

No. 20-4252

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

ROBERTA LINDENBAUM,
on behalf of herself and others similarly situated,
Plaintiff-Appellant,

v.

REALGY, LLC, et al.,
Defendants-Appellees.

On appeal from the United States District Court
for the Northern District of Ohio, Eastern Division
Case No. 1:19-cv-2862
Hon. Patricia A. Gaughan

**BRIEF OF *AMICI CURIAE* NATIONAL CONSUMER LAW CENTER
(NCLC) AND ELECTRONIC PRIVACY INFORMATION CENTER (EPIC)
IN SUPPORT OF APPELLANT SEEKING REVERSAL**

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February 1, 2021

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 20-4252

Case Name: Lindenbaum v. Realgy, LLC, et al.

Name of counsel: Tara Twomey

Pursuant to 6th Cir. R. 26.1, National Consumer Law Center

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

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CERTIFICATE OF SERVICE

I certify that on February 1, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Tara Twomey

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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF AMICI¹

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. EPIC routinely participates as *amicus curiae* in cases concerning the Telephone Consumer Protection Act. *See, e.g.*, Brief for EPIC et al. as *Amici Curiae* Supporting Respondent, *Facebook, Inc. v. Duguid*, No. 19-511 (filed Oct. 23, 2020); Brief for EPIC et al. as *Amici Curiae* Supporting Petitioner, *Barr v. Am. Ass’n of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020) (No. 19-631); Brief for EPIC as *Amicus Curiae* Supporting Respondent, *PDR Network v. Carlton & Harris Chiropractic*, 139 S. Ct. 2051 (2019) (No. 17-1705); Brief for EPIC & NCLC as *Amici Curiae* Supporting Appellant, *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458 (7th Cir. 2020) (No. 19-1738); Brief for EPIC as *Amicus Curiae* Supporting Appellee, *Gallion v. United States*, 772 Fed. App’x. 604 (9th Cir. 2019) (No. 18-55667); Brief of EPIC et al. as *Amici Curiae* in Support of Respondents, *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (No. 15-1221).

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.

The **National Consumer Law Center** (NCLC) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low-income and elderly consumers. Attorneys for NCLC have advocated extensively to protect consumers' interests related to robocalls before the United States Congress, the Federal Communications Commission (FCC), and the federal courts. These activities have included testifying in numerous hearings before various congressional committees regarding how to control invasive and persistent robocalls, appearing before the FCC to urge strong interpretations of the Telephone Consumer Protection Act (TCPA), filing amicus briefs before the federal courts of appeals representing the interests of consumers regarding the TCPA, and publishing a comprehensive analysis of the laws governing robocalls in National Consumer Law Center, *Federal Deception Law*, Chapter 6 (3d ed. 2017), updated at www.nclc.org/library.

SUMMARY OF THE ARGUMENT

This appeal will determine whether robocallers face consequences for autodialed and prerecorded calls they made to consumers' cell phones without the consumers' consent during the period 2015 to 2020. The robocall prohibition is at the heart of the TCPA's protections against unwanted calls. If the Court rules that the prohibition was unconstitutional and unenforceable for the five years before the government debt exemption was severed, it would reward those who made tens of

billions of unwanted robocalls and deprive consumers of any remedy for the incessant invasion of their privacy. Such a ruling would also impair future enforcement efforts.

Congress has made clear that strong enforcement is essential to accomplish the goals of the TCPA. The law puts not one, not two, but three enforcers on the beat: consumers, state attorneys general, and the FCC. All of these enforcers can pursue monetary judgments—and, through the availability of statutory penalties and treble damage awards, Congress clearly intended to deter harmful behavior by imposing significant monetary penalties on violators. All of them are also authorized to issue or seek orders prohibiting future violations based on past robocall violations. The district court’s decision to grant retroactive immunity to past TCPA violators in this case goes against Congress’s clear intent and the deterrent purpose of the law.

In enacting the TCPA, Congress determined that consumer privacy rights should trump callers’ limited interest in unimpeded robocalling. The Supreme Court relied on this expression of Congressional will when it severed the government debt collection exception in *Barr v. Am. Ass’n of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), and this Court should do the same.

The district court’s decision doubles the harm to consumers, who have already been victims of unlawful calls, by taking away their legal redress. It also

rewards the very robocallers whose harmful behavior Congress sought to curtail. The decision would not only wipe out robocallers' financial liability for unlawful behavior but would also give them an unfair advantage over their direct competitors who complied with the law. This retroactive immunity would create a perverse incentive for entities to take the risk of violating well-established prohibitions in the future whenever Congress amends a law and that amendment is subject to a constitutional challenge. If any part of the law is ultimately held unconstitutional, then they will have retroactive immunity, even if the prohibition they violated was clearly constitutional.

The district court's decision puts hundreds of private and public enforcement actions at risk of unwinding. Robocallers who are responsible for the hundreds of millions to billions of calls currently in dispute will be let off the hook for conduct that clearly violated the law. Robocallers will also be able to evade numerous FCC orders against future robocalling that are based on TCPA violations which occurred during the covered period; this will cause harm to consumers for years to come.

A decision to affirm the lower court's decision would reward robocallers at the expense of consumers. This Court should instead follow the lead of Congress and the Supreme Court in ensuring vigorous enforcement of TCPA protections.

ARGUMENT

I. Robocalls Inflict Significant Privacy Harms on Consumers.

The negative impacts of unwanted robocalls were borne by Americans on a daily basis between 2015 and 2020. During that time, consumers received over 175 billion robocalls. YouMail, *Historical Robocall Index By Time* (2021).² As former FCC Chairman Pai has noted, consumers complained:

“‘[R]obocalls...have become a major nuisance to the point where I don’t answer any calls unless I know the number—and [I] have missed some very important calls...because of that.’

‘I receive so many robocalls that I don’t answer the phone unless I recognize the number.’

‘I now find that my cell phone is becoming useless as a telephone.’”

Ajit Pai, FCC Chairman, “Blocking and Tackling Robocalls” (May 15, 2019)

(describing a few of the roughly 630 complaints that the FCC received *daily* about unwanted robocalls).³

These narratives were heard over and over again as unwanted robocalls have exploded in recent years. Internet-powered phone systems have made it easy and cheap for scammers, spoofers, telemarketers, debt collectors, and others to make millions of automated calls. Services like Message Communications offer 125,000

² <https://robocallindex.com/history/time>.

³ Available at <https://www.fcc.gov/news-events/blog/2019/05/15/blocking-and-tackling-robocalls>.

minutes of robocalls for a mere \$875—meaning that if each targeted consumer listens to the call for an average of three seconds and then hangs up, the robocall campaign would reach 2.5 million consumers. MessageCommunications, Voice Broadcasting Pricing / Rates.⁴ Single telemarketing campaigns have involved tens of thousands, or even millions, of nonconsensual, autodialed calls. *See, e.g., Golan v. Veritas Entm't, LLC*, 2017 WL 3923162, at *1 (E.D. Mo. Sept. 7, 2017) (film studio made 3,242,493 unsolicited autodialed calls to promote film), *aff'd sub nom. Golan v. FreeEats.com, Inc.*, 930 F.3d 950 (8th Cir. 2019); *Wakefield v. ViSalus, Inc.*, 2019 WL 1411127 (D. Or. Mar. 27, 2019) (finding defendant responsible for the 1,850,436 calls made to consumers); *Braver v. Northstar Alarm Servs., LLC*, 329 F.R.D. 320 (W.D. Okla. 2018) (holding defendant liable for millions of telemarketing calls made with a prerecorded voice); *O'Shea v. American Solar Solution, Inc.*, 2017 WL 2779261 (S.D. Cal. June 27, 2017) (nearly 900,000 consumers contacted for sale of solar systems).

Not all TCPA cases are large class actions. Creditors and debt collectors make over a billion calls to consumers every year and are especially relentless in their calling. Using autodialers, these companies can call “more than 1 million people an hour for less than a penny per call.” ACA International White Paper,

⁴ Available at <http://www.voicebroadcasting.us/Pricing.html>.

Methodological and Analytical Limitations of the CFPB Consumer Complaint Database 7 (May 2016).⁵ For example, one debtor was subjected to at least 1,401 calls, often multiple calls on a single day, even though she repeatedly asked the defendant to stop calling. *Covarrubias v. Ocwen Loan Servicing, LLC*, 2018 WL 5914239 at *1 (C.D. Cal. Mar. 7, 2018). And, debt collectors often relentlessly call the wrong person. *See, e.g., Juarez v. Citibank, N.A.*, 2016 WL 4547914 (N.D. Cal. Sept. 1, 2016) (Citibank called consumer at least 42 times on his cell phone, at least three times a day, using an autodialer and/or prerecorded voice in an attempt to collect a consumer debt, even after repeated requests to stop calling, informing it that he was not the individual it was attempting to contact).

Robocalls are so pervasive that Americans now often ignore calls from unknown numbers, impacting business and even public health. 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).⁶ 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:*

⁵ Available at <https://www.acainternational.org/assets/research-statistics/aca-wp-methodological.pdf>.

⁶ <https://www.consumerreports.org/robocalls/mad-about-robocalls/>.

Hearing before the S. Comm. on Com., Sci., and Transp., 116th Cong. (Apr. 11, 2019) [hereinafter *S. Hearing on Illegal Robocalls*].⁷ One hospital reported persistent inability to reach patients because of call screening. Tim Harper, *Why Robocalls Are Even Worse Than You Thought*, Consumer Reps. (May 15, 2019).⁸ A doctor described ignoring a call from an emergency room because he assumed it was a robocall—delaying treatment of a patient with a severed thumb. Tara Siegel Bernard, *Yes, It's Bad. Robocalls, and Their Scams, Are Surging*, N.Y. Times (May 6, 2018).⁹

The trend of ignoring calls from unknown numbers also exacerbates the public health crisis as coronavirus contact tracers struggle to reach people across the country. See Benjamin Siegel, Dr. Mark Abdelmalek, & Jay Bhatt, *Coronavirus Contact Tracers' Nemesis: People Who Don't Answer Their Phones*, ABC News (May 15, 2020); Stephen Simpson, *Few Picking Up Phone in Arkansas When Virus Tracers Call*, Ark. Democrat Gazette (July 10, 2020). These missed connections have been particularly harmful, not only to users but to broader public health efforts to respond to the pandemic. Because robocalls undermined

⁷ <https://www.commerce.senate.gov/public/index.cfm/hearings?ID=5A66BB4E-777B-4346-AA5F-CAB536C54862>.

⁸ <https://www.consumerreports.org/robocalls/why-robocalls-are-even-worse-than-you-thought/>.

⁹ <https://www.nytimes.com/2018/05/06/your-money/robocalls-rise-illegal.html>.

individuals' trust that calls they receive are legitimate, they led people to inadvertently compromise efforts to limit the spread of the virus.

The soaring number of complaints to government agencies demonstrates the extent to which unwanted automated calls significantly invade the privacy of Americans, diminish the usefulness of cellular telephones, and threaten public safety. Federal agencies receive a “staggering number of complaints about robocalls.” *AAPC*, 140 S. Ct. at 2343. In 2009, the FTC received about 756,000 robocall complaints; by 2020, that number had nearly quadrupled to 2.8 million. Federal Trade Comm’n, *Do Not Call Data Book 2020* at 4 (Oct. 2020).¹⁰ The FCC ranks automated calls as a “perennial top consumer complaint.” FCC, *Report on Robocalls 2* (2019).¹¹ 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).¹²

State attorneys general have also fielded “a constant barrage of complaints.” *AAPC*, 140 S. Ct. at 2343. Nebraska Attorney General Doug Peterson told Congress last year that robocalls were “the number one source of consumer

¹⁰ Available at https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2020/dnc_data_book_2020.pdf.

¹¹ <https://docs.fcc.gov/public/attachments/DOC-356196A1.pdf>.

¹² https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2019/dnc_data_book_2019.pdf.

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. Att’y Gen., *Stop the Unwanted Robocalls* (Feb. 11, 2019).¹³

Congress has recognized that more must be done to combat robocalls. Last year, Congress passed additional protections against unwanted robocalls.

Telephone Robocall Abuse Criminal Enforcement and Deterrence (“TRACED Act”) Act, Pub. L. 116-105, 133 Stat. 3274. In an ironic twist, Senator Menendez was interrupted during a press conference promoting the TRACED Act by a robocall. Press Release, Sen. Bob Menendez, *Menendez Gets Robocalled during Press Conference Pushing for Crackdown on Illegal Robocalls* (Apr. 12, 2019).¹⁴

He is not the only one to have a live media event interrupted by a robocall that year. See Makena Kelly, *AT&T CEO Interrupted by a Robocall During a Live Interview*, *The Verge* (Mar. 20, 2019).¹⁵

¹³ <https://arkansasag.gov/media-center/news-releases/icymi-stop-the-unwanted-robocalls/>.

¹⁴ <https://www.menendez.senate.gov/news-and-events/press/menendez-gets-robocalled-during-press-conference-pushing-for-crackdown-on-illegal-robocalls->.

¹⁵ <https://www.theverge.com/2019/3/20/18274519/att-ceo-robocall-randall-stephenson-live-interview-fcc-ajit-pai>.

II. The District Court’s Decision is Inconsistent with Congress’s Repeated Emphasis on Strong TCPA Enforcement Mechanisms.

The TCPA was enacted thirty years ago to protect the privacy interests of consumers by stemming the tide of harassing and unwanted phone calls. Congress has long emphasized that strong enforcement of the TCPA is essential to accomplish its purpose. As a result, Congress has created multiple enforcement mechanisms and potent remedies for consumers who receive unwanted calls in violation of the statute.

First, Congress gave consumers a private right of action for monetary damages and injunctive relief for violations of the Act. 47 U.S.C. § 227(b)(3). Consumers may seek damages of \$500 per violation or actual damages, whichever is greater. 42 U.S.C. § 227(b)(3). Courts have discretion to treble damage awards if an entity “willfully or knowingly” violates the law. *Id.* This private right of action was of great importance to Congress in enacting the TCPA. *See* 137 Cong. Rec. S16205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) (the private right of action “will make it easier for consumers to recover damages from receiving these computerized calls.”).

Second, since the TCPA’s original enactment, Congress has empowered state attorneys general to bring civil suits for damages and injunctive relief for violations of the Act. 47 U.S.C. § 227(g). Like consumers, the state attorneys general may recover actual damages or \$500 per violation, which may then be

trebled in the case of willful or knowing violations. *Id.* The TCPA also preserves states' broad investigatory powers with respect to violations of the Act. 47 U.S.C. § 227(g)(5).

Third, the FCC has long been authorized to enforce the provisions of the TCPA, and more recently, Congress explicitly authorized the FCC to impose monetary forfeiture penalties against individuals and entities that violate the TCPA. 47 U.S.C. §§ 227(b)(4), 503(b); *see* Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, § 10(a) 133 Stat. 3274 (2019) ("TRACED Act"). To further strengthen TCPA enforcement, the TRACED Act extended the statute of limitations from one year to four years for public enforcement actions. 47 U.S.C. § 227(b)(4)(E).

The low cost of launching vast numbers of unwanted robocalls and the potential gains that callers can expect—more sales, successful frauds and scams—give callers a major incentive to violate the TCPA's restrictions. Congress wisely anticipated that robust enforcement would be essential for the TCPA to be effective and built in both government enforcement and a private cause of action. The lower court's opinion runs counter to and frustrates the unmistakable legislative intent to create strongly enforceable TCPA provisions to protect consumer privacy. The five-year free pass created by the lower court denies consumers, state attorneys general, and the FCC a remedy against those who made

tens of billions of illegal robocalls between 2015 and 2020. This was neither the intent of Congress in its steady expansion of TCPA enforcement provisions nor the intent of the Supreme Court in *AAPC*.

III. Blocking TCPA Remedies Would Doubly Harm Consumers and Give an Unfair Advantage to Companies that Violated the Well-Established Robocall Prohibition.

When an amendment to a well-established remedial statute is held unconstitutional, courts should preserve to the greatest extent possible the remedies in the statute to limit negative consequences for the group Congress sought to protect, not reward those whose harmful behavior Congress sought to curtail. Congress decided in the TCPA to favor consumer privacy rights over callers' limited interest in robocalling without restriction. The *AAPC* Court deferred to Congress's choice when it invalidated and severed the government debt exception and left the rest of the robocall restriction intact. This Court should follow the logic of the Supreme Court in *AAPC* and continue to enforce the TCPA prohibitions. Granting all TCPA defendants immunity for illegal robocalls made between 2015 and 2020 would cause consumers to bear all of the harm from illegal robocalls—exactly the opposite of what Congress intended. At the same time, those who made illegal robocalls during the five-year period would reap an unjust benefit for engaging in behavior that Congress clearly prohibited. Rewarding those who made illegal robocalls would be unfair to their direct competitors who complied with the

law. It would also create perverse incentives in future situations where Congress adds a new exception to a well-established prohibition.

The TCPA represents a clear legislative decision to favor consumer privacy rights over the limited interest of callers in robocalling without restriction. The TCPA was a response to “a torrent of vociferous consumer complaints about intrusive robocalls.” *AAPC*, 140 S. Ct. at 2344. At the time of the TCPA’s enactment, over 300,000 telemarketers were calling more than 18 million Americans each day. Telephone Consumer Protection Act of 1991 § 2(3), Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. § 227). The leading Senate sponsor of the bill explained 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). Broadly prohibiting robocalls was “the only effective means of protecting telephone consumers from this nuisance and privacy invasion.” TCPA § 2, ¶12.

Congress’s choice to favor consumer privacy rights over callers’ limited interest in unrestricted robocalling was integral to the outcome in *AAPC*. The Court recognized that the general robocall restriction was a perfectly constitutional exercise of legislative authority. *AAPC*, 140 S. Ct. at 2355. The addition of the government debt exception did not change this fact; Congress continued to have a genuine interest in restricting robocalls even after it amended the law in 2015. *Id.*

at 2348. Because Congress made it “crystal clear that robocalls must be restricted,” it would “disrespect the democratic process” for the Court to nullify Congress’s decision. *Id.* at 2356. The continued validity of the general robocall restriction and the clear legislative intent to ban robocalls led the *AAPC* Court to extend the robocall restriction to government debt collectors instead of upending an otherwise constitutional statute that protects the interests of millions of consumers. *Id.* at 2348.

The same logic applies in this case and counsels against immunity for those who violated the TCPA between 2015 and 2020. If these robocallers are granted retroactive immunity, the tens of millions of consumers who received illegal robocalls would be doubly harmed: once by the robocall’s invasion of their privacy, and again by the denial of their right to legal redress. This is the opposite of what Congress intended and what the Supreme Court held in *AAPC*.

In fact, the only group who would be in a position to argue that the retroactive application of the *AAPC* rule is unfair is callers who used automated dialers or prerecorded voice messages to collect government debts from 2015 to 2020. The Court in *AAPC* acknowledged there could be fair notice concerns with punishing callers retroactively who had relied on Congress’s 2015 exemption. But there is no similar justification for extending immunity to callers who violated the clearly established TCPA rules during that period. Between 2015 and 2020,

consumers received over 175 billion robocalls. YouMail, *Historical Robocall Index By Time* (2021).¹⁶ Government debt collection calls comprised “only a slice of the overall robocall landscape.” *AAPC*, 140 S. Ct. at 2348. Just as the Court found that robocallers could not “ride a discrete constitutional flaw in a statute to take down the whole, otherwise constitutional statute,” *Id.* at 2351, robocallers should not be able to leverage a hypothetical fair notice argument for government debt collectors to escape liability for tens of billions of illegal calls that violated well-established TCPA rules.

Immunizing all robocallers for the five-year period would also be unfair to their competitors who complied with the law. Robocalling is cheaper than using a live person to dial and conduct a call. TCPA §2, ¶ 1 (noting the “increased use of cost-effective telemarketing techniques” as motivation for legislation); *see also* S. Rep. No. 102-178, at 2 (1991) (discussing the low costs of robocalling technology); H.R. Rep. No. 102-317, at 6 (1991) (same). The TCPA imposes compliance costs on businesses by requiring that mass-dialing systems meet certain specifications, requiring companies to manage opt-ins and opt-outs, and creating the risk of a hefty statutory penalty for non-compliance. If one company invests the time and resources necessary to comply with the TCPA and its direct competitor does not, the latter has a significant unfair advantage over the former. If

¹⁶ <https://robocallindex.com/history/time>.

a company engages in telemarketing without paying to comply with the law, as the Defendant here allegedly did, then those lower call costs translate into lower customer acquisition costs—a key metric in measuring the value of a company. Granting TCPA defendants five years of immunity would benefit those who engaged in illegal and harmful conduct while punishing those who did not.

One consequence of the lower court's rule would be to incentivize actors to violate a well-established prohibition during the pendency of a constitutional challenge to an exception. Enforcement of any general prohibition will be in question any time Congress enacts a new exception, no matter how small the group exempted and no matter how clear it is that the actor does not fall into the exception. The risk of liability will be lower, and so the perceived cost of non-compliance will also be lower. And if there is a competitive advantage to be gained from the illegal conduct, companies will more likely take the risk, especially if they expect their competitors to do the same. The result will pervert the incentives established by Congress: to discourage harmful conduct.

IV. The District Court's Decision May Wreak Havoc on Current and Future Government Actions.

While the lower court's focus was on the retroactive impact of severing the government debt exemption amendment from the remainder of the TCPA, the court's ruling also has significant repercussions for the FCC's ability to issue

orders prohibiting future misconduct. The ruling potentially impacts pending enforcement actions and ongoing investigations by the FCC.

FCC enforcement of the TCPA involves a multi-step process that can take several years to complete. *See, e.g., Dialing Services, Inc.*, No. EB-TCD-12-00001812 (Fed. Commc'ns Comm'n July 26, 2017)¹⁷ (over four years from issuance of the citation to forfeiture order); *Five Star Advertising, Inc.*, No. EB-07-TC-13323 (Fed. Commc'ns Comm'n Jan. 5, 2012)¹⁸ (same). First, the FCC determines non-compliance with the provisions of the TCPA and issues a citation ordering the entity to cease its prohibited conduct. If the entity persists in violating the statute, the FCC can issue a Notice of Apparent Liability for Forfeiture and enter a forfeiture order. 47 U.S.C. §§ 154(i), (j), 503. *See also* FCC, *Enforcement Primer*.¹⁹ The FCC may also go to court to seek an injunction enforcing its order or a writ of mandamus ordering a defendant to comply with the TCPA. 47 U.S.C. § 401.

The lower court decision jeopardizes the FCC's ability to enforce outstanding citations and forfeiture orders based on robocalls made between 2015 and 2020, as even the most blatant violations would not be unlawful if the statute

¹⁷ Available at <https://transition.fcc.gov/eb/Orders/2017/FCC-17-97A1.html>.

¹⁸ Available at <https://www.fcc.gov/document/five-star-advertising-inc-forfeiture-order>.

¹⁹ Available at <https://www.fcc.gov/general/enforcement-primer>.

was unconstitutional during that period. Below are a few examples of enforcement actions that would be in danger of unwinding if the Court's decision below were permitted to stand:

1. *Dante Sciarra and D&D Global Enterprises, LLC.*— FCC notified defendants that during a four-month period, they had *made thousands of calls per day* alerting call recipients that their business listings might be at risk of not being seen on Google and other online directories. The citation directed D&D to take immediate steps to comply with the Communications Act and informed it that failure to comply with the TCPA may result in liability for significant fines. *Dante Sciarra and D&D Global Enterprises, LLC*, Citation and Order, 2019 WL 6463853 (Nov. 27, 2019).
2. *Kenneth Moser dba Marketing Support Systems.*— FCC issued a citation and order notifying defendants that they violated the law by making unauthorized and disruptive prerecorded voice message calls without the required identification information, and to wireless phone numbers without an emergency purpose or consent. Moser made thousands of prerecorded message calls describing criminal allegations against candidates for a vacant State Assembly seat. The FCC ordered Moser to comply with the TCPA or face significant forfeiture penalties. *Kenneth Moser dba Marketing Support*, Citation and Order, 2019 WL 6837860 (Dec. 13, 2019).
3. *In re Adrian Abramovich.*—FCC imposed a penalty of \$120,000,000 for 96,758,223 illegal spoofed robocalls during a three-month period in 2016. *Adrian Abramovich, Marketing Strategy Leaders, Inc., and Marketing Leaders, Inc.*, Forfeiture Order) 33 FCC Rcd 4663 (2018).

Beyond potentially shielding robocallers from existing FCC enforcement actions, ongoing investigations are also likely to be sent back to square one. The FCC would have to start each investigation over again and develop evidence anew based only on illegal calls made since the publication of the AAPC decision on July

6, 2020. Such an extreme result is inconsistent with both Congressional intent and the Supreme Court's decision in *AAPC*.

V. The District Court's Decision Would Eliminate Numerous Pending Private Enforcement Actions, Leaving Consumers Without Redress.

Private enforcement of the TCPA has long been the bulwark against the relentless and growing onslaught of illegal robocalls. It offers a critical supplement to public efforts to deter violations. The lower court's decision would strip consumers of their right to obtain redress against entities that have invaded their privacy with tens of billions of robocalls. There are pending private cases in which there is no doubt that illegal robocalls were made to consumers. *See, e.g., McCurley v. Royal Seas Cruises, Inc.*, 2019 WL 1383804 (S.D. Cal. Mar. 27, 2019) (634 million calls using an ATDS to 2.1 million consumers to sell cruises); *see also Creasy v. Charter Commc'ns, Inc.*, No. CV 20-1199, 2020 WL 7646640 (E.D. La. Dec. 23, 2020) (class action against telecommunications provider, alleging that the provider repeatedly violated the TCPA by transmitting autodialed calls and text messages to the consumers without consent), *judgment entered*, 2020 WL 7646640 (E.D. La. Dec. 23, 2020).

The government debt exception did not make the tens of billions of robocalls by Royal Seas Cruises, Charter Communications, or Adrian Abromovich any less invasive. Yet, if the Court rules that the TCPA's prohibitions were unconstitutional until the government debt exemption was severed, the callers who violated the

prohibition against unwanted robocalls will face no consequences, the consumers who endured the calls will have no remedy, and the time and cost that government agencies have put into enforcing the law against violators during that period will be for naught.

CONCLUSION

Amici respectfully request that this Court reverse the lower court's decision to grant Defendant's motion to dismiss.

Respectfully submitted,

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Dated: February 1, 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 6,500 words of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B). This brief contains 4,493 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6 Cir. R. 32(b)(1). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32.1 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.

Dated: February 1, 2021

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CERTIFICATE OF SERVICE

I certify that on February 1, 2021, this brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit through the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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