No. 19-631

IN THE
Supreme Court of the United States

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

v.

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

On Writ of Certiorari to
The U.S. Court of Appeals
For the Fourth Circuit

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) AND TWENTY-NINE TECHNICAL EXPERTS AND LEGAL SCHOLARS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C.[1] EPIC was established in 1994 to focus public attention on emerging civil liberties issues, to promote government transparency, and to protect privacy, the First Amendment, and other constitutional values.

EPIC has filed several *amicus* briefs in this Court concerning the interpretation of consumer privacy statutes. *See, e.g.*, Brief for EPIC as *Amicus Curiae* Supporting Respondents, *PDR Network v. Carlton & Harris Chiropractic*, 139 S. Ct. 2051 (2019) (No. 17-1705) (arguing that TCPA defendants should not be able to challenge FCC interpretations of the TCPA outside the review process Congress established); Brief for EPIC et al. as *Amici Curiae* Supporting Respondent, *United States v. Microsoft*, 138 S. Ct. 1186 (2018) (No. 17-2) (arguing that law enforcement access to personal data abroad must comply with international human rights norms); Brief for EPIC et al. as *Amici Curiae* Supporting Respondent, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339) (arguing that violation of statutory privacy rights confers Article III standing); Brief of EPIC et al. as *Amici Curiae* Supporting Petitioner, *Maracich v. Spears,* 570 U.S. 48 (2013) (No. 12-25) (arguing that the scope of the litigation exception to the Driver's Privacy Protection Act should be narrow); Brief of EPIC et al. as *Amici*

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[1] Both parties consent to the filing of this brief. In accordance with Rule 37.6, 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.

Curiae Supporting Petitioners, *Sorrell v. IMS Health*, 564 U.S. 552 (2011) (No. 10-779) (arguing that a Vermont law restricting use of prescriber-identifying data protected patient privacy); Brief of EPIC as *Amicus Curiae* Supporting Petitioners, *Reno v. Condon*, 528 U.S. 141 (2000) (No. 98-1464) (arguing that the Driver Privacy Protection Act was consistent with constitutional principles of federalism).

EPIC also routinely participates as *amicus curiae* in federal cases concerning the Telephone Consumer Protection Act. Brief for EPIC & NCLC as *Amici Curiae* Supporting Appellant, *Gadelhak v. AT&T Services, Inc.,* No. 19-1738, 2020 WL 808270 (7th Cir. Feb. 19, 2020) (arguing that an autodialer need not produce or store random or sequential numbers); Brief for EPIC as *Amicus Curiae* Supporting Appellee, *Gallion v. United States*, 772 Fed. App'x. 604, 606 (9th Cir. 2019) (No. 18-55667) (arguing that the TCPA protects consumers against invasive business practices and does not violate the First Amendment); Brief for EPIC et al. as *Amici Curiae* Supporting Appellees, *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)

Additionally, 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 Com.*, 102d Cong., 1st Sess. 43 (April 24, 1991) (testimony of EPIC Executive

Director Marc Rotenberg);[2] *S. 1963, The Wireless 411 Privacy Act: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 108th Cong., 2d Sess. (Sept. 21, 2004) (testimony of EPIC Executive Director Marc Rotenberg);[3] *Modernizing the Telephone Consumer Protection Act: Hearing Before the Subcomm. on Commc'ns. & Tech. of the H. Comm. on Energy and Com.*, 114th Cong. (2016) (statement for the record submitted by EPIC);[4] *Abusive Robocalls and How We Can Stop Them: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 115th Cong. (Apr. 18, 2018) (statement for the record submitted by EPIC);[5] *Legislating to Stop the Onslaught of Annoying Robocalls*, 116th Cong. (Apr. 30, 2019) (statement for the record submitted by EPIC).[6]

EPIC has also submitted numerous comments to the Federal Communications Commission ("FCC") and the Federal Trade Commission ("FTC") 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);[7] EPIC et al., Comments in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-

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

[3] https://epic.org/privacy/wireless/dirtest_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/testimony/congress/EPIC-HEC-Robocalls-Apr2019.pdf.

[7] https://epic.org/privacy/telemarketing/tsrcomments.html.

278 (2002);[8] 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);[9] EPIC, Comments on Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Docket Nos. CG 02-278, DA 05-2975 (2006);[10] EPIC, Comments In the Matter of ACA International Petition for Expedited Clarification, Docket No. 02-278 (2006);[11] EPIC, Comments Concerning Implementation of the Junk Fax Prevention Act, Docket No. CG 05– 338 (2006);[12] EPIC, Comments Concerning Advanced Methods to Target and Eliminate Unlawful Robocalls, CG 17-59 (2017);[13] 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);[14] EPIC, Comments Concerning the Refreshed Record on Advanced Methods to Target and Eliminate Unlawful Robocalls, CG 17-59 (2018).

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[8] https://epic.org/privacy/telemarketing/tcpacomments.html.

[9] https://epic.org/privacy/telemarketing/tcpacomm7.29.05.html.

[10] https://epic.org/privacy/telemarketing/tcpacom11306.html.

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

[12] https://epic.org/privacy/telemarketing/jfpacom11806.html.

[13] https://epic.org/apa/comments/EPIC-FCC-Robocall-Comments.pdf.

[14] 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.

EPIC's brief is joined by the following distinguished experts in law, technology, and public policy:

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SUMMARY OF THE ARGUMENT

Congress enacted the Telephone Consumer Protection Act ("TCPA") in 1991 to protect consumers from the nuisance of unwanted automated calls. At that time, robocalls could disrupt dinner or quiet evening time with family. Over time, the problem Congress identified has only become more severe. Cell phones are ubiquitous and robocalls now invade every aspect of daily life. Advanced autodialing tools are inexpensive and easy to deploy. Robocall technology is so pervasive that businesses flout the autodialer ban. Today consumers receive nearly ten times more telemarketing calls per day than they did in 1991. Unwanted robocalls are among the top consumer complaints received by the Federal Trade Commission and the Federal Communications Commission. So widespread is the problem that last year a Senator's press conference on anti-robocall legislation was interrupted—by a robocall.

Now is not the time to eliminate the TCPA autodialer ban. For good reason the law prohibits most automated calls, with a few narrowly drawn exemptions. The government-debt exemption, added by Congress in 2015, applies only to a small group of callers. Federal courts unanimously found the original autodialer ban constitutional. And underinclusive statutes that this Court has struck down under the First Amendment bear no resemblance to the TCPA; those laws either only restricted the speech of a specific group or were riddled with exemptions.

If the Court concludes that the 2015 amendment that added the government-debt exemption is unconstitutional, then the provision should be severed. The autodialer ban was in force for more than

two decades before Congress added the exemption. Congress included a severability clause in the law. Severance would bolster privacy protection and address any problem of underinclusiveness. The alternative—jettisoning the entire autodialer ban—would make the law even more underinclusive and would undermine the Government's substantial interest, well established over thirty years, to protect consumers from unwanted automated calls.

ARGUMENT

I. The TCPA protects important consumer privacy interests.

Congress enacted the TCPA in 1991 to prevent robocalls from invading the privacy of American homes. Widespread adoption of cell phones has made the harm caused by unwanted automated calls even more acute. Cell phones have become practically an appendage, and unwanted calls can now invade every aspect of a person's life. New automated dialing technologies have made it easier than ever for marketers, scammers, and others to call thousands of phones with the click of a button. Without the autodialer ban, the assault of unwanted calls could make cell phones unusable.

A. Congress enacted the TCPA to protect against the nuisance of unwanted automated calls.

In the late 1980s, Congress recognized that American consumers were receiving an unprecedented number of unsolicited automated telephone calls that were a nuisance and an invasion of privacy. S. Rep. 102-178, at 1 (1991), *as reprinted in* 1991 U.S.C.C.A.N.

1968. From 1981 to 1991, domestic telemarketing expenditures had increased from $1 billion to $60 billion. H. Rep. 102-317, at 7 (1991). By 1991, more than 300,000 solicitors were calling over 18 million Americans every day. Telephone Consumer Protection Act of 1991 § 2(3), Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. § 227). Senator Fritz Hollings, the TCPA's eventual sponsor, called robocalls "the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall." 137 Cong. Rec. 30,821-22 (1991) (statement of Sen. Hollings). As Professor Anita Allen has recounted, "a typical residential homeowner might receive dozens of calls a week . . . [t]he number of calls was overwhelming." Anita L. Allen, *Unpopular Privacy: The Case for Government Mandates*, 32 Okla. City. U. L. Rev. 87, 96 (2007). The problem was so bad that over half the States enacted their own robocall restrictions. TCPA § 2(7). But because telemarketers could easily avoid state laws by locating their call centers out of state, H. Rep. 102-317, at 9 (1991), a federal law was needed to effectively control the problem, TCPA § 2(7).

In crafting a solution, Congress focused on the use of "autodialers" and prerecorded messages that enable companies to send a large volume of calls quickly and inexpensively. Senator Hollings emphasized that "owning a telephone does not give the world the right and privilege to assault the consumer with machine-generated telephone calls." 137 Cong. Rec. 9,840 (1991) (statement of Sen. Hollings). At the time, autodialers had the capacity to call 1,000 phones per day. H. Rep. 102-317, at 10. Evidence presented to Congress showed that consumers "consider automated or

prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy." TCPA § 2(10). Consumers were "outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers." TCPA § 2(5). Congress determined that consumers should not bear the burden of avoiding automated calls, TCPA § 2(11), and that banning such calls was "the only effective means of protecting telephone consumers from this nuisance and privacy invasion." TCPA § 2(12).

Congress clearly found that the government has a significant and legitimate interest in protecting the privacy of telephone subscribers from unwanted automated calls—and every court to consider the issue has agreed. Even the groups who first challenged the constitutionality of the TCPA 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.), *cert. denied*, 515 U.S. 1161 (1995). Indeed, this 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) (quoting *Carey v. Brown,* 447 U.S. 455, 471 (1980). Unwanted automated calls are intruders in the home, and "in the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of the intruder." *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

B. Widespread adoption of cell phones has made robocalls more invasive than ever.

In 1991, Congress was concerned that automated and prerecorded calls might interrupt dinner and sleep. 137 Cong. Rec. 16,205 (1991) (statement of Sen. Hollings). Today, cell phones are "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude that they were an important feature of human anatomy." *Riley v. California,* 573 U.S. 373, 385 (2014). The constant proximity of cell phones means that unwanted calls interrupt every aspect of life. Phones are no longer single-use devices. Americans use their phones every day for work, education, and entertainment; robocalls disrupt all of these activities. And the number of robocalls has steadily increased each year. It is no wonder that unwanted automated calls continue to be a top consumer complaint with the FCC, the FTC, and state attorneys general. Strong enforcement of the autodialer ban is needed now more than ever.

The number of robocalls consumers receive has increased dramatically over the last 30 years. An estimated 18 million robocalls were made per day at the time of the TCPA's enactment in 1991. H. Rep. 102-317, at 7. Today, roughly 153 million robocalls go out to consumers every single day—eight and a half times as many as in 1991. YouMail, *Robocall Index: January 2020 Nationwide Robocall Data* (2020).[15] The problem continues to grow at an astonishing rate. From 2017 to 2019, the total number of robocalls made each year nearly doubled, from a little over 30.5 billion in 2017

[15] https://robocallindex.com/2020/january.

to 58.5 billion in 2019. YouMail, *Historical Robocalls by Time* (2020).[16] The vast majority of these calls are made for commercial purposes. YouMail, *Top 100 Robocallers Nationwide in January 2020* (2020).[17]

Widespread adoption of cell phones has exacerbated the harmful effects of robocalls. When the TCPA was enacted, the residential landline was the primary means of telephone communication. In 1991, 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). Today, cell phones have largely replaced landlines. At the end of 2018, 57.1% of American households were wireless-only—3.2% more than the previous year. Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2018* 1, National Center for Health Statistics (Jun. 2019).[18] Nearly all Americans (96%) own a cell phone. Pew Research Center, *Mobile Fact Sheet* (June 12, 2019).[19] As this Court noted in *Riley*, "it is the person who is not carrying a cell phone . . . who is the exception." 573 U.S. at 395.

Americans use their phones for many everyday tasks, which robocalls routinely interrupt. Fully 81% of Americans own a smartphone. Pew Research Center, *Mobile Fact Sheet* (June 12, 2019). Mobile applications, or "apps," offer "a range of tools for managing . .

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[16] https://robocallindex.com/history/time.

[17] https://robocallindex.com/top-robocallers.

[18] https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201906.pdf.

[19] https://www.pewinternet.org/fact-sheet/mobile/.

. all aspects of a person's life." *Riley*, 573 U.S. at 396. Mobile app stores offer millions of different apps for work, communication, health, entertainment—for nearly any imaginable task "there's an app for that." *Id.* One survey estimates that Americans spend 178 minutes, or almost three hours a day, using smartphone apps. SimpleTexting, *US Screentime & Smartphone Usage States for 2019* (Jul. 23, 2019).

Robocalls are so pervasive that Americans now often ignore calls from unknown numbers—leading to economic and even medical harms. In one survey, Consumer Reports found that 70 percent of Americans do not answer calls from unrecognized numbers. Consumer Reports, *What Have You Done in Response to Robocalls?* (Dec. 2018).[20] Senator Brian Schatz noted that "robocalls have turned us into a nation of call screeners" and emphasized that this could become a "significant economic issue." *Illegal Robocalls: Calling all to Stop the Scourge: Hearing before the S. Comm. on Com., Sci., and Transp.*, 116th Cong. (Apr. 11, 2019) [hereinafter *S. Hearing on Illegal Robocalls*]. [21] One hospital reported persistent inability to reach patients because of call screening. Tim Harper, *Why Robocalls Are Even Worse Than You Thought*, Consumer Reports (May 15, 2019).[22] One doctor described ignoring a call from an emergency room because he assumed it was a robocall—delaying treatment of a

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[20] https://www.consumerreports.org/robocalls/mad-about-robocalls/.

[21] https://www.commerce.senate.gov/public/index.cfm/hearings?ID=5A66BB4E-777B-4346-AA5F-CAB536C54862.

[22] https://www.consumerreports.org/robocalls/why-robocalls-are-even-worse-than-you-thought/.

patient with a severed thumb. Tara Siegel Bernard, *Yes, It's Bad. Robocalls, and Their Scams, Are Surging*, N.Y. Times (May 6, 2018).[23]

Consumer complaints to federal agencies that enforce robocall protections show that people are frustrated and angry with the number of automated calls flooding their phones. The FCC ranks automated calls as a "perennial top consumer complaint." FCC, *Report on Robocalls* 2 (2019).[24] Complaints to the FCC about robocalls spiked from 150,000 in 2016 to 232,000 in 2018—a 50% increase in just two years. *Id.* at 4. Meanwhile, consumers submitted nearly 3.8 million robocall complaints to the FTC in the first nine months of 2019. FTC, *National Do Not Call Registry Data Book for Fiscal Year 2019* 6 (Oct. 2019).[25]

State attorneys general also report that robocalls are among the top consumer complaints they receive. Nebraska Attorney General Doug Peterson told Congress last year that "[r]obocalls and telemarketing calls are currently the number one source of consumer complaints at many of our offices." *S. Hearing on Illegal Robocalls* (testimony of Neb. Att'y Gen. Doug Peterson). Arkansas Attorney General Lesley Rutledge declared, "I have visited every county in Arkansas, and the most common complaint I hear is that people want these calls to stop." Press Release, Ark.

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[23] https://www.nytimes.com/2018/05/06/your-money/robocalls-rise-illegal.html.

[24] https://docs.fcc.gov/public/attachments/DOC-356196A1.pdf.

[25] https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2019/dnc_data_book_2019.pdf.

Att'y Gen., Stop the Unwanted Robocalls (Feb. 11, 2019).[26]

Congress has recognized more must be done to combat robocalls. Last year, Congress passed additional protections against robocall scammers. Telephone Robocall Abuse Criminal Enforcement and Deterrence ("TRACED") Act, Pub. L. 116-105, 133 Stat. 3274. In a press conference promoting the TRACED Act, Senator Menendez was interrupted—by a robocall. Press Release, Sen. Bob Menendez, Menendez Gets Robocalled during Press Conference Pushing for Crackdown on Illegal Robocalls (Apr. 12, 2019).[27] He is not the only one to have a live media event interrupted by a robocall last year. *See* Makena Kelly, *AT&T CEO Interrupted by a Robocall During a Live Interview,* The Verge (Mar. 20, 2019).[28] Without the autodialer ban, the situation would surely be worse.

C. As technology progresses, the harm from robocalls will only get worse.

"The need for more protection against robocalls has increased" with technological advancements. Sen. Chuck Grassley, *A Bipartisan Effort to End Robocalls*, The Gazette (Apr. 26, 2019).[29] Since the TCPA's enactment, cheap and easily accessible dialing technology

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[26] https://arkansasag.gov/media-center/news-releases/icymi-stop-the-unwanted-robocalls/.
[27] https://www.menendez.senate.gov/news-and-events/press/menendez-gets-robocalled-during-press-conference-pushing-for-crackdown-on-illegal-robocalls-.
[28] https://www.theverge.com/2019/3/20/18274519/att-ceo-robocall-randall-stephenson-live-interview-fcc-ajit-pai.
[29]https://www.thegazette.com/subject/opinion/guest-columnist/grassley-a-bipartisan-effort-to-end-robocalls-20190426.

has exacerbated the problem of unwanted calls. As Representative Frank Pallone, Jr., said last year in his opening remarks in a hearing on robocalls, "as technology has evolved, robocalls, and the threat they impose, have increased. It is easier than ever for someone to begin making robocalls." *Legislating to Stop the Onslaught of Annoying Robocalls: Hearing Before the H. Comm. on Energy and Com.*, 116th Cong. (Apr. 30, 2019).

Today, anyone with a computer or smartphone can, by downloading an app or connecting to a website, dial thousands of phone numbers at once. One robocaller told the Senate that dialing systems that make "millions upon millions of calls" are quickly and easily obtainable on Google. *Abusive Robocalls and How We Can Stop Them: Hearing Before the Subcomm. on Com., Sci., and Transp.*, 116th Cong. (Apr. 18, 2018) (testimony of Adrian Abramovich).

There are now dozens of services offering mass texting software to marketers that are easily accessible online. "Voice broadcast" systems allow users to blast a voice message to thousands of phones instantly. CallFire, *Voice Broadcast* (2020).[30] Stratics Networks advertises software that allows the purchaser to send "Unlimited Voice Broadcasts ALL DAY, EVERY DAY for one low price!" using local phone numbers to increase the likelihood that consumers will answer. Stratics Networks, *Hosted Voice Broadcasting* (2020).[31] The company also markets technology that allows callers to drop messages directly into customers' voicemail in an attempt to avoid the TCPA's restrictions on "calling." Stratics Networks, *Ringless*

[30] https://www.callfire.com/products/voice-broadcast.

[31] https://straticsnetworks.com/hosted-voice-broadcasting.

Voicemail Drops (2020);[32] *see also* All About the Message, LLC, Petition for Declaratory Ruling, CG Docket No. 02-278, at 13 (filed Mar. 31, 2017) (urging the FTC to "declare that the use of direct to voicemail insertion technology is not subject to the TCPA").[33] Another company, Texedly, offers mass texting software and "unparalleled opportunities to reach your contacts instantly and keep yourself literally in the palm of their hands." Textedly, *Products* (2020).[34] Several mass dialers and mass texting apps can be downloaded for free from the Apple and Android app stores. *See, e.g.*, SimpleTexting, *The Best Mass Text Message App and How to Find It* (2020);[35] One Call Now, *Group Messaging, Notification, and Calling App* (2020);[36] DialMyCalls, *iPhone and Android Mass Calling App* (2020).[37]

With mass dialing technology available at the tap of a screen, the autodialer ban needs to be strengthened—not destroyed.

II. Privacy statutes with narrowly drawn exemptions do not violate the First Amendment.

As the Court made clear in *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), privacy laws with "a few narrow and well-justified" exceptions are

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[32] https://straticsnetworks.com/ringless-voicemail-drops.
[33] https://ecfsapi.fcc.gov/file/104010829816078/Petition%20for%20Declaratory%20Ruling%20of%20All%20About%20the%20Message%20LLC.pdf.
[34] https://www.textedly.com/#products.
[35] https://simpletexting.com/the-best-mass-text-message-app-and-how-to-find-it.
[36] https://www.onecallnow.com/how-it-works/mobile-app.
[37] https://www.dialmycalls.com/features/mobile-app.

constitutionally permissible and serve important governmental interests. *Id.* at 573. Indeed, the constitutionality of most federal and state privacy laws is not in question, and few First Amendment challenges to privacy laws have ever succeeded. The outcome in *Sorrell* was the exception that proves the rule: the Court struck down Vermont's law because it did not go far enough to protect privacy—the law "made prescriber-identifying information available to an almost limitless audience" and only excluded "a narrow class of disfavored speakers." *Id.* at 573.

The TCPA autodialer ban is the opposite of the statute at issue in *Sorrell*. The TCPA broadly prohibits robocalls, with a few narrow exceptions. The TCPA does not target a small group for disfavored treatment and is not riddled with exceptions. Nor does the TCPA pose a risk of viewpoint discrimination. There is simply no basis to strike down the autodialer ban.

In fact, the plaintiffs in this case (and defendants in other cases who have challenged the constitutionality of the TCPA) do not advocate for greater privacy protection. These challengers want the Court to strike down the autodialer ban in its entirety so that everyone can make automated calls without prior consent—the exact behavior that the TCPA was enacted to limit. "It is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 448 (2015) (emphasis in original). Accordingly, "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Id.* at 449 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992)). Rather, "underinclusiveness can raise 'doubts about whether the government is in fact pursuing the

interest it invokes, rather than disfavoring a particular speaker or viewpoint.'" *Id*. at 448 (quoting *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 802 (2011)).

In general, privacy statutes limit invasive business practices and give individuals rights to protect their personal information. The privacy interests at stake often vary depending on the type of business conduct involved, the personal information at issue, and the relationship between the entity engaging in the invasive conduct and the individual whose privacy is at risk. Thus, privacy statutes are necessarily tailored to these distinctions. The Court upheld a tailored privacy law in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), which restricted a specific group (attorneys) from soliciting another specific group (accident and disaster victims) concerning a specific topic (the accident or disaster) based on the particular invasiveness of the practice. *Id.* at 626–27. Other federal privacy statutes also make distinctions based on privacy interests and have either been upheld against First Amendment challenges or not challenged at all. *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937 (7th Cir.), *cert. denied*, 136 S. Ct. 689 (2015) (upholding the Driver's Privacy Protection Act's prohibition on disclosure of personal information obtained from motor vehicle records despite 14 exceptions that permitted disclosure under circumstances unlikely to threaten individual's personal safety); *Maryland v. Universal Elections, Inc.*, 729 F.3d 370 (4th Cir. 2013) (upholding the TCPA identity disclosure provision); *Nat'l Cable & Telecomms. Ass'n v. FCC*, 555 F.3d 996 (D.C. Cir. 2009) (upholding a regulation requiring telecommunications carriers to obtain opt-in consent before disclosing customer information); *Mainstream Mktg. Servs., Inc. v.*

FTC, 358 F.3d 1228 (10th Cir.), *cert. denied*, 543 U.S. 812 (2004) (upholding the TCPA Do-Not-Call list); *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003), *cert. denied sub. nom.*, *Fax.com, Inc. v. Missouri ex rel. Nixon*, 540 U.S. 1104 (2004) (upholding the TCPA ban on unsolicited fax advertisements against a content-based challenge); *Moser v. FCC*, 46 F.3d 970 (9th Cir.), *cert. denied*, 515 U.S. 1161 (1995) (upholding the original TCPA autodialer ban); *King v. Gen. Info. Servs., Inc.*, 903 F. Supp. 2d 303 (E.D. Pa. 2012) (upholding the disclosure requirements provision of the Fair Credit Reporting Act against underinclusive challenge because it contained limited exceptions to a general rule and was part of a coherent policy on uses of consumer reports).

Narrow exemptions from a general prohibition that directly advance the government's interest do not undermine the effectiveness of a regulatory scheme. For example, in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the Court found that banning "offsite" billboards and not "onsite" billboards was constitutional because prohibition of offsite advertising was "directly related" to the city's stated objectives in traffic safety and aesthetics—and the interests advanced by the ban on offsite advertising were "not altered by the fact that the ordinance is underinclusive because it permits onsite advertising." *Id.* at 511.[38] Similarly, the TCPA autodialer ban is "directly related" to—and significantly advances—the government's interest in protecting consumer privacy. None

[38] All but two justices agreed that the onsite-offsite distinction was constitutional, though the Court did invalidate the statute in *Metromedia* on other grounds.

of the exemptions alter the fact that the ban prohibits billions of unwanted robocalls each year.

Indeed, the Court has only granted First Amendment challenges to privacy statutes twice—once because the law did not adequately protect privacy (*Sorrell*), and once because the law limited press freedom (*Bartnicki*).[39] In *Sorrell*, the Court invalidated a Vermont statute that restricted pharmacies' disclosure of information about the drugs individual physicians prescribed their patients, and restricted pharmaceutical manufacturers' use of this information to market new drugs to the physicians. 564 U.S. at 558–59. The statute contained numerous exceptions that allowed the prescriber-identifying data to be disclosed or used for many different purposes, including for "health care research;" to enforce "compliance" with preferred drug lists; for communications about care management and treatment options; for "law enforcement operations;" and for "purposes otherwise provided by law." *Id.* at 559–60. The statute also authorized funds for an "evidence-based prescription drug education program" that would promote generic drugs to prescribers, *id.* at 560, and included formal legislative findings that acknowledged that pharmaceutical manufacturers were the "only paying customers" of the data brokers who purchased prescriber-identifying data from pharmacies. *Id.* at 564.

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[39] In a divided opinion in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the Court found that the Wiretap Act's prohibition on intentional disclosure of unlawfully intercepted communications could not be applied to a media outlet reporting on a matter of public concern (assuming they played no part in the illegal interception). *Id.* at 528–35.

The Court invalidated the Vermont law in *Sorrell* because it burdened the speech of a specific, disfavored group of speakers, and did not significantly advance the State's purported interest: physician confidentiality. The narrow drafting of the prohibition, combined with the numerous exceptions, led the Court to conclude that the law "disfavors specific speakers, namely pharmaceutical manufacturers" because the law, in effect, prevented the manufacturers from obtaining or using information that "may be used by a wide range of other speakers." *Id.* at 564. The Court also found that the statute was "*designed*" to "target [pharmaceutical companies] and their messages for disfavored treatment." *Id.* at 565 (emphasis added). Because the law allowed "anyone for any reason save one" to use prescriber-identifying data, the Court found that the statute protected only "a limited degree of privacy," further indicating that the State's goal was to "burden[] disfavored speech by disfavored speakers" and not to protect privacy. *Id.* at 572.

Other underinclusive and invalid content-based speech restrictions have been struck down under the same logic as *Sorrell*: the statute targets a small group for disfavored treatment while exempting everyone else, and thus fails to promote the government's purported interest. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416-17 (1993) (striking down a prohibition on displaying commercial handbills in newsracks because the law removed only a small fraction of racks from the streets—62 out of 1,500-2,000—and thus did not sufficiently impact street aesthetics); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987) (invalidating a tax that "targed[ed] a small group within the press" for disfavored treatment based on the content of the publication); *Minneapolis Star &*

Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 592 (1983) (invalidating a tax that targeted only a small group of newspaper publishers because it "selects a narrowly defined group to bear the full burden" and was "more a penalty for the few" than an attempt to address any legitimate state interest). Other fatally underinclusive statutes are so riddled with exemptions promoting contradictory interests that the law fails to promote any legitimate interest. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231-32 (2015) (invalidating a ban on outdoor signs with 23 exemptions and content-based rules because the content-based rules had no relation to aesthetics or safety); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190 (1999) (invalidating federal ban on casino advertising because the law was "so pierced by exemptions and inconsistencies" that the law did not promote a coherent policy).

But the *Sorrell* Court distinguished the statute at issue in that case with privacy statutes that have "only a few narrow and well-justified" exceptions. *Id.* at 573 (referring, as an example, to the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2; 45 CFR pts. 160 and 164 (2010)). The Court stated that a "statute of that type would present quite a different case from the one presented here." *Id.* Indeed, unlike the Vermont law at issue in *Sorrell,* the TCPA broadly prohibits privacy-invading conduct with only a few narrow exemptions. The number of robocalls that the TCPA prohibits—on the order of tens of billions a year—far surpasses the number of calls it permits through exemptions.

The *Sorrell* Court also noted that not "all privacy measures must avoid content-based rules"—only

that the content-based rules must be "drawn to serve the State's asserted interest" and not be a cloak for viewpoint discrimination. *Id*. at 574. The government-debt exemption merely extends the federal government's immunity to third parties when they act on the government's behalf to collect a debt. Pet'rs' Br. 29 (citing *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663, 672–74 (2016)). More importantly, the government-debt exemption does not lend itself to viewpoint discrimination. The TCPA is a generally applicable ban on use of autodialers by all callers and the government-debt exemption is not related to any viewpoint. There is no greater potential for viewpoint-based discrimination after the 2015 amendment than there was before.

III. If the government-debt exemption is found unconstitutional, the exemption should be severed.

The autodialer ban should not be invalidated even if the Court finds that the government-debt exemption is constitutionally flawed. The autodialer ban was in force for nearly twenty-five years before Congress added the government-debt exemption in 2015, and Congress included a severability clause. Severance would restore the TCPA to its status as a content-neutral time, place, or manner restriction. Severance would also directly address underinclusiveness by once again applying the ban to all callers.

When faced with a constitutional flaw in a statute, the "normal rule" is to "limit the solution to the problem" by "severing any problematic portions while leaving the remainder intact." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 447, 508 (2010) (internal quotation marks and citations

omitted). There is a presumption of severability "unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). The invalid part of a statute "may be dropped if what is left is fully operative as a law." *Id.*

Perhaps the greatest evidence in favor of severance is that Congress did enact the TCPA without the government-debt exemption. The TCPA was fully operative for more than two decades without the exemption and the exemption for government-debt-collection calls has only been in force for a few years. A minor amendment to an otherwise constitutional law, passed decades after the original enactment, should not take down an act of Congress.

Nothing that Congress has done in the last three decades indicates that it intended for the autodialer ban to be invalidated if an exception is found unconstitutional. In fact, Congress explicitly drafted the TCPA to be a "reasonable time, place and manner restriction" that did "not discriminate based on the content of the message" and applied "equally whether the automated message is made for commercial, political, charitable, or other purposes." S. Rep. 102-178, at 4. Congress took steps to ensure that the TCPA's exemptions were consistent with the First Amendment. Congress granted the FCC authority to exempt certain calls from the ban only if the calls were "not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution." TCPA § 2(13). The severability clause in the Communications Act, of which the TCPA is a part,

is further evidence that Congress preferred severance of an unconstitutional exemption to complete invalidation. 47 U.S.C. § 608. A severability clause in a statute "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines*, 480 U.S. at 686.

The autodialer ban would be "fully operative as law" if the Court severs the government-debt exemption. *Id.* at 684. Lower courts have universally upheld the original autodialer ban as a content-neutral time, place, or manner restriction. Severance would simply restore the law to its previously constitutional form. The Ninth Circuit first upheld the law shortly after enactment. *Moser v. FCC*, 46 F.3d 970 (9th Cir.), *cert. denied*, 515 U.S. 1161 (1995). After this Court decided *Reed,* and right before Congress added the government debt exception, the Ninth Circuit reaffirmed *Moser*. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876-77 (9th Cir. 2014), *aff'd on other grounds*, 136 S. Ct. 663 (2016). The Ninth Circuit affirmed the constitutionality of the original autodialer ban for a third (and fourth) time when considering challenges to the post-amended statute. *Duguid v. Facebook, Inc.,* 926 F.3d 1146, 1157 (9th Cir. 2019), *petition for cert. pending*, No. 19-511 (filed Oct. 17, 2019) ("Excising the debt-collection exception preserves the fundamental purpose of the TCPA and leaves us with the same content-neutral TCPA that we upheld—in a manner consistent with *Reed*—in *Moser* and *Gomez*."); *Gallion v. United States*, 772 Fed. App'x. 604, 606 (9th Cir. 2019), *petition for cert. pending*, No. 19-575 (filed Nov. 1, 2019). Every other court to consider the issue has agreed with *Moser*. *See Woods v. Santander Consumer USA Inc.*, No. 14-cv-02104, 2017 WL 1178003, at *4 (N.D. Ala.

Mar. 30, 2017);*Wreyford v. Citizens for Transp. Mobility, Inc.*, 957 F. Supp. 2d 1378 (N.D. Ga. 2013), *mot. for cert. of appeal denied*, 2013 WL 12063934 (N.D. Ga. Sep. 24, 2013); *Strickler v. Bijora, Inc.*, No. 11-cv-3468, 2012 WL 5386089, at *6 (N.D. Ill. Oct. 30, 2012); *Maryland v. Universal Elections*, 787 F. Supp. 2d 408, 418 (D. Md. 2011); *Abbas v. Selling Source, LLC*, No. 09-cv-3413, 2009 WL 4884471, at *8 (N.D. Ill. Dec. 14, 2009); *Margulis v. P & M Consulting, Inc.*, 121 S.W.3d 246, 252 (Mo. Ct. App. 2003).

Severance would also directly resolve any underinclusiveness in the current statutory scheme. Respondents concede that Congress has the authority to regulate robocalls; they only argue that the law should not exempt callers seeking to collect a government debt. The simple and most straightforward remedy is to remove the exemption and subject the debt collectors to the same ban as other callers, as they were before 2015—not to allow everyone to engage in the conduct Congress prohibited as an unwarranted invasion of privacy.

CONCLUSION

For the above reasons, *amici* EPIC et al. respectfully ask this Court to find that the TCPA autodialer ban is constitutional and reverse the decision of the U.S. Court of Appeals for the Fourth Circuit or, in the alternative, to sever the government-debt exemption.

Respectfully submitted,

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