No. 17-3111

IN THE
United States Court of Appeals for the Seventh Circuit

UNITED STATES OF AMERICA, ET AL.,
Plaintiffs-Appellees,
v.

DISH NETWORK L.L.C.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of Illinois
No. 3:09-cv-03073-SEM-TSH
Hon. Sue E. Myerscough

PETITION FOR PANEL REHEARING AND REHEARING EN BANC FOR DEFENDANT-APPELLANT DISH NETWORK L.L.C.

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-3111

Short Caption: United States of America, et al. v. DISH Network L.L.C.

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ E. Joshua Rosenkranz Date: June 10, 2020

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Attorney's Signature: /s/ Elyse D. Echtman Date: June 10, 2020

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Attorney's Signature: /s/ Melanie Hallums Date: June 10, 2020

Attorney's Printed Name: Melanie Hallums

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Sachi Schuricht Date: June 10, 2020

Attorney's Printed Name: Sachi Schuricht

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Eric A. Shumsky Date: June 10, 2020

Attorney's Printed Name: Eric A. Shumsky

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Attorney's Signature: /s/ Randall C. Smith Date: June 10, 2020

Attorney's Printed Name: Randall C. Smith

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ATTACHMENT A

(3) If the party or amicus is a corporation:

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DISH Network L.L.C. is not a publicly held corporation or other publicly held entity. DISH Network L.L.C. is a wholly owned subsidiary of DISH DBS Corporation. DISH DBS Corporation is a wholly owned subsidiary of DISH Orbital Corporation. DISH Orbital Corporation is a wholly owned subsidiary of DISH Network Corporation.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

DISH Network Corporation has publicly traded equity (NASDAQ: DISH) and DISH DBS Corporation has publicly traded debt. Based solely 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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RULE 35 STATEMENT

The panel's decision addresses two questions that go to the core of agency law: First, is a single quality-control provision in a contract between two independent companies sufficient to create an agency relationship? Second, can a principal be found to have ratified an agent's action based on imputed knowledge, rather than actual knowledge?

In answering "Yes" to both questions, the panel decision departs from prior decisions of this Court, splits with other circuits, and radically expands vicarious liability. Rehearing en banc is warranted under both prongs of Federal Rule of Appellate Procedure 35(a): It is necessary to "secure or maintain uniformity of the court's decisions," and "the proceeding involves a question of exceptional importance."

The federal government and four states brought this enforcement action against DISH, based largely on violations of the telemarketing laws that DISH itself did not commit. The vast majority of the violations were committed by independent companies that DISH authorized to market its satellite television services. The contract with each company expressly disclaimed any agency relationship in multiple ways. But the panel decision holds that the companies nevertheless became DISH's agents based on a single, narrow provision that simply required the companies to comply with DISH's rules relating to promotional offers. The panel then held that DISH ratified the companies' conduct, even though the district court never found that DISH knew about or assented to all of the companies' violations. The panel concluded no such finding was necessary because DISH was charged to have known everything its agents knew. Op. 12.

These twin agency law holdings undermine the uniformity of this Court's decisions and warrant en banc review. The panel's determination that a single quality-control provision suffices to create an agency relationship conflicts with prior decisions of this Court, which hold that agency requires "control over the purported agent's day-to-day operations." *Carlisle v. Deere & Co.*, 576 F.3d 649, 656 (7th Cir. 2009); *see also Chemtool, Inc. v. Lubrication Techs., Inc.*, 148 F.3d 742, 745 (7th Cir. 1998) (agency requires "the right to control the manner and method in which work is carried out"). And the panel's holding that ratification can be built on imputed knowledge conflicts with prior decisions of this Court holding that ratification normally demands "actual knowledge" of the acts at issue. *Straits Fin. LLC v. Ten Sleep Cattle Co.*, 900 F.3d 359, 372 (7th Cir. 2018); *Sphere Drake Ins. Ltd. v. Am. Gen. Life Ins. Co.*, 376 F.3d 664, 678 (7th Cir. 2004).

The panel decision also satisfies Rule 35's "exceptional importance" requirement, for two reasons. First, it directly conflicts with decisions of other circuits holding that comparable quality-control provisions are insufficient to make a company liable for telemarketing violations committed by independent marketers. *See Jones v. Royal Admin. Servs., Inc.*, 887 F.3d 443, 446, 451 (9th Cir. 2018); *Hodgin v. UTC Fire & Sec. Ams. Corp.*, 885 F.3d 243, 246, 248 (4th Cir. 2018).

Second, the combined holdings radically expand vicarious liability, with ramifications for businesses in a wide range of contexts. Quality-control provisions are ubiquitous in the modern business world. When the Hilton franchise grants a license to open another Doubletree hotel, it requires the local owner to adhere to requirements meant to protect the Doubletree brand. When a bank authorizes a third-party broker to negotiate loans with prospective borrowers, it demands that the broker accurately communicate the bank's lending terms. On the panel's reading, however, every one of these businesses unwittingly created an agency relationship simply by imposing basic standards of performance. And because the panel also held that ratification occurs based merely on imputed knowledge, an agent's every action, even if prohibited, is necessarily ratified, and principal liability is limitless.

Separately, panel rehearing is warranted to correct an error in the panel's application of the Telemarketing Sales Rule (TSR). The panel decision affirms liability under all the asserted telemarketing laws based on agency law. Unlike the other laws, however, the TSR expressly addresses a seller's vicarious liability for a telemarketer's violations and imposes such liability only when the seller "cause[s]" the telemarketer's violations. 16 C.F.R. § 310.4(b)(1). Yet the panel held that agency law supplies an independent basis for vicarious liability under the TSR. That holding contravenes the principle that courts may not manufacture new bases for vicarious liability where a statute or regulation expressly addresses vicarious liability.

STATEMENT OF THE CASE

Like many service providers, DISH built its customer base by contracting with a network of thousands of independent contractors—called "retailers"—who marketed DISH services. Appendix ("A") 10, 67-

68. The contracts described these retailers—many of whom also sold the services of DISH's competitors—as "independent contractors," expressly disclaimed any agency relationship between the parties, and prohibited the retailers from holding themselves out as DISH's agents. A71-73. The retailers secured their own space, hired their own employees, and devised their own marketing strategies. A12-13, 73. DISH did not supervise their day-to-day activities, but it did impose quality-control measures and required the retailers to obey the telemarketing laws. A1297, 1372-74, 1393-98, 1449-50, 1452. If DISH suspected that a retailer engaged in telemarketing violations, it gave clear warnings, A88-89, 95-96, 113, 127, 133-34, 1328, 1354-55, 1411-12, and ultimately terminated retailers who did not fall in line, A1261-62, 1330-31, 1407-08.

Despite these efforts, four rogue retailers out of thousands committed widespread telemarketing violations. A111-40. Although these retailers lied about their noncompliance and concealed their misconduct from DISH, A1381-83, 1405-06, 1415, the federal government joined with four states to sue DISH for the retailers' telemarketing violations, on theories of vicarious liability. A783-811.

The federal government sued under the Telemarketing Sales Rule (16 C.F.R. § 310.4(b)(1)(iii) & (iv)). The states sued under the Telephone Consumer Protection Act (TCPA) (47 U.S.C. § 227(b) & (c)) and various state statutes. Following a bench trial, the district court found DISH liable and imposed a penalty of $280 million based almost entirely on the violations of the four rogue retailers. A449.

On appeal, the panel affirmed the district court's liability finding. The panel's analysis hinged on agency, which the panel thought provided a basis for affirming DISH's liability under all of the asserted laws. Op. 4-5. The panel concluded that the retailers were DISH's agents and that DISH had ratified the retailers' violations. Op. 6-7. The panel remanded, however, for further proceedings as to the measure of damages. Op. 16.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Rehearing En Banc To Correct The Panel's Erroneous Agency Analysis.

The panel's agency analysis rests on two fundamental errors that warrant en banc review: First, the panel concluded the retailers were DISH's agents on the basis of a single quality-control provision commonly found in independent contractor agreements. Second, the panel held that DISH ratified the retailers' violations based on a theory of imputed knowledge, even though ratification demands actual knowledge. Combined, these errors effect a seismic shift in the rules of agency and vicarious liability under federal law.

A. The Panel's Holding That A Narrow Quality-Control Provision Creates An Agency Relationship Warrants En Banc Review.

The core of agency law is mutual consent: An agency relationship 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, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01. Here, DISH's agreement with each retailer ("the Agreement") expressly provided that the retailer was an "independent contractor," *not* DISH's "agent," and that, "[n]otwithstanding anything in this Agreement to the contrary, [a] Retailer … shall not, under any circumstances, hold itself out to the public or represent that it is an agent," use DISH's name "in any manner which would tend to imply that … Retailer is an agent," or "make any representation, promise or agreement" on behalf of DISH. A1300. Such express disclaimers are "highly significant" evidence that

DISH did not consent to an agency relationship. *Rankow v. First Chicago Corp.*, 870 F.2d 356, 360 (7th Cir. 1989); *see* Opening Brief ("OB") 35, 40.

The panel nevertheless concluded that the retailers were DISH's agents. Op. 6. Its sole basis for that determination was a sentence in the Agreement requiring retailers to "comply with all Business Rules," defined as "any term, requirement, condition, condition precedent, process or procedure associated with a Promotional Program or otherwise identified as a Business Rule" by DISH. A1296, A1281.

This holding is wrong and deeply problematic. It is well-established that "setting standards in an agreement for acceptable service quality does not of itself create a right of control." Restatement (Third) of Agency § 1.01 cmt. f(1). Rather, an agency relationship does not exist unless the principal has "control over the purported agent's day-to-day operations," such as "personnel decisions, bookkeeping and financial matters, and buying and selling inventory and supplies." *Carlisle*, 576 F.3d at 656. The principal must "exercis[e] control over the details of the purported agent's work." *Leon v. Caterpillar Indus.,* *Inc.*, 69 F.3d 1326, 1334 (7th Cir. 1995); *see also Chemtool*, 148 F.3d at 745.

A single provision requiring retailers to "comply with all Business Rules" fails to demonstrate the "overarching control" agency requires. *Carlisle*, 576 F.3d at 657; *see* OB36-39; Reply 17-19. To begin, the provision is buried in the middle of a section governing the intricacies of DISH's customer offers, which is why the requirement narrowly focused on retailers' conduct with respect to "Promotional Program[s]." A1296. Though the definition of "Business Rules" encompasses terms "identified as a Business Rule by" DISH, that cannot stretch the meaning of "Business Rule" beyond its context so as to give DISH "complete control" over retailers' performance, as the panel thought, Op. 6: When a general term (e.g., anything "otherwise identified as a Business Rule") follows specific terms (e.g., a "term, requirement, condition, condition precedent, process or procedure associated with a Promotional Program"), the meaning of the general term must be restricted to the same class as the specific ones. *Alice F. v. Health Care Serv. Corp.*, 367 F. Supp. 3d 817, 825 (N.D. Ill. 2019).

More fundamentally, it cannot be that a single phrase, buried at the tail-end of a list of terms narrowly related to retailers' conduct with respect to customer promotions, nullifies the Agreement's express rejection of any agency relationship and gives DISH "complete control" over retailers' performance. *See* OB38. Contracting parties do not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

The panel's decision sets this Court at odds with other circuits, which have refused to hold sellers vicariously liable for telemarketers' violations, despite quality-control provisions indistinguishable from the one the panel singled out here. The Ninth Circuit held that a seller could not be held vicariously liable for a telemarketer's violations of the telemarketing laws, even though the marketing agreement "contained authorized sales and marketing methodologies with which [the telemarketer] was required to comply." *Jones*, 887 F.3d at 446-47. The Fourth Circuit likewise concluded that a manufacturer could not be held liable for illegal telemarketing calls placed by its authorized dealers, even though the dealership agreements dictated the prices that the dealers could offer and imposed various other restrictions on their conduct in marketing the dealer's product. *Hodgin*, 885 F.3d at 248. The Fourth Circuit has found a principal-agent relationship in this context only where evidence "beyond the contract" showed that the principal "wanted to exercise extensive control over [the telemarketer's] conduct." *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 661 (4th Cir. 2019).

The panel's decision, moreover, has implications well beyond the telemarketing context. Many industries depend on independent contractor agreements, and quality-control provisions are standard across those agreements. *See* OB37; Reply 12-14. In line with the principle that agency requires control of the agent's day-to-day operations, courts have repeatedly rejected arguments that such provisions create an agency relationship. The "clear trend in the case law" across jurisdictions is "that the quality and operational standards and inspection rights … do not establish a [business's] control or right of control … sufficient to ground a claim for vicarious liability." *Allen v. Greenville Hotel Partners, Inc.*, 409 F. Supp. 2d 672, 677 (D.S.C. 2006) (citation omitted), *aff'd*, 276 F. App'x 339 (4th Cir. 2008). The panel's decision runs headlong into this body of law, shattering the settled background rules against which parties have acted in a wide range of areas. *See* OB42-44; Reply 8-9, 20-21.

Consider franchises like gas stations, hotels, convenience stores, and restaurants. Franchise agreements routinely impose quality-control requirements—often quite "numerous," relating to everything from the "appearance and operation" of the franchise to its "days and hours of operation" and "staffing ratios"—and allow the franchisor to conduct inspections to monitor compliance. *Brooks v. Collis Foods, Inc.*, 365 F. Supp. 2d 1342, 1350 (N.D. Ga. 2005). Such 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. *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.*, 105 F. Supp. 2d 83, 90-94 (E.D.N.Y. 2000), *aff'd*, 4 F. App'x 82 (2d Cir. 2001); *Wood v. Shell Oil Co.*, 495 So. 2d 1034, 1037 (Ala. 1986); *BP Expl. & Oil, Inc. v. Jones*, 558 S.E.2d 398, 402 (Ga. Ct. App. 2001); *Little v. Howard Johnson Co.*, 455 N.W.2d 390, 394 (Mich. Ct.

App. 1990); *Hayman v. Ramada Inn, Inc.*, 357 S.E.2d 394, 397 (N.C. Ct. App. 1987).

Or consider the relationship between banks and brokers. Brokers solicit prospective borrowers for bank loans, and brokers are contractually required to follow bank procedures related to loan negotiations. But if a broker goes rogue and violates the law during negotiations, the bank is not liable to the borrower. *See ING Bank, FSB v. Chang Seob Ahn*, 758 F. Supp. 2d 936, 942-43 (N.D. Cal. 2010); *Schweizer v. Keating*, 150 F. Supp. 2d 830, 839-41 (D. Md. 2001). That holds even though banks impose "requirements rang[ing] from the general—follow all laws, communicate with borrowers, submit accurate information—to the specific—obtain the borrower's signature on the application, coordinate the collection of documentation, ensure that borrowers sign an agreement disclosing that [the bank] and [the broker] have a contractual relationship." *ING Bank*, 758 F. Supp. 2d at 938. This kind of "supervisory and even prescriptive" control is a routine part of business-to-business contracts and does not necessarily "indicate agency." *Id.* at 942.

The same rule applies to contracts with carriers in the shipping context. Such agreements routinely control the carrier's performance in various ways—such as requiring the carrier to follow "driving directions" and load and unload the shipment in a certain manner—but those requirements do not transform the carrier into an agent of the broker or shipper. *Schramm v. Foster*, 341 F. Supp. 2d 536, 545 (D. Md. 2004); *see also APL Co. Pte. v. Kemira Water Sols., Inc.*, 890 F. Supp. 2d 360, 369 (S.D.N.Y. 2012) ("While it is true that the Purchase Agreement dictated certain contractual obligations that [the supplier] was to perform related to the shipment …, that in and of itself does not establish an agency relationship[.]").

In short, the panel decision expands agency law far beyond its fundamental basis in mutual consent, sets this circuit at odds with other courts, and creates disarray in a huge range of business relationships.

B. The Panel's Holding That Ratification Can Be Based On Imputed Knowledge Warrants En Banc Review.

The second error in the panel's agency analysis—permitting ratification based on imputed knowledge—also effects an extreme expansion of agency law.

A principal is generally not liable for an agent's conduct that is outside the scope of the agent's authority. *See* Restatement (Third) of Agency § 1.01 cmt. c. In particular, a principal is generally not liable when the agent violates the law, especially where, as here, the principal explicitly directs the agent not to violate the law. *Id.* § 2.02 cmt. h. Anyone trying to hold the principal liable must invoke a legal basis tying the principal to the agent's acts—either by showing that the agent acted with actual, implied, or apparent authority, or that the principal subsequently ratified the agent's acts. *See NECA-IBEW Rockford Local Union 364 Health & Welfare Fund v. A & A Drug Co.*, 736 F.3d 1054, 1058 (7th Cir. 2013); Restatement (Third) of Agency § 7.03.

The district court held that the retailers were acting "within the scope of authority" merely because DISH "authorized [them] to market Dish Network programming nationally through outbound telemarketing." A300. The panel did not adopt that theory, and for good reason: DISH expressly required the retailers to comply with applicable laws and forbade them from violating the telemarketing laws. OB44-46; Reply 22-26.

Instead, the panel shifted to a ratification theory: It determined that DISH could be held liable for the retailers' violations because "DISH knew what [they] were doing" and "those acts benefited DISH." Op. 10. But as the district court recognized, its factual findings provide no basis for ratification. "Ratification requires 'that the principal have full knowledge of the facts and the choice to either accept or reject the benefit of the transaction.'" *NECA-IBEW*, 736 F.3d at 1059 (quoting *Sphere Drake Ins.*, 376 F.3d at 677). Here, the district court never found that DISH had full knowledge or that it assented to the retailers' violations; indeed, it flatly rejected Plaintiffs' ratification theory, citing "significant problems of proof." A702 (Summary Judgment Opinion).

The panel nonetheless found ratification based on a fallacious—and very dangerous—legal theory. "The knowledge of the agent is imputed to the principal," the panel explained. Op. 12. "[T]he order-entry retailers knew that they were making millions of calls, and they were making those calls to gain customers for DISH. Therefore, DISH knew of the calls as well." *Id.*

That reasoning defies black-letter law. Ratification demands "actual knowledge" of the acts at issue. *Straits Fin.*, 900 F.3d at 372;

see also Henderson v. United Student Aid Funds, Inc., 918 F.3d 1068, 1073 (9th Cir. 2019); *Sphere Drake Ins.*, 376 F.3d at 678; Restatement (Third) of Agency § 4.06 cmt. b. The requirement for "full, actual knowledge of the facts of the transaction" means that "constructive or imputed knowledge [is] insufficient to make the principal liable by way of ratification." *NMS Indus., Inc. v. Premium Corp. of Am., Inc.*, 451 F.2d 542, 544 (5th Cir. 1971); *see also Stone v. First Wyo. Bank N.A., Lusk*, 625 F.2d 332, 344 (10th Cir. 1980) ("[T]he knowledge required as a basis for ratification must be actual rather than constructive[.]").

Any other rule would be wholly circular. Because an agent's knowledge is generally imputed to the principal in every agency relationship, Restatement (Third) of Agency § 5.03, an approach that allowed ratification on the basis of imputed knowledge alone would mean that a principal ratifies everything an agent does. Ratification would eliminate the "acting within the scope of authority" element of principal-agent liability: Whether an agent acted within its authority would be irrelevant because the principal's imputed knowledge of the agent's actions necessarily would be deemed ratification.

Making matters worse, the panel decision ignores the second essential ingredient of ratification: "a manifestation of assent or other conduct indicative of consent" to be bound by the agent's actions. Restatement (Third) of Agency § 4.01 cmt. b. In explaining why Plaintiffs' ratification theory posed "significant problems of proof," the district court observed that "[t]he only obvious actions that Dish may have ratified would be acceptance of completed sales." A702-03 (Summary Judgment Opinion). But because "[m]ost of the telemarketing calls did not result in sales, … ratification would not seem applicable to the majority of the calls." A703. The panel decision overlooks this fundamental flaw. *See* Reply 27-28.

* * *

The two errors in the panel's analysis combine to radically expand agency law beyond its foundations. And the decision says nothing to limit the ramifications of these holdings. On the contrary, the decision states that DISH's liability for the retailers' conduct derives from "basic principles of agency law." Op. 12-13. This Court, moreover, has held that "the federal common law of agency, Illinois agency law, and the Restatement of Agency are all in accord." *NECA-IBEW*, 736 F.3d at 1058. If the panel decision is not corrected, contracting parties operating in a wide range of business contexts are—unbeknownst to them—enmeshed in complex agency relationships, and continuously ratifying acts about which they know nothing and to which they never assented.

II. The Panel Should Grant Rehearing To Correct Its Erroneous Interpretation Of The Telemarketing Sales Rule.

Separately, DISH respectfully requests that the panel grant rehearing to correct a fundamental error in its application of the TSR: The panel incorrectly concluded that the TSR permits liability based on agency.

DISH was sued under the TSR, the TCPA, and various state statutes. The TCPA and state statutes do not address vicarious liability; they have thus been construed in accordance with traditional common law agency principles. *See, e.g.*, *Kristensen v. Credit Payment Servs., Inc.*, 879 F.3d 1010, 1014 (9th Cir. 2018); 28 FCC Rcd. 6574, 6584 (2013). The TSR, however, expressly addresses sellers' vicarious liability for telemarketers' violations: A seller is liable for such violations only when the seller "cause[s] a telemarketer to engage in" abusive telemarketing. 16 C.F.R. § 310.4(b)(1).

The district court concluded that DISH "caused" the retailer violations simply because DISH "retained the [retailers] … to market Dish products and services." A284; *see also* A765 (Opinion Denying Motion to Dismiss). Before the panel, DISH vigorously contested that interpretation of "cause," arguing it effectively imposed strict liability for a telemarketer's violations. OB50-58; Reply 31-37.

The panel decision expresses skepticism regarding the district court's interpretation of "cause." Op. 4. Rather than correcting the error, however, the decision holds that agency supplies a wholly separate basis for vicarious liability under the TSR, obviating any need to interpret the Rule's text.

As explained in DISH's panel briefing, that determination is erroneous. Reply 48-50. The Supreme Court has repeatedly held that where drafters "chose to impose some forms of secondary liability, but not others, [it] indicates a deliberate [drafting] choice with which courts should not interfere." *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 184 (1994); *see also Pinter v. Dahl*, 486 U.S. 622, 650 (1988). Indeed, if a law "specifically provide[s] that A's tort [becomes] B's liability if B 'caused' A to subject another to a tort," this indicates that the drafters "did not intend … liability to attach where such causation was absent." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 692 (1978).

The TSR's regulatory history confirms that the Rule's drafters had no intent to allow vicarious liability in the absence of causation. *See* OB52-53. During the notice-and-comment period, the FTC repeatedly explained that "nothing in the statute or legislative history" suggests an intent "to impose joint … liability between a seller and a telemarketer." 60 Fed. Reg. 30,406, 30,411 (June 8, 1995); *see also* 60 Fed. Reg. 43,842, 43,844-45 (Aug. 23, 1995).

The panel opinion thus errs in basing liability on agency law, a separate body unconnected to the language of the Rule. Because the largest chunk of damages was founded on the retailers' TSR violations, that error warrants rehearing.

CONCLUSION

The petition should be granted.

Dated: June 10, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2) because this petition contains 3898 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on June 10, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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