No. 16-56265

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELISA R. ROMERO,
Plaintiff-Appellant,

v.

DEPARTMENT STORES NATIONAL BANK; FDS BANK;
DOES 1 through 10, inclusive,
Defendants-Appellees.

Appeal from the U.S. District Court for the Southern District of California
No. 3:15-cv-00193-CAB-MDD

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Appellees—the banks that issue Macy's-branded credit cards—called Ms. Romero hundreds of times against her will. She told them to stop calling, but still, for months, they continued. And because the banks had her cell phone number, these calls followed her everywhere. No matter where she went, she couldn't escape.

Both state and federal law prohibit harassing a consumer with unwanted calls. Still, the banks argue they can't be held liable for their misconduct. They are wrong.

First, the banks contend that Ms. Romero lacks standing to pursue her federal Telephone Consumer Protection Act (TCPA) claim because, they argue, being hounded with hundreds of unwanted calls is not a concrete injury. But there is binding Ninth Circuit precedent to the contrary.

Next, the banks argue that they cannot be held liable for violating the Rosenthal Act, California's Fair Debt Collection Practices Act, simply because they did not continue to unlawfully call Ms. Romero after she had sued them. But their only support for this startling contention is a statutory cure provision that was superseded nearly twenty years ago and wouldn't apply here anyway.

Finally, the banks assert that a reasonable jury could never hold that hounding someone for months with hundreds of unwanted robocalls is an invasion of privacy. But the Restatement (Second) of Torts—the standard California has adopted—says otherwise.

This Court should reject the banks' unfounded attempts to escape the consequences of their actions.

ARGUMENT

I. MS. ROMERO HAS STANDING TO BRING HER TCPA CLAIM.

A. Under This Court's Recent Decision in *Van Patten*, a Violation of the TCPA is a Concrete Injury.

At least twelve courts have now explicitly rejected the lower court's standing analysis in this case.[1] And just weeks after our opening brief was filed, this Court, in *Van Patten*, rejected its main premise. *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017). Contrary to the decision below, *Van Patten* held that "a violation of the TCPA is," in and of itself, "a concrete, *de facto* injury," sufficient to support standing. *Id.*[2] That decision is dispositive here.

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[1] *See Mohamed v. Off Lease Only, Inc.*, No. 15-23352-CIV, 2017 WL 1080342, at *3 (S.D. Fla. Mar. 22, 2017); *Hamza v. Dunhams Athleisure Corp.*, No. 16-11641, 2017 WL 1077895, at *4 (E.D. Mich. Mar. 22, 2017); *Abante Rooter & Plumbing, Inc. v. Pivotal Payments, Inc.*, No. 16-CV-05486-JCS, 2017 WL 733123, at *7 (N.D. Cal. Feb. 24, 2017); *Toldi v. Hyundai Capital Am.*, No. 16-CV-01877, 2017 WL 736882, at *2 (D. Nev. Feb. 23, 2017); *Cabiness v. Educ. Fin. Sols., LLC*, No. 16-CV-01109-JST, 2017 WL 167678, at *2 (N.D. Cal. Jan. 17, 2017); *Smith v. Blue Shield of California Life & Health Ins. Co.*, No. 16-00108, 2017 WL 167451, at *5 (C.D. Cal. Jan. 13, 2017); *Glasser v. Hilton Grand Vacations Co., LLC*, No. 8:16-CV-952-T-27AAS, 2017 WL 34823, at *2 n.2 (M.D. Fla. Jan. 3, 2017); Opening Br. 33-34.

[2] Unless otherwise specified, all internal quotation marks and alterations are omitted.

1. The plaintiff in *Van Patten* alleged that he had received two unsolicited text messages on his cell phone, sent via auto-dialer, in violation of the TCPA. 847 F.3d at 1041. Like the banks here, the defendants in *Van Patten* argued that the violation of the right to be free from unwanted calls—or, in that case, text messages—was not itself a concrete injury. *See id.* at 1042.[3] To have standing to bring a TCPA claim, they argued, a plaintiff must provide evidence of some *additional* injury—beyond simply receiving unsolicited text messages.[4] This Court disagreed.

Unwanted calls and text messages, the Court held, "*by their nature*, invade the privacy and disturb the solitude of their recipients." *Van Patten*, 847 F.3d at 1043 (emphasis added). Therefore, a "plaintiff alleging a violation under the TCPA need not allege any *additional* harm." *Id.* The receipt of unwanted calls or text messages, in and of itself, *is* a concrete harm. *Id.*

Ms. Romero has alleged—and provided evidence—that the banks robocalled her nearly three hundred times without her consent. Under *Van Patten*, these unwanted calls are themselves a concrete injury. Ms. Romero need not show anything more.[5]

[3] A text message is considered a "call" for purposes of the TCPA. *Van Patten*, 847 F.3d at 1041-42.

[4] *See* Vertical Fitness Supp. Br., Dkt. 57, *Van Patten v. Vertical Fitness*, No. 14-55980 (Aug. 5, 2016), at 2; Advecor Supp. Br., Dkt. 59, *Van Patten v. Vertical Fitness*, No. 14-55980 (Aug. 5, 2016), at 1, 4-9.

[5] As the opening brief explains, however, Ms. Romero has, in fact, showed more. She has, for example, provided evidence that she suffered several tangible injuries as a result of the banks' calls, including wasted time, emotional distress, headaches, and sleeplessness. Opening Br. 11.

2. Much of the banks' argument to the contrary is merely an attempt to re-litigate *Van Patten*. They argue that Congress's conclusion that unwanted robocalls are an invasion of privacy is irrelevant to determining whether such calls constitute a concrete harm. But *Van Patten* held otherwise. *See* 847 F.3d at 1043 (explaining that Congress is "well positioned to identify intangible harms that meet Article III requirements"). They argue that unwanted calls are "bare procedural violation[s]." Banks' Br. 38. But that, too, is in direct conflict with *Van Patten*. 847 F.3d at 1043 (unsolicited contact is not "a violation of a procedural requirement" that "may not cause actual harm or present any material risk of harm," but rather is "the precise harm and infringe[s] the same privacy interests Congress sought to protect in enacting the TCPA").

Finally, the banks argue that unsolicited contact is not, in and of itself, an invasion of privacy—and that an invasion of privacy is not, in and of itself, a concrete harm. But the holding of *Van Patten* is that unwanted calls *are* an invasion of privacy, and that this invasion of privacy *is* a concrete injury. *See* 847 F.3d at 1043.

As we explained in our opening brief, the banks' standing arguments fail on their own merits. Opening Br. 9-34. But after *Van Patten*, they are foreclosed entirely.

3. The banks' attempts to distinguish *Van Patten* are meritless. First, the banks note that unlike the text messages in *Van Patten*—which were advertisements for a gym—the robocalls here were from debt collectors. But it is no less harmful to be called hundreds of times against your will by a debt collector than by a telemarketer. The banks do not seriously contend otherwise.

Instead, they suggest that—despite the statute's plain language barring all (non-emergency) unwanted robocalls to cell phones—Congress was really only concerned with protecting the public from robocalls made by telemarketers. This argument ignores the fundamental principle of statutory interpretation: The "best indicator of congressional intent" is the language of the statute. *Hutcherson v. Arizona Health Care Cost Containment Sys. Admin.*, 667 F.3d 1066, 1070 (9th Cir. 2012).[6]

It also ignores Congress's findings, which explicitly state that "the evidence presented to the Congress indicate[d] that automated or prerecorded calls are a nuisance and an invasion of privacy, *regardless of the type of call," its "content,"*

[6] Amicus ACA attempts to muddy the waters, suggesting that perhaps the Federal Communications Commission has exempted robocalls like those at issue here from the reach of the statute. ACA Br. 17-20. It has not. To the contrary, the agency has been very clear: The TCPA prohibits *all* non-emergency robocalls to cell phones without consent, including those from debt collectors. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 F.C.C. Rcd. 559, 565 (2008). The agency, like Congress, views such calls as an invasion of privacy. *See, e.g.*, *Letter to The Honorable Scott Perry*, 2015 WL 7589459, at *1 (Oct. 26, 2015) (refusing to carve out debt collection calls from TCPA regulation and explaining that "consumers value their privacy").

or its "initiator." Telephone Consumer Protection Act of 1991, Pub. L. No. 102–243 §§ 2, 13, 105 Stat 2394 (Dec. 20, 1991) (emphasis added). And it ignores evidence in the legislative history itself. *See, e.g.*, 137 Cong. Rec. S18781-02, 1991 WL 252592, at *9 (1991) ("The complaints received by the Federal Communications Commission (FCC) and my office indicate that people find these calls to be objectionable regardless of the content of the message or the initiator of the call.").

Contrary to the banks' contention, Congress was actually quite clear that, in its view, robocalls are harmful, *regardless* of their content. There is simply no basis for disregarding its judgment.[7]

Next, the banks assert that their robocalls to Ms. Romero were not unsolicited. Banks' Br. 35. That's simply false. To the contrary, Ms. Romero repeatedly told the banks to stop calling her. *See* ER 75, 135-40.

Finally, the banks argue that because discovery has been completed in this case, the receipt of unwanted phone calls, in and of itself, is somehow no longer a concrete harm sufficient to support standing—that Ms. Romero must provide evidence of some additional injury. Banks' Br. 33-34. This argument is baffling.

[7] Although these cases did not specifically address the issue of standing, both this Court and the Supreme Court have exercised jurisdiction over TCPA claims against debt collectors. *See, e.g., Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 375 (2012); *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1044 (9th Cir. 2012) ("[T]he TCPA was designed to protect against the types of calls at issue in this case.").

Van Patten itself was an appeal of an order granting summary judgment—as here, the parties in *Van Patten* had conducted discovery. *See* 847 F.3d at 1040. And, in fact, the defendants in *Van Patten* made precisely the same argument the banks attempt to resurrect here: that TCPA plaintiffs lack standing unless they can provide some evidence of injury, beyond simply receiving unwanted calls. *See, e.g.*, Advecor Supp. Br., at 1, 4-9.

As explained above, this Court rejected that argument. Under *Van Patten*, unsolicited contact is *itself* a concrete harm. No evidence of additional harm is needed—regardless of what stage a case is in.

The banks repeatedly assert that, despite *Van Patten*, this Court must defer to the district court's "factual findings" that Ms. Romero was not injured. Banks' Br. 36, 39. But the lower court did not make any factual findings. The court accepted Ms. Romero's evidence as true. ER 9. And, contrary to the banks' contention, the court did not hold that Ms. Romero was not harmed. *See, e.g.*, ER 16. Rather, it (wrongly) held that any such harm could not give rise to standing.

In any event, any factual findings made by the district court about the harm Ms. Romero may or may not have suffered as a result of the banks' unwanted robocalls are irrelevant in light of *Van Patten*. Under *Van Patten,* the unwanted robocalls themselves are harm sufficient for standing. Ms. Romero need not show anything more.

B. Ms. Romero's Injuries are Fairly Traceable to the Banks' Conduct.

There is no dispute that the robocalls Ms. Romero received came from the banks. There should be no question, then, that Ms. Romero's injuries—receiving unwanted robocalls (as well as the emotional distress, headaches, and sleeplessness they caused)—are directly traceable to the banks' conduct—making unwanted robocalls.

The banks, however, argue otherwise. Like the lower court, the banks attempt to graft onto the standing analysis a requirement that isn't there: They contend that a plaintiff's injury must not only be traceable to the defendant's conduct; it must be uniquely traceable to each aspect of that conduct that renders it illegal. Thus, the banks argue, Ms. Romero must show not only that she was injured by the banks' calls, but that she was uniquely injured because the banks used an autodialer to make those calls.[8]

As an initial matter, this view of standing cannot be reconciled with *Van Patten*, which imposed no such requirement.

Moreover, as explained in our opening brief, the banks' argument is plainly foreclosed by both Supreme Court and Ninth Circuit precedent. Opening Br. 24-

[8] Contrary to the banks' contention, Ms. Romero presented evidence that they used an autodialer to call her. *See* ER 80, 87-89 (deposition testimony of witness designated by the banks to testify on their behalf that vast majority of calls to Ms. Romero were autodialed).

30. Decades of case law has made clear that standing requires only that a plaintiff's injury be traceable to the defendant's *conduct*. *See id*. It expressly—and repeatedly—rejects the contention that there must be any nexus whatsoever between the injury and the *reason* the defendant's conduct is illegal. *See id*.

The banks do not address this case law at all. Instead, they rely almost entirely on a single quotation taken out of context from *McNamara*, a Seventh Circuit opinion issued nearly twenty years ago. In that case, several white firefighters challenged the Chicago Fire Department's use of affirmative action, which resulted in three firefighters of color gaining promotions before three white firefighters who had better test scores. *McNamara v. City of Chicago*, 138 F.3d 1219, 1221 (7th Cir. 1998). In addition to the three firefighters whose promotions were delayed, other white firefighters also sued the City—firefighters who, because of their low test scores, would not have gotten a promotion anyway, regardless of whether the City used affirmative action. *Id.* The Seventh Circuit questioned whether those firefighters had standing to sue, explaining that a "plaintiff who would have been no better off had the defendant refrained from the unlawful acts of which the plaintiff is complaining does not have standing under Article III of the Constitution to challenge those acts in a suit in federal court." *Id.*

The banks dramatically over-read this quotation. The court was merely pointing out that for the firefighters with low test scores, their injury—the denial of a promotion—was not caused by the conduct they were challenging—the City's use of affirmative action—but instead by their own test scores. *See McNamara*, 138 F.3d at 1221. The quotation the banks rely on was simply the court's way of paraphrasing the basic requirement that the plaintiff's injury be traceable to the challenged conduct of the defendant. There is nothing in the opinion to indicate that the court was attempting to add—in violation of Supreme Court precedent—a new requirement that a plaintiff's injury be traceable to the precise element of that conduct that renders it illegal.

To the contrary, if there were such a requirement, even the firefighters with *high* test scores, whose promotions *were* delayed because of the City's use of affirmative action, would not have standing. Affirmative action is only unlawful if it is unsupported by a compelling governmental interest. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). But the firefighters' promotions would have been equally delayed—that is, they would have suffered the same injury—regardless of whether the City's use of affirmative action was supported by a compelling interest, and therefore legal, or not.[9]

Thus, *McNamara* does not help the banks' argument. The law is clear, and has been for years, that traceability requires nothing more than that a plaintiff's

[9] In fact, ultimately, the Seventh Circuit held that there *was* a compelling interest supporting the City's decision. *See McNamara*, 138 F.3d at 1224.

injury be traceable to the defendant's conduct. Ms. Romero's injuries are traceable to the banks' calls. That is sufficient.

II. THE BANKS' VIOLATIONS OF THE ROSENTHAL ACT WERE INCURABLE.

The banks argue that debt collectors may violate the Rosenthal Act with impunity and escape scot-free, so long as they stop if they get sued. But that's not what the statute says. And, nearly twenty years ago, the California legislature amended the law for the express purpose of preventing debt collectors from interpreting it that way.

The banks ask this Court to allow them to do precisely what the legislature has explicitly prohibited: violate the Rosenthal Act and suffer no consequences. This Court should decline their invitation.

A. The 1999 Amendment to the Rosenthal Act Superseded the Cure Provision.

The 1999 amendment to the Rosenthal Act is unambiguous: "Notwithstanding any other provision of" the statute, "*every* debt collector collecting or attempting to collect a consumer debt . . . *shall* be subject to the remedies in Section 1692k" of the federal Fair Debt Collection Practices Act. Cal. Civ. Code § 1788.17 (emphasis added). This language is mandatory and universal: "every debt collector," no exceptions. *See Plata v. Brown*, 754 F.3d 1070, 1081 (9th Cir. 2014) (word "'shall' indicates" a "mandatory" obligation); *Nofziger v. Holman*, 61 Cal. 2d 526, 528 (1964) (the word every "impl[ies] inclusion of the entire membership and admit[s] no exceptions"); *People v. Baniqued*, 85 Cal. App. 4th 13, 21 (2000) (same); *see also Riggs v. Prober & Raphael*, 681 F.3d 1097, 1100 (9th Cir. 2012) ("The Rosenthal Act . . . makes available the [federal Fair Debt Collection statute] remedies for violations.").

Nevertheless, the banks contend the amendment doesn't apply to them. The banks argue that the cure provision contained in the original version of the Rosenthal Act, enacted in 1977, means they cannot be subject to *any* remedies for their misconduct.

But the cure provision is precisely what the 1999 amendment forbids: an exception. The cure provision states that debt collectors who cure their statutory violations "shall have no civil liability." Cal. Civ. Code § 1788.30(d). In other words, debt collectors who cure their violations shall *not* be subject to the remedies in Section 1692k of the federal statute.

This exception directly conflicts with the 1999 amendment. Either every debt collector is subject to the remedies in the federal Fair Debt Collection statute, or some debt collectors—those who cure their violations—are exempt. Both cannot be true.[10]

[10] This conflict remains even if, as the banks contend, the 1999 amendment is interpreted as adopting only the sections of the federal remedies provision that provide damages for violating the statute and not the sections—such as the bona fide error provision—that limit the availability of those damages. The amendment

By its terms, the 1999 amendment supersedes any conflicting provision. *See Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1065 (9th Cir. 2011). Therefore, the amendment displaces the cure provision.

The banks invoke the presumption against implied statutory repeal. But this principle can't help them here. First, even where the presumption applies, if two statutory provisions are "irreconcilable," the later-enacted statute will supersede the earlier one. *People v. Acosta*, 29 Cal. 4th 105, 122 (2002). As explained above, that's exactly the case here.

Second, the presumption applies only where there is no clear legislative intent to the contrary. *See Acosta*, 29 Cal. 4th at 122. But the 1999 amendment states that it applies "[n]otwithstanding any other provision of" the Rosenthal Act—a clause that "clearly signals" the legislature's intent to "override conflicting provisions." *See Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993); *People v. Wilson*, No. C039630, 2003 WL 1558281, at *5–6 (Cal. Ct. App. Mar. 26, 2003).

As this Court has explained, because "notwithstanding" clauses demonstrate the legislature's intent to displace contrary law, they "mitigate" the "usual presumption against implied repeals." *United States v. Novak*, 476 F.3d 1041, 1052 (9th Cir. 2007). While ordinarily a court might attempt to harmonize two

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would still require that all debt collectors be subject to the federal remedies, and the cure provision would still require that some debt collectors *not* be subject to those remedies.

apparently conflicting statutes—by, for example, interpreting the older statute as an exception to the newer one—a "notwithstanding" clause demonstrates that the new law "was intended to displace the old one." *Id.* at 1053. Therefore, "if the only way [an] earlier [statute] can stand is as a limited exception to the broad terms of the later one," and the later one contains a "notwithstanding" clause, the later statute should be "considered to supersede the earlier" one. *Id.* at 1052.

As explained above, the 1999 amendment—a provision that admits no exceptions—cannot possibly be harmonized with the cure provision—the whole point of which is to create an exception. But even if, theoretically, the two provisions could somehow be harmonized, the amendment's "notwithstanding" clause makes clear that the legislature did not intend harmonization; it intended the 1999 amendment to supersede conflicting provisions.

The banks assert that "nothing in the legislative history" of the amendment demonstrates the legislature's intent to displace the cure provision. Banks' Br. 18-19. But that's simply not true. To the contrary, every single legislative analysis of the amendment criticizes the cure provision for allowing debt collectors to escape liability for violating the statute. *See* Opening Br. 37.[11] All of these analyses

[11] All of the legislative reports analyzing the amendment are available on the California legislature's website at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=19992000 0AB969.

addressed the very same text regarding remedies that was enacted as law.[12] Adopting the banks' view that the legislature did not intend that text to supersede the cure provision would require this Court to believe that the California legislature repeatedly cited the need to obviate the cure provision as a reason for passing an amendment that it believed would not do so. That makes no sense.

The banks argue that none of the legislative history identifies the removal of the cure provision as a proposed change to the statute. But that, too, is false. In fact, the very same Senate report the banks cite in support of their argument contains a section entitled "Changes to Existing Law," which identifies the cure provision as a provision of existing law that would be changed with the adoption of the amendment. *See* Bill Analysis, S. Jud. Comm., AB 969, at 3.

Contrary to the banks' contention, the legislative history reaffirms what the text of the statute makes clear: In amending the Rosenthal Act, the California legislature intended to supersede the cure provision.

B. The Cure Provision Does Not Apply to the Banks' Violations.

Furthermore, even if the cure provision were still operative, it would not apply here. As explained in the opening brief, a violation can only be "cured" if the

[12] The California legislature's website provides the ability to compare different versions of the bill at https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=199920000AB969.

harm it caused is remedied. Opening Br. 38-43. The banks admit that "there is no way to reverse the harms" caused by their campaign of unwanted robocalls. Banks' Br. 20. Therefore, they cannot possibly cure their violations.

The banks insist that a debt collector can "cure" any violation of the statute—and thereby avoid any consequences for its misconduct—simply by not repeating it. Banks' Br. 20-21. But this argument conflicts with the plain meaning of the word cure—even by the banks' own definitions. *Compare, e.g.*, Banks' Br. 21-22 (defining "cure" as "rectify") *with* Rectify, *Merriam-Webster.com*, at https://www.merriam-webster.com/dictionary/rectify (defining "rectify" as "to set right").

The understanding of the word "cure" as "to make whole" or "undo the harm caused" is nearly universal. Opening Br. 38-43. The banks do not cite a single case to the contrary. In fact, the only case the banks cite in support of their interpretation actually rejects it. In that case, the Seventh Circuit held that to "cure" a default, it is *not* enough simply to end the default itself; any consequences of the default must also be undone. *Matter of Clark*, 738 F.2d 869, 872 (7th Cir. 1984).

The banks' only response to the numerous cases and statutes that all use the word "cure" in the same way is to baldly assert—without citing any evidence whatsoever—that the meaning of the word is different when it is used in a statutory safe harbor provision than it is in other contexts. But, as explained in the opening brief, California courts *have* interpreted the word "cure" in a statutory safe harbor provision, and they came to precisely the same conclusion: Stopping a violation does not cure it; the harm must be undone. *See* Opening Br. 40-41. The banks do not mention these cases either.

The banks also don't explain how their interpretation can be squared with the limitation contained within the cure provision itself—that it applies only to violations that are "able to be cured." Cal. Civ. Code § 1788.30(d). If, as the banks argue, all that is required to cure a violation is to stop doing it, *all* violations would be "able to be cured," and this limitation would be meaningless. *Cf. People v. Craft*, 41 Cal. 3d 554, 560 (1986) ("[A] statute should not be given a construction that results in rendering one of its provisions nugatory.").

If the legislature had intended to enable debt collectors to evade liability for violating the Act, simply by stopping their misconduct, it could easily have said so. But the legislature did not provide a safe harbor for collectors that "stop" violating the law; it provided a safe harbor for collectors that "cure" their violations. The banks offer no reason to believe that the California legislature secretly enacted in the Rosenthal Act a different meaning of the word "cure" than the one in common usage everywhere else. *See Trope v. Katz*, 11 Cal. 4th 274, 282 (1995) (absent some indication of legislative intent to the contrary, "the presumption is almost irresistible that the Legislature intended" the words of a statute to have their "usual and ordinary meaning").[13]

Contrary to the contention of Amicus ACA, interpreting the cure provision in accordance with its plain meaning does not render it useless—or, at least, it wouldn't if the provision hadn't been superseded. If the cure provision were still operable, it would allow debt collectors to escape liability for any violations that cause harm that could be undone—so long as the collector actually remedied that harm. So, for example, it could allow a debt collector to escape liability for charging unlawful fees by returning the money impermissibly collected; or for falsely threatening a consumer with criminal prosecution by promptly setting the record straight. This makes perfect sense. Interpreted this way, the cure provision would allow debt collectors to avoid liability for violating the statute if they fix the harm they've done. But it would prevent debt collectors who don't or can't fix the damage they've wrought from getting off scot-free.

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[13] The banks note that supporters of the 1999 amendment argued that the cure provision could allow debt collectors to avoid liability for any violation of the statute, merely by stopping it. Banks' Br. 22-23. This is further evidence that the amendment was intended to supersede the cure provision. But it says nothing about what the cure provision itself was intended to mean. The cure provision was enacted in 1977. Nothing from 1999, therefore, could possibly shed light on its meaning. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."); *accord Harris v. City of Santa Monica*, 56 Cal. 4th 203, 221 (2013).

The banks' interpretation, on the other hand, would allow debt collectors to violate the law with impunity and escape liability, even if they *hadn't* remedied the damage they caused. Thus, debt collectors could go around charging consumers illegal fees, and so long as they stopped charging any consumer who sued them for it, they'd have "cured" their violation—even if they didn't repay the money. Or they could inundate a consumer with false threats of prosecution, and, again, so long as they stopped if they were sued, they'd face no sanction—even if they never corrected their misrepresentations. That interpretation would render the entire statute virtually useless.

The banks contend that their interpretation better serves the purpose of the statute—consumer protection. They argue that somehow the ability to escape all liability will "motivat[e]" debt collectors "to discover and fix purported violations." *Id.* That's absurd. If debt collectors could avoid liability for their misconduct simply by stopping it if they're sued, there would be no incentive for them to discover and fix violations—they would simply violate the statute until they get caught and then stop to avoid the consequences. It's difficult to imagine any plausible argument for the contention that this makes consumers better off.

III. MS. ROMERO IS ENTITLED TO HAVE A JURY DECIDE HER INTRUSION UPON SECLUSION CLAIM.

The paradigmatic example, given by the Restatement, of debt collection that violates a consumer's privacy is "hound[ing]" the consumer with "repeated" phone calls "that become[ ] a substantial burden to [her] existence." Restatement (Second) of Torts § 652B cmt. d (1977); *see also Sanders v. Am. Broad. Companies, Inc.*, 20 Cal. 4th 907, 914 (1999) (California has adopted the Restatement's "definition of the intrusion tort").

That's precisely what the banks did here. They called Ms. Romero hundreds of times against her will, often multiple times a day. ER 19, 71. These calls came from multiple phone numbers, making it impossible for Ms. Romero to consistently identify the caller. ER 122. Ms. Romero told the banks to stop, but they ignored her. ER 75. And, as a result, Ms. Romero suffered headaches, sleeplessness, and emotional distress. ER 118-27.

A reasonable jury could certainly find that this "amount[ed] to a course of hounding" that invaded Ms. Romero's privacy. *See* Restatement § 652B cmt. d. The banks' arguments to the contrary are meritless.

1. The banks contend that hounding someone with unwanted phone calls cannot possibly be an intrusion upon seclusion because "[o]ne of the main purposes of having a telephone is to allow others to contact you." Banks' Br. 31. But the Restatement says otherwise. As explained above, the Restatement explicitly states that hounding someone with unwanted calls is an invasion of privacy. *See* Restatement § 652B cmt. d.

As the California Supreme Court has explained, "[p]rivacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic." *Sanders*, 20 Cal. 4th at 916. "The mere fact that a person can be seen"—or, in this case, called—"by *someone* does not automatically mean that he or she can legally be forced to be subject to being seen"—or called—"by *everyone*." *Id.* (emphasis added). Merely owning a phone does not give anyone who wants to do so the right to hound you with unwanted phone calls.

The banks note that Ms. Romero gave them her cell phone number. But they conveniently omit the fact that she repeatedly told them to stop calling it. Having told the banks not to call her, Ms. Romero could certainly "reasonably expect" that they would not call her hundreds of times. *See Sanchez-Scott v. Alza Pharm.*, 86 Cal. App. 4th 365, 373 (2001) (intrusion tort "covers spheres where an ordinary person in plaintiff's position could reasonably expect that the particular defendant should be excluded"). Indeed, for them to do otherwise was a violation of both state and federal law. *See* Opening Br. 51.

2. The banks argue they cannot be held liable for calling Ms. Romero on her cell phone, because incessant calling is only intrusive if it occurs at home. The banks cite no authority for this contention—a proposition one court has called "incredible" and "disingenuous." *Duncan v. JP Morgan Chase Bank, N.A.*, No. 5:10-CV-01049, 2011 WL 5359698, at *6 (S.D.W. Va. Nov. 4, 2011). Nor could they. The courts that have considered this argument have rejected it. *See Cunningham v. Vanderbilt Univ.*, No. 3:16-CV-00223, 2017 WL 1076478, at *3 (M.D. Tenn. Feb. 27, 2017); *Duncan*, 2011 WL 5359698, at *6; *see also* Opening Br. 49 (explaining that numerous courts have upheld intrusion claims based on calls to cell phones).

California courts have repeatedly made clear that you do not lose your right to be let alone merely by leaving the house. *See* Opening Br. 47-48. Companies do not gain the right to hound consumers with phone calls, simply because technology now allows consumers to bring their phones with them.

3. Finally, the banks argue that repeatedly calling a consumer against her will can never, in and of itself, be an invasion of privacy—regardless of the number of calls. This contention is in direct conflict with the Restatement—which, again, explicitly states that repeatedly calling a consumer against her will *can* be an invasion of privacy. Restatement § 652B cmt. d.

The banks do not address the Restatement at all. Nor do they address the fact that both the California legislature and Congress consider repeated, unwanted phone calls so offensive they prohibited them. *See* Opening Br. 51; *cf. Kersis v. Capital Cities/ABC, Inc.*, No. BC 077553, 1994 WL 774531, at *10 (Cal. Super. Ct. Apr. 25, 1994) (factfinder could "properly find that conduct constituting an intentional violation of" a statute designed to protect the right to privacy "is highly offensive to a reasonable person"); *Safari Club Int'l v. Rudolph*, No. 13-1989, 2014 WL 12577408, at *8 (C.D. Cal. May 14, 2014) (similar); *Wolfson v. Lewis*, 924 F. Supp. 1413, 1434 (E.D. Pa. 1996) (similar).

Instead, the banks argue that debt collectors have a "qualified privilege" to invade consumers' privacy. Banks' Br. 24. But there is no such privilege. In arguing to the contrary, the banks misconstrue *Bundren*, a California Court of Appeal case that held that creditors have a "qualified privilege to protect [their] economic interest" that limits their liability for *intentional infliction of emotional distress* to cases in which their conduct is truly "outrageous." *Bundren v. Superior Court*, 145 Cal. App. 3d 784, 789 (Cal. Ct. App. 1983). But there was no privacy claim at issue in *Bundren*. It's a case solely about intentional infliction. *Id.* at 787. And intentional infliction is different.

To prove intentional infliction of emotional distress, a plaintiff must demonstrate "extreme or outrageous acts" by the defendant that cause the plaintiff severe emotional distress. *Bundren*, 145 Cal. App. 3d at 791. This is a very high standard: It applies only to conduct so outrageous that it exceeds "'all possible bounds of decency.'" *Id.* at 789 (quoting Restatement (Second) of Torts § 46).

As *Bundren* explained, "the attempted collection of a debt, by its very nature, often causes the debtor to suffer emotional distress." *Bundren*, 145 Cal. App. 3d at 789. Therefore, California courts have made clear that a creditor may not be held liable for intentional infliction merely for lawfully attempting to collect a debt. *See, e.g.*, *id.* at 789. Instead, in accordance with the high standard that applies to such claims, a creditor is only liable for intentional infliction of emotional distress if the means by which the creditor attempts to collect payment are truly "outrageous"—that is, if the creditor goes beyond all "bounds of decency." *See id.*

The banks attempt to extend this high standard far beyond intentional infliction claims. No debt collector, they argue, can ever be held liable for *any* common law tort—from invasion of privacy to trespass—unless its conduct is "oppressive or outrageous." Banks' Br. 25. That is not the law.

The banks do not cite, and we have not found, a single case in which a California state court has applied this standard outside the context of intentional infliction of emotional distress claims. *Cf. Janossy v. Washington Mut. Bank*, No. B157252, 2002 WL 31031636, at *5 (Cal. Ct. App. Sept. 12, 2002) (applying qualified privilege to intentional infliction claim but not discussing it with respect to invasion of privacy claim in the same case); *Dolenski v. GE Money Bank, F.S.B.*, No. 11-CV-1594-JAH, 2012 WL 12054940, at *5-*6 (S.D. Cal. Mar. 28, 2012) (same); *Chaconas v. JP Morgan Chase Bank*, 713 F. Supp. 2d 1180, 1184-85, 1188 (S.D. Cal. 2010) (same).

And with good reason. The requirement that conduct be "outrageous" comes directly from the standard for an intentional infliction claim. There's a very high standard for holding debt collectors liable for intentional infliction of emotional distress because there's a very high standard for holding *anyone* liable for intentional infliction of emotional distress. There's no reason to believe that California courts would export this standard to other torts.[14]

But even if they did, it would not apply here. The qualified privilege for debt collection is a privilege for *permissible* conduct. *See Symonds v. Mercury Sav. & Loan Ass'n*, 225 Cal. App. 3d 1458, 1469 (Cal. Ct. App. 1990); *Kruse v. Bank of Am.*, 202 Cal.App.3d 38, 67 (Cal. Ct. App. 1988) ("Of course, the Bank's actions in its own interest are circumscribed in scope and may not be undertaken in an impermissible manner."). It is intended to protect ordinary, lawful debt collection practices. But the banks' conduct here was *unlawful*—it violated the TCPA and the Rosenthal Act. Therefore, even if the privilege applied to privacy claims generally, it could not shield the banks' conduct in this case.

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[14] The banks cite one federal district court case that applies this standard outside the context of intentional infliction of emotional distress, but it does so without any analysis or explanation of why the high standard required for intentional infliction claims should be exported to other torts. *See Inzerillo v. Green Tree Servicing, LLC*, No. 13–cv–06010–MEJ, 2014 WL 6660534, at *4 (S.D. Cal, Dec. 5. 2016). Given that California courts would not do the same, this case should not be followed.

The banks assert—counterfactually—that courts "consistently have held that simply making a large number of calls to a debtor" is "insufficient" to state a claim for invasion of privacy. Banks' Br. 25. But courts have *not* consistently held that. To the contrary, numerous courts have *rejected* that contention. *See, e.g.*, *Dolenski*, 2012 WL 12054940, at *5; *Corr. Med. Care, Inc. v. Gray*, No. CIV.A. 07-2840, 2008 WL 248977, at *10 (E.D. Pa. Jan. 30, 2008); *Pariscoff v. JPMorgan Chase Bank, N.A.*, No. 2:11-CV-258, 2013 WL 3776589, at *5–7 (S.D. Ohio July 16, 2013).

In fact, courts applying the Restatement have repeatedly "held that repeated and continuous calls made in an attempt to collect a debt *may* give rise to a claim of intrusion upon seclusion," *Masuda v. Citibank, N.A.*, 38 F. Supp. 3d 1130, 1134 (N.D. Cal. 2014) (emphasis added). *See, e.g.*, *Hamburger v. Northland Grp., Inc.*, No. 3:13-CV-01155, 2015 WL 631066, at *8 (M.D. Pa. Feb. 12, 2015); *Hunt v. 21st Mortg. Corp.*, No. 2:12-CV-2697-WMA, 2014 WL 426275, at *8 (N.D. Ala. Feb. 4, 2014); *Zirena v. Capital One Bank (USA), N.A.*, No. 11-24158-CIV, 2012 WL 843489, at *2 (S.D. Fla. Feb. 2, 2012) ("[I]ntrusion by the way of numerous and repetitive phone calls is recognized . . . in an overwhelming number of jurisdictions in this country.").

And numerous courts have allowed claims of intrusion to go forward based on a similar number of—or, in many cases, even fewer—calls than those at issue here. *See* Opening Br. 52, 53 n.9; *Varnado v. Midland Funding LLC*, 43 F. Supp. 3d 985, 992 (N.D. Cal. 2014) ("approximately 185-300" calls); *Hamburger*, 2015 WL 631066, at *8 ("approximately seven or eight calls over the course of several weeks"); *Hunt*, 2014 WL 426275, at *8 ("over 100 calls"); *Zirena*, 2012 WL 843489, at *2 ("in excess of 100" calls); *Hoffman v. GC Servs. Ltd. P'ship*, No. 3:08-CV-255, 2010 WL 9113645, at *22 (E.D. Tenn. Mar. 3, 2010) ("over 75 phone calls during a six month period").

The banks do not mention any of these cases. Instead, they cite a few district court cases that are factually distinct and legally unconvincing. In particular, the banks rely heavily on *McEndree v. Rash Curtis*, an unpublished Eastern District of California case, which they assert has "nearly identical facts as those in this case." Banks' Br. 26 (discussing *McEndree v. Rash Curtis & Assocs.*, No. 2:10-CV-01079-MCE, 2012 WL 1640465 (E.D. Cal. May 9, 2012)). It does not.

Whereas Ms. Romero has alleged hundreds of calls, the plaintiffs in *McEndree* specifically alleged only fourteen. *See* Compl. ¶ 5(e), *McEndree*, 2010 WL 2969094 (E.D. Cal. May 2, 2010).[15] Similarly, the other cases the banks cite also involve a much smaller number of calls than those at issue here. *See*

[15] It appears there may have been additional calls beyond those alleged in the complaint, but there's no indication of how many. *See McEndree*, 2012 WL 1640465, at *8. There's certainly no indication that the *McEndree* plaintiffs faced hundreds of unwanted calls, like Ms. Romero did.

Marseglia v. JP Morgan Chase Bank, 750 F. Supp. 2d 1171, 1177–78 (S.D. Cal. 2010) (fifty calls); Compl. ¶ 42, *Castellanos v. JPMorgan Chase & Co.*, No. 09-CV-00969, 2009 WL 2849890 (S.D. Cal. July 23, 2009) (alleging fifteen "contact violations").

Moreover, none of these cases provides any explanation whatsoever for the assertion that a reasonable person could *never* find it an invasion of privacy to be hounded with unwanted phone calls. None explains why, if a reasonable person could not find such calls highly offensive, both Congress and the California legislature decided to make them illegal. And none even attempts to reconcile its holding with the Restatement.

There is simply no basis for the conclusion that hounding a consumer with repeated, unwanted phone calls can never, in and of itself, be an intrusion upon seclusion.

Even if there were, Ms. Romero's claim is not based solely on the number of calls she received. Not only did the banks call Ms. Romero nearly three hundred times, they did so after she told them to stop calling; they often called her multiple times a day; they hung up without identifying themselves; and they called from multiple numbers, making it impossible for Ms. Romero to consistently know who was calling. A reasonable jury could certainly find this conduct an intrusion upon

Ms. Romero's seclusion. *See* Opening Br. 55-56; *Varnado*, 43 F. Supp. 3d at 992 (holding that similar conduct states "a claim for intrusion").

CONCLUSION

For the reasons explained above and in the opening brief, this Court should reverse the district court's orders dismissing Ms. Romero's TCPA claim and granting summary judgment on her Rosenthal Act and intrusion upon seclusion claims, and remand the case for trial.

Date: April 21, 2017

Respectfully submitted,

s/ *Jennifer D. Bennett*

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