

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

STEVE GALLION,

Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,

Intervenor-Appellee,

v.

CHARTER COMMUNICATIONS, INC.; SPECTRUM MANAGEMENT
HOLDING COMPANY, LLC,

Defendants-Appellants.

On appeal from the United States District Court
for the Central District of California, Riverside
No. 5:17-cv-01361-CAS-KK

**BRIEF OF *AMICUS CURIAE* ELECTRONIC PRIVACY INFORMATION
CENTER (EPIC) IN SUPPORT OF PLAINTIFF-APPELLEES**

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November 9, 2018

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, 29(c), and Local Rule 26.1 *Amicus Curiae* Electronic Privacy Information Center (“EPIC”) is a District of Columbia corporation with no parent corporation. No publicly held company owns 10% or more of EPIC stock. No publicly held company has a direct financial interest in the outcome of this litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement.

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INTEREST OF AMICUS

The Electronic Privacy Information Center (“EPIC”) is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging privacy issues.¹ EPIC routinely participates as *amicus curiae* in federal cases concerning the Telephone Consumer Protection Act and other important consumer privacy issues. *See, e.g.*, Br. of *Amici Curiae* EPIC et al., *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (No. 15-1211) (arguing that the TCPA prohibits invasive business practices and that the companies, not consumers, bear the burden of complying with the statute); Br. of *Amicus Curiae* EPIC, *Smith v. Facebook*, 262 F. Supp. 3d 943 (N.D. Cal. 2017), *appeal docketed*, No. 17-16206 (9th Cir. filed Sept. 26, 2017) (arguing that the social media company did not have authority to monitor the activities of internet users on healthcare provider and other websites); Br. of *Amici Curiae* EPIC et al., *Spokeo v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339) (arguing that the violation of a consumer’s privacy rights under federal law constitutes an injury-in-fact sufficient to confer Article III standing).

¹ The parties consent to the filing of this *amicus curiae* brief. In accordance with Rule 29, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

EPIC 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);*² *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);*³ *Modernizing the Telephone Consumer Protection Act: Hearing Before the Subcomm. on Commc'ns. & Tech. of the H. Comm. on Energy and Commerce, 114th Cong. (2016) (letter for the record submitted by EPIC);*⁴ *Abusive Robocalls and How We Can Stop Them: Hearing Before the S. Comm. on Commerce, Sci., & Transp., 115th Cong. (Apr. 18, 2018) (letter for the record submitted by EPIC).*⁵

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);*⁶ EPIC et al., Comments in the Matter of Rules and Regulations

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

³ https://epic.org/privacy/wireless/dirttest_904.html.

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

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

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

Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 (2002);⁷ EPIC et al., Comments on Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Docket Nos. CG 02-278, DA 05-1346 et al. (2005);⁸ EPIC, Comments on Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Docket Nos. CG 02-278, DA 05-2975 (2006);⁹ EPIC, Comments In the Matter of ACA International Petition for Expedited Clarification, Docket No. 02-278 (2006);¹⁰ EPIC, Comments Concerning Implementation of the Junk Fax Prevention Act, Docket No. CG 05-338 (2006);¹¹ EPIC, Comments Concerning Advanced Methods to Target and Eliminate Unlawful Robocalls, CG 17-59 (2017);¹² EPIC, Comments Concerning the Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision, DA 18-493 (2018);¹³ EPIC, Comments Concerning the Refreshed Record on Advanced Methods to Target and Eliminate Unlawful Robocalls, CG 17-59 (2018).¹⁴

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

⁸ <https://epic.org/privacy/telemarketing/tcpacomm7.29.05.html>.

⁹ <https://epic.org/privacy/telemarketing/tcpacom11306.html>.

¹⁰ https://epic.org/privacy/telemarketing/fcc_aca_05-11-06.html.

¹¹ <https://epic.org/privacy/telemarketing/jfpacom11806.html>.

¹² <https://epic.org/apa/comments/EPIC-FCC-Robocall-Comments.pdf>.

¹³ <https://epic.org/apa/comments/EPIC-FCC-TCPA-June2018.pdf>. EPIC also filed reply comments on the same docket: <https://epic.org/apa/comments/EPIC-FCC-TCPA-ReplyComments-June2018.pdf>.

¹⁴ <https://epic.org/apa/comments/EPIC-FCC-Robocalls-Refresh-Sept2018.pdf>.

SUMMARY OF THE ARGUMENT

American consumers are inundated with “robocalls” and the problem has reached nearly epidemic levels. The Federal Trade Commission received a record 4.5 million complaints about robocalls in 2017. Congress recognized the harm of automated phone solicitations when it enacted the Telephone Consumer Protection Act (“TCPA”) in 1991. But it did not realize how bad things would get. The widespread adoption of cell phones has placed the target of telemarketers and scammers directly in the hip pockets of American consumers. Each time the phone rings we feel the physical vibration; the calls interrupt our work and leisure; there is no longer any place to escape. As a result of the changes in phone technology, the TCPA is more important than ever. The law should be strictly enforced.

The defendants in this case disagree. They argue that the Court should invalidate the law and eviscerate this important consumer protection because of an amendment in 2015. It is hard to imagine how unusable our phones would become if the defendants succeed in their efforts to gut the TCPA. But there is no need to find out because the law is clearly tailored to address an important governmental interest: protecting the privacy of telephone subscribers.

ARGUMENT

The Telephone Consumer Protection Act 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 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)*. In enacting the TCPA, Congress found that businesses' use of autodialers and prerecorded voice messages to send unsolicited calls to telephone subscribers was a nuisance and invasion of privacy. To protect consumers against these invasive business practices, Congress prohibited automated and prerecorded calls except in a few narrow circumstances.

Despite the fact that courts have repeatedly upheld the constitutionality of the TCPA, the defendants in this case (and challengers in other similar cases) now allege that the law violates the First Amendment. Other courts have uniformly rejected similar challenges. This is not the time to upend the statutory scheme that Congress put in place more than twenty-five years ago to protect consumers against the barrage of unwanted calls.

The Court should affirm the judgment below for three reasons. First, the TCPA protects important consumer privacy interests that both Congress and the courts have recognized; the government has a legitimate interest in protecting consumer privacy. Second, changes in telephone technology have increased the nuisance of unwanted calls and made the TCPA's protections more important than ever (even as companies actively seek to undermine the law). And third, any First Amendment issue raised by the government debt collection exception could be easily remedied by severing the 2015 amendments.

I. The TCPA protects important consumer privacy interests.

In the late 1980s, Congress recognized that American consumers were receiving unsolicited telephone calls, generated by autodialers, that caused a substantial nuisance and invasion of privacy. S. Rep. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968. After convening hearings and debating proposed solutions, Congress enacted the TCPA to protect the privacy of telephone subscribers. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. § 227). Lawmakers also laid out detailed findings in their report and in the law, including findings that telemarketers had subjected millions of Americans each day to unsolicited calls and messages. S. Rep. 102-178, at 2.

In crafting a solution, Congress focused specifically on the use of “autodialers” and prerecorded messages that enable companies to send a large volume of calls quickly and inexpensively; Congress found the cost of making millions of automated calls to the industry was small, while the burden on consumers was substantial. *Id.* at 2–3. Calls to residential telephones are especially burdensome and invasive because they disrupt meals, leisure, and family time for unimportant and unsolicited communications that in many cases simply relayed an automated message. Congress found that “residential telephone subscribers consider automated or prerecorded telephone calls” to be “a nuisance and an invasion of privacy,” TCPA § 2(10), and that consumers were particularly “outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers,” TCPA § 2(5). Congress ultimately concluded that banning such calls “is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.” TCPA § 2(12).

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. 47 U.S.C. § 227(b)(1). More specifically, Congress prohibited “any person” from making “any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or

prerecorded voice” to a “cellular telephone service.” *Id.* § 227(b)(1)(A). Congress also prohibited any person from initiating “any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B).” *Id.* § 227(b)(1)(B).

Congress was well aware that new technologies could emerge over time that would make the problem of unwanted calls more acute or otherwise require special rules. Lawmakers accordingly gave the FCC the authority to craft exemptions and adopt new rules in such circumstances. 47 U.S.C. §§ 227(b)(2), (c); TCPA § 2(13). Congress thus recognized that if the FCC determines certain types of automated or prerecorded calls do not create a “nuisance or invasion of privacy,” then the agency should have the “flexibility to design different rules for those types of” calls. TCPA § 2(13).

Congress clearly found, and every court to consider the issue has agreed, that the government has a significant and legitimate interest in protecting the privacy of telephone subscribers from unwanted calls. Indeed, even the groups who first challenged the constitutionality of the TCPA after it was passed did “not challenge the government’s significant interest in residential privacy” and did not “dispute that curbs on telemarketing advance that interest.” *Moser v. FCC*, 46 F.3d

970, 974 (9th Cir. 1995). More recently, this Court has reiterated that “the protection of privacy is a significant interest, the restriction of automated calling is narrowly tailored to further that interest, and the law allows for ‘many alternative channels of communication.’” *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876 (9th Cir. 2014).

Other courts have similarly recognized the important governmental interests that the TCPA promotes: “protecting residential privacy; promoting disclosure to avoid misleading recipients of recorded calls; and promoting effective law enforcement.” *Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 376 (4th Cir. 2013); *see also Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 654 (8th Cir. 2003) (upholding the TCPA prohibition on unsolicited facsimile messages against a similar First Amendment challenge). The Supreme Court has long “recognized that ‘[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.’” *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

Courts have also upheld anti-robocall state statutes similar to the TCPA in the face of First Amendment challenges. In *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303 (7th Cir. 2017), the Seventh Circuit considered an Indiana state statute that prohibit automated telephone calls without the recipient’s advance consent. *Id.* at 304. The court compared the Indiana statute to the TCPA, “which contains a

similar limit,” and held that the statute’s restrictions are not content-based violations of the First Amendment. *Id.* at 304–06. Similarly, in *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995), the Eighth Circuit considered a challenged to a Minnesota state statute that regulated the use of automatic dialing-announcing devices, finding that the Minnesota statute was “virtually identical” to the TCPA., 1548 (citing *Lysaght v. New Jersey*, 837 F. Supp. 646, 648 (D. N.J. 1993)). The court held that the Minnesota statute, as applied, was content-neutral. *Id.* at 1551.

The reason that this case, and other similar cases, are not simply meritless under existing precedent is because Congress added an exception to the TCPA in the Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a)(1)(A), 129 Stat. 584, 588. *See* 47 U.S.C. §§ 227(b)(1)(B), (b)(1)(A)(iii). The 2015 amendments permit the use of an autodialer or prerecorded voice by a caller to collect a debt owed to or guaranteed by the United States. *Id.* And while this new exception certainly cuts against the privacy interests of telephone subscribers, it is not sensible for a court to hold that as a result of a 2015 amendment that hurts consumers, it is necessary or logical to invalidate an entire law that has been in place since 1991 to protect consumers. That would throw the baby out with the bathwater. Consumers need more protection against robocalls in 2018, not less.

In fact, the problem of unwanted calls has increased dramatically as a result of fundamental changes in telecommunications technology. Given the ubiquitous role that cell phones now play in modern life and the increase in robocalls experienced by consumers in recent years, the cell phone ban in the TCPA is more important than ever. This Court should not invalidate the TCPA's critical consumer privacy protections.

II. As telephone technology has evolved, the problem of unwanted and automated calls has gotten worse and the TCPA prohibitions are needed now more than ever.

The widespread adoption of cell phones has made robocalls even more invasive than when the TCPA was adopted in 1991. Instead of interrupting dinner, robocalls can now invade every aspect of modern American life. Complaint data from the FTC, FCC, and other organizations that track robocalls show that the number of such calls has skyrocketed in recent years. Meanwhile, companies are developing new technologies to bypass TCPA's protections and lobbying the FCC and the courts to narrow the protections that are currently in place. Now is the time to shore up TCPA's protections—not destroy them.

A. The widespread adoption of cell phones has made unwanted calls even more invasive.

Phone technology has changed dramatically since the TCPA was enacted in 1991, making the TCPA's protections more important than ever. Senator Larry Pressler, one of the original drafters of the TCPA, explained the need for the law

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. 18,785 (1991) (statement of Sen. Pressler). The vast majority of Americans now own cell phones and rely on them for their personal, educational, and professional communications. They carry the devices wherever they go—and so callers can now demand consumers’ attention anytime, anywhere.

When Congress set out in 1991 to “protect[] telephone consumers” from the “nuisance and privacy invasion” caused by unsolicited calls, TCPA § 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). Americans communicated across more than 139 million landline connections, FCC, *Statistics of Communications Common Carriers* 235 (2006/2007), but there were only 7.5 million wireless subscribers. CTIA, *Wireless Industry Survey 2* (2015).

But much has changed since Congress passed the TCPA in 1991. Cell phones are now an indispensable part of daily life in the United States. Courts have recognized the significance of this change. In *Riley v. California*, 134 S. Ct. 2473 (2014), the Supreme Court found that cell phones are a “pervasive and insistent

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

Indeed, in 2018, 95 percent of adults in the United States own at least one cell phone, while 77 percent own a smartphone device. *Mobile Fact Sheet*, Pew Research Ctr. (Feb. 5, 2018).¹⁵ Among adults aged 18 to 29, 100 percent own at least one cell phone, while 98 percent of adults aged 30 to 49 do. *Id.* In 2017, Americans had more than 400 million wireless subscriber connections. CTIA, *Background on CTIA’s Wireless Industry Survey* (2017).¹⁶ There are now more mobile devices in the United States than there are people. CTIA, *The State of Wireless 2018*, at 5 (July 10, 2018).¹⁷

¹⁵ <http://www.pewinternet.org/fact-sheet/mobile>.

¹⁶ https://api.ctia.org/wp-content/uploads/2018/07/CTIA_ToplineWirelessIndustrySurvey.pdf.

¹⁷ https://api.ctia.org/wp-content/uploads/2018/07/CTIA_State-of-Wireless-2018_0710.pdf.

Americans have become more dependent on wireless devices than ever. In 2017, more than half (50.8 percent) of American homes relied on wireless telephones for service (and had no landline phone subscription), while more than 70 percent of adults aged 25-34 were living in wireless-only households. Stephen J. Blumberg & Julian V. Luke, Ctrs. for Disease Control & Prevention, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July—December 2017*, at 1 (2018) [hereinafter “Wireless Substitution 2017”].¹⁸ The number of wireless-only households has more than doubled in the past decade, from 15.8 percent in 2007. *Compare* Wireless Substitution 2017, *supra*, with Stephen J. Blumberg & Julian V. Luke, Ctrs. for Disease Control & Prevention, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July—December 2007*, at 1 (2008).¹⁹ Indeed, wireless-only households have increased 15-fold since 2003 (3.2 percent). *Compare* Wireless Substitution 2017, *supra*, with Stephen J. Blumberg & Julian V. Luke, Ctrs. for Disease Control & Prevention, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July—December 2006*, at 4 (2007).²⁰

¹⁸ <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201806.pdf>.

¹⁹ <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200805.pdf>.

²⁰ <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200705.pdf>.

Today, cell phones are central to American life. Ninety percent of cell phone owners carry their phones frequently and 76 percent rarely (or never) turn off their phones. Lee Rainie & Kathryn Zickuhr, *Americans' Views on Mobile Etiquette*, Pew Research Ctr. (Aug. 26, 2015).²¹ In addition to calls and texts, Americans use their cell phones for a wide variety of tasks. About six in ten U.S. adults often get news on their mobile devices. Sophia Fedeli & Katerina Eva Matsu, *Use of Mobile Devices for News Continues to Grow, Outpacing Desktops and Laptops*, Pew Research Ctr. (July 17, 2018).²² Americans also increasingly use their mobile devices for job searching, dating, making online purchases, and reading books. Lee Rainie & Andrew Perrin, *10 Facts About Smartphones as the iPhone Turns 10*, Pew Research Ctr. (June 28, 2017).²³ A 2012 study showed that 67 percent of cell phone owners “find themselves checking their phone for messages, alerts, or calls — even when they don’t notice their phone ringing or vibrating.” Aaron Smith, *The Best (and Worst) of Mobile Connectivity*, Pew Research Ctr. (Nov. 30, 2012).²⁴ Forty-six percent of smartphone owners in the U.S. say their phone is something

²¹ <http://www.pewinternet.org/2015/08/26/americans-views-on-mobile-etiquette/>.

²² <http://www.pewresearch.org/fact-tank/2018/07/17/use-of-mobile-devices-for-news-continues-to-grow-outpacing-desktops-and-laptops>.

²³ <http://www.pewresearch.org/fact-tank/2017/06/28/10-facts-about-smartphones>.

²⁴ <http://www.pewinternet.org/2012/11/30/the-best-and-worst-of-mobile-connectivity>.

they “couldn’t live without.” Aaron Smith, *U.S. Smartphone Use in 2015*, Pew Research Ctr. (Apr. 1, 2015).²⁵

Meanwhile, the residential telephone is in rapid decline. In 2017, only 5.8 percent of American households had landline telephones without a wireless subscription. *Wireless Substitution 2017*, *supra*, at 5. As of December 2016, the latest date for which the FCC has records, there are 58 million landlines—a number that has suffered a 12% decline each year over a three-year period. FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Voice Telephone Services: Status as of December 31, 2016*, at 2 (Feb. 2018).²⁶

The growing substitution of cell phones for landline telephones has amplified the nuisance and privacy invasion caused by unsolicited automated communications. The mobility of cell phones means that Americans keep them closer than was ever possible with landline telephones. A 2017 survey found that users look at their phones approximately 47 times per day. Deloitte, *2017 Global*

²⁵ <http://www.pewinternet.org/2015/04/01/chapter-two-usage-and-attitudes-toward-smartphones/>.

²⁶ <https://docs.fcc.gov/public/attachments/DOC-349075A1.pdf>. As characterized by the FCC, “[r]etail voice 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 2. As of December 2016, there were 58 million end-user switched access lines in service. *Id.*

Mobile Consumer Survey: US Edition, at 2 (2017).²⁷ More than 70 percent of American smartphone owners—or more than half of all cell phone owners²⁸—keep their phones within five feet a majority of the time. Harris Interactive, *2013 Mobile Consumer Habits Study* (June 2013).²⁹ 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, *The Best (and Worst) of Mobile Connectivity*, Pew Research Ctr. (Nov. 30, 2012).

Unsolicited calls and texts do more than show as a missed call on a subscriber’s smartphone screen; 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. *Contra In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 8091 (2015) [hereinafter “2015 Order”] (statement of Comm’r Michael O’Rielly, dissenting in part and approving in part).

Complaints to the FTC about robocalls have steadily increased in the last four years—increasing almost six-fold from 756,000 complaints in 2009 to 4.5

²⁷ <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-2017-global-mobile-consumer-survey-executive-summary.pdf>.

²⁸ 77 percent of American adults own smartphones. *Mobile Fact Sheet*, *supra*. Seventy percent of 77 percent is 53.9 percent of American adults.

²⁹ <http://pages.jumio.com/rs/jumio/images/Jumio%20-%20Mobile%20Consumer%20Habits%20Study-2.pdf>.

million in 2017, FTC, *Biennial Report to Congress Under the Do Not Call Registry Fee Extension Act of 2007* at 3 (Dec. 2017),³⁰ while unwanted calls—including robocalls—are the top consumer complaint at the FCC. Press Release, FCC, FCC Adopts Rules to Allow Phone Companies to Proactively Block Illegal Robocalls (Nov. 16, 2017).³¹ YouMail, a provider of robocall blocking software, estimates that there have been 38 billion robocalls placed in 2018 so far—up from 30 billion in 2017. YouMail, *Historical Robocalls by Time*.³² In 2012, fully 68 percent of cell phone owners had received unwanted sales or marketing calls, and 25 percent were bothered at least a few times a week. Jan Lauren Boyles, *Mobile Phone Problems*, Pew Research Ctr. (Aug. 2, 2012).³³ Further, 69 percent of cell phone users who text got unwanted spam or text messages, with 25 percent bothered at least weekly. *Id.*

Phone calls—including robocalls—were the method of contact in 70 percent of fraud reports made to the FTC in 2017, with a total of \$290 million lost by consumers. FTC, *Consumer Sentinel Network Data Book 2017*, at 12, (Mar.

³⁰ https://www.ftc.gov/system/files/documents/reports/biennial-report-congress-under-do-not-call-registry-fee-extension-act-2007-operation-national-do-not/biennial_do_not_call_report_fy_2016-2017_0.pdf.

³¹ https://apps.fcc.gov/edocs_public/attachmatch/DOC-347787A1.pdf.

³² <https://robocallindex.com/history/time> (last visited Nov. 9, 2018).

³³ <http://www.pewinternet.org/2012/08/02/mobile-phone-problems/>.

2018).³⁴ The FTC calls text message spam a “triple threat” because “[i]t often uses the promise of free gifts or product offers to get you to reveal personal information; it can lead to unwanted charges on your cell phone bill, and it can slow cell phone performance.” FTC, *Text Message Spam*, (Mar. 2013).³⁵ Unwanted text messages “can be used to try to compromise your financial information or to install harmful software on your mobile device.” Kim Boatman, *Stop Cell Phone Spam in Seven Easy Steps*, Norton (2018).³⁶

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 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).³⁷ Unsolicited calls and texts also demand immediate attention from users

³⁴ https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2017/consumer_sentinel_data_book_2017.pdf.

³⁵ <https://www.consumer.ftc.gov/articles/0350-text-message-spam>.

³⁶ <https://us.norton.com/yoursecurityresource/detail.jsp?aid=CellPhone>.

³⁷ http://www.pcworld.com/article/229300/smartphone_battery_life.html.

wherever they happen to be. Unwanted calls and texts interrupt sleep, disturb meetings and meals, and disrupt concentration.

The growing problem of robocalls and spam text messages has attracted widespread attention from lawmakers. Both the Senate and the House held hearings on robocalls this year. *See Do Not Call: Combating Robocalls and Caller ID Spoofing: Hearing Before the Subcomm. on Dig. Commerce and Consumer Prot. of the H. Comm. on Energy and Commerce*, 115th Cong. (2018);³⁸ *Abusive Robocalls and How We Can Stop Them: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 115th Cong. (2018).³⁹ State attorneys general have warned consumers about fraud from robocalls and called on regulators to stop robocall messages. *See, e.g.*, Press Release, N.Y. Attorney Gen., A.G. Schneiderman Issues Urgent Alert Warning New Yorkers of Telephone Scam Targeting Chinese-American Community (Apr. 26, 2018);⁴⁰ Press Release, Cal. Attorney Gen., Attorney General Becerra Calls on FCC to Block Robocalls from Fake Caller ID Numbers (July 5, 2017);⁴¹ Press Release, Mass. Attorney Gen.,

³⁸ <https://docs.house.gov/meetings/IF/IF17/20180427/108190/HHRG-115-IF17-Transcript-20180427.pdf>.

³⁹ <https://www.commerce.senate.gov/public/index.cfm/hearings?ID=E0EB17D2-A895-40B4-B385-F94EA2716957>.

⁴⁰ <https://ag.ny.gov/press-release/ag-schneiderman-issues-urgent-alert-warning-new-yorkers-telephone-scam-targeting>.

⁴¹ <https://www.oag.ca.gov/news/press-releases/attorney-general-becerra-calls-fcc-block-robocalls-fake-caller-id-numbers>.

MA, NY, and KY Attorneys General Urge FCC to Stop Robocall Messages (June 5, 2017).⁴² And the increase in robocalls and complaints to regulators have sparked a mass of media attention and guides on how to stop them.⁴³

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. Companies are aggressively seeking to evade TCPA restrictions by developing new dialing techniques and lobbying to narrow the scope of the law.

Even as robocalls increasingly invade consumers' private lives, companies that make mass calls are pursuing a multi-prong strategy to evade the law and to undermine TCPA's protections. First, companies have developed new technologies

⁴² <http://www.mass.gov/ago/news-and-updates/press-releases/2017/2017-06-05-urge-fcc-to-stop-robocall.html>.

⁴³ See, e.g., Tara Siegel Bernard, *Yes, It's Bad. Robocalls, and Their Scams, Are Surging*, N.Y. Times (May 6, 2018), <https://www.nytimes.com/2018/05/06/your-money/robocalls-rise-illegal.html>; Katherine Bindley, *Why Are There So Many Robocalls? Here's What You Can Do About Them*, Wall St. J. (July 4, 2018), <https://www.wsj.com/articles/why-there-are-so-many-robocalls-heres-what-you-can-do-about-them-1530610203>; Megan Leonhardt, *Americans Received Over 16 Billion Robocalls So Far This Year—Here's How to Stop Them*, CNBC (June 6, 2018), <https://www.cnbc.com/2018/06/06/americans-got-16-billion-robocalls-this-year-heres-how-to-stop-them.html>; Tony Romm, *Robo-calls Are Getting Worse. And Some Big Businesses Soon Could Start Calling you Even More*, Wash. Post (July 12, 2018), <https://www.washingtonpost.com/technology/2018/07/12/robocalls-are-getting-worse-some-big-businesses-soon-could-start-calling-you-even-more/>.

to make mass calls on the same or greater scale as traditional autodialers, but evade the definition of an autodialer through a technicality. Second, companies have aggressively lobbied the FCC and argued in the courts that the autodialer definition should be narrowed.

Companies have developed several new techniques to evade the TCPA's restrictions on autodialers. Seizing on language in FCC orders interpreting the TCPA that an autodialer dials numbers "without human intervention," companies have developed dialing techniques that automatically pull numbers for callers, but require a human to click a button before the number is dialed. *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 FCC Rcd. 14,014, 14,092, ¶ 133 (2003) [hereinafter "2003 Order"]; *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 FCC Rcd. 559, 566, ¶ 13 (2008) [hereinafter "2008 Order"]; *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 FCC Rcd. 15,391, 15,399 fn. 5 (2012) [hereinafter "2012 Order"]. In one type of "click dialing," a "clicker agent" clicks a button to initiate each call, but another person, called a "closer agent," actually takes the call. *See* Declaration of Kevin Stark at ¶¶ 8-9, *Fleming v. Associated Credit Services, Inc.*, No. 16-3382 (D.N.J. Dec. 1, 2017) (describing LiveVox's Human Call Initiator ("HCI") dialing system). In another type of "click dialing" system, the person clicking the button is the one taking the call. *See*

Declaration of Terry Duane Johnson at ¶ 18, *Maddox v. CBE Group, Inc.*, No. 17-1909 (N.D. Ga. Nov. 20, 2017) (describing CBE’s Manual Clicker Application (“MCA”)). These systems allow companies to make calls on the same scale as systems that clearly fall within the definition of an autodialer. Yet, courts have found both of these systems to be outside the current definition of autodialer because they require human intervention to initiate the call.⁴⁴ Companies are simultaneously arguing for the FCC to declare that any system that requires any human intervention to generate a list of numbers or to make a call is not an autodialer. *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, U.S. Chamber Institute for Legal Reform, Petition for Declaratory Ruling, CG Docket No. 02-278, at 24-25 (filed May 3, 2018).⁴⁵

⁴⁴ See *Fleming v. Associated Credit Services, Inc.*, 2018 WL 4562460 (D.N.J. Sep. 21, 2018) (finding LiveVox HCI’s system not an autodialer); *Maddox v. CBE Grp., Inc.*, 2018 WL 2327037 (N.D. Ga. May 22, 2018) (finding CBE’s MCA system not an autodialer); *Marshall v. CBE Group, Inc.*, 2018 WL 1567852 (D. Nev. Mar. 20, 2018) (finding CBE’s MCA system not an autodialer); *Arora v. Transworld Systems Inc.*, 2017 WL 3620742 (N.D. Ill. Aug. 23, 2017) (finding LiveVox HCI’s system not an autodialer); *Schlusselberg v. Receivables Performance Mgmt., L.L.C.*, 2017 WL 2812884 (D.N.J. June 29, 2017) (finding LiveVox HCI’s system not an autodialer); *Smith v. Stellar Recovery, Inc.*, 2017 WL 1336075 (E.D. Mich. Feb. 7, 2017) (finding LiveVox HCI’s system not an autodialer); *Pozo v. Stellar Recovery, Inc.*, 2016 WL 7851415 (M.D. Fla. Sep. 2, 2016) (finding LiveVox HCI’s system not an autodialer); *Strauss v. CBE Group, Inc.*, 173 F.Supp.3d 1302 (S.D. Fl. 2016) (finding CBE’s MCA system not an autodialer); *But see Somogyi v. Freedom Mortgage Co.*, 2018 WL 3656158 (D.N.J. Aug. 2, 2018) (finding that click dial system where caller need not click to initiate each and every call could still be an autodialer).

⁴⁵ <https://ecfsapi.fcc.gov/file/105112489220171/18050803-5.pdf>.

Companies are broadly advocating for most automated or semi-automated calling systems to be outside the scope of the TCPA. Companies have argued that Congress, not the FCC or the courts, should update the statute to keep up with new technology, *see, e.g.*, U.S. Chamber of Commerce, Comments in the Matter of Petition for Declaratory Ruling filed by All About The Message, L.L.C., CG Docket No. 02-278 at 3 (May 18, 2017)⁴⁶—a position in direct conflict with Congress’s intent in delegating administrative authority for TCPA to the FCC. *See* 137 Cong. Rec. 18784 (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.”).

Another example of a new technology that companies have hoped to use to bypass the autodialer restriction are ringless voicemails. Ringless voicemails allow companies to leave voicemails on a phone without attempting to initiate a live call with the recipient. Strategic Networks, *Ringless Voicemail Drops FAQ*.⁴⁷ On March 31, 2017, All About the Message petitioned the FCC to declare that ringless voicemails were outside the scope of the autodialer restriction. *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, All

⁴⁶ https://ecfsapi.fcc.gov/file/10518228519112/170518_Comments_TCPA_All_AboutTheMessagePetition_FCC.pdf.

⁴⁷ <https://straticsnetworks.com/faq-for-ringless-voicemail-drops-by-stratics-networks/> (last visited Nov. 9, 2018).

About the Message, L.L.C., Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Mar. 31, 2017).⁴⁸ The FCC sought comments on the petition, FCC, Consumer and Governmental Affairs Bureau Seeks Comment on All About the Message, L.L.C. Petition for Declaratory Ruling Under the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Public Notice, DA 17-368 (rel. Apr. 18, 2017),⁴⁹ but the petitioners withdrew their request before the FCC could issue a ruling. Letter from Christian A. Petersen, Att’y for All About the Message, L.L.C., to Marlene H. Dortch, Secretary, FCC (Jun. 20, 2017).⁵⁰ At least one court has found that the technology is within the scope of the TCPA and thus subject to autodialer restrictions. *Saunders v. Dyck O’Neal, Inc.*, 319 F.Supp.3d 907 (W.D. Mich. 2018).

Companies have also sought to narrow the definition of an “autodialer” at the FCC and in the courts. At the FCC, companies have targeted key statutory terms in an effort to redefine the TCPA prohibition into obsolescence. Companies have argued for a narrow definition of the “capacity” to autodial, a narrow definition of what it means for a system to “store and produce” numbers, and a narrow definition for a “random or sequential number generator.” Earlier this year,

⁴⁸ <https://ecfsapi.fcc.gov/file/104010829816078/Petition%20for%20Declaratory%20Ruling%20of%20All%20About%20the%20Message%20LLC.pdf>.

⁴⁹ https://ecfsapi.fcc.gov/file/0418040817699/DA-17-368A1_Rcd.pdf.

⁵⁰ <https://ecfsapi.fcc.gov/file/1062101171891/2017-06-20%20Letter%20to%20Ms.%20Dortch.pdf>.

the U.S. Chamber Institute for Legal Reform, along with sixteen other business organizations, filed a petition urging the FCC to “significantly narrow the range of devices considered” autodialers by interpreting the term “capacity” to require that an autodialer have a “present and active” autodialing function, not a “potential or theoretical capabilit[y].” U.S. Chamber Institute for Legal Reform, *supra*, at 22-24. This interpretation essentially reads “store” out of the statute and erodes “produce” to the narrow situation where a company wishes to call phones completely at random. The petition also urges the FCC to require that an autodialer be able to store or produce numbers that it generates from a random or sequential number generator, and not simply store numbers in a database and produce them at random or in a sequence. *Id.* at 21-22. But this Court has held that an autodialer under the TCPA includes devices that store telephone numbers to be called, not numbers that have been generated by a random or sequential number generator. *Marks v. Crunch San Diego, L.L.C.*, 904 F.3d 1041 (9th Cir. 2018).

Companies have also argued that courts should ignore the FCC’s earlier orders that set out a broad definition of the term “autodialer.” The FCC has issued four such orders—in 2003, 2008, 2012, and 2015. In 2003, the FCC was concerned with updating the definition of “autodialer” to include new dialing techniques that had evaded regulation, such as “predictive dialers,” that evolved as the telemarketing industry decided that “using lists of numbers is far more cost

effective” than dialing “arbitrarily.” 2003 Order, *supra*, ¶132. These dialers use software to “predict” when a telemarketer will be available for their next call, and initiates a new call automatically. *Id.* at ¶ 8. Companies argued that predictive dialers did not fall within the definition of an autodialer because they dial from a pre-programmed list. *Id.* at ¶ 130. The FCC rejected that argument and found that predictive dialers do within the statutory definition because they have the “*capacity* to dial numbers without human intervention.” *Id.* at ¶ 132. The FCC updated and reiterated the 2003 autodialer definition in the 2008, 2012, and 2015 Orders.

After the FCC’s 2015 ruling, several companies challenged the FCC’s definition of an autodialer in the D.C. and Seventh Circuits, and the petitions were consolidated in the D.C. Circuit. *See* Consolidation Order, *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (No. 15-1211). In March 2018, the D.C. Circuit overturned the part of the 2015 Order describing the types of calling equipment that have a “capacity” to autodial. *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). Since then, companies have pressed courts to interpret *ACA International* as overturning earlier orders from the 2003 and 2008 that established a broad definition for autodialers that includes “predictive dialers.” In response to such a challenge, this Court in *Marks* defined “autodialer” broadly and found that the term includes any device that “has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—

and to dial such numbers.” 904 F.3d at 1052. Lower courts across the country have heard many similar challenges and are split in their decisions.⁵¹

These challenges represent a systematic effort by companies to undermine the purpose of the TCPA and to find new ways to inundate consumers with unwanted calls. The First Amendment theory presented in this case is simply an extension of this same anti-consumer strategy.

⁵¹ Some courts have held that *ACA International* overturned the 2003 and 2008 Orders. See, e.g., *Fleming v. Associated Credit Servs., Inc.*, 2018 WL 4562460, at *8–9 (D.N.J. Sept. 21, 2018); *Keyes v. Ocwen Loan Servicing, L.L.C.*, 2018 WL 3914707, at *6 (E.D. Mich. Aug. 16, 2018); *Gary v. TrueBlue, Inc.*, 2018 WL 3647046, at *6 (E.D. Mich. Aug. 1, 2018); *Gonzalez v. Ocwen Loan Servicing, L.L.C.*, 2018 WL 4217065, at *5–6 (M.D. Fla. Sept. 5, 2018); *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 935 (N.D. Ill. 2018); *Sessions v. Barclays Bank*, 317 F. Supp. 3d 1208, 1210–1211 (N.D. Ga. 2018); *Herrick v. GoDaddy.com L.L.C.*, 312 F. Supp. 3d 792, 799–800 (D. Ariz. 2018). Other district courts have rejected the companies’ arguments, finding that *ACA International* left the 2003 and 2008 Orders untouched. *Ammons v. Ally Fin., Inc.*, 326 F.Supp.3d 578 (M.D. Tenn. June 27, 2018); *Reyes v. BCA Fin. Servs., Inc.*, 312 F. Supp. 3d 1308, 1321 (S.D. Fla. 2018); *Ramos v. Hopele of Ft. Lauderdale, L.L.C.*, ___ F. Supp. 3d ___, 2018 WL 4568428 (S.D. Fla. Sept. 20, 2018); *Somogyi v. Freedom Mortg. Corp.*, 2018 WL 3656158, at *5 (D.N.J. Aug. 2, 2018); *Glasser v. Hilton Grand Vacations Co.*, 2018 WL 4565751 (M.D. Fla. Sept. 24, 2018); *Maddox v. CBE Grp., Inc.*, 2018 WL 2327037, at *4 (N.D. Ga. May 22, 2018); *Swaney v. Regions Bank*, 2018 WL 2316452, at *1 (N.D. Ala. May 22, 2018). Charter Communications recently lost an attempt to extend *ACA International* to the 2003 Order in the U.S. District Court for the Western District of Wisconsin. *Maes v. Charter Communications, Inc.*, No. 18-124, 2018 WL 5619199 (W.D. Wis. Oct. 30, 2018) (denying Charter’s motion to dismiss).

III. Any First Amendment concern created by the 2015 amendment could be remedied by severing the exemption.

Even if a court did have concerns about the First Amendment impact of the current exemptions to the TCPA, the remedy would not be to invalidate the entire statute and leave consumers without protection against all forms of unsolicited calls. The obvious remedy would be to sever the offending portions of the statute. *See INS v. Chadha*, 462 U.S. 919, 931–32 (1983) (applying the severance doctrine to portions of a federal law that the Court found unconstitutional).

And it makes sense that the debt collection exception amendments would be severed in such a case; these amendments TCPA were met with sharp criticism by consumer protection advocates. After the FCC issued a Notice of Proposed Rulemaking in May 2016, the agency received over 15,700 comments from individuals. 47 C.F.R. § 64 (2016). More than 12,500 of those comments “expressed a general dislike for robocalls,” while “approximately 2,500 included more pointed comments regarding debt collection and calls by the federal government.” *Id.* Senator Sherrod Brown (D-Ohio) filed a comment stating that “because the Budget Act amendments could expose an additional 47 to 61 million people to robocalls that previously required consent, the Commission must consider these concerns and the increase in the magnitude of these concerns.” *Id.*

After President Obama signed the Bipartisan Budget Act of 2015 into law, Senator Ed Markey (D-Mass) and ten others introduced the Help Americans Never

Get Unwanted Phone calls (HANGUP) Act. The bill proposed to repeal the debt collection exceptions made in Section 301 of the Bipartisan Budget Act of 2015. Help Americans Never Get Unwanted Phone calls Act of 2015, S. 2235, 114th Cong. § 2 (2015). Senator Markey stated that the Budget Act “rolls back a key provision protecting consumers from unwanted robocalls and texts. The budget bill makes it easier to harass students, consumers, veterans—anyone with a debt backed by the federal government—on their mobile phone.” Press Release, Sen. Ed Markey, Markey Leads Bill to Protect Americans from Unwanted Robocalls and Texts (Nov. 4, 2015).⁵²

The National Consumer Law Center (“NCLC”), along with other consumer advocacy groups, sent letters to senators in support of the HANGUP Act, noting that “Section 301 [of the Bipartisan Budget Act of 2015] will only foster more abuses from an industry already known for its abuse of consumers. Cell phone calls can distract people while driving, interrupt them at their jobs, and needlessly impose a cost on struggling families by using up scarce minutes.” Letter from the Nat’l Consumer L. Ctr., to U.S. Senators (Nov. 2, 2015).⁵³

⁵² <https://www.markey.senate.gov/news/press-releases/markey-leads-bill-to-protect-americans-from-unwanted-robocalls-and-texts>.

⁵³ http://www.nclc.org/images/pdf/energy_utility_telecom/telecommunications/Hangup-Support-Senate.pdf.

In December 2015, Senators Orrin Hatch (R–Utah), Michael Lee (R–Utah), Ed Markey (D–Mass), and Elizabeth Warren (D–Mass) sent a letter to then-Secretary of Education Arne Duncan urging the Department of Education to “direct federal student loan servicers, debt collectors, and all other third parties not to use this new authority [in the Bipartisan Budget Act of 2015] to collect student loan debt. . . . We are concerned that this provision will subject student loan borrowers to a barrage of unsolicited calls—and possibly leave them with no refuge to stop the calls.” Letter from Orrin Hatch et al., U.S. Sens., to Arne Duncan, Sec., U.S. Dep’t of Educ., (Dec. 21, 2015). The senators asked the Department of Education to provide evidence that such robocalling will help borrowers or help the federal student loan program. *Id.*

The defendants are mistaken in their requested remedy. The Supreme Court has been clear: courts’ remedial authority for invalid provisions is limited to those invalid provisions. For these reasons, if this Court finds that the TCPA’s debt collection exceptions are unconstitutional as a violation of the First Amendment, the proper remedy is to sever those exceptions while leaving the rest of § 227(b)(1)(A)(iii) intact.

CONCLUSION

Amicus respectfully requests this Court to affirm the decision of the district court and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 7,000 words of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(B)(i). This brief contains 6,976 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14 point Times New Roman style.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November 2018, the foregoing Brief of *Amicus Curiae* Electronic Privacy Information Center in Support of Plaintiff-Appellee was electronically filed with the Clerk of the Court, and thereby served upon counsel for the parties *via* electronic delivery.

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