ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1211

United States Court of Appeals for the District of Columbia Circuit

ACC INTERNATIONAL; SIRIUS XM RADIO INC.; PROFESSIONAL ASSOCIATION FOR CUSTOMER ENGAGEMENT INC.; SALESFORCE.COM INC.; EXACTTARGET, INC.; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICAN; CONSUMER BANKERS ASSOCIATION; VIBES MEDIA, LLC; RITE AID HDQTRS. CORP.; AND PORTFOLIO RECOVERY ASSOCIATES,

Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,

Respondents

On Petition for Review of a Final Order of the Federal Communications Commission

BRIEF OF THE INTERNET ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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December 2, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to District of Columbia Circuit Rule 28(a)(1), amicus hereby certifies that:

A. Parties

All parties, intervenors, and amici appearing in this court are listed in the Brief for the Petitioners, except for the Internet Association and the National Rural Electric Cooperative.

B. Rulings Under Review

Amicus Curiae is supporting the petitioners, who seek review of the following final order of the Federal Communications Commission: *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, 30 FCC Rcd. 7961 (2015).

C. Related Cases

All petitions for review of the order referenced above have been consolidated in this Court. Amicus is unaware of any related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the Internet Association submits the following corporate disclosure statement:

The Internet Association is a national trade association representing leading Internet companies including Airbnb, Amazon, Auction.com, Coinbase, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Gilt, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Sidecar, Snapchat, SurveyMonkey, TripAdvisor, Twitter, Uber Technologies, Inc., Yahoo!, Yelp, Zenefits, and Zynga. The Internet Association is a not-for-profit corporation and has not issued shares or debt securities to the public. The Internet Association does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

STATEMENT OF AUTHORSHIP

Pursuant to Federal Rule of Appellate Procedure 29(c), the Internet Association submits this disclosure of representation. No person or their counsel (other than the amicus and its members) contributed money with the intention of funding the preparation or submission of the brief.

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STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT

The Internet Association is the unified voice of the Internet economy, representing the interests of leading Internet companies[2] and the global community of people who use their products. The Internet Association is dedicated to advancing public policy solutions to empower users, strengthen and protect Internet freedom, and foster innovation and economic growth. Its members stand on the leading frontiers of today's innovation. While these members span a wide variety of business models that compete over a broad spectrum of markets—sometimes against each other—they stand together to foster innovation and economic growth. From small start-ups to industry leaders, the Internet Association's members have not only changed the way people live, travel, entertain, and shop, but also how they communicate with each other.

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[2] The Internet Association's members include Airbnb, Amazon, auction.com, Coinbase, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Gilt, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Sidecar, Snapchat, SurveyMonkey, TripAdvisor, Twitter, Yahoo, Yelp, Uber, Zenefits, and Zynga.

Indeed, the innovative products that Internet Association members have created, currently create, and will create over the coming decades thrive on the instant electronic communication that the Internet makes possible. Rides are requested, news is gathered, and connections are made, all through the medium of the Internet-connected smartphone. The people who use the products and services offered by the Internet Association's members desire the fluid and instantaneous flow of information that is now possible thanks to the innovations of the recent decade.

Yet this mutually desirable exchange of information is threatened by substantial uncertainty created by the Commission's flawed attempts to update a statute designed to curb the telemarketing abuses of the late 1980s and early 1990s. Seizing on the muddle created by the Commission's reimagining of the Telephone Consumer Protection Act (TCPA), plaintiffs are filing multimillion (or even multibillion) dollar class actions that target communications that are essential to the Internet and sharing economy. That uncertainty makes the provision of legitimate, desired communications a risky activity for the Internet Association and its members: engage in the frictionless communications

essential to providing innovative and beneficial services to people under threat of TCPA liability or swiftly fall behind. A world where a business cannot engage in legitimate, desired communications with the people who use its services is a world incompatible with the principles embodied in the First Amendment and hostile to the innovation that is the lifeblood of significant parts of today's economy. Because that is precisely the world created by the Commission's interpretation of the TCPA, the Internet Association supports Petitioners' request that the Commission's recent order be vacated.[3]

ARGUMENT

I. Congress Sought to Curb Abusive Telemarketing Practices, Not Desired Communications Between Companies And People Who Use Their Services.

The TCPA was Congress's response to an outpouring of concern in the late 1980s and early 1990s over abusive practices by telemarketers, who used certain computerized equipment that would generate numbers to be called at random or in a particular sequence. *See* 47 U.S.C. § 227; *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012) (noting that Congress passed the TCPA in response to "[v]oluminous

[3] Amicus is authorized to state that all parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a); D.C. Cir. Rule 29(b).

consumer complaints about abuses of telephone technology"). Given the Act's focus on the unique technology used over two decades ago, it is no wonder that a person looking at the TCPA in the 2010s could call it "the strangest statute I've ever seen," Or. Arg. Tr., *Mims v. Arrow Fin. Servs., LLC*, No. 10-1195 (Nov. 28, 2011), 51:19–20 (Chief Justice Roberts), or "so weird," *id.* at 40:21–22 (Justice Scalia). Nevertheless, the Act was largely successful in eliminating the use by telemarketers of certain automated dialing equipment. In an unlawful attempt to respond to changing technology, however, the Commission has interpreted the TCPA in such a way that it now potentially reaches almost any form of electronic communication—a far more sweeping (not to mention unconstitutional, *see infra*) and ambitious rule than Congress's much more modest focus on the specialized automated dialing equipment that telemarketers used in 1990.

Indeed, the TCPA's legislative history displays a singular focus on telemarketers' use of random or sequential number generators. In the run-up to the TCPA, Congress held hearings on the subject, and tales of telemarketing woe lay at the center of each. Indeed, the low opinion of what telemarketers were doing would make even Congress blush: "A

September 1990 Roper poll of what most annoys Americans put telemarketing at the top of the list—70 percent of those surveyed said computerized telemarketing was a major annoyance." *S. 1462, The Automated Tel. Consumer Prot. Act of 1991; S. 1410, The Tel. Advert. Consumer Prot. Act; and S. 857, Equal Billing for Long Distance Charges: Hearing before the Subcomm. on Commc'ns of the Comm. on Commerce, Sci., and Transp.*, 102nd Cong. 40 (1991) (statement of Michael Jacobson, Cofounder, Center for the Study of Commercialism). The hearings often focused on the particular equipment telemarketers were using to deliver unwanted calls. *See id.* at 2 (statement of Sen. Daniel K. Inouye, Chairman, S. Subcomm. on Commc'ns) ("Computers sometimes call a person's telephone line and do not release the line, even after the person hangs up the phone," autodialing machines "often tie up telephone lines used exclusively for emergency purposes," and "[t]elemarketers sometimes will call the same household three or four times a week."). Congress expressed deep concern over the "proliferation of unwanted, nuisance calls to [customers'] homes . . . due to the increased use of cost-effective telemarketing techniques." 47 U.S.C. § 227 note.

The end product reflected Congress's concentration on telemarketers and their random and sequential number generators. The TCPA sought to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home," S. Rep. No. 102-178, at 1 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1968, using particular "telecommunications equipment,"[4] H.R. Rep. No. 102-317, at 5 (1991). The Act accomplished this by, among other things, sharply curbing the use of the "automated telephone dialing system" or ATDS, which the Act describes as equipment that can "store or produce telephone numbers to be called, using a random or sequential number generator and . . . dial such numbers." 47 U.S.C. § 227 (a)(1). The Act also sharply restricts the use of artificial or pre-recorded voice calls. *See id.* § 227(b)(1).

The Commission's initial set of regulations recognized the statute's focus on particular actors (telemarketers) using particular

[4] In fact, the *only* concerns expressed in the committee reports were with "unrestricted telemarketing," H.R. Rep. No. 102-317 at 8, "[p]hone calls from people selling things," *id.* at 9, the "use of sophisticated, computer driven telemarketing tools," *id.* at 6, and "equipment manufacturers," S. Rep. No. 102-178, at 7.

equipment (an ATDS or an artificial or pre-recorded voice). *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, 8776 (1992) (noting that the "prohibitions of § 227(b)(1) clearly do not apply to" equipment where "the numbers called are not generated in a random or sequential fashion"); *see also In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 F.C.C. Rcd. 12391, 12400 (1995) (acknowledging that certain calls are not covered by the TCPA because they "are not directed to randomly or sequentially generated telephone numbers, but instead are directed to the specifically programmed contact numbers").

In the decade following its passage, the TCPA largely fulfilled its purpose of eliminating the abuse of ATDSs among telemarketers. But as telemarketers adopted new technologies, the Commission began changing the rules to account for "the evolution of the teleservices industry." *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14092 (2003); *see id.* at 14017 ("Over the last decade, the telemarketing industry has undergone significant changes in the technologies and methods used to contact

consumers. . . . The record confirms that these marketplace changes warrant modifications to our existing rules, and adoption of new rules . . . ."). This included interpreting the statutory phrase "call" to include a text message. *See id.* at 14115.

The Commission's most recent Order shows how the Commission has taken the TCPA far beyond the automated and sequential number generators Congress had in mind. A divided Commission held that an ATDS includes any equipment that "has the capacity to store or produce numbers and dial those numbers at random, in sequential order, *or from a database of numbers*," where the term "capacity" is "not limited to [the equipment's] current configuration but also includes its potential functionalities." *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Declaratory Ruling and Order*, 30 FCC Rcd. 7961, 7974 (2015) (emphasis added) ("2015 Order"). By trying to reboot the TCPA for more modern times, the Commission has placed at risk calls from just about any computerized telephone (such as the smartphones or VoIP phones that nearly every business uses), because those telephones can be reconfigured with software that would allow it to store and generate random or sequential numbers or dial numbers

from a list. And so just about every modern telephone call is made with a potential ATDS and occurs under the cloud of the TCPA.

The Commission went a step further by imposing liability on companies for calls to numbers that—unbeknownst to the companies—have been reassigned from someone who has consented to receive communications to someone who has not. This is a real issue with staggering numbers. "Every day, an estimated 100,000 cell phone numbers are reassigned to new users." *Id.* at 8090 (dissenting statement of Cmm'r O'Reilly). "And no authoritative database—certainly not one maintained or overseen by the FCC, which has plenary authority over phone numbers—exists to track all disconnected or reassigned telephone numbers or link all consumer names with their telephone numbers." *Id.* at 8077 (dissenting statement of Cmm'r Pai) (quotation marks and brackets omitted). As a result, companies who have received consent to communicate with their users or customers and therefore believe they are communicating free from TCPA liability, *see* 47 U.S.C. § 227 (b)(1)(A),(B), may potentially be racking up significant statutory liability without even knowing it.

The ambiguity surrounding what equipment qualifies as an ATDS and reassigned numbers threatens the core forms of communication the Internet Association's members engage in with their customers and users—computerized, but customized, text alerts. At best, the Commission's Order has left the Internet Association's members in limbo; at worst, the subject of multimillion dollar lawsuits. As Commissioner Pai explained, "[r]ather than focus on the illegal telemarketing calls that consumers really care about, the Order twists the law's words even further to target useful communications between legitimate businesses and their customers. This Order will make abuse of the TCPA much, much easier." *Id.* at 8073.

II. The Commission's Order Creates Legal Uncertainty For Legitimate, Desired Communications.

Regrettably, Commissioner Pai's vision of the future is in fact the present. Lawyers are increasingly exploiting the ambiguity the Commission has created with its atextual interpretation of the TCPA. *Id.* at 8073 (dissenting statement of Cmm'r Pai) ("[T]he number of TCPA cases filed each year skyrocket[ed] from 14 in 2008 to 1,908 in the first nine months of 2014."). Changes in technology have enabled companies to communicate with their consumers much more efficiently

through a number of methods, including text messages. *See, e.g.*, Desai, et al., *A TCPA For The 21st Century: Why TCPA Lawsuits Are On The Rise And What The FCC Should Do About It*, Int'l J. of Mobile Marketing, Vol. 8, No. 1 (Summer 2013), at 75, *available at* http://www.squirepattonboggs.com/insights/publications/2014/07/a-tcpa-for-the-21st-century. As entities that operate primarily or exclusively through the Internet, Internet Association members have developed innovative ways for people to communicate on the Internet and engage in commerce, and depend upon being able to send computerized, tailored informational alerts that their users and customers have requested.

For example, social media companies allow users to request, via email or text message, a variety of notifications, including alerts regarding messages from social media connections or potential data security issues. Companies that provide Internet-based ridesharing services allow users to use a mobile application to send a text message to friends with the user's estimated time of arrival. Companies offering instant message applications allow users to send instant messages from their computers directly to a friend's cell phone, via text message. The

list goes on—these frictionless communications are the lubricant for the Internet and sharing economy in which millions of people and businesses interact on a day-to-day business. People want these messages.

And yet because of the Commission's increasingly amorphous definition of an ATDS and its *caveat speaker* approach to reassigned numbers, these desired communications—made not by telemarketers but by businesses on the cutting edge of today's economy—are fodder for TCPA statutory damages.

Take a ridesharing transaction, a typical example from the sharing economy. As has been demonstrated on a number of occasions, *see, e.g.*, Scott Wallsten, *Has Uber Forced Taxi Drivers to Step Up Their Game?*, Technology Policy Institute (July 2015), https://www.techpolicyinstitute.org/files/wallsten_hasuberforced.pdf, ridesharing platforms are offering real benefits to consumers in the form of lower prices, higher quality, and reduced dependence on automobile ownership. Part of the appeal of ridesharing is that it allows customers to engage in frictionless and secure transactions across the Internet from the comfort of their own homes. Send out a

request on a phone, and wait for the alert that their ride has arrived. But it is essential to these transactions that the customers be able to receive text messages via the ridesharing service's computerized platform, which transmits information about driver location and ETAs. Given the nebulous version of the TCPA found in the Commission's Order, it is not particularly difficult to imagine how an enterprising lawyer could put a TCPA lawsuit together.

And the threat isn't hypothetical. Lawsuits are threatened or filed targeting the very types of communications that are at the heart of the Internet and sharing economy championed by the Internet Association's members. These are lawsuits about text messages, such as security alerts, subscription confirmations, and other notifications that provide helpful information to the recipients and have been requested by the people using these services. In many cases, a person specifically requests to have communications sent to him at a phone number he provides, but, unbeknownst to the business, the phone number is subsequently reassigned to another person. In other cases, people use Internet services to communicate with others, and the recipients themselves sue.

Here are a few examples based on real-world cases:

- An Internet company that offers free email services also offered its email users the option of forwarding incoming email to the user's cell phone via text message. A user's number is recycled to someone else, who sues under the TCPA.

- A social media company allows users to choose to have notifications sent to their cell phone number whenever someone accesses that user's account from an unrecognized device. A user's phone number is subsequently reassigned to a different person, who sues.

- An Internet-based ridesharing service offers an app that allows its users to invite their friends to use the service and offer them a discount. The friend sues.

- An Internet company offers a group-based texting service that allows a user to customize a messaging group. The customer's creation of a group creates an introductory message. A group member sues.

- An Internet company offers an instant messaging system that allows users to send instant messages from their computer to a friend's cell phone via text message. When a user directs an instant message to a telephone number that has never before been sent an instant message, the system simultaneously sends a "Welcome" message, informing the recipient that a friend sent a message. The recipient sues.

These are simply a handful of examples based on TCPA lawsuits that have actually been brought against Internet companies for sending legitimate, non-advertising messages that *users actually want*, but which nevertheless have invited TCPA liability, often due to factors outside the control of companies like the Internet Association's members, such as reassigned phone numbers.

For many plaintiffs (and their counsel), a strict liability statute and the possibility of trebled, statutory damages up to $1,500 per text message is alluring. When the ambiguity in the Commission's recent orders is added into the mix, it makes bringing TCPA actions based on normal, non-harassing business communications from companies like the Internet Association's members irresistible. Indeed, with respect to a claim brought against a particular Internet company, Judge Clifton of the Court of Appeals for the Ninth Circuit commented that the TCPA claim was "one of the sillier claims I have seen. I've seen lots of claims. But I have a real hard time understanding how this is the kind of harassment that the law is aimed at." Tr. of Oct. 20, 2015 Oral Arguments. at 6:04, *Roberts v. PayPal, Inc.*, No. 13-16304, — Fed. App'x —, 2015 WL 6524840 (9th Cir. 2015), *available at*

http://www.ca9.uscourts.gov/media/view.php?pk_id=0000014870. Yet the Commission's Order rolls out the welcome mat for such lawsuits, threatening the innovative approach to communication that Internet Association members promote and on which their business models depend.

III. The Reimagined TCPA Presents Serious Constitutional Questions.

While these lawsuits do look silly when compared with what actually motivated the passage of the TCPA (telemarketers and their random or sequential dialers), the threat under which Internet Association members operate when they communicate with their customers is real. The Commission's Order forces companies who want to engage in desired communications to navigate the perilous passage between Scylla and Charybdis: speaking with their customers with the threat of TCPA liability looming or refuse to provide the information customers want and lose market share. This TCPA alternative universe is not what Congress had in mind and is incompatible with the First Amendment.

The concerns with the Order's expansion of TCPA liability are heightened here because the TCPA is a *content-based* restriction of

speech. The TCPA's various exceptions create a classic example of a provision where the government endorses certain speech as good and beneficial (calls conveying emergency information, for example) but restricts other speech that it deems unnecessary or bothersome (non-emergency messages or messages the *Commission* decides do not promote privacy). *See* 47 U.S.C. § 227(b). Statutes that make such content-based distinctions are "presumptively unconstitutional." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). And where the exceptions render the statute content-based, the remedy is to void the ban (or here vacate the Commission's interpretation which exacerbates the constitutional infirmity), not the exception. *See Carey v. Brown*, 447 U.S. 455, 460 (1980) (striking down picketing statute where the exemptions made the statute "discriminate[] between lawful and unlawful conduct based upon the content of the demonstrator's communication").

While the TCPA generally prohibits making calls using an ATDS or an artificial or prerecorded voice, *see* 47 U.S.C. § 227 (b)(1)(A),(B), it carves out a number of messages that are allowed. For example, "a call made for emergency purposes" is not subject to liability. *Id.*

§ 227(b)(1)(A). As the Supreme Court has made clear, a statute with exceptions that draw distinctions based on content (like the TCPA) is itself content-based. *See, e.g.*, *Reed*, 135 S. Ct. at 2227–28 (striking down as unconstitutional a local sign ordinance because its various exceptions dr[e]w[] distinctions based on the message a speaker conveys . . . regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech").[5] Like other statutes found to be content-based, the TCPA requires government officials to examine the content of the speech to determine whether the speaker should be penalized. However laudable Congress's purpose behind creating carve-outs for certain types of speech in the TCPA may have been, "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* at 2228.[6]

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[5] Foreshadowing the issues raised here with the TCPA, the Fourth Circuit recently struck down a state robocall statute in light of *Reed*'s guidance on evaluating whether a statute is content-based. *See Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015).

[6] In fact, the Ninth Circuit has recently recognized, albeit in dicta, that the TCPA draws content-based distinctions. In *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (2015), the Ninth Circuit expressly left the door open to an

Given that the content-based TCPA is already "presumptively unconstitutional," *id.* at 2226, the undeniable chilling of speech that results from the Commission's unlawful expansion of the statute even further cannot pass constitutional muster. Under the Commission's Order, the TCPA is no longer just about telemarketing calls made with specialized telemarketing equipment. Companies like the Internet Association's members, who are key drivers of the Internet and sharing economies, use their computerized systems to transmit a wide variety of information *that the people who use their services request*. These alerts provide essential, desired information for people and power the increasingly online economy. Yet with the Commission's revamped ATDS definition and failure to provide a workable solution to the reassigned number issue, these desired, useful communications are increasingly targets for in terrorem TCPA lawsuits, with their accompanying $500 or $1500-per-call statutory damages.

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argument that the TCPA's exceptions are content-based. *See id.* at 876 & n.3 (observing that the defendant in that case had "not argue[d]" that exceptions to the automated call provision made it a content-based regulation, and noting that, like the junk-fax provision of the TCPA, 47 U.S.C. § 227 (b)(1)(C), the automated call provision in fact has content-based exceptions).

Under the Commission's hand, the TCPA has drifted too far. The threat posed by the Order places many Internet companies in a quandary. Automated, customized informational alerts are essential to the electronic transactions that make some of today's leading products and services possible. The sharing economy, for example, relies heavily on the ability to provide information via text message. Companies face serious difficulties in creating new and innovative products and services without these communications. But the increased litigation and regulatory costs that are the product of the Commission's recent activities may make the cost of doing business prohibitive, especially for start-ups. *See* 2015 Order, 30 F.C.C. Rcd. at 8084 (dissenting statement of Cmm'r O'Reilly) (lamenting how the "current state of affairs, where companies must choose between potentially crushing damages under the TCPA or cease providing valuable communications specifically requested by consumers, contravenes Congress's intent for the statute not to interfere with normal, expected, and desired communications *that consumers have expressly consented to receive*") (quotation marks omitted). This is exactly the type of chill that the First Amendment was designed to prevent. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 872

(1997). All the more when the chill emanates from a content-based statute.

The net result is less speech and less innovation. As Commissioner Pai put it, the Order has transformed "the TCPA from a statutory rifle-shot targeting specific companies that market their services through automated random or sequential dialing into an unpredictable shotgun blast covering virtually all communications devices." 2015 Order, 30 F.C.C. Rcd. at 8075. The First Amendment cannot countenance the use of a content-based statute in this manner.

* * *

"One need not bother with the legislative history to realize that lawmakers did not intend to interfere with expected or desired communications between businesses and their customers." *Id.* at 8076 (dissenting statement of Cmm'r Pai) (quotation marks omitted). "And one need not be versed in the canon of constitutional avoidance to know that courts and administrative agencies normally eschew statutory interpretations that chill the speech of every American that owns a phone." *Id.* Because the Order stretches the TCPA far beyond the limited concerns that animated its passage and expands the scope of a

content-based restriction of speech in a way that threatens to squelch vital communications that people now depend on, the Order cannot be allowed to stand.

CONCLUSION

For the foregoing reasons, the Internet Association supports the request of Petitioners to vacate the FCC's 2015 Order.

Respectfully submitted,

December 2, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2), I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 4,315 words as determined by the word counting feature of Microsoft Word 2010.

/s/ *Andrew B. Clubok*

CERTIFICATE OF SERVICE

The undersigned certifies that on this 2nd day of December 2015, she caused an electronic version of the Brief of Amicus Curiae to be served upon all parties or their counsel via ECF.

/s/ *Andrew B. Clubok*