No. 20-____

IN THE

Supreme Court of the United States

DISH NETWORK L.L.C.,

Petitioner,

v.

UNITED STATES, AND THE STATES OF CALIFORNIA, ILLINOIS, NORTH

WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal law prohibits various telemarketing practices, including calls to numbers on the National Do-Not-Call registry. The circuits are split on the basis for vicarious liability under the telemarketing laws. The Fourth and Ninth Circuits, in accordance with a declaratory ruling from the Federal Communications Commission, have held that vicarious liability under the federal telemarketing laws must be assessed in light of the four bedrock theories of common law agency: actual authority, apparent authority, respondeat superior (employment), and ratification. The Seventh Circuit, by contrast, has determined that a seller may be held vicariously liable for telemarketing violations committed by an independent company,

CORPORATE DISCLOSURE STATEMENT

DISH Network L.L.C. is a wholly owned subsidiary of DISH DBS Corporation, a corporation with publicly traded debt, and a wholly owned indirect subsidiary of DISH Network Corporation, a corporation with publicly traded equity (NASDAQ: DISH). Based on a review of Form 13D and Form 13G filings with the Securities and Exchange Commission, no entity owns more than 10% of DISH Network Corporation's stock other than Telluray Holdings, LLC and Dodge & Cox.

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INTRODUCTION

This case presents a classic circuit split: Confronted with analogous (and recurrent) factual circumstances, different circuits apply fundamentally different analytical frameworks, resulting in conflicting results. And the result the Seventh Circuit reached below is untenable. It exposes companies to essentially limitless vicarious liability under the telemarketing laws and threatens to do the same under numerous other statutory regimes that are construed to incorporate common law agency principles.

Petitioner DISH Network L.L.C., like many com-

and recurrent: Companies routinely contract with independent contractors to sell their goods or services.

dishes. A10, 1389-91.[1] During the period of rapid

The Government And Four States Sue DISH, Seeking To Hold It Vicariously Liable For Telemarketing Violations Committed By Four Retailers.

Despite these efforts, a small fraction of the retailers—four out of thousands—committed widespread telemarketing violations. A111-40. These rogue retailers lied about their noncompliance and concealed their unlawful conduct from DISH. A1381-83, 1405-06, 1415. When DISH found out about the violations, it responded by ousting the retailers from its national sales program. A137-38, 1211, 1261-62, 1330-31. The federal government secured judgments against the worst of the perpetrators, but then joined with four states to sue DISH for the same telemarketing violations, on the theory that DISH is vicariously liable for the retailers' misconduct. A783-811, 1167, 1198.

The telemarketing laws at issue involve a complex web of overlapping provisions, administered by multiple agencies. Pursuant to its authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act, see 15 U.S.C. § 6102(a), the Federal Trade Commission created the National Do-Not-Call registry. It also promulgated a regulation—called the Telemarketing Sales Rule (TSR)—declaring it "an abusive telemarketing act or practice … for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in," conduct that includes "initiating any outbound telephone call to a person" whose telephone number is on the national registry or who "has stated that he or

Meanwhile, the TCPA prohibits "initiat[ing] any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message." 47 U.S.C. § 227(b)(1)(B). It also grants the FCC power to engage in rulemaking, which the agency exercised in barring the "initiat[ion of] any telephone solicitation to … [a] residential telephone subscriber

emarketer and authoriz[ed] the telemarketer to mar-

telemarketing violations committed by third-party telemarketers must be assessed "under federal common law principles of agency." Id. at 6584. Among the "agency principles" that can supply a basis for vicarious liability, the FCC noted both "formal agency," as well as "principles of apparent authority and ratification." Id.

Following the FCC's declaratory ruling, the district court conducted a bench trial. Adhering to its original strict liability interpretation of "cause" under the TSR, the court found that DISH was vicariously liable for the retailers' TSR violations because "Dish retained the … Retailers … to market Dish products and services." Pet. App. 254a.

As for the TCPA violations, the court determined that DISH wa1.9(a2ndn1.9(v)6ous)4.8(l)-5(y)6.1( )]TJ ET Q q BT /431 18083(a)-5.8(t

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profits." Pet.App. 96a.**

The Seventh Circuit Affirms The Liability Finding.

**On appeal, DISH argued that t
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was unmoored from any estab
principle of agency. DISH also
court misconstrued "cause"
DISH challenged the $280 million**

**The Seventh Circuit affirm
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telemarke** Stericycle, Inc. v. First Interstate Bank of Denver, N.A., 11 F.3d 183, 184 **(1994) (where drafters "chose to
secondary liability, but no
liberate [drafting] choice
not interfere"). The only evi
in characterizing the reta
the contractual provision
with DISH's "Business Rules," a**

446. As here, the agreement imposed various performance standards on the marketers: It "contained au-

or Federal law." **Id.** (internal quotation marks omitted). That precluded a finding of actual authority. **Id.** at 450.

The Ninth Circuit then proceeded to the respondeat superior theory. The court observed that the "'essential ingredient'" in that theory was the "'extent of control exercised by the principal,'" which must be

of common law agency, "including agency, but also principles of apparent authority." *Id.* at 252 (quoting *Dish Network, LLC*, 28 F.C.C.R. at 6584).

ing parties create a principal-agent relationship sufficient to impose vicarious liability whenever one party imposes basic standards of performance on the other.

The result is a direct circuit conflict, on indistinguishable facts. The Seventh Circuit determined DISH created an agency relationship because it required that the retailers comply with its "Business Rules" relating to promotional offers. Pet. App. 6a-7a. In *Jon*, the seller likewise required that the marketer use only preauthorized "scripts and materials" and comply with other "guidelines and procedures." 887 F.3d at 451. But the Ninth Circuit concluded that these standards afforded the seller "limited control" that was insufficient for vicarious liability. *Id.*

Respondeat Superior: Though the Seventh Circuit, like the *Jon* Court, purported to assess the degree of "control" the seller had over the telemarketer's conduct, Pet. App. 6a, that analysis is fundamentally different. The Seventh Circuit did not ask—as the Ninth Circuit did in *Jon*—whether DISH exercised sufficient "control over 'manner and means'" of the re-

over the order-entry retailers' performance" rested exclusively on the "Business Rules" provision in the contract: Because DISH obligated the retailers to comply with its Business Rules, and also retained the power to modify its Business Rules, the retailers were its agents and it was vicariously liable for their conduct. Pet. App. 6a-7a.

Ratification: The Seventh Circuit's analysis likewise bears no similarity to the Fourth Circuit's ratification analysis in Hodgin . The Seventh Circuit suggested elsewhere in its opinion (rejecting DISH's lack of knowledge defense) that DISH could be held to constructively know about the retailers' violations. Pet. App. 13a. But that suggestion provides no basis for vicarious liability because it started from the premise that the retailers were DISH's agents: DISH may be treated as if it knew about the violations, the court determined, because the "retailers knew that they were making millions of calls," and the "knowledge of the agent is imputed to the principal." Pet. App. 13a. Ratification, by contrast, "is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority." Hodgin , 885 F.3d at 252 (quoting Restatement (Third) of Agency § 4.01(1)) (emphasis added). The knowledge required for ratification is "full, actual knowledge of the facts" at issue, not "constructive or imputed knowledge." NMS Indus., Inc. v. Premium Corp. of Am. , 451 F.2d 542, 544 (5th Cir. 1971); see also Stone v. Fiwco(F)-3(i)2

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Network, LLC

Thus, the Seventh Circuit's decision recognizes a distinct basis for vicarious liability under the telemarketing laws, wholly apart from the four bedrock theories of agency recognized at common law. And its decision presents a pure question of law. Despite the court's general observation that "the existence of an agency relation is a question of fact," Pet. App. 5a, the court's imposition of vicarious liability hinges exclusively on the contract between DISH and the retailers, the interpretation of which the court acknowledged presented a purely "legal question," Pet. App. 6a.

The legal character of the court's decision is apparent from the contrast between it and another decision from the Fourth Circuit. That decision, which followed a jury trial, likewise affirms a liability finding against DISH, but on a diametrically opposed rationale: Where the Seventh Circuit here ignored [illegible]

Circuit's approach contravenes legislative intent, thwarts defendants' legitimate expectations, and undermines the purpose of the telemarketing laws by distorting parties' incentives.

The approach to vicarious liability adopted by the Fourth Circuit, the Ninth Circuit, and the FCC is consistent with a fundamental rule of statutory construction: Statutes that are silent on the question of vicarious liability "permit[] an inference that Congress intended to apply ordinary background tort principles." Meyer v. Holley , 537 U.S. 280, 286 (2003); see also Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media , 140 S. Ct. 1009, 1016 (2020) ("we generally presume that Congress legislates against the backdrop of the common law"); Astoria Fed. Sav. & Loan Ass'n v. Solimino , 501 U.S. 104, 108 (1991) (same). The Seventh Circuit's approach, by contrast, violates the principle that congressional silence "cannot show that it intended to apply an unusual modification of those rules." Meyer, 537 U.S. at 281. Specifically, "unusually strict rules" of vicarious liability apply "only where Congress has specified that such was its intent." Id. Because the telemarketing laws say nothing to indicate a congressional intent to apply unusually strict rules of liability, the Seventh Circuit's determination to do so contravenes congressional intent.

In violating congressional intent, the Seventh Circuit's approach also disrupts parties' legitimate expectations. The core of agency law is mutual consent: An agency relationship arises "when one person (a 'principal') manifests assent to another person (an

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III. The Conflict In Authority Is Exceptionally Important And Warrants Review.

A. The conflicting standards of vicarious

cuit's decision effectively imposes strict liability for violations of the telemarketing laws committed by independent marketing companies.

The Seventh Circuit exacerbated that erroneous holding by joining it with another error: Though the TSR expressly addresses sellers' vicarious liability for telemarketers' violations, and provides that a seller is only liable for such a violation when the seller "cause[s] a telemarketer to engage in" abusive telemarketing, 16 C.F.R. § 310.4(b)(1), the Seventh Circuit held that agency provides a wholly separate basis for vicarious liability under the TSR. Pet. App. 5a. The combination of these two errors will—if not corrected—prompt plaintiffs' firms to file a flood of cases in districts within the Seventh Circuit. Indeed, the Northern District of Illinois is already a center for telemarketing litigation. U.S. Chamber, *supra*, at 10, 16-17, 19-24.

Furthermore, because of the extraordinary amount of potential damages at stake in telemarketing suits, they nearly always result in *in terrorem* settlements. *Id.* at 9. As a consequence, a decision like the Seventh Circuit's will inflict significant costs on businesses—which they will be forced to pass along to customers—but without resulting in a further opportunity for this Court to address the split in authority. Under these circumstances, it is untenable to allow even an incipient circuit split to persist.

B. The conflict disrupts the background rules around which businesses in numerous industries have structured their operations.

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2005). Such routinely amendable quality-control provisions are essential to "protect[ing] the franchisor's national identity and professional reputation." Id. (citation omitted). Yet courts have repeatedly found that such provisions do not transform the franchisee into the franchisor's agent, such that the franchisor could be held liable for the franchisee's conduct. Id. at 1350-51; see also Viches v. MLT, Inc., 127 F. Supp. 2d 828, 832 (E.D. Mich. 2000); Wu v. Dunkin' Donuts, Inc. ,

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CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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