

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	
Broadnet Teleservices LLC Petition for Declaratory Ruling)	
)	
National Employment Network Association Petition for Declaratory Ruling)	
)	
RTI International Petition for Declaratory Ruling)	

**PETITION FOR RECONSIDERATION OF DECLARATORY RULING
and
REQUEST FOR STAY PENDING RECONSIDERATION**

**filed July 26, 2016 by
National Consumer Law Center
(on behalf of its low-income clients) and**

Legal Aid Programs

- National Center for Law and Economic Justice
- Housing and Economic Rights Advocates, Oakland, California
- Connecticut Legal Services, Inc., Bridgeport, Connecticut
- Jacksonville Area Legal Aid, Inc., Jacksonville, Florida
- Economic Justice Clinic, Notre Dame Law School, Notre Dame, Indiana
- Public Justice Center, Baltimore, Maryland
- Michigan Poverty Law Program, Ann Arbor, Michigan
- Mississippi Center for Justice, Jackson, Mississippi
- Legal Aid Center of Southern Nevada, Inc., Las Vegas, Nevada
- Legal Services of New Jersey, Edison, New Jersey
- MFY Legal Services, Inc., New York, New York
- Community Service Society, New York, New York
- Financial Protection Law Center, Wilmington, North Carolina
- North Carolina Justice Center, Raleigh, North Carolina
- Neighborhood Housing Services of Greater Cleveland, Cleveland, Ohio
- South Carolina Appleseed Legal Justice Center, Columbia, South Carolina
- Southeast Tennessee Legal Services, Chattanooga, Tennessee
- Texas Legal Services Center, Austin, Texas
- Virginia Poverty Law Center, Richmond, Virginia
- Columbia Legal Services, Seattle, Washington
- Washington Defender Association, Seattle, Washington
- Mountain State Justice, Charleston, West Virginia

Advocacy Organizations

- Americans for Financial Reform
- Center for Responsible Lending
- Consumer Action
- Consumer Federation of America
- Consumers Union
- Demand Progress
- Electronic Privacy Information Center
- Higher Ed, Not Debt
- Justice in Aging
- NAACP
- National Association of Consumer Advocates
- National Association of Consumer Bankruptcy Attorneys
- National Association of State Utility Consumer Advocates
- National Legal Aid & Defender Association
- Public Citizen, Inc.
- Public Justice
- U.S. PIRG
- Young Invincibles
- Arkansans Against Abusive Payday Lending, Sherwood, Arkansas
- Consumer Federation of California, Sacramento, California
- Elder Abuse Prevention Program, Institute on Aging, San Francisco, California
- Consumer Watchdog, Santa Monica, California
- Florida Alliance for Consumer Protection, Tampa, Florida
- Massachusetts Consumers Council, Sandwich, Massachusetts
- Long Term Care Community Coalition, New York, New York
- Virginia Citizens Consumer Council, Richmond, Virginia
- West Virginia Center on Budget and Policy, Charleston, West Virginia
- One Wisconsin Now, Madison, Wisconsin

Introduction

Pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.106, the National Consumer Law Center¹ (NCLC) (on behalf of its low-income clients), and the legal aid programs, and national, state and local public interest organizations listed on the first page,² file this petition for reconsideration and for a stay of the Federal Communications Commission's (Commission) declaratory ruling³ in the above-named proceeding released July 5, 2016.

The Commission's declaratory ruling [hereinafter Broadnet Ruling] states that federal contractors "validly authorized to act as the government's agent[s]" and "acting within the scope of [their] contractual relationship with the government" are not "persons" under the Telephone Consumer Protection Act (TCPA), and are thus not covered by the statute's prohibitions.⁴ The Commission's ruling is contrary to the TCPA and is a dangerous interpretation of the law. The TCPA unquestionably applies to contractors⁵ of the federal government, regardless of their agency status. If the Commission does not reconsider and change its ruling in this proceeding, tens of millions of Americans will find their cell phones flooded with unwanted robocalls from federal

¹ The National Consumer Law Center (NCLC) is a nonprofit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace. NCLC has expertise in protecting low-income customer access to telecommunications, energy and water services in proceedings at state utility commissions, the FCC and FERC. We publish and annually supplement nineteen practice treatises that describe the law currently applicable to all types of consumer transactions, including *Access to Utility Service* (5th ed. 2011), covering telecommunications generally, and *Federal Deception Law* (2d ed. 2016), which includes a chapter on the Telephone Consumer Protection Act.

² Descriptions of these legal services programs and national, state and local public interest organizations are included as web links in the list at the end of this petition.

³ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petitions for Declaratory Ruling by Broadnet Teleservices LLC, National Employment Network Association, RTI International, Declaratory Ruling, FCC 16-72, CG Docket No. 02-278 (Rel. July 5, 2016) [hereinafter Broadnet Ruling], *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0706/FCC-16-72A1.pdf.

⁴ Broadnet Ruling at 9, ¶ 17; *see also id.* at 1, ¶ 1, and 5-6, ¶¶ 10-11 (providing similar formulations for the exemption for certain government contractors from the definition of "person").

contractors with no means of stopping these calls and no remedies to enforce their requests to stop these calls.

The Commission’s determination that federal contractors acting as agents of the government are not covered by the TCPA is incorrect. The Supreme Court case cited by the Commission as support for its ruling that contractors are not “person[s]” covered by the TCPA, *Campbell-Ewald Co. v. Gomez*,⁶ actually assumed the opposite—that federal contractors *are* covered by the TCPA, subject to claims of qualified immunity. In that case, the Supreme Court held that where the defendant federal contractor was alleged to have called telephone numbers without the called party’s consent, contrary to the TCPA and the instructions of the federal agency that hired it, the contractor could not demonstrate that it was entitled to derivative sovereign immunity from damages.⁷ Indeed, the Court allowed the TCPA suit to proceed against the contractor. Nothing in the Supreme Court’s decision provides support for the proposition that federal contractors, even when acting as agents for the government, are not “person[s]” under the TCPA and are thus wholly exempt from its mandates.

The text and structure of the TCPA make clear that government contractors are subject to the law’s prohibitions, even when they are acting as agents of the government. Congress has defined the term “person,” as used in the TCPA and elsewhere in Chapter 5 of the Communications Act, to include, “unless the context otherwise requires,” an “individual, partnership, association, joint-stock company, trust, or corporation.”⁸ Private contractors that fall into one of these categories are thus presumptively “person[s]” subject to the TCPA’s prohibitions, even if they are acting as agents for

⁶ 136 S. Ct. 663 (2016).

⁷ *Id.* at 763-74.

⁸ 47 U.S.C. § 153(39).

federal agencies. And context confirms, rather than refutes, the TCPA's application to government contractors.

Indeed, Congress has made clear its understanding that contractors are covered by the TCPA. The passage by Congress in 2015 of the Budget Act Amendments exempting from the TCPA's prohibitions some, but not all, calls by federal contractors (only those seeking to collect a debt owed to or guaranteed by the United States), is an action that would have been unnecessary had such contractors not been "person[s]" otherwise subject to the law.⁹

In addition, the error and danger in the Commission's ruling is made plain by the far-reaching, negative effects it will have, which are unquestionably at odds with Congress's intent of protecting consumers from violations of their privacy rights and from the economic costs imposed by unwanted calls and faxes. Relying on the Broadnet Ruling, government contractors will be free to make robocalls to consumers' cell phones, even in the absence of or after revocation of consumer consent. They can target consumers by calling randomly-generated numbers or numbers obtained from database vendors. And the Commission's rules regarding technical and procedural standards for artificial voice calls, and the prohibition against caller ID spoofing, will not apply. Government contractors could even make robocalls to emergency rooms, police and fire departments, poison control centers, and the like.

We urge the Commission to enter a stay of the Broadnet Ruling in light of the rapid, devastating impact it will have on consumers in the United States. We also urge the Commission to reverse its order that government contractors acting as agents for the federal government are not "person[s]" subject to the TCPA.

⁹ Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 [hereinafter Budget Act].

I. Statement of Interests

The Broadnet Ruling adversely affects petitioners and their many clients, members, and supporters who seek to avoid unwanted robocalls permitted by government contractors under the ruling.

The National Consumer Law Center, and the twenty-two other legal aid programs bringing this petition represent clients who are low-income or senior (or both) throughout the United States. Generally, our clients live below or only slightly above the poverty level, or are elderly. Many of our clients have cell phones with limited minutes available; many owe debts to the United States; and many are disabled and receive Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI).

Similarly, the twenty-eight public interest groups joining in this petition have members or supporters on whose behalf they advocate to protect their economic interests and their rights to privacy. All of our groups—national, state and local legal aid programs and public interest organizations—have clients, members and supporters with significant privacy interests in not being robocalled at inconvenient times, by people from whom they do not want to receive calls. All of these people have an interest in their ability to control and stop unwanted robocalls.

The robocalls that the Broadnet petitioners seek to make will harm the petitioners and their clients, members, and supporters. Many, many consumers will view robocalls to announce town hall meetings and other political matters as unwanted, invasive, and aggravating. The Commission's Broadnet Ruling appears to mean that there will be no way for consumers to stop these calls, and no limits on the number, duration, or time of these calls. Similarly, disabled consumers should have the right to consent or decline to receive robocalls about services claimed to enable them to return to work. This is particularly true since many of these individuals, particularly those receiving SSI, are

by definition low-income, and are likely using cell phones with limited minutes that they must preserve carefully in order to be able to communicate with the outside world. And as for surveys, many consumers find survey calls aggravating and intrusive. Moreover, there is a real danger that the exemption for the contractors explicitly covered by the Broadnet Ruling will be claimed as well by other contractors making other types of calls on behalf of the government.

For low-income consumers especially, these calls must be—at the least—controlled. Many, if not most, of the households living below the poverty line rely on pay-as-you-go, limited-minute prepaid wireless products. These wireless plans have been growing in use, especially among low-income consumers and consumers with poor credit profiles.¹⁰ They provide a fixed number of minutes, and often a fixed number of texts. After these limits are exceeded, consumers must purchase a package of new minutes periodically to maintain their service. Consumers with such plans are often billed for incoming calls in addition to outgoing calls, making them very sensitive to repetitive incoming calls—especially calls that they do not want.

II. Justification for the Filing of a Petition for Reconsideration

Consideration of this petition for reconsideration is appropriate because the facts and arguments relied on by petitioners could not have been advanced during earlier opportunities for comment and because reconsideration is required in the public interest.¹¹

A. Reconsideration Is Appropriate Because Consumer Interests Were Not Fully Considered Previously.

The National Employment Network Association petition, filed August 5, 2014,¹² prompted a Request for Comment by the Consumer and Governmental Affairs Bureau.¹³ The Bureau's Request for Comment states:

¹⁰ Federal Communications Commission, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Eighteenth Report, WT Docket No. 15-125, ¶¶ 44, 73, 95-96 (Dec. 23, 2015).

¹¹ See 47 C.F.R. § 1.106(c).

The Association asks the Commission to clarify that, in such limited circumstances, “a long-standing relationship” between a beneficiary of federal benefits and a federal agency “logically implies” the beneficiary’s consent to receive autodialed and prerecorded non-telemarketing calls and text messages under the TCPA, and that such consent includes calls made by a public or private intermediary or associated third party that “stands in the shoes” of the federal government.¹⁴

The questions in this Request for Comment appeared to be related only to an interpretation of the meaning of consent under the TCPA, not the core fundamental question of contractor coverage under the TCPA. Nothing in this Request for Comment indicated that the Commission would be considering the issue of whether federal contractors would be excluded from the TCPA.

The RTI International petition, filed September 29, 2014,¹⁵ also spurred the Consumer and Governmental Affairs Bureau to issue a Public Notice requesting Public Comment.¹⁶ After noting that RTI argues that the term “person,” as defined in the Communications Act, does not include the United States, the Bureau states:

In addition, RTI argues that the legislative history of the TCPA confirms that Congress did not intend to restrict federal government research survey calls under the TCPA nor prohibit calls made by or on behalf of the federal government. RTI further maintains that restricting research survey calls of the types it makes for federal government agencies would limit the ability of those agencies to perform their statutorily mandated functions.¹⁷

The issue appears to be whether the conduct of research survey calls for government agencies is the type of activity that should be covered by the TCPA, not whether the callers

¹² National Employment Network Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Aug. 5, 2014).

¹³ Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Request for Comment on National Employment Network Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (released Sept. 19, 2014), available at <https://www.fcc.gov/ecfs/filing/6019372713/document/7522902874>.

¹⁴ *Id.* at 1.

¹⁵ RTI International Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Sept. 29, 2014).

¹⁶ Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Request for Comment on RTI International for Expedited Declaratory Ruling, CG Docket No. 02-278 (released Nov. 19, 2014), available at <https://www.fcc.gov/ecfs/filing/60001006049/document/60001010534>.

¹⁷ *Id.* at 1-2.

themselves, as agents of the government, would be completely exempt from the TCPA regardless of the purpose of the call. There is nothing in this Public Notice that would give rise to the inference that the Commission, pursuant to this Public Notice, might issue a ruling that exempted all contractor-agents of the federal government from the TCPA.

The Broadnet Teleservices petition, filed September 16, 2015,¹⁸ also prompted a Request for Comment by the Consumer and Governmental Affairs Bureau.¹⁹ The Bureau's Request for Comment states:

Broadnet maintains that the language of the TCPA, as supported by Supreme Court precedent, demonstrates that calls made by or on behalf of government entities, including legislative, judicial, and executive bodies, and those working on behalf of government entities and officials, are not subject to the TCPA. It argues that the term "person" is best construed to exclude the government and government officials at the federal, state, and local levels when calls are made for official purposes.

This Notice indicates that an issue that might be addressed would be whether the term "person" in the TCPA would include "those working on behalf of government entities and officials." However, we did not glean from the Notice the potential for the expansive exemption from coverage under the TCPA provided to all contractor-agents of the federal government that the Broadnet Ruling announces.

Moreover, during the time period following this Notice, we were in frequent communication with several different offices within the Commission discussing the required Budget Amendment regulations.²⁰ We simply could not imagine, and so did not anticipate, that in the midst of the

¹⁸ Petition of Broadnet Teleservices LLC for Declaratory Ruling, CG Docket No. 02-278 (filed Sept. 16, 2015), *available at* <https://www.fcc.gov/ecfs/filing/60001299592/document/60001324258>.

¹⁹ Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Request for Comment on Broadnet Teleservices LLC Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (released Sept. 29, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-15-1094A1_Rcd.pdf.

²⁰ Budget Act § 301(b), 129 Stat. at 588 (directing "the Federal Communications Commission, in consultation with the Department of the Treasury, [to] prescribe regulations to implement the amendments made in this section" by August 2, 2016); 47 U.S.C. § 227(b)(2) (authorizing the Commission to "prescribe regulations to implement the requirements of this subsection").

promulgation of the Budget Act regulations relating to the proper rules to be applicable to a small segment of government contractors making calls pursuant to the TCPA, the Commission would issue a ruling containing the blanket statement that all contractors who are agents of the federal government are exempt from TCPA coverage.²¹

Moreover, the Supreme Court case cited by the Commission as support for its ruling that contractors are not “person[s]” covered by the TCPA, *Campbell-Ewald Co. v. Gomez*,²² was released after the comment periods ended for each of the three petitions. The Court’s revised decision was released on February 9, 2016, and the comment period for the most recent of the petitions—Broadnet—ended on November 13, 2015.²³ It was not reasonably foreseeable that a Supreme Court decision that allowed a case to proceed against a contractor for violating the TCPA would be used by the Commission as the basis for excluding contractors from the definition of “person[s]” under the TCPA.

And finally, there were no comments made by public interest groups representing consumers generally or by legal aid programs representing low-income people with limited minutes on their cell phone plans in the Broadnet proceeding. As a result, the danger to consumers from judicial expansion of the impact of the ruling to other contractors appears not to have been considered, and was not addressed.

²¹ The Commission’s Ruling acknowledges these points. In footnote 96, the Commission states: “the Commission has not yet completed its congressionally mandated rulemaking to determine the scope and contours of the Budget Act amendment, see Budget Act § 301(b), 129 Stat. at 588 (directing ‘the Federal Communications Commission, in consultation with the Department of the Treasury, [to] prescribe regulations to implement the amendments made in this section’ by August 2, 2016); 47 U.S.C. § 227(b)(2) (authorizing the Commission to ‘prescribe regulations to implement the requirements of this subsection’), so we lack a record about the interplay between today’s ruling and the Budget Act amendments until the Budget Act rulemaking proceeding has been completed.”

²² 136 S. Ct. 663 (2016).

²³ Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Request for Comment on Broadnet Teleservices LLC Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (released Sept. 29, 2015), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-15-1094A1_Rcd.pdf.

B. Reconsideration of the Broadnet Ruling is Also Required in the Public Interest.²⁴

The people who will suffer the most if this ruling is allowed to stand will be the low-income clients of the National Consumer Law Center and the twenty-two other legal aid programs signing this petition, as well as the members and supporters of the twenty-eight public interest groups signing on.

Because the Broadnet Ruling defines some federal contractors out of all coverage under the TCPA, it excludes the possibility that some limits on the calls from these contractors may be appropriate and important to protect consumers. Yet the potential damage of too many unwanted calls to consumers is significant.

Estimates indicate that about one third of U.S. cell phone owners,²⁵ or over 62 million people, use limited minute prepaid plans.²⁶ Additionally, there are an estimated 13 million Americans who maintain essential telephone service through the federal Lifeline Assistance Program,²⁷ which most commonly limits usage to only 250 minutes a month for the entire household.²⁸ This means that there are over 75 million Americans who have limited minutes and texts on their cell phone plans. A flood of unwanted calls, regardless of the party for whom they are calling, would be devastating for households struggling to afford essential telephone service. Voluminous unwanted

²⁴ 47 C.F.R. § 1.106(c)(2).

²⁵ Marc Lifsher, *More cellphone users switch to prepaid plans* (Feb. 22, 2013), available at <http://phys.org/news/2013-02-cellphone-users-prepaid.html>.

²⁶ Marrying that statistic to the Pew Research Center's estimate that, as of October 2014, cell phone ownership among adults was approximately 90 percent means that roughly 218,223,738 million adults own cell phones. *See* <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/>. Twenty-nine percent of that number is 63,284,884.

²⁷ *See* Universal Service Administrative Company, LI08 Lifeline Subscribers by State or Jurisdiction - January 2015 through December 2015, available at <http://www.usac.org/about/tools/fcc/filings/2016/q2.aspx>.

²⁸ *In re* Lifeline and Link Up Reform and Modernization, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, FCC 15-71, WC Docket Nos. 11-42, 09-197, 10-90, ¶ 16 (Rel. June 22, 2015).

calls use up the minutes on which the entire household depends to access health care, transportation and other essential services, to find jobs or accept work assignments, to respond to family emergencies, to call police or fire departments, and to avoid social isolation.

The Commission's Broadnet Ruling does not acknowledge these concerns, which are the reasons the TCPA was enacted, but instead cites the petitioners' exaggerated claims about how the inability to make robocalls will do such things as prevent government agencies from collecting child support. Since the TCPA does not prevent government agencies from making regularly dialed calls staffed by humans, and since those calls are infinitely more effective in reaching people than robocalls, these claims are specious.

The potential damage from the mistaken Broadnet Ruling is huge, including:

- Government contractors could make robocalls at any time of day or night, in any number, and for any duration, as long as the calls are made pursuant to government instructions.
- Consumers would have no way to stop the robocalls, as revocation of consent under the TCPA would no longer be applicable.
- All of the other protections of the TCPA, including the prohibitions against caller ID spoofing, against making robocalls to emergency rooms and police stations, and against making calls to randomly-generated or purchased lists of numbers, will not apply to these callers.

We ask that the Commission reconsider its Broadnet Ruling because doing so is required in the public interest.

III. Facts and Arguments in Support of this Petition for Reconsideration

A. Summary

The Commission issued its Broadnet Ruling while it was in the middle of a congressionally-mandated rulemaking to implement the 2015 Budget Act Amendments.²⁹ By those Amendments to

²⁹ See Broadnet Ruling at 12 n.96.

the TCPA, Congress explicitly made two, and only two, provisions of the TCPA inapplicable to calls made to collect debts owed to or guaranteed by the United States.³⁰ The Amendments also provide that the Commission “may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States,”³¹ and they instruct the Commission to prescribe rules within nine months to implement the Amendments.³²

Despite the clear implications in the recent passage of the Budget Act Amendments to the TCPA that Congress understands and intends that the TCPA apply to private-sector agents of the federal government, the Broadnet Ruling states that the “term ‘person’ as used in section 227(b)(1) . . . does not include the federal government or agents acting within the scope of their agency under common-law principles of agency.”³³

The 2015 Budget Act Amendments make it clear that the TCPA applies to federal contractors, as the Amendments would not have been necessary if the TCPA were not applicable. Further, the Supreme Court case cited by the Commission as support for its determination did not hold that private contractors or agents were not “person[s]” and thus not covered by the TCPA.³⁴ In fact, the Court’s decision assumed that the TCPA applies to government contractors, subject to assertions of qualified immunity.

³⁰ Budget Act § 301 (amending 47 U.S.C. § 227(b)(1)(A), (B)).

³¹ Budget Act § 301(a)(2)(C) (amending 47 U.S.C. § 227(b)(2)(H)).

³² Budget Act § 301(b).

³³ Broadnet Ruling at 5.

³⁴ In paragraph 21 of the Broadnet Ruling, the Commission states: “By stating that ‘no statute . . . lifts’ the sovereign immunity of the federal government, *Campbell-Enald* supports our interpretation of ‘person’ in section 227(b)(1).” Broadnet Ruling at 11.

B. The Commission Has Misinterpreted the Supreme Court’s *Campbell-Ewald* Decision.

The Commission based the Broadnet Ruling on the Supreme Court’s decision in *Campbell-Ewald Co. v. Gomez*,³⁵ which the Commission characterized as “indicating that both the federal government, as well as contractors lawfully authorized to make calls on behalf of the federal government, are immune from TCPA liability and hence are not subject to its prohibitions.”³⁶ The Commission misread *Campbell-Ewald* by conflating the concepts of derivative sovereign immunity or qualified immunity with the scope of the term “person” under the TCPA. *Campbell-Ewald* provides no support for the Broadnet Ruling.³⁷

In *Campbell-Ewald*, the Supreme Court upheld the Ninth Circuit’s reversal of a District Court decision that a federal governmental contractor enjoyed derivative sovereign immunity from liability under the TCPA. In so doing, the Supreme Court unequivocally held that it did not.³⁸ The Court did not find, as the Commission implied, that government contractors are entitled to the government’s immunity.

Moreover, *Campbell-Ewald* did not even imply—as the Commission concluded—that “contractors lawfully authorized to make calls on behalf of the federal government” are not “subject to [the TCPA’s] prohibitions.” Rather, it held that where a “contractor violates both federal law and the Government’s explicit instructions, as [t]here alleged,” derivative sovereign immunity

³⁵ 136 S. Ct. 663 (2016).

³⁶ Broadnet Ruling at 11, ¶ 20.

³⁷ We do not concede that the Commission’s determination in the Broadnet Ruling that the federal government is not a “person” under the TCPA is correct. *Campbell-Ewald* does not so hold; instead it assumes, based on the agreement of the parties, that the federal government enjoys complete immunity from a suit claiming damages under the TCPA. But the issue of whether the federal government is covered by the TCPA need not be addressed in this petition because, even assuming such coverage, there is no support for extending it to individuals or companies acting as government agents, including private contractors.

³⁸ 136 S. Ct. 663, 672 (2016).

does *not* “shield[] the contractor from suit by persons adversely affected by the violation.”³⁹ The Court did not determine under what circumstances contractors might be entitled to claim some other form of immunity, such as the qualified immunity that government officers and employees possess. Although it quoted and distinguished another decision that held that, where the government’s authority to carry out a project was validly conferred, there was “no liability on the part of a contractor who simply performed as the Government directed,”⁴⁰ that discussion was *dicta*. And the Court broadly noted elsewhere that *Campbell-Ewald* “offer[ed] no authority for the notion that private persons performing Government work acquire the Government’s embrative immunity,” another illustration that the Commission’s reading of *Campbell-Ewald*—on the issue of immunity for federal contractors—is off-base.⁴¹

In any event, as the Commission acknowledges, *Campbell-Ewald* did not address the statutory question of whether the term “person,” as used in the TCPA, applies to contractors.⁴² The entire discussion in the case is about whether the defendant-contractor was entitled to derivative immunity.

The distinction between granting government contractors immunity in some circumstances and writing them out of the scope of the TCPA is highly important. If a government contractor is not a “person,” then the TCPA is wholly inapplicable to it. In contrast, if a government contractor is subject to the TCPA but entitled to qualified immunity, it can still be ordered to comply with the TCPA going forward, even if it cannot be held liable for damages for past violations of the statute.

The limited, qualified immunity that the Supreme Court suggested might apply to contractors in *Campbell-Ewald* is thus far narrower than excluding government contractors from

³⁹ *Id.*

⁴⁰ *Id.* at 673 (internal quotation marks omitted).

⁴¹ *Id.* at 673.

⁴² *See* Broadnet Ruling at 12 n.96.

coverage under the TCPA altogether. That the Commission failed to acknowledge this distinction, let alone explain why its ruling was appropriate in light of it, underscores why this petition for reconsideration should be granted.

C. The TCPA’s Language and Structure Make Clear That Section 227(b) Applies to Agents Working as Federal Contractors.

The Commission’s Broadnet Ruling is wrong for another reason: the TCPA clearly *does* apply to government contractors, even if they are acting as agents. This is apparent from the language and structure of the statute itself.

Congress has defined the term “person,” as used in the TCPA and elsewhere in Chapter 5 of the Communications Act, to include, “unless the context otherwise requires,” an “individual, partnership, association, joint-stock company, trust, or corporation.”⁴³ Private contractors that fall into one of these categories are thus presumptively “person[s]” subject to the TCPA’s prohibitions.

Context does not require reading the term “person” in 47 U.S.C. § 227(b)(1) more narrowly to exclude government contractors of any kind. To the contrary, other portions of the TCPA confirm that government contractors—as individuals, companies, corporations, and the like—*are* generally covered by the statute’s prohibitions. For example, one subsection of the TCPA prohibits any “person” from falsifying certain information that appears on a caller ID.⁴⁴ Yet Congress has made clear that this subsection “does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.”⁴⁵ If an entity performing

⁴³ 47 U.S.C. § 153(39).

⁴⁴ 47 U.S.C. §227(b)(1)(A), (B), (e)(1).

⁴⁵ 47 U.S.C. § 227(e)(7).

government activities were not a “person” subject to the TCPA, there would be no need for this exception.

The 2015 Budget Act Amendments also confirm that § 227(b)(1) covers government contractors acting as agents for the government. If government agents were not generally subject to the TCPA, there would be no need to exempt certain government contractors—those collecting federal debts—from the prohibitions in § 227(b)(1) against robocalls to cell phones and residential lines. The fact that Congress excluded these contractors from just two of the many provisions of the TCPA is telling, as it shows that the TCPA applies fully to government contractors except where they are specifically exempted. (Indeed, since *Campbell-Ewald* arose under the pre-Budget Act version of the TCPA, even its statements about the possible qualified immunity of federal contractors may no longer be valid in reference to activities covered by the Budget Act provision.)

Although the Broadnet Ruling acknowledged the Budget Act Amendments, its explanation for them—that Congress adopted the Amendments in the event that the FCC later determined that government contractors were “person[s]” covered by the TCPA—disregards whole portions of those Amendments.⁴⁶ The Budget Act Amendments order the Commission to adopt implementing regulations within nine months and specifically provide that the Commission may, in implementing “the requirements of *this subsection*,”⁴⁷ that is, § 227(b), restrict or limit the number and duration of robocalls that can be made to collect a federal government debt.⁴⁸ It defies belief that Congress would order the Commission to expedite consideration of and adopt implementing regulations for portions of a statute that have no practical effect because the government contractors to whom they apply are not “person[s]” subject to the TCPA in the first place.

⁴⁶ See Broadnet Ruling at 12 n.96.

⁴⁷ 47 U.S.C. § 227(b)(2) (emphasis added).

⁴⁸ Budget Act § 301(a)(2)(C) (amending 47 U.S.C. § 227(b)(2)(H)).

D. The Commission Lacks Statutory Authority to Define “Person” to Exclude Federal Contractors.

In the TCPA, Congress gave the Commission authority to adopt rules in certain areas. The Commission’s only authority to create exemptions from the TCPA’s requirements is:

- To exempt artificial voice calls to residential lines that are not made for a commercial purpose or that will not adversely affect privacy rights and that do not include an unsolicited advertisement.⁴⁹
- To exempt robocalls to cell phones that are not charged to the called party, subject to provisions to protect the called party’s privacy rights.⁵⁰
- To exempt certain tax-exempt nonprofit organizations from certain requirements regarding the transmission of faxes.⁵¹

The Commission has no authority to adopt a general exemption for classes of callers, which is the practical effect of its order. Thus, its definition of “person” to exclude federal government contractors goes beyond its statutory exemption authority.

E. Contractors Will Use the Broadnet Ruling to Argue that the TCPA Does Not Apply to Any Government Contractors.

There is little to prevent government contractors accused of violating the TCPA from using this ruling as a get-out-of-jail free card.⁵² In some portions of its order, the Commission appears to leave the door open to a government contractor’s liability for violating the TCPA by requiring that calls be made only where the authority to make the calls was “validly conferred by the federal government and the ...[contractor] complied with the government’s instructions and otherwise

⁴⁹ 47 U.S.C. § 227(b)(2)(B).

⁵⁰ 47 U.S.C. § 227(b)(2)(C).

⁵¹ 47 U.S.C. § 227(b)(2)(F).

⁵² Indeed, we already have reports from attorneys representing consumers in TCPA cases of motions to dismiss being made on just this basis.

acted within the scope of [the] agency”⁵³ However, this ostensible protection for consumers is at best, confusing, and at worst, useless.

Industry will undoubtedly argue that, unless the government directly and specifically requires compliance with the TCPA in its contract, the contractor is acting within the scope of its agency relationship when it makes calls that are not in compliance. Under that theory, the contractor would not be a “person” subject to the TCPA, so there would be no independent application of the law to the contractor’s actions. And where contracting parties believe that such language will be determinative of whether the TCPA applies in the first place, they are likely to exclude direct invocations of the TCPA’s obligations from the contract for that very purpose.

Moreover, how would individual consumers, on the receiving end of unconsented-to and unwanted robocalls know, or ever find out, what is in the government contracts? The terms of government contracts are often kept secret from the public absent Freedom of Information Act (FOIA) requests. Would the consumers whose TCPA rights have been violated have to file a FOIA request before they could bring an action against an abusive robocaller under the TCPA?

IV. Requests for Changes to the Broadnet Ruling.

We urge the Commission to reject the three petitions that prompted this proceeding. The petitioners have not made a case for abandoning the TCPA’s protections for these non-emergency calls, and the petitioners have an array of other ways to reach people. Indeed, the ruling that the petitioners seek would be, in the long term, a disservice to the interests of the federal government. Robocalls by contractors for government agencies to persons who do not want to receive them, and cannot stop them, risk causing anger and disenchantment with the government. For low-income

⁵³ Broadnet Ruling at 6 (internal quotation marks omitted); *see also id.* at 1 (stating that the “TCPA does not apply to calls made by or on behalf of the federal government in the conduct of official government business, except when a call made by a contractor does not comply with the government’s instructions”).

consumers who have limited-minute or prepaid plans, these calls will amount to an additional federal tax.

If, however, the Commission believes that it is necessary to allow the types of calls described in these three petitions to be made to cell phones without consent, the Commission has the power to allow these calls only if they are free to the end user, pursuant to 47 U.S.C. § 227(b)(2)(C), and subject to provisions to protect the called party's privacy rights. Additionally, at a minimum, the Commission would need to add the following essential consumer privacy protections before such a determination could conceivably be appropriate:

1. A limit on the number of these calls permitted to be made by the callers per month (or per year). For example the National Employment Network Association “asserts that the maximum number of contacts to each beneficiary should be limited to four per year, unless the beneficiary opts out first.”⁵⁴
2. Callers should be required to offer consumers the right to opt out of future calls, and then should be required to stop calling those consumers once they have requested the calls to stop.
3. Calls should be permitted only between 8 a.m. and 9 p.m., using the called party's time zone.
4. Voice mail messages should be of limited duration and texts should be of limited length.
5. Limitations for calls made to reassigned numbers should be applicable.

Again, we strongly urge the Commission to completely reverse its rule. We suggest the limitations above only in the event that the Commission is determined to preserve the exemptions in some fashion.

V. Request for Immediate Stay of the Broadnet Ruling

As described above in the Introduction of this petition, the Broadnet Ruling will undoubtedly cause an immediate increase in the number of unwanted robocalls to consumers from contractor-agents of the federal government. These calls are not likely to be limited to the types of calls specifically addressed in the ruling. Because of the expansive language in the ruling, calls from debt collectors will likely also be increased, whether or not the callers have consent from consumers.

⁵⁴ Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Request for Comment on National Employment Network Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 2 (released Sept. 19, 2014) *available at* <https://www.fcc.gov/ecfs/filing/6019372713/document/7522902874>.

In light of the immediate harm to consumers' privacy interests, and the economic costs of the Commission's ruling imposed on low-income consumers, a stay of the ruling is warranted.

* * *

For the reasons outlined in this petition for reconsideration, we ask that the Commission issue an immediate order staying the Broadnet Ruling and reverse its decision granting the petitions for a declaratory ruling.

Respectfully submitted,

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**Legal Aid Programs and Public Interest Organizations
Supporting this Petition**

Legal Aid Programs

[National Center for Law and Economic Justice](#)

[Housing and Economic Rights Advocates](#)
Oakland, California

Connecticut Legal Services, Inc.
Bridgeport, Connecticut

[Jacksonville Area Legal Aid, Inc.](#)
Jacksonville, Florida

Advocacy Organizations

[Americans for Financial Reform](#)

[Center for Responsible Lending](#)

[Consumer Action](#)

[Consumer Federation of America](#)

[Consumers Union](#)

[Demand Progress](#)

[Economic Justice Clinic, Notre Dame Law School](#)
Notre Dame, Indiana

[Public Justice Center](#)
Baltimore, Maryland

[Michigan Poverty Law Program](#)
Ann Arbor, Michigan

[Mississippi Center for Justice](#)
Jackson, Mississippi

[Legal Aid Center of Southern Nevada, Inc.](#)
Las Vegas, Nevada

[Legal Services of New Jersey](#)
Edison, New Jersey

[MFY Legal Services, Inc.](#)
New York, New York

[Community Service Society](#)
New York, New York

Financial Protection Law Center
Wilmington, North Carolina

[North Carolina Justice Center](#)
Raleigh, North Carolina

[Neighborhood Housing Services of Greater Cleveland](#)
Cleveland, Ohio

[South Carolina Appleseed Legal Justice Center](#)
Columbia, South Carolina

[Southeast Tennessee Legal Services](#)
Chattanooga, Tennessee

[Texas Legal Services Center](#)
Austin, Texas

[Virginia Poverty Law Center](#)
Richmond, Virginia

[Electronic Privacy Information Center](#)

[Higher Ed, Not Debt](#)

[Justice in Aging](#)

[NAACP](#)

[National Association of Consumer Advocates](#)

[National Association of Consumer Bankruptcy Attorneys](#)

[National Association of State Utility Consumer Advocates](#)

[National Legal Aid & Defender Association](#)

[Public Citizen, Inc.](#)

[Public Justice](#)

[U.S. PIRG](#)

[Young Invincibles](#)

[Arkansans Against Abusive Payday Lending](#)
Sherwood, Arkansas

[Consumer Federation of California](#)
Sacramento, California

[Elder Abuse Prevention Program, Institute on Aging](#)
San Francisco, California

[Consumer Watchdog](#)
Santa Monica, California

[Florida Alliance for Consumer Protection](#)
Tampa, Florida

[Massachusetts Consumers Council](#)
Sandwich, Massachusetts

[Columbia Legal Services](#)

Seattle, Washington

[Washington Defender Association](#)

Seattle, Washington

[Mountain State Justice](#)

Charleston, West Virginia

[Long Term Care Community Coalition](#)

New York, New York

Columbia Consumer Education Council

Columbia, South Carolina

[Virginia Citizens Consumer Council](#)

Richmond, Virginia

[West Virginia Center on Budget and Policy](#)

Charleston, West Virginia

[One Wisconsin Now](#)

Madison, Wisconsin