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

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

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

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

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

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

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

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[1] Communications Act § 227(b).

[2] *Order* at para. 14.

[3] *Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 781 (2000).

[4] *Compare* Communications Act § 602(15) ("[T]he term 'person' means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity" for purposes of Title VI of the Communications Act.), *with* Communications Act § 3(39) ("The term 'person' includes an individual, partnership, association, joint-stock company, trust, or corporation.").

[5] Communications Act § 3(39).

[6] Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 584.

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

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

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

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

One last point. I do not doubt that federal contractors are entitled to some form of derivative immunity from suit.[15] And I do not doubt that the federal common law of agency is relevant to that

[8] 136 S. Ct. 663, 672 (2016).

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

[10] *Order* at para. 17; *see also Order* at para. 16.

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

[12] *Order* at para. 22.

[13] *Order* at para. 19.

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

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

determination. But it is not the Commission's place to define the proper contours of the federal common law of immunity or its application to federal contractors.[16] The federal common law of immunity is a general body of law that covers numerous agencies. It extends to defense, healthcare, the environment, telecommunications, and much more. We cannot opine—at least not with any authority afforded judicial deference[17]—on its scope or meaning, particularly as we announce its incipient application to the TCPA only today.

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

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

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

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

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