

ORAL ARGUMENT NOT YET SCHEDULED

Nos. 15-1211 (and consolidated cases)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ACA INTERNATIONAL, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES

Respondents.

On Petition for Review of an
Order of the Federal Communications Commission

**BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION
CENTER (EPIC) AND SIX CONSUMER PRIVACY ORGANIZATIONS IN
SUPPORT OF RESPONDENTS**

MARC ROTENBERG
ALAN BUTLER
AIMEE THOMSON
Electronic Privacy Information Center
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140
rotenberg@epic.org
Counsel for Amicus Curiae

January 22, 2016

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), *Amici* submit the following corporate disclosure statement:

None of the *Amici* have a parent, subsidiary, or affiliate. None of the *Amici* has never issued shares or debt securities to the public.

/s/ Marc Rotenberg
MARC ROTENBERG

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *Amici Curiae* certify that:

A. Parties, Interveners, and Amici

All parties, interveners, and *Amici* appearing before this Court are set forth in Brief for Respondents.

B. Ruling under Review

References to the ruling at issue appear in the Brief for Respondents.

C. Related Cases

It is the understanding of *Amici* that all petitions for review of the Commission's Order were consolidated in this Court under the procedures set forth in 28 U.S.C. § 2112(a).

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES.....	ii
TABLE OF AUTHORITIES	iv
GLOSSARY	viii
STATUTES AND REGULATIONS.....	viii
INTEREST OF AMICI.....	1
SUMMARY OF THE ARGUMENT	6
ARGUMENT.....	7
I. The widespread adoption of cell phones has made unwanted calls even more invasive, but has also reduced the costs of TCPA compliance.....	10
A. The majority of Americans now own cell phones and rely on them for their personal, educational, and professional communications.	10
B. Petitioners overstate the burden created by the reassignment of telephone numbers by relying on a factually incorrect number, and ignore the reduction in reassigned numbers caused by portability and the rise in cell phone use.....	17
II. The TCPA prohibits invasive business practices while providing a narrow exception where consumers meaningfully consent.....	23
A. Privacy laws are designed to limit invasive business practices by prohibiting certain conduct absent meaningful consent from the consumer.....	23
B. Companies seeking to engage in privacy-invading business practices—not consumers—bear the burden of proving consent.....	27

TABLE OF AUTHORITIES¹

Cases

* <i>Riley v. California</i> , 134 S. Ct. 2473 (2014).....	6, 13
--	-------

Statutes & Legislative Authorities

47 U.S.C § 251(b)(2)	27
Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584	10
Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a).....	32
Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. § 227).....	9
§§ 2(5)–(6).....	10
§ 2(9)	37
§ 2(10)	10
§ 2(11)	38
* § 2(12)	9, 13, 37
§ 2(13)	11
Telephone Consumer Protection Act, 47 U.S.C. § 227 (1991).....	7
* § 227(b)	33
§ 227(b)(1)(A)	10
§ 227(b)(1)(A)(iii)	10
§ 227(b)(1)(B)	10
§ 227(b)(2)(B)(ii)(I).....	11
§ 227(b)(2)(C)	11
Telephone Disclosure and Dispute Resolution Act, Pub. L. No. 102-556, 106 Stat. 4181 (1992)	11

Other Authorities

137 Cong. Rec. S18784 (daily ed. Nov. 27, 1991)	9, 10
137 Cong. Rec. S18785 (daily ed. Nov. 27, 1991)	12
47 C.F.R. § 52.15(f)(1)	25
47 C.F.R. § 52.15(f)(1)(ii)	24
* Aaron Smith, <i>The Best (and Worst) of Mobile Connectivity</i> (Nov. 30, 2012).....	17, 19
Alyssa Abkowitz, <i>Wrong Number? Blame Companies' Recycling</i> , Wall. St. J. (Dec. 1, 2011)	23
AT&T, <i>Wireless Talk, Text, & Data Plans</i>	29
Brief for EPIC as Amicus Curiae Supporting Appellants, <i>Gordon v. Softech Intern., Inc.</i> , 726 F.3d 42 (2d Cir. 2013) (No. 12–661).....	35, 38

¹ Authorities upon which we chiefly rely are marked with a *.

Brief for Privacy and Consumer Organizations, Technical Experts and Legal Scholars as Amici Curiae in Support of Respondents, NCTA v. FCC, 555 F.3d 996 (D.C. Cir. 2009) (No. 07–1312).....	34
<i>comScore Reports November 2015 U.S. Smartphone Subscriber Market Share</i> , comScore (Jan. 7, 2016).....	14, 18
CTIA – The Wireless Industry, <i>Wireless Industry Survey</i> (2015).....	13, 14
Danielle Keats Citron, <i>Reservoirs of Danger: the Evolution of Public and Private Law at the Dawn of the Information Age</i> , 80 Southern Cal. L. Rev. 241 (2007).....	38, 39
* EPIC, <i>The Code of Fair Information Practices</i>	30
FCC First Report and Order and Further Notice of Proposed Rulemaking, <i>Telephone Number Portability</i> , 96-286 (adopted June 27, 1996, released July 2, 1996).....	27
FCC Memorandum Opinion and Order, <i>Verizon Wireless’s Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation</i> , FCC 02-215 (adopted July 16, 2002, released July 26, 2002).....	27
FCC, Federal-State Joint Board on Universal Service, <i>Universal Service Monitoring Report</i> (2015).....	12
FCC, <i>Keeping Your Telephone Number When Changing Service Providers</i> (Nov. 19, 2015).....	27
FCC, <i>Mobile Wireless Competition Report</i> (16th Annual) (Mar. 21, 2013).....	15
FCC, <i>Mobile Wireless Competition Report</i> (18th Annual) (Dec. 23, 2015).....	14
FCC, <i>Numbering Resource Utilization in the United States</i> (Apr. 2013).....	28
FCC, <i>Numbering Resource Utilization in the United States</i> (Jan. 2011).....	24, 25
FCC, <i>Numbering Resource Utilization in the United States</i> (June 30, 2000 to June 30, 2010).....	25, 26
FCC, <i>Numbering Resource Utilization in the United States</i> (Mar. 2008).....	24
FCC, <i>Statistics of Communications Common Carriers</i> (2006/2007).....	13
FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, <i>Local Telephone Competition: Status as of December 31, 2013</i> (2013).....	17, 18
FTC, <i>Text Message Spam</i> (Mar. 2013).....	20, 21
Guido Calabresi, <i>The Costs Of Accidents: A Legal And Economic Analysis</i> (1970).....	36
Harold Demsetz, <i>When Does the Rule of Liability Matter?</i> , 1 J. Legal. Stud. 13 (1972).....	36
Harris Interactive, <i>2013 Mobile Consumer Habits Study</i> (June 2013).....	18
<i>In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991</i> , 30 FCC Rcd. 7961 (2015).....	11, 39

<i>In re</i> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961 (2015) (statement of Comm’r Michael O’Rielly, dissenting in part and approving in part)	19, 21, 22, 23
<i>In re</i> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961 (2015) (statement of Comm’r Ajit Pai, dissenting)	22
Jan Lauren Boyles, <i>Mobile Phone Problems</i> , Pew Research Ctr (Aug. 2, 2012)	20
Julie Cohen, <i>Examined Lives: Informational Privacy and the Subject As Object</i> , 52 Stan. L. Rev. 1373 (2000)	33
Kim Boatman, <i>Stop Cell Phone Spam in Seven Easy Steps</i> , Norton	20
Lisa Weintraub Schifferle, <i>FTC Stops Robocall Scam</i> , FTC (June 29, 2015)	20
* Maeve Duggan, <i>Cell Phone Activities 2013</i> , Pew Research Ctr. (Sept. 19, 2013)	16, 17
Marc Rotenberg, <i>EPIC: The First Twenty Years, in Privacy in the Modern Age: The Search for Solutions</i> 1, 5 (Marc Rotenberg, Julia Horwitz, & Jeramie Scott eds., 2015)	31
Marc Rotenberg, <i>Fair Information Practices and the Architecture of Privacy</i> , 2001 Stan. Tech. L. Rev. 1 (2001)	33
Monica Anderson, <i>Technology Device Ownership: 2015</i> , Pew Research Ctr. (Oct. 29, 2015)	14
Number Portability Administration Center, <i>What is LNP?</i>	26
<i>Privacy in the Commercial World, Hearing Before the Subcomm. on Commerce, Trade, & Consumer Prot. of the H. Comm. on Energy and Commerce</i> , 107th Cong., 1st Sess. (2001)	30
* <i>Rage Against Robocalls</i> , Consumer Reports (July 28, 2015)	19, 20
Richard Coase, <i>The Problem of Social Cost</i> , 3 J. Law & Econ. 1 (1960)	36
Robert Strohmeier, <i>10 Ways to Boost Your Smartphone’s Battery Life</i> , PC World (June 4, 2011)	21
Sherry Turkle, <i>Reclaiming Conversation: The Power of Talk in a Digital Age</i> (2015)	12
Sprint, <i>Plans</i>	29
Stephen J. Blumberg & Julian V. Luke, <i>Wireless Substitution: Early Release of Estimates Based on Data from the National Health Interview Survey, July – December 2006</i> , Ctrs. for Disease Control & Prevention (May 14, 2007)	16
Stephen J. Blumberg & Julian V. Luke, <i>Wireless Substitution: Early Release of Estimates From the National Health Interview Survey,</i>	

<i>January – June 2010</i> , Ctrs. for Disease Control & Prevention (Dec. 21, 2010).....	15
* Stephen J. Blumberg & Julian V. Luke, <i>Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2015</i> , Ctrs. for Disease Control & Prevention (Dec. 1, 2015).....	15, 16, 17
<i>Telemarketing/Privacy Issues, Hearing on H.R. 1304 and 1305 Before the Subcomm. on Telecomm. and Fin. of the H. Comm. on Energy and Comm.</i> , 102d Cong., 1st Sess. (1991).....	32
T-Mobile, <i>Cell Phone Plans</i>	29
* U.S. Dep’t. of Health, Education and Welfare, Secretary’s Advisory Committee on Automated Personal Data Systems, Records, Computers, And The Rights of Citizens (1973).....	31, 32, 33
<i>Understanding Consumer Attitudes About Privacy: Hearing Before the Subcomm. on Commerce, Manufacturing, and Trade of the House Comm. on Energy and Commerce</i> (Oct. 13, 2011)	38
Verizon Wireless, <i>The Verizon Plan</i>	29

GLOSSARY

FCC	Federal Communications Commission
TCPA	Telephone Consumer Protection Act
FIPs	Fair Information Practices

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Brief for Respondents.

INTEREST OF AMICI

EPIC is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging privacy issues.² EPIC routinely participates as *amicus curiae* in federal cases concerning important consumer privacy issues. *See, e.g., Spokeo v. Robins*, No. 13-1339 (U.S. filed Sept. 8, 2015) (arguing that the violation of a consumer's privacy rights under federal law constitutes an injury-in-fact sufficient to confer Article III standing); *In re Nickelodeon Consumer Privacy Litig.*, No. 15-1441 (3d Cir. filed May 4, 2015) (explaining why the definition of personally identifiable information under the Video Privacy Protection Act includes Internet addresses and other unique persistent identifiers); *FTC v. Wyndham Hotels & Resorts, LLC*, 799 F.3d 236 (3d Cir. 2015) (supporting the agency's argument that data security practices are subject to the unfairness and deception provisions of Section 5 of the FTC Act).

² On December 16, 2015, *Amicus* EPIC filed its Notice by Electronic Privacy Information Center (EPIC) of Intent to File Brief as Amicus Curiae in Support of Respondents. The Petitioners and Respondents have consented to the filing of this *amicus* brief. Pursuant to Circuit Rule 29(d), counsel for *Amici Curiae* certify that filing of this separate brief is necessary because no other non-governmental *amicus* brief of which they are aware relates to the subjects addressed herein.

In accordance with Federal Rule of Appellate Procedure Rule 29, the undersigned states that no monetary contributions were made for the preparation or submission of this brief. This brief was not authored, in whole or in part, by counsel for a party.

EPIC has provided expert analysis to Congress on emerging consumer privacy issues concerning the misuse of telephone numbers. *See, e.g., Telephone Advertising and Consumer Rights Act, H.R. 1304, Before the Subcomm. on Telecomms. and Fin. of the H. Comm. on Energy and Commerce, 102d Cong., 1st Sess. 43 (April 24, 1991) (testimony of Marc Rotenberg);*³ *S. 1963, The Wireless 411 Privacy Act: Hearing Before the S. Comm on Commerce, Sci., & Transp., 108th Cong., 2d Sess. (Sept. 21, 2004) (testimony of Marc Rotenberg, Exec. Dir., EPIC) (discussing privacy issues raised by a proposed wireless directory for customers of wireless telephone services).*⁴

EPIC has also submitted numerous comments to the Federal Communications Commission and the Federal Trade Commission concerning the implementation of the Telephone Consumer Protection Act. *See, e.g., EPIC et al., Comments in the Matter of Telemarketing Rulemaking, FTC File No. R411001 (2002);*⁵ *EPIC et al., Comments in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 (2002);*⁶ *EPIC et al., Comments on Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Docket Nos. CG 02-278, DA 05-1346, DA 05-1347, DA 04-3185, DA 04-3187, DA 04-3835, DA 04-3836, DA 04-*

³ Available at <http://www.c-span.org/video/?18726-1/telephone-solicitation>.

⁴ Available at https://epic.org/privacy/wireless/dirtest_904.html.

⁵ <https://epic.org/privacy/telemarketing/tsrcomments.html>.

⁶ <https://epic.org/privacy/telemarketing/tcpacomments.html>.

3837, DA 05-342 (2005);⁷ EPIC, Comments on Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Docket Nos. CG 02-278, DA 05-2975 (2006);⁸ EPIC, Comments In the Matter of ACA International Petition for Expedited Clarification, Docket No. 02-278 (2006);⁹ EPIC, Comments Concerning Implementation of the Junk Fax Prevention Act, Docket No. CG 05–338 (2006).¹⁰

The Constitutional Alliance¹¹ is a privately funded nonpartisan non-profit organization whose stated mission is “preserve state and national sovereignty, and the unalienable rights to life, liberty, and the pursuit of happiness as pronounced in the Declaration of Independence and protected under the Bill of Rights of the United States of America.” It works through education by educating legislators, pastors, attorneys, governors, and the public.

Consumer Watchdog¹² is a tax-exempt 501(c)(3) nonprofit organization dedicated to educating and advocating on behalf of consumers for over 25 years. Its mission is to provide an effective voice for the public interest. Consumer Watchdog’s programs include health care reform, oversight of insurance rates,

⁷ <https://epic.org/privacy/telemarketing/tcpacomm7.29.05.html>.

⁸ <https://epic.org/privacy/telemarketing/tcpacom11306.html>.

⁹ https://epic.org/privacy/telemarketing/fcc_aca_05-11-06.html.

¹⁰ <https://epic.org/privacy/telemarketing/jfpacom11806.html>.

¹¹ Constitutional Alliance, <http://constitutionalalliance.org/> (last visited Jan. 22, 2016).

¹² Consumer Watchdog, <http://www.consumerwatchdog.org/> (last visited Jan. 22, 2016).

energy policy, protecting privacy rights, protecting legal rights, corporate reform, and political accountability.

The Cyber Privacy Project (“CPP”)¹³ addresses issues about privacy raised in today’s networked world. In upholding the belief that privacy is essential to democratic society, the Cyber Privacy Project anchors its approach in realizing the beneficial potential of the Constitution, laws, and policies of the United States. CPP calls for implementation of privacy protections based on First Amendment rights of privacy and anonymity, Fourth Amendment rights against unreasonable searches and seizures, the Fifth and Fourteenth Amendment rights to due process and protection of liberty, and Ninth Amendment unenumerated rights to privacy. It also call[s] upon similar principles in international human rights documents, state constitutions, and codes of ethics.

Patient Privacy Rights (“PPR”)¹⁴ works to empower individuals and prevent widespread discrimination based on health information using a grassroots, community organizing approach. We educate consumers, champion smart policies, and expose and hold industry and the government accountable.

¹³ Cyber Privacy Project, <http://www.cyberprivacyproject.org/> (Jan. 22, 2016).

¹⁴ Patient Privacy Rights, <https://patientprivacyrights.org/> (last visited Jan. 22, 2016).

The Privacy Rights Clearinghouse (“PRC”)¹⁵ is a nonprofit consumer education and advocacy organization based in San Diego, California. Established in 1992, the PRC focuses on consumers’ rights and interests relating to informational privacy, answers individual consumer inquiries, and maintains a robust website of practical privacy protection tips.

Privacy Times¹⁶ has provides accurate reporting, objective analysis and thoughtful insight into the events that shape the ongoing debate over privacy and Freedom of Information.

¹⁵ Privacy Rights Clearinghouse, <https://www.privacyrights.org/> (last visited Jan. 22, 2016).

¹⁶ Privacy Times, <http://www.privacytimes.com/> (Jan. 22, 2016).

SUMMARY OF THE ARGUMENT

The Federal Communications Commission (“FCC”) order safeguards important consumer privacy interests that Congress sought to protect in the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227 (1991). The TCPA prohibits invasive business practices and extends consumer control over their personal information by requiring business to obtain meaningful consent from subscribers before subjecting them to automated or prerecorded calls.

The petitioners and interveners seek to engage in the very practices that Congress prohibited: making invasive and unwanted calls with “autodialers” and prerecorded messages. Americans are under siege from intrusive messages, made more invasive by the central role cell phones play in American life. *Riley v. California*, 134 S. Ct. 2473, 2484, 2490 (2014). And Petitioners’ key contention that the large quantity of “recycled” numbers would somehow disfavor adoption of the order collapses on close inspection.

The FCC’s regulation reflects the central purpose of the TCPA: to protect consumer from unwanted commercial solicitations. The agency order should be upheld.

ARGUMENT

In the late 1980s and early 1990s, Congress faced a growing problem: American consumers were being inundated with unwanted telephone calls, causing a substantial nuisance and invasion of privacy. Using autodialers and robotic messages, telemarketers and other uninvited callers were contacting millions of Americans each day with unsolicited messages. With these “autodialers” and prerecorded messages, the cost to industry was small but the burden on consumers was substantial. Anticipating calls from friends or colleagues, consumers interrupted meals, meetings, and family time only to be connected to an automated messaging service. After several hearings, Congress concluded that the “*only* effective means of protecting telephone consumers from this nuisance and privacy invasion” was to bar *all* automated or prerecorded telephone communications unless “the *receiving party* consents to receiving the call” or there is some emergency circumstance. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(12), 105 Stat. 2394, 2394 (codified at 47 U.S.C. § 227) (emphasis added).

In the TCPA, Congress established a simple, consumer-centric formula: absent meaningful consent or an emergency, a company cannot use an automated or prerecorded voice system to contact consumers. More specifically, companies cannot call or text a cell phone using an autodialer or an artificial or prerecorded

voice unless they first obtain prior express consent of the subscriber. 47 U.S.C.

§ 227(b)(1)(A). Similar rules apply to calls made to residential telephone numbers.

§ 227(b)(1)(B).¹⁷

Congress's flat ban on unsolicited automated calls derived from its concern about the nuisance and invasion of privacy these calls created. Congress found that “[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy,” and that “[m]any consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.” Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, §§ 2(5)–(6); *see also id.* § 2(10); 137 Cong. Rec. S18784 (daily ed. Nov. 27, 1991) (statement of Sen. Hollings) (stating as one of the original authors of the TCPA that “[c]alls that use an automated or computerized voice . . . are a nuisance and an invasion of our privacy.”).

Congress was well aware that the scope of the nuisance and privacy invasiveness of unwanted calls would evolve over time, and it gave the FCC the authority to craft exemptions and adopt new rules in the future. *See*, 137 Cong. Rec. S18784 (daily ed. Nov. 27, 1991) (statement of Sen. Hollings) (“The FCC is given the flexibility [*sic*] to consider what rules should apply to future technologies as well as existing technologies.”). Here Congress, in its foresight, again placed

¹⁷ In the Bipartisan Budget Act of 2015, Congress modified the TCPA to also exempt calls “made solely to collect a debt owed to or guaranteed by the United States.” Pub. L. No. 114-74, § 301(a)(1)(A), 129 Stat. 584, 588; *see* § 227(b)(1)(B); § 227(b)(1)(A)(iii).

consumer privacy interests at the forefront. The FCC could only exempt those calls that “will not adversely affect the privacy rights that this section is intended to protect.” § 227(b)(2)(B)(ii)(I) (applying to exemptions for residential calls); *accord.* § 227(b)(2)(C) (applying to exemptions for wireless calls);¹⁸ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(13) (finding that “the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy”).

The methods used to telephonically market goods and services to consumers may have evolved, but the problem has remained the same: Consumers continue to be plagued by robotic and autodialed calls and text messages that they don’t want. And the problem is worse now: we all carry phones with us wherever we go, making the intrusion immediate. Consumer privacy drove the enactment of the TCPA, and consumer privacy drives its enforcement today. The FCC’s 2015 Order ensures that the TCPA continues to provide robust protections for consumer privacy as Congress intended. *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961 (2015) [hereinafter “2015 Order”]. This Court should uphold the 2015 Order.

¹⁸ Congress added Section 227(b)(2)(C) in 1992. Telephone Disclosure and Dispute Resolution Act, Pub. L. No. 102-556, § 402, 106 Stat. 4181, 4194–95 (1992).

- I. The widespread adoption of cell phones has made unwanted calls even more invasive, but has also reduced the costs of TCPA compliance.**
- A. The majority of Americans now own cell phones and rely on them for their personal, educational, and professional communications.**

Senator Larry Pressler, one of the original drafters of the TCPA, explained the need for the TCPA by observing that “[u]nlike other communications media, the telephone commands our instan[t] attention. Junk mail can be thrown away. Television commercials can be turned off. The telephone demands to be answered.” 137 Cong. Rec. S18785 (daily ed. Nov. 27, 1991) (statement of Sen. Pressler). More recently, scholars have lamented the many ways in which cell phones can intrude upon our private interactions and conversations, inhibiting our ability to empathize with others. *See* Sherry Turkle, *Reclaiming Conversation: The Power of Talk in a Digital Age* 4 (2015).

When Congress set out in 1991 to “protect[] telephone consumers” from the “nuisance and privacy invasion” caused by unsolicited calls, Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(12), the residential landline was the primary means of communication. Over 93 percent of the tallied 95.7 million American households reported having access to a telephone. FCC, Federal-State Joint Board on Universal Service, Universal Service Monitoring Report 46

(2015).¹⁹ Americans communicated across more than 139 million landline connections, FCC, Statistics of Communications Common Carriers 235 (2006/2007),²⁰ but there were only 7.5 million wireless subscribers, CTIA – The Wireless Industry, *Wireless Industry Survey 2* (2015) [hereinafter “CTIA Survey”].²¹

Much has changed in the past quarter-century. Cell phones are now ubiquitous in the United States, and the courts have recognized the significance of this shift. In *Riley v. California*, the Supreme Court held that the traditional rule permitting searches of physical items on a suspect incident to lawful arrest could not be extended to searches of digital devices. 134 S. Ct. 2473 (2014). The Court found that unlike other objects kept on an arrestee’s person, the unique qualities of cell phones made a warrantless search unconstitutional. *Id.* at 2489–91. In reaching this conclusion, the Court observed that cell phones “are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.” *Id.* at 2484. In the digital age, “it is the person who is not carrying a cell phone, with all that it contains, who is the exception.” *Id.* at 2490.

¹⁹ Available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db1222/DOC-337019A1.pdf.

²⁰ Available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-301505A1.pdf.

²¹ Available at http://www.ctia.org/docs/default-source/Facts-Stats/ctia_survey_ye_2014_graphics.pdf?sfvrsn=2.

Chief Justice Roberts keyed into an important trend in his *Riley* opinion. More than 92 percent of American adults today own at least one cell phone, Monica Anderson, *Technology Device Ownership: 2015*, Pew Research Ctr. (Oct. 29, 2015),²² and 79 percent own sophisticated smartphones, *comScore Reports November 2015 U.S. Smartphone Subscriber Market Share*, comScore (Jan. 7, 2016).²³ Americans have more than 355 million wireless subscriptions. CTIA Survey, *supra*, at 2. Since 2011, there are more mobile phones than people in the United States. FCC, Mobile Wireless Competition Report (18th Annual) 33 (Dec. 23, 2015);²⁴ FCC, Mobile Wireless Competition Report (16th Annual) 10 (Mar. 21, 2013).²⁵

Not only is cell phone ownership pervasive, American dependence on wireless devices has increased dramatically in the past decade. Today, nearly one-half of American households (47.4 percent) are wireless only, meaning they do not use traditional residential landline phones for communication. Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2015*, at 5, Ctrs. for Disease

²² <http://www.pewinternet.org/2015/10/29/technology-device-ownership-2015/>.

²³ <https://www.comscore.com/Insights/Market-Rankings/comScore-Reports-November-2015-US-Smartphone-Subscriber-Market-Share>.

²⁴ https://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db1223/DA-15-1487A1.pdf.

²⁵ https://apps.fcc.gov/edocs_public/attachmatch/FCC-13-34A1.pdf.

Control & Prevention (Dec. 1, 2015) [hereinafter “Wireless Substitution 2015”].²⁶ The number of wireless-only households has almost doubled in the past five years (26.6 percent in 2010). *Compare* Wireless Substitution 2015, *supra*, with Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January – June 2010*, at 6, Ctrs. for Disease Control & Prevention (Dec. 21, 2010).²⁷ Indeed, wireless-only households have increased 15-fold since 2003 (3.2 percent). *Compare* Wireless Substitution 2015, *supra*, with Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates Based on Data from the National Health Interview Survey, July – December 2006*, at 4, Ctrs. for Disease Control & Prevention (May 14, 2007).²⁸

Today, cell phones are central to American life. Fully 81 percent of cell phone owners use their phones to send and receive text messages. Maeve Duggan, *Cell Phone Activities 2013*, Pew Research Ctr. (Sept. 19, 2013).²⁹ In addition to calls and texts, most cell phone owners check email and access the Internet with their phones, while one in two owners use location-based services and listen to music. *Id.* A recent study showed that 67 percent of cell phone owners “find themselves checking their phone for messages, alerts, or calls — even when they

²⁶ <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201512.pdf>.

²⁷ <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201012.pdf>.

²⁸ <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200705.pdf>.

²⁹ <http://www.pewinternet.org/2013/09/19/additional-demographic-analysis/>.

don't notice their phone ringing or vibrating.” Aaron Smith, *The Best (and Worst) of Mobile Connectivity* (Nov. 30, 2012).³⁰ Almost one third of cell phone owners “describe their cell phone as ‘something they can’t imagine living without.’” *Id.*

Meanwhile, the residential telephone is in rapid decline. Only eight percent of Americans have a landline telephone unaccompanied by a wireless subscription. *Wireless Substitution 2015, supra*, at 5. As of December 2013, the latest date for which the FCC has records, there are 85 million landlines—a number that has suffered a 10 percent decline each year. FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Local Telephone Competition: Status as of December 31, 2013*, at 2 (2013).³¹

In 2016, Senator Pressler’s pronouncement that intrusions by phone are uniquely intrusive rings all the more true. Residential landlines can be left at home, but cell phones accompany the majority of Americans throughout their daily affairs, demanding to be answered.

The growing substitution of cell phones for landline telephones has amplified the nuisance and privacy invasion caused by unsolicited automated

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

³¹ *Available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-329975A1.pdf. As characterized by the FCC, “[r]etail local telephone service customers are served by two wireline technologies—‘end-user’ switched access lines and interconnected VoIP ‘subscriptions’—and by mobile wireless subscriptions.” *Id.* at 1. As of December 2013, there were 85 million end-user switched access lines. *Id.*

communications. The inherent mobility of cell phones means that Americans keep them closer than was ever possible with landline telephones. More than 70 percent of American smartphone owners—or more than half of all cell phone owners³²—keep their phones within five feet a majority of the time. Harris Interactive, 2013 Mobile Consumer Habits Study (June 2013).³³ Nearly half of cell phone users “have slept with their phone next to their bed because they wanted to make sure they didn’t miss any calls, text messages, or other updates during the night.” Aaron Smith, *supra*.

As a result, unsolicited calls and texts do more than show as “a missed call on [one’s] smartphone screen,” 2015 Order at 131 (statement of Comm’r Michael O’Rielly, dissenting in part and approving in part)—they facilitate fraud, drain battery life, eat into data plans and phone memory space, and demand attention when the user would rather not be interrupted. The FCC and the Federal Trade Commission receive more than 150,000 consumer complaints about robocalls every month, and an estimated one third of all calls placed in the U.S. are robocalls. *Rage Against Robocalls*, Consumer Reports (July 28, 2015).³⁴ Fully 68 percent of cell phone owners have received unwanted sales or marketing calls, and

³² Seventy-nine percent of American adults own smartphones. *comScore Reports, supra*. Seventy percent of 79 percent is 55.3 percent of American adults.

³³ <http://pages.jumio.com/rs/jumio/images/Jumio%20-%20Mobile%20Consumer%20Habits%20Study-2.pdf>.

³⁴ <http://www.consumerreports.org/cro/magazine/2015/07/rage-against-robocalls/index.htm>.

25 percent are bothered at least a few times a week. Jan Lauren Boyles, *Mobile Phone Problems*, Pew Research Ctr. (Aug. 2, 2012).³⁵ And 69 percent of cell phone users who text get unwanted spam or text messages, with 25 percent bothered at least weekly. *Id.*

“Telemarketing fraud—which often begins with a robocall—is estimated to cost consumers \$350 million per year.” *Rage Against Robocalls, supra; see, e.g.,* Lisa Weintraub Schifferle, *FTC Stops Robocall Scam*, FTC (June 29, 2015).³⁶ Unwanted text messages “can be used to try to compromise your financial information or to install harmful software on your mobile device.” Kim Boatman, *Stop Cell Phone Spam in Seven Easy Steps*, Norton,³⁷ *see* FTC, *Text Message Spam* (Mar. 2013).³⁸

Unsolicited calls and texts can also harm phone performance—especially if the unsolicited messages reach the hundreds or thousands, as envisioned by one dissenting FCC Commissioner. 2015 Order at 131 (statement of Comm’r Michael O’Rielly, dissenting in part and approving in part). Text message spam can lead to unwanted phone charges, and can slow phone performance by taking up space in a phone’s memory. FTC, *Text Message Spam, supra*. Notifications from missed calls

³⁵ <http://www.pewinternet.org/2012/08/02/mobile-phone-problems/>.

³⁶ <https://www.consumer.ftc.gov/blog/ftc-stops-robocall-scam>.

³⁷ <https://us.norton.com/yoursecurityresource/detail.jsp?aid=CellPhone> (last visited Jan. 17, 2016).

³⁸ <https://www.consumer.ftc.gov/articles/0350-text-message-spam>.

and unread text messages drain already limited cell phone battery. *See* Robert Strohmeyer, *10 Ways to Boost Your Smartphone's Battery Life*, PC World (June 4, 2011).³⁹ Unsolicited calls and texts also demand immediate attention from users wherever they happen to be. Unwanted calls and texts interrupt sleep, disturb meetings and meals, and disrupt concentration.

The ubiquitous role of cell phones in modern American life has amplified the nuisance and privacy invasion caused by unwanted calls and text messages. Cell phones demand to be answered not only at home, but anywhere the user goes. Now is not the time to eliminate protections for consumer privacy.

B. Petitioners overstate the burden created by the reassignment of telephone numbers by relying on a factually incorrect number, and ignore the reduction in reassigned numbers caused by portability and the rise in cell phone use.

Petitioners, *Amici* in support of Petitioners, and even dissenting FCC Commissioners have repeated the unsupported assertion that “37 million” telephone numbers are recycled or reassigned to new customers every year, averaging out to more than 100,000 reassigned numbers every day.⁴⁰ Several

³⁹ http://www.pcworld.com/article/229300/smartphone_battery_life.html.

⁴⁰ *See, e.g.*, 2015 Order at 117 (statement of Comm’r Ajit Pai, dissenting); 2015 Order at 130 (statement of Comm’r Michael O’Rielly, dissenting in part and approving in part); Joint Brief of Petitioners ACA International, Sirius XM, PACE, salesforce.com, Exacttarget, Consumer Bankers Association, U.S. Chamber of Commerce, Vibes Media, & Portfolio Recovery Associates at 42–43, ACA Int’l v. FCC, No. 15-1211 (D.C. Cir. filed Nov. 25, 2015) [hereinafter “Joint Petitioners’ Brief”]; Brief for American Bankers Association, Credit Union National

parties even assert that “37 million” wireless numbers are recycled each year.⁴¹ But none of these statements are based on actual facts or data. All of the citations for “37 million” lead back to a single 2011 article stating that “[a]lmost 37 million phone numbers get recycled each year, a 16% increase since 2007, according to the most recent figures from the Federal Communications Commission.” Alyssa

Association, & Independent Community Bankers as Amici Curiae Supporting Petitioners at 34, ACA Int’l v. FCC, No. 15-1211 (D.C. Cir. filed Dec. 2, 2015); Brief for American Financial Services Association, Consumer Mortgage Coalition, & Mortgage Bankers Association as Amici Curiae Supporting Petitioners, ACA Int’l v. FCC, No. 15-1211 (D.C. Cir. filed Dec. 2, 2015); Brief for American Gas Association, Edison Electric Institute, National Association of Water Companies, & National Rural Electric Cooperative Association as Amici Curiae Supporting Petitioners at 3, ACA Int’l v. FCC, No. 15-1211 (D.C. Cir. filed Dec. 2, 2015) [hereinafter “American Gas Association *et al.* Amicus Brief”]; Brief for CTIA—The Wireless Association as Amicus Curiae Supporting Petitioners at 4, ACA Int’l v. FCC, No. 15-1211 (D.C. Cir. filed Dec. 2, 2015) [hereinafter “CTIA Amicus Brief”]; Brief for Internet Association as Amicus Curiae Supporting Petitioners, ACA Int’l v. FCC, No. 15-1211 (D.C. Cir. filed Dec. 2, 2015) [hereinafter “Internet Association Amicus Brief”]; Brief for Retail Litigation Center, Inc., National Retail Federation, & National Restaurant Association as Amici Curiae Supporting Petitioners at 14, ACA Int’l v. FCC, No. 15-1211 (D.C. Cir. filed Dec. 2, 2015).

⁴¹ 2015 Order at 130 (statement of Comm’r Michael O’Rielly, dissenting in part and approving in part) (“Every day, an estimated 100,000 cell phone numbers are reassigned to new users.”); Joint Petitioners’ Brief, *supra*, at 42–43 (“About 37 million wireless numbers are reassigned every year.”); American Gas Association *et al.* Amicus Brief, *supra*, at 3 (“But wireless customers often relinquish their telephone numbers, which then are reassigned. By the FCC’s count, this happens nearly 40 million times a year.”); CTIA Amicus Brief, *supra*, at 4 (“Each year, approximately 37 million mobile phone numbers are recycled, which means that an average of 100,000 numbers are reassigned to new users *every day*.”); Internet Association Amicus Brief, *supra*, at 9 (“Every day, an estimated 100,000 cell phone numbers are reassigned to new users.” (quoting dissenting statement of Cmm’r O’Rielly)).

Abkowitz, *Wrong Number? Blame Companies' Recycling*, Wall. St. J. (Dec. 1, 2011).⁴²

Amicus EPIC undertook extensive research and study to ascertain the actual source of the “37 million” number but hit a dead end. There was no “recent figure” from the FCC at the time of publication that supported the assertion in the Wall Street Journal article. The only relevant data published by the FCC at that time was the January 2011 Numbering Resource Utilization Report, which states that 36.895 million numbers were *aging* as of December 31, 2009.⁴³ FCC, Numbering Resource Utilization in the United States 15 (Jan. 2011) [hereinafter “2011 NRU Report”].⁴⁴ But “aging” numbers are not equivalent to “recycled” numbers, and do not provide a clear indication of a possible impact on TCPA compliance. Aging numbers are “disconnected numbers that are not available for assignment to another end user or customer for a specified period of time”—up to 90 days for residential numbers and 365 days for business numbers. 47 C.F.R. § 52.15(f)(1)(ii); *see* 2011 NRU Report at 5.

⁴² <http://www.wsj.com/articles/SB10001424052970204012004577070122687462582>.

⁴³ There were 31.791 million aging numbers as of June 30, 2007. FCC, Numbering Resource Utilization in the United States 14 (Mar. 2008), https://apps.fcc.gov/edocs_public/attachmatch/DOC-280978A1.pdf. There was a 16 percent increase in aging numbers between June 2007 and December 2009.

⁴⁴ https://apps.fcc.gov/edocs_public/attachmatch/DOC-303900A1.pdf.

Aging telephone numbers are not reassigned telephone numbers. Reassigned or recycled telephone numbers are assigned by telecommunications carriers to new users after the prior user terminates service. But the Report only supports the conclusion that roughly 37 million numbers were *disconnected* as of December 31, 2009. 2011 NRU Report at 15. Less than half of the disconnected numbers in 2009 were for wireless subscribers. *Id.* That ratio stayed relatively consistent between 2000 and 2010. *See* FCC, Numbering Resource Utilization in the United States (June 30, 2000 to June 30, 2010).⁴⁵

Even if all of the roughly 37 million aging numbers had in fact been reassigned in 2009, they would have comprised only 5.7 percent of more than 670 million telephone numbers assigned to U.S. consumers at that time,⁴⁶ and only 2.5 percent of the 1.4 billion total telephone numbers assigned to carriers.⁴⁷ *Id.* Indeed, the number of aging telephone numbers remained relatively flat between 2000 and 2010 (the period of time for which the FCC reported data), while the number of

⁴⁵ <https://transition.fcc.gov/wcb/iatd/number.html>.

⁴⁶ An assigned number “is one that is in use by an end-user customer.” 2011 NRU Report at 5.

⁴⁷ The total number of telephone numbers assigned to carriers is the sum of: (1) assigned numbers, (2) intermediate numbers, which “are those that one carrier has made available for use by another carrier (or to a non-carrier) so that the numbers may then be assigned to an end user”; (3) reserved numbers, which “are those that are being held by the service provider at the request of an end user for future use”; (4) aging numbers; (5) administrative numbers, which “include test numbers and other numbers used for network purposes”; and (6) available numbers, which “are numbers that are generally available for assignment to customers.” 2011 NRU Report at 5; *see* 47 C.F.R. § 52.15(f)(1).

telephone numbers assigned to carriers and in use by consumers steadily increased. *See* FCC, Numbering Resource Utilization in the United States 2000-2010.⁴⁸ The number of aging telephone numbers represents, at most, a ceiling on the number of telephone numbers that *can* be reassigned at any given time. Therefore any statements made by the Petitioners, *Amici* in support of Petitioners, and dissenting Commissioners regarding the scope of the “recycled number problem” are wholly unsupported by the data.

What we do know from data over the last decade is that portability has significantly reduced the number of consumers whose numbers must be reassigned. Number portability is a consumer’s ability to keep the same phone number when changing service providers within the same geographic area, or to transfer a landline telephone number to a cellular service provider. *See* Number Portability Administration Center, *What is LNP?*⁴⁹; FCC, *Keeping Your Telephone Number When Changing Service Providers* (Nov. 19, 2015).⁵⁰ Local number portability is mandated by Congress. 47 U.S.C § 251(b)(2). Consumers with traditional landline phones, also known as wireline phones, have been able to port their numbers since 1996. FCC First Report and Order and Further Notice of Proposed Rulemaking,

⁴⁸ <https://transition.fcc.gov/wcb/iatd/number.html>.

⁴⁹ <https://www.npac.com/number-portability/what-is-lnp> (last visited January 15, 2016).

⁵⁰ <https://www.fcc.gov/consumers/guides/keeping-your-telephone-number-when-changing-service-providers>.

Telephone Number Portability, 96-286 (adopted June 27, 1996, released July 2, 1996). After years of litigation, portability between wireless carriers became available in November 2003. FCC Memorandum Opinion and Order, *Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation*, FCC 02-215 (adopted July 16, 2002, released July 26, 2002).

As of June 2010, the most recent date for which the FCC has data, over 185 million customers have ported wireless and landline numbers. FCC, *Numbering Resource Utilization in the United States* 33 (Apr. 2013).⁵¹ These include over 94 million landline to landline transfers, over 87 million wireless to wireless transfers, over 4 million wireline to wireless transfers, and about 275,000 wireless to landline transfers. *Id.* In the first seven years following the availability of wireless number portability, over 12 million numbers per year were ported instead of being disconnected and made available for reassignment. *Id.* Therefore the trend over the last twenty years since the TCPA's inception has been an increase in portability (not an increase in reassignment).

Finally, the rise in cell phone use and related decline in landline use will continue to reduce the reassignment burden. Previously, consumers who moved were forced to obtain a new telephone number in their new area code. Today,

⁵¹ https://apps.fcc.gov/edocs_public/attachmatch/DOC-319997A1.pdf.

many consumers bring their cell phones and their numbers with them. Cell phones are inherently portable. Long distance rates are also no longer a factor as most phone plans now include nationwide calling for a flat rate. *E.g.*, AT&T, *Wireless Talk, Text, & Data Plans*;⁵² Verizon Wireless, *The Verizon Plan*;⁵³ Sprint, *Plans*;⁵⁴ T-Mobile, *Cell Phone Plans*.⁵⁵

In sum, there is no evidence of a telephone number “reassignment” crisis, and the trend in cell phone portability has likely minimized whatever burden might have existed.

II. The TCPA prohibits invasive business practices while providing a narrow exception where consumers meaningfully consent.

A. Privacy laws are designed to limit invasive business practices by prohibiting certain conduct absent meaningful consent from the consumer.

The TCPA and other modern privacy laws place obligations on companies that seek to engage in invasive business practices and use personal information. The allocation of rights and responsibilities is sensible because the companies that seek to engage in invasive business practices are in the best position to avoid the harmful behavior. *See Privacy in the Commercial World, Hearing Before the*

⁵² <https://www.att.com/shop/wireless/data-plans.html> (last visited Jan. 19, 2016).

⁵³ <https://www.verizonwireless.com/landingpages/verizon-plan/> (last visited Jan. 19, 2016).

⁵⁴ <https://www.sprint.com/shop/plan-wall/?INTNAV=NavStrip:ShopPlans#!/?plan=individual> (last visited Jan. 19, 2016).

⁵⁵ <https://www.t-mobile.com/cell-phone-plans.html> (last visited Jan. 19, 2016).

Subcomm. on Commerce, Trade, & Consumer Prot. of the H. Comm. on Energy and Commerce, 107th Cong., 1st Sess. 65 (2001) (statement of Marc Rotenberg, Exec. Dir., EPIC). It is economically efficient for the entity benefiting from the use of a customer's information to bear the consequences for its subsequent misuse.

The rights and responsibilities that provide the basis of privacy laws have come to be known as “Fair Information Practices” (“FIPs”). See EPIC, *The Code of Fair Information Practices*.⁵⁶ “Fair information Practices provide the central conceptual framework for privacy rights in the digital age.” Marc Rotenberg, *EPIC: The First Twenty Years, in Privacy in the Modern Age: The Search for Solutions* 1, 5 (Marc Rotenberg, Julia Horwitz, & Jeramie Scott eds., 2015). The Privacy Act of 1974, 5 U.S.C. § 552a (2012), incorporated the FIPs as outlined by the HEW Report in 1973, see U.S. Dep't. of Health, Education and Welfare, Secretary's Advisory Committee on Automated Personal Data Systems, Records, Computers, and the Rights of Citizens (1973) [hereinafter “HEW Report”]. One of the core FIPs principles is that there must be a way for an individual to prevent their information obtained for one purpose from being used or made available for other purposes without their consent. *Id.* at viii.

Indeed, a central issue before Congress when it passed the TCPA was giving consumers control over how and when their personal phone numbers would be

⁵⁶ http://epic.org/privacy/consumer/code_fair_info.html.

disclosed and used. *See Telemarketing/Privacy Issues, Hearing on H.R. 1304 and 1305 Before the Subcomm. on Telecomm. and Fin. of the H. Comm. on Energy and Comm.*, 102d Cong., 1st Sess. 44 (1991) (testimony of Marc Rotenberg)

(“Telephone subscribers are entitled to decide when, to whom, and under what circumstances they should disclose their phone numbers.”). In enacting the TCPA, Congress gave consumers the choice of whether and when they would be subjected to unwanted, automated calls. 47 U.S.C. § 227(b). The key to this structure is that a company must obtain meaningful consent from a consumer prior to using their personal information in a new or potentially unwanted way (commonly referred to as an “opt-in” rule). “[I]n the absence of affirmative action by the individual, the company simply could not make use of personal information for purposes unrelated to the transaction at hand.” Marc Rotenberg, *Fair Information Practices and the Architecture of Privacy*, 2001 Stan. Tech. L. Rev. 1, ¶ 29 (2001).

Much of the theory surrounding modern consumer privacy law concerns the scope of meaningful consent. *Id.* ¶ 30. But regardless of how the term is interpreted, meaningful consent must necessarily include three key elements. First, there must be actual consent from the customer (this seems self evident, but has shockingly disputed by the Petitioners and Interveners in this case). Second, the consent must be informed, based on “accurate information about choices and their consequences.” Julie Cohen, *Examined Lives: Informational Privacy and the*

Subject As Object, 52 Stan. L. Rev. 1373, 1396 (2000). Finally, the customer must maintain control over the subsequent use of their personal information. *See* HEW Report, *supra*, at 41 (“There must be a way for an individual to prevent information about him obtained for one purpose from being used or made available for other purposes without his consent.”).

Meaningful consent has been described as an “opt-in” system because consumers must affirmatively chose to be subject to the business practices, rather than being forced to “opt-out” of practices that they do not want. *See* Brief for Privacy and Consumer Organizations, Technical Experts and Legal Scholars as Amici Curiae in Support of Respondents (“EPIC Amicus”), *NCTA v. FCC*, 555 F.3d 996 (D.C. Cir. 2009) (No. 07–1312) (arguing that opt-in policies are the only effective means of protecting consumer privacy).⁵⁷

In the TCPA context, meaningful consent must be obtained from the actual subscriber. It is not sufficient for a company to obtain consent from a prior subscriber and then engage in business practices that invade the privacy of the new subscriber without ever obtaining consent from that individual. Meaningful consent also includes the right to revoke consent, as the FCC has outlined in its order. If a consumer is not permitted to define the terms of their consent, then they are not truly in control of the subsequent use of their information. This Court

⁵⁷ Available at <https://epic.org/privacy/nctafcc/epic-ncta-050608.pdf>.

should uphold the FCC order defining consent requirements under the TCPA because it ensures that the statute is applied consistent with the FIPs.

B. Companies seeking to engage in privacy-invading business practices—not consumers—bear the burden of proving consent.

The TCPA, like other federal privacy laws, places the burden of preventing harm on the party with the most information—that is, the party that seeks to engage in the invasive business practice. *See, e.g.*, Brief for EPIC as Amicus Curiae Supporting Appellants, at 3–4, *Gordon v. Softech Intern., Inc.*, 726 F.3d 42 (2d Cir. 2013) (No. 12–661) (“As the reseller is in the best position to determine whether the subsequent use of the data would be permissible under the [Driver’s Privacy Protection] Act, it is the reseller that must bear the burden of ensuring that an impermissible use does not occur.”).⁵⁸ Because companies seeking to make automated calls know which numbers they intend to call and what equipment they intend to use, they must bear the legal burden of ensuring that meaningful consent is obtained from the subscribers contacted. The TCPA rules do not forbid callers from communicating with consenting consumers; instead, these rules prevent the nuisance and privacy invasion of unsolicited communications.

Basic tort principles, which underly much of modern privacy law, place legal liability for invasive activities on the party who is in the best position to avoid the harm, the “least-cost avoider.” *See* Guido Calabresi, *The Costs Of Accidents: A*

⁵⁸ Available at <https://epic.org/amicus/dppa/softech/EPIC-Amicus-Brief.pdf>.

Legal And Economic Analysis 135 (1970) (“A pure market approach to primary accident cost avoidance would require allocation of accident costs to those acts or activities (or combinations of them) which could avoid the accident costs most cheaply.”); *see also* Richard Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1 (1960) (articulating a theory of cost allocation to promote efficient allocations of property resources).

The least cost avoider theory is particularly relevant where transaction costs are high, as in the case of one party causing harm to a large and diffuse group of individuals. Calabresi, *supra*, at 135–38; *see* Harold Demsetz, *When Does the Rule of Liability Matter?*, 1 J. Legal. Stud. 13, 27–28 (1972) (arguing that when transaction costs are high, the legal system can “improve the allocation of resources by placing liability on that party who in the usual situation could be expected to avoid the costly interaction most cheaply”). Liability rules that hold a least-cost avoider responsible allocate rights and responsibilities such that privacy rights are protected and statutory violations are avoided.

Prior to the TCPA, Congress faced two competing interests: business’s desire to make automated or prerecorded calls to large numbers of individuals, and consumers’ desire to avoid the nuisance and privacy invasion of unsolicited calls. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9) (“Individuals privacy rights, public safety interests, and commercial freedoms of

speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.”). In enacting the TCPA, Congress gave consumers the entitlement to be free from unsolicited calls. *Id.* § 2(12) (“Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.”). Congress also recognized that making consumers responsible for preventing the nuisance and privacy invasion of unsolicited calls was not reasonable or efficient. *Id.* § 2(11) (“Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.”).

Instead, Congress chose to place the burden (and potential liability from the violation) on the businesses that seek to engage in the invasive behavior. *Cf.* Brief for EPIC as Amicus Curiae Supporting Appellants, at 15–17, *Gordon v. Softech Intern., Inc.*, *supra* (arguing for similar liability for resellers of driver’s records); Danielle Keats Citron, *Reservoirs of Danger: the Evolution of Public and Private Law at the Dawn of the Information Age*, 80 Southern Cal. L. Rev. 241, 285–87 (2007) (arguing for similar liability for maintainers of information databases). Bringing together hundreds of millions of consumers with prospective callers to

bargain over how each consumer will receive automated or prerecorded communications would be prohibitively expensive. The relationship between individual consumers and callers is also plagued by information asymmetries. *See Understanding Consumer Attitudes About Privacy: Hearing Before the Subcomm. on Commerce, Manufacturing, and Trade of the House Comm. on Energy and Commerce* (Oct. 13, 2011) (testimony of Prof. Alessandro Acquisti).⁵⁹

Short of turning off the phone, consumers have little knowledge of or control over when a caller chooses to make an automated or prerecorded call, and consumers who acquire a recycled number have no knowledge of or control over the decisions made by the previous subscriber. Indeed, consumers are actually loss bearers, because they are unable to pass along the harm of nuisance and privacy invasion through insurance. *See Citron, supra*, at 285. But the businesses know whom they wish to contact and when, and control the technological mechanisms that make automated and prerecorded calls. Businesses are therefore the least-cost avoiders, best able to take preventive measures that avoid the nuisance and privacy invasion Congress sought to prohibit.

The FCC's 2015 Order remains faithful to Congress's allocation of rights and responsibilities by recognizing that callers, not consumers, bear the burden of ensuring that the actual party receiving the call has given meaningful consent.

⁵⁹ Available at <https://www.gpo.gov/fdsys/pkg/CHRG-112hhr74605/pdf/CHRG-112hhr74605.pdf>.

Callers, not consumers, bear the burden of ensuring that the number dialed still belongs to the party that gave consent. 2015 Order at 39–40. Callers, not consumers, bear the burden of recording and effectuating a consumer’s revocation of consent. 2015 Order at 36–37. And callers, not consumers, are best positioned to maximize consensual and legitimate communications while minimizing intrusive and privacy-invading communications.

The problem of how to track and disseminate information about reassigned numbers should be born by the parties best able to mobilize economic influence and identify viable solutions. Many Petitioners, Interveners, and *Amici* are membership associations advocating on behalf of huge industries with a vested stake in continuing to communicate with consumers using automated or prerecorded messages.⁶⁰ As a result, Petitioners, Interveners, and *Amici* can mobilize substantial economic influence to create market solutions—such as comprehensive reassigned number databases or industry-adopted minimum aging

⁶⁰ *E.g.*, Professional Association for Consumer Engagement, Customer Bankers Association, & Chamber of Commerce of the U.S. (Petitioners); Marketing Research Association & National Association of Federal Credit Unions (Interveners); Communications Innovators, American Gas Association, Edison Electric Institute, National Association of Water Companies, National Rural Electric Cooperative Association, American Bankers Association, Credit Union National Association, Independent Community Bankers, American Financial Services Association, Consumer Mortgage Coalition, Mortgage Bankers Association, Internet Association, CTIA—The Wireless Association, National Association of Chain Drug Stores, Retail Litigation Center, Inc., National Retail Federation, & National Restaurant Association (*Amici*).

periods for reassigned numbers—with far greater ease than individual consumers.

Forcing consumers to bear the burden of a problem beyond their control flouts the congressional purpose that motivated the TCPA in 1991.

CONCLUSION

For the reasons explained above, *Amici* respectfully request this Court to deny the Petition for Review of the FCC order.

Respectfully submitted,

/s/ Marc Rotenberg

MARC ROTENBERG

ALAN BUTLER

AIMEE THOMSON

Electronic Privacy Information Center

1718 Connecticut Ave. NW

Suite 200

Washington, DC 20009

(202) 483-1140

rotenberg@epic.org

Dated: January 22, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7)(B) and D.C. Circuit Rule 32(e) because it contains 6,994 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1).

/s/ Marc Rotenberg
MARC ROTENBERG

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 22nd day of January 2016, he caused the foregoing “Brief Of *Amici Curiae* Electronic Privacy Information Center (EPIC) And Six Consumer Privacy Organizations In Support Of Respondents” to be electronically filed using the Court’s CM/ECF system, which served a copy of the document on all counsel of record in this case.

/s/ Marc Rotenberg
MARC ROTENBERG