INITIAL VERSION

Nos. 15-1211, 15-1218, 15-1244, 15-1290,
15-1306, 15-1304, 15-1311, 15-1313, & 15-1314

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ACA INTERNATIONAL, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES,
Respondents.

ON PETITION FOR REVIEW FROM A DECISION
OF THE FEDERAL COMMUNICATIONS COMMISSION

JOINT BRIEF FOR INTERVENORS MRS BPO LLC; CAVALRY PORTFOLIO SERVICES, LLC; DIVERSIFIED CONSULTANTS, INC.; MERCANTILE ADJUSTMENT BUREAU, LLC; COUNCIL OF AMERICAN SURVEY RESEARCH ORGANIZATIONS; MARKETING RESEARCH ASSOCIATION; NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS; CONIFER REVENUE CYCLE SOLUTIONS, LLC; AND GERZHOM, INC.

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

The following information is provided pursuant to D.C. Circuit Rule 28(a)(1).

A. Parties and Amici

1. Petitioners are ACA International (No. 15-1211); Sirius XM Radio Inc. (No. 15-1218); Professional Association for Customer Engagement, Inc. (No. 15-1244); salesforce.com inc. and ExactTarget, Inc. (No. 15-1290); Chamber of Commerce of the United States of America (No. 15-1306); Consumer Bankers Association (No. 15-1304); Vibes Media, LLC (No. 15-1311); Rite Aid Hdqtrs. Corp. ("Rite Aid") (No. 15-1313); and Portfolio Recovery Associates (No. 15-1314).

2. The Respondents are the Federal Communications Commission ("Commission" or "FCC") and the United States of America.

3. The Intervenors for Petitioners are MRS BRO LLC, Cavalry Portfolio Services, LLC, Diversified Consultants, Inc., Merchantile Adjustment Bureau, LLC, Council of American Survey Research Organizations, Marketing Research Association, National Association of Federal Credit Unions, Conifer Revenue Cycle Solutions, LLC, and Gerzhom, Inc.

4. The majority of the entities participating as amicus curiae are listed in the Petitioners' Joint Brief. The following entities are participating as amicus curiae and were not listed in Petitioners' Joint Brief:

In support of Petitioners: American Bankers Association; Communication Innovators; Independent and Community Bankers of America; Internet Association; and National Rural Electric Cooperative Association.

B. Ruling Under Review.

The ruling under review is the FCC's July 10, 2015 Declaratory Ruling and Order captioned *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling & Order, 30 FCC Rcd. 7961 (2015) ("*Order*").

C. Related Cases.

All petitions for review of the Order were consolidated before this Court pursuant to the lottery procedures contained in 28 U.S.C. § 2112(a). Intervenors are not aware of any other pending challenge to the Order.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, Intervenors make the following disclosures:

1. MRS BPO LLC does not have a parent corporation, and no publicly-held corporation owns 10% or more of its stock.

2. Cavalry Portfolio Services, LLC has a parent company, Cavalry Investments LLC. No publicly-held corporation owns 10% or more of its stock.

3. Diversified Consultants, Inc. does not have a parent corporation, and no publicly-held corporation that owns 10% or more of its stock.

4. Mercantile Adjustment Bureau, LLC does not have a parent corporation, and no publicly-held corporation owns 10% or more of its stock.

5. Council of American Survey Research Organizations is a not-for-profit corporation organized under the laws of the State of Delaware with its principal place of business in New York. CASRO does not have a parent corporation and no publicly-held corporation owns 10% of more of its stock.

6. Marketing Research Association is a not-for-profit association, organized under the laws of the State of New York with its principal place of business in Washington, District of Columbia. MRA is not a publicly-traded company, has no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

7. National Association of Federal Credit Unions is a not-for-profit corporation and trade association. NAFCU does not have a parent corporation, and no publicly-held corporation owns 10% or more of its stock.

8. Conifer Revenue Cycle Solutions, LLC is organized in the State of California with its principal place of business in Texas. Conifer is not a publicly-held company but operates as a subsidiary of Tenet Healthcare Corp., a publicly-held corporation.

9. Gerzhom, Inc. is a dissolved, privately-held corporation. Gerzhom is no longer operational. Gerzhom does not have a parent corporation, and no publicly-held corporation owns 10% or more of its stock.

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GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. § 500, *et seq.*
ATDS	Automatic Telephone Dialing System, as defined in 47 U.S.C. § 227(a)(1)
FCC	Federal Communications Commission
HIPAA	Health Insurance Portability and Accountability Act of 1996
Order	Declaratory Ruling and Order, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7691 (2015)
O'Rielly Dissent	Dissenting Statement of Commissioner Michael O'Rielly, Dissenting In Part and Approving in Part, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7691 (2015)
Pai Dissent	Dissenting Statement of Commissioner Ajit Pai, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7691 (2015)
TCPA	Telephone Consumer Protection Act of 1991
VoIP Phone	Voice Over IP Telephone

STATUTES AND REGULATIONS

The Addendum contains relevant statutes and regulations.

STATEMENT OF THE CASE

Intervenors adopt the Statement of the Case included in Petitioners' Joint Brief, and supplement it as follows.

I. CALLING TECHNOLOGY HAS CHANGED FUNDAMENTALLY SINCE THE TCPA'S ENACTMENT

A. The TCPA Was Enacted to Address A Particular Problem Prevalent in 1991.

In the 1980s, "telemarketers typically used autodialing equipment that either called numbers in large sequential blocks or dialed random 10-digit strings." *Dominguez v. Yahoo, Inc.*, 2015 WL 6405811, at *5-6 (3d Cir. Oct. 23, 2015).[1] This technology allowed callers to reach unlisted numbers with automated messages. It also allowed callers to tie up all phone lines in a particular area, creating a "potentially dangerous" situation in which no outbound calls (including emergency calls) could be placed. H.R. Rep. No. 102-317, at 10 (1991).

[1] *See also* Opening Statement of Chairman Markey, *Hearing Before the Subcomm. on Telecommc'ns and Finance of the Comm. on Energy and Commerce*, House of Representatives, 101st Cong., First Session, on H.R. 2184 (May 24, 1989) ("Each of these machines can automatically dial up to 1,000 phones per day to deliver a pre-recorded message. . . . Unfortunately, these machines are often programmed to dial sequentially whole blocks of numbers, including hospitals, fire stations, pagers and unlisted numbers.").

To address these concerns relating to random and sequential dialing, Congress passed the Telephone Consumer Protection Act (TCPA),[2] which banned, *inter alia*, any call using an "automatic telephone dialing system" (ATDS) or "an artificial or prerecorded voice" to any telephone number assigned to a cellular telephone service, or any service for which the called party is charged for the call, without the called party's prior express consent. 47 U.S.C § 227(b)(1)(A).

B. Conditions Have Changed Dramatically Since the TCPA's Enactment.

Since the TCPA's enactment, calling technology has evolved significantly. Modern dialing equipment rarely employs random or sequential number generating and dialing capability—the technologies that originally prompted Congress to act. Instead, modern dialers use sophisticated systems to select numbers from a preset database, and employ call control technologies that make call campaigns more efficient and reliable, reduce the chance of dialing a wrong number, synchronize with computer-assisted telephone interviewing (CATI) software and ensure compliance with state laws and time-of-day restrictions.[3] For example, "preview

[2] *See* Hearing on H.R. 628, H.R. 2131 and H.R. 2184 Before the Subcomm. on Telecommc'ns and Fin. Of the House Comm. on Energy and Commerce, 101st Cong., at 71-72 (1989) (statement of Professor Robert Ellis) (noting that the ATDS provisions "only include[d] systems which dial numbers sequentially or at random" not "newer equipment which is capable of dialing numbers gleaned from a database.").

[3] *See* Marketing Research Association ("MRA") Comments at 7 (Dec. 22, 2012).

dialing" uses a computer system to call telephone numbers, but requires an employee or agent to view the contact's information before the number is dialed; this results in personalized contact lists with the ability to eliminate numbers that fall into the do-not-call registry or any internal do-not-contact lists. Other systems utilize cloud-based services, Internet-to-phone text messaging technology, or smartphone applications to make calls or send text messages to wireless numbers stored on pre-set contact lists.[4] These new technologies do not present the same problems that the TCPA was designed to address, as they do not allow for randomized dialing of unlisted or emergency numbers.

C. The Proper Interpretation of the TCPA Matters Because Wireless Phones—a Rarity in 1991—Are Ubiquitous Today.

Since the TCPA's enactment, mobile phone usage has grown exponentially as well, rising from six million subscribers in 1991 to approximately 140 million in 2002 to roughly 326 million in 2012.[5] And the percentage of adults using only wireless phones grew to 39 percent by 2013, compared to fewer than three percent

[4] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7691, ¶ 7 (2015) ("Order").

[5] *See Hearing Before the Subcomm. on Commc'ns of the Senate Comm. on Commerce, Science, and Transp.*, 102d Cong., at 45 (statement of Thomas Stroup); Order ¶ 7.

at the start of 2003.[6] Moreover, more than 45 percent of U.S. homes had wireless phones and no landline phones by the second half of 2014.[7]

Correspondingly, the importance of cell phones in the everyday lives of Americans has grown. Today, many types of vital communications—such as information about school closures, emergency services, and appointment reminders[8]—are communicated by cell phone (specifically, by text message or voice alert). And, increasingly, cell phones are the primary means by which customers *wish* to be contacted by businesses of many kinds. The widespread transmission of important messages via wireless call or text could be diminished if companies decide to reign in such practices as a guard against potential TCPA liability.[9] At least one

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[6] Order ¶ 7.

[7] Blumberg SJ, Luke JV. *Wireless substitution: Early release of estimates from the National Health Interview Survey, July to December 2014. National Center for Health Statistics.* June 2015, available at: http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201506.pdf (last viewed Dec. 1, 2015).

[8] *See, e.g.*, Fairfax County Public Schools Comments, CG Docket No. 02-278, at 2 (April 15, 2015); National Council of Nonprofits Comments, CG Docket No. 02-278, at 3 (Sept. 24, 2014).

[9] Statement of Commissioner Michael O'Rielly, Dissenting in Part and Approving in Part, at 1 (listing "normal, expected and desired communications that consumers have expressly consented to receive" including alerts from a school that a child did not arrive or that a building is on lockdown; product recall and safety notifications; notifications regarding storm alerts and utility outages; updates from airlines regarding flight delays; and financial alerts); *see also* Letter from Harold Kim, U.S. Chamber Institute for Legal Reform and William Kovacs, U.S. Chamber of

school district has notified parents that it will stop sending notifications via text message and voice call alerts due to concerns about TCPA liability.[10] The TCPA was not intended to interfere with such expected or desired communications, including normal business communications.[11]

Moreover, calls to wireless numbers are no longer costly to consumers, as they were in the early 1990s. As subscribers became increasingly reliant on wireless devices, the wireless industry adapted by creating plans that allowed subscribers to generate and receive unlimited calls and text messages. A decade ago, by contrast, "the recipient nearly always incur[ed] a cost to receive [a] call" to his or her wireless number, either in the form of a "per-minute charge or a reduction from a bucket of

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Commerce to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 4 (filed April 23, 2015) ("Concern over TCPA liability already has led some businesses to cease communicating important and time-sensitive information via voice and text to consumers.").

[10] See News Release from District 65 in Evanston, Illinois (October 7, 2015), available at http://www.district65.net/Page/573 ("While we strongly believe that any communication from our district and schools are informational, non-commercial, and fall under the "emergency" exception, this interpretation has yet to be tested in courts and the TCPA provides steep penalties for violations.")

[11] *See House Report*, 102-317 at 17, 1st Sess., 102nd Cong. (1991) (determining that the TCPA's restrictions on calls to "emergency lines, pagers and like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications").

airtime minutes for which the recipient pa[id]."[12] At the same time, the creation of the national do-not-call database has allowed wireless subscribers who wished to avoid unwanted calls to their cell phones to opt out from receiving such calls.

The pervasive nature of cell phones, and the way in which wireless technology is utilized, makes it more vital than ever that businesses possess clarity on the provisions and limitations set forth in the TCPA, as well as the consequences of violating such provisions.

II. THE 2015 DECLARATORY RULING AND ORDER DRAMATICALLY EXPANDS THE SCOPE OF THE TCPA.

The Order expands the scope of the TCPA in several ways, none of which accounts for the changes in conditions since the statute's enactment or provides the clarity that businesses need.

First, the Order expands the definition of "automatic telephone dialing system" to include equipment that "lacks the 'present ability' to dial randomly or sequentially" but has the "potential" or "capacity" to provide those capabilities. Order ¶¶ 15, 16. Second, the Order defines "called party" for purposes of the prior express consent provision to include the "subscriber" or "customary user of the phone," rather than the intended recipient of the call, *id.* ¶ 73; and imposes strict

[12] *See* National Association of Attorneys General Comments, CG Docket No. 02-278, at 46 (Dec. 9, 2002); *see also* Electronic Privacy Information Center Comments, CG Docket No. 02-278, at 13 (Dec. 9, 2002) ("Subscribers typically are charged, sometimes on a per-message basis, to receive these messages.").

liability for calls to reassigned wireless numbers following the first call to the new subscriber, "when a previous subscriber, not the current subscriber or customary user, provided the prior express consent on which the call is based," *id.*

Lastly, the Order also requires callers to accept revocation of consent "through any reasonable means," without defining what those means include, and precludes callers from defining those means in advance.[13]

III. INTERVENORS REPRESENT DIFFERENT INDUSTRIES, BUT ALL HAVE SIMILAR CONCERNS PERTAINING TO THE FCC'S ORDER

Intervenors, which represent a wide variety of industries, all regularly contact customers, members, or other individuals on their cellular phones. Intervenors are concerned that the Order will impede their ability to communicate with customers effectively and will expose them to spurious class action claims that will be difficult and costly to defend.

A. Debt Collector Intervenors

Many Intervenors assist companies in collecting lawful debts. MRS BPO LLC ("MRS"), Cavalry Portfolio Services, LLC ("CPS"), Diversified Consultants, Inc. ("DCI"), and Mercantile Adjustment Bureau, LLC ("MAB"), ("Debt Collector Intervenors"), operate debt collection agencies. The primary tool used by the Debt Collector Intervenors is the telephone, which enables direct communication with

[13] Order ¶ 47.

individual consumers obligated to repay debts. Each has made a substantial financial investment in call center technologies that incorporate hardware and software designed to maximize productivity in their collection operations, and minimize calling agent idle time. These technologies are integrated with their recordkeeping systems to facilitate documentation of calling practices. These advanced systems also ensure accuracy in calling and assist the companies in monitoring to ensure that calls are made in accordance with time-of-day restrictions.

Many of the Debt Collector Intervenors have been subjected to suit under the TCPA for calls made in an attempt to collect debts, premised on the FCC's expansive interpretation of what constitutes an ATDS.[14]

B. Research Intervenors

The Council of American Survey Research Organizations ("CASRO") and Marketing Research Association ("MRA") ("Research Intervenors") are two non-profit national associations that represent the interests of the survey, opinion and marketing research industry. Members of both CASRO and MRA rely upon their ability to contact respondents via the telephone to collect and analyze certain opinions and behaviors, and use automated dialing equipment as an essential tool in

[14] *See e.g., Nigro v. Mercantile Adjustment Bureau, LLC*, 769 F.3d 804 (2d Cir. 2014); *Horton v. Calvary[sic] Portfolio Servs., LLC*, 301 F.R.D. 547, 548 (S.D. Cal. 2014); *Echevvaria v. Diversified Consultants, Inc.*, 2014 WL 929275 (S.D.N.Y. Feb. 28, 2014); *Holt v. MRS BPO, LLC*, 2013 WL 5737346 (N.D. Ill. Oct. 21, 2013).

executing and conducting such research-based calls. Researchers must include wireless phone users in their studies to maintain statistically accurate samples. Both Research Intervenors assert that equipment requiring human intervention to call each number should not be defined as an autodialer and also remain concerned about being exposed to liability for good faith errors.

C. Federal Credit Unions Intervenor

The National Association of Federal Credit Unions (NAFCU) is a not-for-profit corporation and trade association which provides federal advocacy, education, and compliance assistance to the nation's federally-insured credit unions. NAFCU's 769 members are not-for-profit, member-owned financial cooperatives that provide financial services for up to 101 million people nationwide. Credit unions regularly contact customers via telephone and text message to provide information regarding fraud, identity theft, and other data security issues, as well as to supply marketing information and account alerts. As member-owners, credit union consumers have a high expectation of customer service from their financial institution, and rely on communications from the credit union.

As a result of the expansive interpretation of the TCPA adopted in the Order, credit unions' ability to communicate with their customers about important issues affecting their accounts will be severely restricted; credit unions will be forced to expend significant time and money attempting to comply with the uncertain

standards created by the Order; and they may be exposed to potentially crippling liability from class action lawsuits for good faith errors.

D. Healthcare-Related Intervenor

Intervenor Conifer Revenue Cycle Solutions, LLC ("Conifer") provides healthcare performance improvement services that help hospitals, physicians, and insurance companies improve the efficiency of their operations by scheduling appointments, offering physician referrals, verifying insurance, managing payment systems, and collecting payments from customers for medical procedures. As part of its services, Conifer makes telephone calls and sends text messages on behalf of its healthcare industry clients.

The Order permits certain healthcare treatment messages, including the requirement that the call or text message results in no cost to the recipient, to be exempt from the prior express consent requirement because those messages already subject to HIPAA's regulatory requirements. Yet, other types of messages pertaining to account communications and payment notifications, which may also be subject to HIPAA, require prior express consent. Conifer contends that this distinction is unworkable and would impose costs on it in an arbitrary and capricious manner.

E. Mobile-Marketing Company Intervenor

Intervenor Gerzhom (f/k/a Mozes) was a mobile-marketing company. Even though it ceased operations long ago, it is being forced to defend itself in a putative TCPA class action in the Northern District of Alabama resulting from text messages sent at a college football game in response to a "text-to-win" Jumbotron campaign for Coke Zero. Gerzhom is an interested party here because various interpretations in the Order could have an impact in the litigation.

STANDARD OF REVIEW

The Order must be held unlawful and set aside if it is in excess of statutory jurisdiction or authority, or arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2) (2014). The Order is arbitrary and capricious if the FCC has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). An agency must also weigh "significant alternatives to the course it ultimately chooses," *Allied Local & Reg'l Mfrs. Caucus v. U.S. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000); and "display awareness" of and "provide reasoned explanation for" a change in position. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

STANDING

Each Intervenor has Article III standing because it or its members regularly make or made calls or send or sent texts to wireless numbers using equipment that the Order might treat as an ATDS. Accordingly, the interests of Intervenors may be adversely affected in numerous ways if the Order is not vacated or modified.

SUMMARY OF ARGUMENT

The Order dramatically expands the TCPA's scope in a manner that is contrary to the statute's language and purpose. As a result of this expansive interpretation, Intervenors' ability to communicate with their customers about important issues will be severely restricted; Intervenors will be forced to expend significant time and money attempting to comply with the uncertain standards created by the Order; and Intervenors may be exposed to potentially crippling liability from class action lawsuits for good faith errors. Intervenors support each of the contentions raised by Petitioners. Further, Intervenors assert that the Order fails to provide clear and workable solutions for a world that has changed dramatically—via advances in wireless and calling technology—since the TCPA was first enacted in 1991.

First, the FCC's conclusion that "the capacity of an [ATDS] is not limited" to what the equipment is capable of doing in its "current configuration[,] but also includes its potential functionalities," Order ¶ 16, is contrary to the text and purpose

of the TCPA. Moreover, the definition of ATDS contained in the Order lacks clarity because the FCC suggests that an ATDS must be able to "store or produce, and dial random or sequential numbers," *id.* ¶ 10, but elsewhere the FCC "reaffirm[ed]" that an ATDS may dial from a preset list. *Id.* ¶¶ 12-14. As a result of this ambiguity, Intervenors are chilled in their use of technologically-advanced non-ATDS equipment with valuable features that serve some of the TCPA's primary purposes, including improving the ability of callers to honor "do not call" requests and helping monitor the frequency of call attempts.[15]

Second, on the issue of reassigned numbers, the FCC's determination that the term "called party" means the current subscriber (or non-subscriber customary user of the phone), not the intended recipient of a call, is wholly unreasonable.[16] Under the FCC's interpretation, a caller faces liability if it calls a number provided by a customer who had provided consent, but inadvertently reaches someone else to whom that number has been reassigned. To address this "severe" result, *id.* ¶ 90 n.312, the Commission permitted callers unaware of reassignment to make one

[15] *See, e.g.*, Letter from Monica S. Desai, Counsel to Wells Fargo, to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 10 (filed June 5, 2015); Comments of American Financial Services Association, CG Docket No. 02-278, at 4 (filed Dec. 2, 2013) (using a predictive dialer substantially reduces the likelihood of human error); s*ee* MRA Comments at 7.

[16] Order ¶¶ 73, 74, 79.

liability-free call.[17] However, this one-call "safe harbor" creates liability for good faith errors, given that the call may not require a response and that individuals who receive misdirected phone calls have no incentive to reveal that the dialed number had been reassigned. In sum, the Order has made it impossible for callers to rely on prior consent given by customers, given that numbers are so frequently reassigned.

Next, the Commission's conclusion regarding revocation of consent is also arbitrary and capricious. The Order states that customers may revoke consent through "any reasonable means," *id.* ¶¶ 55, 64 n. 233; and prohibits callers from "limit[ing] the manner in which revocation may occur," *id.* ¶ 47. Under this unreasonable system, callers cannot rely on standardized revocation procedures and will inevitably fail to record customers' attempts to revoke consent. This too will result in punishing callers for making innocent mistakes.

Finally, the Commission's nebulous healthcare treatment purpose exemption, *id*. ¶¶ 143-146, is arbitrary and capricious and will chill healthcare-related communications.

ARGUMENT

I. THE ORDER'S INTERPRETATION OF ATDS IS UNREASONABLE.

The TCPA defines "automatic telephone dialing system" ("ATDS") as "equipment which has the capacity—(A) to store or produce telephone numbers to

[17] *Id.* ¶ 85.

be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). Interpreting this provision, the Commission concluded that "the TCPA's use of 'capacity' does not exempt [from the definition of ATDS] equipment that lacks the 'present ability' to dial randomly or sequentially," because "the capacity of an autodialer is not limited to its current configuration but also includes its potential functionalities." Order ¶¶ 15, 16.

The Commission's interpretation is contrary to the TCPA's text, history and purpose. It is arbitrary and capricious and should be set aside.

A. The Commission's Definition of ATDS is Inconsistent With The TCPA's Text.

The TCPA makes clear that an ATDS must have the "capacity" to generate random or sequential numbers and to dial such numbers. In defining "capacity" to include not only a system's current configuration but also its "potential functionalities," *id*. ¶¶ 15, 16, the Commission ignored the ordinary meaning of the term "capacity," which encompasses present ability, not hypothetical future uses.[18]

Congress's use of the present tense—by defining ATDS to include only equipment that "*has* the capacity" to generate random or sequential numbers and to dial such numbers, 47 U.S.C. § 227(a)(1) (emphasis added), rather than equipment

[18] *See, e.g.*, Merriam-Webster's New Collegiate Dictionary (defining "capacity" as "the facility or power to produce, perform, or deploy").

that *could have* such capacity—confirms that equipment must be measured by its present ability, and not its potential functionalities. *See United States v. Wilson*, 503 U.S. 329, 333 (1992) (Congress's choice of verb tense "significant" in determining statute's meaning). Had Congress wanted to include equipment with the potential to be modified to generate random or sequential numbers and to dial such numbers, it could easily have done so. Congress chose not to; the Commission was obliged to respect that choice.

Moreover, the TCPA makes explicit what an ATDS must "ha[ve] the capacity" to do: (A) "store or produce telephone numbers to be called, using a random or sequential number generator"; and (B) "dial such numbers." 47 U.S.C. § 227(a)(1). The provision's phrasing indicates that the equipment itself must be able to store or produce the numbers to be called "using a random or sequential number generator." *See id.* § 227(a)(1)(A). And the reference to "such numbers" in subsection (B) shows that the equipment likewise must be able to dial numbers that were stored or generated "using a random or sequential number generator." *See id.* § 227(a)(1)(B). The provision thus indicates that the equipment itself must be able both to store or generate the numbers, and to dial the numbers, and to do so "automatically," *i.e.*, without human intervention.

Yet the Commission concluded that to qualify as an ATDS "equipment need only have the capacity to store or produce telephone numbers," including a "fixed

set of numbers," and "the capacity to … dial those numbers at random, in sequential order, or from a database of numbers," Order ¶¶ 12, 13. In so concluding, the Commission effectively wrote the "using a random or sequential number generator" requirement out of the statute, by permitting a device to qualify as an ATDS based on its dialing numbers simply from a preset list. Moreover, the Commission effectively eliminated the requirement that an ATDS dial numbers "automatically." *See* Order ¶ 20 ("We … reject [the] argument that the Commission should adopt a 'human intervention test[.]'"). The statute, "read …as written," does not permit such a construction; the Commission's interpretation, therefore, is contrary to "the expressed intent of Congress." *United States v. Anderson*, 59 F.3d 1323, 1338 (D.C. Cir. 1995).

B. The Commission's Definition of ATDS is Inconsistent With The TCPA's History and Purpose.

The TCPA was enacted to address a particular problem—the issue of numerous calls made to a random or sequential string of numbers using automated dialers. The TCPA's legislative history confirms that Congress did not intend for the TCPA to cover equipment that did not have the present ability to generate random or sequential numbers and to dial such numbers automatically.[19] When the

[19] *See, e.g.*, S. Rep. No. 102-178, at 1 (1991) (TCPA designed address "the use of automated equipment . . ."""); Covington, Comment on PACE Petition, No. 02-278, at 3 (Dec. 19, 2013) (in enacting the TCPA, "Congress' main concerns were aimed at 'computerized,' 'automated,' or 'machine-generated' calling,'" using an artificial

statute was enacted in 1991, Congress expressed concern that automated calls were not only annoying, invasive, and costly to the consumer,[20] but also potentially dangerous because calls placed this way might reach otherwise unlisted phone numbers, hospitals, or emergency organizations.[21] Legislators were apprehensive that such automated calling technology could tie up phone lines—particularly emergency services lines—for significant periods of time, preventing legitimate callers from reaching those providers in their time of need.

Congress enacted the TCPA to deal with these problems specifically, not to ban all calls using technological devices.[22]

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or prerecorded voice) (quoting 137 Cong. Rec. 18122-23, 35303 (1991); S. Rep. No. 102-178, at 2, 5 (1991)).

[20] *See* S. Rep. No. 102-178, at 4–5 (1991) ("These automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party, … and do not disconnect the line even after the customer hangs up," and thus "are more of a nuisance … than calls placed by 'live' persons.").

[21] *See, e.g.*, 137 Cong. Rec. 35,302 (Nov. 26, 1991); H.R. Rep. No. 101-633, at 3 (1990); H.R. Rep. No. 102-317, at 10 (1991); S. Rep. No. 102-178, at 2 (1991).

[22] The FCC itself has noted as much. *See Report and Order*, CG Docket No. 02-278, FCC 03-153 (July 3, 2003) (The legislative history …suggests that through the TCPA, Congress was attempting to alleviate a particular problem—an increasing number of automated and prerecorded calls to certain categories of numbers. The TCPA does not ban the use of technologies to dial telephone numbers.).

C. The Commission's Definition of ATDS is Arbitrary and Capricious.

"In order to determine the reasonableness of [an agency's] interpretation, [courts] look both to the agency's textual analysis (broadly defined, including where appropriate resort to legislative history) and to the compatibility of that interpretation with the Congressional purposes informing the measure." *TRT Telecommunications Corp. v. FCC*, 876 F.2d 134, 146 (D.C. Cir. 1989) (citation omitted).

The Order rewrites the TCPA's ATDS provision to cover types of equipment Congress never intended to regulate, in a manner flatly inconsistent with the statute's purpose. As noted above, equipment qualifies as an ATDS under the express terms of the statute only if it both "has the capacity" to store or produce random or sequential numbers, and that capacity is used to dial those numbers without human intervention. Itis the combination of those two factors that make a telephone dialing system "automatic." The Order's definition of autodialer nonetheless sweeps in equipment that *lacks* the ability to store or produce, and dial, random or sequential numbers automatically at the time of use, so long as it *could* be modified or configured to have that ability.

As dissenting Commissioner Pai explained, in today's world, the FCC's interpretation of "capacity" renders the ATDS requirement entirely meaningless, because all modern smartphones have the ability to dial from preset lists (*i.e.*, their contacts), and could easily be modified to dial random or sequential numbers (*i.e.*,

by installing widely-available mobile applications). "It's trivial to download an app, update software, or write a few lines of code that would modify a phone to dial random or sequential numbers. Under the Order's reading of the TCPA, each and every smartphone, tablet, VoIP phone, calling app, texting app … is an automatic telephone dialing system." Pai Dissent 115; *see also Hunt v. 21st Mortg. Corp.*, 2013 U.S. Dist. LEXIS 132574, at *11 (N.D. Ala. Sept. 17, 2013) ("[I]n today's world, the possibilities of modification and alteration are virtually limitless.").[23]

Indeed, the Petitions before the FCC and comments on those Petitions reveal that a wide variety of technologies that already exist could be inadvertently swept into the FCC's definition of ATDS:

- Cloud-based services. *See* CI Comments at 6 on YouMail Pet. at 6 (July 25, 2013); Noble Comments on PACE Pet. at 7 (Dec. 18, 2013).
- Systems that enable "one-click" preview dialing. Chamber Comments on PACE Pet. at 4 & n. 21 (Dec. 19, 2013); *see also* PACE Pet. at 7 (Oct. 18, 2013).
- Applications that facilitate user-initiated text or voice messages to third parties using the contacts in the user's address book. *See* Glide Talk Pet. at 1, 9-10 (Oct. 28, 2013); TextMe Pet. at 9 (Mar. 18, 2014); YouMail Pet.

[23] Petitions and comments before the FCC raised these same concerns. *See, e.g.*, PACE Pet. at 9 ("If equipment is an ATDS merely because it has the capacity to: (a) store or produce numbers to be called; and (b) dial such numbers after being prompted by a human, virtually every modern telephone (including smart phones and any phone with speed dial functionality) is an ATDS because they have the capacity to both store numbers and dial them upon command."); Path Comments on Glide Pet. at 15 ("[The] fact that a smartphone is capable of automatically dialing numbers from lists—whether or not that function is used—would render that phone an ATDS, making nearly every call or text message from a cell phone a prima facie violation of the TCPA.").

1 at (Apr. 19, 2013); Twilio Comments on Glide Pet. at 6-7 (Dec. 19, 2013).

- Group text messaging and social networking apps. *See* Nicor Comments on PACE Pet. at 9 (Dec. 19, 2013); GroupMe Pet. at 2 (Mar. 1, 2012); Path Comments on Glide Pet. at 3 (Jan. 3, 2014).
- Apps that allow users to set up auto-reply messages, such as away or out-of-office messages. *See* YouMail Pet. at 1 (Apr. 19 2013).
- Apps that send confirmatory text messages, such as electronic transaction receipts, welcome messages for joining a service, and even messages confirming a customers' request to no longer receive text message. *See* SoundBite Pet. at 1 (Feb. 16, 2012); Path Comments on Glide Pet. at 9-10 (Jan. 3, 2014).
- Internet-to-phone messages from commercial websites and social networking sites. *See* Path Comments on Glide Pet. at 9-10 (Jan. 3, 2014) (outlining lawsuits brought under TCPA).

These systems are a far cry from the automated dialing systems that the TCPA was designed to address.[24] Further, the mere ambiguity as to the scope of the ATDS provision harms Intervenors by increasing costs of call campaigns, as it is impossible for businesses (or their vendors) to know what will qualify as an ATDS.[25]

[24] Even predictive dialers—which the FCC made clear in previous orders could be covered by the TCPA—no longer contain the capabilities that previously justified their inclusion. *See* Letter from Sen. Blunt to FCC Chairman Julius Genachowski, CG Docket No. 02-278 (dated June 28, 2011) ("The current generation of predictive dialers does not raise concerns about calling random numbers—the practice that Congress intended to prevent when it enacted the TCPA"); *see* MRA Comments at 7.

[25] *See* MRA Comments at 6, 9 (inclusion of cell phones increases costs by two to four times that of an ordinary phone study).

In expanding the scope of the TCPA's autodialer provision, the Order also has the effect of regulating messages that customers actually want and find valuable. For example, credit unions and other financial institutions regularly contact customers via telephone and text message to provide information regarding fraud, identity theft, and other data security issues, as well as to supply marketing information and account alerts. The TCPA was not intended to curtail such legitimate business activity.[26]

The FCC's ATDS definition is also arbitrary and capricious for several additional reasons. First, the "potential functionalities" test adopted by the FCC provides no concrete guidance on the provision's scope. Although the Commission states that "the outer contours of the definition of 'autodialer' do not extend to every piece of malleable and modifiable dialing equipment that conceivably could be considered to have some capacity, however small, to store and dial telephone numbers," Order ¶ 18, the Order does not give any guidance to where the "outer contours" of the provision actually lie. The only type of equipment the Commission categorically excluded is a rotary-dialed phone, which is no longer widely in use

[26] *See* Glide Petition at 12 (President George H.W. Bush signed the TCPA into law but acknowledged that "the TCPA 'could also lead to unnecessary regulation or curtailment of legitimate business activities,' [and] that he had signed it only 'because it gives the [FCC] ample authority to preserve legitimate business practices ...'"); *accord* Communication Innovators Comments on Glide Pet. 5; Communication Innovators Comments on TextMe Pet. 6; TextMe Pet. 9-10.

(and cannot function with increasingly prevalent VoIP systems). *See id.* And the definition, as explained above, naturally can be read to include every species of modern dialer technology. Given that such an overbroad definition has a strong likelihood of chilling free speech (including calls made by the Research Intervenors), *Comm. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1395 (D.C. Cir. 1990), the Commission was obligated to give more "meaningful guidance" to covered parties, *USPS v. Postal Regulatory Comm'n*, 785 F.3d 740, 744, 753, 754 (D.C. Cir. 2015).

Furthermore, the Commission's statement that it is unlikely that consumers' use of smartphones will actually result in TCPA litigation, *see id.* ¶ 21 ("We have no evidence that friends, relatives, and companies with which consumers do business find those calls unwanted and take legal action against the calling consumer."), offers little solace to companies that bear that risk, particularly in light of the explosion of TCPA litigation in the past few years, *see, e.g.*, Path Comments on Glide Pet. at 9-10 (describing increase in TCPA lawsuits). Indeed, in light of the rise in employees' use of personal smartphones or employer-provided smartphones to make work-related calls, there is a risk that a call to a consumer from an employee's smartphone might be considered use of an ATDS.

For all of these reasons, the Order's ATDS definition should be set aside as arbitrary and capricious.

II. THE ORDER UNLAWFULLY EXPOSES CALLERS TO POTENTIAL LIABILITY FOR CALLS TO REASSIGNED WIRELESS NUMBERS WHERE CONSENT WAS PROPERLY RECEIVED.

Congress expressly exempted from the TCPA's reach calls "made with the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). The Order eviscerates the concept of consent by declaring that the TCPA requires "the consent not of the intended recipient of a call, but of the current subscriber (or non-subscriber customary user of the phone)."[27] As a result, a caller that receives consent to contact a particular wireless number cannot confidently rely on that consent, as the caller faces liability for calls to that number if it has been reassigned to another subscriber without the caller's knowledge. In opening the door to liability for these innocent mistakes, the Order is arbitrary and capricious.

A. Defining "Called Party" to Mean the "Subscriber" Or "Customary User of the Phone," Rather Than the "Intended Recipient" of the Call, Is Arbitrary and Capricious.

Statutory provisions must always be interpreted in the context of the entire statutory scheme. *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (June 23, 2014) (statutory provisions must be interpreted in a way that fits with "the broader context of the statute") (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). An agency's interpretation is arbitrary if it "produces a substantive effect" that cannot be reconciled "with the design and structure of the statute as a whole."

[27] Order ¶ 72.

Utility Air, 134 S. Ct. at 2442 (citing *Univ. of Tex. Southwestern Med. Center v. Nassar*, 133 S. Ct. 2517 (June 24, 2013)). The Order's interpretation of "called party" fails these requirements in several respects.

First, consent is central to the TCPA. The entire statutory scheme is designed to encourage callers to receive the consent of the parties they intend to contact, and to deter callers from making calls to those parties without first obtaining consent. The FCC's interpretation of "called party" to mean the current subscriber, rather than the intended recipient of the call, conflicts with that goal, as it punishes those who have obtained the consent the TCPA requires, when a phone number provided to them has been reassigned to a third party without the caller's knowledge. This does nothing to serve Congress's objective in enacting the TCPA.

Second, the Commission's interpretation bears no relationship with the reality of how businesses contact their customers. Businesses obtain consent for a variety of purposes. Research entities contact wireless subscribers who have agreed to participate in surveys, opinion research polling, or customer satisfaction studies. Companies and their agents contact customers when they fail to pay their bills on time or have fallen behind on loans. A host of businesses provide appointment reminders, notifications, emergency information, and fraud alerts that customers have consented to receive. Financial institutions contact their account-holders to

gather information regarding fraud, identity theft, and other data security issues, and to provide vital account information and messages.

Customers, in turn, provide their consent to be contacted on their wireless phones because they benefit from and desire these messages. Calls to wireless numbers provide an instantaneous method of communication that may be key to avoiding consumer harm. And, for many consumers, receiving an alert or call on their cell phone is the *preferred* method of communication, as landlines have become less prevalent.

When businesses such as Intervenors attempt to contact customers at the phone numbers those customers have provided, the businesses clearly *intend* to reach the party that gave its consent. In reality, however, callers will undoubtedly reach reassigned telephone numbers despite their best efforts to reach only the precise individuals who provided their consent to be called. Yet, the Commission has interpreted "called party" in a manner that completely ignores the caller's intent, and instead focuses on the current subscriber of the wireless number. Such an interpretation ignores the reality of how and why businesses contact customers, and is completely inconsistent with the natural reading of the term "called party."

The only way to implement the consent regime is to define "called party" as the person the caller intended to reach. Commissioner Pai provided the following example in his dissent: "[y]our uncle writes down his telephone number for you and

asks you to give him a call," and then "you dial that number."[28] It would make perfect sense to "say you are calling … [y]our uncle," and to refer to your uncle, the person "you expect to answer," as the "called party." *Id.* And that would remain true even if "your uncle wrote down the wrong number," "he lost his phone and someone else answered it," someone else "actually pays for the service," or his number was reassigned. *Id.* Thus, under Commissioner Pai's example, the caller's purpose in dialing the number was to reach his uncle—underscoring that his uncle served as the "intended recipient" of the call.

Lastly, the Order is unreasonable because it creates a standard that the FCC admits is impossible to meet. Total assurance of the actual recipient's consent—as opposed to the intended recipient's consent—is not realistically attainable. The Order puts the onus of knowing that a wireless number has been reassigned on the caller. Yet there is no reliable mechanism for businesses to track reassigned wireless number after they have obtained consent to contact that number. Customers change cell phone numbers—and wireless companies reassign those numbers—all the time without notifying businesses previously provided with that phone number. The FCC's purported solutions—maintaining a reassignment database, or asking consumers "to notify them when they switch from a number for which they have given prior express consent," *see* Order ¶ 86—offer only additional burdens and

[28] Pai Dissent at 118.

expenses for callers, and risk annoying customers, by calling them frequently just to confirm that their number has not changed. This is simply not a workable system.

B. The One-Call Safe Harbor Provision is Arbitrary and Capricious.

The Order seeks to "balance" the harm created by this interpretation by exempting from liability the first call made to a wireless number following reassignment.[29] Specifically, the Order states that "callers who make calls without knowledge of reassignment and with a reasonable basis to believe that they have valid consent to make the call should be able to initiate one call after reassignment as an additional opportunity to gain actual or constructive knowledge of the reassignment and cease future calls to the new subscriber."[30] However, the FCC clarified that callers possess "actual or constructive knowledge" of a phone number's reassignment after one call, regardless of whether the caller actually makes contact with the called party. *See* Order ¶ 91. This conclusion is unreasonable on its face.

Imagine a scenario in which a business attempts to make contact with a wireless number for which it obtained the customer's prior express consent, but the

[29] Commissioner Michael O'Rielly referred to this safe harbor provision as "fake relief instead of a solution." As O'Rielly stated: "All we've done is moved the point of liability for reassigned number situations from call one to call two. And if a call is made to a wrong number (i.e., misdialed) there's no free pass at all." *See* O'Rielly Dissent at 7.

[30] Order ¶ 72.

number has since been reassigned without the caller's knowledge. If the caller fails to make contact with the current subscriber or the current subscriber refuses to notify the caller of the reassignment, the business necessarily lacks actual knowledge that the number has been reassigned. Nor is it reasonable to assume that the business "should have known" that the number had been reassigned under these circumstances.[31] Yet, under the Commission's interpretation, the caller is deemed to have "constructive knowledge" of the reassignment, and will be held liable for any further calls to that number. This interprets the statute to "demand the impossible."[32] The FCC acknowledges that methods to detect this are imperfect and thus, no matter what the caller does, the possibility remains that it will obtain consent but still incur liability.[33] Such a result is arbitrary and capricious.

The purported one-call safe harbor provision also fails to provide notice (actual or constructive) because the recipient may act in bad faith in response to the call. The Order does not account for the fact that an individual who wants to bring

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[31] *See Jenkins v. Wash. Area. Transit. Auth.*, 895 F. Supp. 2d 48, 78 (D.C. Cir. 2012) (defining "constructive knowledge" as "what the user knew or reasonably should have known").

[32] *See Rules and Regulations Implementing the TCPA*, CG Docket No. 02-278, Order, 199 FCC Rcd. 19215, 19219 (2004) (quoting *McNeil v. Time Ins. Co*.., 205 F.3d 179, 187 (5th Cir. 2000)).

[33] Order ¶ 88 (finding that even those callers that use all of the "tools" recommended by the Commission "may nevertheless not learn of reassignment).

a lawsuit against certain companies for a TCPA violation has no incentive to reveal that the dialed number had been reassigned. Instead, an individual may purposely receive several calls without providing notice of the reassignment in order to gin up a lawsuit.[34]

By limiting the safe harbor provision to one call regardless of the caller's knowledge, the Order effectively authorizes potential liability for such good faith errors. The threat of such liability will deter Intervenors and other companies from making important, and often necessary, communications to their members, customers or respondents. This conflicts with the purpose of the TCPA, as Congress "d[id] not intend for this restriction to be a barrier to the normal, expected or desired communications between business and their customers." H.R. Rep. 102-317, at 17 (1991).

III. REQUIRING CALLERS TO ACCEPT REVOCATION OF CONSENT "AT ANY TIME AND THROUGH ANY REASONABLE MEANS" IS UNREASONABLE.

As noted above, the TCPA makes it unlawful to contact a wireless number without the called party's prior express consent. In order to ensure that a customer's revocation of consent is properly and uniformly recorded, and to combat the rising tide of TCPA litigation, banks, lenders and other businesses have added "consent to call" provisions to their standard terms and conditions. Such notices typically state

[34] *See* Pai Dissent at 9.

that: "(1) the customer agrees to calls via an ATDS or prerecorded messages to a wireless number; and (2) the contract cannot be modified except in a writing signed by the creditor."[35] In the Order, however, the FCC states that "a called party may revoke consent at any time and through any reasonable means," and that "[a] caller may not limit the manner in which revocation may occur." Order ¶ 47. As a result, the Commission created an unworkable system that will be impossible for callers to implement.

A. The Revocation of Consent Ruling Contravenes Settled Reliance Interests and Common-Law Principles.

The Commission posits that its decision permitting revocation of consent by any reasonable means "finds support in the well-established common law right to revoke prior consent." Order ¶ 58. However, "[n]o statute is to be construed as altering the common law, farther than its words import," nor is it "to be construed as making any innovation upon the common law which it does not fairly express."[36]

[35] *See, e.g.*, Comments of the American Financial Services Association, CG Docket No. 02-278, at 2 (filed Sep. 2, 2014); Reply in Support of Santander Consumer USA, Inc. Pet. For Expedited Declaratory Ruling, at 12 (posted Sept. 18, 2014).

[36] *Shaw v. Merchants' Nat'l. Bank*, 101 U.S. 557, 565 (1879); 3 NORMAN SINGER, SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 61:1 (7th ed.).

And nothing in the common law of consent requires callers to accept revocation of consent by *any* means, nor precludes callers from limiting consent by contract.[37]

Moreover, the FCC's revocation of consent ruling departs from the common law respect for the sanctity of contract.[38] Nothing in the TCPA empowers the FCC to adjudicate the validity of pre-existing contracts proscribing a given method for revocation of consent, and nothing in the FCC's ruling purports to justify the wholesale rejection of consumer contracts that already provide a method for revoking consent in writing on the grounds that such contracts "materially impair" or "significantly burden" a consumer who wishes to revoke consent.[39] Thus, even if permitting revocation of consent by "any reasonable means" were otherwise reasonable, consumers who enter into voluntary agreements with callers should have their precise method of revoking consent governed by the terms of their contract.

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[37] *Cf. Household Finance Corp. v. Bridge*, 252 Md. 531, 541, 543, (1969) (at common law, courts regard acceptance of credit as implied consent to take all reasonable actions to collect debts; repeated unwanted calls invading a consumer's privacy were not actionable unless the pattern of calls was unreasonable); *see also* Restatement (Second) of Torts § 652B, cmt. d (1977) ("It is only when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff, that becomes a substantial burden to his existence, that his privacy is invaded.").

[38] *Credit Alliance Corp. v. Campbell*, 845 F.2d 725, 729 (7th Cir. 1988).

[39] Order ¶¶ 66, 67. *Cf. Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956); *compare with NRG Power Mktg., LLC v. Maine Pub. Utilities Comm'n*, 558 U.S. 165, 174 (2010).

Because the Order abrogates existing contracts, it represents an unwarranted departure from the common law, and must be rejected.[40]

B. The FCC's Revocation of Consent Ruling Is An Unreasonable Policy Choice.

By allowing each customer to revoke consent by any reasonable means, the FCC's interpretation permits an unfeasible level of individualization and unreasonably precludes callers from developing a standardized means for receiving and processing consent revocations.[41]

Here, the FCC has imposed the burden of proving the negative (*i.e.*, that revocation did not take place) on the caller. As noted above, regulations that create untenable regimes for regulated parties are unreasonable.[42]

Furthermore, this rule will be impossible to comply with and will impose substantial burdens on Intervenors. Because revocation of consent can be given by "any reasonable means," and the Order does not define what means are "reasonable," businesses will be forced to determine on a case-by-case basis whether an individual customer's message actually constitutes revocation. This would detract from the

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[40] Order ¶ 70. *Cf. Kidd Communications v. FCC*, 427 F.3d. 1, 7 (D.C. Cir. 2005).

[41] *Cf. Anderson v. Harris & Harris, Ltd.*, 2014 WL 1600575, at *3 (E.D. Wis. Apr. 21, 2014).

[42] *Almay, Inc. v. Califano*, 569 F.2d 674, 682 (D.C. Cir. 1978); *see also Wedgewood Village Pharmacy v. DEA*, 509 F.3d 541, 552 (D.C. Cir. 2007).

streamlined benefits associated with the advanced technology employed by businesses today.[43] And Intervenors and other businesses will have to spend substantial time and expenses training a variety of employees how to identify and process customer consent for TCPA purposes.[44] The resulting confusion will invariably lead to businesses unwittingly failing to record revocation of consent, again resulting in TCPA lawsuits for innocent mistakes.

Moreover, if the Order is allowed to stand, Intervenors will be required to acquire additional hardware capacity to record all outgoing calls that reach voice mail; hire additional staff to listen to all voice mail greetings for every call made that goes unanswered, and spend countless hours rummaging through every call to assess whether some indicia of revocation was annunciated during the call. The Order thereby imposes substantial costs with no reasonable prospects for any benefit. The Order's apparent insistence that companies monitor all unattended messaging systems and the content of consumer voicemail greetings imposes unreasonable burdens on companies because it ignores callers' need for regularity and instead permits each customer to use his own method of revoking consent.

While permitting each customer to select an individualized method of revocation may assist customers who wish to remove themselves from certain

[43] *See* Statement of the Case, Part B.

[44] *See* Pai Dissent at 123.

calling lists, this advantage does not supersede the considerable harm that the provision would bring to Intervenors and other businesses.[45]

Moreover, under the ruling, consumers have no apparent responsibility to satisfy authentication requirements necessary to confirm their identity and authority to revoke consent.[46] This could lead to false revocations of consent and extensive confusion for both companies and customers. The Commission's failure to consider this point renders its holding arbitrary and capricious.

IV. THE ORDER'S TREATMENT OF HEALTHCARE-RELATED COMMUNICATIONS IS ARBITRARY.

Intervenors agree with Rite Aid that the Order's treatment of health-related calls is arbitrary and capricious because it establishes an unworkable standard for businesses, such as Intervenor Conifer, that make telephone calls and send text messages on behalf of healthcare clients.[47]

In 2012, the Commission exempted prerecorded health care-related calls to residential lines subject to HIPAA from consent requirements in the TCPA due to

[45] *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) (holding that an agency may not adopt a regulation whose "costs are … disproportionate to the benefits").

[46] Santander Pet.; Comments of Computer & Communications Industry Assn., CG Docket No. 02-278 (filed Sep. 2, 2014), at 5.

[47] Order ¶ 143-146.

HIPAA's privacy protections.[48] The Commission found that HIPAA-related calls "serve[d] a public interest purpose: to ensure continued consumer access to health care-related information."[49] Moreover, such an exemption does not detrimentally impact consumer privacy interests because "these calls are placed by the consumer's health care provider to the consumer and concern the consumers' health"[50] and such prerecorded healthcare-related calls do not constitute unsolicited advertisements because they are intended to communicate healthcare-related information rather than to offer property, goods or services.[51]

Healthcare-related calls to wireless phones similarly maintain the same beneficial effects for consumers. However, the Order establishes different rules for healthcare-related calls to wireless numbers based on the destination of the call, rather than on its purpose or customer expectations. A healthcare provider or business associate could send an automated appointment reminder to a customer on his or her residential phone, but could require additional consent to send the same message to the customer on his or her wireless phone. As a result, multiple regimes

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[48] *See Rules and Regulations Implementing the TCPA*, FCC 12-21, 27 FCC Rcd 1830 ¶ 57 (2012).

[49] *Id*. ¶ 60.

[50] *Id*. ¶ 63; *see also* 45 C.F.R. § 164.501.

[51] *Id*.; *see also* 42 U.S.C. § 17936(a)(1).

for the same HIPAA-related communication would be established. The Order does not acknowledge this difference in treatment, much less explain it sufficiently to satisfy the APA. *See* Brief for Petitioner Rite Aid Hdqtrs. (Doc. No. 1585613) at 6-7.

The Commission's imposition of potential liability for some healthcare-related calls is arbitrary and capricious and conflicts with HIPAA.[52]

CONCLUSION

In support of Petitioners' contentions, Intervenors assert that all petitions for review should be granted, and the challenged portions of the Order vacated, reversed, or modified.

[52] *See, e.g.*, 45 C.F.R. § 164.502.

DATED: December 2, 2015

Respectfully submitted,

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CIRCUIT RULE 32(a)(2) ATTESTATION

In accordance with D.C. Circuit Rule 32(a)(2), I hereby attest that all other parties on whose behalf this brief is filed consent to its filing.

Dated: December 2, 2015

/s/ *Steven A. Augustino*
Steven A. Augustino

CERTIFICATE OF COMPLIANCE

This brief complies with the Court's Order of October 13, 2015, setting forth the briefing schedule for this case, because it contains 8,643 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(e)(1), as determined by the word-counting feature of Microsoft Word.

Dated: December 2, 2015

/s/ *Steven A. Augustino*
Steven A. Augustino

ADDENDUM

INTERVENORS' ADDENDUM
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Reproduction of Relevant Authorities:

47 U.S.C § 227(b)(1)(A)

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

5 U.S.C. § 706(2) (2014)

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

47 U.S.C. § 227(a)(1)

(a) Definitions

As used in this section—

(1) The term "automatic telephone dialing system" means 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.

42 U.S.C. 17936(a)(1)

(a) Marketing

(1) In general

A communication by a covered entity or business associate that is about a product or service and that encourages recipients of the communication to purchase use the product or service shall not be considered a health care operation for or purposes of subpart E of part 164 of title 45, Code of Federal Regulations, unless the communication is made as described in subparagraph (i), (ii), or (iii) of paragraph (1) of the definition of marketing in section 164.501 of such title.

45 C.F.R. § 164.501

As used in this subpart, the following terms have the following meanings:

* * *

Health care operations means any of the following activities of the covered entity to the extent that the activities are related to covered functions:

(1) Conducting quality assessment and improvement activities, including outcomes evaluation and development of clinical guidelines, provided that the obtaining of generalizable knowledge is not the primary purpose of any studies resulting from such activities; patient safety activities (as defined in 42 CFR 3.20); population-based activities relating to improving health or reducing health care costs, protocol development, case management and care coordination, contacting of health care providers and patients with information about treatment alternatives; and related functions that do not include treatment;

(2) Reviewing the competence or qualifications of health care professionals, evaluating practitioner and provider performance, health plan performance, conducting training programs in which students, trainees, or practitioners in areas of health care learn under supervision to practice or improve their skills as health care providers, training of non-health care professionals, accreditation, certification, licensing, or credentialing activities;

(3) Except as prohibited under § 164.502(a)(5)(i), underwriting, enrollment, premium rating, and other activities related to the creation, renewal, or replacement of a contract of health insurance or health benefits, and ceding, securing, or placing a contract for reinsurance of risk relating to claims for health care (including stop-loss insurance and excess of loss insurance), provided that the requirements of § 164.514(g) are met, if applicable;

(4) Conducting or arranging for medical review, legal services, and auditing functions, including fraud and abuse detection and compliance programs;

(5) Business planning and development, such as conducting cost-management and planning-related analyses related to managing and operating the entity, including formulary development and administration, development or improvement of methods of payment or coverage policies; and

(6) Business management and general administrative activities of the entity,
including, but not limited to:

(i) Management activities relating to implementation of and compliance with the requirements of this subchapter;

(ii) Customer service, including the provision of data analyses for policy holders, plan sponsors, or other customers, provided that protected health information is not disclosed to such policy holder, plan sponsor, or customer.

(iii) Resolution of internal grievances;

(iv) The sale, transfer, merger, or consolidation of all or part of the covered entity with another covered entity, or an entity that following such activity will become a covered entity and due diligence related to such activity; and

(v) Consistent with the applicable requirements of § 164.514, creating de-identified health information or a limited data set, and fundraising for the benefit of the covered entity.

* * *

Marketing:

(1) Except as provided in paragraph (2) of this definition, marketing means to make a communication about a product or service that encourages recipients of the communication to purchase or use the product or service.

(2) Marketing does not include a communication made:

(i) To provide refill reminders or otherwise communicate about a drug or biologic that is currently being prescribed for the individual, only if any

financial remuneration received by the covered entity in exchange for making the communication is reasonably related to the covered entity's cost of making the communication.

(ii) For the following treatment and health care operations purposes, except where the covered entity receives financial remuneration in exchange for making the communication:

(A) For treatment of an individual by a health care provider, including case management or care coordination for the individual, or to direct or recommend alternative treatments, therapies, health care providers, or settings of care to the individual;

(B) To describe a health-related product or service (or payment for such product or service) that is provided by, or included in a plan of benefits of, the covered entity making the communication, including communications about: the entities participating in a health care provider network or health plan network; replacement of, or enhancements to, a health plan; and health-related products or services available only to a health plan enrollee that add value to, but are not part of, a plan of benefits; or

(C) For case management or care coordination, contacting of individuals with information about treatment alternatives, and related functions to the extent these activities do not fall within the definition of treatment.

(3) Financial remuneration means direct or indirect payment from or on behalf of a third party whose product or service is being described. Direct or indirect payment does not include any payment for treatment of an individual.

Payment means:
(1) The activities undertaken by:

(i) Except as prohibited under § 164.502(a)(5)(i), a health plan to obtain premiums or to determine or fulfill its responsibility for coverage and provision of benefits under the health plan; or

(ii) A health care provider or health plan to obtain or provide reimbursement for the provision of health care; and

(2) The activities in paragraph (1) of this definition relate to the individual to whom health care is provided and include, but are not limited to:

(i) Determinations of eligibility or coverage (including coordination of benefits or the determination of cost sharing amounts), and adjudication or subrogation of health benefit claims;

(ii) Risk adjusting amounts due based on enrollee health status and demographic characteristics;

(iii) Billing, claims management, collection activities, obtaining payment under a contract for reinsurance (including stop-loss insurance and excess of loss insurance), and related health care data processing;

(iv) Review of health care services with respect to medical necessity, coverage under a health plan, appropriateness of care, or justification of charges;

(v) Utilization review activities, including precertification and preauthorization of services, concurrent and retrospective review of services; and

(vi) Disclosure to consumer reporting agencies of any of the following protected health information relating to collection of premiums or reimbursement:

(A) Name and address;
(B) Date of birth;
(C) Social security number;
(D) Payment history;
(E) Account number; and
(F) Name and address of the health care provider and/or health plan.

45 C.F.R. § 164.502

(a) Standard. A covered entity or business associate may not use or disclose protected health information, except as permitted or required by this subpart or by subpart C of part 160 of this subchapter.

(1) Covered entities: Permitted uses and disclosures. A covered entity is permitted to use or disclose protected health information as follows:

(i) To the individual;

(ii) For treatment, payment, or health care operations, as permitted by and in compliance with § 164.506;

(iii) Incident to a use or disclosure otherwise permitted or required by this subpart, provided that the covered entity has complied with the applicable requirements of §§ 164.502(b), 164.514(d), and 164.530(c) with respect to such otherwise permitted or required use or disclosure;

(iv) Except for uses and disclosures prohibited under § 164.502(a)(5)(i), pursuant to and in compliance with a valid authorization under § 164.508;

(v) Pursuant to an agreement under, or as otherwise permitted by, § 164.510; and

(vi) As permitted by and in compliance with this section, § 164.512, § 164.514(e), (f), or (g).

* * *

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2015, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which will send notification of the filing to all parties or their counsel of record.

/s/ *Steven A. Augustino*
Steven A. Augustino