

No. 19-631

IN THE
Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL;
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

AMERICAN ASSOCIATION OF POLITICAL
CONSULTANTS, INC., *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF *AMICI CURIAE* OF FIFTEEN
MEMBERS OF CONGRESS SUPPORTING
THE CONSTITUTIONALITY OF THE
TELEPHONE CONSUMER PROTECTION ACT**

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INTEREST OF *AMICI CURIAE*¹

Amici are Members of Congress, some of whom were instrumental in the enactment of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. §227 (hereinafter TCPA), and all of whom have had experience with Congress' role in legislative oversight of the TCPA. Thus, *amici* are particularly well placed to provide the Court with background on the text, structure, and history of the TCPA and the manner in which it was intended to operate.

Amici have unique knowledge and a strong interest in ensuring that the TCPA is construed by the federal courts in accord with its text and purpose.

A full listing of congressional *amici* appears in Appendix A.

1. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Respondents' letters consenting to the filing of amicus briefs in support of either party has been filed with the Clerk. Petitioners have separately consented to this amicus brief.

SUMMARY OF ARGUMENT

In 1991, Congress enacted the TCPA to stop the scourge of robocalls because “[b]anning such automated or prerecorded telephone calls. . . is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.” Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394–95. The TCPA remains an essential, if not more essential, piece of legislation today. By restricting calls made to cell phones using robocall technology, among other provisions, the TCPA prevents a countless number of unwanted robocalls every year, every day, and indeed every hour and minute, from intruding on Americans’ privacy, scamming their wallets, and overwhelming our confidence in the nation’s telephone networks.

The TCPA does not and was never intended to restrict speech, as shown by Congress’ finding that the FCC should design rules “consistent with the free speech protections embodied in the First Amendment.” Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2395. The TCPA merely regulates communications when particular technologies are employed based on the relationship between the parties. Under any relevant level of scrutiny, the TCPA restrictions on automated calling technologies are an appropriate mechanism for protecting Americans from the plague of unwanted robocalls. Thus, the TCPA is also fully consistent with the First Amendment.

ARGUMENT

- I. **The TCPA is a critical law that stops intrusions on Americans’ privacy, deters scams, and protects the integrity of the telephone as a means of communication.**
 - A. **A bipartisan Congress enacted the TCPA to stop the scourge of robocalls.**

Enacted by Congress in 1991, the TCPA is a landmark law designed to protect all Americans from the aggravation and inconvenience of prerecorded or automated calls to cellular telephones, telemarketing calls, and unwanted junk faxes.

“Senator Hollings, the TCPA’s sponsor, described these calls as ‘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 out of the wall.’” *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1255–56 (11th Cir. 2014) (quoting 137 Cong. Rec. 30821 (1991)). Similarly, Congressman Markey noted “the aim of this legislation is ... to secure an individual’s right to privacy that might be unintentionally intruded upon by these new technologies. For this reason the legislation addresses live unsolicited commercial telemarketing to residential subscribers.” 137 Cong. Rec. 11310 (1991).

Congressional findings in 1991 underpinning the TCPA elaborate on these concerns. Specifically, Congress expressly found:

(5) Unrestricted telemarketing ... can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

(6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.

(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is **the only effective means of protecting telephone consumers from this nuisance and privacy invasion.**

(13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 – 95; *see generally*, *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 371–73 (2012) (stating that TCPA “bans certain practices invasive of privacy”).

Specifically on the issue of robocalls, the TCPA places “restrictions on the use of automated telephone equipment” to stem “the proliferation of intrusive, nuisance calls . . . from telemarketers.” Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394–95. Automated calling technology gave telemarketers a cheap and scalable business model for inundating the public, resulting in an explosion of nuisance calls. *Id.* at 2394 (“The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques . . . More than 300,000 solicitors call more than 18,000,000 Americans every day.”)

Similarly, Congress understood the specific harms that could result from a consistent bombardment of mobile devices and so forbade any person from making any call using an automatic telephone dialing system to any telephone number assigned to cellular telephone service, unless made “for emergency purposes” or with the “prior express consent of the called party.” 47 U.S.C. § 227(b)(1)(A)(iii) (2018).

The TCPA is the product of overwhelming bipartisan support, enjoying both Democratic and Republican co-sponsors in Senate, and passing both houses by voice vote in November 1991. *S.1462 – Telephone Consumer Protection Act of 1991 - Actions*, Congress.gov, <https://www.congress.gov/bill/102nd-congress/senate-bill/1462/actions>.

B. The TCPA deters countless robocalls and protects Americans from scammers who use robocalls to prey on consumers.

Since 1991, the TCPA has stopped a countless number of calls from reaching mobile phones that sit in people's pockets, purses, and automobiles. Public and private enforcement has helped discourage telemarketers and others from using automated calling technology to contact consumers without their prior consent.

In 2003, Congress bolstered the TCPA by passing the Do-Not-Call Implementation Act, 15 U.S.C. § 6151–6155, thereby authorizing the Federal Trade Commission (FTC) to establish the national Do Not Call Registry to facilitate compliance with the TCPA's prohibition on calling landlines. The Do Not Call Registry provides a wildly popular means for citizens to notify telemarketers and others that their calls are unwelcome, with 239,472,857 registered phone numbers as of 2019. FTC, *National Do Not Call Registry Data Book for Fiscal Year 2019* 5 (2019).

Nevertheless, the need for the TCPA's protections is ongoing as automated telephone calls continue to proliferate. "Unwanted calls are far and away the biggest consumer complaint to the FCC with over 200,000 complaints each year – around 60 percent of all the complaints [the FCC] receive[s]." FCC, *The FCC's Push to Combat Robocalls & Spoofing*, <https://www.fcc.gov/about-fcc/fcc-initiatives/fccs-push-combat-robocalls-spoofing>. Likewise, in each of fiscal years 2018 and 2019, the FTC received over 5 million complains about unwanted telemarketing calls. FTC, *National Do Not Call Registry Data Book for Fiscal Year 2019* 6 (2019).

The FTC's figures almost certainly understate the problem's scope as many consumers do not contact the FTC to make a complaint. It has been reported that Americans received over 30 billion robocalls in 2017 alone. Herb Weisbaum, *It's Not Just You—Americans Received 30 Billion Robocalls Last Year*, NBC News, Jan. 17, 2018. The number of robocalls has almost doubled in just two years with 58.5 billion robocalls reported for 2019. See *Americans Hit by Over 58 Billion Robocalls in 2019, Says YouMail Robocall Index*, Cision PR Newswire (Jan 15, 2020), <https://www.prnewswire.com/news-releases/americans-hit-by-over-58-billion-robocalls-in-2019-says-youmail-robocall-index-300987126.html>. Likewise, *The New York Times* has reported extensively on the exploding number of robocall complaints and widespread consumer outrage about illegal telemarketing. Gail Collins, *Let's Destroy Robocalls*, N.Y. Times, Mar. 1, 2019; Tara Siegel Bernard, *Yes, It's Bad. Robocalls, and Their Scams, Are Surging*, N.Y. Times, May 6, 2018.

This explosion of unwanted robocalls has occurred despite the protections and penalties provided by the TCPA. Thus, it is self-evident that without those protections and penalties, the already-enormous number of unwanted robocalls would exponentially increase, as the low cost and high scalability of automated call technology would grant anyone with a product or service the unfettered ability to assault the full public with a non-stop wave of unwanted calls around the clock.

Since the TCPA's initial passage in 1991, robocalls have become an even more pernicious problem because scammers are increasingly using robocalling technology to perpetrate their schemes, often targeting senior citizens

and other vulnerable populations. Scammers are using spoofing technology (which allows them to fraudulently make it look like their calls are coming from a neighbor or a trusted entity) in conjunction with automation to make robocalls which target and reach an enormous number of vulnerable consumers. For example, in a span of three months between 2015 and 2016, Adrian Abramovich, allegedly made 96 million spoofed robocalls to trick consumers into sales pitches for vacation packages. FCC, *FCC ISSUES \$120 MILLION FINE FOR SPOOFED ROBOCALLS* (2018), <https://www.fcc.gov/document/fcc-fines-massive-neighbor-spoofing-robocall-operation-120-million>. In 2019, Congress determined that these scam robocalls are a growing concern and estimated that “in 2019, nearly 50 percent of all calls to mobile phones will be scam robocalls.” S. Rep. No. 116-41, 2–3 (2019).

To address the problem of scam robocalls, Congress passed the Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act in 2019 with broad bipartisan support. *Telephone Robocall Abuse Criminal Enforcement and Deterrence Act*, Pub. L. No. 116-105 (2019). The TRACED Act tackled the issue of spoofing and enhanced the enforcement of the TCPA via increased penalties and a longer statute of limitations. *Id.* Congress enacted these changes to “enable the FCC to better pursue bad actors” and considers increased TCPA enforcement to be an important component of punishing and deterring criminal robocall violations. S. Rep. No. 116-41, 5–6 (2019).

C. Invalidating the TCPA would be disastrous for America because unrestricted robocalls would completely undermine the telephone as a means of communication.

Even with the TCPA in place, robocalls are already threatening the viability of the telephone as a useful means of communication for commerce, for government use, or just to keep in touch with one another. Lately, Americans have been screening all of their calls, causing both known and unknown consequences. Many people now refuse to answer calls from unfamiliar sources, sometimes leading to harmful results. *See, e.g.*, Tim Harper, *Why Robocalls are Even Worse Than You Thought*, Consumer Reps., May 15, 2019 (reporting delays in medical treatment because people no longer respond to calls from medical specialists); Tara Siegel Bernard, *Yes, It's Bad. Robocalls, and Their Scams, Are Surging*, N.Y. Times, May 6, 2018 (reporting that one doctor ignored a call from the emergency room because he assumed it was a robocall).

In one survey, 70 percent of respondents said they stopped answering calls from numbers they do not recognize. Octavio Blanco, *Mad About Robocalls*, Consumer Reps., Apr. 2, 2019. As a result, robocallers simply dial more numbers in order to reach the same number of people. Elaine S. Povich, *States Try to Silence Robocalls, But They're Worse Than Ever*, Pew Stateline Blog (July 25, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/25/states-try-to-silence-robocalls-but-theyre-worse-than-ever>.

Now imagine what American phone usage would look like if the TCPA were invalidated, leaving no restrictions

on robocalling. For example, with over 30 million small businesses in the U.S., SBA Office of Advocacy, *2018 Small Business Profile* (2018), <https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf>, if even a small percentage of them started to make thousands of calls each day,² that alone would generate annual unwanted automated calls potentially numbering in the trillions. Imagine further if larger businesses and other entities started to robocall our mobile phones, freed of the need to gain our consent before calling. The scammers are now violating the law and calling without consent, but legitimate businesses—who would likely love to touch base with consumers for surveys and reminders, as well as telemarketing and other purposes—would be free to call as often as they wish.

The constant bombardment of our mobile devices could render them effectively useless. As a means of protecting themselves, some consumers might simply disable the voice calls feature on their phones, possibly causing medical personnel and businesses to miss critical calls and preventing the legitimate and necessary communications and commerce from flowing from one phone to another. The impact would be dramatic and devastating. So just as the number of unwanted calls continues to grow despite the existence and enforcement of the TCPA, in the absence of the safeguards provided by the TCPA, the number of unwanted calls would grow exponentially, as businesses and others could make robocalls with impunity. This robocall explosion would render our cell phones utterly useless as a means of communication.

2. It is a straightforward process to use an internet dialing system to mass dial numbers for very little cost. This technology is readily available to small businesses.

II. The TCPA is consistent with the First Amendment.

A. The TCPA regulates the means of communication, not speech.

As an initial matter, the TCPA does not, and was not designed to, restrict speech. It aims to regulate a particular means of communication to facsimile machines, home numbers on the Do Not Call Registry, and automated telephone calls or prerecorded calls to cellular telephones made without the called party's consent.

This is entirely permissible because “[i]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *Giboney v. Empire Storage & Ice. Co.*, 336 U.S. 490, 502 (1949). Moreover, “[t]he First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another person's home or office.” *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

Simply put, Plaintiffs have no First Amendment Right to make the calls at issue. The First Amendment has never been held to authorize trespasses (here on businesses or consumers' cellular telephones) for the purpose of engaging in even the most highly-protected speech, much less to disseminate unwanted advertising or calls. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972). Likewise, in *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970), this Court upheld a statute authorizing the post office to require advertisers remove names from their mailing lists and stop all future mailings upon request.

In rejecting the First Amendment challenge brought by the industry including publishers and operators of various mail-order advertisers, this Court held:

. . . Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee. . . . To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another. . . . We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient. . . . The asserted right of

a mailer, we repeat, stops at the outer boundary of every person's domain.

Id. At 736 – 38. Requiring consent prior to robocalling a person's cellular phone is simply not an infringement of the First Amendment.

B. The TCPA readily withstands intermediate scrutiny.

As a content-neutral restriction on the manner in which certain calls may be made, at most the TCPA's automated call restrictions are subject to intermediate scrutiny. *See Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 376 (4th Cir. 2013) (applying intermediate scrutiny to TCPA autodialer requirements). A law satisfies that standard if it "promotes a substantial government interest that would be achieved less effectively absent the regulation," and does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (internal citations and quotations omitted). To withstand review, the law "need not be the least restrictive or least intrusive means" of serving the government's significant interests. *Id.* at 798.

Courts have previously upheld restrictions on the time, place, or manner in which calls may be made under this standard. *See, e.g., Universal Elections*, 729 F.3d at 377 (upholding a TCPA provision requiring that all artificial or prerecorded telephone messages disclose the caller's identity and telephone number); *Nat'l Fed'n of the Blind v. F.T.C.*, 420 F.3d 331, 341–43 (4th Cir. 2005) (upholding FTC regulations imposing disclosure requirements, time-

of-day restrictions, and other rules with respect to certain charitable calls).

Congress found that the use of autodialers and artificial or prerecorded voices presents a significant threat to the privacy interest of Americans. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394–95 (finding that unrestricted telemarketing can be “an intrusive invasion of privacy” and that a ban is the only effective means of limiting this intrusion).

These concerns have been echoed by virtually every court to examine the TCPA or a state court analog. “The lack of a live person makes the call frustrating for the recipient but cheap for the caller, which multiplies the number of these aggravating calls in the absence of legal controls.” *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 306 (7th Cir. 2017); *see also, Moser v. F.C.C.*, 46 F.3d 970, 974 (9th Cir. 1995) (concluding that “Congress accurately identified automated telemarketing calls as a threat to privacy”), *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1114, (11th Cir. 2014) (citing *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14022 (2003)) (recognizing the nuisance and privacy invasion caused by automated telephone calls where the consumer is forced to deal with the annoyance and aggravation of abandoned calls); *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 639 (7th Cir. 2012) (“[P]redictive dialers lack human intelligence and, like the buckets enchanted by the Sorcerer’s Apprentice, continue until stopped by their true master. Meanwhile Bystander is out of pocket the cost of the airtime minutes and has had to listen to a lot of useless voicemail.”).

Accordingly, the TCPA easily passes intermediate scrutiny.

C. The TCPA would also satisfy strict scrutiny.

Even if the TCPA was subject to strict scrutiny, it would withstand review because it is “narrowly tailored to serve a compelling interest.” *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 442 (2015) (upholding a judicial solicitation ban under that standard).

The district court is not alone in correctly holding the automated call restriction satisfies this demanding standard of review. *See, e.g., Gallion v. Charter Comms., Inc.*, 287 F. Supp. 3d 920 (C.D. Cal. 2018); *Greenley v. Laborers’ Int’l Union of N. Am.*, 271 F. Supp. 3d 1128 (D. Minn. 2017); *Mejia v. Time Warner Cable, Inc.*, No. 15-CV-6445, 2017 WL 3278926 (S.D.N.Y. Aug. 1, 2017); *Holt v. Facebook, Inc.*, 240 F. Supp. 3d 1021 (N.D. Cal. 2017); *Brickman v. Facebook, Inc.*, 230 F. Supp. 3d 1036 (N.D. Cal. 2017).

As noted above, Congress enacted the TCPA to protect the public from automated phone calls and the attendant invasion of personal and residential privacy. S. Rep. No. 102-178, at 5 (1991). Before this restriction was enacted, “[m]any consumers [we]re outraged over the proliferation of intrusive, nuisance calls to their homes” and cell phones. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394. The government’s interest in preventing such calls and thereby “protecting the well-being, tranquility, and privacy of the home is of the highest order.” *Carey v. Brown*, 447 U.S. 455, 471 (1980); *see Frisby v. Schultz*, 487 U.S. 474, 484–85 (1988) (“[W]e

have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.”). In addition, Plaintiffs conceded “the protection of residential privacy is undoubtedly a compelling governmental interest” in their briefing before the Fourth Circuit. Appellants’ Reply Brief at 6, *American Association of Political Consultants, Inc. v. F.C.C.*, 923 F.3d 159 (4th Cir. 2019) (citing *Carey v. Brown*, 447 U.S. 455, 471 (1980)).

The automated calling restriction directly furthers this compelling privacy interest by generally preventing the use of precisely those technologies Congress found to be the most intrusive, *only when the recipient has not consented to them*. In this way the statute balances the caller’s ease of access with the recipient’s ability to consent—or withhold consent—for these cheap, automated calls. The facts that the Do Not Call Registry continues to increase in registered telephone numbers, that robocall complaints continue to number in the millions, and that Congress continues to pass laws seeking to stop the scourge of robocalls, *Telephone Robocall Abuse Criminal Enforcement and Deterrence Act*, Pub. L. No. 116-105 (2019), all illustrate the legitimacy of the government’s privacy interests underlying the TCPA are still valid, if not more so, in 2020.

Congress further expressly found that limiting the use of autodialers and prerecorded voices to calls for which the recipient had consented “is the only effective means of protecting telephone consumers from th[e] nuisance and privacy invasion” caused by such calls. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394–95. Congress considered alternative means

of addressing these concerns and found that they were unlikely to be effective. *Id.* at 2394. “When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference.” *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985).

In short, Congress reasonably determined that a variety of protections working in tandem are necessary to safeguard consumers from the substantial intrusion into their personal privacy that would otherwise result. Therefore, even under strict scrutiny, the TCPA is constitutional.

CONCLUSION

The TCPA remains a critical piece of legislation. By restricting calls made to cell phones using robocall technology, among other provisions, the TCPA prevents a countless number of unwanted robocalls every year, every day, and indeed every hour and minute, from intruding on Americans’ privacy, scamming their wallets, and overwhelming our confidence in the nation’s telephone networks. These calls harm business and consumers alike.

The TCPA does not and was never intended to restrict speech, as shown by Congress’ finding that the FCC should design rules “consistent with the free speech protections embodied in the First Amendment.” Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2395. Instead, the TCPA merely regulates communications when particular technologies are employed based on the relationship between the parties. Under any relevant level

of scrutiny, the TCPA restrictions on automated calling technologies are an appropriate mechanism for protecting Americans from the plague of unwanted robocalls.

For the foregoing reasons, *amici* respectfully request that the Court find the TCPA constitutional.

Respectfully submitted,

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Dated: March 2, 2020

APPENDIX

APPENDIX A — LIST OF *AMICI CURIAE*

Edward J. Markey
U.S. Senator

Anna G. Eshoo
Member of Congress

Thomas R. Carper
U.S. Senator

Yvette D. Clarke
Member of Congress

Jeffrey A. Merkley
U.S. Senator

Jerry McNerney
Member of Congress

Tammy Baldwin
U.S. Senator

Peter Welch
Member of Congress

Richard Blumenthal
U.S. Senator

Kathy Castor
Member of Congress

Robert Menendez
U.S. Senator

Diana DeGette
Member of Congress

Ron Wyden
U.S. Senator

André Carson
Member of Congress

Cory A. Booker
U.S. Senator