

No. 22-10695

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

KENNETH JOHANSEN,  
individually and on behalf of a class of all persons  
and entities similarly situated,  
Plaintiff - Appellant,

versus

BLUEGREEN VACATIONS UNLIMITED, INC.,  
a Florida corporation,  
Defendant - Appellee.

---

Appeal from the United States District Court  
for the Southern District of Florida  
Hon. Rodney Smith  
9:20-cv-81076-CIV-SMITH

---

**BRIEF OF THE NATIONAL CONSUMER LAW CENTER AND  
THE ELECTRONIC PRIVACY INFORMATION CENTER  
AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT  
AND REVERSAL**

---

William "Billy" Peerce Howard, Esq.  
Florida Bar No. 0103330  
THE CONSUMER PROTECTION FIRM, PLLC  
401 East Jackson Street, Suite 2340  
Truist Place  
Tampa, FL 33602  
Telephone: (813) 500-1500  
Facsimile: (813) 435-2369  
Billy@TheConsumerProtectionFirm.com  
*Attorney for Amici Curiae*

Dated: April 20, 2022

**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to 11th Circuit Rules 26.1-1, 26.1-2, and 26.1-3, Amici hereby identify the judges, attorneys, and persons that have an interest in the outcome of this case.

1. Honorable Rodney Smith (United States District Judge for the Southern District of Florida and Judge below);
2. Abdo, John E. (Vice Chair of Board of Directors of Bluegreen Vacations Corporation);
3. Bailey & Glasser LLP (Plaintiff's firm);
4. Barrett, John W. (Plaintiff's counsel);
5. Bluegreen Vacations Unlimited, Inc. (Defendant and wholly owned subsidiary of Bluegreen Vacations Corporation);
6. Bluegreen Vacations Corporation (Appellee's parent company);
7. Bluegreen Vacations Holding Corporation (BVH) (Corporate Parent of Bluegreen Vacations Corporation and Bluegreen Vacations Unlimited, Inc.);
8. DeZayas, Veronica Louise (Defendant's counsel);
9. Hogan, Benjamin J. (Plaintiff's counsel);
10. Johansen, Kenneth (Plaintiff);
11. Kaufman, Avi R. (Plaintiff's counsel);
12. Kaufman PA (Plaintiff's firm);

13. Levan, Alan (CEO and Chair of Board of Directors of Bluegreen Vacations Corporation);
14. Mead, Grace Lee (Defendant's counsel);
15. Nathan, Andrea Naomi (Defendant's counsel);
16. Onorati, James Joseph (Defendant's counsel);
17. Paronich, Anthony (Plaintiff's counsel);
18. Paronich Law P.C. (Plaintiff's firm);
19. Schumer Management & Consulting, LLC;
20. Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A. (Defendant's firm);
21. Woodbridge Holdings, LLC (Appellee's affiliate);
22. National Consumer Law Center (Amicus Curiae);
23. Electronic Information and Privacy Center (Amicus Curiae);
24. William "Billy" Peerce Howard (Counsel for Amici Curiae)

No other trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations, including subsidiaries, conglomerates, affiliates, parent corporations, publicly held corporations, or other identifiable legal entities related to Amici have an interest in the outcome of this appeal.

Both amici operate as tax-exempt organizations under the provisions of section 501(c)(3) of the Internal Revenue Code. They have

no parent corporation, and no publicly held company owns 10 percent or more of their stock.

Respectfully submitted,

/s/ William "Billy" Peerce Howard

William "Billy" Peerce Howard, Esq.

Florida Bar No. 0103330

THE CONSUMER PROTECTION FIRM, PLLC

401 East Jackson Street, Suite 2340

Truist Place

Tampa, FL 33602

Telephone: (813) 500-1500

Facsimile: (813) 435-2369

Billy@TheConsumerProtectionFirm.com

*Attorney for Amici Curiae*

Date: April 20, 2022

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT.....	C-1
TABLE OF CONTENTS .....	i
TABLE OF CITATIONS .....	iii
STATEMENT OF INTEREST OF AMICI CURIAE .....	1
STATEMENT UNDER FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E) .....	3
STATEMENT OF THE ISSUE.....	4
SUMMARY OF THE ARGUMENT .....	4
ARGUMENT .....	8
I.    Private Rights of Action Are Essential to Consumer Enforcement of the Laws in an Efficient Manner Without Government Assistance or Intervention. ....	8
II.   The TCPA Prohibits Telemarketing Calls to Numbers Listed on the Registry and Incentivizes Consumers with a Private Right of Action to Enforce the Law. ....	12
III.  To Enforce the TCPA, Consumers Must Identify the Defendant. ....	14
IV.  Pretextual Investigations to Enforce the Law Are Common and Appropriate.....	16
V.   Unless Reversed, the Lower Court’s Ruling Will Have a Chilling Effect on TCPA Enforcement, Which Could in Turn Affect the Enforcement of a Wide Array of Consumer Protection Statutes.....	19

CONCLUSION .....	22
CERTIFICATE OF COMPLIANCE.....	25
CERTIFICATE OF SERVICE.....	26

## TABLE OF CITATIONS

### CASES:

<i>Abramson v. Oasis Power L.L.C.</i> , No. 2:18-cv-00479, 2018 WL 4101857 (W.D. Pa. July 31, 2018), <i>adopted</i> , 2018 WL 4095538 (W.D. Pa. Aug. 28, 2018).....	19
<i>Barnes v. Gorman</i> , 536 U.S. 181 (2002) .....	9
<i>Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.</i> , 511 U.S. 164 (1994) .....	9
<i>Charvat v. Echostar Satellite, L.L.C.</i> , 630 F.3d 459 (6th Cir. 2010) .....	13
<i>Cunningham v. Rapid Response Monitoring Services, Inc.</i> , 251 F. Supp. 3d 1187 (M.D. Tenn. 2017) .....	13, 18
<i>Daubert v. NRA Grp., L.L.C.</i> , 861 F.3d 382 (3d Cir. 2017).....	14
<i>Diakos v. HSS Sys., L.L.C.</i> , 137 F. Supp. 3d 1300 (S.D. Fla. 2015) .....	20
<i>FTC v. Lifewatch Inc.</i> , 176 F. Supp. 3d 757 (N.D. Ill. 2016) .....	16, 17
<i>Gager v. Dell Fin. Servs., L.L.C.</i> , 727 F.3d 265 (3d Cir. 2013).....	14
<i>Hossfeld v. Am. Fin. Sec. Life Ins. Co.</i> , No. 0:19-CV-60597, 2021 WL 2453114 (S.D. Fla. June 16, 2021).....	15
<i>Jackson v. Birmingham Bd. of Educ.</i> , 544 U.S. 167 (2005) .....	9

<i>Klehr v. A.O. Smith Corp.</i> , 521 U.S. 179 (1997) .....	11
<i>Krakauer v. Dish Network, L.L.C.</i> , 925 F.3d 643 (4th Cir. 2019) .....	11, 20-21
<i>Lewis v. United States</i> , 385 U.S. 206 (1966) .....	22
<i>Leyse v. Bank of Am.</i> , 804 F.3d 316 (3d Cir. 2015).....	14
<i>Meeks v. Buffalo Wild Wings, Inc.</i> , No. 17-cv-07129, 2018 WL 1524067 (N.D. Cal. 2018) .....	15
<i>Mey v. Castle Law Grp., PC</i> , No. 5:19-CV-185, 2020 U.S. Dist. LEXIS 174894 (N.D. W. Va. Sep. 22, 2020).....	13
<i>Mey v. Venture Data, L.L.C.</i> , 245 F. Supp. 3d 771 (N.D. W. Va. 2017) .....	18-19
<i>Newman v. Piggie Park Enters., Inc.</i> , 390 U.S. 400 (1968) .....	8
<i>Parchman v. SLM Corp.</i> , 896 F.3d 728 (6th Cir. 2018) .....	14
<i>Perrong v. Total Ins. Brokers, L.L.C.</i> , 2021 WL 3036467 (M.D. Fla. Apr. 2, 2021) .....	18
<i>Rotella v. Wood</i> , 528 U.S. 549 (2000) .....	10
<i>Scruggs v. CHW Grp., Inc.</i> , No. 2:20-cv-48, 2020 WL 9348208 (E.D. Va. 2020).....	15
<i>United States v. Peters</i> , 153 F.3d 445 (7th Cir. 1998) .....	22

*Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc.*,  
401 F.3d 876 (8th Cir. 2005) ..... 13

*Van Patten v. Vertical Fitness Grp.*,  
847 F.3d 1037 (9th Cir. 2017) ..... 14

**STATUTES:**

15 U.S.C. § 78j(b)..... 9  
16 U.S.C. § 1540(g)(1)..... 9  
18 U.S.C. § 1964(c) ..... 9  
42 U.S.C. § 3613(a)(1)(A)..... 9  
42 U.S.C. § 12188(a)(1)..... 9  
47 U.S.C. § 227 ..... 12  
47 U.S.C. § 227(c) ..... 12, 13  
  
Pub. L. No. 102-243, § 2(5) (1991)..... 12

**RULES:**

Rule 23 of the Federal Rules of Civil Procedure..... 8, 23

**REGULATIONS:**

47 C.F.R. § 64.1200(c)(2) ..... 12

**OTHER AUTHORITIES:**

Consumer Fin. Prot. Bureau, *CFPB Supervision and Examination Manual* § VII.B (Oct. 2012) ..... 18  
  
Federal Commc’ns Comm’n, *Caller ID Spoofing* (Mar. 7, 2022) ..... 14  
  
Sarah Krouse, *The FCC Has Fined Robocallers \$208 Million. It’s Collected \$6,790.*, Wall. St. J., Mar. 28, 2019..... 11  
  
National Consumer Law Center, *Federal Deception Law*, Chapters 6 & 7 (4th ed. 2022) ..... 2, 14

Press Release, Federal Trade Comm’n, *FTC Issues Biennial Report to Congress on the National Do Not Call Registry*..... 12

Press Release, Federal Trade Comm’n, *FTC Stops Operators of Fake Credit Repair Scheme* (June 21, 2019)..... 15

United States Fed. Bureau of Investigation,  
*Operation Senior Sentinel* ..... 17

United States Fed. Bureau of Investigation,  
*Operation Senior Sentinel Podcast* (Dec. 10, 2010)..... 17

## STATEMENT OF INTEREST OF AMICI CURIAE<sup>1</sup>

The National Consumer Law Center (“NCLC”) and the Electronic Privacy Information Center (“EPIC”) are two of the leading non-profit advocates for consumer robocall protections. NCLC and EPIC regularly participate in judicial, regulatory, and legislative proceedings to protect consumers from illegal calls. Since the Supreme Court’s decision in *Duguid*, amici have educated attorneys and other stakeholders on how to protect consumers from harms caused by autodialers. EPIC and NCLC have recently filed *amicus* briefs in cases before this Court and the Ninth Circuit to assist the court in interpreting the Telephone Consumer Protection Act (TCPA). Br. for EPIC & NCLC as *Amici Curiae* Supporting Plaintiffs-Appellants, *Evans v. Ocwen Loan Servicing, LLC*, No. 21-14045 (11th Cir. filed Feb. 10, 2022); Br. for EPIC & NCLC as *Amici Curiae* Supporting Plaintiffs-Appellants, *Panzarella v. Navient Solutions, Inc.*, No. 20-2371 (11th Cir. filed Feb. 2, 2022); Br. for EPIC as *Amicus Curiae* Supporting Plaintiff-Appellant, *Borden v. eFinancial, LLC*, No. 21-35746 (9th Cir. filed Dec. 10, 2021).

---

<sup>1</sup> The parties have consented to the filing of this amicus curiae brief.

NCLC is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low-income and elderly consumers. Attorneys for NCLC have advocated extensively on behalf of consumers to protect their interests related to robocalls before the United States Congress, the Federal Communications Commission (FCC), and the federal courts. These activities have included testifying in numerous hearings before various congressional committees regarding how to control invasive and persistent robocalls, many filings and appearances before the FCC urging strong interpretations of the Telephone Consumer Protection Act (TCPA), and the filing of a number of *amicus* briefs before the federal courts of appeals and the Supreme Court representing the interests of consumers regarding the TCPA, as well as publishing and regularly updating a comprehensive analysis on the laws governing robocalls in National Consumer Law Center, *Federal Deception Law*, Chapters 6 & 7 (4th ed. 2022), *updated at* [www.nclc.org/library](http://www.nclc.org/library).

EPIC is a public interest research center in Washington, D.C., that focuses public attention on emerging privacy and civil liberties issues. EPIC often participates as *amicus curiae* to explain the

technology at issue in a case.<sup>2</sup> EPIC has done extensive work to protect consumers against illegal calls.<sup>3</sup> EPIC has filed many *amicus* briefs in Telephone Consumer Protection Act cases.<sup>4</sup>

**STATEMENT UNDER FEDERAL RULE OF  
APPELLATE PROCEDURE 29(a)(4)(E)**

*Amici* state: (1) no party or parties' counsel authored this brief in whole or in part; (2) no party or parties' counsel has contributed any money that was intended to fund preparing or submitting the brief; and (3) no person other than *amici curiae*, their members, or their counsel

---

<sup>2</sup> See, e.g., Br. for EPIC et al. as *Amicus Curiae* Supporting Appellant, *United States v. Wilson*, 13 F.4th 961 (9th Cir. 2021) (No. 18-50440); Br. for EPIC et al. as *Amici Curiae* Supporting Petitioner, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402).

<sup>3</sup> See EPIC, Robocalls, <https://epic.org/issues/consumer-privacy/robocalls/>.

<sup>4</sup> See, e.g., Br. for EPIC & NCLC as *Amici Curiae* Supporting Plaintiffs-Appellants, *McCurley v. Royal Seas Cruises, Inc.*, No. 21-55099 (9th Cir. filed Aug. 9, 2021); Br. for NCLC & EPIC as *Amici Curiae* Supporting Appellant, *Lindenbaum v. Realgy, LLC*, 13 F.4th 524 (6th Cir. 2021), *cert. denied*, 21-866 (Mar. 21, 2022); Br. for EPIC et al. as *Amici Curiae* Supporting Respondent, *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2020) (No. 19-511); Br. for EPIC et al. as *Amici Curiae* Supporting Petitioner, *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020) (No. 19-631); Br. for EPIC & NCLC as *Amici Curiae* Supporting Appellant, *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020) (No. 19-1738); Br. for EPIC as *Amicus Curiae* Supporting Appellee, *Gallion v. United States*, 772 Fed. Appx. 604 (9th Cir. 2019) (No. 18-55667); Br. for EPIC et al. as *Amici Curiae* in Support of Respondents, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (No. 15-1221).

contributed money that was intended to fund preparing or submitting the brief.

### **STATEMENT OF THE ISSUE**

Whether Mr. Johansen's investigation to conclusively identify a telemarketer that engaged in illegal conduct renders him inadequate to serve as a class representative or his claims atypical of other class members'.

### **SUMMARY OF THE ARGUMENT**

Private rights of action have long been included in state and federal consumer protection legislation and are crucial to efficient compliance and enforcement. The private right of action creates a unique partnership between the government and the public. It enlists the very consumers the government is charged to protect and incentivizes them – without the assistance of the government – to enforce the law on their own.

Not only do private rights of action efficiently enforce the law, but they also allow limited state and federal resources to be allocated to other societal problems and priorities. Protecting the private right of action is essential to this private/public partnership and to its effective and efficient enforcement of state and federal consumer protection law.

One such crucial consumer protection statute, which includes a private right of action and empowers consumers to protect themselves at their own time and expense, is the Telephone Consumer Protection Act (TCPA). The TCPA was passed by Congress to protect consumers from the intrusion of unwanted telemarketing calls and incentivizes them to efficiently and effectively enforce the law with a private right of action that provides statutory damages for each violation.

Whether it is a governmental or private enforcement action, telemarketers can be held to account only if they can be identified. To avoid responsibility for their illegal acts, telemarketers commonly employ tactics to hide their identities. For example, they often disguise the number they are calling from (“spoofing”) and use fictitious trade names when interacting with consumers. Consumers seeking to enforce the TCPA – per the explicit direction and encouragement of Congress – must often take investigatory steps to accurately identify the legal name of the entity behind the illegal telemarketing calls.

This case concerns the conduct of one such consumer, Ken Johansen, who worked to invoke his rights and enforce the TCPA after receiving illegal telemarketing calls from a telemarketing agent of the defendant Bluegreen Vacations Unlimited, Inc. (“Bluegreen”). Knowing

that it would be his ultimate burden to identify the legal name of the entity behind these calls, Mr. Johansen interacted with the telemarketer with the goal of obtaining a confirmatory e-mail from the telemarketer that would conclusively identify the entity behind the illegal telemarketing calls. In order to obtain that critical confirmatory information, Mr. Johansen feigned interest in purchasing a vacation from Bluegreen. As he actually had no interest in purchasing a vacation and was solely interested in identifying the caller, Mr. Johansen confirmed outdated contact information with the telemarketer. After Mr. Johansen exhausted his investigative efforts to identify Bluegreen as the entity behind the illegal telemarketing calls, Mr. Johansen informed the telemarketer that his phone number was listed on the National Do Not Call Registry. Mr. Johansen then retained counsel and sought to enforce the TCPA not only on his own behalf, but on behalf of all others similarly situated. Mr. Johansen, through counsel, then litigated the case through class certification where, ultimately, his motion for class certification was denied.

The sole basis for the court's denial of Mr. Johansen's motion for class certification was related to the above-described investigation conducted by Mr. Johansen to conclusively identify Bluegreen as the

responsible party behind the calls. Specifically, the district court found that Mr. Johansen was “deceptive” and “dishonest” in his interactions with the telemarketer. He was thus, in the court’s view, inadequate to serve as a class representative, and his claim was not “typical” of the claims of other class members. By taking steps to confirm Bluegreen as the entity behind the illegal telemarketing calls at issue, however, Mr. Johansen was simply doing what Congress instructed and incentivized consumers to do – enforce the law. Mr. Johansen’s investigative efforts to identify Bluegreen as the caller, and then to hold Bluegreen to account on behalf of himself and all others similarly situated, should be celebrated – not scolded.

Perversely, the court’s order protects telemarketers engaged in unlawful conduct from a lawful investigation by a consumer. This contrary view incentivizes telemarketers to hide their identities and punishes consumers for trying to discover them. On one hand, if a consumer cannot identify the telemarketer, the telemarketer will argue that the consumer has failed to carry the burden to identify the illegal calling party and, accordingly, that party cannot be held to account. Conversely, if a consumer takes the time to identify the telemarketer by feigning interest in the call, the consumer has somehow acted

disingenuously and is inadequate to serve as a class representative, and these acts render the consumer's claim atypical. The prevailing party under either outcome is the telemarketer – an outcome in stark contrast to the remedial purposes of the TCPA, a statute designed to punish telemarketers, not to reward them.

Mr. Johansen is a more than adequate class representative and his claims are typical of the class. The court's holding to the contrary was in error and should be reversed.

## ARGUMENT

### **I. Private Rights of Action Are Essential to Consumer Enforcement of the Laws in an Efficient Manner Without Government Assistance or Intervention.**

The TCPA is not the only statute that Congress has empowered consumers to enforce via a private right of action and using the efficiencies of Rule 23 and the class action mechanism. Congress has authorized consumers to act as “private attorneys general” to enforce civil rights laws, *see Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401–02 (1968) (“When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. . . . A Title II suit is thus private in form

only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.”); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 168 (2005); the Fair Housing Act, 42 U.S.C. § 3613(a)(1)(A); the Americans with Disabilities Act, 42 U.S.C. § 12188(a)(1), *see Barnes v. Gorman*, 536 U.S. 181, 185 (2002); the Endangered Species Act, 16 U.S.C. § 1540(g)(1); section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), *see Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 171 (1994); and countless more. What all of these statutes have in common is a legislative recognition that consumers, if incentivized, can enforce these laws on their own without the intervention or assistance of the state or federal government.

The Supreme Court’s explanation of the purposes of the private right of action created by what is known as the “civil RICO” statute, 18 U.S.C. § 1964(c), is particularly revealing as to the underlying public policy behind private rights of action. Specifically, the Supreme Court explained that civil RICO was intended to advance the “congressional objective of encouraging civil litigation to supplement Government

efforts to deter and penalize the respectively prohibited practices.”

*Rotella v. Wood*, 528 U.S. 549, 557 (2000). It further stated that:

The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, “private attorneys general,” dedicated to eliminating racketeering activity. [*Klehr v. A. O. Smith Corp.*, 521 U.S. 179, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997)] citing *Malley–Duff*, 483 U.S., at 151, 107 S.Ct. 2759) (civil RICO specifically has a “further purpose [of] encouraging potential private plaintiffs diligently to investigate”). The provision for treble damages is accordingly justified by the expected benefit of suppressing racketeering activity[.]

*Rotella*, 528 U.S. at 557-58.

As such, when Congress creates a private right of action as it has done for both civil RICO and the TCPA, it is recognizing that the resources of the federal government are inadequate to sufficiently address the problem. Allowing citizens to act privately to enforce the law and then incentivizing them to do so benefits the public by ensuring more efficient enforcement, supplementing governmental resources, and preventing governmental bloat to achieve the law’s ends. Congress also offers specific additional incentives in the form of treble damages or the like to further incentivize “private attorneys general” such as Mr. Johansen to suppress unlawful conduct, something it has done for both

civil RICO claims and for willful violations of the TCPA. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 199 n.2 (1997) (noting that civil RICO “bring[s] to bear the pressure of ‘private attorneys general’ on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective . . . is the carrot of treble damages”).

If consumers can enforce the law on their own, the government can direct its resources to other societal problems. In fact, when properly incentivized to protect themselves and others from unfair conduct, consumers can do an even better job than the federal government. *Compare* Sarah Krouse, *The FCC Has Fined Robocallers \$208 Million. It’s Collected \$6,790.*, Wall. St. J., Mar. 28, 2019, *available at* <https://www.wsj.com/articles/the-fcc-has-fined-robocallers-208-million-its-collected-6-790-11553770803> (reporting that between 2015 and 2019, the FCC fined illegal telemarketers \$208 million but collected only \$6,790), *with Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 659–61 (4th Cir. 2019) (affirming \$61,000,000 jury verdict and trebling judgment in a TCPA case involving illegal telemarketing calls to consumers whose phone numbers were listed on the National Do Not Call Registry).

## II. The TCPA Prohibits Telemarketing Calls to Numbers Listed on the Registry and Incentivizes Consumers with a Private Right of Action to Enforce the Law.

In 1991, Congress enacted the TCPA to regulate the explosive growth of the telemarketing industry. In so doing, Congress recognized that “[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy[.]” Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(5) (1991) (codified at 47 U.S.C. § 227). Perhaps the best known aspect of the TCPA is the creation of the Do Not Call Registry (“the Registry”). *See* 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c)(2). The Registry was established in 2003 to provide a safe haven for consumers from unwanted telemarketing calls. As of January 5, 2022, more than 244 million phone numbers, including Mr. Johansen’s residential number, were listed on the Registry by consumers, making it crystal clear to telemarketers to “Do Not Call.” *See* Press Release, Federal Trade Comm’n, *FTC Issues Biennial Report to Congress on the National Do Not Call Registry* (Jan. 5, 2022), available at <https://www.ftc.gov/news-events/news/press-releases/2022/01/ftc-issues-biennial-report-congress-national-do-not-call-registry>.

To enforce the TCPA, and particularly the provisions of the TCPA relating to the Registry, Congress empowered consumers with a private

right of action and incentivized them to enforce the TCPA by establishing statutory damages for each violation. *See* 47 U.S.C. § 227(c) (creating a private right of action to enforce calls made to numbers listed on the Registry and providing for statutory damages of up to \$500 for a negligent violation and \$1,500 for a knowing or willful violation); *Mey v. Castle Law Grp., PC*, No. 5:19-CV-185, 2020 U.S. Dist. LEXIS 174894, at \*6–7 (N.D. W. Va. Sep. 22, 2020) (“The statutory damages available under the TCPA are, in fact, specifically designed to appeal to plaintiffs’ self-interest and to direct that self-interest toward the public good[.]” (quoting *Cunningham v. Rapid Response Monitoring Services, Inc.*, 251 F. Supp. 3d 1187, 1195 (M.D. Tenn. 2017)); *see also Charvat v. Echostar Satellite, L.L.C.*, 630 F.3d 459, 461 (6th Cir. 2010) (recognizing that consumers enforcing the TCPA “tak[e] on the role of a private attorney general under the [TCPA]”); *Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc.*, 401 F.3d 876, 881 (8th Cir. 2005) (private right of action under TCPA demonstrates congressional intent to incentivize “aggrieved parties to act as private attorneys general”).

Finally, it is well established that the TCPA is a remedial statute that should be given a liberal construction to further its purpose of

protecting consumers' privacy and stopping unwanted, intrusive calls.

*See, e.g., Parchman v. SLM Corp.*, 896 F.3d 728, 738-39 (6th Cir. 2018);

*Daubert v. NRA Grp., L.L.C.*, 861 F.3d 382, 390 (3d Cir. 2017); *Van*

*Patten v. Vertical Fitness Grp.*, 847 F.3d 1037, 1047-48 (9th Cir. 2017);

*Leyse v. Bank of Am.*, 804 F.3d 316, 327 (3d Cir. 2015); *Gager v. Dell*

*Fin. Servs., L.L.C.*, 727 F.3d 265, 271 (3d Cir. 2013).

### III. To Enforce the TCPA, Consumers Must Identify the Defendant.

To exercise the TCPA's private right of action, a consumer must identify the legal name of the entity illegally calling in order to hold it to account. Telemarketers, accordingly, will go to great lengths to disguise their identities.<sup>5</sup> For example, telemarketers routinely use "spoofing" technology to disguise the phone number from which they are calling to prevent their identification. *See* Federal Commc'ns Comm'n, *Caller ID Spoofing* (Mar. 7, 2022), available at <https://www.fcc.gov/spoofing> (spoofing is when a caller deliberately falsifies the information transmitted to the called party's caller ID

---

<sup>5</sup> *See* National Consumer Law Center, *Federal Deception Law* § 7.5.4.2 ("Identifying the Caller and the Principal") (4th ed. 2022) (callers that violate the TCPA often conceal their identity or the identity of the entity on whose behalf they are calling; sometimes a consumer can obtain this information by engaging the caller and asking for more information about the product that is being offered).

display to disguise its identity). Telemarketers will also frequently provide the consumer with a fictitious trade name when asked “who is calling.” *See, e.g.*, Press Release, Federal Trade Comm’n, *FTC Stops Operators of Fake Credit Repair Scheme* (June 21, 2019), available at <https://www.ftc.gov/news-events/news/press-releases/2019/06/ftc-stops-operators-fake-credit-repair-scheme> (FTC takes action against telemarketers using trade names to disguise their identities); *Hossfeld v. Am. Fin. Sec. Life Ins. Co.*, No. 0:19-CV-60597, 2021 WL 2453114, at \*1 (S.D. Fla. June 16, 2021) (noting plaintiff’s allegation that telemarketer hung up when asked for identifying information).

Making matters more challenging for TCPA consumers, courts have found that the mere mention of a defendant’s name on the telemarketing call is an insufficient basis to connect the defendant to the call. *See Scruggs v. CHW Grp., Inc.*, No. 2:20-cv-48, 2020 WL 9348208, at \*7–10 (E.D. Va. 2020) (finding identification of the defendant on the call to be an insufficient basis to hold defendant liable for the call); *Meeks v. Buffalo Wild Wings, Inc.*, No. 17-cv-07129, 2018 WL 1524067, at \*1–5 (N.D. Cal. 2018) (mere mention of defendant in the telemarketing text message is not sufficient to hold defendant to account for a telemarketing violation).

#### **IV. Pretextual Investigations to Enforce the Law Are Common and Appropriate.**

In order to counter a telemarketer's efforts to conceal its identity, private consumers, as well as law enforcement, frequently must engage with the illegal telemarketer and feign interest in the product being sold. Such investigations are common, appropriate, and absolutely necessary to enforce the TCPA. For example, in *FTC v. Lifewatch Inc.*, 176 F. Supp. 3d 757 (N.D. Ill. 2016), the Federal Trade Commission, which is charged with the enforcement of federal telemarketing laws, initiated litigation against the defendant Lifewatch due in part to illegal telemarketing. A key witness for the FTC was Diana Mey, a well-known consumer telemarketing activist who had received illegal telemarketing calls from Lifewatch. *Id.* at 770-71. In order to conclusively identify Lifewatch as the entity behind the illegal calls, Ms. Mey feigned interest in Lifewatch's products and actually made a purchase in order to create an evidentiary trail from the telemarketing calls to the delivery of the products being sold. *Id.* Like the defendant here, Lifewatch responded to Ms. Mey's testimony and evidence with an attack complaining that she "misrepresented to telemarketers that the name 'Lifewatch' appeared on her caller identification in order to elicit

their connection to Lifewatch,” and, accordingly, that her testimony should be ignored. *Id.* at 771. But the court rejected Lifewatch’s efforts to “disparage” Ms. Mey, noting that the telemarketer could not complain “just because Mey (successfully) tricked them into (truthfully) revealing that they sold products for Lifewatch.” *Id.*

The use of pretextual investigations by law enforcement is nothing new. In the 1990s, the FBI teamed up with the American Association of Retired Persons, recruiting senior citizen volunteers to act as victims and to record their conversations with telemarketers in order to expose illegal scammers. *See* United States Fed. Bureau of Investigation, *Operation Senior Sentinel*, available at <https://www.fbi.gov/history/famous-cases/operation-senior-sentinel>; United States Fed. Bureau of Investigation, *Operation Senior Sentinel Podcast* (Dec. 10, 2010), available at <https://www.fbi.gov/audio-repository/news-podcasts-gotcha-operation-senior-sentinel.mp3/view>. The operation resulted in hundreds of arrests. *Id.* The 2012 edition of the Consumer Financial Protection Bureau Supervision and Examination Manual approves of the use of “testers” in the fair lending context to “pose” as “apparently similarly situated applicants” to determine how the lending institution treats them throughout the

lending process. *See* Consumer Fin. Prot. Bureau, *CFPB Supervision and Examination Manual* § VII.B (Oct. 2012), available at [https://files.consumerfinance.gov/f/201210\\_cfpb\\_supervision-and-examination-manual-v2.pdf](https://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf). In short, the use of pretextual investigations to enforce consumer protection laws has long been accepted as an appropriate law enforcement tool.

Similarly, in the context of investigating a TCPA complaint, there is nothing wrong or inappropriate with a consumer feigning interest in the product being illegally marketed in order to conclusively identify the defendant telemarketer or to obtain other important factual evidence that may assist in holding a defendant telemarketer to account. Courts have uniformly rejected similar complaints from telemarketers being held to account by consumers who feigned interest. *See Perrong v. Total Ins. Brokers, L.L.C.*, 2021 WL 3036467, at \*4–5 (M.D. Fla. Apr. 2, 2021) (rejecting argument that plaintiff lacked standing because he engaged with telemarketers as a way to identify the party responsible for the unwanted calls); *Cunningham v. Rapid Response Monitoring Servs.*, 251 F. Supp. 3d 1187, 1194–95 (M.D. Tenn. 2017) (rejecting telemarketer’s complaint that the plaintiff feigned interest in its product; noting that the plaintiff did so to identify the defendant); *Mey*

*v. Venture Data, L.L.C.*, 245 F. Supp. 3d 771, 783-84 (N.D. W. Va. 2017) (rejecting a telemarketer’s complaint that the plaintiff, Diana Mey, acted inappropriately by using her answering machine to record telemarketing calls; noting that “while [defendant] is understandably frustrated by Ms. Mey’s efficacy, she is doing exactly what Congress intended—enforcing the law”); *see also Abramson v. Oasis Power L.L.C.*, No. 2:18-cv-00479, 2018 WL 4101857, at \*5 (W.D. Pa. July 31, 2018) (holding that the fact that the plaintiff may have posed as an interested consumer does not, in itself, negate standing in private TCPA lawsuits), *adopted*, 2018 WL 4095538 (W.D. Pa. Aug. 28, 2018).

**V. Unless Reversed, the Lower Court’s Ruling Will Have a Chilling Effect on TCPA Enforcement, Which Could in Turn Affect the Enforcement of a Wide Array of Consumer Protection Statutes.**

If allowed to stand, the court’s finding that Mr. Johansen, by engaging in a pre-suit investigation in an effort to conclusively identify the telemarketer illegally calling his home, engaged in conduct that was “deceptive” and therefore lacks the requisite “honesty” to serve as a class representative, *see* ECF No. 95 at 8–11, will have a chilling impact on the enforcement of the TCPA, particularly via class actions. Consumers who are particularly motivated to enforce the TCPA not just

for themselves, but for all others similarly situated<sup>6</sup> via a class action, will be wary of feigning interest in an effort to identify the illegal caller if it could result in consumers being labeled inadequate class representatives. The result will be more telemarketers escaping responsibility for conduct that violates the TCPA. As explained by the Fourth Circuit Court of Appeals:

The TCPA was enacted to solve a problem. Simply put, people felt almost helpless in the face of repeated and unwanted telemarketing calls. S. Rep. No. 102-178, at 1-2 (1991). Congress responded with an Act that featured a combination of public and private enforcement, allowing suits both to enjoin intrusive practices and deter future violations through money damages. The features of the private right of action in § 227(c)(5), whether statutory damages or strict liability, evince an intent by Congress to allow consumers to bring their claims at modest personal expense. These same features also make TCPA claims amenable to class action resolution. Dish's arguments, if accepted, would contort a simple and administrable statute into one that is both burdensome and toothless. It would be dispiriting beyond belief if courts defeated Congress' obvious attempt to vindicate the public interest with interpretations that ignored the purpose, text, and structure of this Act at the

---

<sup>6</sup> Notably, "[t]he purpose behind class actions is to eliminate the possibility of repetitious litigation and provide small claimants the means of obtaining redress for claims too small to justify individual litigation." *Diakos v. HSS Sys., L.L.C.*, 137 F. Supp. 3d 1300, 1307 (S.D. Fla. 2015). With \$500 damages per call (or \$1,500 for willful violations) and no provision for attorney's fees, the most typical telemarketing violators, *i.e.*, ones that make a small number of calls to a large group of people, are likely to evade TCPA enforcement in the absence of a motivated class action plaintiff.

behest of those whose abusive practices the legislative branch had meant to curb.

This will not happen. Class adjudication is complicated, and getting it right requires a careful parsing of the claims and the evidence from the start. It also requires striking a balance between efficient administration and fairness to all those affected, whether they be the class members, the defendants, or absent parties who are nonetheless bound by the judgment. The proceedings below reflected just the measured and thorough approach that we might hope for in such demanding situations. For the foregoing reasons, the judgment is *AFFIRMED*.

*Krakauer*, 925 F.3d at 663.

While the application of the ruling appealed would be damaging for the TCPA, the potential of a “spillover” effect from this ruling could be just as devastating for other private right of action statutes such as those listed in Section I of this brief, *supra*. For example, imposing a strict requirement of honesty on citizens investigating racketeering activities is absurd, as civil RICO defendants are particularly unlikely to reveal the pattern of unlawful activities that constitute a civil RICO violation if the “private attorneys general” investigating them must be scrupulously honest about their intention to privately prosecute such offenders with a civil action. Furthermore, the notion that these statutes confer a limited amount of government power on these “private attorneys general” also supports some authorization to deceive. “[I]t has

long been acknowledged . . . that, in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents.” *Lewis v. United States*, 385 U.S. 206, 208–09 (1966); see also *United States v. Peters*, 153 F.3d 445, 464 (7th Cir. 1998) (Easterbrook, J., concurring) (“Police engage in deceit all the time in order to induce suspects to reveal evidence. . . . Deception plays an important and legitimate role in law enforcement.”). While it cannot be said that “private attorneys general” enjoy all powers of law enforcement, the suggestion that even the tool of moderate deception is unavailable to them would unacceptably hinder the investigations that Congress clearly wishes them to perform.

### CONCLUSION

Mr. Johansen’s efforts to identify the illegally calling party should not disqualify him from serving as a class representative. Instead, his diligence should be a factor favoring class certification, as it demonstrates his commitment to represent the best interests of the class. To allow his investigation to defeat class certification would enable the defendant to avoid responsibility for what is alleged to be a *massive* breach of the TCPA involving hundreds of thousands of violations impacting almost 20,000 consumers.

The TCPA is a remedial statute that should be given a liberal construction to further its purpose of protecting consumers' privacy and stopping unwanted, intrusive calls. The decision below does exactly the opposite. It construes the TCPA, and the elements of Rule 23 of the Federal Rules of Civil Procedure, in a manner that protects the telemarketer and precludes approximately 20,000 consumers from enforcing their TCPA-protected privacy rights.

Mr. Johansen is a more than adequate class representative. Like Mr. Johansen, all other members of the class received multiple telemarketing calls from Bluegreen despite having their numbers listed on the Registry. Like Mr. Johansen, all class members seek statutory damages. Any defenses Bluegreen may have to the case are common to the class. The court's ruling that Mr. Johansen was an inadequate class representative and its finding that Mr. Johansen's TCPA claims were not typical of the class due to his alleged "dishonest" conduct were in error and should be reversed.

Respectfully submitted,

/s/ William "Billy" Peerce Howard

William "Billy" Peerce Howard, Esq.

Florida Bar No. 0103330

THE CONSUMER PROTECTION FIRM, PLLC

401 East Jackson Street, Suite 2340

Truist Place

Tampa, FL 33602

Telephone: (813) 500-1500

Facsimile: (813) 435-2369

Billy@TheConsumerProtectionFirm.com

*Attorney for Amici Curiae*

Date: April 20, 2022

## CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(4) because this brief contains 4,788 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and
2. 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 Word in 14-point font in Century Schoolbook font.

/s/ William "Billy" Peerce Howard  
William "Billy" Peerce Howard, Esq.  
Florida Bar No. 0103330  
THE CONSUMER PROTECTION FIRM, PLLC  
401 East Jackson Street, Suite 2340  
Truist Place  
Tampa, FL 33602  
Telephone: (813) 500-1500  
Facsimile: (813) 435-2369  
Billy@TheConsumerProtectionFirm.com

*Attorney for Amici Curiae*

Date: April 20, 2022

## CERTIFICATE OF SERVICE

I certify that on April 20, 2022, this brief was e-filed through the CM/ECF System of the U.S. Court of Appeals for the Eleventh Circuit. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ William "Billy" Peerce Howard

William "Billy" Peerce Howard, Esq.

Florida Bar No. 0103330

THE CONSUMER PROTECTION FIRM, PLLC

401 East Jackson Street, Suite 2340

Truist Place

Tampa, FL 33602

Telephone: (813) 500-1500

Facsimile: (813) 435-2369

Billy@TheConsumerProtectionFirm.com

*Attorney for Amici Curiae*