IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS, INC., *et al.*, Plaintiffs, v. LORETTA LYNCH, in her official capacity as Attorney General of the United States Defendant.	Case No. 5:16-CV-252 (JCD)

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

"Voluminous consumer complaints about abuses of telephone technology — for example, computerized calls dispatched to private homes — prompted Congress to pass the" Telephone Consumer Protection Act nearly a quarter-century ago. *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012). The ubiquity of cell phones only aggravates such problems. *See Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876–77 (9th Cir. 2014), *aff'd* 136 S. Ct. 663 (2016). "People keep their cellular phones on their person at nearly all times: in pockets, purses, and attached to belts. Unlike other modes of communication, the telephone commands our instant attention." *Joffe v. Acacia Mortg. Corp.*, 121 P.3d 831, 842 (Ariz. Ct. App. 2005), *cert. denied*, 549 U.S. 1111 (2007) (mem.). In regulating the use of certain calling technology, the TCPA balances "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade." Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9), 105 Stat. 2394, 2394 (1991) (codified at 47 U.S.C. § 227 Note).

Plaintiffs, a group of political organizations that purportedly make phone calls to the electorate, are concerned that they could one day be accused of violating the TCPA. That alleged fear does not establish a credible threat of enforcement of the law by the Defendant so as to establish an Article III case or controversy. As an initial matter, Plaintiffs contend that the TCPA is a content-based restriction of speech largely in light of FCC orders interpreting and applying the statute, but federal district courts lack jurisdiction to consider challenges to FCC orders. Under the Hobbs Act, such challenges instead must be brought, in the first instance, in the court of appeals. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1). Moreover, even if they were properly stated, questions going to the validity of such agency orders would not serve to call into question the validity of the TCPA itself.

More fundamentally, Plaintiffs' Complaint must be dismissed because they lack standing. First, to adequately allege an injury-in-fact, Plaintiffs must establish that they face a credible threat of having the TCPA enforced against them. They have failed to do so, however, because the statutory provision that Plaintiffs ask the Court to strike down places limitations only on calls made using an autodialer or a prerecorded voice, and Plaintiffs have not alleged that they do either in making the calls that are the basis for this lawsuit

Second, even if Plaintiffs had established a credible threat of prosecution under the TCPA, their alleged injury would not be redressed by any available relief. The only part of the TCPA that potentially applies to Plaintiffs has routinely been upheld against First Amendment challenges as a content-neutral statute. *See, e.g.*, *Campbell-Ewald*, 768 F.3d 871. And indeed, Plaintiffs do not allege that this portion of the statute is content based. Instead, in both counts of the Complaint, they point to FCC orders and a 2015 legislative amendment as the basis of their constitutional challenges, even though none of those provisions apply to or restrict Plaintiffs' calls. If the Court were to find any of the FCC orders or the 2015 amendment to the statute to be unconstitutional, the proper remedy would be to invalidate them individually, not to strike down the Act as a whole. Such relief would provide Plaintiffs with no remedy for their alleged injury, as it would leave intact the provision that could allegedly be applied to them.

Finally, Plaintiffs have named a Defendant — the Attorney General — who is not responsible for the enforcement of the statute. As Plaintiffs concede in the Complaint, a TCPA enforcement action is not brought by the Department of Justice, but by state attorneys general, private parties, or the Federal Communications Commission ("FCC"). Because of this, any alleged injury would not be the consequence of the Attorney General's actions, nor would an injunction against the Attorney General provide redress.

For all of these reasons, Plaintiffs lack standing, and this Court lacks subject matter jurisdiction. The Complaint should be dismissed.

BACKGROUND

The TCPA "protect[s] the privacy of cellular telephone subscribers from automated calls," *Joffe*, 121 P.3d at 842; *see also Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 376–77 (4th Cir. 2013) ("The TCPA protects residential privacy."), by, as pertinent here, requiring anyone who wishes to make a call to a cell phone using a pre-recorded voice or an automatic telephone dialing system — often known as an autodialer or ATDS — to first obtain the called party's express consent. 47 U.S.C. § 227(b)(1)(A)(iii). As initially enacted, the only exception provided in the Act applied to calls made for an emergency purpose. Telephone Consumer Protection Act of 1991 § 3, 105 Stat. at 2395. Recently, Congress further provided that the Act allows calls to collect a debt guaranteed by or owed to the United States. *See* Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 584, 587 (2015). The TCPA also permits the FCC to authorize exemptions from § 227(b)(1)(A)(iii)'s consent requirement under certain, carefully circumscribed circumstances. *See* 47 U.S.C. § 227(b)(2)(C). The TCPA provides for a private right of action under which persons and entities may obtain injunctive or monetary relief for violations of the Act, including statutory damages of $500 per violation, with a possibility of trebling for knowing or willful conduct. *Id.* § 227(b)(3). The statute applies to both voice calls and text messages. *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14115 ¶ 165 (2003); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 949 (9th Cir. 2009).

Plaintiffs filed the present challenge to the TCPA's constitutionality on May 12, 2016, naming as the Defendant Loretta Lynch, in her official capacity as Attorney General of the

United States. Plaintiffs allege that they are various nonprofit and for-profit organizations involved in making calls for political reasons. Compl. ¶¶ 6–10. Most of the Plaintiffs — The Democratic Party of Oregon ("DPO"), Public Policy Polling, LLC ("PPP"), Tea Party Forward PAC ("TPF"), and the Washington State Democratic Central Committee ("WSDCC") — allege that, as organizations, they have standing because of a "personal stake in the outcome of the action." *Id.* ¶¶ 13–16. The American Association of Political Consultants ("AAPC"), meanwhile, maintains that it has standing "as an organization to bring suit on behalf of its members." *Id.* ¶ 12. Plaintiffs contend that the TCPA violates the First Amendment because they claim it is a content-based regulation of speech that cannot survive strict scrutiny. They therefore seek injunctive and declaratory relief holding that the TCPA is unconstitutional and preventing its enforcement against them, as well as nominal damages.[1]

ARGUMENT

I. THE DISTRICT COURT LACKS JURISDICTION TO CONSIDER PLAINTIFFS' CHALLENGES TO FCC ORDERS.

Central to both of Plaintiffs' First Amendment challenges is their contention that the FCC has created certain exceptions to the TCPA, *see* Compl. ¶¶ 26–30, that are allegedly content-based and thus render the statute, in its entirety, unconstitutional, *id.* ¶¶ 36, 38–42, 48–52. However, this Court lacks jurisdiction to consider challenges to FCC orders.[2] And Plaintiffs are

[1] Although this case should not reach the remedial stage, Plaintiffs are plainly not entitled to nominal damages under any circumstances. Sovereign immunity bars suits for money damages against officials acting in their official capacities, absent a specific waiver by the government, which Plaintiffs have nowhere identified. *See Ascot Dinner Theatre, Ltd. v. Small Bus. Admin.*, 887 F.2d 1024, 1031 (10th Cir. 1989); *Bergman v. United States*, 844 F.2d 353, 356 (6th Cir. 1988); *Clark v. Library of Cong.*, 750 F.2d 89, 103–05 (D.C. Cir. 1984).

[2] Plaintiffs point to several FCC orders as "exemptions to the cell phone call ban," but that characterization is not entirely accurate. Compl. ¶ 25. While several of the "exemptions" highlighted by Plaintiffs were orders issued by the FCC pursuant to its statutorily granted

in any event wrong to suggest that a constitutional defect in any of these orders would serve to call the constitutionality of the TCPA into doubt.

The Communications Act of 1934 establishes the exclusive mechanism for challenging the validity of final orders issued by the FCC. Section 402(a) of that statute specifies that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter . . . shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28 [of the United States Code]." 47 U.S.C. § 402(a). The cross-referenced chapter of the U.S. Code, also known as the Administrative Orders Review Act or Hobbs Act, provides in relevant part that "[t]he court of appeals (other than the United States Court of Appeals for the Federal Circuit) has *exclusive* jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the Federal Communications Commission made reviewable by [47 U.S.C. § 402(a)]." 28 U.S.C. § 2342(1) (emphasis added); *see also Cartrette v. Time Warner Cable, Inc.*, No. 5:14-CV-143-FL, 2016 WL 183483, at *3 (E.D.N.C. Jan. 14, 2016) (attached hereto as Exhibit A) ("The Hobbs Act, 28 U.S.C. § 2342(1), and the Federal Communications Act, 47 U.S.C. § 402(a), operate together to restrict district courts from invalidating certain actions by the FCC."). "This procedural path created by the command of Congress 'promotes judicial efficiency, vests an appellate panel rather than a single district judge with the power of

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authority to exempt from § 227(b)(1)(A)(iii)'s consent requirement certain calls for which the called party is not charged, 47 U.S.C. § 227(b)(2)(C); *see also* Compl. ¶¶ 26, 27, 29, 30, in other instances the FCC's orders interpret and clarify the TCPA's operation without exercising the agency's exemption authority. For example, the "exemption" that allows social networks to send text messages confirming consumers' interest in joining such groups without violating the TCPA interprets an ambiguity concerning *how* consent may be obtained in certain circumstances. *See Matter of Groupme, Inc./skype Commc'ns S.A.R.L. Petition for Expedited Declaratory Ruling Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 F.C.C. Rcd. 3442, 3444–45 (2014). At any rate, these distinctions are not directly relevant here, where the question is simply whether the Court has jurisdiction to consider Plaintiffs' challenge to these orders.

agency review, and allows uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress to enforce the TCPA.'" *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014) (quoting *CE Design, Ltd. v. Prism Bus. Media, Inc.,* 606 F.3d 443, 450 (7th Cir. 2010)).

Although Plaintiffs' primary purpose in citing to FCC orders in their Complaint may be to argue that the TCPA writ large is unconstitutional, the fact that those orders form the basis for their constitutional argument is sufficient to invoke the exclusive jurisdiction of the court of appeals. It is well established that "[t]he district courts lack jurisdiction to consider claims to the extent they depend on establishing that all or part of an FCC order subject to the Hobbs Act is 'wrong as a matter of law' or is 'otherwise invalid.'" *Id.* at 1120 (quoting *Self v. Bellsouth Mobility, Inc.*, 700 F.3d 453, 462 (11th Cir. 2012)); *see also Fitzhenry v. Indep. Order of Foresters*, No. 2:14-CV-3690, 2015 WL 3711287, at *2 n.3 (D.S.C. June 15, 2015) (attached hereto as Exhibit B) ("Whichever way it is done, to ask the district court to decide whether the regulations are valid violates [the Hobbs Act]." (quoting *United States v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000))); *Am. Bird Conservancy v. FCC*, 545 F.3d 1190, 1193–94 (9th Cir. 2008) (holding that the plaintiff "cannot elude the Communications Act's exclusive review provision by disguising its true objection"); *Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1307 (11th Cir. 2015); *Morse v. Allied Interstate, LLC*, 65 F. Supp. 3d 407, 412 (M.D. Pa. 2014).

In *Mais*, for example, appellant Gulf Coast Collection Bureau was sued in district court under the same TCPA provision at issue here. 768 F.3d at 1113. The Bureau argued that its calls fell within the statutory exemption for "prior express consent," as the term had been interpreted in an FCC order. *Id.* The district court rejected the Bureau's defense, concluding that the FCC's

interpretation was at odds with the statutory text. *Id.* The court of appeals reversed, holding that the district court lacked jurisdiction, notwithstanding that the plaintiff's "primary intent" in bringing the lawsuit was not to challenge the FCC order, and that the plaintiff's claim did "not necessarily depend on invalidation of the agency's ruling." *Id.* at 1119. Rather, the "Hobbs Act jurisdictional analysis looks to the 'practical effect' of a proceeding, not the plaintiff's central purpose for bringing suit." *Id.* at 1120 (quoting *B.F. Goodrich Co. v. Nw. Indus., Inc.,* 424 F.2d 1349, 1353–54 (3d Cir. 1970)); *see also Baros v. Tex. Mexican Ry. Co.*, 400 F.3d 228, 238 (5th Cir. 2005). Because the "practical effect" of the decision was to invalidate the FCC order, the district court lacked jurisdiction.

The same is true here. Plaintiffs' attempts to point to the FCC orders as indications of the content-based nature of the TCPA are, at their core, an argument that the orders themselves are unconstitutional (and, indeed, Plaintiffs' argument does not succeed in casting doubt on the TCPA itself). The "practical effect" of a ruling in Plaintiffs' favor would be invalidation of the FCC orders alone, as the statute itself could be saved by invalidation of the orders. And Congress has expressly directed that federal courts of appeals should hear all such arguments concerning the validity of FCC orders in the first instance.

II. PLAINTIFFS HAVE NEITHER PLEADED STANDING NOR DEMONSTRATED IT IN THEIR DECLARATIONS.

"Standing to sue is part of the common understanding of what it takes to make a justiciable case," *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998), and "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "[T]he 'irreducible constitutional minimum' of standing consists of three elements." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). At least one Plaintiff must show that "(1) [it] suffered an

actual or threatened injury that is concrete, particularized, and not conjectural; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable decision." *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 753 (4th Cir. 2013). "An organizational plaintiff may establish standing to bring suit on its own behalf when it seeks redress for an injury suffered by the organization itself." *White Tail Park v. Stroube*, 413 F.3d 451, 458 (4th Cir. 2005) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Alternately, "an organizational plaintiff may establish 'associational standing' to bring an action in federal court 'on behalf of its members when: (1) its members would otherwise have standing to sue as individuals; (2) the interests at stake are germane to the group's purpose; and (3) neither the claim made nor the relief requested requires the participation of individual members in the suit.'" *Id.* (quoting *Friends for Ferrell Parkway, LLC v. Stasko,* 282 F.3d 315, 320 (4th Cir. 2002)). In considering a motion to dismiss for lack of Article III standing, the district court may consider evidence outside the pleadings. *White Tail Park*, 413 F.3d at 459.

Here, Plaintiffs lack standing for at least two reasons: (1) they have not established an injury-in-fact, and (2) they cannot show that any injury they have suffered would be redressed by a judgment in their favor.

A. Plaintiffs Cannot Show an Injury-in-Fact Sufficient to Establish Standing.

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). As Plaintiffs acknowledge, the TCPA has not yet been applied to them, *see generally* Compl., and thus they mount a pre-enforcement challenge. To do so, they "must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979). That is, Plaintiffs must allege

"'an intention to engage in a course of conduct arguably affected with a constitutional interest,' and 'there must exist a credible threat of prosecution under the statute or regulation.'" *Ostergren v. McDonnell*, No. CIV. A. 3:08cv362, 2008 WL 3895593, at *3 (E.D. Va. Aug. 22, 2008) (attached hereto as Exhibit C) (quoting *Va. Soc'y for Human Life, Inc. v. Fed. Election Comm'n,* 263 F.3d 379, 386 (4th Cir. 2001)), *aff'd sub nom. Ostergren v. Cuccinelli*, 615 F.3d 263 (4th Cir. 2010); *see also Hispanic Leadership Fund, Inc. v. Fed. Election Comm'n*, 897 F. Supp. 2d 407, 423 (E.D. Va. 2012).

Plaintiffs cannot mount a pre-enforcement challenge to the TCPA here because they have not alleged that they intend to engage in conduct proscribed by the statute. In their Complaint, Plaintiffs seek to challenge 47 U.S.C. § 227(b)(1)(A)(iii), *see* Compl. ¶¶ 6–10, 19, which prohibits calls or text messages to cell phones that are made using an automatic telephone dialing system or prerecorded voice. Plaintiffs allege that AAPC members, for instance, "make calls to persons on their cell phones to solicit political donations and to discuss political and governmental issues." Compl. ¶ 6. Similarly, "DPO makes calls to registered Democratic and progressive non-affiliated voters on their cell phones to discuss political and governmental issues, give voters critical information to help them with the voting process, encourage voters to return their ballots by deadlines and vote for Democratic candidates, and solicit political donations." *Id.* ¶ 7. PPP likewise "makes calls to persons on their cell phones on behalf of politicians, political organizations, unions, consultants, and other organizations." *Id.* ¶ 8. TPF, for its part, "makes calls to potential voters on their cell phones to solicit political donations and discuss political and governmental issues," and WSDCC "makes calls to registered voters on their cell phones to discuss political and governmental issues and to solicit political donations." *Id.* ¶ 9–10.

Plaintiffs parrot similar contentions in the declarations appended to the Complaint. For instance, AAPC's Executive Director has explained that AAPC members "make calls to persons on their cell phones to discuss, persuade, inform and measure opinions on political and governmental issues." Declaration of Alana Joyce ¶ 11, ECF No. 1-2. DPO "makes calls . . . to discuss political and governmental issues, give voters critical information to help them with the voting process, encourage voters to return their ballots by deadlines and vote for Democratic candidates, and solicit political donations." Declaration of Brad Martin ¶ 8, ECF No. 1-3. The remaining declarations contain almost identical statements. *See* Declaration of Dean Debnam, ECF No. 1-4; Declaration of Niger Innis, ECF No. 1-5; Declaration of Karen Deal, ECF No. 1-6.

Plaintiffs' allegations, both in the Complaint and in the Declarations, are insufficient to establish a credible threat of prosecution because they do not establish that *any* of the Plaintiffs intends to undertake conduct that is proscribed by the statute. Most glaringly, neither the Complaint nor the declarations contain a statement by Plaintiff that they intend to use an autodialer or a prerecorded voice in making the calls that provide the basis for this lawsuit. The statute only prohibits calls (made without consent) that use either type of technology.

Particularly with respect to autodialers, it is not readily apparent that this is simply a pleading deficiency that could be cured by adding the phrase "with an ATDS" to the Complaint. The TCPA expressly defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1) (emphasis added). Plaintiffs bringing suit for TCPA violations must typically do more than "parrot the statutory language." *Baranski v. NCO Fin. Sys., Inc.*, No. 13 CV 6349 (ILG) (JMA), 2014 WL 1155304, at *6 (E.D.N.Y. Mar. 21, 2014) (attached hereto as Exhibit D). "[T]he vast majority of courts to have considered the issue

have found that a bare allegation that defendant used an ATDS is not enough." *Id.* (collecting cases) (citations omitted). There is particularly good cause for requiring the same here, where Plaintiffs are the *calling party*. Courts have been somewhat forgiving where *called parties* cannot allege with any certainty what sort of system a calling party had used, but Plaintiffs can claim no entitlement to such leniency. *See, e.g.*, *Stewart v. T-Mobile USA, Inc.*, 124 F. Supp. 3d 729, 733–34 (D.S.C. 2015) ("[C]ourts have noted the difficulty a plaintiff faces in knowing the type of calling system used without the benefit of discovery and found that courts can rely on details about the call to infer the use of an ATDS." (citation omitted)).

Here, Plaintiffs have not even pleaded at a general level how they make their calls, and the allegations they have set forth "tend[] to refute that [Plaintiffs use] an ATDS." *Snyder v. Perry*, No. 14-CV-2090 (CBA) (RER), 2015 WL 1262591, at *8 (E.D.N.Y. Mar. 18, 2015) (attached hereto as Exhibit E). For example, the allegation that AAPC members and the TPF make calls to "to *solicit* political donations and to *discuss* political and governmental issues," Compl. ¶¶ 6, 9 (emphasis added); *see also id.* ¶ 10 ("WSDCC makes calls to registered voters on their cell phones to discuss political and governmental issues and to solicit political donations."), suggests that representatives of Plaintiff organizations (or members thereof) directly dial and personally converse with the recipients of their calls. The standing declarations — particularly where Plaintiffs explain that they intend to discuss issues and persuade potential voters, *see, e.g.*, Declaration of Alana Joyce ¶ 11, ECF No. 1-2; Declaration of Brad Martin ¶ 8, ECF No. 1-3; Declaration of Niger Innis ¶, 8ECF No. 1-5; Declaration of Karen Deal ¶ 8, ECF No. 1-6 — have the same effect. Indeed, such allegations suggest an element of "human intervention," and thus do not rule out person-to-person calls. *Cartrette*, 2016 WL 183483, at *7 (quoting *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961,

7978 (2015)); *see also McKenna v. WhisperText*, No. 5:14-CV-00424-PSG, 2015 WL 428728, at *4 (N.D. Cal. Jan. 30, 2015) (attached hereto as Exhibit F) (holding that plaintiff's "affirmative allegations of the need for human intervention by a Whisper App user when sending an SMS invitation preclude the need for discovery to address whether McKenna has alleged the use of an ATDS"). *Cf. Robinson v. Green Tree Servicing, LLC*, No. 13 CV 6717, 2015 WL 4038485, at *3 (N.D. Ill. June 26, 2015) (attached hereto as Exhibit G) (illustrating that not all calls originating from call center use an autodialer).

Also absent from Plaintiffs' bare-bones allegations is any discussion of whether the recipient consented to the call, even though calls made using autodialers and pre-recorded voices are prohibited only in the absence of consent. It is entirely unclear from the face of the Complaint why Plaintiffs cannot obtain consent prior to making the calls they wish to place or that they have made calls without obtaining consent (and thus face potential liability under the TCPA). Such facts are entirely within Plaintiffs' control, yet they have made no effort to provide them in the Complaint or attached declarations. Accordingly, the Complaint should be dismissed.

B. Plaintiffs Have Failed to Demonstrate Redressability.

1. *The allegedly unconstitutional provisions are severable.*

Because Plaintiffs cannot challenge the FCC orders in this proceeding, they are left with their argument that the statute is unconstitutional because the 2015 amendment, exempting calls made to collect debts owed to or guaranteed by the Federal Government, renders it content-based. *See* Compl. ¶¶ 36, 53. Even were that so, the proper remedy would be to sever the

amendment from the rest of the TCPA and rule only it to be unconstitutional.[3] *See INS v. Chadha*, 462 U.S. 919, 931–32 (1983) ("[T]he invalid portions of a statute are to be severed unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not."); *see also Ameur v. Gates*, 759 F.3d 317, 325 (4th Cir. 2014) ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem." (citation omitted)), *cert. denied*, 135 S. Ct. 1155 (2015). Indeed, there can be no question here that the "balance of the legislation is []capable of functioning independently," *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987), as the TCPA did just that from the time of its passage in 1991 through the enactment of the 2015 amendment. During that period, numerous courts upheld the TCPA as a content-neutral time-place-or-manner restriction. *See Campbell-Ewald*, 768 F.3d 871; *Moser v. FCC*, 46 F.3d 970, 973 (9th Cir. 1995); *Wreyford v. Citizens for Transp. Mobility, Inc.*, 957 F. Supp. 2d 1378, 1380 (N.D. Ga. 2013); *Strickler v. Bijora, Inc.*, No. 11 CV 3468, 2012 WL 5386089, at *5–6 (N.D. Ill. Oct. 30, 2012) (attached hereto as Exhibit H); *Abbas v. Selling Source, LLC*, No. 09 CV 3413, 2009 WL 4884471, at *7–8 (N.D. Ill. Dec. 14, 2009) (attached hereto as Exhibit I).

However, were the Court to sever the amendment and invalidate it, Plaintiffs would gain no relief, as they are neither benefitted nor burdened by the government-debt exception. As a result, Plaintiffs cannot demonstrate redressability. *See Covenant Media of SC, LLC v. City of N. Charleston*, 493 F.3d 421, 430 (4th Cir. 2007) (holding that plaintiff did not have standing to challenge substantive provisions of a sign regulation where unchallenged provisions of the same regulation would have prevented plaintiff from erecting signs); *Advantage Media, LLC v. City of*

[3] Likewise, even if the Court could consider Plaintiffs' challenges to FCC orders, and even if those orders did violate the First Amendment, the proper remedy would be to invalidate the orders themselves, not the entire TCPA.

Eden Prairie, 456 F.3d 793, 801 (8th Cir. 2006) (holding that an outdoor advertising company could not establish redressability because "a favorable decision for Advantage even with respect to those sign code provisions which were factors in the denial of its permit applications would not allow it to build its proposed signs, for these would still violate other unchallenged provisions of the sign code"); *Interstate Traffic Control v. Beverage*, 101 F. Supp. 2d 445, 453 (S.D.W. Va. 2000) (holding that the plaintiff lacked standing because the challenged presumption was severable and its removal would not redress plaintiff's injury); *Cache Valley Elec. Co. v. Utah Dep't of Transp.*, 149 F.3d 1119, 1123 (10th Cir. 1998) (holding that because the disputed portion of a program was severable from the remainder, plaintiff lacked standing).

2. *An injunction against the Attorney General would not redress any alleged injury.*

Plaintiffs state that they are suing the Attorney General in her official capacity based on her role "enforc[ing] the law complained of in this action." Compl. ¶ 11. Several paragraphs later, however, the Complaint explains that only "[t]he FCC, the states, through their attorneys general or otherwise, and private persons, including classes of persons, can sue for actual or statutory damages" for violations of the TCPA. *Id*. ¶ 22. As Plaintiffs' second statement correctly concedes, it is the FCC, not the Attorney General, which is empowered by Congress to enforce and otherwise administer the TCPA. *See* 47 U.S.C. § 503; *id*. § 227(g)(3), (7). Thus, it is the FCC that would be the proper defendant if the Plaintiffs could show a sufficient threat of enforcement to establish standing. *See, e.g.*, *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 593 (2011) (describing a "preenforcement suit in federal court against those charged with administering the Arizona law"); *Nat'l Taxpayers Union v. U.S. Social Sec. Admin.*, 376 F.3d 239, 242 (4th Cir. 2004) (considering preenforcement challenge to the constitutionality of the Social Security Act, enforced by the Social Security Administration). Because the Attorney

General does not enforce the TCPA, any injunction obtained against her in this suit would not redress Plaintiffs' alleged injury. Plaintiffs have therefore failed to show that the injury is "the consequence of the defendant['s] actions, or that prospective relief will remove the harm." *Warth*, 422 U.S. at 504. *See also 1st Westco Corp. v. Sch. Dist. of Phila.*, 6 F.3d 108, 114–15 (3d Cir. 1993) (finding no case or controversy as to Attorney General based on "general duty to enforce the laws" when not "specifically charged with the duty of enforcing the challenged statute"); *Ass'n of Inv. Brokers v. SEC*, 676 F.2d 857, 861–62 (D.C. Cir. 1982) (holding that association of investment brokers lacked standing to SEC because use of the challenged form was required by self-regulatory organization, not the SEC). Thus, even assuming injury-in-fact and the ability to challenge FCC orders, the suit should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint for lack of jurisdiction.

Dated: July 15, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Motion was filed electronically through the Eastern District of North Carolina Electronic Filing System. Notice of this filing will be sent by operation of the court's Electronic Filing System to all registered users in this case. All counsel to have filed a notice of appearance are registered users.

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