

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

Re: *The Joint Petition Filed by DISH Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules; The Petition Filed by Philip J. Charvat for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules; The Petition Filed by DISH Network, LLC for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, CG Docket No. 11-50.

Congress passed the Telephone Consumer Protection Act (TCPA) in the wake of increasing complaints about telemarketing from consumers and a ragged patchwork of state laws addressing the problem. The TCPA was a “federal intervention balancing the privacy rights of the individual and the commercial speech rights of the telemarketer.”¹ Therefore, it is not surprising that the statutory scheme reflects a compromise (and a complicated one at that) that uses precise distinctions to effectuate Congress’s purpose.

Our job at the Commission is to implement the laws as they are written by Congress, not to rewrite them to conform to our own policy preferences. Accordingly, we should—indeed, must—respect the statute’s precise boundaries.² Moreover, clear rules better protect consumers, better inform businesses engaged in lawful telemarketing, and better serve the courts who must handle the litigation arising under the TCPA. Because today’s declaratory ruling does not advance the appropriate interpretation of the statute, eschews clear rules that would preclude wasteful litigation, and expounds an area of law that we are not empowered to administer, I dissent in part.

I.

Let me start with where I agree with today’s item. *First*, I agree that a person “initiates” a telephone call when he physically places that call. Thus when a third-party telemarketer places a call on a seller’s behalf, it is the telemarketer, and not the seller, who “initiates” that phone call.³ *Second*, I agree that a seller may be held vicariously liable for TCPA violations committed by third-party telemarketers.

But it is in defining the scope of that third-party liability that I part ways with my colleagues. I find implausible as a matter of statutory construction the declaratory ruling’s insistence on one and only one standard of third-party liability for both prerecorded call violations (governed by section 227(b)) and do-not-call violations (governed by section 227(c)). Although administratively convenient, this one-size-fits-all approach gives short shrift to the divergent language of these two provisions. I believe instead that sections 227(b) and 227(c) embrace different approaches to third-party liability. Under section 227(b), sellers should be held vicariously liable under federal common-law agency principles for TCPA violations committed by third-party telemarketers. By contrast, under section 227(c), third-party liability

¹ Report of the Energy and Commerce Committee of the U.S. House of Representatives, H.R. Rep. 102-317, at 10 (1991) (TCPA House Report).

² See *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94 (2002) (explaining that “like any key term in an important piece of legislation, the [statutory provision in question] was the result of compromise between groups with marked but divergent interests in the contested provision” and that “[c]ourts and agencies must respect and give effect to these sorts of compromises”); see also John F. Manning, *Second-Generation Textualism*, 98 Cal. L. Rev. 1287, 1309–17 (2010) (arguing that respecting legislative compromise means that courts “must respect the level of generality at which the legislature expresses its policies”).

³ See *Declaratory Ruling*, para. 26.

exists whenever a telemarketer initiates a call on a seller's behalf, even if that telemarketer is not under the seller's control.

Consider first the language the TCPA uses to confer a private right of action in each context. On one hand, the TCPA states that a person “may . . . bring . . . an action based on a violation” of the prerecorded call rules to enjoin further calls or recover damages.⁴ In short, the statute is silent on the scope of third-party liability applicable to section 227(b) violations.

On the other hand, the TCPA's do-not-call rules specifically contemplate third-party liability. The TCPA specifies that 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 [do-not-call] regulations . . . may . . . bring . . . an action based on [such] a violation” to enjoin further calls or recover damages.⁵ In other words, the statutory phrase “on behalf of” explicitly extends third-party liability to section 227(c) violations.

Congress does not normally use differing language in two parallel provisions to mean the same thing. Just as “[i]t cannot be presumed that any clause in the constitution is intended to be without effect,”⁶ statutory language “cannot be regarded as mere surplusage; it means something.”⁷ And yet the declaratory ruling would read section 227(c) no differently if the phrase “on behalf of” were excised from the text.⁸

Instead of incorporating federal common-law agency principles into section 227(c), the Commission should give meaning to “on behalf of” and impose third-party liability for do-not-call violations whenever a telemarketer initiates a call on a seller's behalf, even if that telemarketer is not under the seller's control.⁹ Such a standard would not only respect the specific language Congress used in the TCPA, it would also better implement the statutory scheme.¹⁰

Two further distinctions in the statutory text confirm the necessity and propriety of an “on behalf of” standard for third-party liability for do-not-call violations. *For one*, an “on behalf of” standard is necessary if consumer enforcement of the do-not-call provisions is to be effective. Section 227(c)(5) imposes a two-call rule for do-not-call violations, prohibiting a consumer from bringing suit unless she has received “more than one telephone call . . . by or on behalf of the same entity.”¹¹ If “on behalf of” means what it says, the consumer's burden of proof is low: She would only need to prove that both calls

⁴ 47 U.S.C. § 227(b)(3).

⁵ 47 U.S.C. § 227(c)(5) (emphasis added).

⁶ *Marbury v. Madison*, 1 Cranch 137, 174 (1803); *id.* (“Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.”).

⁷ *Potter v. United States*, 155 U.S. 438, 446 (1894).

⁸ *See Declaratory Ruling*, paras. 29, 31–32, 40.

⁹ *Compare with* Restatement (Third) of Agency § 1.01 (defining “agency” as “the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal's behalf *and subject to the principal's control*” (emphasis added)). To be clear, I do not view “on behalf of” liability as entirely divorced from classical agency principles (and thus I agree with the declaratory ruling that “on behalf of” liability should not extend to resellers such as big-box retailers who are not part of an authorized chain of telemarketers), but I cannot believe Congress intended to simply incorporate agency principles either.

¹⁰ Curiously, the declaratory ruling appears to recognize that the phrase “on behalf of” is often used to mean something more ephemeral than a formal agency relationship—that it can mean simply “in the interest of” or “for the benefit of.” *See Declaratory Ruling*, para. 30 (citing *Webster's Third New International Dictionary*).

¹¹ 47 U.S.C. § 227(c)(5).

were marketing the product of a single seller, and she could then file suit against either the telemarketer or the seller. But if “on behalf of” merely incorporates the federal common law of agency, a consumer will be forced to navigate that legal thicket even if she chooses to sue the telemarketer alone. That’s because under the common-law standard, the private cause of action would depend upon the agency relationship between the seller and every telemarketer that called the consumer. Suppose, for example, the consumer receives calls from two different telemarketers purporting to represent the same seller. If the federal common law would impute the actions of the first telemarketer that called the consumer to the seller but not the second, then the consumer would not have *any* do-not-call cause of action (let alone an action against the seller), despite the fact that both calls were placed “on behalf of” the same seller.¹²

For another, section 227(c)(5) creates an affirmative defense for sellers that have “established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection.” No similar affirmative defense exists under section 227(b). This discrepancy lends additional weight to the argument that Congress did not intend for sections 227(b) and 227(c) to be interpreted in a parallel manner with respect to third-party liability. Rather, recognizing that the third-party liability standard under section 227(c) is stricter than under section 227(b) (due to the phrase “on behalf of”), Congress understandably chose to give sellers an affirmative defense under section 227(c) to exempt sellers who had taken substantial precautions to avoid illegal solicitations made on their behalf by unaffiliated telemarketers.

So why would Congress use a different and more expansive concept of third-party liability for do-not-call violations than for prerecorded call violations? A recent letter from the U.S. Department of Justice lays it out succinctly: “[B]ecause the federal government created and administers the National Do-Not-Call Registry, Congress may have determined that the federal interest in preventing violations of the Registry under section 227(c)(5) is stronger than the federal interest in preventing robocall violations under section 227(b)(3), which were already the subject of many state laws when the TCPA was enacted. In addition, Congress may have determined that one set of violations was more serious or more odious to consumers than another.”¹³ On the last point, consider this: The TCPA’s prerecorded call rules apply to all consumers whereas the TCPA’s do-not-call rules require consumers to opt-in by registering their phone number. If returning some control to consumers over their phones was the purpose of the TCPA, as evidently it was,¹⁴ it’s not hard to see violations that countermand the express wishes of consumers might be “more odious” than other violations.

The Commission does not grapple in any meaningful sense with the differences between the language contained in sections 227(b) and 227(c). Instead, it relies on language contained in our own rules for its conclusion that the two statutory provisions should mean the same thing when it comes to third-party liability. Specifically, the Commission states that:

¹² It is perhaps for this reason that the U.S. Department of Justice (DOJ) repeatedly and vehemently argues that the Commission should not confine its interpretation of section 227(c)(5) to incorporating only principles of agency law. *See, e.g.*, Letter from Lisa K. Hsiao, U.S. Dep’t of Justice, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 11-50, at 3 (filed Oct. 26, 2011) (Dep’t of Justice Oct. 26, 2011 *Ex Parte*) (“Agency Law Has No Place in the TCPA”); Letter from Patrick Runkle, Trial Attorney, U.S. Dep’t of Justice, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 11-50, at 2 (filed Apr. 2, 2013) (Dep’t of Justice Apr. 2, 2013 *Ex Parte*) (“To be perfectly clear, DOJ’s position is that, to interpret § 227(c)(5), the Commission need not and should not import agency law under any circumstance.”); Letter from Patrick Runkle, Trial Attorney, U.S. Dep’t of Justice, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 11-50, at 2 (filed Apr. 8, 2013) (“DOJ also urged that the FCC reject agency law as a rule of decision in this context, and simply confirm that ‘on behalf of’ means what it says.”).

¹³ Dep’t of Justice Apr. 2, 2013 *Ex Parte* at 2.

¹⁴ TCPA House Report at 6 (describing the TCPA as “designed to return a measure of control to both individual residential telephone customers and owners of facsimile machines”).

[E]xisting TCPA regulations implementing both sections 227(b) and 227(c) use the same (“on behalf of”) phrase. Since we find below that vicarious liability for violations of section 227(b) is available only under federal common law agency principles, reading “on behalf of” to provide for more extensive vicarious liability in the context of do-not-call violations under section 227(c) would implausibly require that phrase to have different meaning under our rules, depending on the particular violations at issue, without any indication in past precedent that different meanings were intended.¹⁵

This reasoning is curious, to say the least. It is black-letter law that the terms of a statute trump the terms of a rule. Therefore, our rules should be interpreted (and promulgated) in a manner that is consistent with the terms of statutes they implement. Here, that well-established approach is turned on its head; our interpretation of a statute is driven by what the Commission sees as the most plausible interpretation of our rules. And so the tail wags the dog.

Even if we had the leeway to adopt this approach, it’s important to note that the Commission’s assessment of its regulations is in error. The Commission’s regulations implementing section 227(b) simply do not use the phrase “on behalf of” to establish the scope of third-party liability.¹⁶ Rather, this phrase is used throughout our TCPA regulations for other purposes. Sometimes the rules use that phrase to exempt a category of calls from liability. Other times the rules use that phrase to define a term. Still other times those rules use that phrase to impose liability on sellers for violations of our do-not-call rules.

Indeed, by my count, our rules implementing the TCPA (contained in 47 C.F.R. § 64.1200) use the phrases “on behalf of” or “on whose behalf” twenty separate times. And a close examination of these regulations belies the idea that “on behalf of” merely incorporates the federal common law of agency.

First, the fact that our rules use the phrase “on behalf of” in some places but not others suggests that the Commission itself has thought the phrase goes beyond the common-law standard of agency, that “on behalf of” actually means as much. But the declaratory ruling effectively neglects the phrase, or at best reinterprets it, to have no independent meaning in our rules; precisely the same third-party liability will apply, the declaratory ruling states, regardless of its presence or absence. This cannot be.

Second, taking this interpretation of our rules seriously could have pernicious and unintended results. The charitable exemptions, for example, extend to both charities and third parties calling on a charity’s behalf certain liability protections from the prohibition on prerecorded calls to residences.¹⁷ Now that “on behalf of” means “as the agent of,” charities and their third-party callers must reexamine their relationship to determine if the third parties qualify as agents under the federal common law of agency. If they do not, then the third parties likely have been violating our prerecorded call rules for years.¹⁸ The same goes for any third party that distributes health care messages in compliance with the Health Insurance Portability and Accountability Act.¹⁹

¹⁵ *Declaratory Ruling*, para. 31 (footnotes omitted).

¹⁶ In claiming that we have used “on behalf of” language indiscriminately in implementing sections 227(b) and (c), the declaratory ruling repeatedly cites a single paragraph discussing “on behalf of” liability. *See Declaratory Ruling*, para. 38 & notes 94, 117, 119 (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12397, para. 13 (1995) (*TCPA 1995 Order*)). But the citation misses the mark; that paragraph discusses the statutory term “solicitation” (used in section 227(c)) and cites our do-not-call rules (implementing section 227(c)). It never mentions section 227(b).

¹⁷ *See* 47 C.F.R. § 64.1200(a)(3)(iv).

¹⁸ The declaratory ruling asserts that the incorporation of federal common law principles of agency into the TCPA was “precisely the result that charities and their allied telemarketers sought and received” with the charitable exemption. *Declaratory Ruling*, note 119. But charities made clear that they did not seek to exempt calls by their

Third, this approach may generate some peculiar eddies. Consider the application of the common-law standard to our definition of “seller,” which is the person “on whose behalf” a telemarketing call is initiated.²⁰ If there is no agency relationship between the person that hires a telemarketer and the telemarketer, does that mean there is no “seller” for purposes of our rules? What happens to the requirement that consumers who opt-out of future telemarketing be put on the “seller’s do-not-call list”?²¹ What about other rules that assume a “seller” always exists?²²

We could avoid each of these problems simply by adhering to the bright-line language that Congress chose to put in section 227(c)(5) and that the Commission built into its rules: “On behalf of” means “on behalf of” liability. It should be as easy as that.²³

II.

The second problem with the declaratory ruling is its interpretation of the federal common law of agency. Perhaps as an attempt to cure the problems caused by its interpretation of the phrase “on behalf of,” the declaratory ruling attempts to equate the federal common law of agency with a strict liability standard. It asserts that the federal common law of agency goes beyond classical agency to include the doctrines of apparent authority and ratification.²⁴ It claims that contractual terms forbidding a third-party “from engaging in unlawful telemarketing activities would not, by themselves, absolve the seller” of third-party liability.²⁵ It provides a laundry list of potential evidence “that may demonstrate that the telemarketer is the seller’s authorized representative with apparent authority.”²⁶ It attempts to shift the

agents but instead “calls made on their behalf by independent telemarketers” and “those placed by independent contractors on behalf of” charities. *TCPA 1995 Order*, 10 FCC Rcd at 12397, para. 12 (emphases added). To satisfy their request, we did not point to agency law (which would exclude independent contractors) but rather used the phrase “on behalf of” (which would not).

¹⁹ See 47 C.F.R. § 64.1200(a)(3)(v).

²⁰ See 47 C.F.R. § 64.1200(f)(9).

²¹ 47 C.F.R. § 64.1200(a)(7)(i)(B), (b)(3).

²² See, e.g., 47 C.F.R. § 64.1200(d)(4).

²³ One last point. The declaratory ruling also insists that construing the phrase “on behalf of” to mean “on behalf of” would require a notice-and-comment rulemaking. See *Declaratory Ruling*, paras. 31–32. But that phrase’s meaning is before us now *because* we have not previously answered the question now in front of us. Neither of the rulings cited by the Commission, see *Declaratory Ruling*, note 94 (citing *TCPA 1995 Order*, 10 FCC Rcd at 12397, para. 13; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 20 FCC Rcd 13664, 13667, para. 7 (Consumer & Gov’t Affairs Bur. 2005)), addresses the critical issue: whether a telemarketer *must* be an agent of a company in order to act “on behalf of” that company. Rather, they merely establish the obvious proposition that an agent of a company does act “on behalf of” that company. Moreover, one of these two rulings was issued by the Consumer & Governmental Affairs Bureau and thus is not even binding on the Commission. *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008). In reality, the Commission has previously refused to interpret the private-right-of-action provisions of the TCPA and thus cannot have established an interpretation of “on behalf of” in section 227(c)(5). See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Protection Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3815, para. 56 (2006). Indeed, if the Commission had already decided this question in a prior order, it is strange that it took us years to issue today’s declaratory ruling. In short, I do not know of any administrative law principle that would prevent us from reading the statute or our rules to mean what they say.

²⁴ See *Declaratory Ruling*, para. 34.

²⁵ See *Declaratory Ruling*, note 102.

²⁶ See *Declaratory Ruling*, para. 46.

burden of proof for lack of agency onto the seller.²⁷ And it concludes by saying that “we see no reason that a seller should not be liable under those provisions for calls made by a third-party telemarketer when it has authorized that telemarketer to market its goods or services.”²⁸

I am skeptical of these claims (more on that later), but there is a far more fundamental problem with this “guidance.” It is not the Commission’s place to opine on the proper contours of the federal common law of agency. We must of course fill in the gap in the TCPA regarding the source of agency principles that apply to section 227(b)(3). But once we have determined the applicable body of law and it is evident that we have not been entrusted to administer it (*contra* the TCPA or the Communications Act), our duty and our expertise come to an end. If we had determined, for example, that state agency law governs, there would be no question that we should not endeavor to construe each state’s agency laws. If we had determined that some general federal statute like the Federal Tort Claims Act governed, we would not claim expertise in its interpretation. So too here. The federal common law of agency is a general body of law that covers numerous agencies. Its ambit extends to labor relations, patents, environmental regulation, telecommunications, and much more. We cannot opine—at least not with the authority afforded judicial deference²⁹—on its scope and meaning, particularly as we are announcing its incipient application to TCPA violations only today.

Turning to the merits of the “guidance” provided by the Commission, the federal common law of agency simply does not impose strict liability on sellers for the actions of their telemarketers. And even if we were to assume that the Restatement (Third) of Agency were the law of the land, its application to the relationship between a seller and its telemarketers is generally unclear and may require fact-specific inquiries beyond the scope of the present record.

For example, the black-letter law of apparent authority is that third-party liability accrues when a person “reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.”³⁰ The principal may manifest assent or intent “through written or spoken words or other conduct.”³¹ The key problem with this theory for victims of TCPA violations is that they interact only with the telemarketer, not the seller, and thus there are no (apparent) manifestations *by the seller* on which to hang the hat of apparent authority.³²

²⁷ See *Declaratory Ruling*, para. 46 (“At a minimum, evidence of these kinds of relationships . . . should be sufficient to place upon the seller the burden of demonstrating that a reasonable consumer would not sensibly assume that the telemarketer was acting as the seller’s authorized agent.”).

²⁸ See *Declaratory Ruling*, para. 47.

²⁹ See, e.g., *Chevron, U.S.A. Inc. v. Nat’l Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1986) (deference applies only “[w]hen a court reviews an agency’s construction of the statute which it administers”); *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649–50 (1990) (same); see also Dep’t of Justice Apr. 2, 2013 *Ex Parte* at 2 (“[T]he Commission likely does not have the authority to state for the federal courts what the federal common law of agency is.”). Similarly, *Skidmore* deference makes sense only when an agency’s “specialized experience” in a particular field give its arguments added weight. *U.S. v. Mead Corp.*, 533 U.S. 218, 234–35 (2001). And though we may have “decades of experience” administering the TCPA, *Declaratory Ruling*, note 137, we have none administering the federal common law of agency.

³⁰ Restatement (Third) of Agency § 2.03.

³¹ Restatement (Third) of Agency § 1.03.

³² The declaratory ruling tries to sidestep this issue by noting that “a principal may create apparent authority by appointing a person to a particular position” and “may permit an agent to acquire a reputation of authority in an area or endeavor by acquiescing in conduct by the agent under circumstances likely to lead to a reputation.” See *Declaratory Ruling*, note 102 (citations omitted). While true, this does not explain how a consumer is to know that a seller “appointed” a telemarketer “to a particular position” or that a particular telemarketer has “acquire[d] a

Similarly problematic are some of the items on the laundry list set forth by the Commission. For example, the declaratory ruling claims that “apparent authority may be supported by evidence that the seller allows the outside sales entity access to information and systems that normally would be within the seller’s exclusive control, including: access to detailed information regarding the nature and pricing of the seller’s products and services.”³³ But the whole foundation of apparent authority is the reasonable beliefs of consumers, and few if any consumers will know whether or not a seller allows such access to a telemarketer at the time of the call. And in any case, how does giving a telemarketer access to the detailed information that’s available on almost every company’s website imply agency? Rather than clarifying the common law of agency, these dicta only muddy it, to the detriment of both consumers and businesses that want to leave or avoid the courtroom.³⁴

III.

Given Congress’ inclusion of “on behalf of” in the do-not-call provisions of the TCPA, I would adopt an interpretation consistent with the terms of those provisions and our corresponding rules. And given our limited authority over and expertise in federal agency law principles, I would abstain from opining on their application here. I respectfully dissent in part from the Commission’s contrary approach. This is a somewhat unusual situation in that the declaratory ruling is occasioned by judicial requests for assistance;³⁵ thus, the cases that prompted our decision will return to the courts for review. Hopefully, they will supply a legally sound result that will also better serve the interests of American consumers victimized by violations of the TCPA and American businesses subject to it.

reputation of authority in an area,” let alone how a consumer would know that at the time that she received the undesired call.

³³ See *Declaratory Ruling*, para. 46.

³⁴ The U.S. Department of Justice, too, believes that agency law is not as clear as the declaratory ruling suggests. “[A]gency law is highly malleable” and “is in flux, with multiple—often competing—formulations advanced by litigants and adopted by courts.” Dep’t of Justice Oct. 26, 2011 *Ex Parte* at 4. “[A]gency law has been articulated and applied inconsistently” and “many agency law principles are inapplicable in [the context of the TCPA].” Dep’t of Justice Apr. 8, 2013 *Ex Parte* at 2. In short, the courts are still ironing out the warps and woofs of agency law, so much so that the declaratory ruling may not even be invoking the right principles, let alone applying those principles correctly.

³⁵ It bears noting that we do not answer all the questions the courts asked. For instance, the declaratory ruling declines to resolve what the term “user” means in section 217 of the Communications Act and whether a seller might be liable under that provision, despite the invitation to do so. See *Charvat v. Echostar Satellite*, 630 F.3d 459, 465 (6th Cir. 2010). While disappointing, this is understandable given the fact that we never sought comment on the issue and thus do not have a full record to review.