No. 17-14077

United States Court of Appeals for the Eleventh Circuit

JOHN SALCEDO, individually
and on behalf of others similarly situated,
Plaintiff-Appellee,

v.

ALEX HANNA, an individual, and
THE LAW OFFICES OF ALEX HANNA, P.A.,
a Florida Professional Association,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida
No. 0:16-cv-62480-DPG

MOTION OF CONSUMER FEDERATION OF AMERICA, ELECTRONIC PRIVACY INFORMATION CENTER, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND NATIONAL CONSUMER LAW CENTER FOR LEAVE TO FILE *AMICUS* BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE'S PETITION FOR REHEARING AND REHEARING EN BANC

Movants, Consumer Federation of America (CFA), Electronic Privacy Information Center (EPIC), National Association of Consumer Advocates (NACA), and National Consumer Law Center (NCLC) hereby seek leave to file a brief as *amicus curiae* in support of John Salcedo's petition for rehearing and rehearing en banc pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure.

Appellee's counsel have consented to the filing of this brief, and Appellant's counsel do not oppose it.

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 federal cases concerning the Telephone Consumer Protection Act and other important consumer privacy issues. EPIC has provided expert analysis to Congress on emerging consumer privacy issues concerning the misuse of telephone numbers and has submitted numerous comments to the Federal Communications Commission ("FCC") and the Federal Trade Commission ("FTC") concerning the implementation of the Telephone Consumer Protection Act.

The National Consumer Law Center (NCLC) is a Massachusetts non-profit corporation established in 1969 and incorporated in 1971. It is a national research and advocacy organization focusing specifically on the legal needs of low-income, financially distressed, and elderly consumers. On behalf of these clients and numerous other national and state organizations that represent consumers, NCLC attorneys frequently testify before Congress, file comments and letters with the FCC, and meet with Commissioners and FCC staff, all on robocall issues. NCLC is the author of the Consumer Credit and Sales Legal Practice Series, consisting of twenty practice treatises with annual on-line supplements. One volume, *Federal Deception Law* (3rd ed. 2017), is a standard resource on the TCPA.

It is within the sound discretion of this Court to allow participation of *Amicus Curiae*. *See Northern Securities Co. v. U.S.*, 191 U.S. 555 (1903); *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009) (recognizing that court has discretion to address issue raised only by amicus but declining to do so where the interested party had waived the argument); *U.S. v. Brainer*, 691 F.2d 691 (4th Cir. 1982) (appointing amicus to support district court decision where both parties argued that Act upon which decision relied was unconstitutional). Discussing the appropriate exercise of discretion with respect to use of amicus curiae, Judge Posner said, "[a]n amicus brief should normally be allowed when . . . the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062, 1063 (7th Cir. 1997).

This case deals with the question whether a consumer who receives an unwanted telemarketing text message has Article III standing to enforce the rights provided by the Telephone Consumer Protection Act (TCPA). Protecting cell phones from unwanted robocalls and robotexts is of great importance to consumers. These unwanted messages are particularly intrusive since many consumers carry their cell phones with them at all times, wherever they go. Even if every business in the country could send just one unwanted text message with impunity, the resulting flood of unwanted telemarketing messages would render the text message function of consumers' cell phones unusable. Movants believe that, in their role as national

advocates for consumers and for electronic privacy, they bring a unique perspective to this case that will be helpful to the court in deciding this matter.

WHEREFORE, the movants request that this Motion be granted.

September 25, 2019

Respectfully submitted,

/s/ Tara Twomey

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Counsel for Consumer Federation of America, National Association of Consumer Advocates, Electronic Privacy Information Center, and National Consumer Law Center

STATEMENT OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The National Consumer Law Center (NCLC) is a Massachusetts nonprofit corporation established in 1969 and incorporated in 1971. It is a national research and advocacy organization focusing on the legal needs of low-income, financially distressed, and elderly consumers. NCLC operates as a tax-exempt organization under the provisions of section 501(c)(3) of the Internal Revenue Code. It has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

The National Association of Consumer Advocates (NACA) is a nonprofit membership organization of law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates. NACA is tax-exempt under section 501(c)(6) of the Internal Revenue Code. It has no parent corporation, nor has it issued shares or securities.

Consumer Federation of America (CFA) is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. It is a non-profit, non-stock corporation. It has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

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 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.

I hereby certify that I believe that the CIP contained in the Plaintiff-Appellee's Petition for Rehearing and Rehearing En Banc is complete, with the addition of the following:

- Carter, Carolyn (NCLC Attorney)
- Consumer Federation of America (*Amicus Curiae*)
- Electronic Privacy Information Center (*Amicus Curiae*)
- National Consumer Law Center (Amicus Curiae)
- National Association of Consumer Advocates (*Amicus Curiae*)
- Saunders, Margot (NCLC Attorney)
- Twomey, Tara (Counsel for *Amici Curiae*)

September 25, 2019

Respectfully submitted,

/s/Tara Twomey
Tara Twomey
Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system, which will cause it to be served on all parties through their counsel as follows:

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Tara Twomey
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September 25, 2019

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On brief: Carolyn Carter
Margot Saunders

18-14077 *Salcedo v. Hanna*

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- Twomey, Tara (Counsel for *Amici Curiae*)

September 25, 2019

Respectfully submitted,
/s/Tara Twomey
Tara Twomey
Counsel for *Amici Curiae*

STATEMENT OF COUNSEL UNDER ELEVENTH CIRCUIT RULE 35-5(c)

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the precedents of this circuit identified in the Appellee's Petition for Rehearing and Rehearing En Banc, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court.

I further express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: whether a person who receives an autodialed text message without having given prior express consent has suffered a concrete injury sufficient to allow Article III standing to bring the private cause of action allowed by the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3).

Respectfully submitted,

/s/Tara Twomey
Tara Twomey
Counsel for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are consumer protection organizations that work to safeguard consumers from unwanted robocalls and robotexts and to ensure the enforceability of consumer rights under the Telephone Consumer Protection Act (TCPA) and other consumer protection statutes. *Amici* have advocated extensively for strong interpretations of the TCPA before the Federal Communications Commission (FCC), and have filed numerous amicus curiae briefs defending the TCPA as a primary means to protect Americans from unwanted automated calls.

STATEMENT OF ISSUES

Amici adopt the Appellee's statement of issues.

STATEMENT OF FACTS

Amici adopt the Appellee's statement of facts.

ARGUMENT

This appeal raises questions of exceptional importance. The panel decision is based on an erroneous interpretation of the TCPA, conflicts with other precedent, and will have far-reaching consequences. It opens the floodgates to mass text

[1] No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than amici made a monetary contribution to the preparation or submission of this brief.

messaging, a result that is contrary to the plain language of the statute and Congress's intent.

The panel's holding that a single text message is too minor an annoyance to amount to a concrete injury is unsound. Text messages are often sent as part of massive telemarketing campaigns, reaching hundreds of thousands of consumers. If every business in the United States could send just one text message with impunity, cell phones would be flooded with unwanted messages, defeating the purpose of the TCPA. The text message function would be rendered unusable as a means of communication, as any messages consumers sent or received would be lost in a sea of telemarketing messages.

I. In Enacting the TCPA, Congress Was Broadly Concerned About Invasions of Privacy, Not Just Calls to the Home.

"[B]ecause Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is … instructive and important." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Accordingly, the panel decision appropriately focuses on whether Congress's enactment of the TCPA evidences a judgment that the receipt of an unwanted text message is a concrete injury. However, the panel's conclusion that Congress was primarily concerned with calls to the home, misses the mark and overlooks key statutory language, legislative findings, and legislative history.

The panel portrays Congress's concern as limited to "privacy within the sanctity of the home," and states that "[b]y contrast, cell phones are often taken outside of the home and often have their ringers silenced, presenting less potential for nuisance and home intrusion." Slip Op. 11. It is true that several of the legislative findings relate to the home intrusion caused by telemarketing calls to residential lines. *See, e.g.*, Pub. L. No. 102-243, § 2 ¶ 6 ("Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers."). But Congress's findings clearly express far broader concern about invasions of privacy from telemarketing. Its first finding after reciting statistics about telemarketing is that "[u]nrestricted telemarketing … can be an intrusive invasion of privacy." *Id.* ¶ 5. This broad critique of the invasive nature of unrestricted telemarketing calls is not limited to calls to residential lines. Other key findings are similarly unlimited. For example, Congress noted that, "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices." *Id.* ¶ 9. Here, Congress seeks to balance individual privacy, generally, not just individual privacy within one's home, with legitimate practices. The extensive privacy protection Congress envisioned is further shown by its references to unwanted calls to businesses and the risks to public safety created by unwanted calls. *Id.* ¶¶ 5, 14.

Unsurprisingly, these legislative findings, which are not limited to privacy within the home, are reflected in the plain text of the statute. The breadth of

Congress's concerns is shown most strongly by what it did. Congress enacted a statute that went far beyond restricting telemarketing calls to the home. While section 227(b)(1)(B), which restricted prerecorded calls, and section 227(c), which authorized the FCC to adopt a do-not-call rule, were confined to residential subscribers, no other part of the statute was—or is—so limited. For example, faxes are not commonly sent to residences, yet Congress placed significant restrictions on unwanted fax advertisements. 42 U.S.C. § 227(b)(1)(C). Congress's prohibition of autodialed or prerecorded calls to hospitals, poison control centers, other emergency lines, and patient rooms in health care facilities without the called party's consent has nothing to do with intrusion on the home and is not even confined to telemarketing calls. *Id.* § 227(b)(1)(A), (B). Congress required the FCC to prescribe "technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone," without confining this requirement to residential lines or telemarketing calls. *Id.* § 227(d)(3). And, most relevant here, Congress explicitly prohibited autodialed or prerecorded calls to cell phones, pagers, and similar devices without the called party's consent. *Id.* § 227(b)(1)(C).

The importance that Congress placed on the restrictions on calls to cell phones is particularly clear in light of the remedies it provided for violations. Congress gave a consumer who receives an unwanted cell phone call a private cause of action *regardless of the number of calls received*. *Id.* § 227(b)(3). By contrast, for calls to residential subscribers in violation of the do-not-call rules that Congress allowed the FCC to

adopt, Congress provided a private cause of action only if the consumer received two calls within a twelve-month period. *Id.* § 227(c)(5). This difference in the two causes of action is an unmistakable expression of Congress's judgment that the intangible harm of receiving unwanted cell phone calls—even a single call—is a legally cognizable injury. Indeed, the heightened protection that Congress gave against unwanted cell phone calls, as compared to telemarketing calls to residential subscribers in violation of do-not-call rules, strongly suggests that it had greater concern, not less concern, about the former.

Congress also created stronger substantive protections for cell phones than residential lines. It prohibited both autodialed and prerecorded calls to cell phones without consent, but only prerecorded calls to residential lines. *Compare* 42 U.S.C. § 227(b)(1)(A) to 42 U.S.C. § 227(b)(1)(B). Moreover, in section 227(b)(2)(B), Congress gave the FCC authority to exempt calls to residential numbers from the restrictions on prerecorded calls, yet as originally enacted it gave the FCC no authority to make any exemptions for cell phone calls. Pub. L. No. 102–243, 105 Stat. 2394 (Dec. 20, 1991). When it amended the statute in 1992 to allow the FCC to create exemptions for cell phone calls, it narrowly limited this authority to calls that are both free to the end user and subject to conditions deemed necessary to protect privacy rights. *Id.* § 227(b)(2)(C), *enacted by* Pub. L. No. 102–556, 106 Stat. 4181 (Oct. 28, 1992). The panel opinion treats this exemption authority as evidence that Congress viewed cell phone calls as being unintrusive, but it ignores Congress's explicit privacy

concerns. Slip Op. 11-12. The statute as enacted indisputably conveys Congress's concern about the invasion of privacy caused by unwanted calls to cell phones.

Unwanted calls to cell phones are probably more intrusive than calls to the home. The mobility of cell phones means that Americans keep them closer than was ever possible with a landline. Fully 90% of users carry their cell phones with them wherever they go. Lee Rainie and Kathryn Zickuhr, *Americans' Views on Mobile Etiquette*, Pew Research Ctr. (Aug. 26, 2015).[2] According to the FCC, "autodialed and prerecorded calls are increasingly intrusive in the wireless context." *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 FCC Rcd. 1830 ¶ 25 (Feb. 15, 2012).

The Supreme Court has recognized that cell phones are now indispensable. *Riley v. California*, 134 S. Ct. 2473, 2484, 2490 (2014) (cell phones are a "pervasive and insistent part of daily life"; in the digital age, "it is the person who is not carrying a cell phone, with all that it contains, who is the exception."). 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 "[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 (quoting *Riley*, 134 S. Ct. at 2484).

[2] https://www.pewresearch.org/wp-content/uploads/sites/9/2015/08/2015-08-26_mobile-etiquette_FINAL.pdf.

II. Congress's Explicit Restrictions on Calls to Pagers Shows that it Intended the TCPA to Make Unwanted Text Messages Actionable.

The panel opinion also concludes that the TCPA's failure to refer explicitly to text messaging shows that Congress was not concerned about it when it enacted the statute. Slip Op. 10-15. But Congress restricted calls, not voice calls, when it enacted the TCPA in 1991. Moreover, in section 227(b)(1)(A)(iii) Congress specifically restricted calls to pagers, treating them exactly like cell phones. Pagers, now pretty much obsolete, functioned exactly like a very limited, primitive text messaging system: they enabled a message, originally consisting just of a telephone number, to be sent through a telephone line to the recipient. Mary Bellis, ThoughtCo., *History of Pagers and Beepers* (Sept. 10, 2018).[3] By 1990, the year before the TCPA was enacted, a pager could receive up to four lines of alphanumeric text, and was "a prototype for text messaging." Brian Santo, IEEE Spectrum, The Consumer Electronics Hall of Fame: Motorola Advisor Pager (Jan. 3, 2019).[4] By including pagers in the autodial prohibition, Congress unambiguously expressed concern about text messages as well as voice calls.

But even setting aside the statute's explicit inclusion of calls to pagers, Congress has expressed its approval of the application of the TCPA to text messages

[3] *Available at* https://www.thoughtco.com/history-of-pagers-and-beepers-1992315.

[4] *Available at* https://spectrum.ieee.org/consumer-electronics/gadgets/the-consumer-electronics-hall-of-fame-motorola-advisor-pager.

quite clearly by repeatedly amending the TCPA without disturbing the rulings of the FCC and the courts applying the statute to text messages.

Text messaging as we now know it was introduced in the United States in 2000. FCC, *In the matter of Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, 17 FCC Rcd. 12985, 13051 (July 3, 2002). The FCC moved promptly to clarify that the TCPA encompassed text messages:

> We affirm that under the TCPA, it is unlawful to make *any call* using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number. …This encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls, provided the call is made to a telephone number assigned to such service.

Report and Order, *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 FCC Rcd. 14014, at ¶ 165 (July 3, 2003) (footnotes omitted). The FCC reiterated this conclusion in 2012, *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 FCC Rcd. 1830 ¶ 4 (Feb. 15, 2012), and 2015, *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, at ¶¶ 27, 107–108, 111–115 (July 10, 2015), *appeal resolved*, *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687 (D.C. Cir. 2018) (setting aside two parts of 2015 ruling, but leaving this portion undisturbed). Where an agency's statutory construction has been fully brought to the attention of the public and Congress, and the latter has not sought to alter that interpretation although it has amended the

statute in other respects, then a court may presume that the agency correctly discerned Congress's intent. *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 536 (1982).

Many courts, including this Court and the Third, Sixth, Seventh, and Ninth Circuits, have also ruled that the TCPA applies to text messages. *Blow v. Bijora*, 855 F.3d 793, 798 (7th Cir. 2017); *Murphy v. DCI Biologicals, Inc.*, 979 F.3d 1302 (11th Cir. 2015); *Keating v. Peterson's Nelnet, L.L.C.*, 615 Fed. Appx. 365 (6th Cir. 2015); *Gager v. Dell Financial Servs., LLC*, 727 F.3d 265, 269 n.2 (3d Cir. 2013); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009). In 2016, the Supreme Court endorsed this view, holding that "[a] text message to a cellular telephone, it is undisputed qualifies as a 'call' within the compass of § 227(b)(1)(A)(iii)." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016). The many amendments to section 227(b) after these rulings strongly evinces Congress's acceptance of them. *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015).

III. The Panel Opinion Could Be Construed to Allow Companies to Flood Consumers' Phones with Text Messages.

The panel opinion acknowledges the Supreme Court's ruling that a concrete injury need only be an "identifiable trifle." Slip Op. 6, quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973). The opinion concludes that the plaintiff's claim does not meet this standard. But the opinion creates confusion as to whether the court so

concluded because the claim involves a single text message, or because receipt of text messages, no matter their number, cannot amount to a concrete injury.

The concurring opinion takes the optimistic view that the majority's conclusion is driven by the fact that the plaintiff alleged that the defendant sent him only one text message. Slip Op. 22 (Pryor, J., concurring). However, the majority opinion states: "we are not attempting to measure how small or large Salcedo's injury is." Slip Op. 19. Rather the panel characterizes its conclusion as "qualitative, not quantitative," suggesting that numerosity is irrelevant. *Id.* Following this logic, if a single text message is not an "identifiable trifle," then it is hard to understand how twenty, or fifty, or a thousand would be anything different: zero times 1000 is still zero.

If the panel opinion is interpreted to allow standing when a consumer receives some number of texts more than one, it places the judiciary in the position of drawing essentially arbitrary lines—lines that Congress explicitly chose not to draw when it authorized suit for receipt of a single unwanted call. If receipt of a single text message does not amount to a concrete injury, what about two messages? Five messages? A hundred? How big must the hole in the dike be before a consumer can take action to stop it?

The premise that a single text message is too minor an annoyance to amount to a concrete injury is simply unsound. Even if every business in the United States could send just one text message with impunity, our cell phones

would be flooded with unwanted telemarketing messages. The text message function would be rendered unusable as a means of communication, as any messages consumers sent or received would be lost in a sea of telemarketing messages. Allowing one unwanted text message per business would be the equivalent of giving every mosquito one free bite.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing or rehearing en banc.

September 25, 2019

Respectfully submitted,

/s/ Tara Twomey

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On brief: Carolyn Carter
Margot Saunders

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Garamond font. This document complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(a) because, excluding parts of the documents are exempted by Federal Rule of Appellate Procedure 32(f), this document contains 2,556 words.

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Respectfully submitted,

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