

**United States Court of Appeals
for the Ninth Circuit**

PAM LAMKIN,
Plaintiff-Appellee,

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC,
Defendant-Appellant.

On Appeal From The United States District Court
For The Eastern District Of California

**BRIEF OF *AMICI CURIAE* NATIONAL CONSUMER LAW CENTER,
NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND
CONSUMER FEDERATION OF AMERICA
IN SUPPORT OF AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Per Federal Rule of Appellate Procedure 26.1, 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. 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 non-profit 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.

s/ Tara Twomey

Tara Twomey
Counsel for Amici Curiae

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STATEMENT OF INTEREST OF *AMICI CURIAE*

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. The National Association of Consumer Advocates (NACA) is a non-profit membership organization of law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates. 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.

All three *Amici* are organizations that work to protect consumers from the scourge of unwanted robocalls. *Amici* have advocated extensively on behalf of consumers, urging strong interpretations of the Telephone Consumer Protection Act (“TCPA”), before the Federal Communications Commission (“FCC”). *Amici* have also filed numerous amicus briefs before the federal courts of appeals representing the interests of consumers regarding the TCPA.

CONSENT

All parties have consented to the filing of this *amicus* brief.

RULE 29(a)(4)(E) STATEMENT

No party's counsel authored this brief in whole or in part, or contributed money to fund preparing or submitting it; and no person—other than *amici*, their members, or their counsel—contributed money to fund preparing or submitting it.

SUMMARY OF ARGUMENT

Appellant's brief primarily attacks this Court's decisions in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018) and *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019). These decisions interpret the TCPA's definition of automatic telephone dialing system (ATDS or autodialer) to encompass systems like the predictive dialer used in this case. As Appellee has persuasively argued, Appellant forfeited those arguments by failing to raise them in the District Court.

The reasons not to address the arguments that were not raised below are particularly compelling because of the importance of the TCPA's protections. A reevaluation of these important protections should not be undertaken in a case where the arguments are first

presented on appeal. Moreover, since the interpretation of the TCPA's definition of autodialer was not raised or argued below, the Court evaluation would be based on the Appellant's untested speculation and assumptions. In particular, much of Appellant's argument relies on assertions about the functions that ordinary cell phones can perform. These assertions, which *Amici* assert are not correct, were untested in the District Court because the Appellant failed to raise the issue previously.

ARGUMENT

I. GIVEN THE GREAT IMPORTANCE OF THE TCPA TO INDIVIDUALS, BUSINESSES, AND THE COUNTRY'S TELECOMMUNICATIONS SYSTEM, THE COURT SHOULD NOT REVISIT ITS KEY DECISIONS IN A CASE WHERE THE ISSUES WERE NOT RAISED BELOW.

The TCPA is of great importance, not just to individuals and businesses that need to be able to avoid receiving unwanted calls, but also to the country's telecommunications system as a whole. If *Marks* and *Duguid* were overturned billions of automated calls would no longer be subject to the TCPA's requirement that they be made only with the consent of the recipient, absent an emergency. This Court should not

entertain the request to overturn such key decisions in a case where the issues were not raised or decided below.

A. The Ability to Stop Unwanted Calls and Text Messages Is Critical to Consumer Privacy and Public Safety.

Robocalls and robotexts invade people’s privacy, interrupt their calls, distract them from their work, childcare, driving, and other activities, and clog their voicemail and text message boxes. They interfere with people’s ability to receive wanted and needed information. Consumers’ ability to stop unwanted calls and text messages is critical to their privacy and public safety.

As Senator Hollings, the Senate sponsor of the Telephone Consumer Protection Act, 47 U.S.C. § 227, forcefully stated, “[c]omputerized calls are 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. S16204, S16205 (Nov. 7, 1991). The congressional findings accompanying the TCPA repeatedly stress the purpose of protecting both public safety and consumers’ privacy:

(5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

(6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.

Pub. L. 102–243, § 2, 105 Stat. 2394 (1991) (found as a note to 47 U.S.C.A. § 227). *See also* S. Rep. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972–1973 (“The Committee believes that Federal legislation is necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services.”).

To accomplish its purposes of protecting consumers from unwanted automated calls, the TCPA permits calls to cell phones made using an automatic telephone dialing system (ATDS or autodialer) *only if* the recipient has given “prior express consent” to receive them, except in the case of an emergency. 47 U.S.C. § 227(b)(1)(A)(iii).¹ The TCPA’s

¹ A second exception, not relevant here, has been struck down by this Court in *Duguid* and by the Fourth Circuit in *American Association of Political Consultants, Inc. v. Federal Communications Commission*, 923 F.3d 159 (4th Cir. 2019), *cert. granted sub nom. Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 812 (2020), and is now before the Supreme Court).

requirement that automated calls to cell phones be made only with consent also means that a recipient can *withdraw* that consent and stop future automated calls. *Van Patten v. Vertical Fitness Grp.*, 847 F.3d 1037, 1047–1049 (9th Cir. 2017).

This prior express consent requirement enables recipients to determine which autodialed calls they will receive and which they will not. For example, many people want to receive calls or text messages regarding alerts or reminders. *See* YouMail Robocall Index, Historical Robocalls by Time, *available at* <https://robocallindex.com/history/time/> (accessed Feb. 12, 2020) (23% of robocalls made in 2019 were “Alerts and Reminders”). These messages include reminders from health care providers about appointments, prescription refill reminders from pharmacies, and fraud alerts or low balance notices from banks and credit unions. If recipients no longer had the ability to stop unwanted robocalls, the alerts and reminders that they want to receive would be lost in a flood of unwanted calls and messages.

The narrow definition of autodialer advocated by Appellant would enable callers to circumvent this critical prior express consent requirement. But without the protection of the TCPA’s consent

requirement, robocalls would overwhelm our cell phones, making them of little use as a means of communication. Currently, *Marks* and *Duguid* are key bulwarks against people receiving billions more robocalls.

Other options such as the do-not-call list do not provide the same consumer protection as the prior express consent requirement. For example, the nationwide do-not-call list applies only to telemarketing calls (“telephone solicitations”), not to the vast number of other calls that swamp our phones—phishing calls, surveys, announcements, debt collection calls, and general spam. 47 C.F.R. § 64.1200(c). Without *Marks* and *Duguid*, consumers would have no way to stop these calls. The invasion of robocalls would be unstoppable.

The number of robocalls made in the United States is already staggering. According to a respected robocall watch site, 58.5 *billion* robocalls were made in 2019. YouMail Robocall Index, Historical Robocalls by Time, *available at* <https://robocallindex.com/history/time/> (accessed Feb. 12, 2020). Over half of these calls—56%—were scam calls, spoofed calls, or telemarketing calls. *Id.* And the tsunami is increasing: according to the same source, robocalls to cell phones have

increased by 494% in four years, from 8.9 billion in the last three quarters of 2015 to 43 billion in the same nine months of 2019.

Internet-powered calling systems have made it easy and cheap to make millions of automated calls. *See* Federal Trade Comm’n website at <https://www.consumer.ftc.gov/features/feature-0025-robocalls> (citing “significant increase in the number of illegal robocalls because internet-powered phone systems have made it cheap and easy for scammers to make illegal calls . . .”). Services like MessageCommunications charge \$875 for 125,000 minutes of robocalls—meaning that if each targeted consumer listens to the call for three seconds and then hangs up, the robocall campaign would reach 2.5 million consumers.

MessageCommunications, *Voice Broadcasting Pricing / Rates*, *available at* <http://www.voicebroadcasting.us/Pricing.html>.

Given the ease and low cost of robocalls, it is not uncommon for robocalling campaigns to involve tens of millions of calls. For example, the FCC recently imposed a \$120 million penalty against a company that had made almost 97 million robocalls in three months advertising vacation packages. Federal Commc’ns Comm’n, *In re Adrian Abramovich, Marketing Strategy Leaders, Inc., & Marketing Leaders*,

Inc., Forfeiture Order, File No. EB-TCD-15-00020488 (May 10, 2018), *available at* <https://transition.fcc.gov/eb/Orders/2018/FCC-18-58A1.html>. *See also* *McCurley v. Royal Seas Cruises, Inc.*, 331 F.R.D. 142 (S.D. Cal. 2019) (millions of calls to cell phones to sell cruises allegedly in violation of the TCPA); *Braver v. NorthStar Alarm Servs., L.L.C.*, 2019 WL 3208651, at *13 (W.D. Okla. July 16, 2019) (tens of millions of robocalls made to sell, among other things, home security systems).

The importance of the TCPA's protections is nowhere demonstrated more clearly than in the huge number of complaints that consumers have filed about these calls. In 2019, the Federal Trade Commission received 3.7 *million* complaints about unwanted calls. Federal Trade Comm'n, Biennial Report to Congress Under the Do-Not-Call Registry Fee Extension Act of 2007, at 3 (Dec. 2019), *available at* <https://www.ftc.gov/system/files/documents/reports/biennial-report-congress-under-do-not-call-registry-fee-extension-act-2007-operation-national-do-not/p034305dncreport2019.pdf>. The importance of the TCPA's protections to individuals, and the central role of *Marks* and

Duguid in making those protections meaningful, are compelling reasons why the Court should not reexamine *Marks* and *Duguid* in this case.

B. The TCPA's Protections Are Important for Businesses.

It is not only individuals who value the TCPA so highly. Congress recognized that businesses, as well as individuals, are harmed by these unwanted and intrusive calls. While protection of privacy was the initial driving force for passage of the TCPA, Congress recognized that control over the proliferation of unwanted automated calls is also necessary to ensure the continued health of interstate commerce:

(14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls *are a nuisance, are an invasion of privacy, and interfere with interstate commerce.*

Pub. L. 102–243, § 2, 105 Stat. 2394 (1991) (emphasis added). As Senator Specter stated, “many businesses are called by the telemarketers, making their work lines unreachable to the public and affecting the owner’s ability to effectively run his business.” Statement of Sen. Specter, Introduction of S. 1719, 102d Cong. 1st Sess., 137 Cong. Rec. S13181-83 (daily ed. Sept. 17, 1991). A witness before the committee considering the bill testified:

. . . I have received calls from some of the largest businesses within the State of South Carolina complaining that their phone lines, through the sequential and programmed calling moving through their offices, *tying up their business lines and tying up their staff listening to calls, and you may want to consider whether or not the business community indeed wants to receive these calls.*

Statement of Steve Hamm, Administrator, South Carolina Department of Consumer Affairs, S. Hearing 102-960, S. 1462, The Automated Telephone Consumer Protection Act of 1991; S. 140 The Telephone Advertising Protection Act; and S. 867, Equal Billing for Long Distance Charges, Hearing Before the Senate Subcomm. On Commerce, Science, and Transportation, 102d Cong., 1st Sess. (July 24, 1991) (emphasis added).

Small businesses are increasingly dependent on cell phones. AT&T reports that 94% of small businesses use smartphones to conduct business, for greater efficiency and the ability to work remotely, and that two-thirds of small business owners say that their business could not survive without wireless technology. *See* AT&T, Survey Finds Mobile Technologies Saving U.S. Small Businesses More Than \$65 Billion a Year (May 14, 2014), *available at*

https://about.att.com/story/survey_finds_mobile_technologies_saving_us_small_businesses_more_than_65_billion_a_year.html.

The need to keep business cell phones free from unwanted automated calls is critical to keeping those businesses operational. Indeed, protecting businesses' cell phones was recognized as a driving force behind the recently passed TRACED Act, which amended the TCPA, in 2019, to expand the tools to enforce the underlying restrictions (including the prohibition against unconsented-to calls in section 227(b)(2)(A)(iii)).

For example, an office manager in Colfax logged more than 318 robocalls at her small business, and she told me, "That is 318 times I have picked up the phone to hear a robot talking to me. I dropped what I was doing to run to the phone for one of these obnoxious calls, or I put a real client on hold to answer an empty call. Anything Congress can do to stop this shameful practice would be a relief."

Statement of Rep. Rodgers, 116th Cong., 1st Sess., 165 Cong. Rec. H9235-45 (daily ed. Dec. 4, 2019).

C. The TCPA's Protections Are Important to the Country's Telecommunications System.

As was noted in Congress prior to the initial passage of the TCPA in 1991, the nation's communications providers are also negatively

impacted by the spate of automated calls. Control and limitation of those calls is necessary to allow those systems to operate efficiently:

It is really rough when you come to work every day with the objective of giving service when you have outside influences that can alter that objective. When I say outside influences, I'm talking about autodialers that seize up our blocks of numbers. For example, I have 10,000 numbers in a 363 exchange, and if an autodialer gets into that 363 exchange and attacks numbers in 100 groups, it can tie up that exchange and impede the service to all of my customers. *The Coast Guard, national defense organizations, police, fire department, hospitals, doctors, you name it; they're all affected.* Now, this has been a problem for many years.

Statement of Michael J. Frawley, President of Gold Coast Paging, on behalf of Telocator Telemarketing/Privacy Issues: Hearing Before the Subcomm. On Telecommunications and Finance of the House Comm. On Energy and Commerce, 102d Cong., 1st Sess. (Apr. 24, 1991) (emphasis added). Indeed, the restrictions against automated calls to cell phones are necessary to maintain trust in the communications system:

The rising tide of illegal robocalls has quickly turned from a nuisance to a real threat on the way we all view and use our telephones. . . These calls all undermine the public's trust in our phone system.

Statement of Rep. Pallone. Section-by-Section Summary Pallone-Thune TRACED Act, Comm. On Energy & Commerce (Dec. 2019), *available at*

<https://republicans-energycommerce.house.gov/wp-content/uploads/2019/12/Pallone-Thune-TRACED-Act-Section-by-Section.pdf>.

D. Disasters and Public Emergencies Bring the Importance of the TCPA’s Protections into Even Sharper Focus.

Disasters and public emergencies, like the coronavirus pandemic that has swept the nation, demonstrate how essential it is to preserve cell phone service and protect cell phones from unwanted calls.

Congress’s wisdom in outlawing robocalls has never been clearer.

Indeed, when it enacted the TCPA, one of its findings was that “when an emergency or medical assistance telephone line is seized, [unrestricted calls are] a risk to public safety.” Pub. L. 102–243, § 2(5), 105 Stat. 2394 (1991) (emphasis added) (found as a note to 47 U.S.C.A. § 227).

For many of the families affected by the pandemic, a cell phone represents their only ability to communicate with the outside world. More than half of American homes today have only wireless telephones. *See* U.S. Dep’t of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, Wireless Substitution: Early Release of Estimates From the National Health

Interview Survey, July-December 2018 (June 2019), *available at*
<https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201906.pdf>.

For 10.7 million households (8% of the population), a cell phone represents their only access to the Internet. U.S. Census Bureau, American Community Survey, Table S2801: Types of Computers and Internet Subscriptions (2018), *available at*
<https://data.census.gov/cedsci/table?q=S2801&tid=ACSST1Y2018.S2801>.

Despite the lifeline that cell phones provide, up to 70% of Americans no longer answer phone calls from unknown numbers, which could include calls from health officials, hospitals, financial institutions, or other vital sources. Tim Harper, Consumer Reports, *Why Robocalls Are Even Worse Than You Thought* (May 15, 2019), *available at*
<https://www.consumerreports.org/robocalls/why-robocalls-are-even-worse-than-you-thought/>. The volume of robocalls is one of the main reasons that people cite for not answering their phones. *Id.*

The current pandemic makes vivid the reasons that families must be able to prevent unwanted robocalls and text messages from swamping their cell phones. Families are relying on their cell phones to receive alerts, to access telemedicine, to hear from health care

providers, to order groceries, or to call for help. Children participating in educational programs through a family's cell phone or communicating with teachers should not be interrupted by robocalls. *See* Dana Goldstein, Adam Popescu, and Nikole Hannah-Jones, *As Classes Go Online, Many Students Just Aren't Showing Up*, N.Y Times, Apr. 7, 2020, at A15 (for many low-income children a cell phone is their only means of accessing instruction). Workers suddenly required to work from home need to be able to make steady and intense use of their phones. Families communicating with a hospitalized loved one should not be disturbed by autodialed debt collection calls.

During disasters and public emergencies, it is more important than ever for families to be able to receive the information that they want and need. Robodialed calls to cell phones from telemarketers, debt collectors, and scammers significantly interfere with families' abilities to access critical information.

The TCPA's application to text messages is particularly important in crisis situations. Apps that people use for essential services, such as ordering groceries, rely on text messages. Zak Doffman, Forbes, *Here's Why You Must Check All Your Home Delivery Text Messages* (Mar. 27,

2020), *available at* <https://www.forbes.com/sites/zakdoffman/2020/03/27/warning-heres-why-you-must-check-all-your-home-delivery-text-messages/#2a3d59ad6be6>. Emergency information, government orders about lockdowns, and medical providers' responses may be delivered through text messaging. *See* U.S. Dep't of Homeland Security, Emergency Alerts (updated Mar. 23, 2020), *available at* <https://www.ready.gov/alerts>; Brandon Daniell, Physicians Practice, *5 ways texting makes telehealth simpler and more effective* (Mar. 26, 2020), *available at* <https://www.physicianspractice.com/telemedicine/5-ways-texting-makes-telehealth-simpler-and-more-effective>. Without the TCPA's protections, these essential messages could be drowned in a sea of spam. *See, e.g.*, Hannah Murphy et al., Financial Times (Mar. 19, 2020), *available at* <https://www.ft.com/content/34b6df5a-ea4a-471f-8ac9-606580480049> (unwanted text messages from automated spammers were identified as the culprit in the rapid spread of misinformation related to the coronavirus).

If there was ever a time to avoid reexamining the decisions that protect Americans from unwanted calls, that time is now. The Court

should not relieve Appellant from its previous failure to challenge to *Marks* and *Duguid*.

II. THE ABSENCE OF EVIDENCE IN THE RECORD SUPPORTING APPELLANT'S ASSERTIONS ABOUT CELL PHONES' ABILITY TO MAKE ROBOCALLS IS ANOTHER REASON THE COURT SHOULD DEEM THE ARGUMENT FORFEITED.

An additional reason why the Court should not reconsider *Marks* and *Duguid* is that Appellant's arguments are based on untested assumptions not presented to the District Court. In particular, Appellant's brief repeatedly asserts that the reasoning of *Marks* and *Duguid* sweeps ordinary smartphones into the TCPA's definition of an ATDS. Appellant's Opening Brief at 2, 11, 28-31. Contrary to Appellant's arguments, in *Amici's* view, smartphones are not inherently autodialers. It certainly would not be appropriate for this Court to accept Appellant's assertions about smartphones' capabilities as a matter of public knowledge.

If evidence on this question had been taken in the District Court, *Amici* submit that it would show that smartphones are not manufactured with features that enable users to make simultaneous calls or send mass texts. In other words, they are not manufactured

with any inherent features that would make them fit under the definition of an ATDS. Unlike predictive dialers, smartphones cannot make simultaneous calls to a batch of numbers automatically from a stored list. Calls are made from a smartphone only when the human caller scrolls through the list, chooses a number or name, and presses the call button (or when the human manually inputs the number or otherwise identifies the number to be called). That capability does not make the smartphone an ATDS. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8776, ¶ 47 (F.C.C. Oct. 16, 1992) (speed dialing does not fall within the definition of an ATDS).

Unlike robodialers, factory default smartphone applications require a human to cognitively select numbers to call, whether by touch or voice command. Even the automatic “I’m driving” text feature only texts a single response to an individual call, and it does so only as a result of the initial caller triggering the system to return a call.

Nor can a smartphone send mass texts (as opposed to group texts with modest limits on their number) without downloading an app or

connecting to an Internet program. After much investigation, the only case² *Amici* have found in which a smartphone was used to send mass texts involved a user who downloaded an app: the smartphone did not come with this capability. In this respect, a smartphone is no different from any computer: the fact that computers are commonly part of robodialing systems does not mean that every computer is a robodialer.

Appellant forfeited this issue by failing to raise it below. This Court should not now permit Appellant to rest its argument on untested and controverted assumptions.

² *Wanca v. LA Fitness, Int'l, L.L.C.*, No. 11 CH 4131 (19th Jud. Cir. Lake County, Ill.) (defendants had downloaded a mass texting application to an iPhone and used that to telemarket).

CONCLUSION

Given the importance of the TCPA to consumers, businesses, and our telecommunications system, *Marks* and *Duguid* should not be reconsidered in a case where their correctness was not even raised below, much less argued or decided.

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 3,643 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing complies with Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century 14-point type.

Dated: April 17, 2020

s/ Tara Twomey

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CERTIFICATE OF SERVICE

I certify that on April 17, 2020, I electronically filed the foregoing brief of *Amici Curiae* with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system. I further 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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