

No. 23-3826

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACOB HOWARD,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY
SITUATED

Plaintiff-Appellant

v.

REPUBLICAN NATIONAL COMMITTEE,
A POLITICAL ACTION COMMITTEE,

Defendant-Appellee.

On Appeal from the United States
District Court for the District of Arizona
No. 2:23-cv-00993

The Honorable Steven P. Logan, District Court Judge

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

Megan Iorio
Chris Frascella
ELECTRONIC PRIVACY
INFORMATION CENTER
1519 New Hampshire Ave. NW
Washington, DC 20036
(202) 483-1140
iorio@epic.org

February 14, 2024

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* the Electronic Privacy Information Center and the National Consumer Law Center state that they have no parent corporation and that no publicly held corporation owns 10% or more of their stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES..... iv

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT..... 3

ARGUMENT 6

 I. The restriction on artificial and prerecorded voice messages applies to “any call,” including calls sent via MMS. 6

 A. “Any call” includes calls transmitted via MMS..... 7

 B. An MMS message with an audible utterance component is a call that uses a “voice.” 12

 C. The District Court’s distinction between “voice calls” and “text calls” is irrelevant. 13

 D. The TCPA regulates methods of making mass unsolicited calls, not the circumstances of receipt. 17

 E. Consent addresses overbreadth concerns..... 22

 II. Categorically exempting calls sent via MMS from the artificial and prerecorded voice message restriction would harm consumers..... 25

 A. MMS messages containing an artificial or prerecorded voice cause the same harm as other prerecorded voice messages. 26

 B. Affirming the District Court’s loophole would expose consumers to a torrent of video spam..... 31

CONCLUSION..... 37

CERTIFICATE OF COMPLIANCE 38
CERTIFICATE OF SERVICE 39

TABLE OF AUTHORITIES

Cases

<i>ACA Intl. v. Fed. Comm. Comm’n</i> , 885 F.3d 687 (D.C. Cir. 2018).....	36
<i>Aranda v. Caribbean Cruise Line, Inc.</i> , 179 F. Supp. 3d 817 (N.D. Ill. 2016)	21
<i>Arizona State Bd. For Charter Schools v. U.S. Dept. of Educ.</i> , 464 F.3d 1003 (9th Cir. 2006).....	13
<i>Campbell-Ewald Co. v. Gomez</i> , 577 U.S. 153 (2016), <i>as revised</i> (Feb. 9, 2016)	9
<i>Caplan v. Budget Van Lines, Inc.</i> , 2020 WL 4430966 (D. Nev. July 31, 2020)	10, 25, 36
<i>Dickson v. Direct Energy, LP</i> , 69 F.4th 338 (6th Cir. 2023)	22, 34, 38
<i>Facebook, Inc. v. Duguid</i> , 592 U.S. 395 (2021).....	10, 29
<i>Fillichio v. M.R.S. Associates</i> , 2010 WL 4261442 (S.D. Fla. Oct. 19, 2010)	21
<i>Fober v. Mgmt. & Tech. Consultants, LLC</i> , 886 F.3d 789 (9th Cir. 2018).....	28
<i>Gurzi v. Penn Credit, Corp.</i> , 449 F. Supp. 3d 1294 (M.D. Fla. 2020).....	10, 33
<i>Joffe v. Acacia Mortg. Corp.</i> , 121 P.3d 831 (Ariz. App. 1st Div. 2005)	11
<i>Lenorowitz v. Mosquito Squad of Fairfield and Westchester Cnty.</i> , 2022 WL 4367596 (D. Conn. Sept. 21, 2022)	22
<i>Mais v. Gulf Coast Collection Bureau, Inc.</i> , 768 F.3d 1110 (11th Cir. 2014)	28
<i>Mey v. Venture Data, LLC</i> , 2017 WL 10398569 (N.D.W. Va. June 6, 2017).....	22

<i>Moser v. F.C.C.</i> , 46 F.3d 970 (9th Cir. 1995)	32
<i>Natl. Coalition on Black Civic Participation v. Wohl</i> , 661 F. Supp. 3d 78 (S.D.N.Y. 2023)	44
<i>Pinchem v. Regal Med. Group, Inc.</i> , 228 F. Supp. 3d 992 (C.D. Cal. 2017).....	12
<i>Satterfield v. Simon & Schuster, Inc.</i> , 569 F.3d 946 (9th Cir. 2009)	passim
<i>Self-Forbes v. Adv. Call Ctr. Techs., LLC</i> , 754 Fed. App'x 520 (9th Cir. 2018).....	17
<i>Snyder v. Landcar Mgt. LTD</i> , 2023 WL 2614960 (D. Ariz. Mar. 23, 2023).....	11, 25
<i>Trim v. Reward Zone USA LLC</i> , 76 F.4th 1157 (9th Cir. 2023)	passim
<i>U.S. v. Gonzales</i> , 520 U.S. 1 (1997)	11
<i>Van Patten v. Vertical Fitness Group, LLC</i> , 847 F.3d 1037 (9th Cir. 2017).....	28
<i>Williams v. PillPack LLC</i> , 343 F.R.D. 201 (W.D. Wash. 2022).....	37
<i>Ybarra v. Dish Network, LLC</i> , 807 F.3d 635 (5th Cir. 2015).....	21
Statutes	
47 U.S.C. § 227.....	3, 7, 16
Regulations	
<i>In re Implications of Artificial Intelligence Technologies on Protecting Consumers from Unwanted Robocalls and Robotexts, Declaratory Ruling</i> , FCC 24-17 (Rel. Feb. 8, 2024).....	45
<i>In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order</i> , 18 FCC Rcd. 14640 (CGB 2020)	37

<i>In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order</i> , 30 FCC Rcd. 7961 (F.C.C. 2015)	12
<i>In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order</i> , 37 FCC Rcd 13675 (F.C.C. 2022)	passim
<i>In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order</i> , 18 FCC Rcd. 14014 (F.C.C. 2003)	9, 24
<i>In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order</i> , FCC 23-21 (Rel. Mar. 17, 2023).....	40

Other Authorities

Anonymous, <i>I believed the SMS was from my bank – and fell victim to a \$22,000 scam</i> , The Guardian (Jan. 23, 2023)	41
AP News, <i>New Hampshire investigating fake Biden robocall meant to discourage voters ahead of primary</i> (Jan. 22, 2024).....	44
Ars Technica, <i>Thousands scammed by AI voices mimicking loved ones in emergencies</i> (Mar. 6, 2023).....	43
CBS News, <i>Top 3 most popular artificial intelligence scams and how to avoid them</i> (Nov. 17, 2023)	41
CNN, <i>Finance worker pays out \$25 million after video call with deepfake ‘chief financial officer’</i> (Feb. 4, 2024)	43
CS101- Introduction to Computing Principles, Kilobytes Megabytes Gigabytes Terabytes, Stanford	35
CTIA, <i>SMS Interoperability Guidelines</i> (Jan. 1, 2015)	35
Dictionary.com, <i>Voice</i> (2024).....	15
Emma Fletcher, <i>IYKYK: The top text scams of 2022</i> , Fed. Trade Comm’n (June 8, 2023).....	41
FCC, <i>The Public Switched Telephone Network in Transition</i> (Dec. 14, 2011).....	18
FCC, <i>Voice Over Internet Protocol (VoIP)</i> (2024).....	18

Fed. Trade Comm’n, <i>The FTC Voice Cloning Challenge</i> (2024)	43
Forbes, <i>A Voice Deepfake Was Used to Scam a CEO Out of \$243,000</i> (Sept. 3, 2019)	42
FTC, <i>Consumer Sentinel Network Data Book 2022</i> (Feb. 2023).....	40
IRS, <i>IRS reports significant increase in texting scams; warns taxpayers to remain vigilant</i> (Sept. 28, 2022).....	39
Merriam-Webster, <i>Voice</i> (2023).....	15
Press Release, <i>FCC Chairwoman: Make AI Voice-Generated Robocalls Illegal</i> (Jan. 31, 2024).....	42
Reuters, <i>Deepfaking it: America’s 2024 election collides with AI boom</i> (May 30, 2023)	45
S. Rep. No. 102-178 (1991)	19, 23, 32
Telemarketing/Privacy Issues: Hearing Before the Subcomm. on Telecomms. & Fin. of the H. Comm. on Energy & Commerce on H.R. 1304 & H.R. 1305 (1991).....	25
The Automated Tel. Consumer Prot. Act of 1991: Hearing Before the Subcomm. on Commc’ns of the S. Comm. on Commerce, Sci., & Transp., S. Hrg. 102-960 (1991).....	26
Twilio, <i>How to Increase the MMS File Size Limit on Android</i> (Jan. 11, 2023).....	34
Twilio, <i>MMS</i> (2024).....	8

INTEREST OF THE *AMICI CURIAE*

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 and civil liberties issues.¹ EPIC routinely files amicus briefs in Telephone Consumer Protection Act cases² and advocates before the Federal Communications Commission (“FCC”).³

The National Consumer Law Center (“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 Congress, the FCC,

¹ All parties consent to the filing of this brief. In accordance with Rule 29, the undersigned states that no party or party’s counsel authored this brief in whole or in part nor contributed money intended to fund the preparation of this brief. No outside person contributed money intended to fund the preparation of this brief. EPIC 2024 Spring Intern Chloe Le participated in the drafting of this brief.

² See, e.g., https://epic.org/?s=&_content-type=amicus-brief&_topics=robocalls.

³ See, e.g., https://epic.org/?s=fcc&_agency=federal-communications-commission.

and the federal courts. NCLC also maintains a comprehensive analysis on the laws governing robocalls in National Consumer Law Center, *Federal Deception Law*, Chapters 6 and 7 (4th ed. 2022), updated at www.nclc.org/library.

SUMMARY OF THE ARGUMENT

The Telephone Consumer Protection Act (“TCPA”) makes it unlawful for callers to “make any call . . . using . . . an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service” absent an emergency or prior express consent. 47 U.S.C. § 227(b)(1)(A)(iii). This provision has been consistently understood by Congress, the courts, and the Federal Communications Commission (“FCC”) as having broad applicability. In a recent case, *Trim v. Reward Zone USA LLC*, 76 F.4th 1157, 1162 (9th Cir. 2023), the Ninth Circuit recognized that the artificial and prerecorded voice restriction could apply to the types of messages at issue in this case: video sent via Multimedia Messaging Service (“MMS”). Yet, the District Court categorically exempted MMS messages from the artificial and prerecorded voice restriction. The decision below incorrectly analyzed the text, history, and purposes of the TCPA, and failed to appreciate the consequences of exempting MMS messages from the law.

The restriction on artificial and prerecorded voice messages applies to “any call,” including calls sent via MMS. Although Congress did not define the term “call,” courts and agencies have universally held

that the method of initiating or transmitting a call is irrelevant, and that text messages are “calls” for the purposes of the TCPA.

The term “voice” also does not exclude MMS messages. As the Court recognized in *Trim*, the term “voice” refers to the audio component of a call, not the technology used to transmit or receive the call. MMS calls can have an audio component, and so can be made using a prerecorded voice.

The District Court below made a major misstep by misreading “voice” to mean “voice call,” an ambiguous term that could mean either a call with a voice component (consistent with *Trim*) or the voice-only call historically transmitted and received through a telephone handset (inconsistent with text, history, and precedent). The District Court then used the latter interpretation to establish a false distinction between MMS (text) calls and voice calls. This equivocation can be avoided by sticking to the plain text of the statute—“make a call . . . using a prerecorded voice”—instead of reading in a term—“voice call”—that doesn’t appear and that is ambiguous.

The District Court also conjured a requirement that artificial and prerecorded voice messages must automatically play for the called

party, which has no basis in the text, purpose, or history of the TCPA, and is inconsistent with FCC and court decisions finding that voicemails are calls subject to the artificial and prerecorded voice restriction. The TCPA regulates ways of making a call, not circumstances of receipt. The called parties' actions are irrelevant for determining liability; what matters is that the caller made a call using proscribed technology without consent.

The District Court's concerns regarding overbreadth could have been addressed through other interpretive means than creating a glaring loophole in the artificial and prerecorded voice restriction. In particular, the District Court overlooked the significance of consent in negating the risk of casual violations.

In fact, MMS messages that include an artificial or prerecorded voice inflict the same harm on consumers as other artificial or prerecorded calls. In cases involving Internet-to-phone calling, ringless voicemail, and soundboard technology, both the FCC and courts have consistently recognized that the harm from calls using artificial and prerecorded voices stems from the nuisance of receiving such a call, the prodding to listen to the contents of an unwanted junk call, and the

inability to have a genuine back-and-forth with the caller, not with whether the message automatically plays or the specific technology used to transmit the call.

Affirming the District Court’s decision could lead to a flood of video and audio spam targeting consumers. The increase in MMS scams and unsolicited messages, combined with the rise of generative AI, deepfakes, and their use in financial crimes and voter suppression, underscores the need for strong enforcement of the restriction on artificial and prerecorded voice messages.

Because the restriction on artificial and prerecorded voice messages extends to all types of calls, and artificial or prerecorded voice messages sent via MMS pose a real threat to phone subscribers, the Ninth Circuit should correct the District Court’s erroneous interpretation of the TCPA.

ARGUMENT

I. THE RESTRICTION ON ARTIFICIAL AND PRERECORDED VOICE MESSAGES APPLIES TO “ANY CALL,” INCLUDING MMS CALLS.

The text of the TCPA is clear: it is illegal to make “any call . . . using an artificial or prerecorded voice” absent an emergency or prior

express consent. 47 U.S.C. § 227(b)(1). Because MMS messages are a “call” and can include media with an artificial or prerecorded audible utterance, they can be calls made “using an artificial or prerecorded voice.”

Despite this simple application of the statute’s text, the District Court erred in establishing what amounts to a categorical exemption of MMS messages from the TCPA’s artificial and prerecorded voice restriction. It fabricated a distinction between “text calls” and “voice calls,” and determined that prerecorded messages must automatically play for the called party. Neither conclusion has any basis in the statute’s text, history, or its interpretations by courts and the FCC. While the District Court justified its interpretation by citing fears of overbreadth, these concerns are addressed through the statute’s consent requirement. As there is no basis for the District Court’s exclusion of MMS messages from half of the section’s restrictions, this Court should reverse.

A. “Any call” includes calls transmitted via MMS.

The TCPA’s restriction on *any* call using an artificial or prerecorded voice includes MMS messages. There is no basis in the

statute for treating one *type* of call, like MMS, differently because of the technology used to transmit the call.

MMS, or “Multimedia Messaging Service,” is a technology used to transmit multimedia content like photos, audio, and video over the cellular network. Twilio, *MMS* (2024).⁴ MMS is an extension of SMS, or “Short Message Service,” which transmits text-only messages over the cellular network. *Id.* Because MMS builds off the SMS protocol, the two services are often grouped together and called “text messaging,” even though MMS messages are more than just text.

Though Congress did not define the term “call” in the TCPA, courts and agencies have universally treated text messages as “calls” for the purposes of this provision. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 156 (2016), *as revised* (Feb. 9, 2016) (“A text message to a cellular telephone, it is undisputed, qualifies as a ‘call’ within the compass of § 227(b)(1)(A)(iii).”); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 FCC Rcd. 14014, 14115 at ¶ 165 (F.C.C. 2003) (“2003

⁴ <https://www.twilio.com/docs/glossary/what-is-mms>.

FCC Order”) (finding that the restriction on autodialed or prerecorded messages “encompasses both voice calls and text calls to wireless numbers”); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (“[W]e find that the FCC’s interpretation of the TCPA is reasonable, and therefore afford it deference to hold that a text message is a ‘call’ within the TCPA.”).⁵

The term “call” means “to communicate with or try to get into communication with a person by a telephone.” *Satterfield*, 569 F.3d at 953–54. Courts have found that the method of transmitting the call—traditional phone lines, voice over internet protocol (VoIP), or SMS—is immaterial so long as the caller’s action is an *attempt* to “get into communication.” *Gurzi v. Penn Credit, Corp.*, 449 F. Supp. 3d 1294, 1299 (M.D. Fla. 2020) (quoting *Satterfield*, 569 F.3d at 953–54); *see also*, *Caplan v. Budget Van Lines, Inc.*, 2020 WL 4430966, at *4 (D. Nev. July 31, 2020) (considering the “method of delivery” improperly “elevates form over substance”). Like telephone calls, SMS messages, and

⁵ Though the Supreme Court in *Facebook, Inc. v. Duguid*, 592 U.S. 395 (2021), implied that this question remained unresolved, no court has found that text messages are *not* calls.

voicemail messages, MMS messages are communication made by telephone. *E.g.*, *Satterfield*, 569 F.3d at 953–54 (SMS messages are calls); *Joffe v. Acacia Mortg. Corp.*, 121 P.3d 831, 836 (Ariz. App. 1st Div. 2005) (email to text messages are calls); *Snyder v. Landcar Mgt. LTD*, 2023 WL 2614960, at *3 (D. Ariz. Mar. 23, 2023) (ringless voicemail messages are calls).

The fact that Congress said “*any* call” supports this broad interpretation. The modifier “any” has “an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’” *U.S. v. Gonzales*, 520 U.S. 1, 5 (1997) (citing Webster’s Third New International Dictionary 97 (1976). “Any call” includes “all kinds of calls” without exception or differentiation. *Pinchem v. Regal Med. Group, Inc.*, 228 F. Supp. 3d 992, 997 (C.D. Cal. 2017) (finding that the term “*any* call” supports a broad interpretation of this provision).

Indeed, the FCC has rejected the reasoning adopted by the District Court that “text messages” are not a type of “call” in certain contexts due to their dissimilarity to traditional telephone calls. In 2015, a petition to the FCC asserted that the FCC’s “affirmation that text messages are the same as voice calls may make sense for many

purposes under the TCPA, but perhaps does not hold in all cases. Text messages are more akin to instant messages or emails than voice calls,” and argued that “some limitations and concerns under the TCPA that are appropriate for voice calls may need to be approached differently for text messages.” *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (F.C.C. 2015), at ¶ 107 (“2015 FCC Order”). In response, the FCC found no uncertainty on this issue, noting it had already determined that text messages are calls under the TCPA. *Id.* at 105. According to the FCC, asking for an exception for text messages in any context was tantamount to requesting that the agency overrule its past determination that text messages are calls, and therefore inappropriate. *Id.*

As courts “are not vested with the power to rewrite the statutes,” *Arizona State Bd. For Charter Schools v. U.S. Dept. of Educ.*, 464 F.3d 1003, 1007 (9th Cir. 2006), the District Court should not have drawn its own line between text messages and “voice calls” when the text of the statute unambiguously rejects such an approach.

B. An MMS message with an audible utterance component is a call that uses a “voice.”

Nor does the term “voice” provide support for distinguishing between text messages and traditional telephone calls. As this Court set out in *Trim*, the term “voice” refers to the audible component of a call, not the type of technology used to transmit the call. *Trim*, 76 F.4th at 1162. *Trim* specifically left open whether an MMS message with an audible component could be considered a call made using a prerecorded voice. *See id.* at 1163 n.4. So long as an MMS message contains an audible utterance component, it has a “voice” for the purposes of the TCPA.

In *Trim*, this Court determined that text messages without audible sounds do not use a “voice.” *Id.* at 1162. While the text message at issue in *Trim* used only written words, not all text messages are text-only messages. MMS messages can deliver a variety of media, all of which can include audible components.

The *Trim* Court acknowledged that MMS messages could include an audio component. The Court said that “a ‘text’ call could come via MMS . . . which could include audio sound with an artificial or

prerecorded voice.” *Id.* at 1163 n.4. The *Trim* Court’s reasoning thus did not hinge on the different methods of transmitting calls—telephone call verses text message—but on whether the call contained an audio component or only text.

Dictionary definitions, including ones examined by the *Trim* Court, show that the term “voice” means an audible human utterance. *See id.* at 1162 (citing, *e.g.*, Merriam-Webster, *Voice* (2023) (a “voice” is a “sound produced by vertebrates by means of lungs, larynx, or syrinx, especially . . . by human beings.”));⁶ *see also* Dictionary.com, *Voice* (“the sound or sounds uttered through the mouth of living creatures, especially of human beings in speaking, shouting, singing, etc.”) (2024).⁷ Because the video file sent via MMS in this case included audible human speech, it was a call that used a “voice.”

C. The District Court’s distinction between “voice calls” and “text calls” is irrelevant.

The District Court found that MMS calls could not use an artificial or prerecorded voice—not because MMS calls cannot include

⁶ <https://www.merriam-webster.com/dictionary/voice>.

⁷ <https://www.dictionary.com/browse/voice>.

an audible utterance, but because MMS calls are “text calls” that do not automatically play an artificial or prerecorded voice message upon receipt, rather than “voice calls.” This amounts to a categorical exemption of MMS calls from the artificial and prerecorded voice restriction.

There are two major problems with the District Court’s reasoning. First, the term “voice call” does not appear in the TCPA’s text. Second, the term “voice call” is ambiguous, and the District Court conflated its two meanings in deciding that MMS calls cannot use a “voice.”

The text of the TCPA says that it is illegal to make any “call . . . using an artificial or prerecorded voice.” 47 U.S.C. § 227(b)(1). According to the plain text of the statute, then, the test is (1) whether the person made a call and (2) whether the message contained an artificial or prerecorded voice. *See Self-Forbes v. Adv. Call Ctr. Techs., LLC*, 754 Fed. App’x 520, 522 (9th Cir. 2018) (unpublished) (listing elements of a TCPA claim). The District Court instead read the statute as saying that “artificial or prerecorded voice *calls*” are prohibited and used a different test: (1) did the person make a “voice call,” and (2) was the voice artificial or prerecorded? Because MMS calls are “text calls”

that, unlike “voice calls,” do not automatically play an artificial or prerecorded voice message upon receipt, the lower court found that MMS calls cannot transmit an artificial or prerecorded voice.

The District Court should not have read “voice call” into the statute and should not have asked whether the call at issue was a “voice call.” The term “voice call” is atextual—the TCPA does not use it. It is also ambiguous. “Voice call” can mean that the call contains a “voice” or an audible utterance. This understanding is consistent with *Trim*, along with the text, history, and purpose of the TCPA. But “voice call” can also refer to the method of call transmission. A voice call is thought of as analogous to a traditional telephone call—a call made and received using a handset and transmitted over the switch network. FCC, *The Public Switched Telephone Network in Transition* (Dec. 14, 2011).⁸ Today, voice calls are also transmitted over cellular networks and VoIP and can be received on a computer and other non-handheld devices. FCC, *Voice Over Internet Protocol (VoIP)* (2024).⁹ Voice calls are often

⁸ <https://www.fcc.gov/news-events/events/2011/12/the-public-switched-telephone-network-in-transition>

⁹ <https://www.fcc.gov/general/voice-over-internet-protocol-voip>

contrasted with text messages because they use different protocols to transmit communications.

The District Court incorrectly used the call-transmission sense of the term “voice call” to contrast it with “text calls” and exclude MMS messages from the restriction on calls using an artificial and prerecorded voice. But as discussed above, MMS calls can transmit voices via audio and video files. So while MMS calls are technically not “voice calls” in the call-transmission sense because they are transmitted using an extension of the SMS protocol, they can still use a “voice.” As such, they should be subject to the restriction on artificial and prerecorded voice messages.

Furthermore, Congress intended “voice” to refer to the composition of the message, not the method of transmission. Throughout the TCPA’s legislative history, Congress constantly used the terms “messages” and “prerecorded voice messages” interchangeably with the term “prerecorded voice.” *E.g.*, S. Rep. No. 102-178, at 3, (1991) (“The bill as introduced proposed to restrict artificial or prerecorded messages to residential consumers and to emergency lines, and to place restrictions on unsolicited advertisements

delivered via fax machine.”), 8 (“The bill prohibits telemarketers from using artificial or prerecorded voice messages to residential consumers without the prior express consent of the recipient of the call.”). Viewed in this context, the term “voice” references a message containing an audible utterance—whether that message is sent using a text call or voice call is entirely immaterial.

Because the term “voice call” is atextual, and because the term often refers to the call transmission method, which is irrelevant, the Court should not base its analysis on the meaning of “voice call,” but instead should analyze the actual text of the statute (“a call . . . using an artificial or prerecorded voice”) or use the term “artificial or prerecorded voice *message*.” The actual text and intent behind that text, properly interpreted, demonstrate clearly that there is no good reason to exclude MMS messages from the artificial and prerecorded voice restriction simply because they are “text calls.”

D. The TCPA regulates methods of making mass unsolicited calls, not the circumstances of receipt.

The District Court also ruled that the audible component of a text message must play automatically or be “thrust” upon the recipient. The District Court conjured this requirement out of thin air—it finds no

support in any court, agency, or scholarly interpretation that *amici* can identify. The TCPA regulates the actions of people *making* a call. The actions of the recipient are immaterial. Requiring the sound to “thrust” itself on the recipient of the message turns the statutory language on its head, and improperly places the burden on the wrong party.

“[I]t is the mere act of placing the call that triggers the statute.” *Fillichio v. M.R.S. Associates*, 2010 WL 4261442, at *3 (S.D. Fla. Oct. 19, 2010) (analyzing *Satterfield*, 569 F.3d., at 953–54). Courts have found that successful delivery of a message containing a prerecorded voice triggers TCPA liability, regardless of whether the called party ever listens to it. *See, e.g., Aranda v. Caribbean Cruise Line, Inc.*, 179 F. Supp. 3d 817, 825 (N.D. Ill. 2016) (establishing that, even under the Fifth Circuit’s standard in *Ybarra v. Dish Network, LLC*, 807 F.3d 635 (5th Cir. 2015), a called party receiving but not listening to a prerecorded voice message has still suffered a harm under the TCPA, as receiving the call itself triggers liability); *Dickson v. Direct Energy, LP*, 69 F.4th 338, 345 (6th Cir. 2023) (finding that the TCPA injury occurs when a defendant interjects itself into the plaintiff’s private sphere); *Lenorowitz v. Mosquito Squad of Fairfield and Westchester Cnty.*, 2022

WL 4367596, at *5 (D. Conn. Sept. 21, 2022) (“[I]t is sufficient under the TCPA . . . to demonstrate that a message containing a pre-recorded voice was successfully delivered”); *Mey v. Venture Data, LLC*, 2017 WL 10398569, at *10 (N.D.W. Va. June 6, 2017) (“[C]ourts have held that it is the act of initiating a call, whether or not it was received, that gives rise to liability for violations of § 227(b).”).

These decisions are well-supported by the context and intent of the statute. Congress used the term “prerecorded voice” to refer to the methodology of using a recorded message (in lieu of a live voice) to disseminate communications to vast numbers of unwilling recipients. This aligns with the purpose of the TCPA, which is to regulate the technology enabling mass unsolicited calls and protect consumers from the nuisance and privacy invasion of unsolicited and unwanted calls. *See* S. Rep. 102-178, at 2 (1991).

Courts’ and the FCC’s treatment of voicemail messages demonstrates that it is irrelevant whether a prerecorded message plays automatically or whether the called party can choose not to listen to the message. Like MMS messages that transmit audio and video, voicemail is not listened to in real time and does not play automatically. Ringless

voicemails, which go straight to voicemail without giving the recipient the opportunity to pick up, are even more analogous, because there is no way to listen to the prerecorded message at the time the call is transmitted to the called party.

In 2003, the FCC determined that prerecorded messages delivered to answering machines were within the scope of the TCPA's restrictions. After assessing the congressional record, it found that: "Congress determined that such prerecorded messages cause greater harm to consumers' privacy than telephone solicitations by live telemarketers. The record reveals that consumers feel powerless to stop prerecorded messages largely because they are often delivered to answering machines and because they do not always provide a means to request placement on a do-not-call list." 2003 FCC Order, 18 FCC Rcd. at 14097, ¶ 139 ; *accord. In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, 37 FCC Rcd 13675 (F.C.C. 2022) ("RVM Order").¹⁰ District courts within this circuit have unanimously applied the FCC's interpretation, finding

¹⁰ https://docs.fcc.gov/public/attachments/FCC-22-85A1_Rcd.pdf

voicemails and ringless voicemails can constitute “calls . . . using . . . an artificial or prerecorded voice.” *See, e.g., Snyder*, 2023 WL 2614960, at *3 (“[Ringless Voicemail Messages] fall within the scope of the TCPA’s definition of a call”); *Caplan*, 2020 WL 4430966, at *4 (“[Ringless Voicemail Messages] are calls as defined by the TCPA.”).

The inclusion of pagers in the restriction on artificial and prerecorded messages shows that it is irrelevant whether the called party is able to listen to the message *at all*. While some pagers, called voice pagers, were able to receive voice messages, most pagers only captured the phone number of the called party, so they were incapable of receiving a voice message. The TCPA’s legislative history includes pager companies explaining that their customers found artificial and prerecorded calls not only annoying but confusing— and sometimes soul crushing—precisely because they were not able to receive the message. *See Telemarketing/Privacy Issues: Hearing Before the Subcomm. on Telecomms. & Fin. of the H. Comm. on Energy & Commerce on H.R. 1304 & H.R. 1305*, at 116 (1991). For example, patients waiting for transplants had beepers that would alert them when their transplant organ was available, and when these pager customers received a

robocall, they often thought they were receiving the call letting them know their lives were saved, only to find they were mistaken. *See The Automated Tel. Consumer Prot. Act of 1991: Hearing Before the Subcomm. on Commc'ns of the S. Comm. on Commerce, Sci., & Transp., S. Hrg. 102-960, at 45 (1991) (Statement of Thomas Stroup).*

These examples show that it is immaterial whether an artificial or prerecorded message plays automatically upon receipt. The violation occurs when the call is made using the prohibited technology; the actions of the called party are irrelevant.

E. Consent addresses overbreadth concerns.

Part of the District Court's motivation for exempting MMS calls from the artificial and prerecorded voice restriction was a fear that including them would result in overbroad liability. But the District Court failed to consider how consent would limit the scope of liability. Because the TCPA is a remedial statute, courts should construe it broadly to ensure that it accomplishes Congress' purposes, not narrowly due to unfounded fears of overbroad liability.

Consent is a significant guardrail against overbroad TCPA liability. Almost all calls amongst acquaintances could not incur TCPA

liability because the parties have consented to the calls. For non-telemarketing and non-advertising calls, prior express consent is presumed where a person gives their phone number to the person who initiates a prerecorded call. *See, e.g.*, 2015 FCC Order at 8098, ¶ 52;¹¹ *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1045 (9th Cir. 2017)(“There is a rebuttable presumption that a person who gives his phone number to another person has given consent . . .”); *accord. Fober v. Mgmt. & Tech. Consultants, LLC*, 886 F.3d 789, 792 (9th Cir. 2018). Further, when someone calls another person, they consent to receive a response. 2015 FCC Order, at ¶ 106; *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1118 (11th Cir. 2014). Thus, people who have exchanged numbers or text messages have consented to receive non-telemarketing and non-advertising artificial and prerecorded voice calls from each other, absent any evidence limiting that consent.

¹¹ <https://www.fcc.gov/document/tcpa-omnibus-declaratory-ruling-and-order>.

The defendant below raised the specter of people suing individuals for mistakenly sending them an audio or video file. But *amici* could not find a single case where someone sued an individual over an artificial or prerecorded call sent to a wrong number. Prosecuting such a case would not be worth the time or effort for a *pro se* plaintiff, let alone a lawyer. There are also technological guardrails that prevent people from sending videos to wrong numbers: users typically send media to someone in their contacts list, they do not type in a phone number.

Far from imposing liability for every video sent via MMS, the artificial and prerecorded voice restriction only applies when someone with no prior calling or texting relationship with the called party sends an unsolicited artificial or prerecorded voice audio or video message. Absent evidence that imposing liability for MMS messages would create widespread litigation risk for ordinary phone users—which the record below certainly does not establish—this case cannot be analogized to *Facebook, Inc. v. Duguid*, 592 U.S. 395 (2021). Indeed, the *Duguid* Court acknowledged that the artificial and prerecorded voice restriction is “broader” than the autodialer restriction that the Court decided to construe more narrowly. *Id.* at 408 n.8.

The TCPA is a remedial statute, and “should be construed broadly to effectuate its purposes.” *Satterfield*, 319 F. Supp. 3d at 911. A remedial statute shouldn’t be construed narrowly based on hypothetical cases that, in all likelihood, will never be brought—particularly when the harm to consumers in failing to assign liability for MMS messages is all too real.

II. CATEGORICALLY EXEMPTING CALLS SENT VIA MMS FROM THE ARTIFICIAL AND PRERECORDED VOICE MESSAGE RESTRICTION WOULD HARM CONSUMERS.

Because the text is clear that videos featuring human speech sent via MMS can be calls using artificial or prerecorded voice, the Court need not consider policy arguments supporting one interpretation over another. But policy also weights in Plaintiffs’ favor. The types of calls at issue in this case cause the same types of harm as other artificial and prerecorded voice messages. Given the rise in generative artificial intelligence, creating a categorical exemption for artificial and prerecorded voice messages sent via MMS would create a loophole that would allow bad actors to use the cellular network to perpetrate fraud and disrupt the democratic process.

A. MMS messages containing an artificial or prerecorded voice cause the same harm as other prerecorded voice messages.

The harm caused by unsolicited artificial and prerecorded voice messages is the same regardless of the technology used to transmit or deliver the message. The analysis of harms from ringless voicemail, Internet-to-phone calling, and soundboard technology are especially relevant in assessing the harm from artificial and prerecorded voice messages sent via MMS.

Congress included the restriction on artificial and prerecorded voice messages, in addition to the audiodialer restriction, to protect phone subscribers from unrelenting, unresponsive, automated call campaigns. As this Court has observed, Congress recognized that automated calls were “more of a nuisance and a greater invasion of privacy than calls placed by ‘live’ persons’ because such calls ‘cannot interact with the customer except in preprogrammed ways’ and ‘do not allow the caller to feel the frustration of the called party.’” *Moser v. F.C.C.*, 46 F.3d 970, 972 (9th Cir. 1995) (citing to S. Rep. No. 102-178, at 1972 (1991)) (internal citations omitted). This Court has also found that, generally, “a voice message or a text message are not

distinguishable in terms of being an invasion of privacy.” *Satterfield*, 569 F.3d at 951–52, 954.

The harm caused by prerecorded voice messages sent via MMS is analogous to the harm caused by ringless voicemail. Like MMS messages, ringless voicemail messages are not played automatically upon call transmission. Instead, the called party receives a voicemail notification alert, which nudges them to play the message. *See RVM Order*, at ¶ 11. According to the FCC, ringless voicemail is an invasion of privacy because the voicemail notification is an intrusion. *Id.* at ¶ 16. The time a consumer spends reviewing the message is also an intrusion upon their time and privacy. *Id.* The same kind of harm also results from receipt of an MMS message: consumers receive a text message notification that invades their privacy, and they are nudged to review an audio or video file, which intrudes upon their time and privacy. But both ringless voice mail and MMS messages are meant to nudge or compel consumers into listening to the message, into clicking “play,” out of curiosity or a felt need to review all communications that come into one’s phone, which is not dissimilar to the ringing of a telephone handset that compels consumers into picking up and listening. As one

district court noted in the context of ringless voicemail, it doesn't "matter how the prerecorded message gets to its final destination, there is a clear attempt to 'get into communication' with a 'telephone number assigned to a ... cellular telephone service.'" *Gurzi*, 449 F. Supp. 3d at 1299 (citing to the Ninth Circuit's holding in *Satterfield*, 569 F.3d at 953–954). It is this attempt to compel the called party to listen to their message that causes harm, even if the consumer ignores the alert or deletes the message without reviewing it.

The FCC decided that ringless voicemails were calls under the TCPA for one further relevant reason: because deciding otherwise would expose consumers to a flood of unwanted calls, which could potentially overwhelm their voicemail inboxes. *See* RVM Order at ¶ 9. The Sixth Circuit has agreed with this reasoning. *See Dickson*, 69 F.4th at 342 n. 1 (citing to RVM Order). Similarly, exempting MMS from the restriction would allow callers to inundate consumers' phones with spam and fraudulent messages. Video messages in particular can take up a lot of space on a phone—much more space than a voicemail or SMS message—and spam videos could easily overwhelm a cellphone's storage capacity. *See, e.g.,* Twilio, How to Increase the MMS File Size

Limit on Android (Jan. 11, 2023)¹² (noting each MMS message could take up 1.2 MB or more); CTIA, SMS Interoperability Guidelines 39 (Jan. 1, 2015)¹³ (SMS max size 140 bytes); CS101- Introduction to Computing Principles, Kilobytes Megabytes Gigabytes Terabytes, Stanford¹⁴ (1 MB = 1 million bytes). Consumers would have to spend time deleting these spam videos to prevent them from filling up their storage—another invasive harm.

The FCC’s and courts’ determination about ringless voicemail mirrors their prior reasoning regarding Internet-to-phone and app-to-phone messaging. According to the FCC, these messaging methods were “functionally equivalent to phone-to-phone text messaging;” “the potential harm is identical” to consumers no matter the technology used to deliver the message—they “pose the same cost and annoyance to consumers, regardless of whether they originate from a phone or the

¹² <https://support.bandwidth.com/hc/en-us/articles/360014235473-What-are-the-MMS-file-size-limits>

¹³ https://api.ctia.org/docs/default-source/default-document-library/sms_interoperability_guidelines_v3-2-2_jan_2015-as-posted.pdf.

¹⁴ <https://web.stanford.edu/class/cs101/bits-gigabytes.html> (last visited Feb. 13, 2024).

Internet.” RVM Order at ¶ 9 (citing to 2015 FCC Order, 30 FCC Rcd at 8020, ¶ 115); *accord. Caplan*, 2020 WL 4430966, at *4 (analogizing from FCC internet-to-phone ruling that RVMs are TCPA-protected calls because they are a nuisance delivered to the recipient’s phone by means of their phone number, regardless of the method of delivery).¹⁵

Moreover, the harm from unsolicited artificial and prerecorded voice messages can be present even when there is a live agent on the other line sending the messages in real-time. The FCC found that, in the case of soundboard technology, the TCPA’s protections applied regardless of whether the prerecorded message was sent by a live person the “mere presence of a live operator...does not negate the clear statutory prohibition against initiating a call using a prerecorded or artificial voice.” *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and*

¹⁵ Arguments about “capacity” to autodial numbers and other portions of this ruling were overturned by the D.C. Circuit, but the Internet-to-phone portions were untouched. *See ACA Intl. v. Fed. Comm. Comm’n*, 885 F.3d 687, 695-96 (D.C. Cir. 2018).

Order, 18 FCC Rcd. 14640, 14644 at ¶ 12 (2020); *accord. Williams v. PillPack LLC*, 343 F.R.D. 201, 210 (W.D. Wash. 2022).

Courts and the FCC have consistently found that the harm caused by sending an artificial or prerecorded voice message is the same no matter how the call is transmitted. Here, a prerecorded voice message was directed to a phone using MMS. The message notification and the message itself intruded upon the consumer's time and privacy, and so caused precisely the harm that the TCPA is meant to protect against.

B. Affirming the District Court's loophole would expose consumers to a torrent of video spam.

A loophole in the artificial and prerecorded voice restriction would almost surely be exploited. As discussed below, more and more scams are perpetrated through MMS. Generative artificial intelligence will make video and audio message scams even more prevalent—and dangerous. There are already troubling examples of fraudsters using deepfakes to scam people and influence elections, including in automated call campaigns.

Federal agencies and courts broadly apply this restriction in large part because not doing so would expose a loophole in the regulation that

could inundate consumers with unsolicited messages. As the Sixth Circuit noted last year, to hold that ringless voicemails are not calls: “would elevate form over substance, thwart Congressional intent that evolving technologies not deprive mobile consumers of the TCPA’s protections, and potentially open a floodgate of unwanted voicemail messages to wireless consumers.” *Dickson*, 69 F.4th at 342 n. 1 (citing separately to RVM Order at ¶¶ 1, 10, 14 (Rel. Nov. 21, 2022), for the same principle).

Creating a loophole for MMS messages will also undermine consumers’ ability to stop callers from sending them artificial and prerecorded voice messages via MMS. If the called party’s consent is not required, then the caller will have no need to respect a consumer’s opt-out from future messages. This would fundamentally undermine the TCPA’s consumer protection purpose and deterrent function for an entire communications channel.

Federal agencies are beginning to recognize that MMS, like other text messaging services, is increasingly being used to perpetrate scams, and consumers need to be protected. *See, e.g., IRS, IRS reports significant increase in texting scams; warns taxpayers to remain vigilant*

(Sept. 28, 2022) (noting increase in MMS/SMS/text scams)¹⁶; *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, FCC 23-21 (Rel. Mar. 17, 2023) (proposing rules to protect consumers from text-based scams, including those sent via MMS messages).¹⁷ Indeed, the Consumer Sentinel 2022 Data Book reported that consumers received more than double the number of unsolicited text messages as telemarketing calls. FTC, Consumer Sentinel Network Data Book 2022, at App'x B3 (Feb. 2023).¹⁸ These scams are also becoming increasingly personalized, such as including spoofing specific bank numbers, to induce consumers to engage. *See, e.g.*, Emma Fletcher, *IYKYK: The top text scams of 2022*, Fed. Trade Comm'n (June 8, 2023);¹⁹ Anonymous, *I believed the SMS was from my*

¹⁶ <https://www.irs.gov/newsroom/irs-reports-significant-increase-in-texting-scams-warns-taxpayers-to-remain-vigilant>.

¹⁷ <https://docs.fcc.gov/public/attachments/FCC-23-21A1.pdf>.

¹⁸ https://www.ftc.gov/system/files/ftc_gov/pdf/CSN-Data-Book-2022.pdf.

¹⁹ <https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2023/06/iykyk-top-text-scams-2022> (noting top scams include copycat bank fraud prevention alerts, fake package delivery problems, and phony job offers).

bank – and fell victim to a \$22,000 scam, The Guardian (Jan. 23, 2023).²⁰

Videos sent via MMS can be used for particularly nefarious purposes, especially when generated using artificial intelligence tools. Fraudsters are already using AI to enhance scams. *See, e.g., CBS News, Top 3 most popular artificial intelligence scams and how to avoid them* (Nov. 17, 2023);²¹ Press Release, *FCC Chairwoman: Make AI Voice-Generated Robocalls Illegal* (Jan. 31, 2024).²² Deepfake phone calls began as a method to target executives and have since become a threat to the average consumer by impersonating a family member in distress. *See Forbes, A Voice Deepfake Was Used to Scam a CEO Out of \$243,000*

²⁰ <https://www.theguardian.com/commentisfree/2023/jan/24/i-believed-the-sms-was-from-my-bank-and-fell-victim-to-a-22000-scam>

²¹ <https://www.cbsnews.com/newyork/news/top-3-most-popular-artificial-intelligence-scams-and-how-to-avoid-them/> (noting cloned voices of loved ones, “deepfake” photos or videos, and real-looking personalized emails).

²² <https://www.fcc.gov/document/fcc-chairwoman-make-ai-voice-generated-robocalls-illegal> (“The agency asked questions on how AI might be used for scams that arise out of junk calls, by mimicking the voices of those we know, and whether this technology should be subject to oversight under the TCPA.”)

(Sept. 3, 2019);²³ Ars Technica, *Thousands scammed by AI voices mimicking loved ones in emergencies* (Mar. 6, 2023).²⁴ Artificial intelligence can supercharge video-based scams, as it already has done with audio-based scams. See CNN, *Finance worker pays out \$25 million after video call with deepfake ‘chief financial officer’* (Feb. 4, 2024);²⁵ Fed. Trade Comm’n, *The FTC Voice Cloning Challenge* (2024).²⁶

Beyond fraud concerns, MMS calls transmitting deepfake audio and video can be used to spread misinformation, especially in an election year. Robocalls have been used in recent elections to perpetrate voter suppression on a mass scale. See, e.g., *Natl. Coalition on Black Civic Participation v. Wohl*, 661 F. Supp. 3d 78, 113 (S.D.N.Y. 2023) (finding robocall campaign targeting Black voters amounted to voter intimidation). This is exacerbated by ever-improving, ever-prolific deepfakes, such as one recent robocall campaign using a deepfake of

²³ <https://www.forbes.com/sites/jessedamiani/2019/09/03/a-voice-deepfake-was-used-to-scam-a-ceo-out-of-243000/>.

²⁴ <https://arstechnica.com/tech-policy/2023/03/rising-scams-use-ai-to-mimic-voices-of-loved-ones-in-financial-distress/>.

²⁵ <https://www.cnn.com/2024/02/04/asia/deepfake-cfo-scam-hong-kong-intl-hnk/index.html>.

²⁶ <https://www.ftc.gov/news-events/contests/ftc-voice-cloning-challenge>.

President Biden’s voice. *See* AP News, *New Hampshire investigating fake Biden robocall meant to discourage voters ahead of primary* (Jan. 22, 2024);²⁷ Reuters, *Deepfaking it: America’s 2024 election collides with AI boom* (May 30, 2023).²⁸ The FCC recently responded to the clear and imminent threat of AI-generated robocalls by declaring them to be illegal without prior consent. *See In re Implications of Artificial Intelligence Technologies on Protecting Consumers from Unwanted Robocalls and Robotexts, Declaratory Ruling*, FCC 24-17 (Rel. Feb. 8, 2024).²⁹ It is inevitable that bad actors will utilize MMS as a channel for AI-generated fraud, especially if this court forecloses TCPA liability for MMS messages containing prerecorded voices.

Video and audio messages sent via MMS pose a unique threat to consumers. The District Court’s decision creates a loophole that leaves consumers vulnerable to this harm. This Court should reverse.

²⁷ <https://apnews.com/article/new-hampshire-primary-biden-ai-deepfake-robocall-f3469ceb6dd613079092287994663db5>.

²⁸ <https://www.reuters.com/world/us/deepfaking-it-americas-2024-election-collides-with-ai-boom-2023-05-30/>.

²⁹ <https://www.fcc.gov/document/fcc-makes-ai-generated-voices-robocalls-illegal>.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to reverse the District Court's order granting Defendant's motion to dismiss.

Date: February 14, 2024

/s/ Megan Iorio

Megan Iorio

Chris Frascella

ELECTRONIC PRIVACY
INFORMATION CENTER

1519 New Hampshire Ave. NW

Washington, DC 20036

(202) 483-1140

*Attorneys for Amici Curiae
Electronic Privacy Information
Center & National Consumer
Law Center*

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I certify that on February 14, 2024, this brief was e-filed through the ACMS System of the U.S. Court of Appeals for the Ninth Circuit. I certify that all participants in the case are registered ACMS users and that service will be accomplished by the ACMS system.

Date: February 14, 2024 /s/ Megan Iorio
Megan Iorio
Chris Frascella
ELECTRONIC PRIVACY
INFORMATION CENTER
1519 New Hampshire Ave. NW
Washington, DC 20036
(202) 483-1140

*Attorneys for Amici Curiae
Electronic Privacy Information Center
& National Consumer Law Center*