No. 15-1211 (and consolidated cases)

In The United States Court Of Appeals For The District of Columbia Circuit

ACA INTERNATIONAL, et al.

Plaintiffs,

vs.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Defendants.

Review of FCC Declaratory Ruling and Order
CG Docket No. 02-278, WC Docket No. 07-135. FCC 15-72

BRIEF OF *AMICI CURIAE* AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER MORTGAGE COALITION, AND MORTGAGE BANKERS ASSOCIATION IN SUPPORT OF PETITIONERS

*Eric J. Troutman (SBN 229263)
SEVERSON & WERSON
A Professional Corporation
19100 Von Karman Ave., Suite 700
Irvine, California 92612
Telephone: (949) 442-7110
Facsimile: (949) 442-7118

* D.C. Circuit application pending. This filing is being submitted with permission of the Clerk.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for *Amici* provides the following information as to parties, rulings, and related cases.

A. Parties and *Amici Curiae*

Petitioners before this Court are ACA International ("Petitioners"). Respondents are the Federal Communications Commission ("FCC") and the United States of America. Intervenors for Petitioners are Cavalry Portfolio Services, LLC, Diversified Consultants, Inc., MRS BPO LLC, Mercantile Adjustment Bureau, LLC, National Association of Federal Credit Unions, Gerzhom, Inc., Conifer Revenue Cycle Solutions. Intervenors for Respondents are Council of America Survey Research Organizations and Marketing Research Association.

American Financial Services Association ("AFSA"), Consumer Mortgage Coalition ("CMC"), and Mortgage Bankers Association ("MBA"), hereby give notice of intent to participate in this Court as *amici curiae* on behalf of Petitioners. In compliance with D.C. Circuit Rule 26.1, the undersigned counsel of record for *Amici* states that AFSA, CMC, MBA are all not-for-profit membership organizations, none of which have a parent corporation. AFSA, CMC, and MBA do not issue any stock and hence do not have shareholders. In compliance with D.C. Circuit Rule 29(b), AFSA, CMC, and MBA have obtained consent from all parties to their participation as *amici curiae*. AFSA, CMC, and MBA maintain

shared interests in the financial services industry, including mortgage servicing, and therefore file this joint brief pursuant to D.C. Circuit Rule 29(d). Other amicus briefs filed in this appeal do not address issues related to AFSA, CMC, and MBA's unique interests, and therefore a separate brief is necessary.

B. Rulings Under Review

Petitioners are seeking review of the FCC's order captioned *In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 F.C.C.R. 7961 (2015) (declaratory ruling) ("FCC Order").

C. Related Cases

This case is related to petitions filed by Sirius XM Radio (15-1218), Professional Association for Customer Engagement (PACE) (15-1244), Salesforce.com, Inc, and Exact Target, Inc. (No. 15-1290), Consumer Bankers Association (15-1304), the Chamber of Commerce of the United States (15-1306), Vibes Media, LLC (15-1311), Rite Aid (15-1313), and Portfolio Recovery Associates (15-1314). Pursuant to Clerk's Orders 1562836, 1565258, 1568219, 1571305, 1571466, 1571884, 1572095, and 1572946, these related cases have been consolidated with this case.

/s/ Eric. J. Troutman
Eric J. Troutman
Counsel for Amici Curiae American Financial Services Association, Consumer Mortgage Coalition, Mortgage Bankers Association

Dated: December 2, 2015

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GLOSSARY OF ABBREVIATIONS

AFSA: American Financial Services Association

ATDS: Automatic Telephone Dialing System

CFPB: Consumer Financial Protection Bureau

CMC: Consumer Mortgage Coalition

FCC: Federal Communications Commission

FDCPA: Fair Debt Collection Practices Act

FHA: Federal Housing Administration

GSE: Government-Sponsored Enterprises

HUD: U.S. Department of Housing and Urban Development

JBP: Joint Brief of Petitioners

MBA: Mortgage Bankers Association

TCPA: Telephone Consumer Protection Act

STATUTES AND REGULATIONS

With the exception of the statutes and regulations set forth below, all applicable statutes and regulations are contained in the Brief for Petitioners.

12 C.F.R. § 1024.2

§ 1024.2 Definitions

(a) Statutory terms. All terms defined in RESPA (12 U.S.C. 2602) are used in accordance with their statutory meaning unless otherwise defined in paragraph (b) of this section or elsewhere in this part.

(b) Other terms. As used in this part:

* * *

Federally related mortgage loan means:

(1) Any loan (other than temporary financing, such as a construction loan):

(i) That is secured by a first or subordinate lien on residential real property, including a refinancing of any secured loan on residential real property, upon which there is either:

(A) Located or, following settlement, will be constructed using proceeds of the loan, a structure or structures designed principally for occupancy of from one to four families (including individual units of condominiums and cooperatives and including any related interests, such as a share in the cooperative or right to occupancy of the unit); or

(B) Located or, following settlement, will be placed using proceeds of the loan, a manufactured home; and

(ii) For which one of the following paragraphs applies. The loan:

(A) Is made in whole or in part by any lender that is either regulated by or whose deposits or accounts are insured by any agency of the Federal Government;

(B) Is made in whole or in part, or is insured, guaranteed, supplemented, or assisted in any way:

(1) By the Secretary of the Department of Housing and Urban Development (HUD) or any other officer or agency of the Federal Government; or

(2) Under or in connection with a housing or urban development program administered by the Secretary of HUD or a housing or related program administered by any other officer or agency of the Federal Government;

(C) Is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation (or its successors), or a financial institution from which the loan is to be purchased by the Federal Home Loan Mortgage Corporation (or its successors);

(D) Is made in whole or in part by a "creditor," as defined in section 103(g) of the Consumer Credit Protection Act (15 U.S.C. 1602(g)), that makes or invests in residential real estate loans aggregating more than $1,000,000 per year. For purposes of this definition, the term "creditor" does not include any agency or instrumentality of any State, and the term "residential real estate loan" means any loan secured by residential real property, including single-family and multifamily residential property;

(E) Is originated either by a dealer or, if the obligation is to be assigned to any maker of mortgage loans specified in paragraphs (1)(ii)(A) through (D) of this definition, by a mortgage broker; or

(F) Is the subject of a home equity conversion mortgage, also frequently called a "reverse mortgage," issued by any maker of mortgage loans specified in paragraphs (1)(ii)(A) through (D) of this definition.

(2) Any installment sales contract, land contract, or contract for deed on otherwise qualifying residential property is a federally related mortgage loan if the contract is funded in whole or in part by proceeds of a loan made by any maker of mortgage loans specified in paragraphs (1)(ii) (A) through (D) of this definition.

(3) If the residential real property securing a mortgage loan is not located in a State, the loan is not a federally related mortgage loan.

12 C.F.R. § 1024.39

§ 1024.39 Early intervention requirements for certain borrowers.

(a) Live contact. A servicer shall establish or make good faith efforts to establish live contact with a delinquent borrower not later than the 36th day of the borrower's delinquency and, promptly after establishing live contact, inform such borrower about the availability of loss mitigation options if appropriate.

* * *

(c) Conflicts with other law. Nothing in this section shall require a servicer to communicate with a borrower in a manner otherwise prohibited by applicable law.

(d) Exemptions—

(1) Borrowers in bankruptcy. A servicer is exempt from the requirements of this section for a mortgage loan while the borrower is a debtor in bankruptcy under Title 11 of the United States Code.

(2) Fair Debt Collections Practices Act. A servicer subject to the Fair Debt Collections Practices Act (FDCPA) (15 U.S.C. 1692 et seq.) with respect to a borrower is exempt from the requirements of this section with regard to a mortgage loan for which the borrower has sent a notification pursuant to FDCPA section 805(c) (15 U.S.C. 1692c(c)).

INTERESTS OF AMICI

AFSA is a national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

CMC is a trade association of national residential mortgage lenders, servicers, and service providers.

MBA is a trade association representing all segments of the real estate finance industry, including originators, servicers, underwriters, compliance personnel and information technology professionals representing mortgage companies in the residential, commercial and multi-family arenas.

AFSA, CMC, and MBA's members have been acutely impacted by the FCC's July 10, 2015 Order which is presently under review, particularly to the extent this Order significantly alters and/or impairs members' ability to comply with rules, regulations, and other requirements governing their industries, and imposes severe limitations on communications with customers for purposes of account servicing and other pro-consumer notifications, while exposing members to potential litigation even where such contacts are not actually violative of the TCPA.

All parties have consented to AFSA, CMC, and MBA's participation as *amici curiae*.

RULE 29(c)(5) STATEMENT

A party's counsel did not author *amici curiae's* brief in whole or in part, a party or a party's counsel did not contribute money that was intended to fund preparing or submitting amici curiae's brief, and no person—other than AFSA, CMC, MBA, its members, or its counsel—contributed money that was intended to fund preparing or submitting *amici curiae's* brief.

ARGUMENT

"[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

The FCC has not been listening. Its July 10, 2015 omnibus order interpreting the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.*,[1] simplistically assumes that whatever furthers the TCPA's objective of banning

[1] *In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 F.C.C.R. 7961 (2015) (declaratory ruling) ("FCC Order").

unwanted auto-dialed calls to cell phones is the law, thereby ignoring Congress' choice not to sacrifice several competing values to achieve that objective.

By defining "automatic telephone dialing system" ("ATDS") so expansively as to include virtually any modern telephone, the FCC Order brings nearly all telephone calls to cell phones within 47 U.S.C. § 227(b)(1)(A)'s scope. The FCC Order simultaneously deprives the caller of any practical means of assuring that its call will fit within the statute's principal exception—of calls "made with the prior express consent of the called party." Before making a call, the caller cannot know who is the "called party," as defined by the FCC Order, or whether that person has revoked his prior express consent in the manner the FCC Order allows. So a caller cannot know, in advance, if a call will violate the TCPA and subject the caller to the TCPA's $500 penalty.

Considered individually, each of these three key parts of the FCC Order is an arbitrary and capricious exercise of the FCC's authority to issue regulations implementing the TCPA, as the Joint Brief for Petitioners ("JBP") demonstrates. Considered in combination, these three parts of the FCC Order are even less defensible, making any call to a cell phone a game of Russian roulette.

Worst of all, the FCC Order ignores the competing values that Congress chose not to sacrifice to the goal of banning or punishing unwanted auto-dialed

calls to cellphones. The TCPA, itself, notes one competing objective: "permit[ting] legitimate [calling] practices. 47 U.S.C. § 227 note.

Other statutes and administrative regulations promulgated under them evidence other competing values. For example, under the statutes they enforce, the FHA and CFPB require or encourage lenders or loan servicers to contact borrowers by telephone. It is "simply irrational" to suggest that Congress intended to give lenders only the Hobson's choice of failing to comply with those regulations or of incurring potential $500-per-call liability under the TCPA for complying. *See Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

By failing to accommodate these competing values, the FCC Order thwarts rather than effectuates Congress' intent. The Order is arbitrary and capricious. It should be overturned.

I. By Expanding The TCPA's Scope While Nullifying Its Express Consent Exception, The FCC Order Impermissibly Makes Any Call To A Cell Phone A Potential Violation Subjecting The Caller To A $500 Penalty

The FCC Order defines "ATDS" so broadly as to encompass virtually any modern telephone. At the same time, the Order nullifies the statutory exception for calls "made with the prior express consent of the called party." Under the FCC's new definition of "called party," a caller can never be sure whose consent it needs. Nor can the caller be sure that the "called party," whoever it may be, has not revoked any prior consent by some "reasonable means" as the FCC Order allows.

In combination, these three misinterpretations of the TCPA's statutory language subject a caller to a potential $500 penalty under 47 U.S.C. § 227(b)(3) each time it calls a cell phone. Congress could not have intended that result. Hence, the FCC Order is arbitrary and capricious action, not in accordance with law,[2] exceeding the FCC's limited power to prescribe regulations implementing the TCPA.[3]

A. The FCC's Definition Of ATDS Impermissibly Sweeps All Modern Telephones Within TCPA's Scope

The TCPA prohibits calls made "using an ATDS" to a telephone number assigned to a cellular telephone service. 47 U.S.C. § 227(b)(1)(A)(iii). Hence, the statute's reach turns on what constitutes an "ATDS." Under the FCC Order's definition, virtually any modern telephone is an ATDS. Thus, the TCPA now applies to nearly all telephone calls to a cell phone.

The FCC Order does so by determining that a telephone has the "capacity" to store and dial telephone numbers if there is more than a theoretical possibility

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[2] *See* 5 U.S.C. § 706(2)(A); *see also Motor Vehicle Mfrs. Assn. of the U.S., Inc. v. State Farm Mut. Auto. Ins.* Co., 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (internal quotations omitted). "[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise." *State Farm*, 463 U.S. at 43.

[3] *See* 5 U.S.C. § 706(2)(C); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

that it could be modified, for example by the addition of appropriate software, to become able to do so.[4] FCC Order, ¶¶ 16, 17, 19, 20. The FCC Order also expands the meaning of "ATDS" to encompass any telephone that can store a telephone number and then call that number with or without human intervention. FCC Order, ¶¶ 19, 20.

As petitioners demonstrate, the FCC's new definition misinterprets the TCPA's words, giving "capacity" a meaning inconsistent with its common and statutory uses and gutting the statutory requirement that an ATDS automatically generate and dial random or sequential numbers. *See* JBP, 19-30.

Even if it were a semantically possible interpretation of the TCPA's description of an ATDS, the FCC Order's new definition patently sweeps too broadly. Purportedly to avoid "render[ing] the TCPA's protections largely meaningless by ensuring that little or no modern dialing equipment would fit the statutory definition of an autodialer,"[5] FCC Order, ¶ 20, the FCC has gone to the opposite extreme of ensuring that virtually every modern telephone will be an ATDS under its new

[4] In the FCC's words, a caller's equipment need *not* "be configured such that every functionality contained in the statutory definition of 'autodialer' is installed and active at the time calls are made" nor must "the caller … actually [use] those functionalities to place calls in order for the TCPA's consent requirements to be triggered." FCC Order, ¶ 19 n.70; *see also id.* at ¶ 16 n.63 (recognizing the flexibility of software-controlled equipment).

[5] As the quotation shows, the FCC has mistaken its proper role. Congress authorized it to implement the TCPA as Congress wrote that statute. The FCC has no power to tailor the statutory language to meet modern conditions. That is Congress' task. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014).

definition. Even an ordinary smart phone is an ATDS under that definition. *See* FCC Order, ¶ 21; Pai Dissent, 115. Indeed, the only examples the FCC could find of a telephone that is *not* an ATDS under its definition are "a handset with the mere addition of a speed dial button" or "a rotary-dial phone." FCC Order, ¶ 18; O'Rielly Dissent, 128. Needless to say, few businesses currently use either of those devices.

Due to the FCC's overly expansive definition of an "ATDS," the TCPA will now govern every call a business makes to a cell phone number. Clearly, that was not what Congress intended. Had it meant to encompass all business calls, Congress would have said so and not limited its prohibition to calls made using an ATDS or crafted a lengthy statutory definition of an ATDS. *See* 47 U.S.C. § 227(a)(1). As petitioners point out, Congress, instead, targeted only calls made with a specific type of telephone equipment that in actual use posed particular problems to cell phone users. *See* JBP, 4.

B. The FCC's Ruling Nullifies The Prior Express Consent Exception As A Practical Matter

Due to the FCC's overly expansive definition of an "ATDS," the statutory exception for calls made with the called party's prior express consent has assumed critical importance. Under the FCC Order, the TCPA now applies to nearly every call a business makes to a cell phone number. It penalizes the business $500 for each of those calls unless the business can establish the call was "made with the

prior express consent of the called party."[6] *See* FCC Order, ¶ 47 (caller bears the burden of proving it has prior express consent).

Having thus made the prior express consent exception critical, the FCC Order proceeds to nullify that exception, as a practical shield to TCPA liability. The FCC Order does so in two ways. First, it defines "called party" in a manner that makes it impossible to know in advance of a call whose prior express consent is needed to avoid the statutory penalty. Second, the FCC Order allows revocation by any reasonable means, thereby fatally undermining a business' ability to rely on a consumer's prior express consent or to disprove a consumer's assertion that he or she revoked that consent.

1. Under The FCC Order, A Caller Cannot Know, Before A Call, Whose Consent It Needs

To shield itself from TCPA liability, a caller must obtain the prior express consent of the "called party." To get consent "prior" to the call, the caller must be able to determine, before dialing the number, whose consent is required.

Given the FCC Order's definition of "called party," a caller can no longer do so. "Called party," the FCC Order says, is the subscriber or customary user of the

[6] The FCC Order does recognize a few limited exceptions to the prior express consent requirement for free-to-end-user calls. FCC Order, ¶¶ 125, 127-133. But these exceptions are of little help to the caller which cannot know the terms of a subscriber's agreement with the cell phone service.

phone *at the time the call is placed*. FCC Order, ¶¶ 72-74. A caller cannot know in advance who those people are.

Cell phone numbers are reassigned to new subscribers frequently. Each year 35 million phone numbers are reassigned, about 100,000 a day. Pai Dissent, 117; O'Rielly Dissent, 130. Callers receive no notice of these reassignments. Nor is there any sure way for a caller to find out whether a particular number has been reassigned. *See* FCC Order, ¶¶ 83 n.295, 85, 86 n.301; *see also* JBP, 39-40. At best, through strenuous and expensive efforts, a business can identify the current subscriber "in most circumstances." *See* FCC Order, ¶ 87.

Moreover, a caller has no means of identifying a cell phone's current customary user. Even when a phone number is not reassigned, the subscriber can, without notice to any caller, change the phone's "customary user." A business subscriber can shift the phone to a different employee. A consumer subscriber can allow another friend or relative to use it "customarily."

The FCC Order's one-free-call "safe harbor" affords a caller scant protection against the unavoidable risk that the "called party," under the FCC Order's definition, will turn out to be someone other than the person who gave prior express consent. *See* FCC Order, ¶ 72. The harbor dries up once the first call to a reassigned number is *initiated*. *Id.* at ¶¶ 72, 89. Not a drop remains to shield the caller from TCPA liability even if the first call gives the caller no inkling the phone

number has been reassigned or the phone has a new customary user. *Id.* at ¶¶ 72, 82, 85. And that will be the case often. The call or text message may go unanswered. Only voice mail may be reached.[7]

Even if the new subscriber or customary user answers the first call, he or she may say nothing to alert the caller to the reassignment. The FCC Order emphasizes that the recipient of a call bears *no obligation* to notify the caller that the number has been reassigned or the phone has a new customary user. FCC Order, ¶ 81. Indeed, the FCC Order perversely incentivizes the recipient not to do so. Why speak up when silence earns $500 per future call? Even before the FCC Order, some cell phone users exploited the TCPA for their own financial gain. *See Gensel v. Performant Technologies*, No 13-C-1196, 2015 WL 402840, at *2 (E.D. Wisc. Jan. 28, 2015) (decrying the plaintiff's "opportunistic behavior" and "trans-

[7] The FCC notes that certain feedback tones could indicate that a number is no longer in service, which would prompt the caller to determine that the number has been reassigned. FCC Order, ¶ 82 & n.293. However, monitoring this feedback requires more than a single call to permit a proper inference of a disconnected line with the potential for reassignment. Such an inference would require a pattern; the "one call" safe harbor is essentially meaningless for this purpose. Moreover, the FCC's comment that a caller could discern reassignment that from a name given on an outbound voicemail message of the current subscriber, *id.*, is not viable. For one, an outbound voicemail message will not necessarily provide a name at all, or if it does, the name provided may be a nickname or other name actually associated with the intended recipient of the call. Additionally, a call may not even be patched through to an agent until there is a live connection, which is one of the benefits that contributes to the efficiency of using a predictive dialer. In such a case, there may not be any actual possibility of ascertaining the potential mismatch between names on an outbound voicemail message and the intended recipient of the call.

parent attempt to accumulate damages").[8] The FCC Order leaves open the possibility for more of the same.

Contrary to the FCC Order's assertion, its one-call safe harbor "strikes [no] appropriate balance." Nor is it a "middle ground." *See* FCC Order, ¶ 89, 90 n.312. Instead, it gives a caller no practical means of avoiding liability when the "called party" changes without notice.

Making each call to a cell phone a $500 crap shoot is acceptable, says the FCC Order, because the caller *chooses* to make calls using an ATDS. *See* FCC Order, ¶ 84. The remark illustrates the FCC's failure to assess the combined effect of its three "clarifications" and their impact on other federal legislation. In fact, many callers have no choice. In many situations, the federal government requires or expects businesses to call consumers. *See, e.g.,* Section II.A below. Many consumers only have cell phones. A business has no practical choice but to make the required calls using an "ATDS," as the FCC Order has redefined that term.

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[8] *See also Tel. Science Corp. v. Asset Recovery Solutions*, No. 1:15-cv-05182 (N.D. Ill. filed June 12, 2015), in which plaintiff, the operator of a robocall avoid-ance service "Nomorobo," and winner of the FTC's Robocall Challenge, brought a TCPA action arising out of the defendant's 11,630 calls by the defendant to a pool of numbers plaintiff strategically compiled as a means of attracting robocallers. Compl. at ¶¶ 5-14, 18-25.

See also Stoops v. Navient Corp., No. 3:15-cv-00124-KRG, Dkt. 24 (W.D. Pa. Oct. 29, 2015) (Minute Entry) (Court orders plaintiff to disclose her total TCPA litigation earnings after she conceded that her primary source of income came from her business of purchasing cell phones to generate TCPA suits.).

Congress could not have intended to impose a $500 fine on a call that the government itself requires or encourages when, due to changes the caller cannot know in advance, it turns out that the person who consented to the call no longer uses the phone or phone number.

2. Prior Express Consent Cannot Be Relied Upon If It Is Revocable By "Any Reasonable Means"

The FCC Order further undermines the utility of the "prior express consent" exception by allowing a consumer to revoke that consent by "any reasonable means" and by prohibiting the caller from providing otherwise by agreement. FCC Order, ¶¶ 64, 70. Notably, the FCC does not set out any real formula for revocation. *See* FCC Order, ¶ 67 ("[T]he TCPA requires only that the called party clearly express his or her desire not to receive further calls."). Instead, businesses that grapple daily with ambiguous statements made by consumers in a variety of contexts receive only an admonition to use "common sense." *Id.* But unlocking the true intent behind words of revocation is a tricky task and an instruction to use "common sense" is hardly helpful.

Revocation is at its most clear when a customer, answering a call, demands that all calls to a certain number cease and specifically requests no more calls in the future. However, the FCC entirely ignores that more complex issues will arise in the context of revocation. For instance, a consumer might say "don't call me anymore" in the context of a discussion regarding a specific missed payment on a

specific account without ever considering that those words mean they may never again hear from their lender, even regarding *different* missed payments on *different* accounts or *different* sorts of notifications related to their account. This is so because while "don't call me anymore" is a statement that "clearly express[es] a desire not to receive further calls," *see* FCC Order, ¶ 70, it is unclear which further calls are the object of the revocation. An overly broad, but appropriately conservative, interpretation of the scope of a consumer's revocation taken to assure TCPA compliance will necessarily deny some consumers the contacts they actually desire, such as account notifications and payment alerts. Hence, the FCC's ruling chills speech, interferes with normal business communications and frustrates consumer expectation.

The caller's task of detecting a revocation is all the harder because the FCC allows the revocation to be communicated by any means to anyone associated with the caller. No business of any size can train all of its employees to recognize a revocation of prior consent expressed in any possible manner. A business is even less able to train all employees of all its loan servicers, debt collectors, attorneys and other agents to perform that difficult task. Moreover, listening for a random revocation of consent would distract employees and agents from their main tasks. A bank teller should carefully examine signatures on a check and count cash, not

ponder whether the check cashing customer is revoking consent for the bank's collection department to call him about a delinquent loan payment.

Recording revocations poses even greater issues. Since any employee or agent might receive one, all must be able to record a revocation of consent. Universal access to any system of record creates severe security problems. But even if those issues could be resolved, the difficult and inequitable burden of proving a negative—that there was no revocation—would remain.

Any customer wishing a $500 per call windfall may claim, whether or not truthfully, that he or she revoked consent orally, speaking to some employee or agent of the caller somewhere. This imposes tremendous burdens on the caller, who must then conduct a fact-intensive inquiry and even present documentation in order to disprove the story. In some instances documentation may not be available. A caller cannot record all telephone and face-to-face conversations. Apart from the practical difficulties, it is illegal to do so in many states. *See, e.g.,* Cal. Pen. Code, § 632. Months or years later, an employee or agent may not remember an utterly routine conversation with a customer, one of perhaps hundreds dealt with the same day. Nor can a business operate effectively if, each time a customer

speaks, an employee and agent must halt whatever else he or she is doing to record the fact that the customer did *not* revoke consent.[9]

If a revocation is correctly detected and recorded, there is yet a further problem in disseminating that information instantly to all of a caller's business units, and their employees, agents and telephone equipment to assure that no further calls are placed to the revoking customer's cell phone. This communication problem is accentuated if a revocation whispered in the ear of a debt collection agent suffices to outlaw all calls by all arms of a large financial institution.

On top of everything else, the FCC Order applies retroactively, creating a possible multi-billion dollar field day for cell phone owners, users and their lawyers. Caught unaware of the TCPA's newly expanded scope and the new record-keeping requirements imposed by "any reasonable means" revocations, callers will be left with the extremely arduous and expensive task of defending themselves against claims for $500 per call penalties for calls placed to cell phones during the past four years. *See* 28 U.S.C. § 1658(a).

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[9] The sheer volume of records that a caller will have to maintain in an accessible form for the term of the account plus the four-year limitations period under 28 U.S.C. § 1658(a) (34 years for a conventional home loan; a decade for an ordinary car loan) will impose high costs on the account originator as well as impede any transfer of the account or of account servicing or collections responsibilities, as the data trove must be transferred to (and remain accessible on) the transferee's record system.

II. The FCC Order Ignores Other Federal Law That Requires Or Strongly Encourages Calls To Cell Phones

For the reasons stated above, the cumulative effect of the FCC Order's three principal "clarifications" is to make every call to a cell phone a $500 crap shoot. Each call made with modern telephone equipment will fall within the TCPA's scope. The caller cannot assure that it has prior express consent from the correct "called party" or that the consent has not been revoked by some "reasonable means."

The TCPA and its legislative history evince no congressional intent to impose such an onerous burden on industry. It is even clearer that the FCC Order misreads federal law when it is viewed in the context of other federal statutes and regulations that require or at least strongly encourage businesses to call consumers, many of whom use cell phones exclusively. Congress could not have intended to penalize the very calls it requires or encourages.

A. Federal Law Requires Mortgage Lenders And Loan Servicers To Call Delinquent Borrowers

Foreclosure of defaulted home mortgage loans can have dire consequences not only for the borrower and his or her family, but also for the neighborhood and even, at times, the national economy. To mitigate those potential harms, federal agencies now require loan servicers to contact defaulted borrowers to explore alternatives to foreclosure. The FCC Order's "clarifications" of the TCPA will

harm borrowers and thwart these loss mitigation initiatives by impeding or preventing loan servicers from contacting borrowers by cell phone, often the most effective means of reaching them.

1. FHA Regulations Require Telephone Contact With Delinquent Borrowers

To "promote prompt and effective contact with [Federal Housing Administration ("FHA")] borrowers," and "ensure borrowers are able to communicate with their servicers regarding . . . loss mitigation assistance," the Department of Housing and Urban Development ("HUD") has adopted policies that require servicers of FHA loans to commence telephone contact with borrowers within 20 days of delinquency. *See Methods of Communications with Borrowers*, Mortgagee Letter 2013-39, 2013 WL 5840049, at *1 (HUD October 28, 2013).

At a minimum, the servicer must continue making telephone calls to the borrower two times a week, at varying days and times, until contact is established or the servicer determines that the property is vacant or abandoned. *Id.* Telephone calls must be the servicer's primary means of contacting the borrower. "Electronic communications may be used to supplement telephone contact attempts, but are *not to be solely relied upon* in attempting to establish contact with the borrower." *Id.* at *4 (emphasis added).

HUD requires that servicers' files "evidence efforts to reach the borrower early in his/her delinquency and to take the appropriate loss mitigation action." *Id.*

at *2. HUD also "strongly encourages servicers to have written policies for out-bound collection calls, providing for … [a] minimum of two calls per week beginning on the 17th day of delinquency until contact is established," for borrowers at a low risk of foreclosure. *Id.* at *3-4 (emphasis in original).

Even more stringent requirements apply to loans at risk of early payment default and re-default following loss mitigation. *See id.* at *4. For these loans, HUD requires servicers to "[c]ommence telephone contacts by the 10th day after the first missed payment" and a minimum of two calls per week after until: (1) contact is established; (2) the servicer determines that the phone contact information is inaccurate; or (3) the servicer determines that the borrower's phone line has been disconnected. *Id.*

Servicers of FHA loans are now left to choose between not placing calls to cell phones and accepting exposure to liability for failure to perform HUD's loss mitigation requirements[10] or complying with HUD's requirements for delinquent borrower contact and risking violation of the TCPA, as interpreted by the FCC Order. There is no way to assure that they can comply with both of these now-conflicting federal demands.

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[10] Failure to comply with HUD's requirements may result in monetary penalties, 24 C.F.R. § 30.35(c) and subject servicers to administrative action, 12 U.S.C. § 1708(c)(3). Additionally, such failure exposes servicers to actions brought under the False Claims Act, 31 U.S.C. §§ 3729–3733, including penalties and treble damages, 31 U.S.C. §§ 3729(a)(1)(A).

2. Fannie Mae And Freddie Mac Also Require Telephone Contact With Delinquent Borrowers

Fannie Mae and Freddie Mac, the two government-sponsored entities currently in federal receivership, also require servicers of their loans to call delinquent borrowers as part of the servicers' loss mitigation efforts.

Under Freddie Mac guidelines, servicers must "[m]ake personal contact with the Borrower as early and as often as necessary to cure the delinquency" and must "[c]ontinue to contact the Borrower if satisfactory arrangements have not been made to cure the Delinquency or until the Servicer determines foreclosure is appropriate."[11] These required communications must result in a "quality right person contact" ("QRPC") and further specified minimum collection efforts.[12] Fannie Mae imposes similar requirements.[13]

Telephonic contact must be the servicer's primary vehicle for fulfilling both the QRPC and collection requirements. In fact, telephonic contact is *mandated* for certain stages of collection efforts.[14] After specified triggering events occur, calls

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[11] Freddie Mac, *Single-Family Seller/Servicer Guide*, vol. 2, ch. 63.2(b) (Sept. 15, 2014), *available at* http://www.allregs.com/ tpl/Main.aspx.

[12] Freddie Mac, *Single-Family Seller/Servicer Guide*, vol. 2, ch. 64.10; *see also* Freddie Mac, *Quality Right Party Contact and Borrower Solicitation* (July 2015), *available at* http://www. freddiemac.com/learn/pdfs/service/qrpc.pdf.

[13] Fannie Mae, *Servicing Guide*, ch. D2-2, at 406-410, *available at* https://www.fanniemae.com/content/guide/svc101415.pdf.

[14] Freddie Mac, *Single-Family Seller/Servicer Guide*, vol. 2, ch. 63.2 (requiring servicers to "[i]nitiate telephone contact with each delinquent borrower unless

are required every three days and must continue for 36 days until one of the following occurs:

> (1) the servicer achieves QRPC and determines that the borrower does not want to pursue an alternative to foreclosure;
>
> (2) the delinquency is cured, the servicer achieves QRPC and the borrower has made a promise to pay the delinquent amount by a specified date, not to exceed 30 days;
>
> (3) the servicer receives a complete Borrower Response Package; or
>
> (4) the borrower enters into a repayment plan or forbearance agreement.

Freddie Mac, *Single-Family Seller/Servicer Guide*, Vol. 2, Ch. 63.2.

Freddie Mac guidelines also require telephone calls every third day after the servicer (i) sends a required Borrower Solicitation Package at 31-35 and again at 62-66 days of delinquency, (ii) receives incomplete information from the borrower despite achieving a QRPC, or (iii) offers foreclosure alternatives during the 14-day response period. *Id.*

Given the combined effect of the FCC Order's three principal "clarifications," loan servicers can no longer comply with these GSE requirements without risking a violation of the TCPA and a $500 penalty for each call to a cell phone number.

ACH payment arrangements or arrangements to cure the delinquency have been made").

3. CFPB Mortgage Servicing Regulations Require "Live Contact" With Delinquent Borrowers

The Consumer Financial Protection Bureau's ("CFPB's") recent rewrite of Regulation X[15] includes an "early intervention" rule requiring loan servicers to contact defaulted borrowers and work with them to explore loss mitigation options. *See* 12 C.F.R. § 1024.39. With certain exceptions, the regulation applies to all federally related mortgage loans—which include the vast majority of all home loans.[16]

Under the "early intervention" rule, loan servicers must "establish or make good faith efforts to establish *live contact* with a delinquent borrower not later than the 36th day of the borrower's delinquency," in order to inform borrowers of loss mitigation options. 12 C.F.R. § 1024.39 (emphasis added). The rule specifically recognizes that "[g]ood faith efforts to establish live contact consist of reasonable steps under the circumstances and may include *telephoning the consumer on more than one occasion* or sending the consumer written or electronic communication encouraging the consumer to establish live contact with [the lender or loan

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[15] *See Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X)*, 78 Fed. Reg. 10696-01 (Feb. 14, 2013).

[16] "Federally related mortgage loans" include, among others, all loans secured by liens on residential real property made by any lender that is federally regulated or whose deposits or accounts are federally insured, and loans the lender intends to sell to Fannie Mae or Freddie Mac. *See* 12 C.F.R. § 1024.2.

servicer]." CFPB Bulletin 2013-12, *Implementation Guidance for Certain Mortgage Servicing Rules*, 2013 WL 9001249 (Oct. 15, 2013).

The CFPB exempts loan servicers from the "early intervention" rule where the borrower is a debtor in bankruptcy or the servicer is subject to a written cease and desist request under the Fair Debt Collection Practices Act ("FDCPA"; 15 U.S.C. § 1692 *et seq.*). *See* CFPB Bulletin 2013-12, 2013 WL 9001249. However, loan servicers are not excused because of the TCPA. *See id.*[17]

The CFPB recognizes the importance of "live contact" to reducing delinquencies and preventing foreclosures, and in fact that is the policy behind the CFPB's "early intervention" rule. Telephone contact may be the most effective and efficient way to establish "live contact" for purposes of communicating the potentially grave consequences of a delinquency and presenting a borrower with loss mitigation options. Letters or notices sent by ordinary mail do not suffice. They are comparatively slow and rarely trigger the desired response. Similarly, the purpose of the regulation is not best served by reliance solely on e-mail. Thus, compliance with the "early intervention" rule effectively requires communication

[17] The "early intervention" rule does not "require a servicer to communicate with a borrower in a manner otherwise prohibited by applicable law," 12 C.F.R. § 1024.39(c). However, absent proof it lacks the "called party's" currently effective consent, a loan servicer cannot blindly rely upon this exception. Moreover, owing to the effects of the FCC Order on calls to cell phones, an entire class of potential call recipients would be prevented from receiving loss mitigation assistance via telephone under the TCPA. This result is in direct conflict with the purpose of the CFPB rule.

by telephone call or text message to a cell phone number when, as is often true, that is the only number the borrower has provided.

The FCC Order forces loan servicers into an impossible dilemma. For the reasons already stated, loan servicers cannot assure themselves, in advance, that they have the "called party's" prior express consent and that the consent has not been revoked. Any call made or text message sent to the borrower's cell phone number, using any modern telephone equipment, risks violation of the TCPA and a resulting $500 fine. On the other hand, the loan servicer cannot prove that it lacks the required consent or that consent has, in fact, been revoked, so prudence may dictate choosing a method to comply with the "early intervention" rule that does not necessarily provide the consumer at risk of foreclosure the immediate opportunity to speak with someone who can begin to help them resolve their delinquency, even though such live contact is what the "early intervention" rule was intended to foster and the impetus for the CFPB's promulgating the regulation.

B. The FCC Order Impedes Other Customer Contacts That Federal Law And Public Policy Encourage

By expanding the TCPA's scope to encompass almost all modern telephone equipment while making prior express consent an unreliable defense, the FCC Order thwarts other federal laws and public policies that encourage customer notification. In doing so, the FCC Order contravenes Congress' evident intent and

represents an arbitrary and capricious exercise of the FCC's authority to issue regulations implementing the TCPA.

By making every call to a cell phone number a potential TCPA violation subject to a $500 penalty, the FCC Order creates a strong disincentive for businesses to contact customers by telephone call or text message even in the many situations in which that contact would assist the customer by providing warning or information needed to avert untoward consequences.

The poor, the young, and those living in rural areas will be the most adversely affected by the FCC Order's stifling of these communications, as they have the highest rates of wireless-only households.[18] Businesses can reach them only by risking $500 calls to cell phone numbers. So they are less likely to notice and will be corresponding less able to avoid foreclosures, repossessions and other harmful events.

As already noted, the FHA, Fannie Mae and Freddie Mac, and the CFPB, *require* that loan servicers contact delinquent borrowers to offer loss mitigation options in connection with most home loans. *See* Section II.A above. Loss mitigation efforts benefit borrowers by giving them alternatives to losing their

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[18] Drew Desilver, *For Most Wireless-Only Households, Look South and West*, (Pew Research Center; Dec. 28, 2013), available at http://www.pewresearch.org/fact-tank/2013/12/23/for-most-wireless-only-households-look-south-and-west/.

homes and ensuing damage to their credit. *See Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X)*, 78 Fed. Reg. at 10722.

The "greatest barrier to foreclosure prevention is inability to contact delinquent borrowers; communication increases the effectiveness and likelihood of success of foreclosure prevention efforts."[19] It is for this reason that consumer advocacy groups strongly *favor* requiring oral notice for loss mitigation. *See* Mortgage Servicing Rules, 78 Fed. Reg. at 10788. Yet, the FCC Order will discourage loan servicers from providing that notice to delinquent borrowers in instances when federal law does not compel them to call.

Notice is equally beneficial to delinquent borrowers in the car finance arena. Automobile loans are the third-largest source of outstanding household debt in the United States.[20] A car is often a primary mode of transportation, including to and from work. Repossession of the car upon default can have wide-ranging deleterious consequences for the borrower and his or her family.

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[19] Samuel Frumkin, et al., *Foreclosure Prevention: Improving Contact with Borrowers," Community Developments: Insights* (OCC June 2007), *available at* http://www.occ.gov/topics/community-affairs/publications/insights/insights-foreclosure-prevention.pdf ; *see also Strengthening the Student Loan System to Better Protect All Borrowers*, 16 (U.S. Dep't of Educ. Oct. 1, 2015), *available at* http://www2.ed.gov/documents/press-releases/strengthening-student-loan-system.pdf (recognizing the benefits of consumer cell phone contact for remedying delinquency or default in the student loan context).

[20] Research and Statistics Group, Fed. Reserve Bank of N.Y., 3 Quarterly Report on Household Debt and Credit, 3(2015), *available at* https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2015Q3.pdf.

Most automobile lenders and loan servicers now telephone borrowers to provide notice of overdue payments and impending repossession even in the many states which do not require pre-foreclosure notice at all[21] or when no late payments have been accepted.[22] As in the home mortgage area, these calls benefit borrowers by allowing them the chance to cure defaults, enter into payment plans or adopt other measures to avoid repossession and ensuing damage to the borrower's credit score. Better the minor annoyance of a telephone call than walking out one morning to find the family car is gone.

Now lenders and loan servicers will have to re-examine their practices in light of the FCC Order. The $500 penalty for a call to a cell phone number that has been reassigned unbeknownst to the lender or loan servicer will likely exceed one or more months' payments on the car loan. It is a high price to pay and large risk to run for a call that the lender or loan servicer is not legally required to make.

Other elective telephone call or text message alerts, notices, and warnings will be discouraged as well by the FCC Order. Account activity notices, password change warnings, lease expiration reminders, payment due date and statement

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[21] *See e.g.*, Ala. Code § 7-9A-609 (1975); Ariz. Rev. Stat. Ann. § 47-9609 (2001); D.C. Code § 28:9-609 (2001); Md. Code Ann., Com. Law, § 12-624 (2015); Va. Code Ann. § 8.9A-609 (2015).

[22] *See, e.g.*, *Slusser et al. v. Wyrick dba Wyrick's Auto Sales*, 28 Ohio App. 3d 96, 99 (1986); *Nevada Nat'l Bank v. Huff*, 582 P.2d 364, 369 (Nev. 1978); *but see*, *Minor v. Chase Auto Fin. Corp.*, 372 S.W.3d 762, 768 (Ark. 2010) (dealer to repossess without notice even after accepting late payments due to anti-waiver language in contract).

issuance notices, and many other types of customer-friendly communications will have to be re-evaluated in light of the risk of TCPA liability even when the caller thinks it has the customer's consent to call. As noted, this reassessment will harm most several vulnerable groups—the young, the poor, and residents of rural areas. They are the ones most likely to lack land lines, e-mail accounts or other means of quickly receiving those communications.

Even customers who have land lines or e-mail accounts may prefer to be contacted by a call or text message to their cell phones—particularly if they are traveling or working out of town. The FCC Order will likely deprive them of that option since the caller will have no assurance that their consent to or even adamant insistence on cell phone contact will remain unrevoked and their cell phone number will not be reassigned.

The FCC Order fails to address these and other harmful consequences likely to follow from the order's three principal "clarifications" which, in combination subject a caller to a potential $500 penalty per call or text to a cell phone number no matter how diligently the caller attempts to comply with the TCPA. By failing to take these harmful consequences into account or view its "clarifications" in combination and in the context of their probable practical consequences, the FCC Order represents an arbitrary and capricious exercise of the FCC's authority to implement the TCPA. The order should be overturned.

III. Conclusion

For the foregoing reasons, *Amici Curiae* AFSA, CMC, and MBA respectfully request that the Court rule in favor of Petitioners.

Respectfully submitted,

/s/ Eric J. Troutman

Eric J. Troutman
SEVERSON & WERSON
A Professional Corporation
19100 Von Karman Ave., Suite 700
Irvine, California 92612
Telephone: (949) 442-7110
Facsimile: (949) 442-7118

Counsel for Amici Curiae American Financial Services Association, Consumer Mortgage Coalition, Mortgage Bankers Association

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

Pursuant to D.C. Circuit Rule 32(a)(3)(C) and Fed. R. App. 32(a)(7)(C), this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) and D.C. Circuit Rule 32(e)(3) because this brief contains 6,689 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1), as determined by the word-counting feature of Microsoft Word.

/s/ Eric J. Troutman
Eric J. Troutman

Counsel for Amici Curiae American Financial Services Association, Consumer Mortgage Coalition, Mortgage Bankers Association

CERTIFICATE OF SERVICE

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

By *s/ Eric J. Troutman*
Eric J. Troutman