total amount of the proposed forfeiture. *Id.* ¶39 (SER-20–21). When making that determination, the Commission observed that Moser neither contested the forfeiture amount nor sought a reduction. *Id.* ¶40 (SER-21).

D. SUBSEQUENT PROCEDURAL HISTORY

Moser's forfeiture penalty was due within thirty days of the *Order*'s release, i.e., by December 19, 2020. *Id.* ¶49 (SER-23). To date, Moser has not paid any part of the penalty. Instead, Moser filed a petition for review of the *Order*.

The FCC moved to dismiss the petition for lack of jurisdiction because circuit precedent requires Moser to assert any defenses in a trial de novo when the United States seeks to recover the forfeiture. *See* Dkt. 7-1 (FCC's Motion to Dismiss). A motions panel denied the motion without prejudice to the Commission's raising its jurisdictional argument in its merits brief. *See* Dkt. 15-1 (Apr. 23, 2021 Order).

STANDARDS OF REVIEW

Under the Administrative Procedure Act (APA), the Court may set aside the FCC's decision only if it is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise inconsistent with law. *See* 5 U.S.C. § 706(2). Review is "deferential" and requires only "that the agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). The Court "may not substitute its own policy judgment for that of the agency," but "simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.*

Challenges to the agency's "factual findings" are reviewed for "substantial evidence." *City of Portland v. United States*, 969 F.3d 1020, 1037 (9th Cir. 2020) (cleaned up). That standard is "not high" and simply requires evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id.*

The Court determines jurisdictional and constitutional questions de novo. *See Moser v. FCC*, 46 F.3d 970, 973 (9th Cir. 1995) (constitutional questions); *Sable Commc'ns of Cal., Inc. v. FCC*, 827 F.2d 640, 642 (9th Cir. 1987) (jurisdiction).

SUMMARY OF THE ARGUMENT

I. The Court lacks jurisdiction over Moser's petition. Forfeiture orders are subject to a special judicial review scheme in which parties seeking to avoid enforcement must raise their arguments in "a trial de novo" in district court. 47 U.S.C. § 504(a). This Court has held that a district court's original jurisdiction under Section 504(a) is "exclusive" and requires dismissal of petitions for review that challenge unpaid forfeiture orders in circuit court. *Dougan v. FCC*, 21 F.3d 1488, 1491 (9th Cir. 1994).

Transfer cannot cure this jurisdictional defect. *See* 28 U.S.C. § 1631. Liberally construing the petition as a civil complaint would not bring this case within Section 504(a), under which *the United States* initiates enforcement. Moreover, Moser faces no serious prejudice from dismissal because Section 504(a) affords him a trial de novo in the government's suit to recover the forfeiture.

II. The Commission did not err in finding Moser liable for unlawful spoofing. Substantial evidence supports each of the Commission's findings, and the Commission reasonably explained its findings by reference to this evidence—or, where appropriate, by reference to Moser's failure to provide evidence that he was best positioned to have. Moser

also cannot establish "prejudicial error" because he does not challenge several independent grounds on which the Commission based its liability and penalty determinations. 5 U.S.C. § 706.

III. Moser's numerous legal arguments are either barred, meritless, or both.

A. Moser's argument that he did not violate the TCPA because he did not initiate the robocalls is barred because he did not raise it to the Commission. *See* 47 U.S.C. § 405(a). In any event, the argument is untenable given his admission that he placed the calls. *See, e.g.*, Pet'r Br. 37, 42. At the very least, the Commission's interpretation and application of the TCPA is reasonable and entitled to deference. *See City of Portland v. United States*, 969 F.3d 1020, 1037 (9th Cir. 2020).

B. Moser's challenges to the forfeiture penalty amount also fail. Judicial review is barred because Moser never contested the penalty's amount to the Commission. *See* 47 U.S.C. § 405(a). Moser's statutory argument—that the Commission failed to consider his ability to pay—is inconsistent with the record. And in view of the extent and severity of Moser's unlawful spoofing, the penalty is not unconstitutionally excessive. *Cf., e.g.*, *United States v. Mackby*, 339 F.3d 1013, 1016–19 (9th Cir. 2003).

C. Moser's First Amendment claim fails because the Commission applied a valid, content-neutral time, place, and manner rule to Moser's method of robocalling, not to the content of the message he transmitted. *See Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1223 (9th Cir. 2019). Moser's conjecture that the Commission targeted him because his robocalls were political is inconsistent with the *Order*'s stated basis, which the Court must accept given the substantial objective evidence supporting that explanation. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019).

D. Moser also cannot establish a Fifth Amendment due process violation. The Commission gave Moser a fair opportunity to challenge the *Notice*. At the outset, the Due Process Clause is not in play because the *Order* is not a deprivation of property: No deprivation will occur until Moser is subject to a final federal court judgment following a trial de novo. *See* 47 U.S.C. § 504(a). In any event, Moser had six months to submit a written response to the *Notice*, which was ample time to address the proposed forfeiture. Finally, Moser's assertion that the Commission violated *Brady v. Maryland* fails because *Brady* does not apply to these civil forfeiture proceedings, nor has Moser identified exculpatory evidence that the FCC suppressed to his detriment.

ARGUMENT

I. THE COURT LACKS JURISDICTION, AND THE DEFECT IS INCURABLE.

Congress's review scheme for forfeiture orders "vests exclusive jurisdiction in the district courts" over "suits by private individuals seeking to avoid enforcement." *Dougan v. FCC*, 21 F.3d 1488, 1491 (9th Cir. 1994). Moser's petition in this Court is incurably defective.

A. Under Settled Precedent, District Courts Have Exclusive Original Jurisdiction Over Challenges To Unpaid Forfeiture Orders.

Ordinarily, parties seeking "to enjoin, set aside, annul, or suspend any order of the Commission" must proceed directly in the courts of appeals by filing a petition for review. 47 U.S.C. § 402(a); *see* 28 U.S.C. § 2342(1). But a special rule applies to forfeiture orders—like Moser's—that are "recoverable pursuant to section 504(a)" of title 47. *See* 47 U.S.C. § 227(e)(5)(A)(ii). Section 504(a) provides for recovery only "in a civil suit in the name of the United States" in district court, with "a trial de novo" for the violator. *Id.* § 504(a).

In *Dougan v. FCC*, this Court held that Section 504(a)'s "specific provision regarding forfeiture … trumps the general rule" of direct appellate review. 21 F.3d at 1490. The Court agreed with the D.C.

Circuit that "a special review statute vesting jurisdiction in a particular court"—as Section 504(a) vests in district courts—"cuts off other courts' original jurisdiction in all cases covered by the special statute." *Id.* at 1490–91 (quoting *Pleasant Broadcasting v. FCC*, 564 F.2d 496, 501 (D.C. Cir. 1977)).[4] Because "Congress did not intend to give [violators] two bites at the apple," it did not allow violators to "challenge the forfeiture in the appellate court, and if they lost, to sit back and await an enforcement action, at which time they would be entitled to a trial *de novo* in the district court." *Id.* at 1491. Thus, the Court held "that 47 U.S.C. § 504(a) vests exclusive jurisdiction in the district courts to hear enforcement suits by the government, *and* suits by private individuals seeking to avoid enforcement." *Id.* (emphasis in original). The Court therefore dismissed a petition for review challenging a forfeiture. *See id.*[5]

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[4] The D.C. Circuit has since held "that section 504(a) establishes district courts as the exclusive forum for challenges to *unpaid* forfeiture orders" but "has no effect on court of appeals jurisdiction to review challenges to *paid* forfeiture orders." *AT&T Corp. v. FCC*, 323 F.3d 1081, 1085 (D.C. Cir. 2003) (emphasis added). That distinction is immaterial here because Moser has not paid the forfeiture.

[5] Numerous other courts follow *Dougan* and *Pleasant Broadcasting* to hold that district courts have exclusive original jurisdiction to hear cases involving enforcement of unpaid forfeiture orders. *See, e.g.*, *United States v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000); *United States v. Baxter*, 841 F. Supp. 2d 378, 390 (D. Me.

Dougan resolves this case. Just as in *Dougan*, Moser challenges an unpaid forfeiture via a petition for review rather than await a civil action for recovery. *Compare* 21 F.3d at 1489–90, *with* Pet'r Br. 43–50. And just as in *Dougan*, this is improper. Section 504(a) governs when and where Moser can raise his factual and legal arguments: in "a trial de novo" in federal district court when the United States files suit for recovery. 47 U.S.C. § 504(a). This specific procedure for enforcing and reviewing forfeiture orders is "exclusive" and "cuts off simultaneous jurisdiction in other courts." *Dougan*, 21 F.3d at 1491. The Court should dismiss the petition for review for lack of jurisdiction, just as it did in *Dougan*. *See id.*

B. Transfer Cannot Cure The Jurisdictional Defect.

Even if the Court liberally construes Moser's petition for review as a misfiled civil complaint, there is no basis to transfer this case to district court. *See* 28 U.S.C. § 1631. Transfer is proper only if it "is 'in the interest of justice,'" which requires a "colorable claim for relief." *Amity Rubberized Pen Co. v. Market Quest Grp. Inc.*, 793 F.3d 991, 995, 996 (9th

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2012), *aff'd*, No. 12-1196 (1st Cir. Sept. 10, 2012); *United States v. Neely*, 595 F. Supp. 2d 662, 669 n.8 (D.S.C. 2009); *United States v. Ne. Commc'ns of Wis., Inc.*, 608 F. Supp. 2d 1049, 1053–54 (E.D. Wis. 2008).

Cir. 2015) (quoting 28 U.S.C. § 1631). Under Section 504(a), federal jurisdiction is invoked only when *the United States* brings a civil enforcement suit. 47 U.S.C. § 504(a); *see Pleasant Broadcasting*, 564 F.2d at 502. Moser has no statutory cause of action. Nor does he face serious prejudice; justice does not require transfer of Moser's claims because he can raise them in defending against the government's enforcement suit.[6]

II. THE COMMISSION DID NOT ERR IN FINDING MOSER LIABLE.

On the merits, Moser attacks several of the *Order*'s factual findings. But Moser did not preserve certain arguments; substantial evidence supports each finding; and any errors were harmless.

A. Substantial Evidence Shows That Moser Called Cell Phone Subscribers Without Their Prior Express Consent.

Moser principally argues that the Commission erred in finding intent to harm consumers because the evidence was inadequate to show that Moser violated the TCPA by calling cell phone subscribers without

[6] This Court has once before transferred in a similar case, but only via an unpublished order. *See Minority Television Project, Inc. v. FCC*, No. 05-77294, Dkt. 18 (Apr. 18, 2006). That transfer occurred only after the petitioner cured the jurisdictional defect by paying the penalty in full, which Moser has not done. *See Minority Television Project, Inc. v. FCC*, 736 F.3d 1192, 1196 & n.3 (9th Cir. 2013) (en banc) (describing, but not endorsing, the transfer).

their prior express consent. *See* Pet'r Br. 24–39. This argument fails for at least two reasons.

1. Moser did not exhaust his challenge to the Commission's investigation.

Moser first objects (at 24–26, 27–31) that the Commission unreasonably inferred lack of consent from a 44-person sample of the 5,713 calls on which the Commission based the forfeiture penalty. This challenge is barred because Moser did not exhaust it at the FCC.

Congress "has explicitly mandated that the FCC have the 'opportunity to pass' on the merits of any challenges to its orders before review may be sought in the Courts of Appeals." *Fones4All Corp. v. FCC*, 550 F.3d 811, 818 (9th Cir. 2008). This statutory exhaustion requirement is "a condition precedent to judicial review" that applies to "questions of fact." 47 U.S.C. § 405(a). And exhaustion is "strictly construed." *Fones4All Corp. v. FCC*, 561 F.3d 1031, 1033 (9th Cir. 2009) (quoting *In re Core Commc'ns*, 455 F.3d 267, 276 (D.C. Cir. 2006)). Factual arguments must be "meaningfully raised" so that the Commission has a "fair opportunity" to address them. *Fones4All Corp.*, 550 F.3d at 819 (cleaned up).

Moser did not meaningfully raise his argument. The *Notice* disclosed the Commission's reliance on a 44-person sample, yet Moser did not object to it in his list of "Errors in the Notice" or elsewhere.[7] *Notice* ¶21 (SER-149–150); *see* Moser Response at 7–8 (SER-34–35). Nor did Moser file a petition for reconsideration raising the objection after the *Order* issued, as Section 405 requires. *See* 47 U.S.C. § 405(a); *Nat'l Lifeline Ass'n v. FCC*, 983 F.3d 498, 509 (D.C. Cir. 2020) (petition for reconsideration required to preserve judicial review "even when a petitioner has no reason to raise an argument" initially). Having failed to raise this factual argument before the Commission, Moser cannot raise it here.

2. The Commission reasonably found lack of consent after Moser failed to provide proof.

Moser's argument fails on the merits regardless. Prior express consent "is an affirmative defense" on which Moser bears the burden of

[7] Moser made a passing comment that only "six people out of 44 who the FCC spoke with stated [that] they had not given permission," but this argument did not suggest the 44-person sample's inadequacy. *See* Moser Response at 14 (SER-41). Instead, Moser's point was that the six people were likely mistaken. *See id.* at 14–15 (SER-41–42) (arguing that they "probably didn't remember that they willfully and knowingly provided their phone numbers" when registering to vote); *see also id.* at 12 (SER-39) (similar).

proof. *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1044 (9th Cir. 2017).

Moser argues only that the call recipients consented when they registered to vote—an argument the Commission considered and rejected. *See Order* ¶¶27–28 (SER-15–16); Moser Response at 5, 12 (SER-32, 39); Pet'r Br. 9–10, 38–39. As the Commission explained, the mere act of providing a phone number when registering to vote "does not create express consent to receive unsolicited robocalls," especially "from a third-party unknown to the call recipient." *Order* ¶27 (SER-15–16). And the voter registration forms "do not include the consent that Moser needed under the TCPA" because the forms do not indicate that providing a phone number is consent to receive unsolicited third-party robocalls. *Id.* ¶28 (SER-16). Moser has no response to these specific findings about the content of the voter registration forms.

Moser's reliance (at 38–39) on the California Elections Code is misplaced. For one, Moser cannot raise this state law challenge to the *Order* because he did not present it to the Commission. *See* 47 U.S.C. § 405(a); *see generally* Moser Response (SER-28–42) (not citing either provision). In any event, neither provision that Moser cites purports to address whether registering to vote provides consent to receive pre-

recorded telephone calls, or liability for such calls under the TCPA, both of which are questions of federal—not state—law. *See* Cal. Elec. Code § 2188 (requirements for obtaining voter registration information); *id.* § 2194 (restrictions on use of voter registration information). In short, the Commission reasonably explained that Moser failed to make out his affirmative defense because he "offer[ed] no proof of prior express consent." *Order* ¶25 (SER-15).

Moser's attack on the Commission's investigative process also fails. Contrary to Moser's claim (at 17), the Commission explained its method of evaluating the calls underlying the forfeiture: The Commission obtained call records, *Order* ¶5 & n.19 (SER-5); used an industry-standard software database to identify the robocalls made to cell phone numbers, *id.* ¶6 & n.26 (SER-6); and then contacted certain of those call recipients to confirm that they were the subscribers of the called numbers, received the robocalls, and had not given Moser or his client permission to robocall them, *id.* ¶25 (SER-15). Reasonable "methods of inquiry" like this are owed deference. *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 543 (1978) (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965)). Moser's invitation (at 30–31) to impose more stringent investigative steps on the agency asks the Court to run afoul of

"the general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385 (2020) (cleaned up).

Finally, Moser's complaint (at 31–34) of a "pattern" of under-investigation hurts rather than helps his cause. The Commission reasonably relies on sampling when violators do not assert prior express consent. Thus, Moser's reference (at 31–32) to the *Roesel* forfeiture only reinforces that the Commission acted with regularity. In *Roesel*, as with Moser, the Commission sampled calls to confirm lack of consent where the violator did not "claim to have obtained prior consent." *See* Forfeiture Order, *Best Ins. Contracts, Inc., & Philip Roesel, dba Wilmington Ins. Quotes*, FCC 18-134, 33 FCC Rcd 9204, 9207 ¶9, 2018 WL 4678487 (2018). Moser's treatment in line with agency precedent underscores that he was not unfairly targeted.

B. Moser's Miscellaneous Factual Arguments Fail Because Substantial Evidence Supports The Commission's Findings.

1. Moser objects (at 14–15, 29) to an "inconsistency" in how the Commission referred to HomeyTel (i.e., as HomeyTel, Inc. versus HomeyTel Network). But the Commission explained that "HomeyTel

Network and HomeyTel, Inc. are mere business names of the same entity," and thus the discrepancy is "immaterial." *Order* ¶16 & n.73 (SER-11). Moser does not dispute that, regardless of the precise name used by the phone number subscriber, substantial evidence supports the finding that the number Moser spoofed is not assigned to him or otherwise his to use. *See id.* Because Moser intended to harm whoever subscribes to the number, *id.* ¶19 (SER-12–13), any discrepancy over names is at most a harmless error unrelated to Moser's liability. *See* 5 U.S.C. § 706 ("due account shall be taken of the rule of prejudicial error"); Part II-C, *infra*.

2. Moser's related argument (at 39–41) that he believed HomeyTel was defunct fares no better. The Commission found this argument not credible because substantial evidence showed that HomeyTel was publicly active well after Moser claimed it went defunct. *Order* ¶18 (SER-12). That evidence included updates to its website, *see id.* & nn.86–87, and Moser's statement "that his calls went to voicemail when he called" HomeyTel's number, *id.* ¶18 & n.85 (citing Moser Response at 11 (SER-38)). Especially in the context of Moser's contentious "personal history" with HomeyTel, *id.* ¶18 (SER-12), a "reasonable mind" could disbelieve Moser's argument. *See City of Portland*, 969 F.3d at 1037.

3. Moser also attacks (at 19–21, 41–42) the Commission's reliance on declarations by HomeyTel's founder, who Moser argues is unreliable and biased. But the Commission independently verified the factual bases for Moser's liability. *Order* ¶18 (SER-12). The Commission relied on the challenged declarations to establish only (1) that HomeyTel was the spoofed number's subscriber and (2) that Moser did not have permission to use the number. *Id.* The Commission confirmed the former with subscription records, *id.* n.89, and Moser did not contest the latter. *See, e.g.*, Moser Response at 5 (SER-32) (stating that he chose to use a phone number that belonged to HomeyTel). It was not unreasonable for the Commission to credit a declaration that was consistent with independent sources and uncontested facts.

C. Moser's Factual Arguments Cannot Establish Prejudicial Error.

Even if the Court credited Moser's factual arguments, he would still be liable for the full amount of the forfeiture because the *Order*'s liability and penalty determinations rest on alternative and unchallenged grounds wholly independent from the issues Moser raises.

1. Spoofing is unlawful if committed with any of three specific intents. *See* 47 U.S.C. § 227(e)(1). The Commission needed only one

basis to find liability, but the *Order* cites three bases that Moser does not dispute.

First, Moser intended to harm consumers by making spoofed robocalls without the disclosures that the TCPA and FCC rules require. *Order* ¶¶21, 23 (SER-13–15). Moser admits that he placed tens of thousands of robocalls identifying "Jennifer Jones" as the calls' sponsor—a disclosure Moser admits was untrue because the real sponsor was Shannon Piazzo.[8] *See id.* ¶21 (SER-13–14); Pet'r Br. 6–7, 24, 35 (discussing the client and disclosure); *id.* at 26 (conceding that over 21,000 numbers were called). Nor does Moser contest his failure to identify himself in the calls. *See Order* ¶23 (SER-14–15).

[8] The Commission's finding about the disclosure violation is relevant only as evidence of Moser's intent to harm consumers via his spoofing. Moser objects (at 33), claiming that the two provisions (Sections 227(d) and 227(e)) cover the same conduct. But although both provisions regulate robocalling, in both their text and purpose they address different conduct. Because Moser's violation of Section 227(d) is in addition to his violation of 227(e), his attempt to distinguish the *Abramovich* forfeiture fails. There, as here, the Commission found intent to harm because the spoofed calls were illegal apart from the Truth in Caller ID Act. *See* Forfeiture Order, *Adrian Abramovich, Marketing Strategy Leaders, Inc., & Marketing Leaders, Inc.*, FCC 18-58, 33 FCC Rcd 4663, 4666, 2018 WL 2192429, at *3 ¶10 (2018) (noting an undisputed wire fraud violation).

Second, Moser intended to harm the spoofed phone number's subscriber. *Order* ¶19 (SER-12–13). Moser admits that he intentionally spoofed a specific number associated with a business rival. *See id.* ¶16 (SER-11); Pet'r Br. 39–41. Even if HomeyTel had been defunct, consumers would still direct their ire to whatever entity subscribed to the spoofed number. *Cf. Order* ¶19 (SER-12–13).

Third, Moser spoofed with intent wrongfully to obtain something of value. *Id.* ¶¶29–30 (SER-16–17). Moser admits that he was paid to place spoofed calls to protect his client's anonymity. *See id.* ¶34 (SER-18–19); Pet'r Br. 21–22. There is thus no dispute that Moser "benefited monetarily from making unlawful, spoofed robocalls." *Order* ¶34 (SER-19).

2. The penalty amount likewise rests on independent and unchallenged grounds. Moser does not dispute that he placed at least 5,713 robocalls, nor that each call (1) was spoofed; (2) contained inaccurate disclosures; and (3) was made for payment.[9] So, the grounds

[9] Because Moser concedes that he placed over 5,713 calls—the number underlying the penalty—his claim (at 26) that the Commission erred in finding 47,610 total calls is irrelevant. In any event, the Commission based its finding on evidence from the third-party dialing platform that Moser used to place the calls. *See Order* ¶5 & n.19 (SER-5).

for the Commission's base forfeiture amount remain untouched. *See id.* ¶39 (SER-20–21).

The aggravating factors on which the Commission relied are likewise unaffected. The Commission applied a 75% upward adjustment because Moser intentionally (and not for the first time) spoofed a phone number associated with a business rival. *See Notice* ¶¶32–35 (SER-153–154). Again, Moser does not challenge that he intentionally used a number associated with HomeyTel—just as he had done in 2016. *Id.* ¶34 (SER-154).

Because the *Order* rests on independent and unchallenged findings and conclusions, Moser's factual arguments would amount to (at most) harmless errors. *See* 5 U.S.C. § 706; *cf. Little Sisters of the Poor*, 140 S. Ct. at 2385.

III. MOSER'S LEGAL ARGUMENTS ARE BARRED, FAIL ON THE MERITS, OR BOTH.

Moser raises four legal claims: (1) that he did not violate the TCPA; (2) that the forfeiture penalty is unlawful under the APA and Eighth Amendment; (3) that the Commission violated the First Amendment by penalizing speech; and (4) that the Commission violated his due process

rights. Moser cannot raise the first two challenges because he did not exhaust them at the agency, and each argument fails regardless.

A. Moser Did Not Exhaust His Statutory Challenge, Which Fails Under Plain Text And Agency Precedent.

1. Moser challenges (at 17–18, 35–36) the Commission's conclusion that he made or initiated the calls for purposes of the TCPA. Section 405(a) bars this challenge because Moser did not raise it to the Commission in his response to the *Notice* or in a petition for reconsideration of the *Order*.[10] *See* 47 U.S.C. § 405(a); *Fones4All Corp.*, 550 F.3d at 818; *see generally* Moser Response (SER-28–42).

2. Regardless, Moser made the calls under any reasonable view of the statute's text. The Commission found Moser responsible for "mak[ing]" robocalls to cell phones without consent, 47 U.S.C. § 227(b)(1)(A)(iii); "mak[ing]" robocalls without required disclosures, *id.* § 227(d)(1)(A); and "caus[ing]" a caller identification service to transmit misleading information, *id.* § 227(e)(1). That was reasonable: Moser "admits that he selected the spoofed number and caused it to transmit to

[10] Moser argued in passing that his clients are "ultimately responsible" for TCPA compliance. *See* Moser Response at 6 (SER-33). That fleeting statement did not give the Commission a "fair opportunity" to address the very different argument that Moser cannot be a maker of phone calls under the TCPA. *Fones4All Corp.*, 550 F.3d at 819 (cleaned up).

call recipients," *Order* ¶11 n.55 (SER-9) (citing Moser Response at 5 (SER-32)), and he "does not dispute that he initiated the calls," *id.* ¶21 n.96 (SER-13). Indeed, Moser concedes here that he "placed the calls through his dialing system." Pet'r Br. 37. By any reasonable view, that is "mak[ing]" a call.

Settled agency precedent confirms this. A person "who took the steps necessary to physically place the call" is liable for making or initiating the call. *See* Forfeiture Order, *Dialing Servs., LLC*, FCC 17-97, 32 FCC Rcd 6192, 6195–96 ¶11, 2017 WL 3187648 (2017).[11] Moser admits (at 37) that he "placed the calls through his dialing system," which satisfies the agency's test. At minimum, the FCC is owed deference to this reasonable interpretation and application of the TCPA.[12] *See City of Portland*, 969 F.3d at 1037.

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[11] *Accord, e.g.*, Declaratory Ruling & Order, *Rules & Regulations Implementing the TCPA*, FCC 15-72, 30 FCC Rcd 7961, 7980–81 ¶30, 2015 WL 4387780 (2015) (citing Declaratory Ruling, *Joint Petition Filed by Dish Network, LLC et al.*, FCC 13-54, 28 FCC Rcd 6574, 6584 ¶28, 2013 WL 1934349 (2013)), *vacated in part on other grounds*, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

[12] Moser suggests (at 22, 34–35) that the Commission erred by not also bringing an enforcement action against his client (who is under investigation for state election law violations), but non-enforcement is an unreviewable exercise of the agency's "absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

Regardless, any error is harmless. Even if Moser were not liable under the TCPA, he was still responsible for spoofing telephone calls with intent wrongfully to obtain something of value and is therefore liable under the Truth in Caller ID Act. *See* 5 U.S.C. § 706; Part II-C, *supra*.

B. Moser Did Not Exhaust His Challenge To The Forfeiture Penalty Amount, Which Fails Regardless.

Moser raises two arguments about the forfeiture penalty amount: (1) that the Commission did not consider his ability to pay, Pet'r Br. 49–50; and (2) that the penalty is an excessive fine under the Eighth Amendment, *id.* at 43–45. Both fail.

1. Moser did not afford the Commission a fair opportunity to pass on his challenges to the forfeiture amount.

Moser did not exhaust his challenges to the penalty amount. *See* 47 U.S.C. § 405(a); *Fones4All Corp.*, 550 F.3d at 818. At the agency, Moser did not raise any arguments about his ability to pay or contend that the proposed forfeiture amount was unlawful. In fact, the Commission affirmed its proposed forfeiture in part *because* Moser "d[id] not contest the amount of the forfeiture or seek a reduction." *Order* ¶40 (SER-21).

Once the *Order* issued, Moser should have raised any legal objections to the forfeiture amount in a petition for reconsideration. 47 U.S.C. § 405(a); *see Nat'l Lifeline Ass'n*, 983 F.3d at 509 (petition for reconsideration required to preserve judicial review "even when a petitioner has no reason to raise an argument" initially). Because Moser never gave the Commission a fair opportunity to pass on his statutory and Eighth Amendment challenges to the forfeiture amount, these arguments are not properly before the Court.

2. The Commission properly considered Moser's ability to pay.

Moser faults (at 49–50) the Commission for not considering his "ability to pay," as the statute requires. 47 U.S.C. § 503(b)(2)(E). The record belies that argument. In the *Notice*, the Commission gave Moser specific instructions for raising a claim of inability to pay. *See Notice* ¶42 (SER-156). He did not raise that claim. Then, in the *Order*, the Commission cited the statutory factors, including ability to pay, *Order* ¶39 (SER-20), and correctly found that Moser had not contested his ability to pay, *id.* ¶ 40 (SER-21). There was no reason for the Commission to consider the matter further.

3. The penalty does not violate the Eighth Amendment's Excessive Fines Clause.

Moser also challenges (at 43–45) the forfeiture penalty under the Eighth Amendment's Excessive Fines Clause, which limits the government's power to extract payments, including "civil penalties imposed by federal law." *Pimentel v. City of Los Angeles*, 974 F.3d 917, 922 (9th Cir. 2020). A penalty is unconstitutionally excessive only if "grossly disproportional" to the violation's gravity. *Id.* at 921 (quoting *United States v. Bajakajian*, 524 U.S. 321, 336–37 (1998)). Whether a fine is grossly disproportional turns on four factors: (1) the nature and extent of the underlying offense; (2) whether the underlying offense relates to other illegal activities; (3) whether other penalties may be imposed for the offense; and (4) the extent of the harm caused by the offense.[13] *Id.* None counsels against Moser's penalty.

First, Moser is highly culpable because he knowingly misled thousands of consumers. *Order* ¶¶5, 10–13 (SER-5, 8–9); *see Pimentel*, 974 F.3d at 922, 923 (stating that "the specific actions of the violator" are "critical"). Moser's argument (at 44) that he "merely placed" the calls,

[13] Given these factors, Moser's arguments (at 21–22, 45) that he "only received $800" and that there was no "formal" complaint are irrelevant.

but did not create the message, misses the point: Deception about the caller—not the content of the call—is the offense, and Moser's large-scale knowing and intentional deception justifies higher penalties. *Cf., e.g.*, *United States v. Mackby*, 339 F.3d 1013, 1017 (9th Cir. 2003) (upholding a penalty for "knowingly mak[ing] a false claim for payment" over 8,000 times).

Second, Moser's violation relates to other illegal activities. *See Pimentel*, 974 F.3d at 923. Moser's 47,610 robocalls each violated the TCPA's disclosure rules, and over 11,000 of the calls were unlawfully placed to cell phones. *Order* ¶6 (SER-6).[14]

Third, Moser's $9,997,750 penalty is a small fraction of the maximum he faced. The third factor looks to "other penalties that the Legislature has authorized," including statutory maximums, *United States v. $100,348 in U.S. Currency*, 354 F.3d 1110, 1122 (9th Cir. 2004) (quoting *United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1197 (9th Cir. 1999)), with "substantial deference" to Congress's judgment about an appropriate penalty, *Pimentel*, 974 F.3d at 924 (cleaned up).

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[14] Nor was this "a first-time violation," as Moser contends. Pet'r Br. 45. The Commission found that Moser spoofed HomeyTel's number in 2016 as well. *Order* ¶7 n.33 (SER-7).

Congress authorized an inflation-adjusted fine of $11,905 per spoofed call, 47 U.S.C. §§ 227(e)(5)(A), (e)(5)(B); 47 C.F.R. § 1.80(b)(4), which is evidence that Congress deems this "a serious offense." *See Mackby*, 339 F.3d at 1017–18. Moser's fine is less than 1.8 percent of the total $566 million penalty he faced ($11,905 for each of 47,610 total calls) and less than 15 percent of the $68 million maximum for the verified calls ($11,905 for 5,713 calls). Prior cases have upheld penalties approaching 50 percent of a maximum, and the "substantial difference" between the actual and maximum penalties weighs against gross disproportionality. *See id.* at 1018 (collecting cases).

Fourth, Moser's violation caused extensive harm. This inquiry "is not limited to monetary harms" but includes "how the violation erodes the government's purposes for proscribing the conduct." *Pimentel*, 974 F.3d at 923. Unlawful robocalls are "an invasion of privacy" that harm the consumers receiving the calls. *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 372 (2012). And Moser also caused tangible harm to HomeyTel, which faced "immediate backlash" that included "numerous irate calls from aggrieved call recipients" and the threat of "imminent litigation." *Order* ¶17 (SER-11–12).

In sum, given the extent of harm and wrongdoing, Congress's judgments about severity, and the stark disparity between the actual and authorized penalty amounts, the forfeiture imposed on Moser was not grossly disproportional to his offense.

C. Moser's First Amendment Claim Fails Because The *Order* Penalizes Conduct, Not Speech.

Moser argues (at 18–19, 45–47) that the *Order* improperly penalizes anonymous political speech. This, too, is unavailing.

1. Spoofing is not constitutionally protected "anonymous speech." Pet'r Br. 45–46. The Truth in Caller ID Act protects anonymity by allowing "any person" to "prevent or restrict" the transmission of caller identification information altogether, 47 U.S.C. § 227(e)(2), but if "information … regarding the telephone number of" the originator is transmitted, it cannot be dishonest in furtherance of wrongful conduct. *See id.* § 227(e)(1), (8)(A). In any event, this Court has dismissed as "devoid of merit" arguments that mere "[e]xposure of a telephone number … violates a First Amendment right to speak anonymously." *People of State of Cal. v. FCC*, 75 F.3d 1350, 1362 (9th Cir. 1996).

2. This Court has consistently "upheld statutes that regulate the *method* rather than the content of robocalls as reasonable time, place,

and manner restrictions." *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1223 (9th Cir. 2019) (emphasis in original) (citing *Moser v. FCC*, 46 F.3d 970, 973–75 (9th Cir. 1995)); *see also, e.g.*, *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876–77 (9th Cir. 2014). Lawful rules include the TCPA's general robocall restrictions, *see Gomez*, 768 F.3d at 876 (citing *Moser*, 46 F.3d at 973–74), and the requirement to disclose robocall sponsors.[15] *See Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 376–77 (4th Cir. 2013). The Truth in Caller ID Act's spoofing ban is no different; it merely regulates the method of robocalling by prohibiting knowing use of inaccurate originating numbers with harmful intent. *Cf. Victory Processing*, 937 F.3d at 1223.

The Commission found Moser liable because his conduct violated these neutral time, place, and manner rules—not because of the message's content. Moser points (at 18, 45) to isolated words and phrases in the *Notice* to accuse the Commission of targeting political speech. But

[15] Moser obliquely suggests (at 15–16) that the TCPA applies only to commercial calls. Not so; the TCPA still bans certain "political robocalls," *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2344 (2020) (plurality opinion), and the Commission explained that political calls are not exempt from the relevant provisions in the TCPA or Truth in Caller ID Act. *Order* ¶35 (SER-19).

the Commission took care in the *Order* to explain that the forfeiture was based "solely" on Moser's spoofing, not the content of his robocalls. *Order* ¶¶37–38 (SER-20). The Commission explained that its action "does not hinge on the truthfulness or factual accuracy of the prerecorded message or Moser's knowledge thereof," nor on any effect or intended harm to the campaign for office. *See id.* ¶37 (SER-20). Rather, the Commission's decision was "based on Moser's unlawful spoofing" and was "not dependent on the content of the call." *Id.* ¶38 (SER-20).[16]

The Commission's statement settles the matter. Courts are "ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019). Here, substantial objective evidence supports the *Order*'s stated basis. Indeed, Moser does not contest that he made tens of thousands of spoofed robocalls and that he knowingly caused those calls to display a business rival's number.

[16] Moser cites (at 46) Commissioner O'Rielly's partial dissent to cast doubt on those statements, but Commissioner O'Rielly agreed that content "is irrelevant to [the Commission's] analysis," and he explained that the *Notice*'s words and phrases to which Moser objects were merely "sensationalist language." *Order* at 13438 (O'Rielly Statement) (SER-26).

Against this objective evidence of wrongdoing, Moser's conjectures fall far short of "a strong showing of bad faith or improper behavior" that would allow a court to look beyond the *Order*'s explanation. *Id.* at 2574.

D. The Commission Afforded Moser Due Process.

1. The Commission did not prejudge Moser's case.

Moser argues (at 48) that the Commission "made up [its] mind" about Moser's case when it issued a *Notice* and a *Citation* in late 2019. By his telling, he was cited one day and found guilty and fined the next. *See* Pet'r Br. 14. Moser is mistaken.

Moser complains (at 48) that the Commission did not issue a "citation." But it did. Ordinarily, the Commission cannot impose a forfeiture on someone (like Moser) who does not hold a license from the FCC unless the Commission first issues a citation for the violation, affords an opportunity to be heard, and then finds that the offender violated the same law after the citation. *See* 47 U.S.C. § 503(b)(5). That requirement applies to violations of the Commission's rules, *id.* § 503(b)(1)(B), including those implementing the TCPA, *see, e.g.*, *id.* § 227(d)(3)(A). But the citation requirement does *not* apply to forfeitures under the Truth in Caller ID Act. *See id.* § 227(e)(5)(A)(ii) ("Paragraph (5) of section 503(b) of this title shall not apply in the case of a violation

of this subsection."). Instead, a notice of apparent liability is the prerequisite for fining these violations. *See id.* § 503(b)(4).

Because the Commission's preliminary investigation indicated that Moser violated both the TCPA's disclosure rules *and* the Truth in Caller ID Act, the Commission directed a *Citation* to the TCPA violations and the *Notice* to the Truth in Caller ID Act violations. *Compare Notice* ¶37 (SER-155) (notifying Moser of violations of 47 U.S.C. § 227(e)), *with* Citation & Order, *Kenneth Moser dba Marketing Support Systems*, DA 19-1250, 2019 WL 6837860 ¶14 (EB rel. Dec. 13, 2019) (SER-165) (citing Moser for violations of 47 U.S.C. § 227(b), (d)).

These documents started the forfeiture process; they did not end it. The *Notice*, for example, referred to the Commission's liability finding as "tentative." *Notice* ¶15 (SER-147). Although Moser objects (at 48) that the *Notice* told him to "pay the fine," the *Notice* directed him either to pay *or* to file a written response seeking reduction or cancellation. *See Notice* ¶38 (SER-155). There was no conclusive finding when the *Notice* and the *Citation* were issued in 2019.

2. Moser received notice and a meaningful opportunity to be heard, even though the *Order* does not deprive him of property.

Moser asserts (at 49) that the Commission violated the Due Process Clause by providing him with an insufficient opportunity to respond to the *Notice*. That argument fails for at least three reasons.

First, the *Order* is not a deprivation of property. The forfeiture penalty is not self-executing and does not authorize the government to take anything from Moser. Rather, the only means to recover the penalty is through a trial de novo in federal district court. *See* 47 U.S.C. § 227(e)(5)(A)(ii); *id.* § 504(a). A deprivation occurs only pursuant to a final federal court judgment, and the trial is the process that leads to the deprivation.

Second, Moser received adequate notice and opportunity to be heard regardless. Moser complains (at 49) that he had "thirty days" to respond to the *Notice*. But he ignores the "substantial extensions of time" he received. *Order* ¶47 (SER-23). Although Moser's response was due in January 2020, *see Notice* ¶38 (SER-155); 47 C.F.R. § 1.80(g)(3), he did not file until June 15. *See Order* ¶2 n.5 (SER-4). Moser thus had six months to prepare a written response—not thirty days. And in that time, the FCC provided him "with all of the information and documents that the

agency relied upon in the *Notice*, as well as additional non-material documents that did not inform [the Commission's] proposed determination and sanction." *Id.* ¶44 (SER-22).[17] The six-month opportunity to respond was more than constitutionally adequate. *Cf. Kulakchyan v. Holder*, 730 F.3d 993, 996 (9th Cir. 2013) (per curiam) (three months was "sufficient opportunity" to respond); *Pal v. Barr*, 793 F. App'x 550, 551 (9th Cir. 2020) (applying *Kulakchyan* to reject due process claim).

Third, Moser has not explained how additional time to respond would have affected his response or the outcome. Thus, even if the Commission erred, Moser has not shown that the error was prejudicial. *See* 5 U.S.C. § 706.

3. *Brady* does not apply, and Moser cannot show a violation regardless.

Moser separately claims (at 17, 48–49) that the Commission violated due process by not disclosing all material exculpatory evidence

[17] Moser contends (at 14) that "he has not received all of the evidence that the FCC claims as the basis for its rulings." But at the Commission, Moser conceded that he "received" "all the material" cited in the *Notice*. *See* Moser Response at 14 (SER-41). Moser has not identified with specificity any material cited in the *Notice* or *Order* that has not been disclosed to him.

under *Brady v. Maryland*, 373 U.S. 83 (1963). But *Brady* applies to civil investigations "only in rare instances" that involve deprivations of liberty or joint investigations with law enforcement. *See Kashem v. Barr*, 941 F.3d 358, 387 (9th Cir. 2019) (collecting cases). Neither was present here.

Regardless, Moser cannot establish a *Brady* violation. Moser complains (at 48–49) that "he would have liked the opportunity" to review certain documents. But a *Brady* claim requires more: Moser must (1) identify favorable evidence (2) that the FCC suppressed and (3) explain what prejudice ensued. *See Amado v. Gonzalez*, 758 F.3d 1119, 1134 (9th Cir. 2014). He has not done any of the three, nor can he for the first time in his reply brief.[18] *See, e.g.*, *United States v. Anderson*, 472 F.3d 662, 668 (9th Cir. 2006).

[18] Moser speculates (at 17, 27–28) to the existence of Enforcement Bureau witness interview records, which he claims might have "assisted" him. A *Brady* claim, however, requires more than "stating that [evidence] might have been useful." *United States v. Abonce-Barrera*, 257 F.3d 959, 970 (9th Cir. 2001). Moreover, because Moser bears the burden of proving prior express consent, *see* Part II-A-2, there is no "reasonable probability that … the result of the proceeding would have been different" if Moser had these records, given his failure to suggest any plausible basis for consent. *United States v. Manning*, 56 F.3d 1188, 1198 (9th Cir. 1995).

CONCLUSION

The Court should dismiss the petition for review for lack of jurisdiction or, in the alternative, deny the petition on the merits.

Dated: December 1, 2021

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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CERTIFICATE OF FILING AND SERVICE

I certify that on December 1, 2021, I caused the foregoing Brief for Respondents to be filed with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit using the Court's CM/ECF system, which caused a true and correct copy of the same to be served on all attorneys registered to receive such notices.

I further caused a true and correct copy of the same to be served by electronic mail on *pro se* Petitioner Kenneth Moser, dba Marketing Support Systems, at kmoser1@san.rr.com on December 1, 2021, consistent with his written consent to accept service in that manner.

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STATUTORY ADDENDUM

STATUTORY ADDENDUM CONTENTS

47 U.S.C. § 227 provides in pertinent part:

§ 227. Restrictions on use of telephone equipment

* * *

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States--

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States;

* * *

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States--

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that--

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call,

and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Prohibition on provision of misleading or inaccurate caller identification information

(1) In general

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States, in connection with any voice service or text messaging service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value, unless such transmission is exempted pursuant to paragraph (3)(B).

(2) Protection for blocking caller identification information

Nothing in this subsection may be construed to prevent or restrict any person from blocking the capability of any caller identification service to transmit caller identification information.

(3) Regulations

(A) In general

The Commission shall prescribe regulations to implement this subsection.

(B) Content of regulations

(i) In general

The regulations required under subparagraph (A) shall include such exemptions from the prohibition under paragraph (1) as the Commission determines is appropriate.

(ii) Specific exemption for law enforcement agencies or court orders

The regulations required under subparagraph (A) shall exempt from the prohibition under paragraph (1) transmissions in connection with--

(I) any authorized activity of a law enforcement agency; or

(II) a court order that specifically authorizes the use of caller identification manipulation.

(4) Repealed. Pub.L. 115-141, Div. P, Title IV, § 402(i)(3), Mar. 23, 2018, 132 Stat. 1089

(5) Penalties

(A) Civil forfeiture

(i) In general

Any person that is determined by the Commission, in accordance with paragraphs (3) and (4) of section 503(b) of this title, to have violated this subsection shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this paragraph shall be in addition to any other penalty provided for by this chapter. The amount of the forfeiture penalty determined under this paragraph shall not exceed $10,000 for each violation, or 3 times that amount for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act.

(ii) Recovery

Any forfeiture penalty determined under clause (i) shall be recoverable pursuant to section 504(a) of this title. Paragraph (5) of section 503(b) of this title shall not apply in the case of a violation of this subsection.

(iii) Procedure

No forfeiture liability shall be determined under clause (i) against any person unless such person receives the notice required by section 503(b)(3) of this title or section 503(b)(4) of this title.

(iv) 4-year statute of limitations

No forfeiture penalty shall be determined or imposed against any person under clause (i) if the violation charged occurred more than 4 years prior to the date of issuance of the required notice or notice or apparent liability.

(B) Criminal fine

Any person who willfully and knowingly violates this subsection shall upon conviction thereof be fined not more than $10,000 for each violation, or 3 times that amount for each day of a continuing violation, in lieu of the fine provided by section 501 of this title for such a violation. This subparagraph does not supersede the provisions of section 501 of this title relating to imprisonment or the imposition of a penalty of both fine and imprisonment.

* * *

(8) Definitions

For purposes of this subsection:

(A) Caller identification information

> The term "caller identification information" means information provided by a caller identification service regarding the telephone number of, or other information regarding the origination of, a call made using a voice service or a text message sent using a text messaging service.
>
> **(B) Caller identification service**
>
> The term "caller identification service" means any service or device designed to provide the user of the service or device with the telephone number of, or other information regarding the origination of, a call made using a voice service or a text message sent using a text messaging service. Such term includes automatic number identification services.

47 U.S.C. § 405 provides:

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

> **(a)** After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission,

or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C. § 503(b) provides in pertinent part:

§ 503. Forfeitures

* * *

(b) Activities constituting violations authorizing imposition of forfeiture penalty; amount of penalty; procedures applicable; persons subject to penalty; liability exemption period

(1) Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--

(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;

(B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;

(C) violated any provision of section 317(c) or 509(a) of this title; or

(D) violated any provision of section 1304, 1343, 1464, or 2252 of Title 18;

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this chapter; except that this subsection shall not apply to any conduct which is subject to forfeiture under subchapter II of this chapter, part II or III of subchapter III of this chapter, or section 507 of this title.

* * *

(3)(A) At the discretion of the Commission, a forfeiture penalty may be determined against a person under this subsection after notice and an opportunity for a hearing before the Commission or an administrative law judge thereof in accordance with section 554 of Title 5. Any person against whom a forfeiture penalty is determined under this paragraph may obtain review thereof pursuant to section 402(a) of this title.

(B) If any person fails to pay an assessment of a forfeiture penalty determined under subparagraph (A) of this paragraph, after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the Commission, the Commission shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the forfeiture penalty shall not be subject to review.

(4) Except as provided in paragraph (3) of this subsection, no forfeiture penalty shall be imposed under this subsection against any person unless and until--

(A) the Commission issues a notice of apparent liability, in writing, with respect to such person;

(B) such notice has been received by such person, or until the Commission has sent such notice to the last known address of such person, by registered or certified mail; and

(C) such person is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, why no such forfeiture penalty should be imposed.

Such a notice shall (i) identify each specific provision, term, and condition of any Act, rule, regulation, order, treaty,

convention, or other agreement, license, permit, certificate, instrument, or authorization which such person apparently violated or with which such person apparently failed to comply; (ii) set forth the nature of the act or omission charged against such person and the facts upon which such charge is based; and (iii) state the date on which such conduct occurred. Any forfeiture penalty determined under this paragraph shall be recoverable pursuant to section 504(a) of this title.

(5) No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, and if such person is not an applicant for a license, permit, certificate, or other authorization issued by the Commission, unless, prior to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation. The provisions of this paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required, or is a cable television system operator, if the person involved is transmitting on frequencies assigned for use in a service in which individual station operation is authorized by rule pursuant to section 307(e) of this title, or in the case of violations of section 303(q) of this title, if the person involved is a nonlicensee tower owner who has previously received notice of the obligations imposed by section 303(q) of this title from the Commission or the permittee or licensee who uses that tower. Whenever the requirements of this paragraph are satisfied with respect to a particular person, such person shall not be entitled to receive any additional citation of the

violation charged, with respect to any conduct of the type described in the citation sent under this paragraph.

47 U.S.C. § 504(a) provides:

§ 504. Forfeitures

(a) Recovery

The forfeitures provided for in this chapter shall be payable into the Treasury of the United States, and shall be recoverable, except as otherwise provided with respect to a forfeiture penalty determined under section 503(b)(3) of this title, in a civil suit in the name of the United States brought in the district where the person or carrier has its principal operating office or in any district through which the line or system of the carrier runs: *Provided*, That any suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial de novo: *Provided further*, That in the case of forfeiture by a ship, said forfeiture may also be recoverable by way of libel in any district in which such ship shall arrive or depart. Such forfeitures shall be in addition to any other general or specific penalties provided in this chapter. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures under this chapter. The costs and expenses of such prosecutions shall be paid from the appropriation for the expenses of the courts of the United States.

47 C.F.R. § 1.80 provides in pertinent part:

§ 1.80 Forfeiture proceedings

* * *

(b) Limits on the amount of forfeiture assessed

* * *

(4) Forfeiture penalty for a 227(e) violation. Any person determined to have violated section 227(e) of the Communications Act or the rules issued by the Commission under section 227(e) of the Communications Act shall be liable to the United States for a

forfeiture penalty of not more than $11,905 for each violation or three times that amount for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,190,546 for any single act or failure to act. Such penalty shall be in addition to any other forfeiture penalty provided for by the Communications Act.

* * *

(10) Factors considered in determining the amount of the forfeiture penalty. In determining the amount of the forfeiture penalty, the Commission or its designee will take into account the nature, circumstances, extent and gravity of the violations and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

Table 3 to Paragraph (b)(10)—Adjustment Criteria for Section 503 Forfeitures

Upward Adjustment Criteria: (1) Egregious misconduct. (2) Ability to pay/relative disincentive. (3) Intentional violation. (4) Substantial harm. (5) Prior violations of any FCC requirements. (6) Substantial economic gain. (7) Repeated or continuous violation. Downward Adjustment Criteria: (1) Minor violation. (2) Good faith or voluntary disclosure. (3) History of overall compliance. (4) Inability to pay.

47 C.F.R. § 64.1200 provides in pertinent part:

§ 64.1200 Delivery restrictions

(b) All artificial or prerecorded voice telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated;

<Text of subsection (b)(2) effective until (date pending).>

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; and

<Text of subsection (b)(2) delayed until announcement of effective date in the Federal Register. See 86 FR 11443.>

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages and messages made pursuant to an exemption under paragraphs (a)(3)(ii) through (v) of this section to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours; and

<Text of subsection (b)(3) effective until (date pending).>

(3) In every case where the artificial or prerecorded voice telephone message includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone line or any of the lines or telephone numbers described

in paragraphs (a)(1)(i) through (iii), provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism, within two (2) seconds of providing the identification information required in paragraph (b)(1) of this section. When the called person elects to opt out using such mechanism, the mechanism, must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call. When the artificial or prerecorded voice telephone message is left on an answering machine or a voice mail service, such message must also provide a toll free number that enables the called person to call back at a later time and connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person's number to the seller's do-not-call list.

<Text of subsection (b)(3) delayed until announcement of effective date in the Federal Register. See 86 FR 11443.>

(3) In every case where the artificial or prerecorded-voice telephone message is made pursuant to an exemption under paragraphs (a)(3)(ii) through (v) of this section or includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone line or any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section, provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism, within two (2) seconds of providing the identification information required in paragraph (b)(1) of this section. When the called person elects to opt out using such mechanism, the mechanism must automatically record the called person's number to the caller's do-not-call list and immediately terminate the call. When the artificial or prerecorded-voice telephone message is left on an answering machine or a voice mail service, such message must also provide a toll free number that enables the called person to call back at a later time and connect directly to the automated, interactive voice- and/or key press-

activated opt-out mechanism and automatically record the called person's number to the caller's do-not-call list.

47 C.F.R. § 64.1604 provides:

§ 64.1604 Prohibition on transmission of inaccurate or misleading caller identification information.

(a) No person or entity in the United States, nor any person or entity outside the United States if the recipient is within the United States, shall, with the intent to defraud, cause harm, or wrongfully obtain anything of value, knowingly cause, directly, or indirectly, any caller identification service to transmit or display misleading or inaccurate caller identification information in connection with any voice service or text messaging service.

(b) Paragraph (a) of this section shall not apply to:

(1) Lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States; or

(2) Activity engaged in pursuant to a court order that specifically authorizes the use of caller identification manipulation.

(c) A person or entity that blocks or seeks to block a caller identification service from transmitting or displaying that person or entity's own caller identification information pursuant to § 64.1601(b) of this part shall not be liable for violating the prohibition in paragraph (a) of this section. This paragraph (c) does not relieve any person or entity that engages in telemarketing, as defined in § 64.1200(f)(10) of this part, of the obligation to transmit caller identification information under § 64.1601(e).