

No. 19-631

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IN THE  
**Supreme Court of the United States**

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

v.

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

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

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**BRIEF OF AMICI CURIAE NATIONAL CONSUMER  
LAW CENTER, VERIZON, AND  
CONSUMER FEDERATION OF AMERICA  
IN SUPPORT OF NEITHER PARTY**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	v
INTEREST OF AMICI CURIAE .....	1
SUMMARY OF ARGUMENT.....	4
ARGUMENT .....	7
I.    THE TCPA’S PROHIBITION ON NON-CONSENSUAL AUTOMATED CALLS TO CELLULAR CUSTOMERS PROTECTS CONSUMER PRIVACY, INTERSTATE COMMERCE, AND THE NATION’S TELECOMMUNICATIONS SYSTEM.....	9
A.    Congress Intended the TCPA to Protect Consumers’ Privacy from Unwanted Calls.....	9
B.    Businesses Are Also Protected from Automated Calls Made Without Consent.....	11
C.    The TCPA Protects the Integrity of the Nation’s Telecommunications System.....	12

D.	Limited Exceptions to the Prohibition on Unconsented-to Calls to Cell Phones Are Not Inconsistent with the TCPA’s Purpose.....	13
II.	UNWANTED ROBOCALLS ARE EVEN MORE PERNICIOUS TODAY THAN IN 1991 WHEN CONGRESS IDENTIFIED STOPPING THEM AS A PUBLIC POLICY PRIORITY. ....	16
A.	Individuals and Businesses Increasingly Rely on Cell Phones as Their Primary Means of Communications. ....	16
B.	Technological Advances Have Made Sending Massive Numbers of Robocalls to Cellphones Inexpensive and Easy. ....	17
C.	Illegal Robocallers Have Developed Techniques to Avoid Detection, Impersonate Others’ Identities, and Bypass Tools that Service Providers Offer Their Customers to Block Unwanted Calls.....	19

III.	THE TCPA'S LIMITATION ON ROBOCALLS WITHOUT CONSENT TO CELLULAR TELEPHONES IS CRUCIAL. ....	21
A.	The Consent Requirement is a Key Deterrent That Would Be Lost if the Provision Were Struck Down.....	21
1.	Multiple Stakeholders Actively Investigate and Successfully Prosecute TCPA Cases on Behalf of Cellular Subscribers. ....	21
2.	The Prohibition on Robocalls to Cellular Phones Without Consent is an Important Hook for Efficiently Investigating and Prosecuting Robocalls That Also Constitute Fraud.....	23

3.	Residential Subscribers’ Experience Confirms That Removing the Consent Requirements for Cellular Subscribers Would Likely Cause Substantial Harm.....	25
B.	The Restriction on Robocalls to Cellular Phones Undergirds and Complements Multiple Industry and Regulatory Innovations That Protect Consumers from Unwanted Calls and Texts. ....	28
C.	The Restriction on Robocalls to Cellular Phones is Necessary to Protect Cellular Subscribers from Emerging and Future Techniques to Spam Customers. ....	30
	CONCLUSION.....	32

## TABLE OF AUTHORITIES

### CASES:

<i>Braver v. NorthStar Alarm Servs., L.L.C.</i> , 2019 WL 3208651 (W.D. Okla. July 16, 2019) .....	19
<i>Campbell-Ewald Co. v. Gomez</i> , 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016) .....	14
<i>Gold v. Ocwen Loan Servicing, L.L.C.</i> , 2017 WL 6342575 (E.D. Mich. Dec. 12, 2017) .....	23
<i>McCurley v. Royal Seas Cruises, Inc.</i> , 331 F.R.D. 142 (S.D. Cal. Mar. 27, 2019) .....	19

### STATUTES:

15 U.S.C. § 6103 .....	21
15 U.S.C. § 6104 .....	22
47 U.S.C. § 227 .....	<i>passim</i>

### REGULATIONS:

16 C.F.R. Part 310 .....	22
47 C.F.R. § 64.1200 .....	6, 7, 8, 26

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AT&T, Survey Finds Mobile Technologies Saving U.S. Small Businesses More Than \$65 Billion a Year (May 14, 2014) .....	16
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Consent Order Granting Permanent Injunctive Relief, <i>Cellco Partnership d/b/a/ Verizon Wireless v. Plaza Resorts, Inc.</i> , Case No. 9:12-CV-81238- KAM (S.D. Fla. issued Sept. 15, 2014) ....	22-23
Federal Commc’ns Comm’n, Consumer Complaints Data—Unwanted Calls (Feb. 6, 2020) .....	18
Federal Commc’ns Comm’n, <i>In re Adrian Abramovich, Marketing Strategy Leaders, Inc., &amp; Marketing Leaders, Inc.</i> , Forfeiture Order, File No. EB- TCD-15-00020488 (May 10, 2018) .....	19, 21
Federal Commc’ns Comm’n, <i>In re Communications Marketplace Report, GN Docket No. 18-231, 2018 WL 6839365</i> (rel. Dec. 26, 2018) .....	11, 16
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Federal Trade Comm’n, Biennial Report to Congress Under the Do-Not-Call Registry Fee Extension Act of 2007 (Dec. 2019) .....	17-18
Federal Trade Comm’n Blog, <i>On the Do Not Call List But Still Getting Calls? Here’s What to Do Next...</i> , (Aug. 28, 2018) .....	26

Matt Hamblen, <i>Verizon pursues illegal autodialers</i> , Computerworld (Apr. 28, 2009).....	25\3
<i>In re</i> Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59, Second Report and Order, 33 FCC Rcd. 12024 (F.C.C. Dec. 13, 2018).....	30
<i>In re</i> Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59, Declaratory Ruling & Third Further Notice of Proposed Rulemaking, 2019 WL 2461905 (F.C.C. rel. June 7, 2019).....	20
<i>In re</i> Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd. 9706 (F.C.C. Nov. 17, 2017).....	30
<i>In re</i> Cargo Airline Ass'n Petition for Expedited Declaratory Ruling, Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 29 FCC Rcd. 3432 (F.C.C. Mar. 27, 2014).....	15
<i>In re</i> Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 92-90, Report and Order, 7 FCC Rcd. 8752 (F.C.C. Oct. 16, 1992) .....	14



<i>In re</i> Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd. 14014 (F.C.C. July 3, 2003).....	29
<i>In re</i> Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961 (F.C.C. July 10, 2015).....	4, 14-15, 29
<i>In re</i> Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, Report and Order, 31 FCC Rcd. 9074 (F.C.C. Aug. 11, 2016).....	14
Letter of Christopher D. Oatway, Verizon, to J. Patrick Webre, Consumer & Governmental Affairs Bureau, Fed. Commc'ns Comm'n, <i>Advanced Methods to Target and Eliminate Unlawful Robocalls</i> , CG Docket No. 17-59; <i>Call Authentication Trust Anchor</i> , WC Docket No. 17-97 (filed Feb. 28, 2020).....	27
Letter of Margot Saunders, National Consumer Law Center, to Marlene Dortch, Federal Commc'ns Comm'n, Notice of <i>Ex Parte</i> Presentation, CG Docket No. 02-278 (filed June 26, 2017).....	31

Office of Info. & Reg. Affairs, Office of Mgmt. & Budget, <i>In re</i> Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, Brief and OIRA Conclusion (Jan. 27, 2017).....	15
Doug Osborne, <i>Verizon wins in lawsuit against auto warranty telemarketers</i> , Geek.com (Apr. 29, 2009) .....	23
Press Release, CTIA, CTIA Updates Messaging Principles and Best Practices to Further Protect Messaging from Spam, Updates Clarify Importance of Organizations Obtaining Opt-in Consent Prior to Messaging Consumers (July 19, 2019) .....	29
Pub. L. 102–243, § 2, 105 Stat. 2394 (1991).....	10
Pub. L. No. 114-74, 129 Stat. 584 (2015) .....	9
Pub. L. No. 116-105, § 4(b)(5)(C), 133 Stat. 3274 (2019) .....	29
Dan Rafter, Norton, Does the Do Not Call Registry work? .....	26
Statement of Michael J. Frawley, President of Gold Coast Paging, on behalf of Telocator Telemarketing/Privacy Issues: Hearing Before the Subcomm. On Telecommunications and Finance of the House Comm. On Energy and Commerce, 102d Cong., 1st Sess. (Apr. 24, 1991).....	13

Statement of Steve Hamm, Administrator, South Carolina Department of Consumer Affairs, S. Hearing 102-960, S. 1462, The Automated Telephone Consumer Protection Act of 1991; S. 140 The Telephone Advertising Protection Act; and S. 867, Equal Billing for Long Distance Charges, Hearing Before the Senate Subcomm. On Commerce, Science, and Transportation, 102d Cong., 1st Sess. (July 24, 1991) .....	12
Statement of Rep. Pallone, Section-by-Section Summary Pallone-Thune TRACED Act, Comm. On Energy & Commerce (Dec. 2019).....	13
Statement of Sen. Specter, Introduction of S. 1719, 102d Cong. 1st Sess., 137 Cong. Rec. S13181-83 (daily ed. Sept. 17, 1991).....	11
Telemarketing Sales Rule, Fed. Reg. 4580 (Jan. 29, 2003) .....	22
U.S. Dep't of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July- December 2018 (June 2019).....	27

U.S. Government Accountability Office, Fake Caller ID Schemes: Information on Federal Agencies’ Efforts to Enforce Laws, Educate the Public, and Support Technical Initiatives (Dec. 2019) .....	19, 20
USTelecom’s Industry Traceback Group, Policies and Procedures (Jan. 2020) .....	24-25
USTelecom, State Attorneys General Anti- Robocall Principles, Principle No. 4.....	28
YouMail Robocall Index, Historical Robocalls by Time, <i>available at</i> <a href="https://robocallindex.com/history/time/">https://robocallindex.com/history/time/</a> (accessed Feb. 12, 2020) .....	17

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

The Telephone Consumer Protection Act (TCPA) plays a critical role in protecting the country's communications customers from being deluged by automated, unsolicited calls to mobile phones. Amici do not take a position with regard to the constitutionality of the specific exemption to the TCPA that is before the Court or the proper remedy to be adopted if that exemption is unconstitutional. Instead, Amici argue that there is a compelling interest sufficient to justify any narrow restrictions on speech inherent in protecting consumers and the communications network from such calls. Furthermore, the fact that the TCPA carves out, and authorizes the FCC to carve out, limited categories of calls from its prohibitions, along with appropriate protections to safeguard the privacy of persons called, does not *per se* undermine this compelling interest. A statute such as the TCPA necessarily balances customer privacy and network integrity against the need for certain important messages to get through to customers. Regardless of how the Court resolves this case, it should not undermine Congress' ability to pass legislation reflecting these important interests.

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

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<sup>1</sup> Pursuant to Rule 37.6, Amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than Amici and their counsel made a monetary contribution to its preparation or submission. The Respondent has filed a blanket permission for amicus briefs. A letter of consent from the Petitioner accompanies this brief.

behalf of consumers to protect their interests related to robocalls before the United States Congress, the Federal Communications Commission (FCC), and the federal courts. These activities have included testifying in numerous hearings before various congressional committees regarding how to control invasive and persistent robocalls, numerous filings and appearances before the FCC urging strong interpretations of the Telephone Consumer Protection Act (TCPA), and the filing of multiple amicus briefs before the federal courts of appeals representing the interests of consumers regarding the TCPA, as well as publishing and regularly updating a comprehensive analysis on the laws governing robocalls in National Consumer Law Center, *Federal Deception Law*, Chapter 6 (3d ed. 2017), updated at [www.nclc.org/library](http://www.nclc.org/library).

**Verizon** is a global leader delivering innovative communications and technology solutions. In the United States, Verizon's award-winning wireless network affords its more than 100 million connected devices a fast, reliable network to make phone calls and consume ever-increasing amounts of data and video. Verizon makes extensive efforts to protect its customers from robocalls and text message spam. For example, Verizon has deployed a service called Call Filter to more than 50 million customers that helps identify and block unwanted robocalls. Verizon also is a founding member of a coalition of service providers led by its trade association, USTelecom, which assists law enforcement agencies in tracing illegal robocalls so that they can identify and prosecute the callers. Verizon's efforts to protect its customers from robocalls would be significantly more difficult without the TCPA's prohibitions on many types of autodialed calls.

The **Consumer Federation of America (CFA)** is an association of nearly 300 non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. As a research organization, CFA investigates consumer issues, behavior, and attitudes through surveys, focus groups, investigative reports, economic analysis, and policy analysis. The findings of such research are published in reports that assist consumer advocates and policymakers as well as individual consumers. As an advocacy organization, CFA works to advance pro-consumer policies on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts. As an educational organization, CFA disseminates information on consumer issues to the public and news media, as well as to policymakers and other public interest advocates. CFA has participated repeatedly in comments to the FCC on a wide variety of issues concerning the Telephone Consumer Protection Act and has made recommendations to the FCC regarding robocalls and other TCPA issues as a member of the FCC's Consumer Advisory Council. Since it was formed, ensuring a fair marketplace has been a top priority for CFA.

## SUMMARY OF ARGUMENT

The Telephone Consumer Protection Act plays an integral role in protecting the country's communications customers as well as the communications system from being deluged by automated, unsolicited calls to mobile phones. This represents a compelling interest sufficient to justify any narrow restrictions on speech inherent in protecting consumers and the communications network from such calls.

Congress passed the Telephone Consumer Protection Act in 1991 to curtail the burgeoning problem of robocalling,<sup>2</sup> which was then proliferating using relatively new autodialing technology. Through the TCPA, Congress sought to protect the interests of telephone consumers, businesses that relied on their phones, as well as the communications network itself. Among other things, the TCPA imposes particularly stringent limitations on calling cellular telephones, prohibiting almost all such calls made without the consent of the subscriber. While the TCPA permits the Federal Communications Commission (FCC or Commission) to allow exemptions to this prohibition on calls to cellular phones, these exemptions are constrained both by a requirement that they be limited to calls not charged to the end user and that such exceptions be "in the interest of the privacy rights" the statute was intended to protect. 47 U.S.C. § 227(b)(2)(C).

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<sup>2</sup> The FCC uses the term "robocall" to mean "calls made either with an automatic telephone dialing system ('autodialer') or with a prerecorded or artificial voice." *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961 n.1 (F.C.C. July 10, 2015) [hereinafter 2015 TCPA Order].



In contrast to legitimate calls made by companies to their customers, the TCPA prohibition on robocalls to cellular subscribers without consent constitutes a critical protective measure that, if removed, would risk exponentially increasing the already large number of unwanted robocalls and rendering legitimate calls ineffective. The robocall outbreak that Congress sought to control with the TCPA in 1991 has grown into an epidemic as technological advances have made it easy and inexpensive for robocallers to make vast numbers of automated calls. Telephone users in the United States receive billions of autodialed calls monthly, including both calls that are in compliance with the TCPA, and calls that violate it. Many of the callers who make the calls do not just flout the TCPA but also hide from detection by changing the “calling party number” transmitted with their calls so that the calls appear to be coming from someone else. These autodialed calls often go beyond nuisance marketing to furthering dangerous scams such as impersonating personnel from the Internal Revenue Service or the Social Security Administration, thus imperiling the financial well-being of hundreds of millions of recipients. In addition to being a major consumer protection problem, the flood of illegal robocalls harms legitimate companies that use autodialers for calls their customers affirmatively want to receive, but that increasingly find that their contact rates are falling because of consumers’ wavering trust in incoming voice calls.

The TCPA’s prohibition on robocalls to cellular subscribers without consent constitutes a critical check that, if removed, would likely cause the already large number of unwanted robocalls to surge. Multiple parties aggressively investigate and

prosecute violations of this prohibition, thus increasing incentives to comply with the law. And the provision undergirds promising efforts that industry, regulators, and law enforcement agencies have launched to turn the tide in consumers' favor. The prohibition on robocalls is essential to identify likely-illegal traffic. Without it, industry programs to trace back suspicious traffic would be stymied, and it would be substantially harder for service providers and regulators to stanch unwanted robocalls (as well as bulk text messages) at the source with policies that ensure service providers do not help to originate such illegal traffic in the first place.

For an illustration of what might befall cellular subscribers if the protections Congress has established for them were removed, the Court need look no further than the experiences of traditional landline phone customers. Residential telephone subscribers' protections under the TCPA are much weaker than those of cellular customers: there is no restriction on autodialed calls to residential telephone numbers, and prerecorded calls are restricted only if made for telemarketing purposes. *See* 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(3). Verizon, which serves both cellular and residential customers, has confirmed that its average residential customer receives well over *twice* as many unwanted robocalls as its average wireless customer.

The TCPA's prohibition on most types of automated calls to cellular telephones without consent is essential to preserving both customer privacy and the integrity of the communications system in the United States. This constitutes a compelling interest justifying any restrictions on speech contained in the TCPA. Moreover, although

Amici do not, in this brief, take any position on the TCPA exemption at issue in this case, the fact that the TCPA does not prohibit every single non-consented-to, non-emergency call to cellular phones, and also allows the FCC to promulgate certain limited exemptions, does not on its own undermine this compelling interest. Not only are these exceptions limited to narrow circumstances, but there is no evidence that they have contributed materially to the explosion of robocalls or undermined the TCPA's purpose. These minimal exceptions to the TCPA's general protections do not in any way justify a ruling from this Court that would undermine Congress' ability to adopt the TCPA's general prohibition on non-consented-to calls to cellular phones.

### **ARGUMENT**

The Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, and its implementing FCC rules, 47 C.F.R. § 64.1200, prohibit what Congress considered to be abusive methods of contacting consumers and businesses through their telephones.

Congress adopted different rules for traditional residential wireline service than for what was, at the time, relatively new cellular telephone technology. For residential customers, Congress limited only calls using an artificial or prerecorded voice, 47 U.S.C. § 227(b)(1)(B), as well as authorizing the FCC to set up a "do not call" list for customers who affirmatively

opt not to receive other types of telemarketing calls.<sup>3</sup> Congress did not, however, prohibit autodialed calls to landline residential phones. Moreover, the general statutory prohibition on unconsented-to calls using an artificial or prerecorded voice is currently limited by regulation to telemarketing calls. 47 C.F.R. § 64.1200(a)(3).

Congress adopted significantly more stringent protections for cellular telephones, as well as certain other critical phone lines such as “911” numbers, hospital emergency lines, physicians’ offices, police and fire departments, and poison control centers. For these, Congress prohibited making most types of non-emergency autodialed or prerecorded calls without the prior express consent of the called party. 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1). Congress allowed the FCC to establish limited exemptions from this prohibition. While the FCC is permitted to exempt all non-commercial calls from the limits on prerecorded calls to residential lines, 47 U.S.C. § 227(b)(1)(B), the Commission is permitted to allow unconsented-to automated calls to cellular phones only when they are not charged to the called party. 47 U.S.C. § 227(b)(1)(C). Exemptions for automated calls to both residential lines and cell phones must be “subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect.” *Id.*

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<sup>3</sup> Callers violate the “do not call” rules by making any type of telemarketing call to registered residential lines or cellphones. 47 C.F.R. § 64.1200(e). Telemarketing calls are covered whether they are made using a prerecorded or artificial voice, an automated dialer, or even if the call is manually dialed. 47 C.F.R. § 64.1200(c)(2).

The 2015 Appropriations Act (referred to as the Budget Act Amendment) amended the prohibitions applicable to both residential and cellular customers to exclude calls made solely to collect a debt owed to or guaranteed by the United States. 47 U.S.C. § 227(b)(1)(A), (B), *as amended by* Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (2015) [hereinafter Budget Act]. As this case challenges only the prohibitions on making autodialed calls to cellular customers, this brief focuses on the importance of the TCPA's restrictions on those calls.

**I. THE TCPA'S PROHIBITION ON NON-CONSENSUAL AUTOMATED CALLS TO CELLULAR CUSTOMERS PROTECTS CONSUMER PRIVACY, INTERSTATE COMMERCE, AND THE NATION'S TELECOMMUNICATIONS SYSTEM.**

The prohibition on autodialed calls to cellular telephones advances three critical societal interests. First, it protects individual consumers from invasion into their privacy and the costs associated with receiving numerous unwanted calls. Second, it protects businesses and the public safety system that use cell phones as a primary means of communications from having their lines clogged with uninvited calls. And third, it helps to maintain the integrity of the nation's telephone system.

**A. Congress Intended the TCPA to Protect Consumers' Privacy from Unwanted Calls.**

The congressional findings accompanying the TCPA repeatedly stress the purpose of protecting consumers' privacy against the intrusion and nuisance caused by the calls:

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

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

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(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.

Pub. L. 102–243, § 2, 105 Stat. 2394 (1991) (emphasis added). Congress concluded that the only effective way to protect people from these unwanted and intrusive calls was to require *prior consent for the automated calls*:

(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.

*Id.*

The privacy goals Congress articulated thirty years ago are even more applicable to the cellular phones today when cell phones are ubiquitous. *See* Federal Commc'ns Comm'n, *In re* Communications Marketplace Report, GN Docket No. 18-231, 2018 WL 6839365, at \*4 ¶ 8 (rel. Dec. 26, 2018) [hereinafter Communications Marketplace Report]. Cellular subscribers take their cell phones with them wherever they go, and without restrictions on autodialing consumers run the risk of being bombarded with robocalls at all times and in all places.

**B. Businesses Are Also Protected from Automated Calls Made Without Consent.**

Congress recognized that businesses using both traditional wireline as well as cellular phones are harmed by these unwanted and intrusive calls. As Senator Specter stated, “many businesses are called by the telemarketers, making their work lines unreachable to the public and affecting the owner’s ability to effectively run his business.” Statement of Sen. Specter, Introduction of S. 1719, 102d Cong. 1st Sess., 137 Cong. Rec. S13181-83 (daily ed. Sept. 17, 1991). A state government witness before the committee considering the TCPA similarly testified:

. . . I have received calls from some of the largest businesses within the State of South Carolina complaining that their phone lines, through the sequential and programmed calling moving through their offices, *tying up their business lines and tying up their staff listening to calls, and you may want to consider*

*whether or not the business community  
indeed wants to receive these calls.*

Statement of Steve Hamm, Administrator, South Carolina Department of Consumer Affairs, S. Hearing 102-960, S. 1462, The Automated Telephone Consumer Protection Act of 1991; S. 140 The Telephone Advertising Protection Act; and S. 867, Equal Billing for Long Distance Charges, Hearing Before the Senate Subcomm. On Commerce, Science, and Transportation, 102d Cong., 1st Sess. (July 24, 1991) (emphasis added).

**C. The TCPA Protects the Integrity of the Nation's Telecommunications System.**

Congress found that the nation's communication systems and providers were also negatively impacted by the explosion of automated calls before the TCPA was adopted. As the head of a paging provider testified:

It is really rough when you come to work every day with the objective of giving service when you have outside influences that can alter that objective. When I say outside influences, I'm talking about autodialers that seize up our blocks of numbers. For example, I have 10,000 numbers in a 363 exchange, and if an autodialer gets into that 363 exchange and attacks numbers in 100 groups, it can tie up that exchange and impede the service to all of my customers. *The Coast Guard, national defense organizations, police, fire department, hospitals, doctors, you*



*name it; they're all affected.* Now, this has been a problem for many years.

Statement of Michael J. Frawley, President of Gold Coast Paging, on behalf of Telocator Telemarketing/Privacy Issues: Hearing Before the Subcomm. On Telecommunications and Finance of the House Comm. On Energy and Commerce, 102d Cong., 1st Sess. (Apr. 24, 1991) (emphasis added).

Indeed, Congress recently reiterated the need for the TCPA's restrictions against automated calls to cell phones as necessary to maintain trust in the communications system:

The rising tide of illegal robocalls has quickly turned from a nuisance to a real threat on the way we all view and use our telephones. . . These calls all undermine the public's trust in our phone system.

Statement of Rep. Pallone, Section-by-Section Summary Pallone-Thune TRACED Act, Comm. On Energy & Commerce (Dec. 2019), *available at* <https://republicans-energycommerce.house.gov/wp-content/uploads/2019/12/Pallone-Thune-TRACED-Act-Section-by-Section.pdf>.

**D. Limited Exceptions to the Prohibition on Unconsented-to Calls to Cell Phones Are Not Inconsistent with the TCPA's Purpose.**

The TCPA sought to protect these important interests by prohibiting nearly all autodialed calls to cellular phones without the consent of the subscriber.

As noted earlier, there are a limited number of calls that are not subject to the prohibition. Some autodialed calls do not fall within the statutory scope of the TCPA at all. For instance, the FCC has long held that calls or texts by wireless carriers to their own customers without charge to the customer do not fall within the scope of the TCPA. *See In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 92-90, Report and Order, 7 FCC Rcd. 8752, 8775 ¶ 45 (F.C.C. Oct. 16, 1992). Similarly, calls by the federal government are not subject to the TCPA. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016).

In 1993, Congress amended the TCPA to provide the FCC the power to authorize narrow exceptions to the TCPA’s prohibition against unconsented-to calls to cell phones. 47 U.S.C. § 227(b)(2)(C). The statute limits these exemptions to calls for which a customer is not charged, and these exemptions are “subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect.” To date, the FCC has exercised this power sparingly, authorizing only a few exemptions in nearly thirty years.<sup>4</sup> *See, e.g., In re Rules and*

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<sup>4</sup> While Amici do not take any position in this brief with regard to the statutory exemption at issue allowing calls to collect government debt, Amici point out that Congress only permitted these debt collection calls to be made subject to the FCC’s “implementing regulations,” while also permitting the FCC to “restrict or limit the number and duration” of those calls. 47 U.S.C. § 227(b)(2)(H). These regulations were issued, (*In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-278, Report and Order, 31 FCC Rcd. 9074 (F.C.C. Aug. 11, 2016), *available at* <https://docs.fcc.gov/public/attachments/FCC-16-99A1.pdf>), but

Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961, 8030 ¶ 143, 8031 ¶ 146 (F.C.C. July 10, 2015) (exigent health care alerts); *In re* Cargo Airline Ass'n Petition for Expedited Declaratory Ruling, Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, Declaratory Ruling, 29 FCC Rcd. 3432, 3439 ¶ 21 (F.C.C. Mar. 27, 2014) (package delivery notifications).

The fact that the TCPA allows for these limited statutory or regulatory exceptions does not undermine its important purposes. While Amici do not in this brief address any specific exception, Amici note that the existence of such exceptions is not *per se* inconsistent with the TCPA's goals. Rather, these exceptions reflect a balanced judgment that while the overwhelming majority of autodialed calls are not in customers' interests, in some cases the importance of the call or its lesser privacy impact may outweigh the negatives associated with it. Moreover, there is no evidence that any of these exceptions have over the past thirty years contributed to the expanding robocall problems described below.

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withdrawn five months later. *See* Office of Info. & Reg. Affairs, Office of Mgmt. & Budget, *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, Brief and OIRA Conclusion (Jan. 27, 2017), *available at* [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201701-3060-011](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201701-3060-011).

**II. UNWANTED ROBOCALLS ARE EVEN MORE PERNICIOUS TODAY THAN IN 1991 WHEN CONGRESS IDENTIFIED STOPPING THEM AS A PUBLIC POLICY PRIORITY.**

**A. Individuals and Businesses Increasingly Rely on Cell Phones as Their Primary Means of Communications.**

The concerns leading up to the enactment of the TCPA are even more significant today. The harm to cellular subscribers from robocallers is greater as cell phones have become ubiquitous and many consumers rely on their cellular telephones as their primary, if not sole, method of communication. *See* Communications Marketplace Report at \*6 ¶ 8 (“[F]rom December 2014 to December 2017, the percentage of U.S. households that were identified as wireless-only (no landline telephone service) increased from approximately 45% to approximately 54%.”).

Small businesses are increasingly dependent on mobile phones. AT&T reports that 94% of small businesses use smartphones to conduct business, for greater efficiency and ability to work remotely, and that two-thirds of small business owners say that their business could not survive without wireless technology. *See* AT&T, Survey Finds Mobile Technologies Saving U.S. Small Businesses More Than \$65 Billion a Year (May 14, 2014), *available at* [https://about.att.com/story/survey\\_finds\\_mobile\\_technologies\\_saving\\_us\\_small\\_businesses\\_more\\_than\\_65\\_billion\\_a\\_year.html](https://about.att.com/story/survey_finds_mobile_technologies_saving_us_small_businesses_more_than_65_billion_a_year.html). Protecting businesses’ cell phones was recognized as a driving force behind the recently passed TRACED Act, which amended the TCPA in 2019 to expand the tools to enforce the

underlying restrictions (including the prohibition against unconsented-to calls in § 227(b)(2)(A)(iii)).

**B. Technological Advances Have Made Sending Massive Numbers of Robocalls to Cellphones Inexpensive and Easy.**

According to a respected robocall watch site, robocalls to cellular phones have increased by a whopping 494% in four years: from 8.9 billion in the last three quarters of 2015 to 43 billion in the same nine months of 2019. *See YouMail Robocall Index, Historical Robocalls by Time, available at <https://robocallindex.com/history/time/> (accessed Feb. 12, 2020).*

Of the 58.5 billion robocalls made in 2019, YouMail reports that over half of these calls—56%—were scam calls, spoofed calls, or telemarketing calls. But 23% were “Alerts and Reminders” (*see id.*), which recipients probably value, thus highlighting the importance of the TCPA’s approach of allowing calls to which the recipient consents. While some of the increase in robocalls is due to these desired medical alerts and reminders, these wanted automated calls are only a fraction of all the automated calls made to cell phones.

The fact that huge numbers of these automated calls are unwanted, and considered a significant invasion of privacy and a limitation on the usefulness of consumers’ cellular telephones, is illustrated by the soaring numbers of complaints to government agencies about these calls. In 2009, the FTC received about 756,000 robocall complaints; by 2019, that number had more than quintupled to 3.7 million. Federal Trade Comm’n, Biennial Report to Congress

Under the Do-Not-Call Registry Fee Extension Act of 2007, at 3 (Dec. 2019), *available at* <https://www.ftc.gov/system/files/documents/reports/biennial-report-congress-under-do-not-call-registry-fee-extension-act-2007-operation-national-do-not-p034305dncreport2019.pdf>. Likewise, the FCC received 189,076 complaints about unwanted calls in 2019. Federal Commc'ns Comm'n, Consumer Complaints Data—Unwanted Calls (Feb. 6, 2020), *available at* <https://opendata.fcc.gov/Consumer/Consumer-Complaints-Data-Unwanted-Calls/vakf-fz8e>.

One reason for the explosion in scam calls, spoofed calls, and unwanted telemarketing and other calls is that Internet-powered phone systems have made it easy and cheap to make millions of automated calls. *See* Federal Trade Comm'n website at <https://www.consumer.ftc.gov/features/feature-0025-robocalls> (citing “significant increase in the number of illegal robocalls because internet-powered phone systems have made it cheap and easy for scammers to make illegal calls . . .”). For example, services like MessageCommunications charge \$875 for 125,000 minutes of robocalls—meaning that if each targeted consumer listens to the call for three seconds and then hangs up, the robocall campaign would reach 2.5 million consumers. MessageCommunications, Voice Broadcasting Pricing / Rates, *available at* <http://www.voicebroadcasting.us/Pricing.html>.

Given the ease and low cost of robocalling, it is not uncommon for robocalling campaigns to involve tens of millions of calls. For example, the FCC recently imposed a \$120 million penalty against a company that had made almost 97 million robocalls in three months advertising vacation packages.

Federal Commc'ns Comm'n, *In re Adrian Abramovich, Marketing Strategy Leaders, Inc. & Marketing Leaders, Inc.*, Forfeiture Order, File No. EB-TCD-15-00020488 (May 10, 2018), *available at* <https://transition.fcc.gov/eb/Orders/2018/FCC-18-58A1.html>. Similarly, in the recent case of *McCurley v. Royal Seas Cruises, Inc.*, 331 F.R.D. 142 (S.D. Cal. Mar. 27, 2019), the plaintiffs challenged the legality of millions of calls to cell phones to sell cruises allegedly in violation of the TCPA. And there are numerous similar other cases in recent years. *See, e.g., Braver v. NorthStar Alarm Servs., L.L.C.*, 2019 WL 3208651, at \*13 (W.D. Okla. July 16, 2019) (tens of millions of robocalls made to sell, among other things, home security systems).

**C. Illegal Robocallers Have Developed Techniques to Avoid Detection, Impersonate Others' Identities, and Bypass Tools that Service Providers Offer Their Customers to Block Unwanted Calls.**

Like bacteria that evolve to bypass the body's defenses, illegal robocallers have a history of changing their practices to find effective ways to reach telephone users who do not want to be reached. For example, the same Voice over Internet Protocol (VoIP) technology that robocallers use to generate high volumes of computer-originated calls also permits them to manipulate the Caller ID information that they send with those calls, a practice known as "spoofing." *See* U.S. Government Accountability Office, *Fake Caller ID Schemes: Information on Federal Agencies' Efforts to Enforce Laws, Educate the Public, and Support Technical Initiatives* 6 (Dec. 2019), *available at*

<https://www.gao.gov/assets/710/703362.pdf>  
[hereinafter GAO Report].

Fraudsters can use spoofing to impersonate a trusted person such as a government agency. *Id.* at 10, 19; *see also* Federal Commc'ns Comm'n, *In re Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Declaratory Ruling & Third Further Notice of Proposed Rulemaking, 2019 WL 2461905, at \*3-4 ¶¶ 11-13 (F.C.C. rel. June 7, 2019). Other illegal robocallers use the technique to make harassing calls while hiding their identities. GAO Report at 11. Although service providers are implementing technology that, when fully in place, will help validate the accuracy of Caller ID, there will still be gaps that robocallers will likely exploit. *In re Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Declaratory Ruling & Third Further Notice of Proposed Rulemaking, 2019 WL 2461905, at \*6 ¶ 21, \*22 ¶ 80 (F.C.C. rel. June 7, 2019). This constant arms race between service providers and robocallers highlights that there is no static technological fix to the robocall problem, driving home the need for the TCPA's meaningful legal protections against unwanted calls.



### **III. THE TCPA'S LIMITATION ON ROBOCALLS WITHOUT CONSENT TO CELLULAR TELEPHONES IS CRUCIAL.**

#### **A. The Consent Requirement is a Key Deterrent That Would Be Lost if the Provision Were Struck Down.**

##### **1. Multiple Stakeholders Actively Investigate and Successfully Prosecute TCPA Cases on Behalf of Cellular Subscribers.**

The TCPA vests the ability to enforce its provisions in multiple parties, strengthening its deterrent effect. First, the FCC has broad authority to enforce it. In the last five years (2014-2019), the FCC has brought 33 enforcement actions against companies for violation of the TCPA. Federal Commc'ns Comm'n, Telecommunications Consumers Division—Enforcement Actions (Aug. 13, 2019), *available at* <https://transition.fcc.gov/eb/tcd/eabydate.html>. As noted earlier, in just one example, in 2018, the FCC imposed a \$120 million penalty on a company that had made almost 97 million robocalls in three months advertising vacation packages. Federal Commc'ns Comm'n, *In re Adrian Abramovich, Marketing Strategy Leaders, Inc., & Marketing Leaders, Inc.*, Forfeiture Order, File No. EB-TCD-15-00020488 (May 10, 2018), *available at* <https://transition.fcc.gov/eb/Orders/2018/FCC-18-58A1.html>.<sup>5</sup>

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<sup>5</sup> Some of the unwanted calls also violate the Federal Trade Commission's (FTC) Telemarketing Sales Rule. 16 C.F.R. Part 310. However, because of general limits on the FTC's jurisdiction, that rule does not apply to a number of major industries, including banks, federal credit unions, federal

But the TCPA does not leave enforcement to the FCC alone. Highlighting the importance Congress placed on enforcement of the statute, it also authorizes the states to bring enforcement actions on behalf of their residents. States can seek not only injunctive relief but also actual monetary loss or statutory damages of \$500—which the court can treble if the violation was willful or knowing—for each violation. 47 U.S.C. § 227(g)(1).

Finally, the TCPA allows private parties to bring claims to enjoin and collect statutory damages for illegal robocalls. 47 U.S.C. § 227(b)(3).<sup>6</sup> Service providers such as Verizon have used this provision to enforce the TCPA and stem the tide of unconsented-to calls to its customers. For example, as a TCPA plaintiff, Verizon secured a federal court order that shut down a robocall scam in which millions of customers received calls asking them to provide personal information in exchange for the promise of a “free cruise.” *See* Consent Order Granting Permanent Injunctive Relief, *Cellco Partnership d/b/a/ Verizon*

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savings associations, common carriers, and insurers. *See* Telemarketing Sales Rule, Fed. Reg. 4580, 4591 n.19 (Jan. 29, 2003). Nor does it restrict dangerous non-telemarketing calls, like phishing calls, general public relations announcements, and other spam calls and text messages. The enforcement mechanisms under the enabling statute for the FTC’s rule are far weaker than those under the TCPA, as it does not authorize states to seek any sort of statutory damage award, 15 U.S.C. § 6103, and it allows for only a very limited private cause of action with no statutory damages. 15 U.S.C. § 6104.

<sup>6</sup> Amici in this brief do not take any position with regard to the advisability of allowing private claims for relief for violations of statutes other than the TCPA, nor with regard to specific questions regarding the scope of the private right of action under the TCPA.

*Wireless v. Plaza Resorts, Inc.*, Case No. 9:12-CV-81238-KAM (S.D. Fla. issued Sept. 15, 2014); *see also* Doug Osborne, Verizon wins in lawsuit against auto warranty telemarketers, Geek.com (Apr. 29, 2009), *available at* <https://www.geek.com/mobile/verizon-wins-in-lawsuit-against-auto-warranty-telemarketers-758582/>; Matt Hamblen, *Verizon pursues illegal autodialers*, Computerworld (Apr. 28, 2009), *available at* <https://www.computerworld.com/article/2524113/verizon-pursues-illegal-autodialers.html>. Individual customers who receive robocalls can also bring such claims. *See, e.g., Gold v. Ocwen Loan Servicing, L.L.C.*, 2017 WL 6342575 (E.D. Mich. Dec. 12, 2017) (consumer, who had consented to be called about his mortgage debt, sued after repeated requests that the calls stop, after which the servicer called his cell phone 1,281 times). This ability would also be lost if the TCPA were no longer available.

**2. The Prohibition on Robocalls to Cellular Phones Without Consent is an Important Hook for Efficiently Investigating and Prosecuting Robocalls That Also Constitute Fraud.**

As discussed above, many of the unwanted robocalls that U.S. consumers receive are not just invasive but are also part of fraudsters' sophisticated campaigns to inflict substantial financial harm on the American public. Whereas investigating fraud requires developing evidence of fraudulent intent, evidence that a fraudulent robocaller has violated the TCPA's consent requirement for calls to cellular phones can be much more readily assembled. Law enforcement agencies are increasingly partnering with industry to efficiently identify, investigate, and

shut down large-scale fraudulent robocall scams using the TCPA cellular customer consent provision as a primary “hook” for those activities. Importantly, those opportunities to shut down large-scale fraudulent robocalling campaigns benefit not just cellular subscribers but all telephone users.

The USTelecom Industry Traceback Group (“ITG”), an industry-led initiative to address the robocall problem, is a good example of an investigative program that relies on the TCPA’s cellular consent provision to efficiently investigate robocalls that often involve criminal conduct. If the administrator of the ITG group has information about a robocalling campaign involving large numbers of likely-illegal calls, it will coordinate a “traceback” among the service providers that handled the robocall traffic in order to identify the calls’ origin. *See* USTelecom’s Industry Traceback Group, Policies and Procedures 6-11 (Jan. 2020) [hereinafter ITG Policies and Procedures], *available at* [https://www.ustelecom.org/wp-content/uploads/2020/02/USTelecom\\_ITG-Policies-and-Procedures\\_Jan-2020.pdf](https://www.ustelecom.org/wp-content/uploads/2020/02/USTelecom_ITG-Policies-and-Procedures_Jan-2020.pdf). In 2019, the group traced back more than 1,000 illegal calls and shared information about those robocallers with law enforcement so that those agencies could bring enforcement actions against the illegal robocallers. *See* USTelecom, “What is the Industry Traceback Group?”, *available at* <https://www.ustelecom.org/the-ustelecom-industry-traceback-group-itg/>.

The ITG is not permitted to initiate a traceback into a robocalling campaign, no matter how much it may be frustrating and irritating consumers, unless it has a basis to conclude that a robocalling campaign is illegal or abusive. *See* 47 U.S.C. § 222(d)(2) (authorizing information sharing by service providers

to protect consumers from fraudulent, abusive or unlawful calling practices); *see also* ITG Policies and Procedures at 11. Because it is straightforward and efficient to determine that a robocalling campaign has made an unconsented-to call to a cellular telephone number, a large percentage of the illegal robocalls that ITG traces back are traced back based on that suspected TCPA violation, although many of those cases in fact involve fraudulent robocallers. It would be inefficient and impractical to initiate large numbers of tracebacks targeting suspected fraudsters if the ITG needed to first assemble evidence of criminal intent for each one.

**3. Residential Subscribers' Experience Confirms That Removing the Consent Requirements for Cellular Subscribers Would Likely Cause Substantial Harm.**

If the cellular subscribers' consent-based protections from autodialed calls were to be eliminated, those customers' protections from robocalls would be even fewer than the protections that residential customers currently have. And cellular customers' satisfaction with their service would likely be correspondingly lower because the volume of unwanted robocalls to their phones would likely surge. There is strong evidence that residential customers receive substantially more unwanted robocalls than cellular customers because of their diminished TCPA protections.

If the TCPA's prohibition against automated calls to cell phones without consent were eliminated, the only remaining provisions of the TCPA that would

cover cell phones relate to the requirements for compliance with company-specific and nationwide do-not-call lists. *See* 47 C.F.R. § 64.1200(d) and (c)(2). These rules apply only to telephone solicitations, and the company-specific do-not-call rule applies only to telemarketing calls. 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(d) and (f)(12). Without the TCPA, there would be no federal law addressing or limiting non-telemarketing robocalls.<sup>7</sup> In other words, absent the consent requirement for calls to cellular telephones, cellular customer would have no protections from any robocalls except for those few telemarketing calls that violate the do-not-call lists. As is the case with residential customers today, the TCPA would place no limit on numerous categories of calls that—while wanted if consented to—many consumers consider to be intrusive absent consent, such as: charitable calls; informational calls; telephone survey calls; political calls; and phishing calls that do not seek to sell

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<sup>7</sup> Additionally, even for the telemarketing calls covered by these parts of the TCPA, many complain that the do-not-call registries do not work, as the calls keep coming. *See, e.g.*, Federal Trade Comm’n Blog, *On the Do Not Call List But Still Getting Calls? Here’s What to Do Next...*, (Aug. 28, 2018), *available at* <https://www.ftc.net/blog/on-the-do-not-call-list-but-still-getting-calls-heres-what-to-do-next>; Dan Rafter, Norton, *Does the Do Not Call Registry work?*, *available at* <https://us.norton.com/internetsecurity-privacy-do-not-call-registry.html>. There are several likely reasons for the failure of the registry requirements to stop telemarketing calls, leading with the scope of the current problem with unwanted robocalls, as well as the limited enforcement provisions allowed for violations of the registry. Unlike violations of the prohibitions against illegal robocalls to cell phones that trigger damages for each illegal call, 47 U.S.C. § 227(b)(3), violations of the registry requirements are only permitted to be brought after the person “has received more than one telephone call within any 12-month period by or on behalf of the same entity . . .” 47 U.S.C. § 227(c)(5).

anything, but seek only to further the collection of identity-stealing information from the called parties.

Verizon has confirmed that the average residential customer receives more than *twice* the number of unwanted calls than the average cellular customer.<sup>8</sup> Consistent with a wavering trust in voice calls is the fact that residential customers have been “cutting the cord” at remarkable rates. More than half of American homes today have only wireless telephones. *See* U.S. Dep’t of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2018* (June 2019), *available at* <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201906.pdf>. The fact that residential customers get far more robocalls than cellular customers illustrates the substantial harm that eliminating cellular customers’ protections could cause.

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<sup>8</sup> Verizon provides services to tens of millions of its wireless and wireline customers that they can use to avoid calls identified as likely to be unwanted. *See* Letter of Christopher D. Oatway, Verizon, to J. Patrick Webre, Consumer & Governmental Affairs Bureau, Fed. Comm’ns Comm’n, *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59; *Call Authentication Trust Anchor*, WC Docket No. 17-97 (filed Feb. 28, 2020). Verizon compared the volumes of unwanted calls to wireless (cellular) and wireline (residential) customers using the same algorithms those services use to identify unwanted calls.

**B. The Restriction on Robocalls to Cellular Phones Undergirds and Complements Multiple Industry and Regulatory Innovations That Protect Consumers from Unwanted Calls and Texts.**

There are a number of anti-robocall activities and regulatory innovations that would be less promising, and possibly even impossible to realize, but for the legal backdrop created by the TCPA's consent provision for calls to cellular customers.

First, service providers have worked with other stakeholders, including state attorneys general, to develop best practices that service providers should follow to prevent illegal robocallers from being served by their networks. For example, numerous service providers have agreed to investigate “suspicious calls and calling patterns” on their networks in order to ensure that they do not become the conduit for illegal robocallers’ operations. *See* USTelecom, State Attorneys General Anti-Robocall Principles, Principle No. 4, available at <https://www.ustelecom.org/wp-content/uploads/2019/08/State-AGs-Providers-AntiRobocall-Principles-With-Signatories.pdf>. If a provider has reason to suspect illegal robocalling taking place on its network, that best practice requires taking appropriate action, such as notifying law enforcement. *See id.* But without a bright line with which to identify illegal traffic (i.e., the TCPA’s cellular consent provision), implementing this “know your customer” best practice would be challenging at best, and would possibly require service providers to abandon this promising robocall mitigation practice.

Second, Congress has embraced industry’s know your customer principle, recently requiring the



FCC to issuing rules requiring service providers to have “robocall mitigation programs” for certain traffic they originate. *See* TRACED Act, Pub. L. No. 116-105, § 4(b)(5)(C), 133 Stat. 3274 (2019). FCC rules requiring service providers to “prevent unlawful robocalls from originating” on their networks must be grounded in procedures and processes to identify unlawful calls. Like the “know your customer” industry best practice, those FCC rules can be most effective and most efficiently implemented if service providers can follow a bright line for determining which robocalls are illegal.

Third, Verizon and other wireless carriers are taking a similar approach to protecting customers from unwanted text messages, which are considered “calls” for purposes of the TCPA’s limitations on automated calls. *See* 2015 TCPA Order at 8016 ¶¶ 107-110; *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd. 14014, 14025 ¶ 14 n.48 (F.C.C. July 3, 2003). Recognizing that industry self-regulation of the origination of bulk texts can help keep texting spam-free, in 2019, the wireless industry’s trade association updated its best practices for bulk texting to require organizations to obtain opt-in consent prior to initiating mass texting campaigns. *See* Press Release, CTIA, CTIA Updates Messaging Principles and Best Practices to Further Protect Messaging from Spam, Updates Clarify Importance of Organizations Obtaining Opt-in Consent Prior to Messaging Consumers (July 19, 2019), *available at* <https://www.ctia.org/news/ctia-updates-messaging-principles-and-best-practices-to-further-protect-messaging-from-spam>. That industry initiative to protect consumers from unwanted text messages is

undergirded by the TCPA's consent requirement for calls to cellular numbers.

Finally, many of the FCC's regulatory initiatives to address the robocall epidemic have been at least partially grounded in the TCPA's overall prohibitions against robocalls to cell phones without consent. For example, the FCC has authorized voice service providers to block calls from certain categories of numbers that are highly likely to be associated with unlawful calling such as calls purporting to originate from unassigned, unallocated, or invalid numbers, and calls purporting to originate from numbers that are valid and in service but that are not used by their subscribers to originate calls. *In re* Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd. 9706, 9710-21 ¶¶ 10-40 (F.C.C. Nov. 17, 2017). The FCC also has created a database of reassigned numbers to help callers avoid calling non-consenting cellular subscribers to whom the phone number of a consenting subscriber has been reassigned. The FCC concluded that the reassigned number database order would protect consumers from receiving unwanted robocalls. *See In re* Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59, Second Report and Order, 33 FCC Rcd. 12024 (F.C.C. Dec. 13, 2018).

**C. The Restriction on Robocalls to Cellular Phones is Necessary to Protect Cellular Subscribers from Emerging and Future Techniques to Spam Customers.**

The cellular consent requirement is a technologically neutral provision that has been, and

likely will continue to be, sufficiently flexible to protect consumers from unwanted calls, regardless of the techniques robocallers develop. One example of an emerging robocalling trend that the cellular consent provision may help address is the increased incidence of “ringless voicemails,” a technology that inserts a message into the called party’s voicemail without causing the phone to ring. Ringless voicemails can congest service providers’ networks and voicemail systems, and consumers and small business owners have expressed alarm about ringless voicemails because they clog voicemail boxes, potentially preventing customers from receiving wanted—and potentially crucial—messages. For dozens of examples (out of thousands) of comments expressed by small businesses, medical personnel, and individuals to the FCC about the possibility that ringless voicemails could be permitted to take over their voicemail, see Letter of Margot Saunders, National Consumer Law Center, to Marlene Dortch, Federal Commc’ns Comm’n, Notice of *Ex Parte* Presentation, CG Docket No. 02-278 (filed June 26, 2017), *available at* <https://ecfsapi.fcc.gov/file/10626290404762/Ex%20parte%20letter%206-23-17.pdf>.

Callers delivering those ringless voicemails use an innovative technique called “dual seizure.” The caller makes two calls to the cellular subscriber in rapid succession that are timed to manipulate the service provider’s network so that the second call goes directly to voicemail. The first call causes the cellular subscriber’s device to begin setting up a connection with the network so that it can receive the incoming call, and the second call arrives while the device is in setup mode and thus is directed into the called party’s voicemail. The robocaller then hangs up the first call

before that call rings on the cellular subscriber's device, so that the customer has received an unsolicited voicemail without her device ringing. Verizon calculates that its cellular customers in recent months have been receiving approximately five million ringless voicemails every day that are delivered using this dual-seizure technology.

The TCPA's prohibition on unconsented-to calls to cellular numbers forms a basis to stanch this emerging robocalling trend via enforcement actions against the companies making these dual-seizure calls. It also would provide support for actions that service providers may choose to take to protect their networks and their customers from ringless voicemails. The cellular consent requirement thus is likely to continue to be relevant and important as these sorts of new technological challenges continue to emerge.

## CONCLUSION

Because of the steady drumbeat of unwanted automated calls to cell phones, and the rising—and sometimes dangerous—nature of the scams made through these calls, the nation's telephone system has already suffered a loss of trust. The TCPA's prohibition against making automated calls to cell phones is an essential tool to combat unwanted robocalls that would threaten to overwhelm American consumers and the nation's telephone system if the limits imposed on these calls by the TCPA were removed. Providers are working together and with the government to restore that trust and reinvigorate this essential communication tool in the U.S. marketplace. Eliminating this provision in the TCPA would move in the opposite direction and could

seriously undermine the cell phone system as a meaningful way for people to communicate. Amici urge that no matter how the Court resolves the specific question in this case regarding the constitutionality of the government debt exemption to the TCPA, it should not undermine the basic premise that the TCPA's general prohibition on unconsented-to calls to cellular phones, subject to the power of the FCC to authorize narrow exceptions to this prohibition, serves a vital national interest.

Respectfully submitted,

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