

**DISSENTING STATEMENT OF  
COMMISSIONER AJIT PAI**

***Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278***

Last month in the *Broadnet/RTI Declaratory Ruling*, my colleagues voted to find that federal contractors, including federal debt collectors, are not “persons” under the Telephone Consumer Protection Act (TCPA) and thus get a free pass to robocall the American people.<sup>1</sup> I did not support that decision. In my view, federal law makes clear that federal contractors are “persons” and thus are subject to the TCPA’s consumer protections.<sup>2</sup>

The FCC should reverse this mistake. As the National Consumer Law Center, the Electronic Privacy Information Center, the NAACP, and 48 other organizations have told us, “[i]f the Commission does not reconsider and change its ruling in [the *Broadnet/RTI*] proceeding, tens of millions of Americans will find their cell phones flooded with unwanted robocalls from federal contractors with no means of stopping these calls and no remedies to enforce their requests to stop these calls.”<sup>3</sup>

The FCC takes the same path here as it did in the *Broadnet/RTI Declaratory Ruling* by again failing to follow the law.

Some background: Section 227(b)(1) of the TCPA prohibits “any person” from using certain automated telephone equipment without the called party’s prior express consent.<sup>4</sup> Section 227(b)(2) authorizes the FCC to “prescribe regulations to implement the requirements of this subsection.”<sup>5</sup>

Last year’s budget deal snuck a special exemption for federal debt collectors into the TCPA.<sup>6</sup> First, it amended section 227(b)(1) to exempt calls “made solely to collect a debt owed to . . . the United States.”<sup>7</sup> Next, it amended section 227(b)(2) to give the FCC authority to “restrict or limit the number and duration of calls made . . . to collect a debt owed to . . . the United States.”<sup>8</sup> It also instructed the FCC to adopt final rules implementing these changes by August 2, 2016.<sup>9</sup>

As I said when we started this proceeding to implement this exemption, I do not believe the federal government should be bestowing regulatory largesse upon favored industries such as federal debt collectors.<sup>10</sup> I hope Congress will soon reverse course and eliminate this special exemption.

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<sup>1</sup> *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, Declaratory Ruling, FCC 16-72 (July 5, 2016) (*Broadnet/RTI Declaratory Ruling*).

<sup>2</sup> *Id.* (Statement of Commissioner Ajit Pai, Approving in Part and Dissenting in Part) (“But I part ways with the Commission’s conclusion that federal contractors are not persons under the TCPA.”).

<sup>3</sup> National Consumer Law Center *et al.* Petition for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration, CG Docket No. 02-278, at 2 (July 26, 2016).

<sup>4</sup> Communications Act § 227(b)(1).

<sup>5</sup> Communications Act § 227(b)(2).

<sup>6</sup> Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a), 129 Stat. 584 (Budget Act).

<sup>7</sup> See Communications Act § 227(b)(1)(A)(iii), (b)(1)(B).

<sup>8</sup> See Communications Act § 227(b)(2)(H).

<sup>9</sup> Budget Act § 301(b).

<sup>10</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Notice of Proposed Rulemaking, 31 FCC Rcd 5134, 5154–55 (2016) (*Notice*) (Dissenting Statement of Commissioner Ajit Pai).

Anyway, enough background. In this case, the FCC tries to solve the problem it created in the *Broadnet/RTI Declaratory Ruling* by arguing that even if the TCPA's consumer protections in section 227(b)(1) do not apply to federal contractors, the Commission is free to regulate non-persons—including “the federal government and its contractors”—under section 227(b)(2).<sup>11</sup>

The Commission's approach is unlawful and makes a dog's breakfast of the TCPA.

*First*, the plain text of the TCPA limits the scope of the FCC's rulemaking authority under section 227(b)(2). The Commission does not have unlimited power to “restrict or limit the number and duration of [federal debt collection] calls” but only that necessary to (as the preface of that paragraph puts it) “implement[] the requirements of this subsection.”<sup>12</sup> Those requirements are outlined in section 227(b)(1) and apply only to “any person.”<sup>13</sup> Thus, our authority under section 227(b)(2)(H) can only extend to “any person” otherwise subject to the requirements of section 227(b)(1)—and not to the federal government itself, a non-person as all agree.

*Second*, the canons of construction confirm that section 227(b)(2) does not extend to the federal government. Federal law does not apply to the sovereign absent “some affirmative showing of statutory intent to the contrary.”<sup>14</sup> That principle drove the FCC's decision to exclude the federal government from the scope of the TCPA in the *Broadnet/RTI Declaratory Ruling*. There, we rightly held that Congress's decision to apply the TCPA to “any person” was insufficient to conclude that it intended to extend the TCPA to the federal government.<sup>15</sup> A clearer statement of Congressional intent was needed. And that holding mortally wounds this one: Congress's decision to indirectly indicate to whom section 227(b)(2) applies (through its reference to the “requirements” of section 227(b)(1)) cannot possibly be a more “affirmative showing” than Congress's decision to directly indicate that section 227(b)(1) applies to “any person.”<sup>16</sup>

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<sup>11</sup> *Order* at para. 62. Although I focus on the application of section 227(b)(2) to the federal government here, these arguments carry equal force with respect to federal contractors, at least so long as the FCC continues to believe it an “untenable result” to apply the TCPA to federal contractors when those contractors make calls the TCPA allows the government itself to make. See *Broadnet/RTI Declaratory Ruling*, FCC 16-72, at para. 16.

<sup>12</sup> See Communications Act § 227(b)(2)(H) (“The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission— . . . may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States.”).

<sup>13</sup> See Communications Act § 227(b)(1) (“It shall be unlawful for any person . . . .”); *Broadnet/RTI Declaratory Ruling*, FCC 16-72, at para. 10. The *Order* responds that “another requirement in subsection (b) appears in new subparagraph (b)(2)(H).” *Order* at para. 64. Not true. *For one*, new subparagraph (b)(2)(H) is not a “requirement.” It mandates no action. It prohibits no conduct. It does not even require the FCC to adopt rules. All it says is that the Commission “may” adopt certain limits. And any such limits would be “requirements” of the FCC's regulations, not requirements of subsection (b). *Cf.* Communications Act § 227(b)(3) (distinguishing between violations of “this subsection” and violation of “the regulations prescribed under this subsection”). *For another*, the *Order*'s reading renders the prefatory language hopelessly circular. After all, if the prefatory language refers to the provisions of paragraph (b)(2) (such as new subparagraph (b)(2)(H)), then the Commission would *automatically* be “implementing the requirements of this subsection” whenever it adopted rules under paragraph (b)(2). In other words, the prefatory language does no work at all and is mere surplusage. We must interpret this language in a way that gives meaning to every clause. See *Potter v. United States*, 155 U.S. 438, 446 (1894) (the presence of statutory language “cannot be regarded as mere surplusage; it means something”).

<sup>14</sup> *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000).

<sup>15</sup> See *Broadnet/RTI Declaratory Ruling*, FCC 16-72, at para. 12.

<sup>16</sup> The *Order* responds that the existence of rulemaking authority under section 227(b)(2) is the “requisite affirmative showing.” *Order* at para. 65. But that misses the point. No one doubts that Congress intended the FCC to issue *some* rules. The question is whether there's an affirmative showing that Congress intended to encompass

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Perhaps even more fatal is the “settled propositio[n]” that the United States’ waiver of sovereign immunity “cannot be implied but must be unequivocally expressed.”<sup>17</sup> Notably, the necessary consequence of applying section 227(b)(2) to the federal government is a waiver of federal sovereign immunity. That’s because section 227(b)(3) expressly empowers private parties to bring an action for money damages against anyone who violates “the regulations prescribed under this subsection,” i.e., the regulations enacted under section 227(b)(2).<sup>18</sup> But the United States obviously has not delegated authority to the FCC to waive federal sovereign immunity. And section 227(b)(2) contains no unequivocal expression, no implication, not even a wink suggesting that Congress intended to waive the government’s sovereign immunity.<sup>19</sup>

*Third*, the structure of the TCPA does not support an expansive reading of section 227(b)(2)’s scope. After all, section 227(b)(2)(H) is not unique in omitting the word “person.” In fact, not one of the regulatory authorities contained in subsection 227(b)(2) uses that word. Not one FCC precedent (until today) has found that omission meaningful. And not once has the FCC suggested that these other regulatory authorities could apply to the federal government. The structure is key<sup>20</sup>: Whereas section 227(b)(1) contains mandatory prohibitions (e.g., barring robocalls to consumers’ cellphones), section 227(b)(2) only contains discretionary prohibitions (e.g., asking the FCC to consider banning robocalls to businesses). And every FCC to date has apparently recognized that it makes no sense to say that Congress intended a narrower scope (only “any person”) for the mandatory prohibitions and a broader scope (“any person” plus the federal government) for the discretionary prohibitions.

*Fourth*, the FCC never proposed to extend its new rules to non-persons such as the federal government. Notice to the public is the critical first step in any rulemaking under the Administrative Procedure Act.<sup>21</sup> But the Commission never proposed in the *Notice* to extend its rules beyond “any person” already covered by the TCPA. Indeed, the *Notice* apparently recognized that the TCPA did *not* extend beyond persons and instead asked the converse question, “whether the Budget Act amendments imply that the federal government is a person for TCPA purposes.”<sup>22</sup> And the proposed rules never suggested they’d apply to the federal government.<sup>23</sup> So it’s no surprise that the *Order* does not identify a

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the federal government in those rules. And though the *Order* repeatedly points to places where Congress could have inserted such a showing, the lack of a showing just doesn’t suffice.

<sup>17</sup> *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 682 (1999) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)).

<sup>18</sup> Communications Act § 227(b)(3).

<sup>19</sup> I agree with the *Order* that the FCC should not be deciding questions of sovereign immunity. See *Order* at para. 65. Nonetheless, we must grapple with the natural consequences of our construction of the statute. The *Order*’s reading naturally raises the question of whether the United States has waived its sovereign immunity. I do not believe that it has.

<sup>20</sup> See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2483–84 (2016) (noting the “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme” (quoting *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2441 (2014))).

<sup>21</sup> See 5 U.S.C. § 553(b).

<sup>22</sup> *Notice*, 31 FCC Rcd at 5140, para. 16.

<sup>23</sup> *Id.* at 5146 (Appendix A). Notably, the *Order* appears to agree and suggests that commenters should have somehow guessed that divergent strands from different sections of the *Notice* could be stitched together to apply these section 227(b)(2) regulations to non-persons. See *Order* at para. 66 (quoting section III.A of the *Notice* (discussing calls exempted from section 227(b)(1)) and section III.B of the *Notice* (discussing rules under section 227(b)(2))). But the Administrative Procedure Act does not require a post-hoc explanation. It requires advance notice. Furthermore, even the *Order*’s attempt to stitch together notice fails. As the *Order* recognizes, the *Notice* only proposed applying limits to “covered calls,” *Notice*, 31 FCC Rcd at 5140, paras. 17–18, i.e., those calls exempted by the Budget Act amendments and thus only calls by “persons” subject to the TCPA, *id.* at 5139, para.

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single stakeholder that's even commented on the issue, let alone supported the *Order's* interpretation. And that includes the Treasury Department, which oversees federal debt collection efforts and with which we are legally required to "consult[]."24

In the end, we can't mitigate by misinterpreting. The FCC got the *Broadnet/RTI Declaratory Ruling* wrong. Adding a second wrong to the first does not make a right.

For all these reasons, I respectfully dissent.

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15. And the *Order* omits the relevant context when it says the FCC proposed applying rules to "any call." The *Notice* used that phrase to cover calls "even if unanswered by a person." *Id.* at 5140, para. 18. At no point did the *Notice* suggest it would cover calls made by *anyone*.

<sup>24</sup> Budget Act § 301(b).