

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)
)
Petition for Reconsideration of Declaratory Ruling)
and Request for Stay Pending Reconsideration of the)
National Consumer Law Center *et al.*)

To: The Commission

**BROADNET TELESERVICES LLC OPPOSITION TO
PETITION FOR RECONSIDERATION OF NATIONAL
CONSUMER LAW CENTER**

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EXECUTIVE SUMMARY

Last month, the Commission took a significant step towards ensuring citizens reliant on wireless phones as their primary (or only) means of telephone communication – a group that includes a disproportionate number of people of color, youth, and individuals living in poverty – will no longer be deprived of opportunities to engage with the federal government that wired citizens currently have. In the *Declaratory Ruling*, the Commission declared that restrictions set forth in the Telephone Consumer Protection Act (“TCPA”) do not apply to calls made by or on behalf of the federal government under certain circumstances. Because of the *Declaratory Ruling*, all citizens now are able to more actively participate in critical conversations with their government.

Nevertheless, the National Consumer Law Center (“NCLC”) now seeks reconsideration of the *Declaratory Ruling*’s application to entities acting on behalf of the federal government, citing a fear of unwanted calls from government contractors without limits. But NCLC’s fears are unfounded for several reasons. First, the *Declaratory Ruling* does not provide government contractors or any other entities acting on behalf of the government unfettered ability to autodial wireless phones, as the *Declaratory Ruling* itself includes certain important limitations. Second, there is no evidence that citizens actually will be bombarded with unwanted calls made on behalf of federal government entities, and in fact federal government entities have incentives not to allow conduct on their behalf that will frustrate and annoy citizens. Third, to the extent that concerns are ever raised, the relevant federal government bodies themselves, rather than the TCPA and the Commission, are best suited to respond directly to citizens’ concerns and restrict calling activities made on their behalf. Finally, the Commission has already independently acted to restrict the calls made to collect a debt owed to or guaranteed by the United States, the calls seemingly of most concern, regardless of whether such calls are made on behalf of the federal government.

The Petition also mistakenly challenges the legality of the *Declaratory Ruling*. Contrary to NCLC’s claims, the Commission reasonably determined that it needed to extend relief to those acting on behalf of government entities to effectuate congressional intent, and nothing in congressional amendments to the TCPA or the Supreme Court’s *Campbell-Ewald Co. v. Gomez* decision requires otherwise. Not only is the Petition substantively wrong, but it also is procedurally defective. It relies on arguments NCLC had not raised previously, and fails to satisfy the limited conditions under which the Commission will consider a petition for reconsideration. For this reason alone, the Commission should dismiss the Petition.

While some may debate the merits of the *Declaratory Ruling*, the outcome of reconsidering the *Declaratory Ruling* is certain: Citizens that rely on wireless phones as their primary or only means of telephone communication will once again be deprived of important opportunities to engage with their government. At a time of growing divide, distrust, and fear, effective engagement between the government and its citizens is more vital than ever. Government conversations with citizens are far too important to limit to the decreasing subset of the population that utilizes wireline phones. The Commission must not risk the public interest and democratic participation for concerns that are unproven, unlikely, and addressable through other means. The Commission, therefore, should dismiss, or at least deny, the Petition.

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Broadnet Teleservices LLC (“Broadnet”) hereby opposes the Petition for Reconsideration (“Petition”) by the National Consumer Law Center *et al.* (“NCLC”)¹ of the July 5, 2016 *Declaratory Ruling* in the above-referenced proceeding.² In the *Declaratory Ruling*, the Commission declared that the Telephone Consumer Protection Act (“TCPA”), specifically Section 227(b)(1),³ “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

¹ Petition for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration of the National Consumer Law Center *et al.*, CG Docket No. 02-278 (filed July 26, 2016) (“Petition”); *see also* Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on National Consumer Law Center Petition for Reconsideration of the FCC’s Broadnet Declaratory Ruling*, CG Docket No. 02-278, DA 16-878 (rel. Aug. 1, 2016).

² *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Broadnet Teleservices, LLC Petition for Declaratory Ruling; National Employment Network Association Petition for Expedited Declaratory Ruling; RTI International Petition for Expediting Declaratory Ruling*, Declaratory Ruling, CG Docket No. 02-27, FCC 16-72 (rel. July 5, 2016) (“*Declaratory Ruling*”).

³ 47 U.S.C. § 227(b)(1) (restrictions on the use of automated telephone equipment).

comply with the government’s instructions.”⁴ Based on Supreme Court precedent, the Commission concluded that Congress did not intend to apply the TCPA to the federal government, and thus the term “person” as used in Section 227(b)(1) of the Communications Act excludes the federal government.⁵ The Commission decided further to apply this interpretation to a contractor acting on behalf of the federal government in part to ensure that the TCPA does not unintentionally impede federal government communications.⁶

Because of the *Declaratory Ruling*, all citizens now are able to more actively participate in critical conversations with their government. Nevertheless, NCLC now seeks reconsideration of the *Declaratory Ruling*’s application to entities acting on behalf of the federal government, citing a fear of unwanted calls from government contractors without limits.⁷ NCLC’s fears are unfounded. The *Declaratory Ruling* does not provide government contractors or any other entities acting on behalf of the government unfettered ability to autodial wireless phones. Instead, it includes important limitations, and in fact federal government entities have incentives not to allow, and means to restrict, conduct on their behalf that may frustrate and annoy citizens. The Petition also mistakenly challenges the legality of the *Declaratory Ruling*. The Commission

⁴ *Declaratory Ruling* ¶ 1.

⁵ *See id.* ¶¶ 12-15.

⁶ *See id.* ¶¶ 16-18.

⁷ Notably, although NCLC “do[es] not concede” that the Commission correctly determined in the *Declaratory Ruling* that the federal government is not a person under the TCPA, *see* Petition at 13 n. 37, neither it nor any other party has sought reconsideration of this issue. In fact, even some critics of the *Declaratory Ruling* agree that the TCPA does not apply to the federal government. Most notably, Commissioner Ajit Pai has indicated “all agree” that the federal government itself is not a “person” for purposes of the TCPA. Dissenting Statement of Commissioner Ajit Pai, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, FCC 16-99, CG Docket No. 02-278, at 51 (rel. Aug. 11, 2016) (“*Budget Act R&O*”).

reasonably determined that it needed to extend relief to those acting on behalf of government entities to effectuate congressional intent, and nothing in the Budget Act Amendments⁸ or *Campbell-Ewald Co. v. Gomez*⁹ requires otherwise. Not only is the Petition substantively wrong, but it also is procedurally defective – it impermissibly relies on arguments not raised previously without meeting the very limited conditions under which the Commission will consider a petition for reconsideration reliant on such new arguments.

While some may debate the merits of the *Declaratory Ruling*, the outcome of reconsidering the *Declaratory Ruling* is certain: Citizens that rely on wireless phones as their primary or only means of telephone communication will once again be deprived of important opportunities to engage with their government. The Commission should not upset the reasonable and balanced pro-citizen efforts it has achieved to date based on histrionic concerns that are contrary to the evidence to date and common sense.

For all of these reasons, the Commission should dismiss, or at least deny, the Petition.

I. THE *DECLARATORY RULING* ENSURES THAT WIRELESS-ONLY CITIZENS CAN BENEFIT FROM THE SAME OPPORTUNITIES TO ENGAGE WITH THE FEDERAL GOVERNMENT AS WIRELINE CITIZENS

Last month, the Commission took significant steps toward ensuring citizens reliant on wireless phones as their primary (or only) means of telephone communication – a group that includes a disproportionate number of people of color, youth, and individuals living in poverty¹⁰

⁸ Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584, § 301 (“Budget Act”) (amending 47 U.S.C. §§ 227(b)(1)(A), (B), (2)).

⁹ *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016).

¹⁰ See Notice of Ex Parte Presentation of Broadnet Teleservices LLC, CG Docket No. 02-278, at 2 (filed Dec. 17, 2015) (providing data from Stephen Blumberg and Julian Luke, Division of Health Interview Statistics, National Center for Health Statistics, Wireless Substitution: Early

– will no longer be deprived of opportunities to engage with the federal government that wired citizens currently have. As Broadnet explained in its initial petition, confirmation that the TCPA and the Commission’s TCPA rules do not apply to government entities, as well as those that act on their behalf, was necessary to ensure that the TCPA does not create a new digital democracy divide.¹¹

The Commission agreed, stating it could “discern no legal or policy rationale that would justify making it more difficult for the federal government to inform citizens of ways to leave poverty behind or to otherwise contact citizens for similar benevolent purposes.”¹² According to the Commission, absent the ruling, “wireless consumers would be less able to participate in government and make their views known to their representatives.”¹³ The Commission was correct. By way of example, before the *Declaratory Ruling*, wireless-only citizens missed the opportunity to participate in important telephone town hall calls such as:

- A call with a U.S. congressman from Louisiana to every landline phone in his district, offering potentially life-saving emergency preparedness tips in anticipation of hurricane season.
- Separate calls with members of Congress from Delaware and New Hampshire regarding the opioid epidemic within their respective states and what Congress and law enforcement are doing to help fight the broader epidemic nationwide.
- A call in which officials from the Environmental Protection Agency addressed questions regarding fracking safety and alternative access to natural gas, progress on reducing carbon

Release of Estimates from the National Health Interview Survey, January-June 2015 (Dec. 2015), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201512.pdf>.

¹¹ See generally Petition of Broadnet Teleservices LLC for Declaratory Ruling, CG Docket No. 02-278 (filed Sept. 16, 2015) (“Broadnet Petition”).

¹² *Declaratory Ruling* ¶ 19.

¹³ *Id.* ¶ 18.

emissions, and plans to help renters who may not have access to clean water and may be exposed to mercury, asbestos and other materials that pose public health risks.

- A call with a member of Congress informing her constituents in Hawaii about mosquito-borne illnesses, including Zika and dengue fever, and what they can do to prevent the spreading of these dangerous diseases.

The Commission's *Declaratory Ruling* is a game-changer – it provides, for the first time, increased access to critical government communications for a wide group of individuals who were previously unable to participate in telephone town halls with their elected leaders. Indeed, the ruling already is having a profound positive impact on citizens. For example, earlier this month, a member of Congress held a telephone town hall call focused on the Zika virus with his California constituents. He, along with several infectious disease and public health experts, discussed how to prevent Zika and how to prepare when visiting a Zika-infected area. Unlike the telephone town hall call in Hawaii that preceded the *Declaratory Ruling*, however, wireless citizens actually had access to, and participated in, this critical call.¹⁴ The *Declaratory Ruling* is the sole reason why.

Moreover, citizens that have received telephone town hall calls on their mobile phones already have attested to the value of such opportunities. For example, in response to a telephone town hall call with a member of Congress from Iowa, a mobile participant stated she had never heard from a member of Congress before and therefore really appreciated the opportunity.¹⁵ A mobile participant in a separate call expressed her appreciation for the call, noting that she has

¹⁴ One participant suggested that the Congressman try to reach farm workers, who, according to the participant, may have substantial exposure to mosquitos, with the valuable information. In many cases, these farm workers may be wireless-only.

¹⁵ Her response emphasizes the importance and impact of the *Declaratory Ruling*. If she never had received the call, she would not know that such opportunities for government engagement even exist, let alone how to seek them out.

been unable to attend previous in-person town hall events due to inconvenient times and meeting locations. The *Declaratory Ruling* already is enhancing citizen access to government, providing them with vital information provided by government officials, and, in turn, enhancing democracy and serving the public interest.

Nevertheless, NCLC – a constant opponent to any and all requests to ensure that the TCPA does not unintentionally restrict desired communications – now seeks to undo this win for citizens and democracy based on hypothetical concerns and an unfounded belief that citizens are completely unprotected from receiving unwanted calls. The Petition, which raises NCLC’s concerns for the very first time in this proceeding,¹⁶ grossly exaggerates the impact of the *Declaratory Ruling*, claiming it will unleash a flurry of unwanted robocalls and robotexts to wireless phones, as well as allow government contractors to violate the TCPA with impunity with a get-out-jail-free card. But these fears miss the mark. While their concerns are speculative and unproven, the *Declaratory Ruling*’s benefits are clear and concrete. The Commission cannot, and should not, reconsider a decision that provides millions of citizens new access to their government due to a procedurally defective Petition that raises specious concerns.

II. CONTRACTORS’ ABILITY TO MAKE CALLS ON BEHALF OF THE FEDERAL GOVERNMENT IS LIMITED AND CAN BE FURTHER LIMITED AS APPROPRIATE

NCLC’s breathless concerns that entities working for the federal government will recklessly invade citizens’ privacy are counterintuitive and unsupported.¹⁷ According to NCLC, “[i]f the Commission does not reconsider and change its ruling ... tens of millions of Americans

¹⁶ As described below, the Petition is procedurally defective because it raises new arguments that could, and should, have been previously raised. This alone requires dismissal of the Petition.

¹⁷ See Petition at 17-18.

will find their cell phones flooded with unwanted robocalls from federal contractors with no means of stopping these calls and no remedies to enforce their requests to stop these calls.”¹⁸ To the contrary, the *Declaratory Ruling* will not “lead to extreme results – such as an ‘explosion’ of unwanted calls accompanied by ‘chaos and abuse,’”¹⁹ as it in no way means that those acting on behalf of the federal government have carte blanche to make autodialed and prerecorded calls; nor does any evidence exist that suggests they will. Rather, the calling activities on behalf of the federal government are limited in several ways.

First, the Commission itself limited the application and reach of the *Declaratory Ruling*. The Commission “emphasize[d] that ... a call placed by a third-party agent will be immune from TCPA liability *only* where (i) the call was placed pursuant to authority that was ‘validly conferred’ by the federal government, and (ii) the third party complied with the government’s instructions and otherwise acted within the scope of his or her agency, in accord with federal common-law principles of agency.”²⁰ Described another way,

[A] government contractor who places calls on behalf of the federal government will be able to invoke the federal government’s exception from the TCPA when the contractor has been validly authorized to act as the government’s agent and is acting within the scope of its contractual relationship with the government, and the government has delegated to the contractor its prerogative to make autodialed or prerecord- or artificial-voice calls to communicate with its citizens.²¹

¹⁸ *Id.* at 2-3.

¹⁹ *Declaratory Ruling* ¶ 22.

²⁰ *Id.* ¶ 11 (emphasis added).

²¹ *Id.* ¶ 16.

Under such constraints, it is hard if not impossible to imagine scenarios in which contractors, for example, “target consumers by calling randomly-generated numbers or numbers obtained from database vendors” or otherwise conduct activities that “violat[e] [consumers’] privacy rights....”²²

Second, the democratic process itself further limits federal government actors. Federal government entities simply have no reason or incentive to authorize and/or allow conduct on their behalf that will frustrate and annoy citizens. If federal government contractors contact citizens with unwanted autodialed calls and texts, the federal government officials on whose behalf such calls will be made may face political consequences. Tellingly, while NCLC creates its parade of hypothetical horrors, the record is devoid of actual evidence showing such concerns will arise, let alone become widespread. Tellingly, there is no evidence of such government (or government contractor) abuse on landline phones, where such calls have long been permitted. NCLC (nor any other party) has not submitted evidence of such abuse on wireline phones. Nor has NCLC (nor any other party) explained why such abuse is more likely on wireless than wireline phones. Such evidence is unavailable because government entities

²² Petition at 3. In fact, Professional Services Council (“PSC”) has filed a separate petition for reconsideration asserting that the relief provided by the *Declaratory Ruling* is actually far narrower than the Commission intended. *See* Petition for Reconsideration of Professional Services Council, CG Docket No. 02-278 (filed Aug. 4, 2016). In other words, according to PSC, the *Declaratory Ruling* may not actually enable some of the calls that the FCC decided wireless-only citizens should be able to receive. Should the Commission grant PSC’s petition, which Broadnet does not oppose, contractors would still only be afforded relief where they comply with the government’s instructions. Again, it is hard if not impossible to imagine many scenarios where a contractor would be complying with the government instructions but committing the malfeasance NCLC predicts.

have no reason or desire to bombard citizens with unwanted calls, and thus would never authorize a contractor to do so on their behalf.²³

Third, *if* concerns are ever raised, the relevant federal government bodies themselves, rather than the TCPA and the Commission, are best suited to respond directly to citizens' concerns and restrict calling activities made on their behalf. Indeed, the House and Senate already self-police how they conduct mass communications with citizens.²⁴ And the Office of Management and Budget ("OMB") can likewise regulate how federal agencies do so.²⁵ In addition to OMB adopting government-wide rules for the use of autodialing technologies, individual agencies can also adopt agency-specific rules tailored to meet their needs while ensuring that citizens are not unintentionally affected by calls placed on such agencies' behalf.

Finally, the Commission has already acted to restrict the calls made to collect a debt owed to or guaranteed by the United States.²⁶ Thus the *Declaratory Ruling* cannot fulfill NCLC's prediction that "calls from debt collectors will likely also be increased...."²⁷ Specifically, the Commission applied limits to the number and duration of "any autodialed,

²³ While unlikely, to the extent that a contractor ultimately does exceed the government's authorization, the contractor will not meet the requirements of the *Declaratory Ruling*, and thus still may be subject to TCPA liability.

²⁴ See Franking FAQ, Committee on House Administration, <https://cha.house.gov/franking-commission/franking-faq>; Franking Privilege and Radio and Television Studios, Committee on Rules & Administration, <http://www.rules.senate.gov/public/index.cfm?p=RuleXL>.

²⁵ See Letter from Edward J. Markey, U.S. Senate, *et al.*, to Shaun Donovan, Director, OMB, and Tom Wheeler, Chairman, FCC, at 2 (July 12, 2016) (asking if OMB will require federal agencies to adhere to a set of enforceable standards to protect consumers from unwanted calls).

²⁶ See *Budget Act R&O*.

²⁷ Petition at 19; *see also id.* at 5 (noting that many of NCLC's clients owe debts to the United States).

prerecorded-voice, and artificial-voice calls that reasonably relate to the collection of a covered debt,” noting that such rules “apply to calls by the federal government (to the extent it is the owner or guarantor of the debt) and its contractors....”²⁸

III. THE PETITION DISTORTS THE COMMISSION’S LEGAL REASONING AND AUTHORITY

NCLC misunderstands the Commission’s findings in the *Declaratory Ruling*: The Commission never found that the TCPA or *Campbell-Ewald* compel a determination that Section 227(b)(1) does not apply to those acting on behalf of the federal government.²⁹ Instead, the Commission determined such declaration was necessary to ensure that, consistent with congressional intent, such restrictions do not apply to the federal government itself. The Petition does not address, much less disprove, this Commission judgment, and nothing in the Budget Act Amendments counsels otherwise. Moreover, the *Declaratory Ruling* is entirely consistent with *Campbell-Ewald*.

A. The Petition Fails to Address the Commission’s Reasoning for Applying the *Declaratory Ruling* to Those Acting on Behalf of the Government

The Commission has clear statutory authority to interpret the definitions of Section 153 of the Communications Act as the context requires³⁰ – and in the *Declaratory Ruling*, reasonably

²⁸ *Budget Act R&O* ¶ 31.

²⁹ In this regard, NCLC’s suggestions that Section 227(e)(7) and the Budget Act Amendments indicate that the TCPA must apply to entities working on behalf of the government are irrelevant. *See* Petition at 15. They could only be *made* relevant were NCLC to attempt to argue that those provisions indicate the TCPA applies to the federal government – and the Petition does not raise such arguments. In any event, such arguments would fail: These provisions do not amount to a clear “affirmative showing of statutory intent” to apply the TCPA to the federal government. *See* Pai Dissent at 19 (citing *Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 781 (2000)).

³⁰ *See Declaratory Ruling* ¶¶ 13 n. 64, 17 n. 79; *see also Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the*

interpreted the definition of “person” to give force to its determination that Congress did not intend that the TCPA apply to the federal government.³¹ While NCLC mistakenly asserts that context does not require the Commission to interpret “person” to also include those acting on behalf of the federal government,³² the Petition fails to so much as discuss the Commission’s valid rationale that such relief was necessary to adhere to congressional intent and to avoid an otherwise “untenable result.”

The Commission correctly determined that “person” should be interpreted to exclude entities acting on behalf of the federal government to ensure that, consistent with congressional intent, the TCPA does not restrict federal government communications.³³ As the Commission reasoned, “[i]f the TCPA were interpreted to forbid third-party contractors from making autodialed or artificial- or prerecorded-voice calls on behalf of the government, then, as a practical matter, it would be difficult (and in some cases impossible) for the government to

Communications Act, 20 FCC Rcd 14242, 14246 ¶ 9 (2005) (relying on the Commission’s authority under Section 153 to contextually interpret the word “state” in a discrete fashion for purposes of Section 338(a)(4)); *Hawaiian Telephone Company v. Public Utilities Commission of State of Hawaii*, 827 F.2d 1264, 1269 (9th Cir. 1987) (Section 153 “expressly gives ... leeway to interpret terms in the Act ‘[as] the context ... requires.’”); *New England Telephone & Telegraph Company*, 570 F.Supp 1558, 1567 (D. Maine 1983), *overturned on other grounds* (Section 153 are “guideline definitions whose scope and meanings are, as a general principle, to be varied as the context in which they are used in the Act may require in order to effectuate the Congressional intent with which they are used.”).

³¹ See *Hammann v. 1-800 Ideas.com, Inc.*, 455 F. Supp. 2d 942, 960-61 (D. Minn. 2006) (finding that for purposes of certain common carrier regulations, the “context requires a narrower definition of ‘person’ set forth in § 153” than an interpretation that would apply to employees and/or officers of a common carrier).

³² Petition at 15.

³³ See *Declaratory Ruling* ¶ 18.

engage in important activities on behalf of the public.”³⁴ Therefore, “in order to make meaningful” its “finding that the federal government is not subject to section 227(b)(1),” it is indeed “necessary also” for “the definition of ‘person’ under section 227(b)(1)” to “not include a contractor acting as an agent to the federal government.”³⁵

NCLC does not address, let alone overcome, the Commission’s reasoned judgment here. Nor does the Petition even bother to grapple with the Commission’s concern that “subjecting contractors operating on behalf of the government to liability under the TCPA, even though the federal government itself would not be liable ... would potentially allow the government to be held *vicariously* liable for conduct in which the TCPA *allows* the government to engage,” which “would be an untenable result.”³⁶

B. The *Declaratory Ruling* Is Entirely Consistent with the Budget Act Amendments

Further, the *Declaratory Ruling* is entirely consistent with the 2015 Budget Act Amendments to the TCPA.³⁷ In the amendments, Congress granted the Commission authority to “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.”³⁸

³⁴ *Id.* ¶ 19.

³⁵ *Id.* ¶ 19 n. 79.

³⁶ *Id.* ¶ 16.

³⁷ Of note, neither Section 227(e)(7) nor the Budget Act Amendments preclude the Commission from interpreting “person” as it did in the *Declaratory Ruling*. Section 227(e)(7) by its very name (“Effect on other laws”) details how *not* to interpret the TCPA – it does not define the scope of the TCPA. Likewise, exceptions set forth by the Budget Act Amendments are just that – exceptions to certain prohibitions that cannot be read as a backdoor mandate regarding the scope and applicability of the TCPA itself.

³⁸ Budget Act § 301(a)(2)(C) (codified at the new 47 U.S.C. § 227(b)(2)(H)).

Congress also directed the Commission to “prescribe regulations to implement the amendments made *by this section*.”³⁹ As the Commission has found, new Section 227(b)(2)(H) authorizes the agency to regulate government-debt-collection “calls made” to cellular numbers – even if the callers are not “persons” under the TCPA.⁴⁰ The Commission reasonably determined that the same section of the Budget Act *both* exempts these calls from the prior-express-consent requirement *and* authorizes the FCC to regulate their frequency and duration. Thus, Congress’s intent in adding Section 227(b)(2)(H) should be understood as desiring to protect consumers by ensuring that certain kinds of calls otherwise exempt from the consent requirement are subject to additional regulations.⁴¹

As the Commission recognized, its conclusion is supported by the timing of the Budget Act.⁴² When Congress passed the Budget Act, the Commission had not determined the federal government or its contractors are not “person[s]” for purposes of the TCPA. Congress – presumptively aware of the regulatory status quo⁴³ – wrote subsection (b)(2)(H) in language that does not limit the Commission’s regulatory authority under this new subparagraph to “persons.”

³⁹ *Id.* (emphasis added).

⁴⁰ *Budget Act R&O* ¶ 62; Budget Act § 301(a)(1)(A) (amending 47 U.S.C. § 227(b)(1)(A)(iii)).

⁴¹ *Budget Act R&O* ¶ 62. Moreover, as the Commission also has noted, while the prior express consent requirement applies only to “persons,” Section 227(b)(2)(H) contains no such limitation. *See id.*

⁴² *See id.* ¶ 63.

⁴³ *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184 (1988) (Congress is presumed to know the existing law pertinent to the legislation it enacts); *see also* Letter from Robert E. Latta, United States Congress, to Marlene H. Dortch, Secretary, FCC at 1 (July 8, 2015) (filed in Docket No. 02-278) (supporting Broadnet’s petition, among others, and requesting clarification that the “Commission’s TCPA rules do not apply to calls made by or on behalf of local, state and federal governments”).

Again, NCLC has failed to offer anything to refute the Commission’s logic on this point or otherwise demonstrate the Budget Act Amendments *preclude* the Commission from the action it took in the *Declaratory Ruling*.⁴⁴

C. The *Declaratory Ruling* Is Entirely Consistent with *Campbell-Ewald*

Campbell-Ewald supports – and certainly does not preclude – the *Declaratory Ruling*’s findings.⁴⁵ NCLC correctly notes that *Campbell-Ewald* addressed derivative sovereign immunity and qualified immunity, rather than the scope of the term “person” under the TCPA,⁴⁶ but nothing in the decision suggests that the Commission cannot interpret the term “person” to include those acting on behalf of the federal government.

As the Commission found, “[b]y indicating that agents enjoy derivative immunity to the extent they act under authority ‘validly conferred’ by the federal government and in accord with the government’s instructions, *Campbell-Ewald* also supports our clarification that the term ‘person,’ as used in Section 227(b)(1), does not include agents....”⁴⁷ The Commission reasoned further:

⁴⁴ Further, the Commission has consistently applied exceptions or exemptions from the TCPA to apply to third parties acting on behalf of a party to which the exception or exemption applies. *See* Broadnet Petition at 8 n. 22. Per Supreme Court precedent, this understanding of Commission precedent should be imputed to all congressional actions modifying the TCPA, including the Budget Act. *See, e.g., Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527-33 (1994) (*citing Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (Congress is presumed to be aware of an administrative or judicial interpretation of a statute)).

⁴⁵ *See Declaratory Ruling* ¶ 20 (The Commission “finds strong support in the Supreme Court’s recent decision 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.”) (*citing Campbell-Ewald*, 136 S. Ct. at 673-74) (emphasis added).

⁴⁶ *See* Petition at 13.

⁴⁷ *Declaratory Ruling* ¶ 21 (*citing Campbell-Ewald*).

While the *Campbell-Ewald* Court held that federal contractors do not share the Government’s unqualified immunity from liability and litigation, we disagree that that this holding makes no sense if federal contractors are not persons. The Court in *Campbell-Ewald* was not presented with the question, and thus did not decide, whether such contractors are “persons” within the meaning of the TCPA. Instead, the Court granted certiorari and ruled only on the question of whether and when government contractors share in the government’s sovereign immunity.⁴⁸

Thus, while *Campbell-Ewald* did not address whether the term “person” for purposes of the TCPA excludes those acting on behalf of the federal government, in no way did it preclude such determination.

The Commission has not, as NCLC claims, “misread *Campbell-Ewald* by conflating the concepts of derivative sovereign immunity or qualified immunity with the scope of the term ‘person’ under the TCPA.”⁴⁹ If anything, NCLC has conflated the concepts of derivative sovereign immunity or qualified immunity with the scope of the term “person” under the TCPA, because the *Declaratory Ruling* does *not* address derivative sovereign immunity or qualified immunity, but rather *only* addresses the scope of the term ‘person’ – an issue that the Supreme Court did not address.⁵⁰

IV. THE PETITION IS PROCEDURALLY DEFECTIVE AND SHOULD BE DISMISSED

The Petition also is procedurally flawed and should be rejected. The Petition impermissibly relies on arguments NCLC had not raised previously, and fails to satisfy the limited conditions under which the Commission will consider a petition for reconsideration

⁴⁸ *Id.* ¶ 21 n. 96.

⁴⁹ Petition at 13.

⁵⁰ *See id.* at 14 (“The entire discussion in the case is about whether the defendant-contractor was entitled to derivative immunity.”).

reliant on such new arguments or facts.⁵¹ Specifically, the Petition should be dismissed because: (1) no intervening events have occurred, nor circumstances changed, since NCLC's last opportunity to present to the Commission, that warrant reconsideration;⁵² (2) the Petition does not rely on facts or arguments unknown to NCLC after their last opportunity to present to the Commission, or at least does not rely on facts or arguments that could not have been known through the exercise of ordinary diligence;⁵³ and (3) the public interest does not warrant consideration of any of the previously unraised concerns.⁵⁴ Because none of those criteria are met here – and because public interest, Commission precedent, and administrative equity all weigh in favor of leaving the agency's prior ruling undisturbed – the Petition must be dismissed.

As a threshold matter, NCLC concedes that its facts and arguments were not previously presented to the Commission, stating that “there were no comments made by public interest groups representing consumers generally or by legal aid programs” in the proceeding – and thus, the issues were not presented to the Commission.⁵⁵ A petition for reconsideration of a Commission action should not be used as a weapon for parties to use after failing completely to participate in the process during the Commission's consideration of the issue. Otherwise, parties could lie in waiting and “sit back and hope for a decision in their favor,”⁵⁶ only popping up with

⁵¹ 47 C.F.R. § 1.106(p)(2); *Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, Order on Reconsideration, 27 FCC Rcd 1972, 1974 ¶ 5 (2012).

⁵² 47 C.F.R. § 1.106(b)(2)(i).

⁵³ 47 C.F.R. § 1.106(b)(2)(ii).

⁵⁴ 47 C.F.R. § 1.106(c)(2).

⁵⁵ Petition at 9.

⁵⁶ *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

new arguments after a decision they disfavor is reached. As courts have explained, and as the Commission has cited, “[n]o judging process in any branch of government could operate effectively or accurately if such a procedure were allowed.”⁵⁷ Such gamesmanship not only would threaten the efficiency of the agency, but it also would threaten the fairness of the rulemaking process for all those parties that participated. For this reason alone, under Section 1.106(p)(2) of the Commission’s rules, the Petition fails.

Nor have any events occurred, nor circumstances changed, since NCLC last had the opportunity to present such matters to the Commission. Despite NCLC’s argument that the Supreme Court’s decision in *Campbell-Ewald v. Gomez* constitutes an intervening event,⁵⁸ the Commission has dismissed similar arguments regarding judicial decisions in the past.⁵⁹ Moreover, since the Commission’s decision did not hinge on *Campbell-Ewald*⁶⁰ and, critically, the Supreme Court issued its *Campbell-Ewald* six months before the FCC voted on the *Declaratory Ruling*, *Campbell-Ewald* is not an “event[] which [has] occurred or circumstance[] which [has] changed since the last opportunity to present such matters to the Commission” for purposes of Section 1.106(b)(2)(i). NCLC does not raise any other alleged new events or circumstances.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Rural Call Completion*, Order on Reconsideration, 29 FCC Rcd 14026, 14048 ¶ 54 (2014) (dismissing a rulemaking petition by Transcom Enhanced Services, Inc. in part because the D.C. Circuit’s decision in *Verizon v. FCC*, 740 F.3d 623 (2014) did not constitute an “intervening event”).

⁶⁰ Rather, as noted above the agency noted its “consideration” was simply “informed” and “supported” by the Court’s decision. *Declaratory Ruling* ¶¶ 9-10, 20.

The Petition also does not rely on facts NCLC was previously unaware of – or at minimum, certainly could have learned by ordinary diligence. NCLC has filed more than 20 times in this very docket over the past two years alone. NCLC, as a result, can and should be considered aware of the full set of circumstances at play in the proceeding. As NCLC admits,⁶¹ the Commission in its *Public Notice* sought comment on “calls made *by or on behalf* of government entities ... and *those working on behalf of government entities and officials.*”⁶² Consequently, dismissal of the Petition is warranted – and supported by Commission precedent.⁶³

Finally, for the reasons described above, the Commission has no reason to reconsider its decision on public interest grounds. Having already acted in the public interest, the agency need not – and should not – undo this good now. Accordingly, the Petition should be dismissed.

⁶¹ Petition at 8.

⁶² *Public Notice* at 1-2 (emphasis added). Moreover the Commission clearly – and reasonably – expected would-be commenters to fully review Broadnet’s petition, which transparently asked for exactly the relief granted in the *Order*. *Public Notice* at 2 (“We seek comment on these *and any other issues raised in the Petition.*”) (emphasis added).

⁶³ Even true and blameless *lack* of awareness has been held to not overcome the necessity for “ordinary diligence” under the Commission’s rules. *Amendment of Section 7.302(b) et al.*, Memorandum Opinion and Order, 6 FCC Rcd 6111, 6112 ¶ 6 (1991). Similarly, the Commission has held in cases where *actual* service was required that failure to serve did not constitute grounds for rehearing under section 1.429(b)(2). *Amendment of Section 73.202(b) et al.*, Memorandum Opinion and Order, 7 FCC Rcd 7653, 7655 ¶ 8 (1992). Of note, the Commission cites in this decision to filings made by the petitioner referencing the unserved documents to support the agency’s decisions. *Id.* Here, NCLC has touted its “frequent communications with several different offices within the Commission” during the course of this and related proceedings. *See* Petition at 8. Even where potentially significant data on a regulation emerges post-final decision, the Commission has wisely held this does not warrant reconsideration, where the data *could* have been generated during the course of the proceeding (demonstrating a lack of “ordinary diligence”). *Access to Telecommunications Equipment and Services by Persons with Disabilities*, Order on Reconsideration, 12 FCC Rcd 10077, 10080 ¶ 5 n. 19 (1997).

V. CONCLUSION

The *Declaratory Ruling* ensures that federal government entities can utilize modern technologies to engage, communicate with, and reach *all* citizens. At a time of growing divide, distrust, and fear, effective engagement between the government and its citizens is more vital than ever. The conversations that members of the federal government are having today with citizens are far too important to limit to the decreasing subset of the population that utilizes wireline phones. The Commission must ensure that any decisions it makes going forward do not have the effect of reducing wireless citizens' ability to participate in government and make their views known to their representatives. Otherwise, as the Commission already has observed, "[t]he unfortunate upshot would be inimical to democratic participation."⁶⁴ And the Commission must not undertake such risk to the public interest and democratic participation for concerns that are unproven, unlikely, and addressable through other means. The Commission, therefore, should dismiss, or at least deny, the Petition.

⁶⁴ See *Declaratory Ruling* ¶ 18 ("We also agree that if tele-town hall meetings on behalf of the federal government, or other government-to-citizen communications, were subject to the TCPA's consent requirement, wireless consumers would be less able to participate in government and make their views known to their representatives. The unfortunate upshot would be inimical to democratic participation.") (footnotes omitted).

