

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of Rules and Regulations)
Implementing the)
Telephone Consumer Protection Act and)
Interpretations in Light of the D.C. Circuit's)
ACA International Decision)

CG Docket No. 02-278

CG Docket No. 18-152

Comments of

National Consumer Law Center

on behalf of its low-income clients and

Americans for Financial Reform

Consumer Action

Consumer Federation of America

Consumers Union

NAACP

National Association of Consumer Advocates (NACA)

National Association of Consumer Bankruptcy Attorneys (NACBA)

National Legal Aid & Defender Association

Prosperity Now

Public Justice

Public Knowledge

US PIRG

**Arkansans Against Abusive Payday Lending
Housing and Economic Rights Advocates,
California**

Public Good Law Center, California

Connecticut Legal Services, Inc.

Jacksonville Area Legal Aid, Inc., Florida

Florida Alliance for Consumer Protection

LAF, Illinois

Greater Boston Legal Services,

**Massachusetts on behalf of its low-income
clients**

Public Justice Center, Maryland

Michigan Poverty Law Program

Legal Aid Center of Southern Nevada

Legal Services of New Jersey

Public Utility Law Project of New York

Bronx Legal Services, New York

Brooklyn Legal Services, New York

**Long Term Care Community Coalition, New
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Manhattan Legal Services, New York

Queens Legal Services, New York

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Financial Protection Law Center, North Carolina

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June 13, 2018

These comments are respectfully submitted to the Federal Communications Commission (FCC or Commission) by the **National Consumer Law Center** on behalf of its low-income clients and forty-one other national and state public interest groups and legal services organizations, regarding the momentous questions posed by the FCC in this request for comments. The decisions made in this proceeding will impact the daily lives of hundreds of millions of American consumers. If the FCC issues definitions of “automated telephone dialing system” and “call” that are as narrow as the calling industry urges, the consequence will be a tsunami of unwanted—and unstoppable—calls to our cell phones. We strongly urge the FCC not to take this route but, instead, to write definitions that will ensure that the consumer protection law it is charged with implementing is effective in protecting the sanctity of Americans’ privacy.

SUMMARY OF COMMENTS

Robocalls Are an Escalating Problem. Despite the clear prohibitions in the Telephone Consumer Protection Act (TCPA), unwanted robocalls are escalating. Over 3.4 billion robocalls were made in the month of April 2018 alone—a 285% increase in less than three years. The number of complaints to government agencies increased 100% during the same three-year period, from 3.5 million to 7.1 million in 2017.

Scam Calls Are Not the Only Problem. The TCPA protects consumers from unwanted calls that invade their privacy, without regard to the subject matter of the calls. Scam calls are far from the only problem. Debt collection callers make the most robocalls. The Fair Debt Collection Practices Act provides no protections or limits against unrelenting collection calls made by creditors collecting their own debts.

Strong Consumer Remedies Are Essential to Put Teeth in the TCPA’s Protections. Public enforcement alone has not prevented and cannot prevent the flood of illegal calls. Without

consumer suits, and particularly the availability of consumer class actions, there would be little incentive for callers to comply with the TCPA. Even now, private TCPA suits do not even begin to match the level of complaints consumers make: consumer suits under the TCPA in 2017 amounted to only six hundredths of a percent of the seven million complaints about robocalls that consumers filed with the FTC and the FCC.

The FCC Should Interpret the Term “Automated Telephone Dialing System” (ATDS) Broadly So That Consumers Are Protected From Unwanted Calls. The TCPA’s prohibition against autodialed calls to cell phones without the called party’s consent is of utmost importance to consumers. The FCC must resist industry requests to eviscerate this protection by interpreting the term “automatic telephone dialing system” (ATDS) so narrowly that it does not apply to the devices that are used today to inundate consumers with unwanted calls. The statutory language should be interpreted to encompass any device that dials numbers from a stored list, regardless of whether it generates those numbers. In addition, the FCC should interpret the term “capacity” in the ATDS definition broadly, coupled with a specific carve-out for the ordinary use of a smartphone. Finally, the word “sequential” in the definition of ATDS should be interpreted not to be limited to numerical order, but to include the generation and dialing of numbers in any sequence, including a sequence selected from a list.

The FCC Should Clearly and Forcefully Shut Down TCPA Evasions. An example is clicker systems, which require that a human click a button over and over again to launch calls for a set of agents who will speak to the called parties who answer.

The TCPA Governs All Calls That Use ATDS Equipment. The TCPA’s protections explicitly and unquestionably apply to “any call . . . using any automatic telephone dial system.” The FCC should resist calls to misinterpret the statute as applying only to calls that use the automated capacity of the system.

Calls to Reassigned Numbers Must Be Closely Limited. The FCC should reiterate the rule that “called party” means the person actually called, even if the telephone number has been reassigned from a person who had given consent. The Commission should push forward with its initiative to facilitate compliance by creating a reassigned number database.

Revocation of Consent Should Be Simple and Always Permitted. We support the Commission’s idea of designating clearly defined and easy-to-use methods for consumers to revoke their consent to receive robocalls. This initiative will encourage callers to make these revocation methods available to consumers, which will make it easier for consumers to regain control of their phones by revoking consent, and thus protect their privacy.

The FCC Should Revisit the Broadnet Ruling. The FCC’s 2016 Broadnet Ruling concludes that “the term ‘person’ in section 227(b)(1) does not include a contractor acting on behalf of the federal government, as long as the contractor is acting as the government’s agent in accord with the federal common law of agency.” This determination is incorrect. The FCC should retract it and definitely should not extend the Ruling to contractors working for state and local governments, or to independent contractors.

The FCC Should Issue Rules Promptly Regarding Calls to Collect Federal Government Debt. In 2015, Congress created an exemption to the TCPA for calls to collect federal government debt, and directed the FCC to issue regulations to implement the amendment within nine months. Yet although the FCC issued regulations in 2016 that would have created consumer protections for these calls, it has withdrawn its request that OMB approve them. The FCC should finalize these rules without further delay.

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I. The Telephone Consumer Protection Act is an Essential Tool to Restrict Automated Calls.

A. The Purpose of the TCPA is to Govern Automated Calls.

In these comments, we seek to answer all of the questions asked in this proceeding.¹ All of our recommendations are grounded in the language of the Telephone Consumer Protection Act (TCPA)² and its legislative history. However, as the FCC addresses how to answer these questions, we urge the Commissioners to keep in mind the increasing severity of the problem caused by unwanted automated calls to American businesses and consumers.

Unwanted robocalls are an invasion of privacy. As was forcefully stated by Senator Hollings, the TCPA's sponsor, "[c]omputerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall."³

There has been much discussion by the FCC in recent months about the necessity of dealing with scam calls.⁴ And scams are indeed important for the FCC to deal with. But scams are not the

¹ Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Seeks Comments on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, CG Docket Nos. 18-152 and 02-278 (Rel. May 14, 2018), *available at* <https://ecfsapi.fcc.gov/file/0514497027768/DA-18-493A1.pdf>.

² 47 U.S.C. § 227.

³ 137 Cong. Rec. S16204, S16205 (Nov. 7, 1991) (also quoting Justice Brandeis, in *Olmstead v. U.S.*, 277 U.S. 438, 479, 48 S. Ct. 564, 72 L. Ed. 944 (1928), declaring "the right to be let alone is the most comprehensive of rights and the one most valued by civilized men"). *See also* S. Rep. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972-1973 ("The Committee believes that Federal legislation is necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services."); 137 Cong. Rec. S18781-02 (1991) (quoting Sen. Hollings as stating "These calls are a nuisance and an invasion of our privacy."); *Mims v. Arrow Fin. Services, L.L.C.*, 565 U.S. 368, 370 132 S. Ct. 740, 181 L. Ed. 2d 881 (2012) (noting that the TCPA "bans certain practices invasive of privacy").

⁴ *See* Remarks of FCC Chairman Ajit Pai at the FCC-FTC Policy Forum: "Fighting the Scourge of Illegal Robocalls" (Mar. 23, 2018), *available at* <https://www.fcc.gov/document/chairman-pai-remarks-joint-fcc-ftc-illegal-robocall-policy-forum>.

focus of the TCPA. Protection of consumers' privacy rights was clearly foremost on Congress's mind when it enacted the telephone call restrictions of the TCPA. The congressional findings accompanying the TCPA repeatedly stress the purpose of protecting consumers' *privacy*:

- (5) Unrestricted telemarketing, however, can be an *intrusive invasion of privacy* and, when an emergency or medical assistance telephone line is seized, a risk to public safety.
- (6) Many consumers are outraged over the proliferation of *intrusive*, nuisance calls to their homes from telemarketers.
* * *
- (9) Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that *protects the privacy of* individuals and permits legitimate telemarketing practices.
- (10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be *a nuisance and an invasion of privacy*.
* * *
- (12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this *nuisance and privacy invasion*.
- (13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and *an invasion of privacy*, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.
- (14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are *an invasion of privacy*, and interfere with interstate commerce.⁵

The Supreme Court has recognized this legislative intent, noting that the TCPA “bans certain practices invasive of privacy.”⁶

The TCPA is an essential privacy protection law intended to protect consumers from the intrusions of unwanted automated and prerecorded calls to cell phones. Except in the case of an

⁵ Pub. L. 102-243, § 2, 105 Stat. 2394 (1991) (emphasis added) (found as a note to 47 U.S.C. § 227).

⁶ *Mims v. Arrow Fin. Services, L.L.C.*, 565 U.S. 368, 370, 132 S. Ct. 740, 744, 181 L. Ed. 2d 881 (2012).

emergency, and with an exception for calls to collect federal government debt,⁷ the TCPA permits these calls *only if* the consumer has given “prior express consent” to receive them.⁸

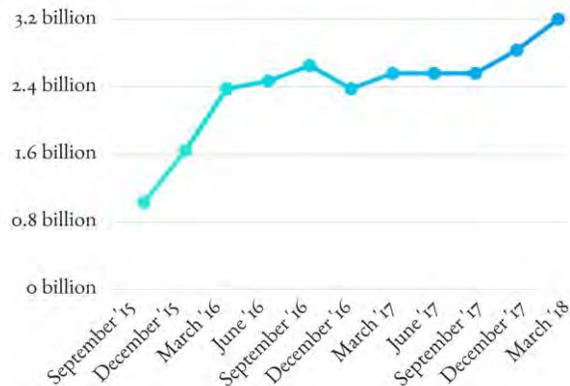
Despite the clear prohibitions in the TCPA, Americans are facing an escalating problem with robocalls. The calls are unrelenting. The callers will not stop, despite consumers’ pleas. The Federal Trade Commission’s (FTC) Biennial Report to Congress⁹ reveals a surge in consumer complaints about robocalls in 2017, with 4.5 million complaints filed in 2017 compared to 3.4 million in 2016. This rise in complaints is consistent with an increased use of intrusive and disruptive robocall technology. But the problem is far worse than the FTC’s complaint numbers indicate. Industry data shows that over three *billion* robocalls are now made *every month*, many of which are unwanted and illegal. Over 3.4 billion robocalls were made in the month of April 2018 alone. Looking at the quarterly totals of calls, robocalls increased from 831 million in September 2015 to 3.2 billion in March 2018—a 285% increase in less than three years.

⁷ Congress amended the TCPA in 2015 to allow calls to be made without consent to collect a debt owed to or guaranteed by the United States, subject to regulations issued by the FCC. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301,129 Stat. 584 (Nov. 2, 2015).

⁸ 47 U.S.C. § 227(b)(1)(A)(iii).

⁹ Federal Trade Commission, Biennial Report to Congress Under the Do Not Call Registry Fee Extension Act of 2007 (Dec. 2017), available at https://www.ftc.gov/system/files/documents/reports/biennial-report-congress-under-do-not-call-registry-fee-extension-act-2007-operation-national-do-not/biennial_do_not_call_report_fy_2016-2017_0.pdf.

Table 1
Monthly Number of Robocalls



The complaints about unwanted robocalls are still pouring in to government agencies. Private litigation and public enforcement have not kept pace with the problem—both the number of calls and the number of complaints by consumers increase every month. Robocalls are very inexpensive to make. Callers can discharge tens of millions of robocalls over the course of a day at the mere cost of only a penny per call.¹⁰

B. Who Is Making These Calls?

The problem of abusive, unwanted robocalls is not limited to scam calls. Scam calls—calls that are selling products or services the callers do not intend to provide, or that are pretexts for identity theft—are a serious problem, but are only one small part of the invasive robocall problem in the United States.

We know well enough who is making the overwhelming majority of robocalls, because of call-blocking technologies that track the identity of callers. The Robocall Index, created by a call-blocking app provider, YouMail, identifies the robocallers who make the most robocalls every

¹⁰ For example, the website [Robodial.org](https://www.robodial.org) quotes one cent per call for calls of up to fifteen seconds, at <https://www.robodial.org/instantpricequote/> (last accessed June 8, 2018), and Call-Em-All Pricing quotes pricing from a high of six cents per call to \$7.50 per month “for one inclusive monthly fee. Call and text as much as you need.” See <https://www.call-em-all.com/pricing> (last accessed June 8, 2018).

month.¹¹ The leading robocallers are not scammers; scammers actually account for only a small fraction of the robocalls to consumers in the United States. In March of 2018, only two scam callers (those marked in bold in Table 2, below) made the list of the top twenty sources of robocalls. Banks, credit card companies, retailers, and debt collectors, all of whom were collecting debts, according to the robocall blocker, took seventeen of the top twenty spots.

Table 2
Top Twenty Robocallers in the United States
March 2018¹²

1. Capital One	8. Loan scam	14. Barclaycard
2. <i>Portfolio Recovery Associates</i> (debt collection)	9. AT&T	15. First Premier Bank
3. Wells Fargo	10. <i>Enhanced Recovery Corporation</i> (debt collection)	16. PayPal
4. Santander	11. Fingerhut	17. Chase Bank
5. A health insurance scam	12. <i>Transworld Systems</i> (debt collection)	18. Chase Bank (alternate number)
6. Comcast	13. <i>Encore Receivables Management</i> (debt collection)	19. Kohl's
7. Job availability call (substitute teachers)		20. Citibank

By no means do we intend to minimize the problem with scam calls. They are a real problem that must be dealt with. But they are not, by any measure, the entire problem. In the first two months of 2018, scam calls accounted for only a quarter of all robocalls:

¹¹ The existence of these third-party call-blocking technologies does not fully address the problem. Unfortunately, many consumers do not use them. Moreover, many consumers, particularly traditional landline users, lack access to effective robocall-blocking tools.

¹² See YouMail Robocall Index, available at <https://robocallindex.com/> (last accessed June 8, 2018). To come up with the names of the callers, we simply called the numbers listed on the website to see who answered. As discussed later in these comments, the italicized callers are third-party debt collectors.

Table 3
Estimated National Robocalls By Type¹³

Category	January	February
Alerts and Reminders	27%	28%
Payment Reminders	33%	32%
Telemarketing	15%	16%
Scams	25%	24%

This list of robocallers begs the question of which calls are objected to by consumers. We know the answer from the developers of one of the leading robocall-blocking apps: YouMail’s Call Blocker.¹⁴ Users of the call-blocking program routinely block all of the calls in the bottom two categories—Telemarketing and Scams.¹⁵ Very few of the calls in the first category—Alerts and Reminders—are blocked. Most of the calls in the second category—Payment Reminders (which is a polite characterization for the debt collection callers)—are blocked by their recipients.¹⁶

C. Debt Collection Robocalls Are a Huge Problem That Often Only the TCPA Can Address.

As can be surmised from the huge number of debt collection robocalls made in the United States, one third of all American consumers have accounts in collection.¹⁷ Indeed, ACA International, “a trade group located in the United States representing collection agencies, creditors, debt buyers, collection attorneys, and debt collection industry service providers,”¹⁸ has been a primary driver of efforts before the Commission to roll back the consumer protections in the

¹³ Press Release, YouMail, YouMail Releases Detailed Breakdown of U.S. Robocalls in February (Mar. 21, 2018), *available at* <https://www.prnewswire.com/news-releases/youmail-releases-detailed-breakdown-of-us-robocalls-in-february-300616969.html> (last accessed June 8, 2018).

¹⁴ See <https://www.youmail.com/home/feature/stop-robocalls> (last accessed June 8, 2018).

¹⁵ This information was provided by Alex Quilici, CEO of YouMail, on March 28, 2018.

¹⁶ *Id.*

¹⁷ See Urban Institute, Debt in America: An Interactive Map (last updated May 16, 2018), *available at* <https://apps.urban.org/features/debt-interactive-map/> (last accessed June 8, 2018).

¹⁸ https://en.wikipedia.org/wiki/ACA_International.

TCPA,¹⁹ both before and after the FCC's 2015 Omnibus Order.²⁰ This organization was also the lead petitioner in the appeal of the FCC's pro-consumer order issued in 2015, the appeal that led to the recent decision of the D.C. Circuit Court of Appeals in *ACA International v. F.C.C.*²¹ [hereinafter *ACA International*].

It is a common misconception that the federal Fair Debt Collection Practices Act²² (FDCPA) provides sufficient protections for consumers against invasive and abusive debt collection calls. Unfortunately, that is the not case, for several reasons. The primary reason is that the FDCPA does not cover collection efforts made by creditors to collect their own debts; it covers only third-party debt collectors—those collecting debts originally owed to others.²³ So of the twenty top robocallers listed in Table 2, only four (whose names are in italics) are even covered by the FDCPA. Debt collection calls by all of the remaining robocallers are not covered by the FDCPA, because they were collecting their own debts.

This leaves the TCPA as the principal federal law providing protections against unrelenting debt collection calls to consumers' cell phones. Below is one case example of a creditor using robocalls to harass a consumer multiple times every day:

Tonya Stevens of Tampa, Florida purchased some appliances from Conns Appliances, Inc., a Texas company, in late 2014. Although her payments were not always on time, she always made them. Nevertheless, over the next fourteen months Conns called Ms. Stevens on her cell phone 1,845 times, over 100 times a month,

¹⁹ See, e.g., *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petition for Rulemaking of ACA International, CG Docket No. 020278 (filed Feb. 11, 2014), available at <https://ecfsapi.fcc.gov/file/7521072801.pdf>.

²⁰ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961 (F.C.C. July 10, 2015) [hereinafter 2015 TCPA Omnibus Order].

²¹ 885 F.3d 687 (D.C. Cir. 2018).

²² 15 U.S.C. § 1692.

²³ 15 U.S.C. § 1692a(6).

often as many as eight or nine times a day.²⁴ These calls were made despite Ms. Stevens' repeated requests that Conns' agent stop calling. During one call, she said, "I am at my grandmother's death bed, quit calling." Conns' position is that once Ms. Stevens provided consent to be called on her cell phone, she could never revoke that consent.

This case is emblematic of the problem Americans are facing with robocalls. Below are several more examples of the extensive problem of debt collector robocallers. Each of these cases is recent; each involves hundreds—if not thousands—of calls; and each involves multiple calls after repeated requests from the consumer to stop calling:

- a) **Robertson v. Navient Solutions.**²⁵ Shortly after Ms. Robertson acquired a Certified Nursing Assistant certificate, which she had funded with federal and private student loans, she experienced health problems and also had to care for her dying father. She was unable to work, and applied for disability. She received forbearance on her federal student loans, but not for the private loans. Ms. Robertson made payments when she was able. However, payments did not stop the calls. In total, Navient called Ms. Robertson 667 times, including 522 calls regarding the private student loans after she told them to stop calling. Navient would call back the same day even when Ms. Robertson told the collection agent that she would not have any money to pay until the following month.
- b) **Gold v. Ocwen Loan Servicing.**²⁶ The consumer consented to being contacted about his mortgage debt, and answered several collection calls, but then asked for the calls to stop. However, the servicer called his cell phone at least 1,281 times between April 2, 2011 and March 27, 2014, after repeated requests to stop.
- c) **Montegna v. Ocwen Loan Servicing.**²⁷ The servicer called the consumer on his cell phone at least 234 times, even after he requested that the calls stop.
- d) **Todd v. Citibank.**²⁸ Sometime in January 2016, the bank began calling the consumer's cell phone. The calls, often made twice a day, totaled 350 calls, even after repeated requests to

²⁴ As this case is in arbitration, there is no formal complaint. However, Appendix 1 is a calendar showing the number of times these calls were made each day and each week.

²⁵ Robertson v. Navient Solutions, Inc., Case No.: 8:17-cv-01077-RAL-MAP (M.D. Fla. filed May 8, 2017).

²⁶ 2017 WL 6342575 (E.D. Mich. Dec. 12, 2017).

²⁷ 2017 WL 4680168 (S.D. Cal. Oct. 18, 2017).

²⁸ 2017 WL 1502796 (D.N.J. Apr. 26, 2017).

stop calling. The court identified the consumer’s injury as disturbance of her “privacy, peace, and quiet” by the numerous telephone calls.”²⁹

D. Real Telemarketers Are Making Many of the Unwanted Robocalls.

Telemarketing calls are also the source of millions of unwanted, and illegal, robocalls. Telemarketers with real products to sell (*e.g.*, car insurance, home security networks, even marketing an independent film) bombard consumers’ homes and cell phones with illegal robocalls. It is important to note that “real” telemarketing calls, often with a human caller at the other end of the phone, are not scammers. Their caller IDs are sometimes—although not always—accurately displayed.³⁰ So addressing scams and caller ID spoofing, while important, will not be enough to deal with these maddening and invasive—and illegal—“real” telemarketing calls.

One example of a particularly intrusive telemarketing campaign is the case of *Golan v. Veritas Entertainment*, decided by a federal court in Missouri in 2017.³¹ In its efforts to market a political film, the company made so many calls in violation of the TCPA—over 3.2 million—that the judge ordered the statutory damages award reduced to just \$10 per call. If he had stuck with \$500 per call, the total award would have been \$1.6 billion, which he held to be so disproportionate as to violate due process. In making an award of \$32,424,930, the court noted:

This reflects the severity of the offense, a six-day telemarketing campaign which placed 3.2 million telephone calls, as well as respecting the purposes of the TCPA to have a deterrent effect and to account for unquantifiable losses including the invasions of privacy, unwanted interruptions and disruptions at home, and the

²⁹ *Id.* at *8.

³⁰ See, *e.g.*, David Lazarus, *Putting the Kibosh on Robocalls is Easier Said Than Done*, Los Angeles Times, June 2, 2015, available at www.latimes.com (quoting Lindsay Hutter of the Direct Marketing Association as saying “Responsible telemarketers use caller ID for transparency and to clearly identify to the customer who is calling them.”). Cf. Consumer Federation of America, *Understanding Your Telemarketing Rights and Avoiding Fraud*, available at https://consumerfed.org/pdfs/Understanding_Telemarketing_Rights.pdf (noting that, with respect to consumers’ do-not-call rights, “Legitimate telemarketers follow the rules. Scammers don’t.”).

³¹ 2017 WL 3923162 (E.D. Mo. Sept. 7, 2017).

wasted time spent answering unwanted solicitation calls or unwanted voice messages.³²

This sentiment was emphasized in another large class action case, *Krakauer v. DISH Network*,³³ in which the court not only refused to unwind the jury’s award of \$400 per call, but actually trebled the award, for each of 51,000 telemarketing calls. The court pointed out:

It is not “grossly excessive” to require Dish to pay treble damages for the more than 50,000 willful violations it committed, given the nature of the privacy interests repeatedly invaded and Dish’s continuing disregard for those interests, the extent of the violations, and the need to advance reasonable governmental interests in deterring future violations.³⁴

The court found it appropriate to treble the jury’s award in light of the seller’s “sustained and ingrained practice of violating the law,” and the need for deterrence.³⁵

Below are just a few examples of pending or resolved class action lawsuits that used the TCPA to obtain redress for consumers for tens of millions of illegal robocalls:

1. **Ott v. Mortgage Investors Corp.**³⁶ In this case, which settled in 2016, there were over 64 million illegal telemarketing calls made to millions of veterans to convince them to refinance their VA loans. The consumers reported receiving dozens of unwanted calls from the defendant, who repeatedly failed to remove their telephone numbers from its call list upon demand. The defendant’s telemarketing efforts were so aggressive that thousands of consumers filed complaints with the FTC and other agencies regarding the unwanted and harassing telemarketing calls. The technology used was an autodialer with a human agent.
2. **Strache v. SCI Direct, Inc.**³⁷ This class action involved over four million calls made by a company selling cremation services. One of the consumers had kept receiving these calls,

³² *Id.* at *4 (emphasis added).

³³ 2017 WL 4417957 (M.D.N.C. Oct. 3, 2017).

³⁴ *Id.* at *11 (emphasis added; citation omitted). *See also* U.S. v. DISH Network, 256 F. Supp. 3d 810, 940 (C.D. Ill. 2017) (similar case brought against DISH by the United States, as well as the states of California, Illinois, North Carolina and Ohio; the court ordered DISH to pay a civil penalty of \$168,000,000 “for Dish’s violation of the TSR done with knowledge or knowledge fairly implied,” plus statutory damages of \$84,000,000).

³⁵ *Krakauer v. DISH Network, L.L.C.*, 2017 WL 2242952, at *12–13 (M.D.N.C. May 22, 2017).

³⁶ *Ott v. Mortg. Investors Corp. of Ohio*, 65 F. Supp. 3d 1046 (D. Or. 2014).

³⁷ Case No. 1:17-cv-04692 (N.D. Ill.); original case was *Allard v. SCI Direct, Inc.*, Case No. 3:16-cv-01033 (M.D. Tenn.).

even after sending emails, calling back and requesting that the calls stop, and filing an FTC complaint.

3. **Smith v. State Farm Mutual Auto. Ins. Co.**³⁸ This class action was filed after a marketing company made 350 million phone calls to different consumers from a list of numbers it found in the White Pages. During each call, a recording instructed recipients to “press 1 now” for a better deal on auto insurance. Recipients who pressed 1 were transferred to a live “screener,” who asked questions and then transferred the call to insurance agents, including agents for State Farm Mutual Automobile Insurance Company. The calls resulted in leads to State Farm agents for at least 62,827 unique cell phone numbers. State Farm agents continued to employ the marketers’ services for over six months after the lawsuit was brought.

E. Class Actions Are Not the Problem.

Robocallers like to point to the numbers of class actions as fodder for their claim that TCPA rules are out of control. Class actions regarding TCPA violations have increased over the past several years, but they have not increased nearly as dramatically as the number of robocalls has increased. The annual number of robocalls increased from fourteen billion in 2015 to thirty billion in 2017. *See* Table 4. However, the numbers of robocalls have increased even more dramatically in the first four months of 2018, escalating to 3.4 billion just in the month of April 2018. Even if the monthly rate does not increase beyond April’s total, there will be over forty billion robocalls this year.

The number of complaints to government agencies has also increased dramatically—a 100% increase during the same three-year period, from 3.5 million to 7.1 million.³⁹ Yet the number of TCPA lawsuits *of all types*—both class actions and individual actions—increased only nineteen percent, from 3687 in 2015 to 4392 in 2017. The key point is that robocalls are rapidly increasing, which is clearly upsetting the Americans subjected to them.

³⁸ Case No. 1:13-cv-02018 (N.D. Ill.)

³⁹ Growth calculated through analysis of 2015 and 2017 figures. Federal Trade Commission, National Do Not Call Registry Data Book FY 2017, at 6, (Dec. 2017), *available at* https://www.ftc.gov/sites/default/files/filefield_paths/dnc_data_book_fy2017.pdf (last accessed June 8, 2018).

Table 4
Comparing Lawsuits to Complaints to Robocall Numbers

	TCPA Lawsuits Filed ⁴⁰	Complaints to FTC & FCC ⁴¹	Total Number of Robocalls in U.S. ⁴²
2015	3687	3,578,710	14,214,000,000
2016	4860	5,340,234	29,300,000,000
2017	4392	7,157,370	30,500,000,000

Note that the numbers of TCPA lawsuits filed include many individual actions, as well as class actions generally used in the egregious situations described in section I(D), above. Class actions serve a critical role in more effectively deterring robocallers from violating the law, as well as protecting consumers from widespread TCPA violations. Often a single consumer is hounded by persistent telemarketing calls from the same company.⁴³ With many telemarketing campaigns, however, the campaign will make millions of illegal calls, but only one or two to any given consumer. The only effective way to enforce the TCPA's protections against these widely cast illegal calls is through either public enforcement or private class actions, because the TCPA allows a consumer to recover only \$500 to \$1500 per call, and does not require the defendant to reimburse the consumer for the attorney fees incurred to prosecute the case. As a result, individual suits involving just one or two calls are not economically feasible. (And a million individual suits for a million-robocall campaign would overwhelm the court system in any event.)

Without the availability of class actions, there would be little incentive for callers to comply with the TCPA. As is evident from the comparison of the number of complaints filed by

⁴⁰ WebRecon, *Web Recon Stats for Dec 2017 & Year in Review*, available at <https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review/> (last accessed June 8, 2018).

⁴¹ See Federal Trade Commission, National Do Not Call Registry Data Book FY 2017, at 6 (Dec. 2017), available at https://www.ftc.gov/sites/default/files/filefield_paths/dnc_data_book_fy2017.pdf.

⁴² The 2016 and 2017 numbers are derived from the sum of monthly totals. See YouMail Robocall Index, available at <https://robocallindex.com/> (last accessed Apr. 12, 2018). The 2015 number is derived from the average number of calls in the six months for which totals are provided. *Id.*

⁴³ See, e.g., *Jenkins v. mGage, L.L.C.*, 2016 WL 4263937 (N.D. Ga. Aug. 12, 2016) (individual action challenging 150 text messages promoting events at a nightclub despite 17 requests to stop).

consumers with the FTC and the FCC, and the number of cases actually filed, only a tiny proportion of complaints actually mature into actual lawsuits. As there are no fee-shifting provisions in the TCPA, the economics of bringing litigation under the TCPA require that there be significant numbers of violations (multiples of the \$500 statutory damages) before litigation regarding even the most blatant violations is feasible. These cases are time-consuming to litigate, and they require expensive expert witnesses to prove the claims. The lawyers who bring these cases are paid only if they can successfully prove the elements of the claims under the TCPA.

Consumers who are not members of the class also benefit from class actions, whether the actions are settled or resolved in trial. Class actions provide a much-needed deterrent effect against violating the TCPA. This deterrent limits the number of unwanted calls and texts to cell phones for the rest of us.

In dissenting from the FCC's 2015 Omnibus Order,⁴⁴ Chairman (then Commissioner) Pai cited three TCPA cases as evidence of inappropriate litigation under the TCPA.⁴⁵ But these cases do not provide a reason to weaken the TCPA. The courts dismissed each of the cases cited as meritless. The three cases that Chairman Pai cited illustrate that our justice system, while not perfect, does a dependable job of weeding out meritless or abusive cases:

1. **Emanuel v. Los Angeles Lakers, Inc.**⁴⁶ In this case, the consumer attended a Lakers game during which attendees were invited to send a text message to a specified telephone number for the opportunity to have the message appear on the scoreboard. After the consumer sent the Lakers a text message, he received a confirmatory text back. He then sued, alleging that this confirmatory text violated the TCPA's prohibition against sending a consumer a text message without the consumer's prior consent.

The District Court granted the Lakers' motion to dismiss with prejudice. Taking a

⁴⁴ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961 (F.C.C. July 10, 2015).

⁴⁵ *Id.* at 8072 (Pai, Comm'r, dissenting).

⁴⁶ 2013 WL 1719035 (C.D. Cal. Apr. 18, 2013).

“common sense” approach, the court held that the challenged text message was not actionable under the TCPA. By sending his original message, the consumer expressly agreed to receive a return confirmatory text. This confirmatory text was not the type of intrusive communication prohibited by the TCPA, because it responded directly to the consumer’s original text.

2. **Gragg v. Orange Cab Co., Inc.**⁴⁷ After the consumer requested a taxi, the dispatcher manually inputted pertinent information, and pressed “enter” to transmit the data to TaxiMagic to reach the nearest available driver. A driver transmitted his acceptance of the request by pressing “accept” on his Mobile Data Terminal and then sent the consumer a message that read “Taxi # 850 dispatched @ 05:20.” The consumer brought a class action suit alleging that the text message violated the TCPA as it was made with an autodialer without prior express consent.

The court rejected the consumer’s argument that the modem utilized by defendants to operate the TaxiMagic program was a “system” as envisioned by TCPA precedent: “The Court declines to adopt an interpretation of ‘system’ that would lead to an absurd result.”⁴⁸ The court entered summary judgment against the consumer on the TCPA claim.

3. **Kinder v. Allied Interstate, Inc.**⁴⁹ Soon after acquiring a pager number, the plaintiff realized that it was receiving thousands of unwanted pages that were not meant for him. He then disconnected the pager, but recorded all the calls made to it and filed many suits regarding them. The appellate court affirmed the trial court’s finding that the plaintiff intentionally subjected himself to unwanted calls and that, as a matter of policy, this conduct precluded any recovery under the TCPA.⁵⁰

F. The FCC’s Order in this Proceeding Should Reflect the Goals of the TCPA.

The TCPA’s goal of protecting consumers from unwanted calls and messages should be paramount in this proceeding. The enormous volume of complaints about robocalls that the FCC and FTC receive shows how important this issue is to American consumers.

⁴⁷ 995 F. Supp. 2d 1189 (W.D. Wash. 2014).

⁴⁸ *Id.* at 1192 (emphasis added).

⁴⁹ 2010 WL 2993958 (Cal. Ct. App. Aug. 2, 2010).

⁵⁰ *Id.* at *8.

“Because the TCPA is a remedial statute intended to protect consumers from unwanted automated telephone calls..., it should be construed in accordance with that purpose.”⁵¹ This means that when the TCPA permits the FCC to make a policy decision between protecting consumers from more robocalls, or permitting more robocalls to be made, the interests of consumers—the intended beneficiaries of the law—should be its guiding light.

II. The Definition of an ATDS Under the TCPA

The FCC’s request for comments is triggered in large part by the decision of the D.C. Circuit Court of Appeals in *ACA International v. F.C.C.*⁵² regarding the definition of an autodialer (ATDS) under the TCPA. The court makes clear in several places in its decision that the FCC has the decision-making authority to clarify the issues.⁵³ We agree that the FCC does have this authority, and urge it to exercise this authority with great care so as to ensure that the TCPA’s protections are effective.

There are multiple issues to be addressed in determining the definition of an ATDS:

- 1) Is equipment that dials stored numbers, without generating them, an ATDS?
- 2) What is the meaning of the word “capacity” in the definition?
- 3) What is the meaning of “random or sequential”?
- 4) Can the definition of ATDS be framed so as to deter evasions such as “click dialing”?
- 5) Does the statutory prohibition against making calls using an ATDS apply to all calls made by that equipment?

⁵¹ *Van Patten v. Vertical Fitness Grp., L.L.C.*, 847 F.3d 1037, 1047 (9th Cir. 2017).

⁵² 885 F.3d 687 (D.C. Cir. 2018).

⁵³ *See id.* at 699 (“[T]he Commission retains a measure of authority under the TCPA to fashion exemptions to the restrictions on use of autodialers to call wireless numbers. *Id.* § 227(b)(2)(C). The agency presumably could, if needed, fashion exemptions preventing a result under which every uninvited call or message from a standard smartphone would violate the statute.”), 703 (“It might be permissible for the Commission to adopt either interpretation”).

We will address each of these issues separately below, and respond to the requests made in the petition of the U.S. Chamber Institute for Legal Reform.⁵⁴ The bottom line, however, is that if the Commission were to define an ATDS as the robocallers are requesting, the effect will be that most, if not all, automated calls with a human agent who comes on the line after the call is dialed will not be covered by the restrictions of the TCPA. This would mean that consumers would be unable to stop not only the hundreds or thousands of debt collection calls described in section I(C) of these comments, but also a daily deluge of “how did you like your shopping experience?” or “today is Arbor Day” calls and texts. It simply could not have been the intent of Congress to allow all robocallers who do not use artificial-voice or prerecorded messages to evade coverage under the statute. In fact, that would be as arbitrary and unreasonable an interpretation of ATDS as the one the court overturned in *ACA International*. Rather than including too many pieces of equipment in the scope of the prohibition, such a definition would *exclude* too many—if not all—of the dialers that robocallers use.

A. Equipment that Stores and Dials Numbers Meets the Definition of an ATDS.

The TCPA defines an ATDS as follows:

- (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.⁵⁵

This language cannot reasonably be interpreted to require that the numbers dialed be produced by a random or sequential number generator. To do so would read the word “store” out of the statute, and render significant provisions of the statute superfluous or nonsensical.

⁵⁴ *In re* Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, U.S. Chamber Institute for Legal Reform, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed May 3, 2018), available at <https://ecfsapi.fcc.gov/file/105112489220171/18050803-5.pdf>.

⁵⁵ 47 U.S.C. § 227(a)(1) (emphasis added.)

As the Third Circuit noted in its unpublished opinion *Dominguez v. Yahoo, Inc.*, “it is unclear how a number can be *stored* (as opposed to *produced*) using a random or sequential number generator.”⁵⁶ Storage is an entirely separate function from generation of numbers. For example, one might store milk generated by a cow, but one would not store milk *using* a cow. In fact, it is not possible for one system both to store and to produce numbers. Those two functions are mutually exclusive. If the system already has the numbers in it (stored), then there would be no need for it to produce or generate the numbers. Numbers cannot be *stored* using a random or sequential number generator, so the phrase “using a random or sequential number generator” must modify only the word “produce.”

Moreover, traditional canons of statutory construction support a reading of the statute that treats “storage” of telephone numbers separately from “production” of those numbers, and that treats “using a random or sequential number generator” as applying only to “produce.” First, it is a traditional canon of statutory interpretation that “a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”⁵⁷ The ATDS definition includes the disjunctive “or,” meaning that an ATDS must include a system that simply *stores* telephone numbers, regardless of whether it *produces* the numbers.⁵⁸

⁵⁶ *Dominguez v. Yahoo, Inc.*, 629 Fed. Appx. 369, 373 n.1 (3d Cir. 2015) (“To the extent the District Court held otherwise, we clarify that the statutory definition is explicit that the autodialing equipment may have the capacity to store *or* to produce the randomly or sequentially generated numbers to be dialed. We acknowledge that it is unclear how a number can be *stored* (as opposed to *produced*) using a ‘random or sequential number generator.’ To the extent there is any confusion between the parties on this issue (or whether Yahoo’s equipment meets this requirement in *Dominguez*’s case), the District Court may address it on remand.” (emphasis in original)).

⁵⁷ *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001), which in turn cites *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115-116, 25 L. Ed. 782 (1879)).

⁵⁸ *See Bourff v. Rubin Lublin, L.L.C.*, 674 F. 3d 1238, 1241 (11th Cir. 2016) (explaining “or” in a similarly worded consumer protection statute).

If the phrase “using a random or sequential number generator” modifies both “store” and “produce,” the term “store” is essentially read out of the statute.

Interpreting “store” as independent of “using a random or sequential number generator” is also supported by the Last Antecedent Rule. Under that rule, a limiting clause or phrase “should ordinarily be read as modifying only the noun or phrase that it immediately follows.”⁵⁹ Applying this rule to section 227(a)(1)(A), the most straightforward reading is that the phrase “using a random or sequential number generator” modifies only the word “produce,” and not the word “store.” This reading also avoids a nonsensical reading of the word “store” and gives meaning to all words in the definition.

The callers’ interpretation not only reads the word “store” out of the statute, but also renders other portions of the statute superfluous or nonsensical. First, under 47 U.S.C. § 227(b)(1)(A)(iii), the statute allows autodialed calls to be made only to a party who has consented. Were the Commission to adopt the callers’ interpretation that the definition includes only telephone numbers *produced* randomly or sequentially from thin air, rather than generated from a stored database of inputted numbers, the prohibition of autodialed calls to consumers who had not consented to receive them would be meaningless. Autodialed calls would *always* reach parties who had not consented, because the calls would go to numbers that had been generated from thin air. Callers would have consent for calls to autodialed numbers only as a matter of sheer coincidence, if ever. Only if the prohibition encompasses calls made to a stored list of numbers, for which the caller will know whether it has obtained consent, does the prohibition make sense.

Second, the TCPA prohibits use of an autodialer in a way that ties up multiple lines of a multi-line business.⁶⁰ If an autodialer is defined just as one that dials numbers in a random or

⁵⁹ *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003).

⁶⁰ 47 U.S.C. § 227(b)(1)(D).

sequential order, not from a list, it would be impossible to implement this prohibition, because a caller calling numbers produced out of thin air would have no way of ensuring that it was not tying up a business's multiple lines.

Finally, the TCPA permits an award of treble damages if a violation is willful or knowing.⁶¹ If numbers were generated out of thin air, rather than from a list, a caller could never *know* it was calling an emergency line or a cell phone, so this provision would also be rendered meaningless.

Importantly, the court in *ACA International* did not in any way disavow the interpretation that equipment which stores and dials is an ATDS. The court was only critical of the 2015 Order's lack of clarity on this point:

So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity? The 2015 ruling, while speaking to the question in several ways, gives no clear answer (and in fact seems to give both answers). It might be permissible for the Commission to adopt either interpretation.⁶²

For these reasons, the FCC should interpret the ATDS definition to include any device that calls numbers from a stored list.

B. The Commission Should Define “Capacity” Broadly to Include Both Present and Potential Capabilities, While Carving Out Ordinary Use of Smartphones.

As noted above, we urge the FCC to adopt an interpretation of ATDS that will protect consumers from the billions of unwanted robocalls and texts that they will otherwise be unable to stop. The preceding section of these comments proposes an interpretation of “store” that is faithful to the statute and that would achieve Congress’s goal of protecting consumers from this massive invasion of privacy. In addition, the Commission should adopt a broad but reasonable

⁶¹ 47 U.S.C. § 227(b)(3). *See also* Lary v. Trinity Physician & Fin. Services., 780 F. 3d 1101, 1107 (11th Cir. 2015).

⁶² *ACA International v. F.C.C.*, 885 F.3d 687, 702-703 (D.C. Cir. 2018) (emphasis added).

interpretation of the term “capacity” in the statute, coupled with a clear carve-out for the ordinary use of a smartphone.

The D.C. Circuit Court’s analysis in *ACA International v. F.C.C.*⁶³ extensively discusses the FCC’s 2015 Order’s use of the word “capacity” in defining an ATDS. The court criticizes this portion of the 2015 Order, but not because it disagrees with the FCC’s determination that the term “capacity” includes potential as well as current capabilities. Rather, its criticism is premised on the effect of defining the word in such a way that it includes “hundreds of millions of everyday callers” within the constraints of the TCPA.⁶⁴ The court concluded that Congress could not have contemplated “the applicability of the statute’s restrictions to the most commonplace phone device used every day by the overwhelming majority of Americans.”⁶⁵

Although the court rejected the 2015 Order’s definition of ATDS because the consequences of the description had the effect of including the smartphones now carried by 80% of American adults,⁶⁶ the court expressly found that the word “capacity” in the ATDS definition includes future potential as well as present ability:

Virtually any understanding of “capacity” thus contemplates some future functioning state, along with some modifying act to bring that state about.⁶⁷

The court suggested that the Commission use its exemption authority as a way to resolve the tension between the need for a broad definition of ATDS and the goal of avoiding a definition that would sweep in the ordinary use of a smartphone:

[T]he Commission retains a measure of authority under the TCPA to fashion exemptions to the restrictions on use of autodialers to call wireless numbers. *Id.* § 227(b)(2)(C). The agency presumably could, if needed, fashion exemptions

⁶³ 885 F.3d 687 (D.C. Cir. 2018).

⁶⁴ *Id.* at 698.

⁶⁵ *Id.* at 699.

⁶⁶ *Id.* at 697 (“And as of the end of 2016, nearly 80% of American adults had become smartphone owners.”).

⁶⁷ *Id.* at 696.

preventing a result under which every uninvited call or message from a standard smartphone would violate the statute.⁶⁸

We agree with the D.C. Circuit, and with the many expressions of this view by the Commission, that the definition of ATDS should not sweep in the ordinary use of a smartphone. We also agree with the D.C. Circuit’s suggestion that a reasonable approach to achieving this goal while still protecting consumers from unwanted calls would be a broad definition of “capacity,” coupled with a carve-out for the ordinary use of a smartphone.

The first step in this approach, then, is a broad interpretation of the term “capacity.” We urge the Commission to adopt a definition that encompasses not just current capabilities, but also capabilities that can be achieved by installing software, as well as capabilities that the device achieves by working in tandem with other devices or systems.⁶⁹

The petition of the U.S. Chamber Institute for Legal Reform⁷⁰ urges the Commission to constrict the word capacity to mean “that both functions must be actually—not theoretically—present and active in a device at the time the call is made.” It argues that this conclusion is compelled by the fact that “[t]he statute uses the present tense.”⁷¹ But, as the D.C. Circuit pointed out, the word “capacity” inherently includes some potential functioning. This is an interpretation of the noun “capacity” that is not dependent upon whether the term is used in a sentence with a present-tense, past-tense, or future-tense verb.

The remaining issues are, first, what exemption authority the Commission can use to carve out ordinary use of a cell phone, and, second, how to frame the exemption. The D.C. Circuit

⁶⁸ *Id.* at 699 (emphasis added).

⁶⁹ *See, e.g.,* Moore v. DISH Network, 57 F. Supp. 3d 639 (N.D. W. Va. 2014) (predictive dialer is autodialer if it has capacity to be upgraded by software to store or generate numbers randomly or sequentially; human involvement in inputting the number is irrelevant).

⁷⁰ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, U.S. Chamber Institute for Legal Reform, Petition for Declaratory Ruling, CG Docket No. 02-278, at 22 (filed May 3, 2018), available at <https://ecfsapi.fcc.gov/file/105112489220171/18050803-5.pdf>.

⁷¹ *Id.*

referred to the Commission’s exemption authority under section 227(b)(2)(C). That exemption authority may not be not appropriate for this purpose, as it only permits the FCC to exempt calls that are not charged to the called party. However, the FCC’s general authority to “prescribe regulations to implement the requirements of” section 227(b)⁷² should allow it to interpret the phrase “make any call” or the term “using any automatic telephone dialing system” in section 227(b)(1)(A) to carve out the ordinary use of a smartphone.

We propose that the caller’s *ordinary use* of the equipment should be the definitive criterion. Regardless of whether the equipment could be adapted with a single application or with a massive reworking, the seminal question to avoid qualifying as an ATDS for purposes of coverage under the TCPA should be whether its basic use by the particular caller is to make large numbers of automated calls in short periods of time. Therefore, we propose that the FCC define the types of ATDS equipment that are excluded from the definition as:

Equipment which otherwise meets the definition of an “automatic telephone dialing system” for purposes of section 227(b)(1)(A) does not include equipment that the caller shows is not customarily used by the caller to make large numbers of automated calls in short periods of time.

We recommend against including any exact numbers in this definition (*e.g.*, how many calls, in how many minutes) because some members of the calling industry will simply program their equipment to fit just under the triggering thresholds criteria, whatever the thresholds are set to be. If the FCC chooses to include exact numbers in the definition, we recommend that it set low numbers. But, of even greater importance, we recommend that the Commission make it known that it will

⁷² 47 U.S.C. § 227(b)(2) (“The Commission shall prescribe regulations to implement the requirements of this subsection.”).

initiate a program of monitoring the industry, and that it will tighten the standards if it finds that callers are making massive robocall campaigns by using dialers designed to evade the limit.⁷³

The Commission asks a number of questions about how simple it must be to add a robocalling feature to a system in order for the Commission to treat it as part of the system's "capacity." We think that the approach of a broad definition of capacity, coupled with a carve-out for ordinary use of a smartphone, will make it unnecessary to resolve those issues. In other words, a carve-out for ordinary use of a smartphone will resolve the issue that caused the D.C. Circuit to set aside the 2015 Order, without the need to draw precise lines around the term "capacity." The goal of defining ATDS in a way that captures the robocall campaigns to which consumers object so strongly, but without sweeping in ordinary use of a smartphone, is best accomplished, and will dovetail most closely with the goals of the statute and the expectations of consumers, by way of such a carve-out.

The carve-out approach is also less likely to become obsolete than an attempt to narrow the definition of capacity. For example, the ease of modifying a smartphone changes with the development of each new app. With technology developing so rapidly, the appropriateness of a definition that is tied to the ease of modifying a dialing system is unlikely to last very long.

In addition, any attempt to draw precise lines about how simple it must be to add a robocalling feature would invite evasions, as it would create a demand for equipment that is just barely outside those lines but that still enables callers to inundate consumers with unwanted calls. Regardless of whether the equipment could be adapted with a single application or with a massive reworking, the key criterion to avoid qualifying as an ATDS for purposes of coverage under the

⁷³ The Commission should also make it clear that a business cannot evade the prohibition by instructing or allowing an employee to use a company-supplied or employee-owned smart phone to make mass robocalls or send mass texts, even if the employee customarily uses the phone for other purposes.

TCPA should be whether the caller customarily uses the equipment to make large numbers of automated calls in a short period of time.

C. A “Random or Sequential Number Generator” Should be Interpreted to Include Selection of Numbers from a List in Any Sequence.

The U.S. Chamber Institute for Legal Reform argues that the definition of ATDS applies only to a device that is being used to produce random or sequential numbers and to dial them.⁷⁴ As discussed in section II(B) of these comments, this argument reads “store” out of the statute. But in any event, the word “sequential” should be interpreted simply to mean that numbers are generated and dialed in a sequence, including a sequence selected from a list. The court in *ACA International* expressly endorses this broad definition of “sequential”: “Anytime phone numbers are dialed from a set list, the database of numbers must be called in *some* order—either in a random or some other sequence.”⁷⁵ Notably, Congress did *not* specify that the numbers must be generated in *numerical* order, but chose the broader term “sequential.”

Dictionary definitions also support this meaning of “sequential.” For example, far from confining “sequential” to numerical order, the Merriam-Webster Dictionary defines the term as “of, relating to, or arranged in a sequence,” and defines “sequence” as merely “a continuous or connected series.”⁷⁶ It gives a sonnet sequence and a succession of related shots or scenes in a film as illustrations. The Oxford English Dictionary defines “sequential” as “That follows as a sequel to. Of two or more things: Forming a sequence.”⁷⁷ It then defines “sequence” as “The fact of

⁷⁴ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, U.S. Chamber Institute for Legal Reform, Petition for Declaratory Ruling, CG Docket No. 02-278, at 21 (filed May 3, 2018), available at <https://ecfsapi.fcc.gov/file/105112489220171/18050803-5.pdf>.

⁷⁵ *ACA International v. F.C.C.*, 885 F.3d 687, 702 (D.C. Cir. 2018) (emphasis in original).

⁷⁶ *Sequential*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/sequential> (last visited June 11, 2018).

⁷⁷ *Sequential*, OED.COM, <http://www.oed.com.ezp-prod1.hul.harvard.edu/view/Entry/176297?redirectedFrom=sequential#eid> (last visited June 11, 2018).

following after or succeeding; the following of one thing after another in succession; an instance of this.”⁷⁸ The online dictionary vocabulary.com gives this description of the use of the word

“sequential”:

If you make a list of things you need to do, starting with number 1 and continuing until all your tasks are accounted for, then you’ve made a *sequential* list. Something that is *sequential* often follows a numerical or alphabetical order, but it can also describe things that aren’t numbered but still need to take place in a logical order, such as the *sequential* steps you follow for running a program on your computer.⁷⁹

With this understanding of “sequential,” the ATDS definition would encompass a device that produces numbers from a stored list in a sequence the equipment selects pursuant to instructions programmed into it by a human, and then dials those numbers. Thus it would include predictive dialers, and systems used to send text messages *en masse* to numbers selected from a stored list.

This understanding of the word “sequential” also makes the question of the meaning of “capacity” in the ATDS definition less complicated. Since predictive dialers *have the present capacity* to generate numbers from a stored list in a sequence chosen by the device pursuant to instructions programmed into it, the question of the extent to which “capacity” also includes potential capabilities becomes essentially moot.

D. Systems that Use Humans to Evade Coverage Should Be Covered.

Some callers bring up the information about a particular consumer on a screen and then the agent makes a conscious decision to call that consumer and presses a button and the call is made. The human is involved in deciding whether and when to make the call, and the call is made only when the human presses the button to make it. Systems like this are typically called “preview dialers.” These systems may not meet the definition of ATDS, because the system is not dialing from a list. A human is dialing from a list.

⁷⁸ *Id.*

⁷⁹ <https://www.vocabulary.com/dictionary/sequential>.

However, “click dialers” are systems that are quite automated, yet appear to be designed with the sole purpose of evading TCPA coverage, while making as many calls as unattended dialers do. In these systems, there are two groups of human agents.⁸⁰ One group of agents has the sole job of rapidly pressing a computer button that causes a group of calls to be made.⁸¹ These agents do not have any discretion about the number of calls initiated, when the calls are initiated, or to whom they are initiated; computer algorithms decide the actual time for the calls to be made. Clicker agents also do not speak to the called parties when the calls are answered. These agents just click the buttons prompting the set of calls to be made as fast as they can click "enter" on their keyboards. The second group of agents sit in front of computer screens, and when one of the calls is answered by a human, the information particular to that call comes up on the computer screen and the agent speaks to the called party. Many of these calls result in very long "dead air"⁸² wait times for the consumer between the moment when the phone is answered and the time the agent speaks, because calls are made faster than call agents can handle.⁸³ The entire purpose of the first set of agents is to create a system where a human is deemed to be dialing the numbers such that the systems are not counted as ATDS because of that human intervention.

The FCC should clearly and forcefully shut down evasive actions such as the use of clicker

⁸⁰ See *Schlusberg v. Receivables Performance Mgmt., L.L.C.*, 2017 WL 2812884, at *2 (D.N.J. June 29, 2017) (“The human intervention aspect of [the LiveVox Human Call Initiator] involves a ‘clicker agent’ and a ‘closer agent.’”).

⁸¹ See, e.g., *Smith v. Stellar Recovery, Inc.*, 2017 WL 1336075, at *3 (E.D. Mich. Feb. 7, 2017) (explaining that, in “clicker” dialing systems, the system begins to run the campaign by presenting each telephone number to “clicker agents” who simply press the dial button, and if a debtor answers the call, other agents called “closer agents” sit and wait for those telephone calls to come back to them), *report and recommendation adopted*, No. 2:15-CV-11717, 2017 WL 955128 (E.D. Mich. Mar. 13, 2017), *reconsideration denied*, No. 2:15-CV-11717, 2017 WL 1362794 (E.D. Mich. Mar. 29, 2017).

⁸² “[C]onsumers are often frightened by dead-air and hang-up calls generated by predictive dialers believing they are being stalked.” *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd. 14014, 14030 ¶ 21 (F.C.C. July 3, 2003).

⁸³ *Smith v. Stellar Recovery, Inc.*, 2017 WL 1336075, at *3 E.D. Mich. Feb. 7, 2017) (“If the HCI system detects a live person, the person is automatically connected with an agent, or occasionally placed on hold until an agent is available.”).

systems. The human intervention necessary to avoid coverage as an ATDS should require a human to actually choose to dial a particular called party, and for that same human to then be waiting to speak to the called party if the call is answered.

E. The Statutory Prohibition is Against Making Calls *Using ATDS Equipment*, Not Just Automated Calls.

Another question on which the FCC requests comments is whether “If a caller does not use equipment as an automatic telephone dialing system, does the statutory prohibition apply?”⁸⁴ This follows the question asked by the court in *ACA International*:

Or does the bar apply to all calls made with a device having that “capacity,” even ones made without any use of the equipment's autodialer capabilities?⁸⁵

The petition of the U.S. Chamber Institute for Legal Reform (joined by many robocallers) urges the FCC to interpret the TCPA’s prohibition to “find that only calls made using actual ATDS capabilities are subject to the TCPA’s restrictions.”⁸⁶

Such an interpretation would indeed be a victory for the robocallers, because it would eviscerate the TCPA’s prohibition of autodialed calls to consumers who have not consented. Neither consumers nor government enforcement agencies would ever be able to prove—after such a call was made by an ATDS—that the device’s specific autodialing feature had been used for that particular call. The consequence of such an interpretation would be to allow all automated calls that do not use prerecorded or artificial voices to be made without the protections of the TCPA. These

⁸⁴ Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Seeks Comments on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s *ACA International* Decision, CG Docket Nos. 18-152 and 02-278, at 3 (Rel. May 14, 2018), *available at* <https://ecfsapi.fcc.gov/file/0514497027768/DA-18-493A1.pdf>.

⁸⁵ *ACA International v. F.C.C.*, 885 F.3d 687, 704 (D.C. Cir. 2018).

⁸⁶ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, U.S. Chamber Institute for Legal Reform, Petition for Declaratory Ruling, CG Docket No. 02-278, at 33 (filed May 3, 2018), *available at* <https://ecfsapi.fcc.gov/file/105112489220171/18050803-5.pdf>.

calls could be made without consent, and there would be no law that effectively required callers to abide by a consumer's request to stop calling.

Moreover, the Chamber's proposed interpretation is completely inconsistent with the actual language of the statute. The statute first specifically defines the ATDS equipment, referring to this equipment as an "automatic telephone dialing system," and then requires consent when calls are made *using* that equipment:

(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--⁸⁷

This prohibition is explicitly and unquestionably applicable to "any call . . . using any automatic telephone dialing system." An interpretation of this language to prohibit only calls made using the automated capacity of the system would be an unreasonably and incorrectly narrow reading of the statute. If that were the intent of Congress, then the separate definition of an ATDS would have been completely unnecessary, as the prohibition could simply have been against calls dialed in an automated manner, either as part of a list of calls or generated by a machine. Instead, the statute defines the equipment and then restricts "any call" made on the defined equipment.

Moreover, the Chamber's interpretation does not square with Congress's use of the word "capacity" in the ATDS definition. Regardless of the resolution of the other questions regarding the scope of this term, it clearly refers to what a device *can* do, not what it did in a particular instance.

Finally, were the FCC to grant the request by the calling industry, as articulated in the Chamber's petition, the effect would be so unreasonable that the definition struck down by the decision in *ACA International* would pale in comparison. Instead of the definition having too broad

⁸⁷ 47 U.S.C. § 227(b)(1) (emphasis added).

a reach, the impact would be that it would have no reach at all, as no one could ever prove which capabilities—innate or potential—a particular call utilized when it was placed. And it could not have been the intent of Congress to create a protection for automated calls (requiring consent for those calls) that could never be enforced. Therefore, an interpretation that would have this effect would likely meet the same fate as the one in the 2015 Order: “Those sorts of anomalous outcomes are bottomed in an unreasonable, and impermissible, interpretation of the statute’s reach.”⁸⁸

III. Calls to Reassigned Numbers Must Be Closely Limited.

The Commission also requests comment on how to treat calls to reassigned numbers. We urge the Commission to reiterate the rule, which the *ACA International* court found persuasive, that “called party” means the person actually called, even if the telephone number has been reassigned from a person who had given consent. We also urge the Commission to push forward with its initiative to create a reassigned number database, with an appropriately narrow safe harbor for calls made in reliance on errors in that database.⁸⁹ In our view, these steps will resolve the concerns that led the *ACA International* court to set aside the portion of the 2015 Order that dealt with reassigned numbers.

A. “Called Party” Refers to the Person Actually Called.

The court in *ACA International* reviewed two issues relating to calls to reassigned numbers: 1) the definition of the “called party,” and 2) whether the one-call safe harbor was arbitrary. The court

⁸⁸ *ACA International v. F.C.C.*, 885 F.3d 687, 697 (D.C. Cir. 2018).

⁸⁹ See Comments of National Consumer Law Center et al., Second Further Notice of Proposed Rulemaking, CG Docket No. 17-59, at 8-9 (filed May 29, 2018), *available at* <https://ecfsapi.fcc.gov/file/10529677826789/Comments%20on%202nd%20notice%20on%20database%20May%2029%2C%202018.pdf>.

held that the 2015 Order’s definition of “called party” as the actual recipient of the call comported with precedent from Seventh Circuit.⁹⁰ The court, quoting from this precedent, noted:

The Seventh Circuit explained that the phrase “called party” appears throughout the broader statutory section, 47 U.S.C. § 227, a total of seven times. 679 F.3d at 640. Four of those instances “unmistakably denote the current subscriber,” not the previous, pre-reassignment subscriber. *Id.* Of the three remaining instances, “one denotes whoever answers the call (usually the [current] subscriber),” and the other two are unclear. *Id.* By contrast, the court observed, the “phrase ‘intended recipient’ does not appear anywhere in § 227, so what justification could there be for equating ‘called party’ with ‘intended recipient of the call?’” *Id.* For those and other reasons, the court concluded “that ‘called party’ in § 227(b)(1) means the person subscribing to the called number at the time the call is made,” not the previous subscriber who had given consent. *Id.* at 643; *see also* Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 1250-52 (11th Cir. 2014).⁹¹

The D.C. Circuit held that this analysis by the Seventh Circuit was “persuasive” support for the conclusion that the FCC could define “called party” to mean the person actually called, even when the telephone number had been reassigned.⁹² However, the *ACA International* court also held that the Commission’s creation of a one-call safe harbor was arbitrary. Since the court could not be sure that, without the safe harbor, the FCC would have adopted the interpretation of “called party” to mean the person reached, the court set aside both parts of the FCC’s treatment of reassigned numbers.⁹³

The Seventh Circuit’s analysis is not just persuasive, but compelling. There is no justification for defining “called party” as the “intended recipient,” except to provide callers a way to avoid liability for calling the wrong number.

⁹⁰ Soppet v. Enhanced Recovery Co., 679 F.3d 637 (7th Cir. 2012); *see also* Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 1250-52 (11th Cir. 2014).

⁹¹ *ACA International v. F.C.C.*, 885 F.3d 687, 706 (D.C. Cir. 2018) (emphasis added).

⁹² *Id.*

⁹³ *Id.* at 708-09.

To treat “called party” in section 227(b)(1)(A) as the person the caller intended to reach would be inconsistent with the way the term is used elsewhere in the statute. And the implications of such a ruling with respect to revocation of consent would be staggering. If the original subscriber is the person whose consent is necessary, then a logical corollary is that the original subscriber—who may have died, left the country, gone to jail, or disappeared, and who certainly has no interest in revoking consent to receive calls that he or she is no longer actually receiving—would also be the only person who has the authority to revoke that consent. This interpretation would leave millions of consumers trapped—barraged by unwanted calls, with no way to escape. And the problem would grow with each reassignment of a cell phone number. As long as any subscriber, no matter how far back in the chain of assignments, had given consent, that number would be permanently and irrevocably open season for unrestricted robocalling.

We also urge the Commission to retain the portion of its 2015 Order holding that the customary user of a cell phone can be the “called party,” even if that person is not the subscriber.⁹⁴ The opinion in *ACA International* expresses no disagreement with this view, even though it set aside the Commission’s general interpretation of “called party” on other grounds.⁹⁵ With cell phone family plans, it is common for a person who is the customary user of a cell phone not to be the subscriber, and some employers similarly subscribe to cell phones for their employees to use.⁹⁶ Many courts have held that a person who carries and regularly uses a cell phone and who receives

⁹⁴ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961, 8001 ¶ 75 (F.C.C. July 10, 2015), *appeal resolved*, *ACA International v. F.C.C.*, 885 F.3d 687 (D.C. Cir. 2018) (setting aside two parts of 2015 declaratory ruling).

⁹⁵ *ACA International v. F.C.C.*, 885 F.3d 687, 705-706 (D.C. Cir. 2018).

⁹⁶ *See, e.g.*, *Soulliere v. Central Florida Investments*, 2015 WL 1311046, at *4 (M.D. Fla. 2015) (“Generally, the subscriber is the person who is obligated to pay for the telephone or needs the line in order to receive other calls and has the authority to consent to receive calls that would otherwise be prohibited by the statute. However, in some cases the subscriber transfers primary use of the telephone to another, as Plaintiff’s employer did here.” (internal citations omitted)).

unwanted calls has standing to sue even if another person’s name is on the bill.⁹⁷ A necessary corollary is that a customary user also has authority to consent—and to revoke consent—to receive robocalls.⁹⁸ When it issued its 2015 Order, the FCC noted that several industry commenters agreed with this position.⁹⁹

B. The Commission Should Proceed with Its Creation of a Reassigned Number Database, and Establish a Narrow Safe Harbor, Which Will Resolve the *ACA International* Court’s Concerns.

We view the reassigned number database as a key part of both protecting consumers from unwanted calls and resolving the concerns of the *ACA International* court. As the Commission noted in its current consideration of a reassigned number database,¹⁰⁰ an effectively created and managed

⁹⁷ *Tillman v. Ally Fin. Inc.*, 2017 WL 1957014 (M.D. Fla. May 11, 2017) (called party who treated cell phone as his own and paid the bills has statutory standing even though his phone was one of two numbers on family plan account for which he was not the subscriber); *Lee v. Loandepot.com, L.L.C.*, 101 Fed. R. Evid. Serv. 218, 2016 WL 4382786 (D. Kan. Aug. 17, 2016); *Gesten v. Stewart Law Grp., L.L.C.*, 67 F. Supp. 3d 1356 (S.D. Fla. 2014) (primary user may bring TCPA suit even if she is not the subscriber); *Olney v. Job.com, Inc.*, 2013 WL 5476813 (E.D. Cal. Sept. 30, 2013) (evidence that plaintiff was not subscriber to his telephone line did not undermine statutory standing); *Page v. Regions Bank*, 917 F. Supp. 2d 1214, 1219 (N.D. Ala. 2012) (plaintiff was “subscriber” when he was “the regular user and carrier of the cellular telephone, as well as the person who need[ed] the telephone line to receive other calls,” despite the phone not being registered to him); *Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d 1316 (S.D. Fla. 2012), *aff’d*, 755 F.3d 1265 (11th Cir. 2014); *Agne v. Papa John’s Int’l, Inc.*, 286 F.R.D. 559, 565 (W.D. Wash. 2012) (authorized user of shared cell phone plan who is intended recipient of text message has standing even though her ex-husband is primary account holder); *D.G. ex rel. Tang v. William W. Siegel & Associates*, 791 F. Supp. 2d 622 (N.D. Ill. 2011) (plaintiff is a “called party” if caller intends to call plaintiff’s number, plaintiff receives calls, and plaintiff is regular user and carrier of phone); *Kane v. Nat’l Action Fin. Services*, 2011 WL 6018403 (E.D. Mich. Nov. 7, 2011); *Tang v. Med. Recovery Specialists, L.L.C.*, 2011 WL 6019221, at *3 (N.D. Ill. July 7, 2011) (finding “called party” was actual recipient). *Cf.* *Soppet v. Enhanced Recovery Co., L.L.C.*, 679 F.3d 637, 640 (7th Cir. 2012) (defining “subscriber” in *dicta* as “the person who pays the bills or needs the line in order to receive other calls”). *But see* *Jamison v. First Credit Services, Inc.*, 2013 WL 3872171 (N.D. Ill. July 29, 2013) (only subscriber can sue).

⁹⁸ *See, e.g., Soulliere v. Central Florida Investments*, 2015 WL 1311046, at *4 (M.D. Fla. 2015) (when subscriber transfers a cell phone to another to use, “the primary user may be the subscriber’s agent, thereby permitting the primary user to consent to being called”).

⁹⁹ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961, 8001 ¶ 75 n.271 (F.C.C. July 10, 2015), *appeal resolved*, *ACA International v. F.C.C.*, 885 F.3d 687 (D.C. Cir. 2018) (setting aside two parts of 2015 declaratory ruling).

¹⁰⁰ *In re* Advanced Methods to Target and Eliminate Unlawful Robocalls, Second Further Notice of Inquiry, FCC 17-90, CG Docket No. 17-59 (Mar. 22, 2018), *available at* <https://ecfsapi.fcc.gov/file/032399073325/FCC-18-31A1.pdf>.

database will significantly reduce the number of unwanted calls to consumers, as well as reduce liability under the TCPA for callers. Callers that use the reassigned number database will also reach their intended recipients more successfully. The existence of the database will provide a clear context and rationale for a limited safe harbor, satisfying the *ACA International* court's concerns that there was not a rational enough justification for the 2015 Order's one-call safe harbor.

Retaining the definition of "called party" as the person actually called is essential for the success of this initiative. If the Commission were to change direction at this time and adopt the definition of "called party" as the "intended recipient," there would be no reason for callers to use the database, because they would have no liability so long as they had previously obtained the consent of the party they intended to call. Without this liability, callers will have no incentive to use the database. Exposure to liability for making wrong-number calls is what gives callers the incentive to spend the time and money to check the database to ensure that they are calling only numbers for which they still have consent. And that liability is dependent upon the Commission continuing to define "called party" as the party actually reached. Without this liability, wrong-number calls will continue to plague consumers.

The Commission's use of a "reasonable reliance" approach to prior express consent is reasonable to continue only if the Commission maintains the incentive on callers to *act* reasonably, by using available tools to avoid making calls to wrong parties. Allowing callers to avoid liability for reaching parties who have numbers reassigned from the persons who had earlier provided consent works only if the callers use something like a reassigned number database. And callers will use that database only if they have the incentive to do so.

It would be self-defeating for the Commission to propose a methodology that affords a means for callers to avoid wrong-number calls after numbers have been reassigned, yet at the same

time define “called party” as the intended party. That would leave the reassigned number database rarely if ever used, and all this good effort would be for naught.

For all of these reasons, we urge the Commission to reiterate that the “called party” is the person the caller actually reaches, and to push forward with the reassigned number database, with an appropriately narrow safe harbor for wrong-number calls made in reliance on errors in the database. As set forth in more detail in our response to the Commission’s Second Notice of Proposed Rulemaking,¹⁰¹ we propose that a safe harbor a caller could use to avoid liability for a call made to a reassigned number would apply only when *all* of the following conditions apply:

- a) The caller must have checked the database *before* making the call to the reassigned number, and must have made the call within the number of days for which the database provides reliable information based on any minimum aging period.¹⁰²
- b) The call must have been made to the reassigned number as the result of a mistake made either by the database or by the telephone company making the report about the disconnection date of the phone number, or as a result of a mistake made by the telephone company in reassigning the number before the aging period expired.
- c) The caller must show that it had the consent of the prior subscriber of the telephone number.
- d) The safe harbor would not shield the caller from any other TCPA violations (such as calling after a revocation, or after the called party has told the caller that it had reached the wrong party).
- e) The caller must show that it took affirmative steps to correct its internal records and report any discovered mistakes regarding the number mistakenly reported to the database administrator.
- f) *The FCC must strictly enforce the participation requirements of the database by telephone carriers.* The value of this database is based entirely on the reliability and accuracy of the information that it gathers and disseminates. Telephone carriers should be closely supervised to ensure that they report accurate and timely information. Constructing a program with weak compliance

¹⁰¹ Comments of National Consumer Law Center on behalf of its low-income clients, et al., Second Further Notice of Proposed Rulemaking, CG Docket No. 17-59, at 8-9 (filed May 29, 2018), *available at* <https://ecfsapi.fcc.gov/file/10529677826789/Comments%20on%202nd%20notice%20on%20database%20May%2029%2C%202018.pdf>.

¹⁰² *See id.* at 8.

and messy protocols that is unreliable for the callers would be a waste of the FCC's time and effort and the taxpayers' money, and would not help callers or consumers.

IV. Revocation of Consent

A. Introduction

The Commission has also asked for comments on how a called party may revoke prior express consent to receive robocalls. We support the Commission's idea of designating clearly defined and easy-to-use revocation methods. This will encourage callers to make these revocation methods available to consumers, which will make it easier for consumers to regain control of their phones by revoking consent, and thereby protect their privacy. The FCC should also articulate clearly the position that is implicit in the *ACA International* decision—that consent provided as a term of a contract can be revoked, and that all reasonable methods for revoking consent must be available and accepted.

B. *ACA International* Confirms that Consumers Have the Right to Revoke Consent by Any Reasonable Means.

Several important principles should be kept in mind as a backdrop to this set of questions. First, it is firmly established, and not at issue in this matter, that consumers have the right to revoke any consent they have given. The Commission so held in its 2015 order.¹⁰³ And the *ACA International* court repeats and confirms this rule:

It is undisputed that consumers who have consented to receiving calls otherwise forbidden by the TCPA are entitled to revoke their consent.¹⁰⁴

The Third,¹⁰⁵ Ninth,¹⁰⁶ and Eleventh Circuits,¹⁰⁷ and a number of lower court decisions,¹⁰⁸ have all agreed.

¹⁰³ See 2015 TCPA Omnibus Order at 7993 ¶ 56.

¹⁰⁴ *ACA International v. F.C.C.*, 885 F.3d 687, 709 (D.C. Cir. 2018).

¹⁰⁵ *Gager v. Dell Fin. Services, L.L.C.*, 727 F.3d 265 (3d Cir. 2013).

¹⁰⁶ *Van Patten v. Vertical Fitness Grp.*, 847 F.3d 1037, 1047–49 (9th Cir. 2017).

Second, consumers can exercise this right to revoke by any reasonable means, and callers cannot limit how consent can be revoked. This issue was squarely before the D.C. Circuit, as the petitioners had specifically requested the FCC to rule that callers could “unilaterally prescribe the exclusive means for consumers to revoke their consent.”¹⁰⁹ In the 2015 Order, the FCC denied that request, saying that such a rule would “materially impair” the right of revocation,¹¹⁰ and concluding that “a called party may revoke consent at any time and through any reasonable means”—orally or in writing—“that clearly expresses a desire not to receive further messages.”¹¹¹ The D.C. Circuit expressly upheld the FCC’s decision in this regard.¹¹²

C. The FCC Should Specify a Nonexclusive Suite of Reasonable and Easy-to-Use Revocation Procedures.

The ability to revoke consent to be robocalled or robotexted is a critically important protection for consumers. The examples cited in Section I of these comments include too many instances where consumers have received hundreds—or even thousands—of calls or texts even after repeated pleas that these calls and texts stop. Often the robocallers defend the repeated messages after consent either by contesting the consumer’s right to revoke or by saying that the consumer failed to revoke in the manner required by the contract.

¹⁰⁷ *Osorio v. State Farm Bank*, 746 F.3d 1242 (11th Cir. 2014). *Accord* *Schweitzer v. Comenity Bank*, 866 F.3d 1273 (11th Cir. 2017) (reiterating that consent can be revoked orally, and holding that it can be partially revoked).

¹⁰⁸ *Cartrette v. Time Warner Cable, Inc.*, 157 F. Supp. 3d 448 (E.D.N.C. 2016); *King v. Time Warner Cable*, 113 F. Supp. 3d 718, 726 (S.D.N.Y. 2015) (applying FCC’s 2015 declaratory ruling; consumer’s revocation, communicated to caller, was effective); *Conklin v. Wells Fargo Bank, N.A.*, 2013 WL 6409731 (M.D. Fla. Dec. 9, 2013); *Munro v. King Broad. Co.*, 2013 WL 6185233 (W.D. Wash. Nov. 26, 2013).

¹⁰⁹ *ACA International v. F.C.C.*, 885 F.3d 687, 709 (D.C. Cir. 2018).

¹¹⁰ 2015 TCPA Omnibus Order at 7996 ¶ 66.

¹¹¹ *Id.* at 7996 ¶¶ 47, 63.

¹¹² *ACA International v. F.C.C.*, 885 F.3d 687, 709-10 (D.C. Cir. 2018).

We support the FCC’s proposal that it specify a set of clearly defined, easy-to-use revocation procedures. We—and millions of consumers—would welcome this and any other steps that will make it easier for consumers to stop unwanted calls. We agree with the FCC’s view that, when a caller clearly offers one or more of the specified revocation methods, a court is less likely to conclude that a called party who uses some other, non-standard revocation method—particularly one that will be difficult for the caller to detect or understand—has used a reasonable method of revoking consent.¹¹³

The clear-and-easy revocation procedures that the FCC designates should all include notifying consumers of their right to revoke and the means to do so. A caller that offers one of the designated revocation procedures and complies with consumers’ requests for revocation should be considered to have complied with the TCPA rules regarding revocation. However, this should not mean that, if the consumer revokes in another way that was reasonable, the caller should not still be required to accept and abide by that revocation. If the caller clearly promotes and routinely accepts one or more of the designated revocation procedures, it will be less likely that a consumer will have a need to use some other means of revocation.

We propose that the designated procedures should have three separate components:

- 1) Inform Consumers of Right. There should be a requirement to inform called parties about the availability of the right to revoke and the means by which revocation could be accomplished. This information should be provided *in every phone call and text* (much like the right to opt out of future texts is provided regularly in many text messages now).
- 2) Simple Means of Revocation. A simple way for consumers to exercise their right to revoke should be provided. This might be by either a) pressing a button when the call does not involve a live agent, b) clearly articulating to the live agent the revocation request, or c)

¹¹³ See, e.g., [Epps v. Earth Fare, Inc.](#), 2017 WL 1424637 (C.D. Cal. Feb. 27, 2017) (concluding that called party’s method of revoking consent was not reasonable where she responded to commercial text messages with long sentences requesting that the caller stop sending them rather than simply responding with the STOP command, as instructed in each message).

calling the number displayed on the caller ID to request revocation.

- 3) Immediate Compliance. Callers should be required to comply with the revocation request, either immediately or within twenty-four hours.

D. The FCC Should State Clearly That Consent Provided as a Term in a Contract Can Be Revoked.

Recently, creditors have begun inserting provisions in form agreements purporting to authorize the use of automated equipment to contact consumers at any number furnished by the consumer or otherwise obtained by the creditor. Under the Third Circuit opinion in *Gager v. Dell Financial Services*, this consent can be revoked.¹¹⁴ By entering into a contractual relationship with a seller, a consumer does not waive the right to revoke consent to receive autodialed or prerecorded cell phone calls.¹¹⁵

However, a 2017 Second Circuit decision, *Reyes v. Lincoln Automotive Financial Services*, erroneously holds that the consumer's consent is irrevocable when it is part of a binding contract—in the particular case, a vehicle lease.¹¹⁶ The decision fails to give appropriate weight to the FCC's 2015 ruling that, “[w]here the consumer gives prior express consent, the consumer may also revoke that consent.”¹¹⁷ The FCC ruling on this point is unambiguous, and without qualifications or conditions. It cannot be construed as dependent on how consent was originally provided.¹¹⁸

The *ACA International* decision only strengthens this view, stating: “It is undisputed that consumers who have consented to receiving calls otherwise forbidden by the TCPA are entitled to

¹¹⁴ *Gager v. Dell Fin. Services, L.L.C.*, 727 F.3d 265, 273–74 (3d Cir. 2013).

¹¹⁵ *Id.* at 274. *Accord* *Osorio v. State Farm Bank*, 746 F.3d 1242 (11th Cir. 2014); *Cartrette v. Time Warner Cable, Inc.*, 157 F. Supp. 3d 448 (E.D.N.C. 2016). *See also* *Ginwright v. Exeter Fin. Corp.*, 280 F. Supp. 3d 674 (D. Md. 2017). *See generally* National Consumer Law Center, Federal Deception Law § 6.3.4.4 (3d ed. 2017), updated at www.nclc.org/library.

¹¹⁶ *Reyes v. Lincoln Auto. Fin. Services*, 861 F.3d 51, 58 (2d Cir. 2017).

¹¹⁷ 2015 TCPA Omnibus Order at 7996 ¶ 62. *See* *Ginwright v. Exeter Fin. Corp.*, 280 F. Supp. 3d 674 (D. Md. 2017) (declining to follow *Reyes*; noting its inconsistency with FCC's ruling).

¹¹⁸ *See* 2015 TCPA Omnibus Order at 7996 ¶¶ 47, 63.

revoke their consent.”¹¹⁹ Like the FCC’s 2015 order, this statement is unambiguous and without qualifications or conditions, so it provides further support for the view that a consumer has the right to revoke consent even if consent was provided as part of a contract. We urge the FCC to incorporate this principle into an explicit ruling that consumers have the right to revoke consent provided by contract.

E. The *ACA International* Decision Does Not Decide Whether The Method of Revoking Consent Can Be Limited or Controlled By the Terms of a Contract.

A final issue regarding revocation of consent that was mentioned but not resolved in *ACA International* is whether the *method* of revoking consent can be limited or controlled by the terms of a contract. As noted in the preceding section, the weight of authority is that consent can be revoked even when that consent has been made a term in a contract, but courts of appeals have not yet weighed in on the question whether a contract can impose a specific method of revoking consent.

ACA International holds that this question was not before the court:

The Commission correctly concedes, however, that the ruling “did not address whether contracting parties can select a particular revocation procedure by mutual agreement.” The ruling precludes unilateral imposition of revocation rules by callers; it does not address revocation rules mutually adopted by contracting parties. Nothing in the Commission’s order thus should be understood to speak to parties’ ability to agree upon revocation procedures.¹²⁰

Nonetheless, *ACA International* is relevant to the issue of whether contracts can limit the *means of revocation*, in that it upholds the FCC’s ruling that a consumer has the right to revoke consent by any reasonable means. It thus seems clear after *ACA International* that, at a minimum, a contract cannot require an *unreasonable* method of revoking consent. For example, a requirement in a contract that only permits revocation of consent in writing, delivered by certified mail to a specific address, would be unreasonable.

¹¹⁹ *ACA International v. F.C.C.*, 885 F.3d 687, 709 (D.C. Cir. 2018).

¹²⁰ *ACA International v. F.C.C.*, 885 F.3d 687, 710 (D.C. Cir. 2018) (emphasis added; citation omitted).

It can be reasonably argued that, since the consumer has the right to revoke consent by any reasonable means, a contract cannot control this choice at all. Indeed, that is at least the clear implication of the following language in the FCC’s 2015 Order:

We next turn to whether a caller can designate the exclusive means by which consumers must revoke consent. We deny Santander’s request on this point, finding that callers may not control consumers’ ability to revoke consent.¹²¹

At an absolute minimum, callers should be clearly prohibited from denying consumers the ability to use a method of revoking consent that the Commission designates as reasonable, as long as that method is appropriate for the type of contact made with the consumer (for example, the caller could not require the consumer to *text* a “stop” message in order to revoke consent to receive *voice* calls). By doing so, the Commission would give callers a further incentive to offer and promote the easy-to-use, clear revocation methods that the Commission designates, and facilitate their spread in the market.

V. Dealing with the Broadnet Ruling

The FCC’s request for comments asks several questions in relation to the Broadnet Declaratory Ruling.¹²² In this section, we first address the question of whether the Commission should reconsider the Broadnet Ruling, as requested by the National Consumer Law Center’s Petition for Reconsideration,¹²³ and clearly reiterate that federal contractors are “persons” under the TCPA. Second, we address whether the FCC should grant the Professional Services Council’s

¹²¹ 2015 TCPA Omnibus Order at 7996 ¶ 63.

¹²² *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petitions for Declaratory Ruling by Broadnet Teleservices LLC, National Employment Network Association, RTI International, CG Docket No. 02-278, Declaratory Ruling, 31 FCC Rcd. 7394 (filed July 5, 2016) [hereinafter Broadnet Ruling] available at <https://ecfsapi.fcc.gov/file/0705087947130/FCC-16-72A1.pdf>.

¹²³ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petition of National Consumer Law Center et al. for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration, CG Docket No. 02-278 (filed July 26, 2016), available at <https://ecfsapi.fcc.gov/file/10726059270343/NCLC%20Petition%20for%20Reconsideration%20of%20Broadnet.pdf>.

petition asking that contractors who are not technically “agents” of the federal government be declared outside of the TCPA’s scope. Third, we address the question of whether contractors acting for state or local governments are “persons” under the TCPA.¹²⁴

A. The Broadnet Ruling’s Determination that Federal Contractors are Not Persons for Purposes of TCPA Coverage Is Fundamentally Wrong.

The Broadnet Ruling’s determination that contractors acting on behalf of the federal government are not persons covered by section 227(b)(1) of the TCPA¹²⁵ was incorrectly reasoned, is not supported by applicable law, is contrary to the public interest, and will lead to significant harm to consumers.¹²⁶

The Broadnet Ruling concludes that “the term ‘person’ in section 227(b)(1) does not include a contractor acting on behalf of the federal government, as long as the contractor is acting as the government’s agent in accord with the federal common law of agency.”¹²⁷ This determination is incorrect, as the TCPA unquestionably applies to contractors for the federal government, regardless of their agency status. This is first indicated by the plain language of the definition of “person” in the Communications Act (“The term ‘person’ includes an individual, partnership, association, joint-

¹²⁴ See Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Seeks Comments on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision, CG Docket Nos. 18-152 and 02-278, at 5 (Rel. May 14, 2018), *available at* <https://ecfsapi.fcc.gov/file/0514497027768/DA-18-493A1.pdf>.

¹²⁵ *Broadnet Ruling*, 31 FCC Rcd. 7394, 7401 ¶ 16 (F.C.C. July 5, 2016) .

¹²⁶ A comprehensive discussion of the basis for our Petition for Reconsideration can be found in the Comments in Support of the Petition for Reconsideration in furtherance of the Petition for Reconsideration filed by National Consumer Law Center on behalf of its low-income clients and fifty legal aid programs, and national, state and local public interest organizations, CG Docket No. 02-278 (filed Aug. 29, 2016), *available at* <https://ecfsapi.fcc.gov/file/10829228610098/Final%20Broadnet%20Comments%20in%20Support%20of%20Petition%20.pdf>.

¹²⁷ *Broadnet Ruling*, 31 FCC Rcd. 7394, 7401 ¶ 16 (F.C.C. July 5, 2016).

stock company, trust, or corporation.”¹²⁸) and is further reinforced by the congressional changes in the 2015 amendments to the TCPA made by the Budget Act.¹²⁹

The purpose of the 2015 amendments was to create a specific exception from the consent requirement, for calls to collect federal government debt. The only callers who would possibly be making calls to collect debts owed to or guaranteed by the United States would either be the agencies of the government or its contractors—and the agencies themselves were already considered immune from suit.¹³⁰ The Budget Act’s creation of an exception to the consent requirement for certain government contractors—those calling to collect debts owed to or guaranteed by the federal government—makes sense only if those contractors would not have been able to make these calls without the amendment. There would have been no need for the exception created by the Budget Act amendments if calls made by government contractors were not covered by the TCPA.¹³¹ As Senator Markey said, “Section 301 of this legislation before this body today *removes* that precall

¹²⁸ 47 U.S.C.A. § 153 (39).

¹²⁹ Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (Nov. 2, 2015).

¹³⁰ For example, prior to the 2015 amendments, the district court in *Gomez v. Campbell-Ewald Co.*, 2013 WL 655237, at *4 (C.D. Cal. Feb. 22, 2013), held “Because the United States cannot be sued without the consent of Congress, and Congress did not consent to TCPA suits against the federal government, the Navy cannot be sued.” (Citations omitted). Upon review, the Ninth Circuit disagreed with the conclusions that the district court drew as to whether this immunity would extend to independent contractors, but it did not question the premise that the federal entity itself was immune. 768 F.3d 871 (9th Cir. 2014). When the case reached the Supreme Court, its decision—issued shortly after the 2015 amendments—confirmed that “[t]he United States and its agencies, it is undisputed, are not subject to the TCPA’s prohibitions because no statute lifts their immunity.” *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672, 193 L. Ed. 2d 571 (2016).

¹³¹ The Commission’s Order for the Budget Act Amendments Rules (*In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, FCC 16-99, 31 FCC Rcd. 9074 (F.C.C. Aug. 11, 2016)) takes the position that the Budget Act amendments merely conferred *new authority* on the FCC to regulate robocalls by government contractors. It is true that section 227(b)(2)(H) gives the FCC *rulemaking* authority that it did not previously have. The addition of rulemaking authority in section 227(b)(2)(H) was to impose a limit on these new calls permitted to be made without consent, not as a stand-alone provision to provide new authority to the Commission to regulate debt collection calls made to collect government debt. However, the Budget Act amendments’ carve-out of calls to collect federal government debts without consent in section 227(b)(1) has a purpose only if those collecting federal government debts would otherwise be subject to that section.

consent requirement if someone is collecting debt owed to the Federal Government.”¹³² The concept of “removing” a requirement is inconsistent with any claim that the requirement does not exist.

Additionally, the Broadnet Ruling appears to have relied on a fundamental misunderstanding of the express language and holding in the U.S. Supreme Court case of *Campbell-Ewald Co. v. Gomez*.¹³³ In that case, as the Broadnet Ruling acknowledges in a footnote,¹³⁴ the Supreme Court expressly held that a federal contractor could be liable under the TCPA.¹³⁵ The Court held that while the United States and its agencies have immunity from TCPA suits, federal contractors do not have derivative immunity. The Court held: “When a contractor violates both federal law and the Government’s explicit instructions, as here alleged, no ‘derivative immunity’ shields the contractor from suit by persons adversely affected by the violation.”¹³⁶ Nor did the contractor have qualified immunity, since it knew or should have known that its conduct violated clearly established rights.¹³⁷

In concluding that federal contractors are not “persons” under the TCPA when they are acting as agents of the federal government, the Commission relied in part on the fact that the general definition of “person” in the Communications Act—which explicitly includes partnerships, associations, and corporations—states that it applies “unless the context otherwise requires.”¹³⁸ The Commission then considered the definition in the context of its possible effect on the activities of the federal government.¹³⁹ But the Supreme Court has held that the *only* context that should be

¹³²161 Cong. Rec. S7636 (daily ed. Oct. 29, 2015) (statement of Sen. Markey) (emphasis added).

¹³³ 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016).

¹³⁴*Broadnet Ruling*, 31 FCC Rcd. 7394, 7405 ¶ 21 n.96 (F.C.C. July 5, 2016).

¹³⁵ *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672, 193 L. Ed. 2d 571 (2016).

¹³⁶ *Id.* at 673.

¹³⁷ *Id.* at 673–674.

¹³⁸*Broadnet Ruling*, 31 FCC Rcd. 7394, 7402 ¶ 17 n.79 (F.C.C. July 5, 2016)

¹³⁹ *See id.*

considered when interpreting such a caveat to a definition is “the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts.... Review of other materials is not warranted.”¹⁴⁰ Thus, the fact that the contractor is making calls “on behalf of” the federal government is not relevant. The contractor is still a “person” as defined by the TCPA.

The Broadnet Ruling purports to rely on *Campbell-Ewald* even though that decision did not address the question of whether the defendant government contractor was a “person” under the statute. On the contrary, the Supreme Court’s decision makes it quite clear that section 227(a) *does* apply to government contractors, as it upheld the Ninth Circuit’s reversal of a decision that the defendant had derivative federal immunity from a TCPA suit—a question that the Court would not have had to reach if the TCPA did not apply to federal contractors. The Court also held that the contractor was not entitled to qualified immunity because, *inter alia*, the defendant did not “contend that the TCPA’s requirements . . . failed to qualify as ‘clearly established’”¹⁴¹—an observation that would make no sense if the TCPA did not apply to the contractor.

The other justification for the Commission’s holding that contractors are not persons when they are acting as agents of the federal government is the Commission’s misplaced reliance on the U.S. Supreme Court case of *Campbell-Ewald Co. v. Gomez*:¹⁴²

By indicating that agents enjoy derivative immunity to the extent they act under authority “validly conferred” by the federal government and in accord with the government’s instructions, *Campbell-Ewald* also supports our clarification that the term “person,” as used in section 227(b)(1), does not include agents acting within the scope of their agency in accord with federal common-law principles of agency.¹⁴³

¹⁴⁰ *Hubbard v. United States*, 514 U.S. 695, 701, 115 S. Ct. 1754, 131 L. Ed. 2d 779 (1995) (citations omitted).

¹⁴¹ *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 673, 193 L. Ed. 2d 571 (2016).

¹⁴² 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016).

¹⁴³ *Broadnet Ruling*, 31 FCC Rcd. 7394, 7405 ¶ 21 (F.C.C. July 5, 2016) .

The primary problem with this statement is that the Supreme Court made no finding that contractors for the federal government enjoy “derivative immunity.” Quite the opposite. The Court stated:

[“G]overnment contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States.” That immunity, however, unlike the sovereign’s, is not absolute. Campbell asserts “derivative sovereign immunity,” but can offer no authority for the notion that *private persons performing Government work acquire the Government’s embracive immunity.* When a contractor violates both federal law and the Government’s explicit instructions, as here alleged, no “derivative immunity” shields the contractor from suit by persons adversely affected by the violation.¹⁴⁴

There was no determination by the Supreme Court—in this or any other case—that a contractor can ever acquire derivative sovereign immunity and avoid liability for its violations of the law just because it is under contract with the federal government. The Supreme Court held only that when a federal contractor violates the express instructions provided by the government, it is not entitled to any immunity from liability under the TCPA.¹⁴⁵ There is no statement whatsoever in *Campbell-Ewald* that “derivative sovereign immunity” (a term asserted by Campbell-Ewald in its briefing, not by the Court) even exists, much less what elements must be met to invoke it.

Moreover, the Commission’s concern that “[i]f the TCPA applied to contractors calling on behalf of the federal government, this rule would potentially allow the government to be held *vicariously* liable for conduct in which the TCPA *allows* the government to engage”¹⁴⁶ is mistaken. While the Federal Tort Claims Act waives the federal government’s sovereign immunity for certain torts committed by its *employees*, that waiver does not extend to independent contractors’ torts.¹⁴⁷

¹⁴⁴ *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672, 193 L. Ed. 2d 571 (2016) (emphasis added; internal citations omitted).

¹⁴⁵ *See id.* at 674.

¹⁴⁶ *Broadnet Ruling*, 31 FCC Rcd. 7394, 7402 ¶ 16 (F.C.C. July 5, 2016). (emphasis in original).

¹⁴⁷ *See* 28 U.S.C. § 1346(b)(1). *See also* *Diaz v. United States Postal Service*, 2003 WL 21767530 (S.D.N.Y. July 31, 2003).

The Broadnet Ruling compounds its faulty reasoning by switching back and forth between the definition of “person” and the doctrine of governmental immunity in an inconsistent and confusing way.¹⁴⁸ This is unfounded and incorrect, as the two issues are very different from each other. Whether a caller is a “person” subject to the provisions of the TCPA’s consumer protections is a seminal determination premised on congressional intent and the language of the statute. Whether the caller is entitled to immunity from liability for damages for its violations of the TCPA’s consumer protections is based on whether the caller’s behavior falls within the entirely separate and largely judge-made doctrine of sovereign immunity. The Broadnet Ruling conflates the two issues in a confusing and dangerous way that renders very unclear all the rules governing robocalls from government contractors to cell phones.

The danger to consumers from unwanted and unstoppable robocalls¹⁴⁹ resulting from the Broadnet Ruling is potentially devastating. The Ruling should be reconsidered, and the relief provided to the petitioners, if any, should be limited to that which is explicitly authorized by Congress for the Commission to make. Specifically, it should be based either on the exemption for free-to-end-user calls in 47 U.S.C. § 227(b)(2)(C), or on the mandate to adopt rules to implement the Budget Act, which, of course, must be limited to collection of federal government debts rather than applying to all federal contractors. In either case, the rules must be accompanied by strong consumer protections.

¹⁴⁸ For example, the Ruling says, on the one hand, that in certain circumstances contractors are not persons under the TCPA. *See Broadnet Ruling*, 31 FCC Rcd. 7394, 7401-7402 ¶ 16 (F.C.C. July 5, 2016). But the Ruling states on the other hand that the Supreme Court determined that government contractors lawfully authorized to make calls on behalf of the federal government “are immune from TCPA liability.” *Id.* at 7404 ¶ 20.

¹⁴⁹ We are using the term “robocalls” to refer to calls made with either an automatic telephone dialing system (“autodialer”) or with a prerecorded or artificial voice, or both.

B. The Professional Services Council’s Petition Should Be Denied.

The Professional Services Council’s Petition for Reconsideration requests that the Commission delete, from the Broadnet Ruling’s determination that federal contractors are not persons as used in section 227, the requirement that the contractor be “acting as the government’s agent in accord with the federal common law of agency.”¹⁵⁰ This action would be both improper and very harmful to consumers. It would compound the harm that could already result from the Broadnet Ruling.

The Commission’s reasoning in the Broadnet Ruling is essentially that the private contractors step into the shoes of the federal government when they are acting as its agents. The Commission’s analysis first determines that the federal government is not a person under section 227(b)(1) of the TCPA;¹⁵¹ it then reasons that “if a statutory requirement does not expressly apply to government entities, the government generally will not be subject to the statute unless ‘the inclusion of a particular activity within the meaning of the statute would not interfere with the processes of the government.’”¹⁵² The Commission then finds that subjecting the federal government to TCPA compliance when making the calls at issue in the Ruling *would* interfere with the government processes.¹⁵³ Finally, the Commission points out that, if private contractors are making the calls for the government, then under the Commission’s analysis holding principals responsible for the acts of their agents,¹⁵⁴ the government would be vicariously liable for the acts of its agents:

If the TCPA applied to contractors calling on behalf of the federal government, this rule would potentially allow the government to be held *vicariously* liable for conduct in

¹⁵⁰ *Broadnet Ruling*, 31 FCC Rcd. 7394, 7401 ¶ 16 (F.C.C. July 5, 2016).

¹⁵¹ *Id.* at 7400 ¶ 13.

¹⁵² *Id.* at 7401 ¶ 15 (internal citation omitted).

¹⁵³ *Id.*

¹⁵⁴ *See id.* at 7401-7402 ¶ 16 (citing *In re* Joint Petition filed by DISH Network et al., CG Docket 11-50, Declaratory Ruling, 28 FCC Rcd. 6574, 6587 ¶ 35 (May 9, 2013)).

which the TCPA *allows* the government to engage. That would be an untenable result.¹⁵⁵

Then, to protect the government from this potential liability, the Commission concludes that, as long as the contractors with whom the government has contracted are acting as agents of the government, then they—like the government itself—are also not persons under the TCPA.¹⁵⁶

As explained in Section V(A), above, we disagree with this reasoning and these legal conclusions. Nevertheless, if the Commission maintains its decision that federal contractors are not persons under section 227(b) of the TCPA, the contractor’s relationship as an agent for the governmental entity is an essential rung in the logical ladder supporting that decision. If the requirement that the contractor be an agent of the government were to be withdrawn from the Commission’s Ruling, the foundation for the determination that contractors are not persons under the TCPA would be completely undermined.

C. There is No Authority to Extend the Broadnet Ruling to Contractors of State and Local Governments.

The Broadnet Ruling explicitly excludes calls on behalf of state and local government contractors.¹⁵⁷ As explained in the previous two subsections, we urge the Commission to reverse the Broadnet Ruling completely, because it is based on a misreading of congressional intent, the law, and a recent Supreme Court decision. It would be compounding the harm considerably if the Commission instead were to extend the exemption for government contractors to those working for state and local governments.

Courts have repeatedly held that independent contractors of state and local governments are subject to the TCPA. A few examples include:

¹⁵⁵*Broadnet Ruling*, 31 FCC Rcd. 7394, 7402 ¶ 16 (F.C.C. July 5, 2016) (emphasis in original).

¹⁵⁶ *Id.* at 7404 ¶ 20.

¹⁵⁷*Broadnet Ruling*, 31 FCC Rcd. 7394, 7399 ¶ 11 (F.C.C. July 5, 2016) (“We also emphasize that this Declaratory Ruling focuses only on calls placed by the federal government or its agents, and does not address calls placed by state or local governments or their agents.”)

- *Castro v. Kentucky Higher Education Student Loan Corporation*, 2017 WL 588379, at *10 (S.D. Fla. Feb. 14, 2017) (denying motion to dismiss TCPA and FCCPA claims: “The KHESLC’s enabling statute does not explicitly make Defendant an arm of the state, and under the Eleventh Circuit’s four-factor test, Defendant has not met its burden of showing it is entitled to sovereign immunity.”).
- *Gaffney v. Kentucky Higher Education Student Loan Corporation*, 2016 WL 3688934, at *9 (M.D. Tenn. July 12, 2016) (denying motion to dismiss FDCPA and TCPA claims; concluding that “KHESLC is not an arm of the state entitled to sovereign immunity”).
- *Worley v. Municipal Collections of America, Inc.*, 2015 WL 890878 (N.D. Ill. Feb. 27, 2015) (denying motion to dismiss TCPA claim, among others; MCOA tried to collect unpaid municipal fines that consumer owed to Calumet City; no substantive discussion of the Act).
- *Sailola v. Municipal Services Bureau*, 2014 WL 3389395 (D. Haw. July 9, 2014) (claim stated against defendant, a collection agency that collects fines and fees on behalf of the state of Hawaii judiciary).

There are some cases holding that state and local governments are themselves not subject to the TCPA, including one case¹⁵⁸ concluding that an arm of local government was not a person under the Communications Act. But that case is not relevant, because it was the local government itself that was being sued under the TCPA, not an independent contractor. In several cases, courts have found that state or local governments *themselves* are not liable for TCPA violations because of a sovereign immunity analysis.¹⁵⁹ But no case that we have been able to find includes an analysis that a contractor acting for the state agency is *not* a person under the Communications Act, “an individual, partnership, association, joint stock company, trust, or corporation.” And there is no good reason to extend the originally flawed logic to more parties.

¹⁵⁸ *Lambert v. Seminole County Sch. Bd.*, 2016 WL 9453806, at *2 (M.D. Fla. Jan. 21, 2016) (“Since the plain meaning of the TCPA’s liability provision excludes governmental entities—an observation supported by the statute’s legislative history—the School Board cannot be subjected to a TCPA lawsuit.”).

¹⁵⁹ *See, e.g., Abellard v. Oklahoma Student Loan Auth.*, 2018 WL 654462, at *3-4 (S.D. Fla. Jan. 29, 2018) (appeal filed 11th Cir. Mar. 7, 2018) (finding that defendant state agency “operates as an arm of the State... for purposes of the Eleventh Amendment”). *But see Gaffney v. Kentucky Higher Educ. Student Loan Corp.*, 2016 WL 3688934, at *9 (M.D. Tenn. July 12, 2016) (denying motion to dismiss FDCPA and TCPA claims; concluding that “KHESLC is not an arm of the state entitled to sovereign immunity”).

VI. Debt Collection Rules Need to be Issued Promptly to Protect Consumers.

On November 2, 2015, the TCPA was amended by an appropriations bill (“the Budget Amendment”) to exempt calls “made solely pursuant to the collection of a debt owed to or guaranteed by the United States” from the prohibition against making autodialed or prerecorded calls to cell phones without the consent of the called party.¹⁶⁰ The Commission seeks comment on the pending petition by collectors of student loans to reconsider several aspects of the rules that it published in 2016 pursuant to this amendment.

A. The FCC’s Failure to Implement the Debt Collection Rules Has Hurt Consumers.

In section 301(b) of the Budget Amendment, Congress expressly directed the FCC to issue regulations to implement the amendment:

Not later than 9 months after the date of enactment of this Act, the Federal Communications Commission, in consultation with the Department of Treasury, shall prescribe regulations to implement the amendments made by this section.¹⁶¹

The word “implement” means: “to put into effect according to or by means of a definite plan or procedure.”¹⁶² Yet although the FCC issued regulations in 2016,¹⁶³ in early 2017 it withdrew its request that OMB approve them.¹⁶⁴ As a result, the FCC has failed to follow the clear directives from Congress in section 301(b).

While the rules that Congress has mandated sit in limbo, student loan collectors are harassing debtors and non-debtors relentlessly in the apparent belief that they can do so with impunity. In June 2017, the National Consumer Law Center, joined by the Center for Responsible

¹⁶⁰ Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 584 (Nov. 2, 2015) (amending 47 U.S.C. § 227(b)(1)(A)(iii)).

¹⁶¹ Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(b), 129 Stat. 584 (Nov. 2, 2015) (emphasis added).

¹⁶² <http://www.dictionary.com/browse/implement>.

¹⁶³ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 31 FCC Rcd. 9074 (F.C.C. Aug. 11, 2016), *available at* <https://docs.fcc.gov/public/attachments/FCC-16-99A1.pdf>.

¹⁶⁴ *See* https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201701-3060-011.

Lending, Consumer Federation of America, Public Citizen, Public Knowledge, and Higher Ed, Not Debt, collectively representing millions of student loan borrowers and other consumers, formally filed a request for an enforcement action by the Federal Communications Commission to enforce the law against Navient Solutions, LLC for massive and continuous violations of the TCPA against student loan debtors.¹⁶⁵ The enforcement request describes numerous, repeated and deliberate flouting of the strictures of the TCPA, causing considerable harm to student loan debtors and their families.¹⁶⁶ For example, between 2014 and June 2017, there were over 18,389 complaints reported to the Consumer Financial Protection Bureau just about Navient’s practices. Of those complaints, 599 are specifically classified as relating to “Communication Tactics.” These complaints include information about the following types of abuses that Navient, as a student loan servicer, routinely used to harass consumers:

- “I have requested 5 times that Navient not call my home or my cell phone. I am receiving at least 10 calls a day at all times on both numbers. When I do answer, it is usually an automated system.”
- I got called from the same number 14 times in a 30 minutes period on XX/XX/2017. I got called 14 times total on XX/XX/2017 and 6 times on and 7 times on XX/XX/2017. . .
- Navient continues to call my phone multiple times daily. Although I am behind on my payments I did contact the company in attempts to set up a payment plan and was told

¹⁶⁵ Enforcement Request by National Consumer Law Center on behalf of its low-income clients, the Center for Responsible Lending, Consumer Federation of America, Public Citizen, Public Knowledge, and Higher Ed, Not Debt, that the FCC initiate enforcement action against Navient Solutions, LLC for massive and continuous violations of the Telephone Consumer Protection Act against student loan debtors (June 12, 2017), available at <https://ecfsapi.fcc.gov/file/106121158414766/Enforcement-Request%20Filed.pdf>

¹⁶⁶ The enforcement request provides details of numerous instances in which Navient deliberately engaged in a campaign of harassing and abusing consumers through the use of repeated, unconsented-to robocalls, calling consumers’ cell phones hundreds, and—in some cases—thousands of times after being asked to stop. Many of these calls occur multiple times a day, often numerous times a week. These calls are frequently made to consumers while they are at work, even after they have explicitly explained to Navient that they cannot accept personal calls at work. Indeed, Navient’s internal policies permit up to eight calls per day in the servicing of student loan debt. *See, e.g.,* McCaskill v. Navient Solutions, Inc., 178 F. Supp. 3d 1281, 1286 (M.D. Fla. 2016).

nothing is available to me. The calls have continued and when I asked that the calls end I was told they would continue until a payment plan was arranged. I expressed my frustration with the harassing calls. The company will not work with me on my past due amount but also will not cease the calls.

- This company has called past co-workers, childhood friends, and mother in law. Some of these people I haven't spoken to in years nor know their phone numbers myself.
- “Navient calls me 10+ times a day after only being 1 day late for pmt, if I don't answer then they harass my Mother because she is a cosigner, they call from different numbers every time and even outside of their business hours. If I answer and tell them that I plan to make a payment they still call and harass me every day.”
- “Pioneer Credit Recovery, Inc. [a subsidiary of Navient] contacts our business multiple times every day in reference to a worker 's personal debt despite being advised over and over that this is a business and our workers are not allowed to take personal phone calls on business lines.

The enforcement request also included—as just a few of many examples of the litigation filed against Navient for these abusive calls—descriptions of twenty-two cases detailing hundreds or thousands of calls Navient made to individual consumers and their families, even after being requested to stop.¹⁶⁷

B. The Budget Rules Are Necessary and Well-Supported, and the FCC Should Proceed to Issue Them.

The Budget Rules that the Commission published in 2016¹⁶⁸ would:

- Limit the exception from the consent requirement to: calls regarding a debt that is delinquent at the time the call is made; or calls made after or up to thirty days before the expiration of a grace, deferment, or forbearance period, an alternative payment arrangement, or a similar time-sensitive event or deadline affecting the amount or timing of payments due;¹⁶⁹
- Allow calls only to: the number the debtor provided at the time the debt was incurred; a number subsequently provided by the debtor to the owner of the debt or the owner’s contractor; or a number that the owner of the debt or its contractor has obtained from an

¹⁶⁷ Enforcement Request by National Consumer Law Center on behalf of its low-income clients, the Center for Responsible Lending, Consumer Federation of America, Public Citizen, Public Knowledge, and Higher Ed, Not Debt, that the FCC initiate enforcement action against Navient Solutions, LLC for massive and continuous violations of the Telephone Consumer Protection Act against student loan debtors 5-11 (June 12, 2017), *available at* <https://ecfsapi.fcc.gov/file/106121158414766/Enforcement-Request%20Filed.pdf>.

¹⁶⁸ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 31 FCC Rcd. 9074, 9080 ¶ 14, 9092 ¶ 42 (F.C.C. Aug. 11, 2016), *available at* <https://docs.fcc.gov/public/attachments/FCC-16-99A1.pdf>.

¹⁶⁹ 47 C.F.R. § 64.1200(i)(2), (j)(8).

independent source, provided that the number actually is the debtor’s telephone number;¹⁷⁰

- Limit the number of calls a caller could make to a debtor pursuant to the exception, to three calls per thirty days;¹⁷¹ and
- Require consumers to be allowed to stop unwanted calls, and require callers to inform consumers of this right.¹⁷²

These rules are well-reasoned and completely supported by the record. The limits imposed on robocalls to collect government debt are clearly necessary to protect consumers from unwanted and invasive robocalls, which would be unstoppable without the Commission’s rules. The Commission appropriately recognized that robocalls are a significant intrusion into the lives of those called and, through its regulation, sought to produce a balanced system of permitting these unconsented robocalls, but with reasonable limits.¹⁷³

With respect to the Commission’s 2016 Budget Rules:

- Over 15,700 individuals filed comments directly in the record;
- Over 12,500 of those comments expressed a general dislike for robocalls;
- Approximately 2,500 comments included more pointed comments regarding debt collection and calls by the federal government;
- Consumers Union submitted an additional petition containing 4,800 signatures asking the FCC to stop robocalls to cellphones; and
- Americans for Financial Reform submitted a petition containing 5,346 comments in support of the FCC’s proposed limitations on calls.¹⁷⁴

The FCC’s 2016 Order announcing the rules, citing a letter to the FCC from Senator Sherrod Brown, pointed out that “because the Budget Act amendments could expose an additional 47 to 61 million people to robocalls that previously required consent, the Commission must

¹⁷⁰ 47 C.F.R. § 64.1200(i)(3), (j)(7).

¹⁷¹ 47 C.F.R. § 64.1200(j)(1)(A). Note that, in the case of a text message, the disclosure about the right to stop robocalls can be made in a separate text message, and that message does not count toward the three-per-month limit on the number of calls. *See id.* at 9091-9092 ¶ 40.

¹⁷² 47 C.F.R. § 64.1200(j)(3), (4).

¹⁷³ *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 31 FCC Rcd. 9074, 9078 ¶ 9 (F.C.C. Aug. 11, 2016), *available at* <https://docs.fcc.gov/public/attachments/FCC-16-99A1.pdf>

¹⁷⁴ *See id.*

consider these concerns and the increase in the magnitude of these concerns.”¹⁷⁵ Considerably more detail is in the Order.

The threat to consumers is vividly illustrated by the Petition for Reconsideration filed by the student loan collectors.¹⁷⁶ The Petition points out more than once how important it is for the collectors to be able to call consumers repeatedly until they reach them, and to keep calling until they are able to persuade consumers to make payments on these debts.¹⁷⁷ We do not dispute that calling consumers repeatedly is likely to push more of them to make payments on these debts. Indeed, consumers may be so desperate to stop the relentless calls that they use the rent money or forego food or health care in order to stop them.

The harms to consumers are significant. For low-income consumers who are forced to choose limited-minute cell phone plans, robocalls can use up the minutes they need for other purposes. Robocalls at work can cause debtors to lose their jobs. The FCC should not countenance these tactics—particularly by entities collecting student loans that young people were encouraged to use to further their educations and become productive members of society.

The TCPA is a consumer protection statute. It was passed explicitly to protect consumers from the annoyance and expense of too many automated calls.¹⁷⁸ It is perfectly clear that, in case of

¹⁷⁵ *Id.* at 9078 ¶ 9 n.36 (citing Letter from Sherrod Brown, Ranking Member, United States Senate Committee on Banking, Housing, and Urban Affairs, to Marlene H. Dortch, Secretary, FCC at 2 (Mar. 28, 2016) (on file in CG Docket No. 02-278)).

¹⁷⁶ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petition for Reconsideration of Great Lakes Higher Education Corp.; Navient Corp.; Nelnet, Inc.; Pennsylvania Higher Assistance Agency; and the Student Loan Servicing Alliance, CG Docket No. 02-278 (filed Dec. 16, 2016), available at <https://ecfsapi.fcc.gov/file/1217190700960/Petition%20for%20Reconsideration.pdf>.

¹⁷⁷ *See, e.g., id.* at 6 (Navient data “shows that 25 percent of federal student loan borrowers require 40 or more call attempts to reach”) and 11 (“Nelnet also showed that calling up to 10 times per month leads to 42 percent more live contacts compared to calling three times per month.”).

¹⁷⁸ *See* Pub. L. No. 102-243, § 2, 105 Stat. 2394 (Dec. 20, 1991) (congressional findings). *See also Mims v. Arrow Fin. Servs., L.L.C.*, 565 U.S. 368, 370-71, 132 S. Ct. 740, 181 L. Ed. 2d 881 (2012) (“Voluminous consumer complaints about abuses of telephone technology—for example, computerized calls dispatched to private homes—prompted Congress to pass the TCPA. Congress determined that federal legislation was needed

doubt, the balance should be tipped toward protecting consumers.¹⁷⁹ Congress passed the Budget Act amendments to permit some debt collection robocalls to be made, in specified circumstances, without consent, thereby creating an exception to the previous strict requirement of prior express consent except for emergency calls. But Congress also *required* the Commission to prescribe regulations to implement the Budget Act amendments, in section 301(b).¹⁸⁰ Notably, this general rulemaking authority, which the servicers’ petition never cites or even acknowledges, is *in addition to* the Commission’s more specific discretionary authority set forth in section 227(b)(2)(H) to restrict the number and duration of these calls. This general rulemaking authority parallels the rulemaking authority created by section 227(b)(2), which also uses the language “the Commission shall prescribe regulations to implement the requirements [of § 227(b)].” However, the pre-existing rulemaking authority set forth in section 227(b)(2) is subject to numerous restrictions and requirements, while the new authority in section 301(b) is not. If Congress wanted the Commission to regulate just the number and duration of calls, section 301(b) would be entirely superfluous. The Budget Rules fall easily within the scope of the Commission’s discretionary authority to limit the number and duration of calls, but even if they did not, they are well within the more general authority conferred by section 301(b).

1. Limit on the Number of Calls. Petitioners complain about the Budget Rules’ limitation of three robocalls per month. Yet this limit falls squarely within the Commission’s discretionary authority to “limit the number...of calls” in 47 U.S.C. § 227(b)(2)(H). Petitioners simply do not like

because telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls.”).

¹⁷⁹ See, e.g., *Barnes v. Fleet Nat’l Bank, N.A.*, 370 F.3d 164, 171 (1st Cir. 2004) (“We construe consumer protection statutes liberally in favor of consumers.”); *Legg v. Voice Media Grp., Inc.*, 990 F. Supp. 2d 1351, 1354 (S.D. Fla. 2014) (“because the TCPA is a consumer protection statute that is remedial in nature, it should be construed liberally in favor of consumers”); *Ramirez v. Apex Fin. Mgmt., L.L.C.*, 567 F. Supp. 2d 1035, 1040 (N.D. Ill. 2008) (as a consumer protection statute, the FDCPA “is liberally construed in favor of consumers to effect its purpose”).

¹⁸⁰ Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(b), 129 Stat. 584 (Nov. 2, 2015).

the number. In setting this number, the Commission recognized both the harassment that consumers suffer from debt collectors, and the particular annoyance and invasion of privacy caused by robocalls.

Petitioners repeatedly denigrate the Commission's statements that callers can make manually-dialed, real-voice calls if they want to make more calls than the permitted three per month.¹⁸¹ But consumers object particularly to robocalls, and for good reasons: the absence of a human on the line, the inability to get the calls to stop, the dead air, the abandoned calls, and their huge number. It is entirely reasonable to restrict robocalls more than other calls, and that is exactly what the TCPA does.

Petitioners claim that the Commission ignored data in the record showing that they should be able to make more than three unconsented-to robocalls a month.¹⁸² Yet Petitioners ignore the enormous volume of submissions in the record showing the extent to which consumers object to these calls and want a low limit on their number. The Commission was well within its authority to consider and balance *both* sources of information.

2. Limit on Call Attempts. Petitioners also protest that the limit should be based on live contacts, rather than attempts. But the entire point of limiting the calls is to address the annoyance and invasion of privacy caused by the autodialed calls. A ringing telephone is an annoyance and an invasion of privacy whether or not the consumer chooses to answer the phone.¹⁸³ It would be a

¹⁸¹ See *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petition for Reconsideration of Great Lakes Higher Education Corp.; Navient Corp.; Nelnet, Inc.; Pennsylvania Higher Assistance Agency; and the Student Loan Servicing Alliance, CG Docket No. 02-278, at 14 (filed Dec. 16, 2016), available at <https://ecfsapi.fcc.gov/file/1217190700960/Petition%20for%20Reconsideration.pdf>.

¹⁸² See *id.* at 11.

¹⁸³ See *Tillman v. Ally Fin. Inc.*, 2017 WL 1957014, at *7 n.6 (M.D. Fla. May 11, 2017) (finding Article III standing; consumer suffers harm when cell phone receives calls that produce audible or visual signal, go to voicemail, or appear on list of missed calls); *Mey v. Got Warranty, Inc.*, 193 F. Supp. 3d 641, 647 (N.D. W. Va. 2016) (even if the consumer does not answer the call or hear the ring tone, the mere invasion of the consumer's electronic device can be considered a trespass to chattels, thereby providing Article III standing); *King v. Time Warner Cable*, 113 F. Supp. 3d 718, 725–26 (S.D.N.Y. 2015) (stating that “[u]nanswered calls

significant break from longstanding interpretation of TCPA protections to measure that annoyance only when the consumer answered the phone.

Indeed, Petitioners' own data provides compelling support for the Budget Rules' limit of three attempted calls per month. According to Nelnet, calling up to ten times per month leads to 42% more live contacts than calling three times per month.¹⁸⁴ In other words, a 233% increase in the number of calls produces only a 42% increase in the number of live contacts. Thus while increasing the number of robocalls from three to ten comes at little financial cost for the debt collector, the repeated robocalls produce rapidly diminishing returns that do not justify the additional harassment, invasion of privacy, and costs caused to consumers by tripling the number of calls.

3. Prohibiting Unconsented-to Robocalls To Persons Other Than the Debtor.

Petitioners also object to the Commission's refusal to allow them to make unconsented-to robocalls to persons other than the debtor. They want to be able to robocall "every 'endorser, relative, reference, and entity'" in the consumer's file,¹⁸⁵ and they want to be able to robocall wrong numbers with impunity.

The Budget Act's authorization for these calls does not exempt *all* calls related to the debt

count"); *Castro v. Green Tree Servicing, L.L.C.*, 959 F. Supp. 2d 698, 720 (S.D.N.Y. 2013) ("for purposes of Plaintiffs' TCPA claim, it is immaterial whether the Plaintiffs picked up all of Defendants' calls or whether several of the calls went unanswered"); *Fillichio v. M.R.S. Associates*, 2010 WL 4261442, at *3 (S.D. Fla. Oct. 19, 2010) (the TCPA "does not include [] a requirement... that the recipient of a call must answer the phone or somehow be aware of the call in order for there to be a violation"). *See also* *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953–54 (9th Cir. 2009) (holding that "to call" in the TCPA means "to communicate with or try to get in communication with a person by a telephone"); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 31 FCC Rcd. 9074, 9086-9087 ¶ 28 (F.C.C. Aug. 11, 2016) (a call is any initiated call; the call need not be completed and need not result in a conversation or voicemail).

¹⁸⁴ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Petition for Reconsideration of Great Lakes Higher Education Corp.; Navient Corp.; Nelnet, Inc.; Pennsylvania Higher Assistance Agency; and the Student Loan Servicing Alliance, CG Docket No. 02-278, at 11 (filed Dec. 16, 2016), available at <https://ecfsapi.fcc.gov/file/1217190700960/Petition%20for%20Reconsideration.pdf>.

¹⁸⁵ *Id.* at 15.

collection process from the consent requirement. The statute specifies that the calls must be “solely” to collect the debt. If the word “solely” is to be given any meaning—as statutory construction principles require—then the authorization must encompass something less than calls for any reason simply *associated* with the collection of the debt.

The extent of the problems that would be caused if Petitioners’ position were to be accepted is illustrated by Petitioners’ own data, which shows that “less than half of defaulted borrowers are reachable via telephone, and right party contact is extremely low.”¹⁸⁶ To authorize unconsented-to robocalls to non-debtors would unleash a tsunami of robocalls to wrong numbers, and to family, friends, and employers, affecting millions of non-debtors, and likely resulting in an even greater acceleration of the volume of consumer complaints.

The problem of wrong-number calls is exacerbated by the fact that Petitioners have shown that, even when they do know that the people they are calling are not those who provided consent, they not only keep calling, but they keep calling relentlessly. In one recently litigated case, Petitioner Nelnet called one consumer over 185 times, leaving recorded messages and texts clearly indicating that Nelnet knew perfectly well that it was not reaching the debtor, but that it was trying to get the called party to tell Nelnet how to reach the debtor. These messages and texts were sent numerous times even after the consumer tried to inform Nelnet that he was not the debtor and had no idea who the debtor was.¹⁸⁷ The case was brought and settled as a class action,¹⁸⁸ because this was by no

¹⁸⁶ *Id.* at 12.

¹⁸⁷ Cooper v. Nelnet, Case No. 6:14-cv-00314-GKS-DAB (M.D. Fla. filed Feb. 25, 2014).

¹⁸⁸ Cooper v. Nelnet, Inc., 2015 WL 12839778 (M.D. Fla. Aug. 4, 2015) (final approval order of class action settlement agreement).

means an isolated event. In a similar case against Navient,¹⁸⁹ the consumer repeatedly informed Navient that he was not the person Navient said it was trying to reach, but still received fifty-five calls after telling Navient that it was calling the wrong number. In this case, the consumer alleged that “during a recent four-year period, Navient placed over nine million autodialed calls to over a quarter of a million cellular telephone users or subscribers, each of whom previously informed Navient they did not want to receive calls from it.”¹⁹⁰ This case settled for almost \$20 million because so many individuals were impacted by Navient’s calls.¹⁹¹

In these cases, a business entity set loose an automated system that called a non-debtor’s cell phone multiple times, even after the consumer’s repeated attempts to stop the calls. The collectors had simply decided that it was more cost-effective to ignore the clearly expressed wishes of these consumers for the calls to stop, and to continue to make these automated calls.

The mandate by Congress to the Commission to regulate these calls¹⁹² clearly justifies excluding calls to reassigned numbers from the Budget Act exception to the requirement of consent. These calls have such a remote and tangential relationship to collection of the debt that they cannot be considered to fall within the Budget Act amendments at all. And if they do, limiting them to zero would be clearly within the Commission’s authority to regulate their “number,” even if the Commission did not have the more general rulemaking authority of section 301(b). Moreover, if the Commission follows through on the development of the reassigned number database as

¹⁸⁹ Johnson v. Navient Solutions, Inc., Case No. 1:15-cv-0716-LJM-MJD (S.D. Ind. filed May 4, 2015) (complaint), *available at* [https://johnsoncpasettlement.com/Portals/0/Documents/\(1\)%20Class%20action%20complaint.pdf](https://johnsoncpasettlement.com/Portals/0/Documents/(1)%20Class%20action%20complaint.pdf).

¹⁹⁰ Johnson v. Navient Solutions, Inc., Case No. 1:15-cv-0716-LJM-MJD (S.D. Ind. filed May 4, 2015) (Plaintiff’s Memorandum of Law in Support of His Motion for Summary Judgment at 1).

¹⁹¹ The Settlement Agreement and Release (filed Dec. 23, 2016) stated that the *Johnson* case and the case of Toure, et al. v. Navient Solutions, Inc., Case No. 1:17-cv-00071-LJM-TAB (N.D. Ill. Aug. 23, 2016) would be coordinated following the execution of the Agreement. The final approval order, which was filed on July 13, 2017, is available at [https://johnsoncpasettlement.com/Portals/0/Documents/\(177\)%20Final%20approval%20order.pdf](https://johnsoncpasettlement.com/Portals/0/Documents/(177)%20Final%20approval%20order.pdf)

¹⁹² See Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a)(1)(H), 129 Stat. 584 (Nov. 2, 2015).

contemplated, virtually all reassigned-number wrong-number calls should stop—as long as the Commission does not create exceptions to callers’ liability for calling reassigned numbers that would undermine the incentive for callers to check the database.

VII. The Interplay Between the Debt Collection Rules and the Broadnet Decision

As the Commission indicates in its question about the interplay between the Broadnet Ruling and the debt collection exemption passed in the 2015 Budget Act,¹⁹³ there would be no need for the exemption passed by Congress for calls to collect federal debt if the Broadnet Ruling were correct. The Broadnet Ruling holds that federal contractors are not persons for purposes of TCPA coverage.¹⁹⁴ Yet the only callers who would possibly be making calls to collect debts owed to or guaranteed by the United States would be either the agencies of the government or its contractors. The Budget Amendment’s creation of an exception to the consent requirement for certain government contractors—those calling solely to collect debts owed to or guaranteed by the federal government—makes sense only if those contractors would not have been able to make these calls without the amendment.¹⁹⁵

¹⁹³ See *id.* at § 301(a)(1)(A) (amending 47 U.S.C. § 227(b)(1)(A)); see also *id.* at § 301(a)(1)(B) (amending 47 U.S.C. § 227(b)(1)(B) to read, in part, that artificial- or prerecorded-voice calls cannot be made to a residential telephone line without the consent of the called party unless the call is “made solely pursuant to the collection of a debt owed to or guaranteed by the United States”). The Commission has interpreted the TCPA to apply both to voice calls and text messages. 2015 TCPA Omnibus Order at 8016-17 ¶ 107.

¹⁹⁴ *Broadnet Ruling*, 31 FCC Rcd. 7394, 7401 ¶ 16 (F.C.C. July 5, 2016).

¹⁹⁵ Senator Markey’s remarks about the Budget Amendment illustrate this fact: “Section 301 of this legislation before this body today removes that precall consent requirement if someone is collecting debt owed to the Federal Government. The provision opens the door to potentially unwanted robocalls and texts to the cell phones of anyone with a student loan or a mortgage, calls to the cell phones of delinquent taxpayers, calls to farmers, to veterans, or to anyone with debt backed by the Federal Government.” 161 Cong. Rec. S7636 (daily ed. Oct. 29, 2015) (statement of Sen. Markey).

The Commission's Order for the Budget Amendment Rules¹⁹⁶ seeks to reconcile the conflict between the Broadnet Ruling and the existence of the Budget Amendment by taking the position that the Budget Amendment merely conferred *new authority* on the FCC to regulate robocalls by government contractors.¹⁹⁷ Therefore, the theory goes, the purpose of the whole amendment was not to permit *more* calls to be made without consent, but to require instead that the FCC issue rules to protect consumers from calls that contractors could already make without consent because they were not covered by the TCPA. The problem with this rather absurd and strained reading of the Budget Amendment is that if federal contractors are not persons under the TCPA, as held by the Broadnet Ruling, no rules issued by the FCC pursuant to the TCPA would be applicable to them. Moreover, if the entire purpose of the Budget Amendment was to protect consumers from more robocalls seeking to collect federal debt, the FCC has failed miserably in this mandate, as the FCC has yet to promulgate rules applicable to this activity, despite the passage of two and a half years as well as many requests that the agency move expeditiously to protect consumers from overzealous collectors.¹⁹⁸ This line of reasoning is also completely belied by the many requests by servicers and the U.S. Department of Education, made before the Budget Amendment was passed, asking that contractors collecting or servicing student loans be allowed to robocall cell phones without consent, including requests contained in the President's proposed budgets.¹⁹⁹

¹⁹⁶ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, FCC 16-99, 31 FCC Rcd. 9074 (F.C.C. Aug. 11, 2016).

¹⁹⁷ *See id.* at 9098-9099 ¶¶ 61-63.

¹⁹⁸ *See, e.g.*, Enforcement Request by National Consumer Law Center on behalf of its low-income clients, the Center for Responsible Lending, Consumer Federation of America, Public Citizen, Public Knowledge, and Higher Ed, Not Debt, that the FCC initiate enforcement action against Navient Solutions, LLC for massive and continuous violations of the Telephone Consumer Protection Act against student loan debtors (June 12, 2017), available at <https://ecfsapi.fcc.gov/file/106121158414766/Enforcement-Request%20Filed.pdf>

¹⁹⁹ *See, e.g.* U.S. Department of Education, Report to the White House, Strengthening the Student Loan System to Better Protect All Borrowers 16 (Oct. 1, 2015), available at <http://www2.ed.gov/documents/press-releases/strengthening-student-loan-system.pdf> ("Current Federal law prohibits servicers from contacting

It is true that section 227(b)(2)(H), passed as part of the Budget Amendment, gives the FCC *rulemaking* authority that it did not previously have. However, the purpose of this addition of rulemaking authority was clearly to impose limits on the new calls authorized by the Amendment. One cannot reasonably read the purpose of the new rulemaking authority granted in that section as a stand-alone provision divorced from the new provision allowing robocalls without consent to collect federal government debt.

If Congress had sought only to add the authority to the Commission to regulate the number and duration of these calls, it would have needed to add only the new subsection (b)(2)(H), providing this authority. The new language added to subsection (b)(1)(A)(iii), specifying that calls to collect federal debt do not require consent, would have been superfluous and unnecessary. Common rules of statutory construction require that all words in a statute must have real meaning.²⁰⁰ And there is simply no meaning to be given to the new language providing an exception from the consent requirement if the Broadnet Ruling is correct. This issue is well-articulated in the Statements of both Commissioners Rosenworcel and Pai.²⁰¹

VIII. Conclusion

We appreciate the Commission's consideration of the needs of consumers, and the views of their advocates, as articulated in these comments. We will be happy to answer any questions.

Respectfully submitted,

borrowers on a cell phone number using an auto-dialer unless the borrower has provided explicit consent to be contacted at that number. ...The President's 2016 Budget proposed amending this law to allow the use of automated dialers to contact borrowers to inform them of their federal repayment obligations and benefits like Pay As You Earn, or Rehabilitation, in the case of a defaulted borrower.”).

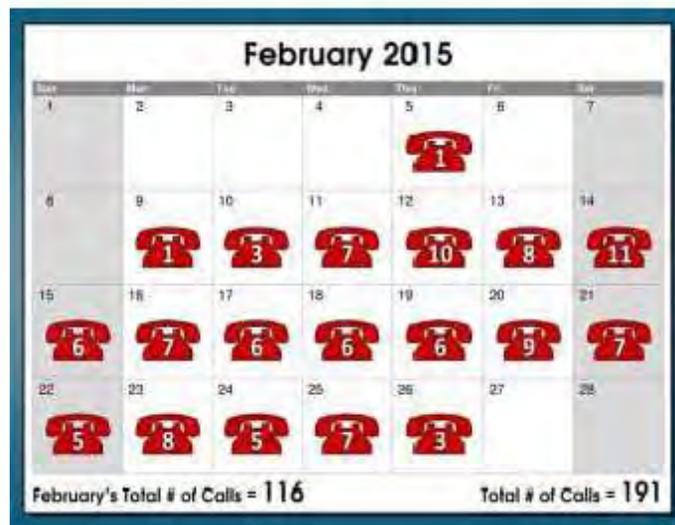
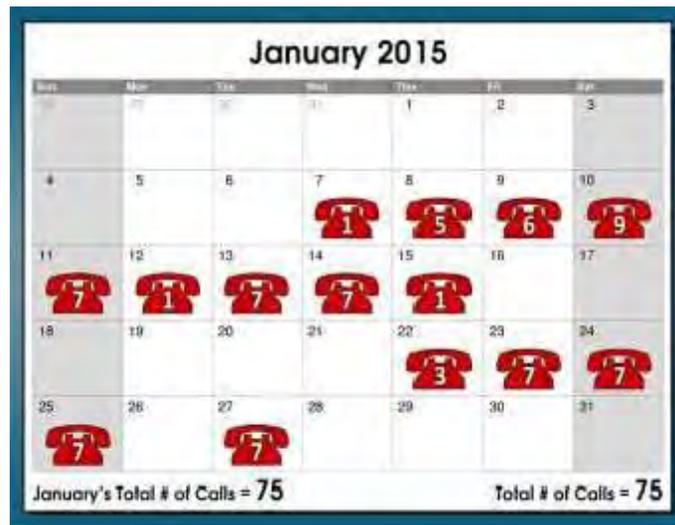
²⁰⁰ See *Potter v. United States*, 155 U.S. 438, 446, 15 S. Ct. 144, 39 L. Ed. 214 (1894) (the presence of statutory language “cannot be regarded as mere surplusage; it means something”).

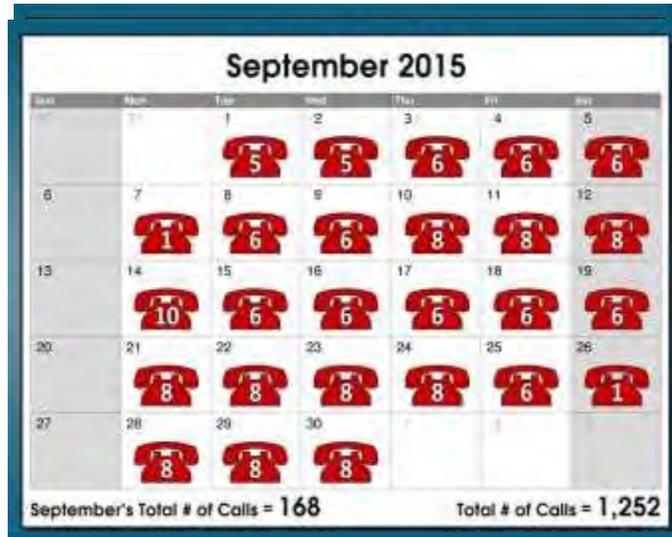
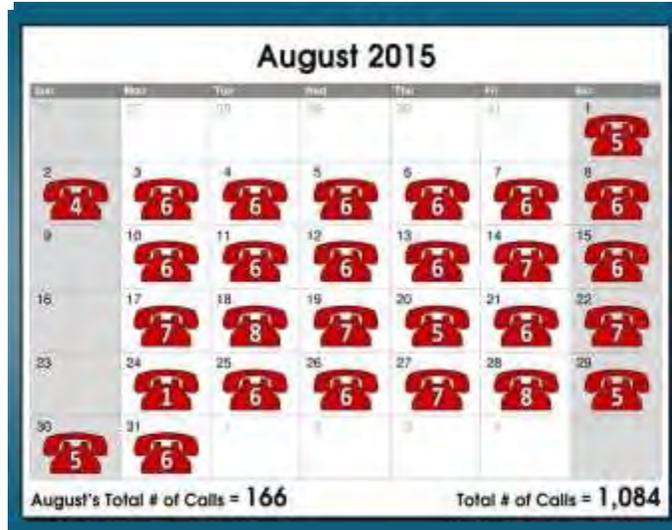
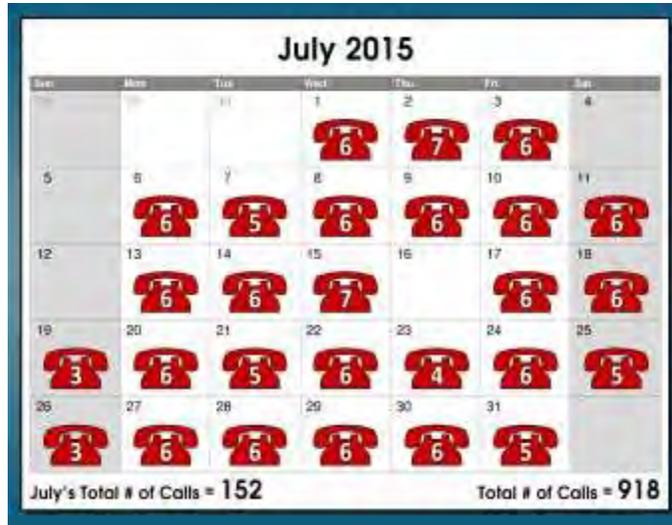
²⁰¹ See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, FCC 16-99, 31 FCC Rcd. 9074 (F.C.C. Aug. 11, 2016) (Concurring Statement of Commissioner Jessica Rosenworcel; Dissenting Statement of Commissioner Ajit Pai).

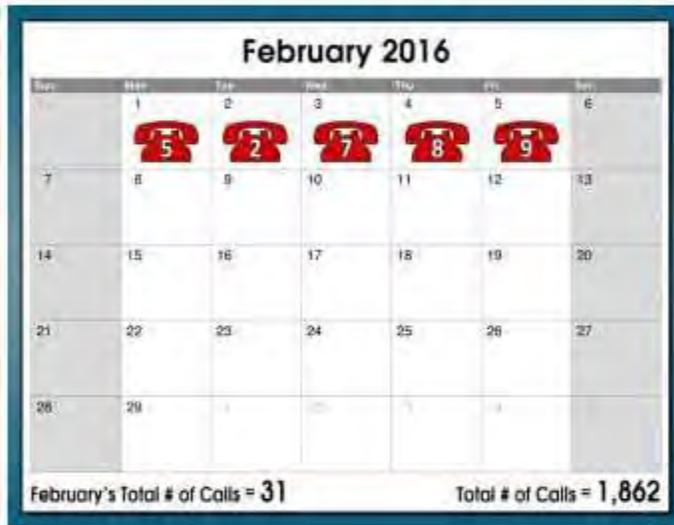
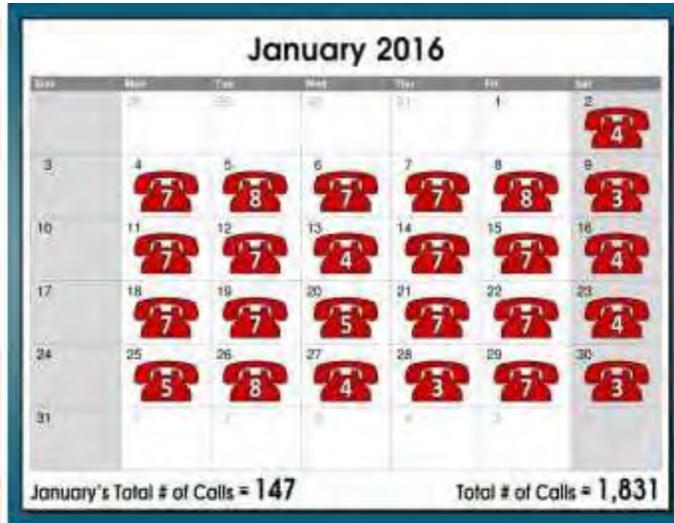
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Appendix 1: Calendar Showing Daily and Monthly Calls from Conns Appliances to Ms. Stevens







Ms. Stevens' Payment History

Actual Date	Effective Date	Tran Code	Description	Applied Principal	Applied Interest	Applied Other	Principal Balance
12-06-2014	11-29-2014	702-4	New loan debit	9,240.64	00	00	9,240.64
01-13-2015	01-13-2015	764-6	Late charge assessment	00	00	5.00	9,240.64
01-26-2015	01-26-2015	738-2	Collect late charge	00	00	1.23	9,240.64
01-26-2015	01-26-2015	725-5	Regular Payment	288.77	00	00	8,951.87
02-13-2015	02-13-2015	764-6	Late charge assessment	00	00	5.00	8,951.87
02-26-2015	02-26-2015	725-5	Regular Payment	288.77	00	00	8,663.10
03-13-2015	03-13-2015	764-6	Late charge assessment	00	00	5.00	8,663.10
04-01-2015	04-01-2015	725-5	Regular Payment	288.77	00	00	8,374.33
04-13-2015	04-13-2015	764-6	Late charge assessment	00	00	5.00	8,374.33
04-29-2015	04-29-2015	725-5	Regular Payment	288.77	00	00	8,085.56
05-05-2015	05-05-2015	712-4	NSF Fee NSF Batch 8752	30.00	00	00	8,115.56
05-05-2015	04-29-2015	718-4	Amegy NSF Pmt NSF Batch 8752	288.77	00	00	8,404.33
05-13-2015	05-13-2015	764-6	Late charge assessment	00	00	5.00	8,404.33
06-05-2015	06-05-2015	725-5	Regular Payment	288.77	00	00	8,115.56
06-13-2015	06-13-2015	764-6	Late charge assessment	00	00	5.00	8,115.56
07-13-2015	07-13-2015	764-6	Late charge assessment	00	00	5.00	8,115.56
07-15-2015	07-15-2015	725-5	Regular Payment	288.77	00	00	7,826.79
08-13-2015	08-13-2015	764-6	Late charge assessment	00	00	5.00	7,826.79
08-29-2015	08-29-2015	725-5	Regular Payment	288.77	00	00	7,538.02
09-13-2015	09-13-2015	764-6	Late charge assessment	00	00	5.00	7,538.02
10-13-2015	10-13-2015	764-6	Late charge assessment	00	00	5.00	7,538.02
10-30-2015	10-30-2015	725-5	Regular Payment	288.77	00	00	7,249.25