

**United States Court of Appeals
For the District of Columbia Circuit**

ACA INTERNATIONAL, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents,

CAVALRY PORTFOLIO SERVICES, L.L.C., *et al.*,
Intervenors for Petitioners.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

**BRIEF OF AMICI CURIAE NATIONAL CONSUMER LAW CENTER;
NATIONAL ASSOCIATION OF CONSUMER ADVOCATES
CONSUMERS UNION; AARP; CONSUMER FEDERATION OF
AMERICA, AND MFY LEGAL SERVICES IN SUPPORT OF
AFFIRMANCE OF THE FEDERAL COMMUNICATIONS COMMISSION
2015 OMNIBUS DECLARATORY RULING AND ORDER**

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CORPORATE DISCLOSURE INFORMATION

The National Consumer Law Center (NCLC) is a Massachusetts non-profit corporation established in 1969 and incorporated in 1971. It is a national research and advocacy organization focusing specifically on the legal needs of low-income, financially distressed and elderly consumers. NCLC operates as a tax-exempt organization under the provisions of section 501(c)(3) of the Internal Revenue Code. It has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

The National Association of Consumer Advocates (NACA) is a non-profit membership organization of law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates. NACA is tax-exempt under section 501(c)(6) of the Internal Revenue Code. It has no parent corporation, nor has it issued shares or securities.

Consumers Union of United States, Inc., d/b/a Consumer Reports (CU), is the publisher of Consumer Reports. It is a non-profit membership organization representing the interests of consumers. It has no parent corporation and there is no corporation that has an ownership interest of any kind in it.

AARP is a non-profit, non-partisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as health

care, employment and income security, retirement planning, affordable utilities, and protection from financial abuse. The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, and AARP Insurance Plan, also known as the AARP Health Trust.

AARP has no parent corporation, nor has it issued shares or securities.

Consumer Federation of America (CFA) is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. It is a non-profit, non-stock corporation. It has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares

MFY Legal Services, Inc. has provided free legal assistance to residents of New York City on a wide range of civil legal issues, prioritizing services to vulnerable and under-served populations. It is a non-profit, non-stock corporation.

It has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

/s/ Craig L. Briskin

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**CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW,
RELATED CASES
AUTHORITY TO FILE AND SEPARATE BRIEFING**

Pursuant to D.C. Circuit Rule 28(a)(1), Amici Curiae certify that:

(A) Parties, Intervenors and Amici

All parties, intervenors, and amici appearing before this Court are set forth in Brief for Respondent.

(B) Ruling under Review

The Federal Communications Commission (FCC) released the ruling under review on July 10, 2015. *See 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 (2015). The Order is an Omnibus Declaratory Ruling and Order that addressed requests for action by the Commission related to the Telephone Consumer Protection Act (TCPA), Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227.

(C) Related Cases

It is the understanding of Amici that all petitions for review of the Commission's Order were consolidated in this Court under the lottery procedures set forth in 28 U.S.C. § 2112(a).

(D) Authority to File

On December 11, 2015, Amici filed their Notice of Consent From All Parties for National Consumer Law Center, National Association of Consumer Advocates, and Consumers Union to File a Brief Amici Curiae in Support of the Federal Communications Commission 2015 Omnibus Declaratory Ruling and Order. All parties to this proceeding have consented to the filing of this brief. Pursuant to Circuit Rule 29(d), counsel for Amici Curiae certify that filing of this separate brief is necessary because no other non-governmental amicus brief of which they are aware relates to the subjects addressed herein.

(E) Authorship And Financial Contributions

- 1) No party's counsel authored this Amici Curiae brief in whole or in part;
- 2) No party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and
- 3) No person, other than the Amici Curiae, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

/s/ Craig L. Briskin

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TABLE OF CONTENTS

CORPORATE DISCLOSURE INFORMATIONi

CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, RELATED
CASES AUTHORITY TO FILE AND SEPARATE BRIEFINGiv

TABLE OF AUTHORITIES viii

GLOSSARY OF ABBREVIATIONSxi

STATUTES AND REGULATIONSxi

STATEMENT OF IDENTITY AND INTEREST IN CASExi

INTRODUCTION AND SUMMARY OF THE ARGUMENT 1

ARGUMENT2

 I. CONSUMERS MUST HAVE THE ABILITY TO STOP
 UNWANTED ROBOCALLS2

 A. The Volume of Unwanted Robocalls and Texts Has
 Reached Epidemic Proportions.....2

 B. People Will be Hurt by More Unwanted Robocalls4

 C. More Robocalls Threaten Public Safety6

 D. Texts are as Intrusive as Calls.....7

 E. The Extent of Unwanted Robocalls is Revealed in
 Litigation.....8

 F. The Number of TCPA Lawsuits Pales in Comparison to
 the Number of Consumer Complaints Regarding
 Unwanted Calls and Texts10

II.	ACCEPTING PETITIONERS’ AND INTERVENORS’ POSITIONS WOULD ERADICATE THE CONSUMER PROTECTIONS OF THE TCPA.....	13
A.	Adoption of Petitioners’ and Supporting Intervenors’ Definition of Autodialer Would Mean that the TCPA Applies Only to Old Technology.....	14
B.	“Called Party” Means the Current Subscriber of the Dialed Number.....	16
C.	“Reasonable Means of Revoking Consent” Includes Only Means that are Reasonable.....	22
III.	RITE AID DOES NOT HAVE STANDING TO APPEAL THE FCC ORDER.....	26
	CONCLUSION.....	28
	CERTIFICATE OF COMPLIANCE.....	30
	CERTIFICATE OF SERVICE.....	31
	ADDENDUM.....	Add. 1

TABLE OF AUTHORITIES¹

CASES:

<i>Allen v. JPMorgan Chase, N.A.</i> , Case No. 13-cv-08285 (N.D. Ill.)	19-20
<i>Beal v. Wyndham Vacation Resorts, Inc.</i> , 956 F. Supp. 2d 962 (W.D. Wis. 2013)	9
<i>Breslow v. Wells Fargo Bank, N.A.</i> , 857 F. Supp. 2d 1316 (S.D. Fla. 2012)	19
* <i>Cooper v. NelNet</i> , 6:14-cv-00314-GKS-DAB (M.D. Fla.)	17
* <i>Dominguez v. Yahoo, Inc.</i> , --- Fed. Appx. ---, 2015 WL 6405811 (3d Cir. Oct. 23, 2015)	8, 9, 11, 12, 19
<i>Fini v. DISH Network L.L.C.</i> , 955 F. Supp. 2d 1288 (M.D. Fla 2013)	19
* <i>Gager v. Dell Fin. Servs., L.L.C.</i> , 727 F.3d 265 (3d Cir. 2013)	8, 9, 25
<i>King v. Time Warner Cable</i> , 2015 WL 4103689 (S.D.N.Y. July 7, 2015), <i>appeal filed</i> , No. 15-2474 (2d Cir. Aug. 6, 2015)	8, 9
<i>Manno v. Healthcare Revenue Recovery Group, L.L.C.</i> , 289 F.R.D. 674 (S.D. Fla. 2013)	19
<i>Mims v. Arrow Fin. Servs., L.L.C.</i> , 132 S. Ct. 740 (2012)	3
<i>Moore v. Dish Network L.L.C.</i> , 57 F. Supp. 3d 639 (N.D. W. Va. 2014)	8, 9

¹ Authorities upon which we chiefly rely are marked with an *.

<i>Munro v. King Broadcasting Co.</i> , 2013 WL 6185233 (W.D. Wash. Nov. 26, 2013).....	9
<i>Osorio v. State Farm Bank, F.S.B.</i> , 746 F.3d 1242 (11th Cir. 2014)	8, 9, 18, 19
<i>Paradise v. Commonwealth Fin. Sys., Inc.</i> , No. 3:13-cv-00001, 2014 WL 4717966 (M.D. Pa. Sept. 22, 2014)	19
<i>Percora v. Santander</i> , Case No. 5:14-cv-04751-PSG (N.D. Cal.)	20
<i>Scott v. Reliant Energy Retail Holdings, L.L.C.</i> , Case No. 4:2015-cv-00282 (S.D. Texas).....	20
<i>Shady Grove Orthopedic Associates, P.A., v. Allstate Insurance Co.</i> , 559 U.S. 393 (2010).....	13
<i>Singh v. Titan Fitness Holdings, L.L.C. d/b/a Fitness Connection</i> , Case No. 4:14-cv-03141 (S.D. Texas).....	20
* <i>Soppet v. Enhanced Recovery Co., L.L.C.</i> , 679 F.3d 637 (7th Cir. 2012)	17, 18
<i>Soundbite Communications, Inc.</i> , 27 FCC Rcd. 15391 (Nov. 26, 2012).....	25

STATUTES:

15 U.S.C. §§ 1601 <i>et seq.</i>	21
*47 U.S.C. § 227(b)(1)(A)(iii)	3
*47 U.S.C. § 227(b)(3)(C)	12
*Pub. L. No. 102-243, 105 Stat. 2394 §§ 12-13 (1991)	3

RULES:

Federal Rules of Civil Procedure Rules 4, 5, 11, 12, 15, 16, 17, 23, 26, 27, 30,
32, 33, 34, 36, 37, 43, 45, 50, 51, 53, 56, 60, 65, and 6823

REGULATIONS:

45 C.F.R. § 160.10327
47 C.F.R. § 64.1200(a)(2).....27
47 C.F.R. § 64.1200(a)(2)-(3).....28

U.C.C. § 1-20123
U.C.C. § 1-20323
U.C.C. § 1-20523
U.C.C. § 1-30423
U.C.C. § 2-20623

OTHER AUTHORITIES:

H.R. 303515, 16

Pub. L. No. 114-74, 129 Stat. 584 (2015) (§ 301).....3

Michael P. Battaglia, Meg Ryan, Marcie Cynamon, *Purging Out-Of-Scope
And Cellular Telephone Numbers From RDD Samples*, in Proceedings
of the AAPOR-ASA Section on Survey Research Methods 3798
(2005)..... 20-21

Stephen Blumberg and Julian Luke, U.S. Dep’t of Health and Human
Services, National Center for Health Statistics, *Wireless Substitution:
Early Release of Estimates From the National Health Interview
Survey, July-December 2014 (June 2015)*4

*FCC, Second Further Notice of Proposed Rulemaking, Order on
Reconsideration, Second Report and Order, and Memorandum
Opinion and Order 15-71, ¶ 16 (Rel. June 22, 2015)5

FCC, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Eighteenth Report, WT Docket No. 15-125, ¶¶ 44, 73, 95, 96 (Dec. 23 2015)	4
*Federal Trade Commission, National Do Not Call Registry Data Book, FY 2014, at 5 (Nov. 2014)	3, 11
Hearing Before the Senate Comm. on Commerce, Sci., and Transp.’s Subcomm. on Consumer Prot., Prod. Safety, and Ins. (July 10, 2013).....	2
<i>Injury Prevention & Control: Motor Vehicle Safety: Distracted Driving</i> , Centers for Disease Control and Prevention, <i>available at</i> http://www.cdc.gov/motorvehiclesafety/distracted_driving/ (last accessed Jan. 14, 2016).....	6
<i>In re</i> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 23 FCC Rcd. 9779, at 12–16 (2008).....	15
Frank Newport, <i>The New Era of Communication Among Americans</i> , Gallup (Nov. 10, 2014), <i>available at</i> http://www.gallup.com/poll/179288/new-era-communication-americans.aspx	7
Numbering Resource Optimization, CC Docket No. 99-200, Report and Order, 15 FCC Rcd. 7574, 7590, ¶ 29 (2000)	22
<i>Rage Against Robocalls</i> , Consumer Reports (July 28, 2015).....	2
U.S. Dep’t of Transportation, Facts and Statistics, <i>available at</i> http://www.distraction.gov/stats-research-laws/facts-and-statistics.html (last accessed Jan. 14, 2016)	6
Universal Service Administrative Company, 2014 Annual Report 9 (2014).....	5
WebRecon, <i>What Goes Up...Debt Collection Litigation & Complaint Statistics</i> (Nov. 2015), <i>available at</i> http://dev.webrecon.com/what-goes-up-debt-collection-litigation-cfpb-complaint-statistics-nov-2015/	11

GLOSSARY OF ABBREVIATIONS

TCPA	Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227
2015 Order	<i>In re</i> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961 (2015)
2008 Order	<i>In re</i> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 23 FCC Rcd. 9779, at 12–16 (2008)
2003 Order	<i>In re</i> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 Report and Order, 18 FCC Rcd. 14014 (2003)

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Brief for Respondent.

STATEMENT OF IDENTITY AND INTEREST IN CASE

Amici Curiae: The National Consumer Law Center, the National Association of Consumer Advocates, Consumers Union, AARP, Consumer Federation of America, and MFY Legal Services are each non-profit organizations dedicated to improving the lives of consumers. All of the organizations have extensive experience in consumer protection legal issues, including the financial impact of onerous policies and practices affecting consumers, and specifically the burdens and intrusions of increasingly rampant automatically dialed “robocalls” and texts to cell phones. Amici each have advocated for comprehensive protections under the Telephone Consumer Protection Act (TCPA) and have a strong interest

in ensuring that repetitive, harassing, and unwanted robocalls are curbed. More information about each of the organizations authoring this brief is included in Addendum 1.

No other amicus brief will address the issues raised herein: the distressing—and sometimes financially perilous—impacts on consumers subjected to multiple unwanted and unconsented-to robocalls to their cell phones. Amici support the FCC’s 2015 Order as an entirely legal and justified interpretation of the TCPA, and an appropriate safeguarding of consumers’ legal right to decide whose autodialed and prerecorded calls and texts to their cell phones they will receive.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

If these efforts by Petitioners and supporting Intervenors were to be successful, an unprecedented number of robocalls, affecting nearly every consumer in the nation, would be unleashed. Changing the definitions of “autodialer”—referred to by Petitioners and Intervenors as “ATDS”—and “called party” would cause consumers to be flooded with unwanted calls and texts—even for telemarketing and debt collection purposes—without consent *and without any way to stop the calls*. Allowing these petitions would eviscerate the fundamental purpose of the TCPA. No longer would consumers have the right to consent (or to revoke consent) to be the recipients of automated, prerecorded calls or texts to their cell phones.

A paramount issue in this case is the liability for callers who call people with reassigned numbers—people who were never even asked to consent. If the petitions in this case were granted, then these innocent bystanders who have been assigned a new telephone number and never gave consent to receive robocalls, and who have no relationship whatsoever to either the caller or the party who gave consent, will be inundated with unwanted calls with no way to halt them. The FCC’s Order maintains strong protections against these calls and creates incentives for the industry to avoid harassing people who have not agreed to be called on their cell phones.

There are countless examples of how consumers' pleas to industry players to stop unwanted automated calls and texts to cell phones are blatantly ignored. Granting the petitions would remove the controls that the TCPA provides consumers over automated calls and texts to cell phones. This would not only be an improper interpretation of the TCPA, but it would also eviscerate the essential privacy rights of cell phone users.

ARGUMENT

I. CONSUMERS MUST HAVE THE ABILITY TO STOP UNWANTED ROBOCALLS

A. The Volume of Unwanted Robocalls and Texts Has Reached Epidemic Proportions

“If robocalls were a disease, they would be an epidemic.” *Rage Against Robocalls*, Consumer Reports (July 28, 2015) (hereinafter “*Rage Against Robocalls*”). An average of 200,000 complaints are made to the Federal Trade Commission (“FTC”) every month about robocalls. Hearing Before the Senate Comm. on Commerce, Sci., and Transp.’s Subcomm. on Consumer Prot., Prod. Safety, and Ins. (July 10, 2013) (hereinafter “Senate Hearing”) (statement of Lois Greisman, Associate Director, Division of Marketing Practices, FTC). Indeed, some estimate that 35 percent of all calls placed in the U.S. are robocalls. *Rage Against Robocalls*. The FTC reported over 3.2 million complaints about robocalls in 2014, of which almost half (1,678,433) occurred after the consumer had already

requested that the company stop calling. Federal Trade Commission, National Do Not Call Registry Data Book, FY 2014, at 5 (Nov. 2014).

The TCPA was passed in 1991 in direct response to “[v]oluminous consumer complaints about abuses of telephone technology—for example, computerized calls dispatched to private homes.” *Mims v. Arrow Fin. Servs., L.L.C.*, 132 S. Ct. 740, 744 (2012). Yet the complaints are still coming. Robocalls are very inexpensive to make. As was noted in a Senate hearing on the subject: “With such a cheap and scalable business model, bad actors can blast literally tens of millions of illegal robocalls over the course of a single day at less than 1 cent per minute.” Senate Hearing at 5.

The TCPA is essentially a privacy protection law, intended to protect consumers from the intrusions of unwanted automated and prerecorded calls to cell phones. It permits these calls *only if* the consumer has given “prior express consent” to receive them. 47 U.S.C. § 227(b)(1)(A)(iii). Calls for emergency purposes are excluded from this prohibition. *Id.*² When it enacted the TCPA, Congress found that automated and prerecorded calls are “a nuisance and an invasion of privacy, regardless of the type of call . . .” TCPA, Pub. L. No. 102–243, 105 Stat. 2394 §§ 12-13 (1991).

² 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. Pub. L. No. 114-74, 129 Stat. 584 (2015) (§ 301).

B. People Will be Hurt by More Unwanted Robocalls

Many people in the United States today rely exclusively on their cell phones as their only means of communication. These consumers include:

- close to 70 percent of adults aged 25-29 and over 67 percent of adults aged 30-34;
- nearly 60 percent of persons in households below the poverty line;
- 59 percent of Hispanics and Latinos, and 46 percent of African Americans.

See Stephen Blumberg and Julian Luke, U.S. Dep't of Health and Human Services, National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2014*, at 6 (June 2015).

Many, if not most, of the households living below the poverty line rely on pay-as-you-go, limited-minute prepaid wireless products. These wireless plans have been growing in use, especially among low-income consumers and consumers with poor credit profiles. FCC, *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Eighteenth Report*, WT Docket No. 15-125, ¶¶ 44, 73, 95, 96 (Dec. 23 2015). These prepaid wireless products provide a fixed number of minutes, and often texts, for a set price. After these limits are exceeded, consumers must purchase a package of new minutes periodically to maintain their service. Consumers in such plans are billed

for incoming calls in addition to outgoing calls, making them very sensitive to repetitive incoming calls—especially calls that they do not want.

Additionally, almost 12.5 million low-income households maintain essential telephone service through the federal Lifeline Assistance Program. Universal Service Administrative Company, 2014 Annual Report 9 (2014). Most of these Lifeline participants have service through a prepaid wireless Lifeline Program, which most commonly limits usage to only 250 minutes a month for the entire household. FCC, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order 15-71, ¶ 16 (Rel. June 22, 2015).

Allowing calls without the consent of the person called, limiting the right to revoke consent, or curbing the definition of autodialer—all proposals made by Petitioners and supporting Intervenors—would be devastating for households struggling to afford essential telephone service. Any one of these interpretations would lead to the receipt of unwanted and unconsented-to calls that would further deplete the scarce minutes available for the Lifeline household. For the lower-income consumers and households that struggle to afford essential telephone service, on which they depend to access health care, transportation, emergency, and other essential services, and to avoid social isolation, any one of these changes would deplete the scarce minutes available for the entire Lifeline household.

C. More Robocalls Threaten Public Safety

Cell phones accompany people wherever they go, including in cars. Too often, calls and texts are answered while people are driving because so many cannot resist the imperious ring of the wireless telephone. Receiving cell phone calls while driving threatens public safety. The National Highway Traffic Safety Administration found that cell phone use contributed to 995 (or 18 percent) of fatalities in distraction-related crashes in 2009. More robocalls will inevitably lead to more distracted drivers and, inescapably, more accidents. *See* U.S. Dep't of Transportation, Facts and Statistics, *available at* <http://www.distraction.gov/stats-research-laws/facts-and-statistics.html> (last accessed Jan. 14, 2016) (citing 3,154 deaths and 424,000 injuries from distracted drivers in 2013, and noting that text messaging, because of the visual, manual, and cognitive attention required from the driver, is “by far the most alarming distraction”). *See also Injury Prevention & Control: Motor Vehicle Safety: Distracted Driving*, Centers for Disease Control and Prevention, *available at* http://www.cdc.gov/motorvehiclesafety/distracted_driving/ (last accessed Jan. 14, 2016) (“Each day in the United States, more than 9 people are killed and more than 1,153 people are injured in crashes that are reported to involve a distracted driver.”).

D. Texts are as Intrusive as Calls

The TCPA's prohibitions against unwanted communications apply to both phone calls and texts. *See* 2003 Order ¶ 165. This is because text messages are just as intrusive and costly to consumers as phone calls. And, particularly for low-income consumers using prepaid wireless plans, the calls deplete the limited data they pay for and rely on.

As noted in a recent Gallup study: "Texting, using a cellphone and sending and reading email messages are the most frequently used forms of non-personal communication for adult Americans." Frank Newport, *The New Era of Communication Among Americans*, Gallup (Nov. 10, 2014), available at <http://www.gallup.com/poll/179288/new-era-communication-americans.aspx>.

As Americans use texts as a regular means of communication, unwanted texts become more invasive. People now respond to text messages in the same way they respond to calls—the beep of a text demands an immediate acknowledgment. As a result, autodialed texts that arrive in droves interrupt, annoy and harass consumers just as robodialed calls do. And these unwelcome texts use up precious limits for consumers whose cell phone plans impose restrictions, such as those consumers on prepaid or Lifeline plans.

E. The Extent of Unwanted Robocalls is Revealed in Litigation

In addition to the hundreds of thousands of complaints made monthly to government agencies, a tiny percentage of consumers who are plagued with repeated and unwanted robocalls and prerecorded calls do file suit. A small selection of cases illustrates just some of the abuses to which consumers have been subjected:

- *Dominguez v. Yahoo, Inc.*, No. 14-751, --- Fed. Appx. ---, 2015 WL 6405811 (3d Cir. Oct. 23, 2015) (Yahoo sent 27,809 wrong number text messages in 17 months, and refused to stop even after the consumer's many pleas);
- *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014) (327 robocalls to consumer's cell phone in 6 months, all seeking to collect on a debt owed by someone else);
- *Gager v. Dell Fin. Servs., L.L.C.*, 727 F.3d 265 (3d Cir. 2013) (40 robocalls to consumer's cell phone in 3 weeks, even after she asked the company to stop robocalling);
- *King v. Time Warner Cable*, No. 14 Civ.2018(AKH), --- F. Supp. 3d ---, 2015 WL 4103689 (S.D.N.Y. July 7, 2015), *appeal filed*, No. 15-2474 (2d Cir. Aug. 6, 2015) (automated system for debt collection calls involving zero human intervention or review resulted in 153 robocalls to a woman who had never been a customer; calls continued even after she informed Time Warner of its error and asked it to stop calling, including 74 additional robocalls after she filed suit);
- *Moore v. Dish Network L.L.C.*, 57 F. Supp. 3d 639 (N.D. W. Va. 2014) (31 robocalls in 7 months to cell phone of low-income consumer receiving Lifeline support, even after he repeatedly told the company it had the wrong number and to stop calling);

- *Munro v. King Broadcasting Co.*, No. C13–1308JLR, 2013 WL 6185233 (W.D. Wash. Nov. 26, 2013) (hundreds of text messages despite consumer’s dozens of requests for the company to stop);
- *Beal v. Wyndham Vacation Resorts, Inc.*, 956 F. Supp. 2d 962 (W.D. Wis. 2013) (dozens of robocalls to consumer’s cell phone, which continued even after her repeated requests to stop calling).

The defenses in these cases revolved around the issues pending in this case. In these cases, the defendants argued that the technology used to make the multiple calls did not fit the definition of an autodialer under the statute (*see Dominguez*, 2015 WL 6405811, at *1; *King*, 2015 WL 4103689, at *4; *Moore*, 57 F. Supp. 3d at 652-55); that the statutory term “called party” should be construed to allow calls to a number given by, and formerly assigned to, a different person (the “intended party”) (*see Osorio*, 746 F.3d at 1252; *King*, 2015 WL 4103689, at *3; *Moore*, 57 F. Supp. 3d at 648-49); and that the consumer could not revoke consent (*see Osorio*, 746 F.3d at 1255-56; *Gager*, 727 F.3d at 272; *King*, 2015 WL 4103689, at *5; *Beal*, 956 F. Supp. 2d at 977; *Munro*, 2013 WL 6185233, at *3-4). If the FCC’s position had not been sustained in those cases, and if it is not upheld in this case, nothing will prevent callers like these from continuing the unwanted calls.

In all of these cases, a business entity set loose an automated system that called a consumer’s cell phone multiple times, even after the consumer’s repeated attempts to stop the calls. In each case, the caller had simply decided that it was

more cost-effective to ignore the clearly expressed wishes of these consumers and continue to make these automated calls and texts.

It is evident that consumers need more protection from such abuses, not less. The sheer number of calls a single caller with an autodialer can generate is staggering. The figures exemplify why robust interpretation and continued enforcement of the TCPA is critical, particularly given the increase in cell phone use and advances in technology.

F. The Number of TCPA Lawsuits Pales in Comparison to the Number of Consumer Complaints Regarding Unwanted Calls and Texts

Petitioners, their supporting Intervenors, and their amici make extravagant claims about spurious lawsuits, wrongful class actions, and nefarious attorneys churning new claims relating to TCPA litigation—all to support their requests that the 2015 Order be declared substantively improper. For example, some groups point to websites that track incoming unlawful calls to support their claim that much of TCPA litigation is a sham. Yet these businesses, like Privacy Star, track calls only *after callers choose to make them*. Further, even if there are instances of improperly litigious individuals, the judicial system has mechanisms to protect against meritless cases. And a few instances of wrongdoing certainly do not justify allowing innocent consumers to fall victim to a barrage of unwanted robocalls. The

Court should not let this fictional threat of spurious litigation distract it from the harmful effects of the millions of unwanted calls on consumers.

Congress deliberately created statutory penalties in the TCPA to ensure compliance. Any allegedly harsh consequence of repeated violations is precisely the deterrent intended and needed to instigate corrective action and industry-wide compliance. Only businesses that use autodialers without consent and without up-to-date dialing lists risk liability from TCPA lawsuits.

Despite the facts that robocalls consistently top the list of consumer complaints (*see* 2015 Order ¶ 1) and over 3.2 million complaints were made to the FTC in 2014, (FTC, National Do Not Call Registry Data Book, FY 2014, at 4 (2014)), there were only 2,590 TCPA lawsuits filed in the year ending November 1, 2015. *See* WebRecon, *What Goes Up...Debt Collection Litigation & Complaint Statistics* (Nov. 2015), *available at* <http://dev.webrecon.com/what-goes-up-debt-collection-litigation-cfpb-complaint-statistics-nov-2015/>.

This means that for every 10,000 complaints to the FTC, only eight lawsuits are filed. Most consumers who receive robocalls do not take the time to complain to a federal agency, and even a tinier percentage actually files a lawsuit. Most contact the caller or give up. Only those who are very frustrated will seek redress with state or federal agencies. For example, the consumer in *Dominguez*, who received nearly 28,000 text messages from Yahoo, repeatedly asked Yahoo to stop,

without success. The consumer then turned to the FCC, which also asked Yahoo to stop. Yahoo refused, stating it did not believe, based on its narrow view of what constitutes an autodialer under the TCPA, that it was regulated by the FCC. Only then did the consumer file suit. 2015 WL 6405811, at *1. If Petitioners and supporting Intervenors achieve their goal of weakening the law, unwanted calls and texts will skyrocket.

The TCPA does not provide for an attorney fee award even when the consumer prevails, and the statutory damages recovery is limited to \$500 per impermissible call. The court has discretion to treble this amount if it finds that the defendant acted willfully or knowingly. 47 U.S.C. § 227(b)(3)(C). This means that only cases involving a high volume of illegal calls will provide the possibility of a recovery sufficient to cover the attorney's time spent investigating, filing and litigating the case. Thus, the very structure of the TCPA weeds out cases that involve only a low volume of calls.

Moreover, the alarmist criticisms of class actions are simply a red herring. A few problematic class actions do not diminish the necessity of fostering effective enforcement of the significant substantive protections provided by the TCPA. The vast majority of TCPA claims are brought as individual actions; but having the ability to pursue TCPA claims as a class action furthers the statute's fundamental purpose. Class settlements bring real relief to the public, as many defendants then

stop the offending calls or implement safeguards. Because the TCPA has no attorney’s fee provision, as noted above, class actions are also often the only practical means of litigating a claim.³

II. ACCEPTING PETITIONERS’ AND INTERVENORS’ POSITIONS WOULD ERADICATE THE CONSUMER PROTECTIONS OF THE TCPA

Petitioners and supporting Intervenors ask this Court to overrule three critical definitions applicable to the TCPA:

1. They seek a narrow definition of “autodialer” or “ATDS” under the TCPA—which would have the effect of eliminating any statutory or government oversight over automated calls, whether for telemarketing, debt collection, or other purposes.
2. They seek a definition of the term “called party” to mean the “intended recipient” of the call—which would remove any incentives for callers to maintain timely records of consent, and eliminate any means for consumers to demand that wrong number calls cease.
3. They seek a ruling that once a consumer has provided consent to receive robocalls, such consent can never be revoked, regardless of the number of unwanted automated calls and texts.

³ “It may be that without class certification, not all of the potential plaintiffs would bring their cases. But that is true of any procedural vehicle; without a lower filing fee, a conveniently located courthouse, easy-to-use federal procedural rules, or many other features of the federal courts, many plaintiffs would not sue.” *Shady Grove Orthopedic Associates, P.A., v. Allstate Insurance Co.*, 559 U.S. 393, 435 n.18 (2010).

Not only are these arguments incorrect as a matter of law, but granting any one of them would unleash a tsunami of unwanted calls upon owners of cell phones in the United States.

A. Adoption of Petitioners’ and Supporting Intervenors’ Definition of Autodialer Would Mean that the TCPA Applies Only to Old Technology

Petitioners’ and supporting Intervenors’ primary assertion relating to why the Commission’s longstanding definition of autodialer is wrong is based on the argument that the current definition covers too many instruments, supposedly making the distinction meaningless. The implication is that because so many people have smart phones, each of which could be considered an autodialer, all of those people could be sued under the TCPA—a danger Petitioners and supporting Intervenors would have the Court prevent by changing the definition of autodialer to exclude all of the technology that is actually being used by commercial entities to call consumers.

The more relevant point, however, is that the 2015 Order did not provide any new interpretation of the definition of autodialer, leading to the question of whether there are really any grounds to appeal the Order on that point. The industry chooses to ignore the fact that the FCC simply reiterated in the 2015 Order (2015 Order ¶¶ 12–14) what it had said in 2003 regarding a system’s capacity:

131. **Automated Telephone Dialing Equipment.** The record demonstrates that a predictive dialer is equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls. The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers.

132. The TCPA ... also provides that, in order to be considered an “automatic telephone dialing system,” the equipment need only have the “capacity to store or produce telephone numbers....” It is clear from the statutory language and the legislative history that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies.

2003 Order ¶¶ 131, 132 (citations omitted).

And the FCC reiterated this same analysis in its 2008 Order. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 23 FCC Rcd. 9779, at 12–16 (2008).

One illustration that the 2015 Order is simply a reiteration of the 2003 and 2008 Orders is the fact that a substantively similar request to “clarify” capacity was proposed in September 2011 in H.R. 3035, which was introduced in the House of Representatives. H.R. 3035, like the Petitioners and supporting Intervenors here, sought to limit the definition of an autodialer to systems that dial numbers randomly or sequentially. As most modern automatic dialers use preprogrammed lists, H.R. 3035 effectively would have allowed telemarketers to robodial consumers just by avoiding already antiquated technology. The public opposition was so overwhelming against any relaxation of the TCPA that the bill was

completely withdrawn. *See* Letter from Edolphus Towns, sponsor of H.R. 3035, to Fred Upton, Chairman of the House Energy and Commerce Committee (Dec. 12, 2011) (attached as Addendum 2) (stating that there was “no hope for this legislation”). Current protections are clearly not sufficient to protect consumers from abusive calling; it is understandable why the public fears opening the floodgates to even more calls to their cell phones.

Having failed in Congress, the industry has repeatedly asked the FCC to do what Congress refused to do. The 2015 Order was the FCC’s denial of these requests. For the Court to grant the industry’s requests in this case, it would have to ignore over 20 years of FCC rulings and guidance on the interpretation and application of the TCPA, as well as Congress’s direct and considered refusal to change them. The result would be that the TCPA would apply only to some hypothetical, unused technology. Virtually every business would be free to robocall with impunity, regardless of consent and regardless of the purpose of the call. This result would entirely defeat the purpose of the TCPA and leave consumers without the tools Congress gave them to protect their privacy.

B. “Called Party” Means the Current Subscriber of the Dialed Number

“Called party” must mean the person who currently subscribes to phone service at the dialed number. It cannot mean whomever the caller claims to have *intended* to call. Such a tortured analysis of the TCPA’s plain language would

yield disastrous results for consumers. As the Seventh Circuit aptly reasoned in *Soppet v. Enhanced Recovery Co., L.L.C.* 679 F.3d 637 (7th Cir. 2012), three years before the FCC’s 2015 ruling:

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”? (Section 227(b)(1) does use the word “recipient” in a context where “recipient” means “current subscriber”; this doesn’t remotely suggest that “called party” must mean “intended recipient.”) . . . The idea that one person can revoke another’s consent is odd. Anyway, there can’t be any long-term consent to call a given Cell Number, because no one—not Customer, not Bystander, not even the phone company—has a property right in a phone number. . . . *Consent to call a given number must come from its current subscriber. . . . this really means that Customer’s authority to give consent, and thus any consent previously given, lapses when Cell Number is reassigned.*

679 F.3d at 640-41 (emphasis added).

Adopting the industry’s absurd interpretation not only runs afoul of the TCPA’s plain reading, but it would also leave innocent consumers who receive uninvited, wrong number robocalls without recourse. For example, NelNet called one consumer over 185 times, contending it had consent because the intended recipient was the person they were trying to call, the real debtor. *Cooper v. NelNet*, 6:14-cv-00314-GKS-DAB (M.D. Fla.). NelNet offered no opt-out option in its barrage of prerecorded calls.

Below is the text of one of the many prerecorded calls to Mr. Cooper in which NelNet provides no opportunity for him to explain that he was not the debtor, that he did not know the debtor, and that he wanted the calls to stop:

Hello, this is an important message for Leonor Vargas from NelNet, calling on behalf of the US Department of Education. We do not have a current address, phone number, or email on file for Leonor Vargas. Without current contact information, we are unable to provide important information about their student account. Please contact NelNet 24/7 at 888-486-4722 or visit us at www.nelnet.com. This matter requires your immediate attention. Thank you.⁴

If Petitioners' position were to become the rule, NelNet would have no liability for calling Mr. Cooper 185 times when it says it meant to call Mr. Vargas. NelNet's defense would be that because it *intended* to call Mr. Vargas 185 times, and it had consent from Mr. Vargas, such factors were sufficient. It would not matter that it actually reached Mr. Cooper 185 times. Mr. Cooper is the person called, and is clearly the "called party." It does not make sense to treat the "intended party" as the "called party."

The FCC did not make new law in its 2015 ruling. It simply reiterated the holdings of the vast majority of courts that "called party" is the person called and not the intended recipient. *See Osorio*, 746 F.3d at 1250-52 (rejecting argument that "intended recipient" is the "called party"); *Soppett*, 679 F. 3d at 640-41;

⁴ Of course, in this prerecorded call, NelNet admits that it knows it is not even calling the person it is trying to reach, namely Mr. Vargas, as the text of the call includes the statement that it does not have Mr. Vargas' current phone number.

Paradise v. Commonwealth Fin. Sys., Inc., No. 3:13-cv-00001, 2014 WL 4717966, at *3 (M.D. Pa. Sept. 22, 2014) (“called party” does not mean intended recipient); *Fini v. DISH Network L.L.C.*, 955 F. Supp. 2d 1288, 1296 (M.D. Fla 2013) (“possessing standing as a ‘called party’ . . . does not require the plaintiff to have been the intended recipient”); *Manno v. Healthcare Revenue Recovery Group, L.L.C.*, 289 F.R.D. 674, 682 (S.D. Fla. 2013); *Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d 1316, 1322 (S.D. Fla. 2012) (“called party” refers to the actual, not the intended, recipient).

There are many examples of the adverse consequence for consumers that would follow if the Court were to adopt the industry groups’ ill-conceived reading of “called party.” For example, in *Osorio*, the consumer received 327 debt collection robocalls to her cell phone for a debt owed by someone else. 746 F.3d at 1246. In *Dominguez*, Yahoo sent 27,809 texts, and maintained that it did not have to stop because it had consent from a prior subscriber. 2015 WL 6405811, at *1. In *Allen v. JPMorgan Chase, N.A.*, a noncustomer of Chase Auto Finance received over 80 prerecorded calls to her cell phone relating to the debt of someone else. When she answered the calls, an automated voice instructed her to call Chase Auto Finance to discuss “her” account, or to visit www.chase.com. When she called, Chase initially refused to take action because she was not a customer. Only after

numerous complaints and litigation did the calls cease. Case No. 13-cv-08285 (N.D. Ill.).

Wrong number calls generally are not a matter of one or two calls, but usually result in many calls. *See, e.g., Percora v. Santander*, Case No. 5:14-cv-04751-PSG (N.D. Cal.) (50 calls); *Scott v. Reliant Energy Retail Holdings, L.L.C.*, Case No. 4:2015-cv-00282 (S.D. Texas) (at least 100 calls); *Singh v. Titan Fitness Holdings, L.L.C. d/b/a Fitness Connection*, Case No. 4:14-cv-03141 (S.D. Texas) (200 calls).

It does not matter if the industry does not benefit from wrong number calls—the industry must be incentivized to *stop* the wrong number calls. The TCPA places the burden of proving consent on the caller. That burden should remain on the caller to ensure the consent remains valid. The experience reflected in the cases shows that, without proper incentives to stop making wrong-number calls, the industry will simply keep calling.

The FCC’s Order is reasonable, and allows industry groups one “free” call before liability attaches. After all, the businesses placing the calls are in the best position to ensure ongoing consent. Industry groups that insist on placing robocalls to consumers can seek technologies with a higher accuracy rate than those on the market (which currently have about 85 to 90 percent accuracy in identifying cellular numbers). Michael P. Battaglia, Meg Ryan, Marcie Cynamon, *Purging*

Out-Of-Scope And Cellular Telephone Numbers From RDD Samples, in Proceedings of the AAPOR-ASA Section on Survey Research Methods 3798 (2005). They can combine existing technologies with other strategies to prevent wrong number calls, such as making a manual call first, or developing a method to confirm that the called party is the intended recipient. Keeping the onus on the caller is appropriate. It is analogous to what transpired in the financial sector when the regulatory system for credit cards was designed with the passage of the Fair Credit Billing Act. 15 U.S.C. §§ 1601 *et seq.* Placing the burden of managing consumer fraud in credit card transactions upon banks provided them with the incentive to create systems that limit and avoid fraud. The rationale is the same here.

Many callers communicate regularly with the persons they intend to call (*i.e.*, their own customers). Who better than the callers to ensure that they have ongoing consent? These callers have processes in place to maintain current customers' contact information; they can also establish consent to call cell phones. Businesses can implement features in their customer communications to confirm ongoing consent (*i.e.*, via their websites, at their storefronts, via telephone). If they are unable to confirm consent, the best practice would be to remove the consumer's name from their automated calling list.

Notably, most cell phone providers do not reassign numbers for at least 30 days. *See* Numbering Resource Optimization, CC Docket No. 99-200, Report and Order, 15 FCC Rcd. 7574, 7590, ¶ 29 (2000). Autodialers are equipped to record “triple-tone” signals that identify a number that has been disconnected. A manual dialer will also hear a triple-tone. Once the caller knows that the number has been disconnected, it also knows that the number is on track to be reassigned to a different person. *See* 2015 Order at 38 n.303.

And, of course, if a business wants an absolute guarantee against TCPA liability, it has the option of simply refraining from making robocalls; it can manually dial instead. Businesses do not have a “right” to make robocalls. And their ability to do so must not undermine the privacy rights of consumers. The FCC struck an appropriate balance between providing callers a safe harbor from liability without opening the floodgates of unwanted calls to consumers.

C. “Reasonable Means of Revoking Consent” Includes Only Means that are Reasonable

Any “reasonable” means to revoke consent is appropriate and consistent with the TCPA’s plain reading. Industry briefs lay out a myriad of far-fetched examples of ways consumers *could* attempt to revoke consent. But the FCC did not say consent could be revoked in *any* way, but rather any *reasonable* way. *See* 2015 Order ¶ 47.

The Petitioners and supporting Intervenors object to the use of reasonableness as a standard. But reasonableness is often used as a standard in statutes, court rules, and administrative agency rules and decisions. The “Reasonable Man” is an eminent personality in United States law. For example, the term “reasonable” is used to define a standard in Rules 4, 5, 11, 12, 15, 16, 17, 23, 26, 27, 30, 32, 33, 34, 36, 37, 43, 45, 50, 51, 53, 56, 60, 65, and 68 of the Federal Rules of Civil Procedure.

The Uniform Commercial Code—the basic law governing commercial transactions throughout the United States—imposes upon parties a duty of good faith, defined to include “reasonable commercial standards of fair dealing.” U.C.C. §§ 1-201, 1-304. It provides that an offer shall be construed as inviting acceptance “by any medium reasonable in the circumstances” and is construed to remain open for a “reasonable time.” U.C.C. § 2-206. “Reasonably predictable” fair market rent is part of the standard for distinguishing between a lease and a sale. U.C.C. § 1-203. When the parties have not agreed upon a time for an action to be taken, it is to be taken within a “reasonable time.” U.C.C. § 1-205. And this is just a partial list of the references to reasonableness as a standard in only the first of the U.C.C.’s eleven Articles. The Petitioners’ objection to a reasonableness standard is alarming, and indicative that—absent this requirement—these industry groups would seek to impose unreasonable measures to *restrict* revocation of consent.

It is only when callers make it unduly cumbersome to revoke consent that they are likely to receive varying manners of revocation, which may or may not ultimately be deemed reasonable. For example, if the caller does not provide a mechanism to opt out when making a robocall (and many do not), the consumer might go to the brick and mortar storefront and ask a representative to remove his name from the calling list.

Reasonable methods of revocation should include an easy-to-use opt-out mechanism provided within the call or text. Other methods may include going to the caller's website, or calling the company's customer service line. It stands to reason that consumers would be likely to use these methods. However, no specific method should be mandatory because not every method fits every scenario. The industry should welcome all methods of revocation if the motivation is to provide valuable information to the called party, as many briefs suggest. Instead of requiring consumers to discern how to revoke consent for a particular business (*i.e.*, XYZ Co. requires completion of a form), the onus must be on the caller. If they want to robocall consumers, businesses should train their employees how to handle a consumer's wish to opt out of robocalls, and not shift their burden to consumers.

Allowing the industry to limit mechanisms for revocation is contrary to the TCPA's broad construction, and also disregards the myriad of ways in which

businesses may be organized (*i.e.*, not all have a website or customer service line). Allowing any “reasonable” manner of revocation that conveys a message to the caller that the recipient does not wish to receive future communications is appropriate.

Some industry groups have suggested that the terms for revocation should be limited to the terms of contracts. However, not all communications are subject to a contractual relationship between the parties (*e.g.*, wrong-number calls), so even the most consumer-protective contract would not be a one-size-fits-all solution. More importantly, leaving the matter to contract opens the door to unequal bargaining positions in contractual drafting, as well as substantial consumer confusion about how to revoke consent. Better to keep the FCC’s approach: that revocation must simply be *reasonable*.

The Third Circuit, in *Gager v. Dell Fin. Servs.*, found that three independent grounds existed for TCPA consent to be revocable. First, the court noted that the FCC, in its 2012 decision in *Soundbite Communications, Inc.*, 27 FCC Rcd. 15391 (Nov. 26, 2012), had already tacitly determined that TCPA consent is revocable. Second, it held that revocation of consent is consistent with basic common law principles:

Under the common law understanding of consent, the basic premise of consent is that it is “given voluntarily.” . . . Further, at common law, consent may be withdrawn.

Gager, 727 F.3d at 270 (citations omitted).

Finally, the court noted that because the TCPA is a remedial statute to protect consumers from unwanted automated telephone calls, “it should be construed to benefit consumers.” *Id.*

III. RITE AID DOES NOT HAVE STANDING TO APPEAL THE FCC ORDER

Rite Aid has filed a separate appeal in this case, yet it never filed a formal petition before the FCC specifically requesting the relief it seeks from this Court. Because Rite Aid never filed such a petition, there was never a Public Notice from the FCC seeking public comments on a petition. Instead, Rite Aid only made an informal request for clarification within the comments it filed regarding the petition of another party, AAHAM. As a result, the FCC declined to entertain Rite Aid’s oblique request. *See* 2015 Order at 68 n.471. The appeal to this Court of that denial should be rejected for the same reason. Regardless of the procedural issues that Rite Aid’s appeal presents, there are serious substantive problems with its requests as well.

In its appeal, Rite Aid provides a distorted interpretation of the FCC’s prior regulations to create the impression that the 2015 Order subjects “health care” robocalls to the TCPA’s prior express consent requirement for the first time. However, as the FCC recognized when it declined Rite Aid’s informal request for clarification, “health care” robocalls made to wireless numbers have always

required prior express consent. *See* 2015 Order at 68 n.471.⁵ The 2015 Order did provide a qualified exemption for certain free-to-end-user “health care” robocalls to cell phones: those that (1) are made without expense to the called party, and (2) fit within a narrow set of specific limitations and exclude telemarketing calls. *See* 2015 Order ¶¶ 143-147. However, in its comments on AAHAM’s petition, Rite Aid had sought a ruling that would turn the FCC regulations on their head by exempting all telemarketing of health care products.

The effect of such an overly broad interpretation would permit an onslaught of robocalls to cell phones about all sorts of pharmacy products, from aspirin to toothpaste, without consent. Notably, Amici are aware that Rite Aid has legal action pending regarding telemarketing calls it made to promote the commercial availability of its flu shot product.

“Health care messages” relate to the health care of a specific individual or patient, not to the marketing of a product to any consumer who answers a phone or reads a text message. 45 C.F.R. § 160.103. The 2015 Order is clear that exceptions are made only as they relate to the true health care treatment of an individual as encompassed in the initial consent provided by that individual. *See* 2015 Order at

⁵ 47 C.F.R. § 64.1200(a)(2) exempts “health care messages” from the written consent requirement for telemarketing calls. A “health care message” conveys information about “care, services, or supplies related to the health *of an individual.*” 45 C.F.R. § 160.103 (emphasis added). Calls that merely reference the commercial availability of health care products do not meet this definition.

71 n.489. Robocalls to market products are instead subject to the written consent mandates relating to telemarketing. 47 C.F.R. § 64.1200(a)(2)-(3). Rite Aid seeks the limitless ability to make robocalls and send texts with impunity. Existing leeway granted by the FCC's 2015 Order is both substantial and reasonable. Anything more would be contrary to the TCPA.

CONCLUSION

The Amici herein respectfully urge this Court to affirm the FCC's 2015 Order.

Respectfully submitted,

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Counsel for Amici Curiae

January 22, 2016

CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify as follows:

- This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 6,621 words.

- This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

/s/ Craig L. Briskin

Craig L. Briskin
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2016, the foregoing was filed and served upon all counsel of record electronically by filing a copy of the document with the Clerk through the Court's ECF system.

/s/ Craig L. Briskin

Craig L. Briskin
Counsel for Amici Curiae

ADDENDUM

ADDENDUM TABLE OF CONTENTS

Addendum 1 – Information about Amici.....Add. 1

Addendum 2 – Letter from Edolphus Towns, sponsor of H.R. 3035, to Fred
Upton, Chairman of the House Energy and Commerce Committee
(Dec. 12, 2011)Add. 3

Addendum 1

The **National Consumer Law Center, Inc.** (“NCLC”) is a non-profit Massachusetts corporation specializing in consumer law, with historical emphasis on protecting the interests of low income and elderly consumers. NCLC is recognized nationally as an expert in consumer credit issues and access to utility services, including debt collection and telecommunications, and has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 47 years. NCLC is the author of the Consumer Credit and Sales Legal Practice Series, consisting of twenty practice treatises and annual supplements. One volume, *Federal Deception Law* (1st ed. 2012 and 2013 Supplement), is a standard resource on the Telephone Consumer Protection Act (TCPA). NCLC has testified before Congress regarding the TCPA, regularly submits comments to the FCC concerning the TCPA, and has issued special reports on the TCPA.

The National Association of Consumer Advocates is a non-profit association of attorneys and consumer advocates committed to representing consumers’ interests. Its members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus is the protection and representation of consumers. NACA’s mission is to promote justice for all consumers by maintaining a forum for communication, networking, and information sharing among consumer advocates across the country, particularly regarding legal issues, and by serving as a voice for its members and consumers in the ongoing struggle to curb unfair or abusive business practices that affect consumers.

Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for telecommunications reform, health reform, food and product safety, financial reform, and other consumer issues. Consumer Reports is the world’s largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications. Consumers Union is a strong advocate for consumers on telecommunications issues before the FCC and Congress.

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare,

employment and income security, retirement planning, affordable utilities, and protection from financial abuse. AARP advocates regularly to protect older people from unwanted robocalls and texts that can increase the cost of cell phone service for many low-income older people who often pay by the minute for their cell service. Such calls also increase their exposure to fraud and abuse.

The **Consumer Federation of America** (CFA) is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education.

MFY Legal Services, Inc. (MFY) has provided free legal assistance to residents of New York City on a wide range of civil legal issues, prioritizing services to vulnerable and under-served populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform and policy advocacy. We provide advice and representation to more than 10,000 New Yorkers each year. MFY's Consumer Rights Project provides advice, counsel, and representation to low-income New Yorkers on a range of consumer problems, including unwanted and harassing debt collection robocalls. The issues raised in this amicus brief regarding the potential impact on low-income consumers of a successful challenge to the FCC's 2015 Omnibus Order are of particular concern to us and directly impact our clients.



Congress of the United States
House of Representatives
Washington, DC 20515

December 12, 2011

Hon. Fred Upton, Chairman
House Energy and Commerce Committee
Washington, DC 20515

Dear Chairman Upton:

We would like to take this opportunity to thank you and Chairman Walden, for allowing the hearing to occur on the merits of HR 3035. The hearing really helped to bring to our attention the issue of out of date telecommunications policy and how we need to begin to modernize current law.

However, what he have learned is that there is no hope for this legislation. We have heard from our constituents. They are concerned about what they believe will happen should this legislation become law. We have convened meetings with numerous consumer groups, as well as other organizations who have an interest in this legislation, but we have been unable to reach any kind of consensus on language that bans unwanted cell phone calls, while allowing calls that are consented to.

In an attempt to thread the needle and address the issues that have been brought before us, it is clear that this bill cannot be improved in a manner that will address the concerns of those involved. Therefore, we ask that HR 3035 not be advanced by the committee.

Thank you in advance for your consideration.

Sincerely,



Lee Terry
Member of Congress



Edolphus "Ed" Towns
Member of Congress

Cc: Hon. Greg Walden, Chairman,
Subcommittee on Communications and Technology