

No. 19-1738

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

ALI GADELHAK,

Individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

AT&T SERVICES, INC.,

Defendant-Appellee.

On appeal from the United States District Court
for the Northern District of Illinois
No. 17-cv-01559
The Honorable Edmond E. Chang

**BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION
CENTER (EPIC) AND NATIONAL CONSUMER LAW CENTER IN
SUPPORT OF PLAINTIFF-APPELLANT & IN SUPPORT OF REVERSAL**

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July 8, 2019

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Appellate Court No: 19-1738

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INTEREST OF AMICI

The Electronic Privacy Information Center (“EPIC”) is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging privacy issues.¹ EPIC routinely participates as *amicus curiae* in federal cases concerning the Telephone Consumer Protection Act and other important consumer privacy issues. *See, e.g.*, Brief for EPIC as *Amicus Curiae* Supporting Respondents, *PDR Network v. Carlton & Harris Chiropractic*, No. 17-1705, 2019 WL 2527470 (U.S. June 20, 2019) (arguing that TCPA defendants should not be able to challenge FCC interpretations of the TCPA outside the review process Congress established); Brief for EPIC as *Amicus Curiae* Supporting Appellee, *Gallion v. Charter Commc’ns*, No. 18-55667 (9th Cir. filed Nov. 9, 2018) (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); Brief for EPIC as *Amicus Curiae* Supporting Appellants, *Smith v. Facebook*, 745

¹ The parties consent to the filing of this *amicus curiae* brief. In accordance with Rule 29, 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. EPIC 2019 IPIOP clerks Jessica Hui and Lauren O’Brien participated in the drafting of this brief.

Fed. Appx. 8 (9th Cir. 2018) (No. 17-16206) (arguing that the social media company did not have authority to monitor the activities of internet users on healthcare provider and other websites); Brief for EPIC et al. as *Amici Curiae* Supporting Respondents, *Spokeo v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339) (arguing that the violation of a consumer’s privacy rights under federal law constitutes an injury-in-fact sufficient to confer Article III standing).

EPIC has provided expert analysis to Congress on emerging consumer privacy issues concerning the misuse of telephone numbers. *See, e.g., Telephone Advertising and Consumer Rights Act, H.R. 1304, Before the Subcomm. on Telecomms. and Fin. of the H. Comm. on Energy and Com., 102d Cong., 1st Sess. 43 (April 24, 1991) (testimony of EPIC Executive Director Marc Rotenberg);² S. 1963, The Wireless 411 Privacy Act: Hearing Before the S. Comm. on Com., Sci., & Transp., 108th Cong., 2d Sess. (Sept. 21, 2004) (testimony of EPIC Executive Director Marc Rotenberg);³ Modernizing the Telephone Consumer Protection Act: Hearing Before the Subcomm. on Commc’ns. & Tech. of the H. Comm. on Energy and Com., 114th Cong. (2016) (statement for the record submitted by EPIC);⁴ Abusive Robocalls and How We Can Stop Them: Hearing Before the S. Comm. on Com., Sci., & Transp.,*

² <http://www.c-span.org/video/?18726-1/telephone-solicitation>.

³ https://epic.org/privacy/wireless/dirtiest_904.html.

⁴ <https://epic.org/privacy/telemarketing/EPIC-Modernizing-TCPA.pdf>.

115th Cong. (Apr. 18, 2018) (statement for the record submitted by EPIC);⁵ *Legislating to Stop the Onslaught of Annoying Robocalls*, 116th Cong. (Apr. 30, 2019) (statement for the record submitted by EPIC).⁶

EPIC has also submitted numerous comments to the Federal Communications Commission (“FCC”) and the Federal Trade Commission (“FTC”) concerning the implementation of the Telephone Consumer Protection Act. *See, e.g.*, EPIC et al., Comments in the Matter of Telemarketing Rulemaking, FTC File No. R411001 (2002);⁷ EPIC et al., Comments in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 (2002);⁸ EPIC et al., Comments on Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Docket Nos. CG 02-278, DA 05- 1346 et al. (2005);⁹ EPIC, Comments on Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Docket Nos. CG 02-278, DA 05- 2975 (2006);¹⁰ EPIC, Comments In the Matter of ACA International Petition for Expedited Clarification, Docket No. 02-278 (2006);¹¹ EPIC, Comments Concerning Implementation of the Junk Fax Prevention Act,

⁵ <https://epic.org/EPIC-SCOM-Robocalls-April2018.pdf>.

⁶ <https://epic.org/testimony/congress/EPIC-HEC-Robocalls-Apr2019.pdf>.

⁷ <https://epic.org/privacy/telemarketing/tsrcomments.html>.

⁸ <https://epic.org/privacy/telemarketing/tcpacomments.html>.

⁹ <https://epic.org/privacy/telemarketing/tcpacomm7.29.05.html>.

¹⁰ <https://epic.org/privacy/telemarketing/tcpacom11306.html>.

¹¹ https://epic.org/privacy/telemarketing/fcc_aca_05-11-06.html.

Docket No. CG 05– 338 (2006);¹² EPIC, Comments Concerning Advanced Methods to Target and Eliminate Unlawful Robocalls, CG 17-59 (2017);¹³ 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);¹⁴ EPIC, Comments Concerning the Refreshed Record on Advanced Methods to Target and Eliminate Unlawful Robocalls, CG 17-59 (2018).¹⁵

The National Consumer Law Center (NCLC) is a Massachusetts non-profit corporation established in 1969 and incorporated in 1971. It is a national research and advocacy organization focusing specifically on the legal needs of low-income, financially distressed, and elderly consumers.

NCLC has long advocated to protect consumers from the scourge of unwanted robocalls. Robocalls have a particularly pernicious effect on the low-income and elderly consumers that NCLC represents. On behalf of these clients and numerous other national and state organizations that represent consumers, NCLC attorneys frequently testify before Congress, file comments and letters with the FCC, and meet with Commissioners and FCC staff, all on robocall issues.

¹² <https://epic.org/privacy/telemarketing/jfpacom11806.html>.

¹³ <https://epic.org/apa/comments/EPIC-FCC-Robocall-Comments.pdf>.

¹⁴ <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>.

¹⁵ <https://epic.org/apa/comments/EPIC-FCC-Robocalls-Refresh-Sept2018.pdf>.

NCLC staff have participated in numerous FCC proceedings regarding the interpretation of the TCPA, particularly regarding the definition of “automatic telephone dialing system,” the question before this Court.¹⁶ This advocacy has included dozens of comments and letters with the FCC and meetings with Commissioners and FCC staff often to discuss robocall issues.

NCLC staff presented testimony on robocall issues on April 30, 2019, before the House Committee on Energy and Commerce, Subcommittee On Communications and Technology, regarding “Legislating to Stop the Onslaught of Annoying Robocalls”; on April 11, 2019, before the Senate Committee on Commerce, Science and Transportation, Subcommittee on Communications, Technology Innovation and The Internet, on “Illegal Robocalls: Calling All to Stop the Scourge”; on April 18, 2018, before the Senate Committee on Commerce, Science & Transportation regarding “The Escalating Problem of Unwanted Robocalls and What To Do About It”; and on May 18, 2016, before the same committee regarding “The Importance of the Telephone Consumer Protection Act to Safeguard Consumers.”¹⁷

¹⁶ See <https://www.nclc.org/issues/robocalls-and-telemarketing.html>.

¹⁷ All are available at <https://www.nclc.org/issues/robocalls-and-telemarketing.html> and <https://www.nclc.org/issues/robocalls-and-telemarketing-archive.html>.

NCLC's practice manual *Federal Deception Law* (3d ed. 2017), updated at www.nclc.org/library, includes comprehensive treatment of the TCPA as well as the FTC's telemarketing sales rule. NCLC includes sessions on the TCPA both at its annual Consumer Rights Litigation Conference every fall and at its annual spring conference on fair debt collection practices.

NCLC has filed amicus briefs in several other TCPA cases in the Courts of Appeal: *Marks v. Crunch San Diego*, 904 F.3d 1041 (9th Cir. 2018); *Evans v. Penn. Higher Educ. Assistance Agency*, No. 18-14586 (11th Cir. filed Apr. 1, 2019); and *Glasser v. Hilton Grand Vacations Co.*, No. 18-14499-J (11th Cir. filed Jan. 24, 2019).¹⁸

¹⁸ All are available at <https://www.nclc.org/issues/robocalls-and-telemarketing.html>.

SUMMARY OF THE ARGUMENT

Robocalls have frustrated and angered American consumers for decades. In 1991, Congress passed the Telephone Consumer Protection Act (“TCPA”) to protect consumers from the onslaught of calls that interrupted their lives and invaded their privacy. Since then, the problem has gotten much worse. Today, consumers receive 10 times more unwanted calls per day than they did in 1991. The FCC receives thousands of complaints a week about the constant barrage of robocalls. And ubiquitous adoption of cell phones means that robocalls now invade our lives even more than they did in 1991. Meanwhile, the costs of mass dialing and texting have plummeted and it is easier than ever for companies to send out thousands of robocalls. Congress has recognized that the problem requires an immediate solution, and has held multiple hearings on the issue in 2018 and 2019.

The lower court’s narrow definition of autodialer ignores the explicit legislative purpose of the TCPA, the changes in technology that have led to a sharp increase in automated calls, and the harm and frustration the public experiences daily. History shows that companies will take advantage of this narrow interpretation to evade the law while engaging in precisely the business practice Congress sought to curb: sending mass calls and texts to consumers without permission. This Court should not uphold an interpretation of the TCPA that renders the law’s key provisions obsolete.

ARGUMENT

The Telephone Consumer Protection Act (“TCPA”) was enacted in 1991 to protect consumers from the privacy invasion caused by incessant automated and prerecorded calls, often called “robocalls.” The TCPA bans calls “using any automatic telephone dialing system [(‘autodialer’)] or an artificial or prerecorded voice” except in a few narrow circumstances. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. § 227). The statute defines an autodialer as “equipment with the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” *Id.* § 227(a)(1).

The lower court in this case surprisingly held that it need not consider the legislative purpose of the TCPA, or the harm caused by robocalls, when it interpreted the autodialer provision. The court found that the “most sensible reading of the provision” required “using a random or sequential number generator” to modify the phrase “telephone numbers to be called.” *Gadelhak v. AT&T Servs., Inc.*, No. 17-cv-01559, 2019 WL 1429346 at *5 (N.D. Ill. Mar. 29, 2019).

As the D.C. Circuit recognized in *ACA International v. FCC*, 885 F.3d 687, (D.C. Cir. 2018), “[t]he role of the phrase, ‘random or sequential number generator,’ has generated substantial questions over the years.” *Id.* at 702-03. In

past rulemakings, the FCC interpreted the phrase to include list-based systems. *See In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 15,391, 15,392 ¶ 2 n5 (2012) [hereinafter FCC 2012 Order] (“[The autodialer] definition covers any equipment that . . . [can] generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists.”). The D.C. Circuit also acknowledged that the definition of autodialer might include list-based systems that do not randomly or sequentially generate numbers. *ACA Int’l*, 885 F.3d at 702–03. In *Marks v. Crunch San Diego*, 904 F.3d 1041 (9th Cir. 2018), the Ninth Circuit concluded that the “statutory text is ambiguous on its face” and therefore “not susceptible to a straightforward interpretation based on the plain language alone.” *Id.* at 1051. After looking to the context and legislative purpose, the Ninth Circuit concluded that the definition of autodialer “includes devices with the capacity to dial stored numbers automatically.” *Id.* at 1052. The Ninth Circuit reaffirmed this interpretation just weeks ago, finding that an autodialer “need not be able to use a random or sequential generator to store numbers—it suffices to merely have the capacity to ‘store numbers to be called’ and ‘to dial such numbers automatically.’” *Duguid v. Facebook*, No. 17-15320, 2019 WL 2454853 at *3 (9th Cir. June 13, 2019).

When the Third Circuit concluded that an autodialer must dial numbers generated by “a random or sequential number generator,” the court acknowledged that “it is unclear how a number can be *stored* (as opposed to *produced*) using a ‘random or sequential number generator.’” *Dominguez v. Yahoo, Inc.*, 629 Fed. Appx. 369, 372 n.1 (3d Cir. 2015) (emphasis in original).¹⁹ The text is ambiguous—it leaves open the possibility that generating random or sequential numbers is not a necessary condition of an autodialer. This Court should look to the legislative history and context of the act itself to interpret the TCPA as Congress intended.

When the TCPA was introduced, Congress found that the cost to industry of making millions of automated calls was small and the burden on consumers was large. S. Rep. 102-178, at 2–3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968. The TCPA was enacted to correct this imbalance and to shield consumers from the “nuisance and privacy invasion” of robocalls. TCPA § 2(12). The lower court’s definition of autodialer would undermine the law’s effectiveness by inviting easy circumvention and rendering the restriction obsolete. To narrow the definition of an autodialer would fail to protect consumers’ privacy interests and would

¹⁹ After remand, *Dominguez v. Yahoo, Inc.* returned to the Third Circuit. The court adopted its prior definition of autodialer with no additional reasoning. 894 F.3d 116, 119 (3d Cir. 2018) (“[W]e interpret the statutory definition of an autodialer as we did prior to the issuance of 2015 Declaratory Ruling.”).

contravene Congress’s original intent by allowing solicitors to circumvent the TCPA simply by using list-based dialers.

Following the TCPA’s enactment, the problem of robocalls has only gotten worse. One reason is that consumers have become dependent on cell phones, allowing robocalls to invade consumers’ lives wherever and whenever. *See* Pew Research Center, *Mobile Fact Sheet* (June 12, 2019) (stating that 96% of American own cell phones).²⁰ Moreover, technology enabling mass calling has become cheaper and more easily accessible—today, anyone with a computer or smartphone can, by downloading an app or connecting to a website, dial thousands of phone numbers at once. *See, e.g.,* One Call Now, *Group Messaging, Notification, and Calling App* (2019);²¹ SlickText, *Pricing* (2019);²² DialMyCalls, *iPhone and Android Mass Calling App* (2019).²³ As consumers become more frustrated with these constant invasions of their privacy, the TCPA should not be weakened by an unnecessarily narrow definition of an autodialer.

The Court should reverse the judgement below for two reasons. First, the TCPA protects important consumer privacy interests that both Congress and courts have recognized. Second, a narrow definition of an autodialer would accelerate the

²⁰ <https://www.pewinternet.org/fact-sheet/mobile/>.

²¹ <https://www.onecallnow.com/how-it-works/mobile-app/>.

²² <https://www.slicktext.com/pricing.php>.

²³ <https://www.dialmycalls.com>.

rising levels of robocalls and texts. To adopt the lower court’s definition of autodialer would be to undermine the TCPA in its entirety.

I. The TCPA should be construed broadly to reflect its underlying purpose and to protect the privacy interests of consumers.

The context and legislative history of the TCPA both suggest that software that enables mass texting from a list, such as the system used by AT&T in this case, is precisely the type of technology the TCPA sought to restrict. Subsequent interpretations of the legislative history by courts and the FCC reinforce that interpretation. Regardless of whether AT&T dials phone numbers that are generated randomly or that are stored in “flat files” and other types of lists, the impact on recipients is the same. The term autodialer should be interpreted to cover systems that “produce” phone numbers “using a random or sequential number generator” and systems that “store” phone numbers to be dialed automatically. Otherwise, consumers will suffer precisely the harm that Congress intended to stop in the TCPA. S. Rep. 102-178, at 2-3.

From 1981 to 1991, domestic telemarketing expenditures had increased from \$1 billion to \$60 billion. By 1991, more than 300,000 solicitors were calling over 18 million Americans every day. H. Rep. 102-317, at 7 (1991). As Professor Anita Allen has recounted, “a typical residential homeowner might receive dozens of calls a week . . . [t]he number of calls was overwhelming.” Anita L. Allen,

Unpopular Privacy: The Case for Government Mandates, 32 Okla. City. U. L. Rev. 87, 96 (2007).

In the late 1980s, Congress recognized that American consumers were receiving an unprecedented number of unsolicited automated telephone calls that were a nuisance and an invasion of privacy. Senator Fritz Hollings, the TCPA's eventual sponsor, complained that robocalls "are 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." 137 Cong. Rec. 30,821-22 (1991) (statement of Sen. Hollings). Congress explained that prerecorded calls were particularly overwhelming and frustrating because they could not interact with customers "except in preprogrammed ways, do not allow the caller to feel the frustration of the called party . . . [Customers lose] the ability to slam the telephone down on a live human being." S. Rep. 102-178, at 2, 4 n.3. Representative Ed Markey, Chairman of the House Telecommunications and Finance Subcommittee, urged Congress to make the home, one's "sanctuary," off-limits to robocalls, which were "intrusive and annoying interruptions." 137 Cong. Rec. 11,310 (1991) (statement of Rep. Markey). Senator John Warner declared: "the most important thing we have in this country is our freedom and our privacy, and this [robocalls] is clearly an invasion of that." 137 Cong Rec. 16,206 (1991) (statement of Sen. Warner).

Thus, from its first proposal, the TCPA had a clear purpose: to protect the privacy interests of the American consumer by preventing robocalls from “proliferat[ing] beyond our control.” 137 Cong. Rec. 9,840 (1991) (statement of Sen. Hollings). Senator Hollings declared that “owning a telephone does not give the world the right and privilege to assault the consumer with machine-generated telephone calls.” 137 Cong. Rec. 9,840 (1991) (statement of Sen. Hollings). Senator Lloyd Bentsen and Representative Marge Roukema similarly stressed the importance of consumers’ privacy rights. Senator Bentsen noted that automated telephone calls are “unreasonable encroachment[s] upon . . . privacy.” 137 Cong. Rec. 16,208 (1991) (statement of Sen. Bentsen). Representative Roukema explained that robocalls are “an unwarranted invasion of privacy, and it can be dangerous and life-threatening. This Congress can no longer stand by the wayside.” 137 Cong. Rec. 11,313 (1991) (statement of Rep. Roukema). According to Representative Markey, the TCPA “gives the public a fighting chance to curtail unwanted telemarketing practices.” 137 Cong. Rec. 11,310 (1991) (statement of Rep. Markey).

Courts too, have long affirmed that the TCPA’s purpose is to protect the privacy interests of American consumers by restricting non-consensual robocalls. In *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041 (7th Cir. 2013), this Court noted that the legislative history of the TCPA indicates the law’s purpose was “to

protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home.” *Id.* at 1050 (citing 47 U.S.C. § 227(b)(2)(B)(ii)(I); (c)(2)). This Court additionally acknowledged that the TCPA’s language reinforces its purpose: to “limit unsolicited automatically dialed telephone recordings.” *Id.* at 1053.

Other circuits have agreed. In *Reyes v. Lincoln Automotive Financial Services*, 861 F.3d 51 (2d Cir. 2017), the Second Circuit made clear that the TCPA was enacted “to protect consumers from unwanted automated telephone calls.” *Id.* at 56 (citations omitted). In *Gager v. Dell Financial Services, LLC*, 727 F.3d 265 (3d Cir. 2013), the Third Circuit explained that “[t]he TCPA is a remedial statute that was passed to protect consumers from unwanted automated telephone calls.” *Id.* at 271. In *Ashland Hospital Corporation v. SEIU*, 708 F.3d 737 (6th Cir. 2013), the Sixth Circuit noted that “Congress sought . . . to protect individuals . . . from the invasions of privacy occasioned by automated and prerecorded calls.” *Id.* at 743. The Ninth Circuit also agreed, stating in *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037 (9th Cir. 2017), that “Congress was trying to prohibit the use of [automatic dialing] to communicate with others by telephone in a manner that would be an invasion of privacy.” *Id.* at 1045 (citations omitted).

When enacting the TCPA, Congress clearly knew that technology would advance. To ensure that the autodialer definition kept up with changes in

technology, Congress gave the FCC “the flexibility to consider what rules should apply to future as well as existing technologies.” 137 Cong. Rec. 18,784 (1991) (statement of Sen. Hollings).

The FCC has interpreted “autodialer” in the TCPA to include list-based systems. In 2003, the FCC explicitly stated that to exclude technologies that could automatically and simultaneously dial thousands of numbers merely because they “relie[d] on a given set of numbers[,] would lead to unintended results.” *In Re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C.R. 14,014, 14,092 ¶ 133 (2003) [hereinafter FCC 2003 Order] (citing American Teleservices Association, Comments in the Matter of Rules and Regulations Implementing the TCPA, FCC File No. 6513398307 at 113 (2002)²⁴). An interpretation of the TCPA that permits list-based dialing systems would not stop the “particularly troublesome” phenomenon that autodialers could still “dial thousands of numbers in a short period of time.” *Id.* Thus, “to ensure that the prohibition on autodialed calls [cannot] be circumvented,” the FCC has repeatedly classified technologies as autodialers even though they do not produce phone numbers using a random number generator. *Id.* at 14,093 ¶ 133. In 2012, for example, the FCC affirmed that autodialer includes “any equipment that has the specified capacity to generate numbers and dial them without human invention

²⁴ <https://www.fcc.gov/ecfs/filing/5508550519>.

regardless of whether the numbers called are randomly or sequentially generated.”
FCC 2012 Order at 15,392 ¶ 2 n.5.

Other courts have agreed with the FCC’s interpretation and have held that the TCPA extends to list-based systems. In *Marks v. Crunch San Diego*, the Ninth Circuit emphasized that, in 2015, Congress amended the TCPA without expanding the definition of autodialer. 904 F.3d at 1052. The court held that this was “tacit approval” of the FCC’s understanding that the TCPA was enacted to regulate all “devices that make automated calls,” even if the calls are made to numbers stored in a list. *Id.* at 1051–52. The *Marks* court used the TCPA’s legislative history and subsequent FCC orders to conclude that Congress intended for the TCPA to keep up with the state of autodialer technology. *Id.* at 1045-46.

An interpretation of the TCPA that limits “autodialers” to systems that produce phone numbers using a random number generator and excludes systems that call numbers stored in lists or other data structures would make the definition of autodialer easy to engineer around and would incentivize further invasions of privacy. For example, companies could bypass the TCPA simply by compiling a list of every active phone number and systematically calling numbers down the list. This is an absurd result that illustrates why this Court should consider the legislative history and purpose behind the TCPA in interpreting the autodialer provision.

II. A narrow interpretation of “autodialer” will exacerbate the harm caused by unwanted automatic calls and texts.

As the nuisance of unwanted robocalls and texts has increased, the TCPA’s protections have become more important than ever. In 1991, Congress was concerned that automated and prerecorded calls might interrupt dinner and sleep. 137 Cong. Rec. 16,205 (1991) (statement of Sen. Hollings). Now we carry smartphones with us everywhere—using them as maps, for entertainment, and to send work emails—and unwanted calls and texts can interrupt any moment in our lives. At the same time, mass dialing and texting software is easily available at the touch of a button. Robocallers can target specific demographics, including elderly or immigrant populations, that might be more vulnerable to scams. Congress understandably sought to regulate this practice at the outset. The passage of time has only underscored the need to uphold the congressional intent.

A. Robocalls and texts increasingly invade consumers’ privacy and disrupt daily life.

The number of robocalls consumers receive every day has increased drastically over the last 30 years. An estimated 18,000,000 calls were received per day at the time of the TCPA’s enactment in 1991, but roughly 152,900,000 calls are received each day in 2019. YouMail, *Robocall Index* (2019).²⁵ The problem continues to grow at an astonishing rate. The total number of robocalls jumped

²⁵ <https://robocallindex.com/>.

from a little over 30 billion in 2017 to almost 48 billion in 2018—an increase of over 50% in just one year. YouMail, *Historical Robocalls by Time* (2019).²⁶

YouMail, a provider of robocall blocking software, estimates that there have been 25 billion robocalls placed already in 2019. YouMail, *Robocall Index* (2019).²⁷ The vast majority of these calls are made by corporations and telemarketers—AT&T was listed as one of the top twenty robocallers in the United States in May 2019. YouMail, *Top 100 Robocallers Nationwide in May 2019* (May 2019).²⁸

Widespread adoption of cellphones has exacerbated the harmful effects of robocalling. The residential landline was the primary means of telephone communication when the TCPA was enacted. 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. In 2019, 96% of Americans own cell phones. Pew Research Center, *Mobile Fact Sheet* (June 12, 2019).²⁹ Fully 81% of Americans now own smartphones. *Id.* Americans use their phones for more and more daily tasks, such as drafting work emails, navigating directions, watching

²⁶ <https://robocallindex.com/history/time>.

²⁷ <https://robocallindex.com/>.

²⁸ <https://robocallindex.com/2019/may/top-robocallers>.

²⁹ <https://www.pewinternet.org/fact-sheet/mobile/>.

television, and reading books. See Andrew Perrin, *Book Reading*, Pew Research Ctr. (Sept. 1, 2016);³⁰ Monica Anderson, *More Americans Using Smartphones for Getting Directions, Streaming TV*, Pew Research Ctr. (Jan. 29, 2016).³¹ Over one-third of adults report using their smartphones for work. Deloitte, *2018 Global Mobile Consumer Survey: US Edition*, at 5 (2018) [hereinafter *Deloitte 2018 Mobile Consumer Survey*].³² Since 2013, the percentage of adults who access the internet primarily through their cell phones has nearly doubled, going from 19% to 37%. Monica Anderson, *Mobile Technology and Home Broadband*, Pew Research Ctr. (June 13, 2019).³³

The mobility of cell phones means that Americans keep them closer than was ever possible with a landline. Users look at their phones approximately 52 times per day. *Deloitte 2018 Mobile Consumer Survey* at 2. Fully 90% of users carry their cell phones with them wherever they go. Lee Rainie & Kathryn Zickuhr, *Americans' Views on Mobile Etiquette*, Pew Research Ctr. (Aug. 26, 2015).³⁴ Nearly half of cell phone users “have slept with their phone next to their

³⁰ <https://www.pewinternet.org/2016/09/01/book-reading-2016/>.

³¹ <https://www.pewresearch.org/fact-tank/2016/01/29/us-smartphone-use/>.

³² <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-global-mobile-consumer-survey-exec-summary-2018.pdf>.

³³ <https://www.pewinternet.org/2019/06/13/mobile-technology-and-home-broadband-2019/>.

³⁴ https://www.pewresearch.org/wp-content/uploads/sites/9/2015/08/2015-08-26_mobile-etiquette_FINAL.pdf.

bed because they wanted to make sure they didn't miss any calls, text messages, or other updates during the night." Aaron Smith, *The Best (and Worst) of Mobile Connectivity*, Pew Research Ctr. (Nov. 30, 2012).³⁵ In the last year alone, mobile data use has seen an 82% increase. CTIA, *Wireless Industry Survey Highlights 1* (2019).³⁶

U.S. courts have recognized that cell phones are now indispensable. In *Riley v. California*, 134 S. Ct. 2473 (2014), the Supreme Court found that cell phones are a "pervasive and insistent part of daily life." *Id.* at 2484. The Court noted that, in the digital age, "it is the person who is not carrying a cell phone, with all that it contains, who is the exception." *Id.* at 2490. In *Carpenter v. United States*, 138 S. Ct. 2206 (2018), Chief Justice Roberts again emphasized the ubiquity of cell phones in daily American life, writing that cell phones are "almost a 'feature of human anatomy,'" and that "[individuals] compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other [] locales." *Id.* at 2218 (quoting *Riley*, 134 S. Ct. at 2484).

³⁵ <https://www.pewinternet.org/2012/11/30/the-best-and-worst-of-mobile-connectivity/>.

³⁶ <https://api.ctia.org/wp-content/uploads/2019/06/2019-Annual-Survey-Highlights-FINAL.pdf>.

Currently, phone users bear the burden of avoiding robocalls. As a result, people now often 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);³⁷ 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).³⁸ In a survey, 70 percent of respondents said they stopped answering calls from numbers they do not recognize to avoid robocalls. Consumer Reports, *What Have You Done in Response to Robocalls?* (Dec. 2018).³⁹ The CEO of YouMail attributes the recent increase in the number of robocalls to efforts to avoid answering these calls, noting that, when consumers let calls go to voicemail more often, callers simply dial more numbers in an effort to reach the same number of live people. Elaine S. Povich, *States Try to Silence Robocalls, But They're Worse Than Ever*, Pew Research Ctr. (July 25, 2018).⁴⁰ Senator Brian Schatz noted that “robocalls have turned us into a nation of

³⁷ <https://www.consumerreports.org/robocalls/why-robocalls-are-even-worse-than-you-thought/>.

³⁸ <https://www.nytimes.com/2018/05/06/your-money/robocalls-rise-illegal.html>.

³⁹ <https://www.consumerreports.org/robocalls/mad-about-robocalls/>.

⁴⁰ <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/25/states-try-to-silence-robocalls-but-theyre-worse-than-ever>.

call 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 *S. Hearing on Illegal Robocalls*].⁴¹

Consumer complaints to federal and state officials show that people are frustrated and angry with the amount of automated calls flooding their phones. In a 2019 report, the FCC noted that the majority of the complaints it receives from consumers are about unwanted automated and recorded calls. FCC, *Report on Robocalls 2* (2019).⁴² Complaints to the FCC about robocalls have spiked from 150,000 in 2016 to 232,000 in 2018—a 50% increase in just two years. *Id.* at 4. In 2019, the FCC has already received over 90,000 complaints about unwanted calls. FCC, *Consumer Complaints Data: Unwanted Calls* (2019).⁴³ State attorneys general have indicated that “[r]obocalls and telemarketing calls are currently the number one source of consumer complaints at many of [their] offices.” *S. Hearing on Illegal Robocalls* (testimony of Neb. Att’y Gen. Doug Peterson). Arkansas Attorney General Lesley Rutledge stated, “I have visited every county in Arkansas, and the most common complaint I hear is that people want these calls to stop.”

⁴¹ <https://www.commerce.senate.gov/public/index.cfm/hearings?ID=5A66BB4E-777B-4346-AA5F-CAB536C54862>.

⁴² <https://docs.fcc.gov/public/attachments/DOC-356196A1.pdf>.

⁴³ <https://opendata.fcc.gov/Consumer/Consumer-Complaints-Data-Unwanted-Calls/vakf-fz8e>.

Press Release, Ark. Att’y Gen., Stop the Unwanted Robocalls (Feb. 11, 2019).⁴⁴ In an attempt to respond to the rising levels of consumer complaints, the FTC has collaborated with local law enforcement agencies in a joint initiative called “Operation Call it Quits” to bring 94 new enforcement actions against robocallers. Press Release, FTC, FTC, Law Enforcement Partners Announce New Crackdown on Illegal Robocalls (June 25, 2019).⁴⁵ Andrew Smith, the Director of the FTC’s Bureau of Consumer Protection, emphasized that the “joint effort shows that combatting this scourge remains a top priority for law enforcement agencies around the nation.” *Id.*

The House and the Senate have both held hearings recently to address the problem of incessant robocalling, evidencing the gravity of the issue. *See S. Hearing on Illegal Robocalls; Legislating to Stop the Onslaught of Annoying Robocalls: Hearing Before the H. Comm. on Energy and Com., 166th Cong. (Apr. 30, 2019) [hereinafter H. Hearing on Onslaught of Robocalls]*.⁴⁶ Members of Congress have stressed the need to keep pace with technology and prevent robocallers from evading detection and enforcement. Senator Roger Wicker

⁴⁴ <https://arkansasag.gov/media-center/news-releases/icymi-stop-the-unwanted-robocalls/>.

⁴⁵ <https://www.ftc.gov/news-events/press-releases/2019/06/ftc-law-enforcement-partners-announce-new-crackdown-illegal>.

⁴⁶ <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-legislating-to-stop-the-onslaught-of-annoying-robocalls>.

emphasized that robocalling is a problem that has “long plagued consumers, particularly the nation’s most vulnerable and underserved populations.” *S. Hearing on Illegal Robocalls*. In his opening remarks in the House hearing on *Legislation to Stop the Onslaught of Robocalls*, Representative Frank Pallone, Jr. emphasized that “as technology has evolved, robocalls, and the threat they impose, have increased. It is easier than ever for someone to begin making robocalls.” *H. Hearing on Onslaught of Robocalls*.

B. As technology progresses and mass texting becomes simpler and cheaper, the harm to consumers will become more acute.

“The need for more protection against robocalls has increased” with technological advancements. Sen. Chuck Grassley, *A Bipartisan Effort to End Robocalls*, *The Gazette* (Apr. 26, 2019).⁴⁷ Since the TCPA’s enactment, cheap and easily accessible dialing technology has exacerbated the problem of unwanted calls. The development of mass texting software has allowed solicitors to reach just as many consumers as with prerecorded voice messages.

Callers can easily and cheaply download apps and software that permit mass texting and calling. There are now dozens of services offering mass texting software to businesses and marketers that are easily accessible online. A company called Stratics Networks, Inc. advertises, for a flat fee, software that allows the

⁴⁷<https://www.thegazette.com/subject/opinion/guest-columnist/grassley-a-bipartisan-effort-to-end-robocalls-20190426>.

purchaser to send “Unlimited Voice Broadcasts ALL DAY, EVERY DAY,” using local phone numbers to increase the likelihood that consumers will answer.

Stratics, *Hosted Voice Broadcasting* (2019).⁴⁸ The company advertises the ability to upload lists of numbers to be called simultaneously. Stratics, *Stratics Networks vs. The Competitors* (2019).⁴⁹ The company also recently marketed technology allowing for the transmission of voicemail messages directly to consumers in an attempt to avoid the TCPA’s restrictions on “calling.” Stratics, *Ringless Voicemail Drops* (2019);⁵⁰ see also All About the Message, LLC, Petition for Declaratory Ruling, CG Docket No. 02-278, at 13 (filed Mar. 31, 2017) (urging the FTC to “declare that the use of direct to voicemail insertion technology is not subject to the TCPA”).⁵¹ Another 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* (2019).⁵² Several mass dialers and mass texting apps can be downloaded for free in Apple’s app store. See, e.g., One Call Now, *Group Messaging, Notification, and Calling App* (2019);⁵³ SlickText,

⁴⁸ <https://straticsnetworks.com/hosted-voice-broadcasting/>.

⁴⁹ <https://straticsnetworks.com/stratics-networks-vs-the-competitors/>.

⁵⁰ <https://straticsnetworks.com/ringless-voicemail-drops/>.

⁵¹ <https://ecfsapi.fcc.gov/file/104010829816078/Petition%20for%20Declaratory%20Ruling%20of%20All%20About%20the%20Message%20LLC.pdf>.

⁵² <https://www.textedly.com/#products>.

⁵³ <https://www.onecallnow.com/how-it-works/mobile-app/>.

Pricing (2019);⁵⁴ *DialMyCalls, iPhone and Android Mass Calling App* (2019).⁵⁵

One robocaller, who was recently fined by the FCC, testified before the Senate that dialing systems used to make “millions upon millions of calls” can be obtained quickly and easily on Google. *Abusive Robocalls and How We Can Stop Them: Hearing Before the Subcomm. on Com., Sci., and Transp., 166th Cong.* (2018) (testimony of Adrian Abramovich).

Targeted, list-based calling is more widely used today than in 1991. Recent cases illustrate how easy and harmful list-based dialing to mass consumers has become. In *Blow v. Bijora*, 855 F.3d 793 (7th Cir. 2017), text messages were sent to 20,000 people using a spreadsheet of customer cell phone numbers. *Id.* at 797. This Circuit recognized that a broad definition of autodialer espoused by the FCC in a series of orders starting in 2003 would encompass the system used in that case. *Id.* Under the lower court’s definition in this case, however, the list-based texting system used in *Blow* would be permitted. In *Dominguez*, Yahoo sent over 27,800 unwanted text messages to a single number from a stored database. 894 F.3d at 117. The Third Circuit adopted a narrow interpretation of the definition of autodialer in *Dominguez*, allowing the caller to evade liability. *Id.* at 119. Under

⁵⁴ <https://www.slicktext.com/pricing.php>.

⁵⁵ <https://www.dialmycalls.com>.

the lower court’s definition of autodialer in this case, consumers like *Dominguez* would continue to lack redress.

Robocallers also use lists to target particular groups that might be more vulnerable. In a recent incident, a scammer impersonated the Chinese consulate and targeted New Yorkers with Chinese last names. FTC, *Scammers Impersonate the Chinese Consulate* (Apr. 2018).⁵⁶ In other schemes, robocallers have targeted veterans, FCC, *Veterans Targeted in Benefits Scams* (Sept. 2018),⁵⁷ and small business owners, Press Release, FTC, *FTC Action Halts Deceptive Robocalls Aimed at Small Business Owners* (May 23, 2018).⁵⁸

Just like prerecorded messages, prewritten text messages allow companies to easily contact millions of consumers at once. The TCPA’s prohibition on prerecorded calls prohibits simultaneous transmission of a single message to many cell phone users. Callers can achieve the same outcome using prewritten text messages combined with mass texting software. The FTC calls text message spam a “triple threat” because it often uses the “promise of free gifts” or product offers to get consumers to reveal personal information; it can lead to unwanted charges on consumers’ cell phone bills; and it can slow cell phone performance. FTC, *Text*

⁵⁶ <https://www.consumer.ftc.gov/blog/2018/04/scammers-impersonate-chinese-consulate>.

⁵⁷ <https://www.fcc.gov/veterans-targeted-benefits-scams>.

⁵⁸ <https://www.ftc.gov/news-events/press-releases/2018/05/ftc-action-halts-deceptive-robocalls-aimed-small-business-owners>.

Message Spam (Mar. 2013).⁵⁹ Unwanted text messages “can be used to try to compromise your financial information or to install harmful software on your mobile device.” Kim Boatman, *Stop Cell Phone Spam in Seven Easy Steps*, Norton (2018).⁶⁰ Text message spam can lead to unwanted phone charges and can slow phone performance by taking up space in a phone’s memory. FTC, *Text Message Spam, supra*. As users stop answering voice calls and switch to communicating via text message, telemarketers and spammers will likely ramp up texting campaigns. *See, e.g.,* Aaron Mak, *Getting the Message*, Slate (Apr. 3, 2019) (“The advantages of reaching [cell phone users] through SMS or iMessage are clear: While many people have tuned out calls and emails, texting remains a crucial personal mode of communication.”).⁶¹

If the TCPA was necessary in 1991 because the burden on consumers was substantial, S. Rep. 102-178, at 2–3, the TCPA is critical now because the problem of unsolicited telemarketing calls is far worse. To construe the definition of autodialer narrowly, such that systems that mass dial and text consumers but do not use the “random or sequential number generator” technique are not autodialers, would exacerbate harm to consumers.

⁵⁹ <https://www.consumer.ftc.gov/articles/0350-text-message-spam>.

⁶⁰ <https://us.norton.com/yoursecurityresource/detail.jsp?aid=CellPhone>.

⁶¹ <https://slate.com/technology/2019/04/2020-presidential-election-campaign-texting.html>.

CONCLUSION

Amici respectfully request that this Court reverse the lower court's finding that AT&T's system is not an autodialer under the TCPA.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 7,000 words of Circuit Rule 29. This brief contains 6,098 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman style.

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I hereby certify that on July 8, 2019, this brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit through the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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