

IN THE
Supreme Court of the United States

FACEBOOK, INC.,

Petitioner,

v.

NOAH DUGUID, ET AL.,

Respondent.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals
for the Ninth Circuit

**BRIEF OF *AMICI CURIAE*
ELECTRONIC PRIVACY INFORMATION CENTER
(EPIC) AND TWENTY-TWO TECHNICAL EXPERTS
AND LEGAL SCHOLARS
IN SUPPORT OF RESPONDENT**

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INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center (“EPIC”) is a public interest research center in Washington, D.C.¹ EPIC was established in 1994 to focus public attention on emerging civil liberties issues, to promote government transparency, and to protect privacy, the First Amendment, and other constitutional values.

EPIC regularly participates as *amicus* in this Court concerning consumer privacy statutes, including the Telephone Consumer Protection Act (“TCPA”). *See, e.g.*, Brief for EPIC et al. as *Amici Curiae* Supporting Respondent, *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020) (No.19-631). Brief for EPIC as *Amicus Curiae* Supporting Respondents, *PDR Network v. Carlton & Harris Chiropractic*, 139 S. Ct. 2051 (2019) (No. 17-1705) (arguing that TCPA defendants should not be able to challenge FCC interpretations of the TCPA outside the review process Congress established); Brief for EPIC et al. as *Amici Curiae* Supporting Respondent, *United States v. Microsoft*, 138 S. Ct. 1186 (2018) (No. 17-2) (arguing that law enforcement access to personal data abroad must comply with international human rights norms); Brief for EPIC et al. as *Amici Curiae* Supporting Respondent, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339)

¹ Respondents the United States and Noah Duguid consent to the filing of this brief. Petitioner Facebook filed a blanket consent on Nov. 7, 2019. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

(arguing that violation of statutory privacy rights confers Article III standing).

EPIC also routinely files *amicus* briefs in TCPA cases in federal circuit court. Brief for EPIC & NCLC as *Amici Curiae* Supporting Appellant, *Gadelhak v. AT&T Services, Inc.*, No. 19-1738, 2020 WL 808270 (7th Cir. Feb. 19, 2020) (arguing that an autodialer need not produce or store random or sequential numbers); Brief for EPIC as *Amicus Curiae* Supporting Appellee, *Gallion v. United States*, 772 Fed. App'x. 604, 606 (9th Cir. 2019) (No. 18-55667) (arguing that the TCPA protects consumers against invasive business practices and does not violate the First Amendment); Brief for EPIC et al. as *Amici Curiae* Supporting Appellees, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (No. 15-1211) (arguing that the TCPA prohibits invasive business practices and that the companies, not consumers, bear the burden of complying with the statute).

EPIC has also participated in legislative and regulatory processes concerning the TCPA. *See, e.g., Legislating to Stop the Onslaught of Annoying Robocalls*, 116th Cong. (Apr. 30, 2019) (statement for the record submitted by EPIC);² EPIC, Comments Concerning the Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, DA 18-493 (2018);³ EPIC, Comments Concerning the Refreshed Record on Advanced

² <https://epic.org/testimony/congress/EPIC-HEC-Robocalls-Apr2019.pdf>.

³ <https://epic.org/apa/comments/EPIC-FCC-TCPA-June2018.pdf>. EPIC also filed reply comments on the same docket: <https://epic.org/apa/comments/EPIC-FCC-TCPA-ReplyComments-June2018.pdf>.

Methods to Target and Eliminate Unlawful Robocalls, CG 17-59 (2018).⁴

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⁴ <https://epic.org/apa/comments/EPIC-FCC-Robocalls-Rfresh-Sept2018.pdf>.

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SUMMARY OF THE ARGUMENT

The Telephone Consumer Protection Act (“TCPA”) restricts use of systems that can be used to send calls to millions of cell phone users without their consent. When Congress enacted the TCPA, it rightly labeled these computer-dialed calls—or “robocalls”—the scourge of modern civilization. In particular, Congress found that robocalls interrupted family and leisure time, and required that any robocall with a pre-recorded message or artificial voice could only be made with the called party’s prior express consent. When a live agent was on the line, Congress decided that land-line subscribers should have the right to opt-out of future calls. But Congress chose to give cell phone subscribers greater protections because of the substantial burdens imposed by unwanted calls—especially the burdens on individual privacy. The record before Congress contained numerous accounts of the heightened privacy invasion caused by robocalls to mobile devices and special purpose phones. The text, structure, and purpose of the autodialer restriction demonstrate that Congress was concerned above all else with protecting the privacy of cell phone users from the scourge of robocalls. Congress gave no indication that the type of autodialer used had any impact on the privacy harm caused by the call; what mattered was that the caller used a mass dialing system to make unwanted calls without the called party’s consent.

In the three decades since the TCPA’s enactment, the privacy harms from unwanted calls to cell phones have gotten much worse. Unwanted calls interrupt us every day and disrupt every aspect of our lives. You may well get interrupted by a robocall as you read this brief! Nearly every American carries a cell

phone with them everywhere they go. And cell phones are no longer just used for calls; users rely on their phones to complete a wide variety of personal, educational, and work tasks. Increasingly, users ignore calls from unknown numbers to avoid unwanted calls—sometimes with disastrous results. Robocalls are also one of the top consumer privacy complaints each year in the United States. Congress recently took action to strengthen, not weaken, robocall prohibitions.

A broad interpretation of the TCPA's autodialer restriction is necessary to curtail unwanted calls to cell phones. Companies now have access to an unprecedented amount of information about individuals, including their telephone numbers and consumption profiles. The proliferation of data brokers and data breaches have led consumers to rightly feel that they have lost control of their personal data. The TCPA is one of the few laws that gives individuals direct control over companies' use of their data. But the problem of unwanted automated calls has grown exponentially in recent years as new systems have made it easier and cheaper than ever to use mass dialing systems. The modern equivalent of the prerecorded or artificial voice robocall, prewritten autodialed text messages, are not only cheap and easy to send en masse, but cause the same kind of frustration as a prerecorded or artificial voice call. The TCPA is an important tool to limit the overwhelming privacy invasions caused by these unwanted automated calls, and the ban should be interpreted in a way that actually limits mass dialing without user consent.

ARGUMENT

To paraphrase Justice Kavanaugh, if there is one thing that unites Americans, it is “their disdain for robocalls.” *Barr v. Am. Ass’n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2343 (2020). Thankfully, “[f]or nearly 30 years, the people’s representatives in Congress have been fighting back.” *Id.* The TCPA’s robocall restriction “proscribes *tens of millions* of would-be robocalls that would otherwise occur *every day*.” *Id.* at 2348 (emphasis in original). In other words, robocalls are the flood water; the TCPA is the levy.

Now, just a few months after preserving the TCPA’s broad robocall restriction in *Barr*, the Court is being asked to significantly narrow the scope of the law’s protection. The interpretation of automated telephone dialing system offered by the Defendant is completely unmoored from the structure and purpose of the law. As the Court made clear in *Barr*, the underlying interest of the robocall restriction is to protect “consumer privacy.” *Id.* at 2348. Narrowing the autodialer definition would not protect privacy. Instead, it would put the most widely used mass dialing systems outside the scope of the TCPA, allowing callers to inflict privacy harms on the “tens of millions of consumers who would be bombarded every day with nonstop robocalls.” *Id.* at 2356.

The TCPA was not a targeted attack on a limited set of the mass dialing systems in use in 1991—it was a comprehensive restriction. Congress enacted the TCPA as a “very broad restriction on robocalls.” *Id.* at 2348. Congress was concerned, above all else, with the rapidly decreasing cost and increasing volume of calls that companies could make using automated systems that required little or no human intervention.

Congress knew that companies were beginning to use sophisticated database systems to automatically call millions of individuals. States had already begun to regulate the use of these systems. No one denies that one of the purposes of the TCPA and other robocall laws was to regulate the use of dialing systems that relied upon random or sequential number generators. But nothing in the text or legislative history of the TCPA indicates that Congress intended to regulate *only* this narrow set of autodialers.

The TCPA is a broad statute that codifies the presumption that individuals do not want to receive unsolicited robocalls. Congress created broad prohibitions on many different types of robocalls with only a few, narrow statutory exemptions. Congress also delegated to the FCC authority to promulgate rules to specify other narrow exemptions in the future for calls that do not invade privacy. It would thus be inconsistent with the text and overall structure of the TCPA to narrowly interpret the cell phone autodialer prohibition. If businesses feel that the autodialer restriction is too broad, they can ask Congress to amend the statute or petition the FCC to create a special exemption. As President George H.W. Bush said in his statement on signing the TCPA, the law “gives the Federal Communications Commission ample authority to preserve legitimate business practices” and “flexibility to adapt its rules to changing market conditions.” Presidential Statement on Signing the Telephone Consumer Protection Act of 1991, 27 Weekly Comp. Pres. Doc. 1877–78 (Dec. 20, 1991). Even if the Court shares concerns about the broad reach of the autodialer prohibition, the Court should not bypass the “crystal clear” instruction from “the people’s representatives” that the FCC, and not the Courts, grant exemptions under the TCPA.

I. Congress recognized that a broad restriction on unsolicited autodialed calls was necessary to prevent privacy harms to cell phone users.

Congress was clear when it enacted the TCPA that the autodialer restriction protects user privacy. The privacy harms caused by unsolicited calls, which are discussed at length in the statutory findings and legislative history, do not depend on the specific type of autodialer used to make the call. The purpose of the TCPA was to limit mass dialing because of the harms it caused to individuals. The harms are similar whether the robocalls are made to home phones or to cell phones. Indeed, cell phones are frequently used in the home—or wherever the user happens to be at the moment. But the decision to ban all robocalls to cell phones—as opposed to only robocalls made with a pre-recorded message—reflects Congress’s determination that cell phone users require *more* protection than residential landline users. Congress saw that the privacy invasion caused by robocalls to mobile devices was uniquely harmful precisely because individuals carry these devices with them wherever they go. And autodialers were found to be particularly harmful to privacy because they dramatically lowered the cost of making high volume calls. The TCPA was meant to fill the gap between state privacy protections and the out of state robocaller problem—and a narrow autodialer definition would have undercut this purpose.

A. The autodialer restriction protects important privacy interests.

This Court has recognized that the primary interest underlying the TCPA is privacy. *Barr*, 140 S. Ct. at 2348; *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368,

383 (2012). The key privacy harm is the interruption and disruption of daily life caused by an unwanted call. Other harms, such as the monetary cost of incoming calls to cell phone users, may have played some role in the stronger prohibition on calls to cell phones. But the TCPA's text makes clear that even where no additional monetary cost is imposed, unsolicited calls to cell phones are prohibited. Privacy, and not monetary costs or service disruptions, also motivated other elements of the robocall ban, including the prohibition on autodialed calls to hospital patient rooms.

Robocalls inflict a privacy harm by interrupting our lives. As Rep. Markey, a leading sponsor of the TCPA, explained, “[t]he telephone is an insistent master—when it rings we answer it.” *Telemarketing Practices: Hearing Before the Subcomm. on Telecomms. & Fin. of the H. Comm. on Energy & Commerce on H.R. 628, H.R. 2131, & H.R. 2184*, Ser. No. 101-43, at 1 (1989) [hereinafter May 1989 Hearing]. Sen. Hollings, another leading sponsor of the TCPA, called robocalls “the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.” *Barr*, 140 S. Ct. at 2344 (quoting 137 Cong. Rec. 30821 (1991)). A witness in a committee hearing called robocalls “telephone terrorism,” *S. 1462, The Automated Tel. Consumer Prot. Act of 1991: Hearing Before the Subcomm. on Commc'ns of the S. Comm. on Commerce, Sci., & Transp.*, S. Hrg. 102-960, at 8 (1991) [hereinafter July 1991 Hearing] (statement of Steve Hamm, Administrator, South Carolina Department of Consumer Affairs), a framing which Sen. Hollings subsequently borrowed. *Computerized Telephone Sales Calls & 900 Serv.: Hearing Before the Comm. on*

Commerce, Sci., & Transp., S. Hrg. 102-918, at 1 (1991) [hereinafter Oct. 1991 Hearing] (opening statement of Sen. Hollings). Owning a telephone was “a basic necessity of life,” but it did not “give the world the right and privilege to assault the consumer with machine-generated telephone calls.” 137 Cong. Rec. 30821 (1991).

Congress traced the privacy harm caused by robocalls to the unwanted nature of the call. When the phone “rings to deliver unsolicited advertising, it is invading [our] privacy.” *Id.* One of the Senate reports noted that “only one-tenth of 1 percent of the population ‘likes’ to receive unsolicited calls.” S. Rep. No. 102-177 (1991), at 2 (1991). This evidence led the bill’s sponsors to adopt a presumption that individuals did not want to receive unsolicited calls, and the requirement that callers obtain prior express consent before they used an autodialer. *See* Oct. 1991 Hearing at 53 (exchange between Steve Hamm and Sen. Hollings); Oct. 1991 Hearing at 57 (exchange between Ismael R. Norris and Sen. Hollings). As Sen. Hollings remarked, the infinitesimal number of individuals who want to receive robocalls “is no justification for allowing these calls to ruin the lives of the rest of us.” 137 Cong. Rec. 30821 (1991).

Congress repeatedly emphasized that the purpose of the TCPA was to protect Americans from these privacy invasions. Congress never articulated any reason to limit that prohibition to dialers that *use* random or sequential number generators. Congress found more broadly that “unrestricted telemarketing” was “an intrusive invasion of privacy,” TCPA §2, ¶5, and consumers were “outraged” by the “proliferation of intrusive, nuisance calls,” TCPA §2, ¶6. Businesses also

complained that robocalls were a “a nuisance and an invasion of privacy” no matter their content or the identity of the caller. TCPA §2, ¶¶10, 14. The TCPA’s restrictions balanced “individuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade.” TCPA §2, ¶9. Congress chose to ban robocalls absent prior express consent because that was “the only effective means of protecting telephone consumers from this nuisance and privacy invasion.” TCPA §2, ¶12. And the FCC’s authority to exempt calls from the restriction was to be based on whether the calls “are not considered a nuisance or invasion of privacy.” TCPA §2, ¶13.

The text and structure of the TCPA support the conclusion that its cell phone autodialer restriction should be read broadly to protect privacy. Congress delegated rulemaking authority to the FCC to create new, narrow exemptions for calls made to cell phones, but only when those calls did not threaten the privacy interests at stake. The FCC has the authority to exempt calls to cell phones only when the calls are not charged to the called party and “subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect.” 47 U.S.C. 227(b)(2)(C). The provision does not say that the FCC can exempt only artificial or prerecorded voice calls based on the privacy interests at stake. Nor does it say that the FCC should look to whether autodialed calls not charged to the called party cause service disruptions. The provision is a clear statement that Congress intended a broad prohibition on robocalls to cell phones even when those calls do not impose a monetary cost on users, and that the restriction on robocalls to cell phones *as a whole* is fundamentally about protecting privacy.

The record before Congress also contained evidence that the privacy harms to mobile device users were especially acute because users carried these devices with them wherever they went. During one committee hearing, the head of a paging and cellular service company stated that unsolicited robocalls could interrupt during “wholly inappropriate” times. *Telemarketing/Privacy Issues: Hearing Before the Subcomm. on Telecomms. & Fin. of the H. Comm. on Energy & Commerce on H.R. 1304 & H.R. 1305*, Ser. No. 102-9, at 113 (1991) [hereinafter April 1991 Hearing] (statement of Michael J. Frawley, President, Gold Coast Paging). The executive recounted the story of a doctor “whose commiseration with bereaved family members at the deathbed of a patient was interrupted by a loud and obnoxious sales pitch” from his pager. *Id.* In a subsequent hearing, another paging service head agreed that unsolicited marketing calls to cell phones and pagers were “not only disruptive, but wholly inappropriate.” July 1991 Hearing (statement of Thomas Stroup, President, Telocator). Another witness, who was an attorney, expressed concern about his beeper going off in court. Oct. 1991 Hearing at 62 (statement of Joseph Rosen). During one hearing, a witness’s pager went off—and because there was no number or message, he announced that it was, most likely, an automatic dialer. Oct 1991 Hearing at 18 (statement of Steve Hamm, Administrator, South Carolina Department of Consumer Affairs). Sen. Hollings retorted that “rather than getting a wonderful assistance, then you have really bought yourself a nuisance.” *Id.* (statement of Sen. Hollings).

The only hearing witness to speak at length from the perspective of a cell phone user identified privacy as the primary harm caused by robocalls. The

witness, who ran a burglar alarm service, explained that his business spent thousands of dollars purchasing cell phones so that the employees could always be available to customers experiencing problems with their systems. Oct. 1991 Hearing at 60 (statement of Leland Kelley). Robocalls were “aggravating” and, when placed at the same time as a legitimate customer’s call, prevented the customer from getting through to service agents. *Id.* at 58.

Privacy was also clearly the primary motivation for banning autodialed calls to the rooms of hospital patients and others similarly situated. The record before Congress indicated that unsolicited robocalls were an “extreme nuisance” for patients recovering from illnesses or injuries, who would “go through great extremes to answer the phone.” Oct 1991 Hearing at 15 (statement of Jerry Madden, Director of Telecommunications, Greenville Hospital System). One hospital administrator called it “sickening” that sick patients “be harassed” by robocalls. Oct. 1991 Hearing at 55 (statement of James M. Faircloth, Director, Security Services, Richland Memorial Hospital). The Department of Consumer Affairs in South Carolina received a complaint from a woman who had been in her room for two hours post-surgery when she struggled to answer a ringing phone only for it to be an “automatic dialed call.” Oct 1991 Hearing at 10 (statement of Steve Hamm, Administrator, South Carolina Department of Consumer Affairs). During the hearing, Sen. Hollings announced that “we will have to include a provision to address the problems facing hospitals.” Oct 1991 Hearing at 56 (statement of Sen. Hollings). The bill was subsequently revised to ban all autodialed calls to hospital patient rooms and others similarly situated. 137 Cong. Rec. S16204-01, 1991 WL 229525, at *S16205-

06 (Nov. 7, 1991). Of course, today, it would be a patient's cell phone that would cause the disturbance. The harm remains the same.

B. High call volume and low costs of autodialing were Congress's primary motivations for regulating autodialers.

Congress sought to regulate mass dialing systems in the TCPA because they could inflict the unwanted intrusions of ringing phones on a huge number of individuals at once. The evidence before Congress indicated that autodialers were used to make "millions of calls every day." H.R. Rep. No. 102-317, at 10 (1991). Congress learned that each device was able to "automatically dial as many as 1,000 phones per day." *Id.* With the help of computerized dialing systems, "over 300,000 solicitors call[ed] more than 18 million Americans, for an average of 60 calls per solicitor." H.R. Rep. No. 102-317, at 7. And telemarketers weren't the only ones making a massive volume of calls. The House Report also cited a Wall Street Journal report about stockbrokers making even *more* calls: "some 75,000 stockbrokers [made] some 1.5 billion calls a year—roughly 80 calls per stockbroker per business day." H.R. Rep. No. 102-317, at 7.

Congress also found that the low costs of autodialing as compared to manual dialing were driving more and more companies to use autodialers. The House Report described the problem as "rapidly decreasing telecommunications costs coupled with nationwide business use of sophisticated, computer driven telemarketing tools" causing the "frequency and number of unsolicited telemarketing calls [to] increase markedly." H.R. Rep. No. 102-317, at 6. The

Senate Report explained that the “costs of telemarketing have fallen” with the “the advent of automatic dialer” systems. S. Rep. No. 102-178, at 2 (1991). Automatic dialing systems allowed companies to get their message out “without incurring the normal cost of human intervention.” H.R. Rep. No. 102-317, at 6.

Congress was aware that predictive dialers were key to reducing costs for companies doing high volume calls with “live” agents. Companies would use computers to “dial[] the telephone number of [a] prospective customer and transfer[] the call to the next available telemarketing service representative.” H.R. Rep. No. 102-317, at 9. Autodialers used by “live” agents “reduce[d] the amount of time that each person must spend dialing numbers and waiting for the call to be answered.” S. Rep. No. 102-177, at 3. As a result, “a telemarketer may only employ three persons for every six automatic dialers because of the high proportion of calls that are never answered.” *Id.* A witness during a Senate committee hearing testified that “between 30 and 40 percent of national telemarketing firms” were using predictive dialers at the time. July 1991 Hearing at 16 (statement of Robert Bulmash, Private Citizen, Inc.). The witness noted that companies “want live people on the phone to go through as many folks as they can in the shortest period of time to increase their efficiency.” *Id.*

While dialing numbers randomly or sequentially is one way to make unwanted calls, it is not the only way—and there is no evidence that Congress intended to limit the TCPA’s prohibitions to devices that *use* random or sequential number generators to store or dial. Indeed, if the prohibition were that narrow then a caller could simply generate a “list” of random

or sequential numbers with one device, then load that list into an autodialer to complete the calls and circumvent the TCPA. And Congress was aware when it enacted the prohibition that some companies were already using database-backed software to “numerically sort[] listed numbers and identif[y] the missing numbers.” H.R. Rep. No. 102-317, at 9. The committee reports mention dialing sequential blocks of numbers—which does not necessarily require sequential number *generation*—and frame the sequential dialing issue as one of several issues with autodialers. *See* S. Rep. No. 102-178, at 2 (“some” autodialers—but not *all*—“dial[ed] numbers in sequence;” *see also* H.R. Rep. No. 102-317, at 10 (autodialers were “often”—but not *always*—“program[med] their systems to dial sequential blocks of telephone numbers.”))

Congress was aware that dialing from a list of numbers obtained from a data broker could also be used with a mass dialing system to annoy and violate the privacy of users. *See* April 1991 Hearing at 2 (opening statement of Rep. Markey) (reporting that collection and sale of personal data was a “big business”). The House Report noted that “modern telemarketing software organize[d] information on current and prospective clients into databases,” and “businesses routinely purchase[d] data from multiple sources in an effort to create unique product- or service-specific databases.” H.R. Rep. No. 102-317, at 7. These calls were just as likely to annoy as calls dialed randomly or sequentially; Congress found that only one-tenth of one percent of individuals wanted to receive such unsolicited calls. S. Rep. No. 102-177, at 2.

C. A narrow autodialer definition is inconsistent with Congress's original aim to fill gaps in existing state laws.

When it enacted the TCPA, Congress found that “[o]ver half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.” TCPA §2, ¶7; *see also* S. Rep. No. 102-178, at 3; H.R. Rep. No. 102-317, at 25. The need for protections from out-of-state robocalls was repeatedly emphasized at the hearings, particularly by witnesses who represented state consumer agencies. *See, e.g.*, May 1989 Hearing at 90–94 (testimony of John A. Glynn, Maryland People’s Counsel); April 1991 Hearing at 28 (statement of Rep. Jolene Unsoeld, who sat in the Washington legislature when the state passed anti-robocall legislation); April 1991 Hearing at 31 (statement of Tom Beard, Chairman, Florida Public Service Commission); July 1991 Hearing at 10 (statement of Steve Hamm, Administrator, South Carolina Department of Consumer Affairs).

The Government acknowledges that most of the state laws in force at the time the TCPA was passed covered a broad range of mass dialing systems. Br. of Respondent United States at 27–28. In order to support and not undermine the existing state laws, the federal robocall ban would need to provide at least as much protection as the state law analogs. Thus, a narrow interpretation of the TCPA autodialer definition limited to systems that use random or sequential number generators to store the numbers to be dialed would be inconsistent with Congress’s intent.

The Government anticipates this argument and retorts that the TCPA was more expansive than the state laws because of its separate prohibition on artificial and prerecorded calls. *Id* at 28. But that is not consistent with the legislative history. The scope of the TCPA was expanded in July 1991 when Senator Hollings introduced a version that separated the prerecorded and artificial voice call ban from the autodialer ban. *Compare* S. 1462, 102d Cong., § 2 (as introduced on July 11 1991) (defining autodialer at § 228(a)(1)) *with* H.R. 628, 101st Cong., § 2 (1989) (defining autodialer at § 225(a)); H.R. 2131, 101st Cong., § 2 (1989) (defining autodialer at § 225(a)(1)); H.R. 2921, 101st Cong., § 2 (as passed on Oct. 26, 1990) (defining autodialer at § 225(a)(1)); H.R. 1304, 102d Cong., § 3 (as introduced on Mar. 6, 1991) (defining autodialer at § 227(a)(1)); S. 1410, 102d Cong., § 3 (as introduced on June 27, 1991) (defining autodialer at § 227(a)(1)). Before that, all versions of the bill combined the definitional clause at issue in this case with the prohibition on prerecorded calls. So if the Government is correct that § 227(a)(1)(A) limits the autodialer definition to those systems that use a random or sequential number generator to store numbers to be dialed, then the early versions of the TCPA under consideration in the May 1989 and April 1991 would have been significantly more limited than the existing state laws. Yet the state enforcement agencies that testified in support of the early versions and pushed for interstate robocall restrictions never raised any concern that the federal proposal was less protective than their state analogs. Nor did state representatives ever intimate during the July 1991 hearing that Sen. Pressler's bill protected citizens from far fewer robocalls than Sen. Hollings' bill. That issue would have been raised at that time

because that is when the committee considered, and compared, the two bills. There is no evidence that any of the drafters or witnesses saw the TCPA autodialer definition as narrower than the existing state statutes.

II. The privacy harms from unwanted autodialed calls to cell phones have only gotten worse since the TCPA was enacted.

In 1991, Congress was concerned that automated and prerecorded calls might interrupt dinner and disrupt people in their sleep. 137 Cong. Rec. 16,205 (1991) (statement of Sen. Hollings). That problem is much worse now than it was in 1991. Today, cell phones are “such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude that they were an important feature of human anatomy.” *Riley v. California*, 573 U.S. 373, 385 (2014). The constant proximity of cell phones means that unwanted calls interrupt every aspect of life. It is no wonder that unwanted automated calls continue to be a top consumer complaint with the FCC, the FTC, and state attorneys general. Strong enforcement of the autodialer ban is needed now more than ever.

Widespread adoption of cell phones has exacerbated the harmful effects of robocalls. When the TCPA was enacted, the residential landline was the primary means of telephone communication. In 1991, Americans communicated across more than 139 million landline connections, FCC, *Statistics of Communications Common Carriers* 235 (2006/2007), but there were only 7.5 million wireless subscribers, CTIA, *Wireless Industry Survey 2* (2015). Today, cell phones have largely replaced landlines. At the end of 2018, 57.1% of American households were wireless-only—3.2% more than the previous year. Stephen J. Blumberg & Julian V.

Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2018* 1, National Center for Health Statistics (Jun. 2019).⁵ Nearly all Americans (96%) own a cell phone. Pew Research Center, *Mobile Fact Sheet* (June 12, 2019).⁶ As this Court noted in *Riley*, “it is the person who is not carrying a cell phone . . . who is the exception.” 573 U.S. at 395.

Americans use their phones for many everyday tasks, which robocalls routinely interrupt. Fully 81% of Americans own a smartphone. Pew Research Center, *Mobile Fact Sheet* (June 12, 2019). Mobile applications, or “apps,” offer “a range of tools for managing . . . all aspects of a person's life.” *Riley*, 573 U.S. at 396. Mobile app stores offer millions of different apps for work, communication, health, entertainment—for nearly any imaginable task “there’s an app for that.” *Id.* One survey estimates that Americans spend 178 minutes, or almost three hours a day, using smartphone apps. SimpleTexting, *US Screentime & Smartphone Usage States for 2019* (Jul. 23, 2019).

Robocalls are so pervasive that Americans now often ignore calls from unknown numbers—leading to economic and even medical harms. In one survey, Consumer Reports found that 70 percent of Americans do not answer calls from unrecognized numbers. Consumer Reports, *What Have You Done in Response to Robocalls?* (Dec. 2018).⁷ Senator Brian Schatz noted that “robocalls have turned us into a nation of call

⁵ <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201906.pdf>.

⁶ <https://www.pewinternet.org/fact-sheet/mobile/>.

⁷ <https://www.consumerreports.org/robocalls/mad-about-robocalls/>.

screeners” and emphasized that this could become a “significant economic issue.” *Illegal Robocalls: Calling all to Stop the Scourge: Hearing before the S. Comm. on Com., Sci., and Transp.*, 116th Cong. (Apr. 11, 2019) [hereinafter Hearing on Illegal Robocalls].⁸ One hospital reported persistent inability to reach patients because of call screening. Tim Harper, *Why Robocalls Are Even Worse Than You Thought*, Consumer Reps. (May 15, 2019).⁹ One doctor described ignoring a call from an emergency room because he assumed it was a robocall—delaying treatment of a patient with a severed thumb. Tara Siegel Bernard, *Yes, It’s Bad. Robocalls, and Their Scams, Are Surging*, N.Y. Times (May 6, 2018).¹⁰

The trend of ignoring calls from unknown numbers has also recently exacerbated the public health crisis as coronavirus contact tracers struggle to reach people across the country. See Benjamin Siegel, Dr. Mark Abdelmalek, & Jay Bhatt, *Coronavirus Contact Tracers’ Nemesis: People Who Don’t Answer Their Phones*, ABC News (May 15, 2020);¹¹ Stephen Simpson, *Few Picking Up Phone in Arkansas When Virus Tracers Call*, Ark. Democrat Gazette (July 10, 2020).¹² These missed connections are particularly harmful, not only to users but to broader public health efforts to

⁸ <https://www.commerce.senate.gov/public/index.cfm/hearings?ID=5A66BB4E-777B-4346-AA5F-CAB536C54862>.

⁹ <https://www.consumerreports.org/robocalls/why-robocalls-are-even-worse-than-you-thought/>.

¹⁰ <https://www.nytimes.com/2018/05/06/your-money/robocalls-rise-illegal.html>.

¹¹ <https://abcnews.go.com/Health/coronavirus-contact-tracers-nemeses-people-answer-phones/story?id=70693586>.

¹² <https://www.arkansasonline.com/news/2020/jul/10/few-picking-up-phone-when-virus-tracers-call/>.

respond to the pandemic. Because robocalls undermine individuals' trust that calls they receive are legitimate, they have led people to inadvertently compromise efforts to limit the spread of the virus.

Federal agencies receive a “staggering number of complaints about robocalls.” *Barr*, 140 S. Ct. at 2343. The FCC ranks automated calls as a “perennial top consumer complaint.” FCC, *Report on Robocalls 2* (2019).¹³ Complaints to the FCC about robocalls spiked from 150,000 in 2016 to 232,000 in 2018—a 50% increase in just two years. *Id.* at 4. Meanwhile, consumers submitted nearly 3.8 million robocall complaints to the FTC in the first nine months of 2019. FTC, *National Do Not Call Registry Data Book for Fiscal Year 2019 6* (Oct. 2019).¹⁴

State attorneys general also “field a constant barrage of complaints.” *Barr*, 140 S. Ct. at 2343. Nebraska Attorney General Doug Peterson told Congress last year that “[r]obocalls and telemarketing calls are currently the number one source of consumer complaints at many of our offices.” Hearing on Illegal Robocalls (testimony of Neb. Att’y Gen. Doug Peterson). Arkansas Attorney General Lesley Rutledge declared, “I have visited every county in Arkansas, and the most common complaint I hear is that people want these calls to stop.” Press Release, Ark. Att’y Gen., Stop the Unwanted Robocalls (Feb. 11, 2019).¹⁵

¹³ <https://docs.fcc.gov/public/attachments/DOC-356196A1.pdf>.

¹⁴ https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2019/dnc_data_book_2019.pdf.

¹⁵ <https://arkansasag.gov/media-center/news-releases/icymi-stop-the-unwanted-robocalls/>.

Congress has recognized more must be done to combat robocalls. Last year, Congress passed additional protections against robocall scammers. Telephone Robocall Abuse Criminal Enforcement and Deterrence (“TRACED”) Act, Pub. L. 116-105, 133 Stat. 3274. In a press conference promoting the TRACED Act, Senator Menendez was interrupted—by a robocall. Press Release, Sen. Bob Menendez, Menendez Gets Robocalled during Press Conference Pushing for Crackdown on Illegal Robocalls (Apr. 12, 2019).¹⁶ He is not the only one to have a live media event interrupted by a robocall last year. See Makena Kelly, *AT&T CEO Interrupted by a Robocall During a Live Interview*, The Verge (Mar. 20, 2019).¹⁷ Without the autodialer ban, the situation would surely be worse.

III. A broad autodialer restriction is necessary to curtail unwanted calls to cell phones.

In today’s digital world, the TCPA is one of the few laws that give consumers control over how companies use their data. A wide variety of companies now access vast amounts of personal data, including consumers’ telephone numbers, financial information, consumption patterns, and general habits. New technologies give companies the ability to cheaply and easily track individuals online and offline and, as a result, we are being inundated with unwanted calls and text messages at a scale previously unimaginable. As data brokers trade our information behind the scenes, hackers are also increasingly targeting these massive

¹⁶ <https://www.menendez.senate.gov/news-and-events/press/menendez-gets-robocalled-during-press-conference-pushing-for-crackdown-on-illegal-robocalls->

¹⁷ <https://www.theverge.com/2019/3/20/18274519/att-ceo-robocall-randall-stephenson-live-interview-fcc-ajit-pai>.

databases and selling our information to scammers. Meanwhile, mass dialing and mass texting systems are cheaper and easier to use than ever. Against this frightening backdrop, people understandably feel they have lost control over their data. The TCPA is one of the few tools available to directly limit these overwhelming privacy invasions. The autodialer ban should not be interpreted in a way that allows mass dialing without user consent at a time when unauthorized collection and use of personal data has become such a widespread problem.

A. Many companies harvest personal data and target individuals for unsolicited calls.

An expansive array of companies collect information about consumers from numerous sources and then sell or license that data to others. Data brokers and lead generators make up a \$200 billion industry with at least 4,000 companies worldwide. *See* WebFX, *What Are Data Brokers – And What Is Your Data Worth?* (Mar. 16, 2020).¹⁸ The largest data brokers hold the contact information and consumption profiles of 95% of the U.S. population. Kalev Leetaru, *The Data Brokers So Powerful Even Facebook Bought Their Data – But They Got Me Wildly Wrong*, *Forbes* (Apr. 5, 2018).¹⁹ Without a broad autodialer definition, nearly

¹⁸ <https://www.webfx.com/blog/internet/what-are-data-brokers-and-what-is-your-data-worth-infographic/>.

¹⁹ <https://www.forbes.com/sites/kalevleetaru/2018/04/05/the-data-brokers-so-powerful-even-facebook-bought-their-data-but-they-got-me-wildly-wrong/#be628f63107a>.

every American will be the target of an unending telemarketing campaign.

The data industry is a multi-layered network of companies that collect, sell, and combine individual's data from multiple sources. On one layer, companies collect data directly from people who use their services. See William Chalk, *Landmark Laws: Data Brokers and the Future of US Privacy Regulation*, CSO Online (Mar. 6, 2019).²⁰ Some companies, called lead generators, also sell personal data collected from online forms and applications. See Amy Hebert, *How Did That Company Get My Info?*, FTC (Sept. 29, 2016).²¹ On another layer, data brokers that have no direct connection to individuals harvest a wide range of data to build and sell profiles on consumers.

A recent case illustrates how robocallers obtain phone numbers through the multilayered data trafficking process. In *Rice-Redding v. Nationwide Mutual Insurance Co.*, No. 16-cv-3632, 2017 WL 2999178 (N.D. Ga. Mar. 13, 2017), a consumer received a call through a Nationwide Mutual Insurance Company advertising campaign run by a third-party advertising company. The complaint alleged that the call “came through several further layers of third-party lead generators—i.e., [the advertising company] received the lead by way of Avenue Digital, which received the lead through Astoria, which received the lead through Philippines-based Abundantgeeks—and was ultimately derived through a purported ‘opt-in’ obtained through

²⁰ <https://www.csoonline.com/article/3356458/landmark-laws-data-brokers-and-the-future-of-us-privacy-regulation.html>.

²¹ <https://www.consumer.ftc.gov/blog/2016/09/how-did-company-get-my-info>.

BestCheapIns.com.” *Id.*, Doc. 79, at ¶¶ 125-26 (filed Mar. 8, 2019). These systems are intended to take advantage of individuals and use their data in ways that they do not understand or expect.

In another case, the FTC uncovered a data broker operation involving two companies that collected sensitive information from online payday loan applications, then sold that information to companies including non-lenders who then scammed millions of people. *See* Colleen Tressler, *Who’s Brokering Your Data?*, FTC (Aug. 12, 2015).²²

Lead generation in particular can cause an onslaught of autodialed calls. By disclosing their phone number to just a single company, an individual’s data can be sold and transferred through calling lists to hundreds of additional companies. Web forms that allow people to express interest in a service or offering of one company frequently lead to an inundation of calls from other companies. *See* Comments of Nat’l Consumer Law Ctr. et al., In Opposition to the Petition for Declaratory Ruling Filed by Assurance IQ, LLC at 2, CG Docket No. 02-278 (FCC June 22, 2020) (describing a company that discloses telephone numbers for auto-dialing to 174 partner companies).²³ One lead generation website promises job seekers calls from potential employers, but within moments of filling out the form, individuals are instead called by a for-profit college urging enrollment. *See* David Halperin, *For-Profit*

²² <https://www.consumer.ftc.gov/blog/2015/08/whos-brokering-your-data>.

²³ <https://ecfsapi.fcc.gov/file/10622280311488/Consumer%20Comments%20on%20Assurance%20Petition.pdf>.

College Recruiter Hides Behind McDonalds Arches, HuffPost (Mar. 1, 2016).²⁴

The troves of personal information held by data brokers and lead generators are also attractive targets of hackers, who then sell the data to scammers for robocalling. One of the largest early data breaches targeted a data broker, Acxiom, and resulted in 1.6 billion records of individuals' information being stolen and sold to scammers. *See* Linda Rosencrance, *Acxiom Database Hacked*, Computerworld (Aug. 8, 2003).²⁵ In 2017, about 150 million people—almost half of all Americans—had their sensitive personal data, including phone numbers, stolen in the Equifax breach. *See* Press Release, Equifax, *Equifax Releases Details on Cybersecurity Incident, Announces Personnel Changes* (Sept. 15, 2017).²⁶

Companies are also increasingly collecting phone numbers for security purposes, such as two-factor authentication for online account access—and then using those phone numbers to advertise to consumers. Both Facebook and Twitter have admitted to selling marketers access to phone numbers that users had provided for two-factor authentication and other security purposes. *See* Sean Captain, *Stop Giving Companies Your Phone Number. Do This Instead*, Fast Co. (Oct. 10, 2019).²⁷ Facebook also created so-called

²⁴ https://www.huffpost.com/entry/for-profit-college-recrui_b_9359434.

²⁵ <https://www.computerworld.com/article/2571741/acxiom-database-hacked.html>.

²⁶ <https://investor.equifax.com/news-and-events/press-releases/2017/09-15-2017-224018832>.

²⁷ <https://www.fastcompany.com/90415625/stop-giving-companies-your-phone-number-do-this-instead>.

“shadow contact information” on non-users. Kashmir Hill, *Facebook Is Giving Advertisers Access to Your Shadow Contact Information*, Gizmodo (Sept. 26, 2018).²⁸ When a user shared their mobile contacts with Facebook, advertisers were able to target non-users in their contacts. *Id.*

Americans understandably feel they lack control over their personal data, which is harvested and trafficked by thousands of companies without their knowledge or consent. The TCPA’s autodialer ban gives people a right to control one aspect of how their data is used, and the Court should not limit that right.

B. Autodialing is cheaper and easier than ever.

Over the last three decades, automatic dialing technology has become cheaper and more easily accessible. See *Legislating to Stop the Onslaught of Annoying Robocalls: Hearing Before the H. Comm. On Energy and Com.*, 166th Cong. (Apr. 30, 2019) (opening remarks of Rep. Frank Pallone, Jr.) (“[A]s technology has evolved, robocalls, and the threat they impose, have increased. It is easier than ever for someone to begin making robocalls.”). Anyone with a computer or smartphone can dial thousands of phone numbers at once simply by downloading an app or connecting to a website. They can also send millions of text messages just as quickly, cheaply, and easily through mass texting software. Many of these systems are completely automated, with no human at the other end to hear the recipient’s complaints or their plea to opt-out. In these ways, mass texting technology recreates all of the

²⁸ <https://gizmodo.com/facebook-is-giving-advertisers-access-to-your-shadow-co-1828476051>.

same frustration as autodialers connected to prerecorded or artificial voice messages.

There are now dozens of downloadable mass-calling and texting programs online which scammers and others can easily and cheaply use to send unwanted calls to thousands at once. One prolific robocaller, who was repeatedly fined by the FCC, testified in the Senate that dialing systems used to make “millions upon millions of calls” are a simple Google search away. *Abusive Robocalls and How We Can Stop Them: Hearing Before the Subcomm. On Com., Sci., and Transp.*, 166th Cong. (Apr. 18, 2018) (testimony of Adrian Abramovich). And several mass dialer and mass texting apps can be downloaded for free from the Apple and Android app stores. See, e.g., SimpleTexting, *The Best Mass Text Message App and How to Find It* (2020);²⁹ One Call Now (2020);³⁰ DialMyCalls (2020);³¹ SlickText (2020).³² One company offers mass texting software and “unparalleled opportunities to reach your contacts instantly and keep yourself literally in the palm of their hands.” Textedly, *Products* (2020).³³

“Peer-to-peer” (or P2P) texting companies have also created platforms and smartphone apps that enable senders to auto-fill phone numbers and prewritten

²⁹ <https://simpletexting.com/the-best-mass-text-message-app-and-how-to-find-it/>.

³⁰ https://play.google.com/store/apps/details?id=com.One-CallNow&hl=en_US&gl=US.

³¹ <https://apps.apple.com/us/app/dialmycalls-mass-notification/id424056135>.

³² <https://play.google.com/store/apps/details?id=io.gona-tive.android.njldwy&hl=en&gl=US>.

³³ <https://www.textedly.com/#products>.

text messages, then send hundreds or thousands of text messages to individuals at once. See Alex Thompson, *Text Campaigns Are Changing American Politics—And Nobody’s Ready*, VICE (Aug. 20, 2018).³⁴ One service claims they can send over 200 messages per minute—one-third of one second per message. See *Get Thru* (2020);³⁵ another promises 3,500 texts per hour. See Callhub, *Peer to Peer Texting Campaigns* (2020).³⁶

As large amounts of personal data are collected, aggregated, disclosed, sold, and re-sold, targeted list-based calling and messaging has become even more widespread than the TCPA’s drafters predicted. Recent political campaigns have harvested the power of mass-texting software to send millions of messages to voters in the past four years alone. In the 2018 cycle, Democratic campaigns and related organizations sent 350 million mass-text messages—six times the number sent in 2016 and 2017. See Mark Sullivan, *Inside the 2020 Campaign Messaging War that’s Pelting Our Phones with Texts*, Fast Co. (Mar. 4, 2020).³⁷ Using a program developed during the 2016 campaign, this year’s campaigns have boasted about their plans to send “almost a billion texts” in the lead up to the 2020 election. *Id.* Recent cases also demonstrate how easy and harmful list-based dialing to mass consumers has become. In *Blow v. Biojrg*, 855 F.3d 793 (7th Cir. 2017),

³⁴ <https://www.vice.com/en/article/vbjw9/text-campaigns-are-changing-american-politics-and-nobodys-ready>.

³⁵ <https://www.getthru.io/p2p-thrutext>.

³⁶ <https://callhub.io/peer-to-peer-texting-campaign/>.

³⁷ <https://www.fastcompany.com/90469445/inside-the-2020-campaign-messaging-war-thats-pelting-our-phones-with-texts>.

text messages were sent to 20,000 people from a spreadsheet of customer cell phone numbers. *Id.* at 797. And in *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018), Yahoo sent over 27,800 unwanted text messages to a single number from a stored database. *Id.* at 117.

Text message spam is a “triple threat,” according to the FTC, because it entices consumers to reveal personal information in return for free gifts or product offers; it can lead to unwanted charges on cell phone bills; and it can slow cell phone performance. James Leggate *Robotexts Are the Next Annoying Spam Ready to Blow Up Your Phone*, Fox Business (Aug. 21, 2019).³⁸ Some text message scams even install harmful malware on cell phones that can steal personal information without users realizing it. See FTC, *How to Recognize and Report Scam Text Messages* (Feb. 2020).³⁹

* * *

A narrower autodialer definition would remove important TCPA protections against technologies most commonly used by robocallers to automatically dial and deliver millions of unwanted calls. That is inconsistent with Congress’s clear intent in the TCPA and the Court should reject the Petitioner’s proposed interpretation.

³⁸ [https://www.foxbusiness.com/technology/robotexts-an-
noying-spam-blow-up-your-phone](https://www.foxbusiness.com/technology/robotexts-an-
noying-spam-blow-up-your-phone).

³⁹ [https://www.consumer.ftc.gov/articles/how-recognize-
and-report-spam-text-messages](https://www.consumer.ftc.gov/articles/how-recognize-
and-report-spam-text-messages).

CONCLUSION

For the above reasons, *amici* EPIC et al. respectfully ask this Court to affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

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