



April 4, 2019

The Honorable Ajit Pai
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Public Notice DA 18-493, Consumer and Government Affairs Bureau
Seeks Comment on Interpretation of the Telephone Consumer Protection
Act in Light of the D.C. Circuit's ACA International Decision, CG Dkt.
Nos. 18-152, 02-278

Dear Chairman Pai:

I am submitting these comments in opposition to the Federal Communication Commission's reconsideration of the *Broadnet Declaratory Ruling* on behalf of the U.S. Department of Commerce and the U.S. Census Bureau (Census Bureau).¹ The Commission correctly decided in *Broadnet* that Federal agencies and contractors acting on behalf of Federal agencies are not "persons" under the Telephone Consumer Protection Act (TCPA).² Any reversal of this decision would adversely affect Federal agencies' ability to perform their critical missions and, in particular, will increase the cost of business to the Government and taxpayers, and could impair the Census Bureau's ability to reach every person as part of the upcoming 2020 Census as is constitutionally required.

Supreme Court precedent clearly stands for the proposition that Federal contractors are immune from TCPA liability when they comply with the Government's instructions.³ The Solicitor General of the United States clearly articulated the Government's position on the

¹ The National Telecommunications and Information Administration (NTIA) serves as the President's principal adviser on telecommunications and information policy and represents the Executive Branch before the Federal Communications Commission on telecommunications matters. See 47 U.S.C. § 902(b)(2)(D), (H), (J).

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Broadnet Teleservices LLC Petition for Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 31 FCC Rcd. 7394 (2016) (Broadnet Declaratory Ruling).

³ *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672-74 (2016).

applicability of the TCPA to Federal agencies and their contractors in its amicus brief to the Supreme Court in *Campbell-Ewald Co. v. Gomez*.⁴ The amicus brief provided in pertinent part:

The government utilizes contractors to perform various functions on the government's behalf. In doing so, the government ordinarily can authorize contractors to take actions that the government could lawfully perform itself. That principle flows, not from any derivative "immunity" from liability for unlawful acts, but from the common-law rule that a principal may delegate to its agents its own "privilege" to take certain actions *lawfully* Because the TCPA's prohibitions do not apply to Federal agencies, those agencies possess a privilege to engage in conduct that private parties are forbidden to undertake. Ordinarily such "privileges are delegable" Thus, if the United States possesses a privilege to take an action that others could not lawfully take, and if that privilege is not a "personal" (*i.e.*, non-delegable) one, a contractor may perform the action on the government's behalf if the government so directs. The contractor in such circumstances is insulated from liability, not because it possesses an "immunity" from suit, but because its conduct is *lawful*.⁵

The Commission's analysis in the *Broadnet Declaratory Ruling* was consistent with the U.S. Government's legal position with respect to the TCPA. In deciding that Federal agencies and their contractors are not subject to the TCPA, the Commission stated:

Based on the Federal common law of agency, we clarify that 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 prerecorded- or artificial-voice calls to communicate with its citizens.⁶

The Commission further opined that:

This follows from the agency-law rule that when a principal is privileged to take some action, an agent may typically exercise that privilege on the principal's behalf. . . . We are not persuaded by the argument that because Federal contractors meet the definition of "person" under section 3 of the Communications Act, the plain and unambiguous meaning of that text must control our decisions in this declaratory ruling. The terms defined in section 3 apply only "unless the context otherwise requires[.]" We find that the legal and

⁴ Brief for the United States as Amicus Curiae Supporting Respondent at 23-32, *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016) (No. 14-857).

⁵ Brief for the United States as Amicus Curiae Supporting Respondent at 23, 24, 29, *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016) (No. 14-857) (emphasis in original) (footnote omitted).

⁶ *Broadnet Declaratory Ruling* at ¶ 17 (footnote omitted).

factual context of this proceeding triggers the “otherwise requires” caveat to section 3. Specifically, in order to make meaningful our finding that the Federal government is not subject to section 227(b)(1), we find it necessary also to find that the definition of “person” under section 227(b)(1) does not include a contractor acting as an agent of the Federal government. In the absence of such a finding, many activities of the Federal government would effectively be prohibited or restricted. Taking this factual context into account, along with the legal context noted above, we find that section 3’s definition of “person” is not controlling under section 227(b)(1) with respect to contractors acting as agents of the Federal government.⁷

The Commission’s legal analysis was thorough and correct and there is no legal basis for reversing this position.⁸ In fact, the Supreme Court in *Campbell-Ewald* indicated that a contractor would be immune from TCPA liability when it complies with the Government’s instructions and thereby acts under authority validly conferred to it by the Federal Government.⁹

A reversal of the Commission’s decision would have a devastating impact on Federal agencies that use contractors to complete critical missions, particularly the Census Bureau as it approaches the decennial census in 2020. The Census Bureau is required to count every resident of the United States every ten years.¹⁰ Congress has directed the Census Bureau to deliver an economical, accurate, and complete enumeration of the U.S. population in 2020, chiefly by leveraging technology.

To meet this expectation, the Census Bureau must use every tool at its disposal. The Census Bureau has determined that telephone calls to respondents will be critical to ensuring complete and high quality 2020 Census data. The Census Bureau plans to use telephone call centers to provide assistance to the 2020 Census respondents, collect data from households

⁷ Broadnet Declaratory Ruling at n.79 (internal citations omitted).

⁸ NTIA notes that seven commenters urged the Commission to retain the declaratory ruling or otherwise supported the Commission’s interpretation that Federal contractors are not “persons” under the TCPA. *See* (1) Broadnet at 1-6; (2) National Council of Higher Education Resources at 6-7; (3) National Opinion Research Center at 5-13; (4) Professional Services Council *generally*; (5) RTI International at 1-6; (6) Selene Finance LP at 5-6; and (7) Student Loan Servicing Alliance *et al.* at 1-8.

⁹ *Campbell-Ewald Co.*, 136 S. Ct. at 672-74. The Commission was correct in finding that its decision accords with the Supreme Court decision in *Campbell-Ewald*:

By 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 acting within the scope of their agency in accord with Federal common-law principles of agency.

Broadnet Declaratory Ruling at ¶ 21 (footnote omitted).

¹⁰ U.S. Const. art. 1, § 2. *See also* 13 U.S.C. § 1, *et seq.*

responding to the Census, and make outgoing calls in connection with key 2020 Census operations. The ability to call cell phones will be particularly important in reaching hard-to-count populations, many of whom do not have landline telephones.¹¹ A team of contractors supports the Census Bureau telephone operations. The Commission’s reconsideration of the *Broadnet Declaratory Ruling* injects substantial uncertainty into the Census Bureau’s ability to use this necessary contractor support to reach every person, jeopardizing the completeness and quality of the 2020 Census data. Moreover, the Census Bureau estimates that elimination of this critical component of its operations would cost taxpayers approximately \$20 million.

Even if the Commission were to decide that Federal agencies and Federal contractors are “persons” under the TCPA contrary to the U.S. Government’s legal opinion of the Act, the Census Bureau’s planned telephone operations would not violate the TCPA. If the Commission reverses the *Broadnet Declaratory Ruling*, the Commission should clarify that the Census Bureau and its contractors would not violate the TCPA.

The Census Bureau plans to use Federal contractors to make outbound calls for coverage improvement. Coverage improvement is a quality operation in which the Census Bureau will call respondents to correct missing or inconsistent information. The Census Bureau and its contractors would use a live agent to call specific numbers provided by respondents to the Census Bureau staff. The TCPA prohibits autodialed calls to cellphones without prior express consent of the called party.¹² Even if the Census Bureau and its contractors would be subject to the TCPA, the TCPA would not prohibit these calls.

The Census Bureau and its contractors would not use autodialers. The statutory definition of “automatic telephone dialing system” is “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”¹³ The Census Bureau will not be using a random or sequential number generator to dial phone numbers. Instead, respondents will be providing a specific phone number to the Census Bureau and the Census Bureau and its contractors will be dialing the specific phone numbers to reach respondents. The Census Bureau and its contractors also will be using a live agent when they call respondents. Because the Census Bureau and its contractors would not be using an autodialer to call respondents, the telephone operations would not violate the TCPA.

The decennial census is a cornerstone of democracy that should not be put at risk. NTIA urges the Commission to take swift and decisive action to reaffirm the *Broadnet Declaratory*

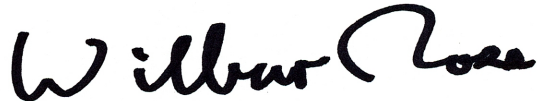
¹¹ According to the Centers for Disease Control, more than one-half of American homes (54.9%) had only wireless telephones during the first half of 2018. More than three in four adults aged 25-34 (77.3%) were living in wireless-only households; a similar percentage of adults living in rented homes (74.4%) were in wireless-only households. Adults living in poverty (67.1%) were in wireless-only households. *See* U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, Wireless Substitution: Early Release Estimates from the National Health Interview Survey, January–June 2018 (released Dec. 2018), available at <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201812.pdf>.

¹² 47 U.S.C. § 227(b)(1)(A)(iii).

¹³ 47 U.S.C. § 227(a)(1).

Ruling that Federal agencies and their contractors are not “persons” under the TCPA. However, if the Commission reverses the *Broadnet Declaratory Ruling*, then it should clarify that the planned Census Bureau telephone operations would not violate the TCPA.

Sincerely,

A handwritten signature in black ink that reads "Wilbur Ross". The signature is written in a cursive, flowing style.

Wilbur Ross
Secretary of Commerce

cc: The Honorable Michael O’Rielly
The Honorable Brendan Carr
The Honorable Jessica Rosenworcel
The Honorable Geoffrey Starks