ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1211 (and consolidated cases)

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

ACA INTERNATIONAL ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents

CAVALRY PORTFOLIO SERVICES, LLC ET AL.,
Intervenors for Petitioners

ON PETITIONS FOR REVIEW FROM AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

JOINT BRIEF FOR PETITIONERS ACA INTERNATIONAL, SIRIUS XM, PACE, SALESFORCE.COM, EXACTTARGET, CONSUMER BANKERS ASSOCIATION, U.S. CHAMBER OF COMMERCE, VIBES MEDIA, AND PORTFOLIO RECOVERY ASSOCIATES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

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

2. Respondents are the Federal Communications Commission and the United States of America.

3. The following entities are intervenors:

Intervenors for Petitioners: Cavalry Portfolio Services, LLC; Conifer Revenue Cycle Solutions, LLC; Council of American Survey Research Organizations; Diversified Consultants, Inc.; Gerzhom, Inc.; Marketing Research Association; Mercantile Adjustment Bureau, LLC; MRS BPO LLC; and National Association of Federal Credit Unions.

Intervenors for Respondents: None.

4. The following entities are *amici curiae*:

In support of Petitioners: American Gas Association; Credit Union National Association; CTIA—The Wireless Association; Edison Electric Institute; National Association of Chain Drug Stores; National Association of Water Companies; National Restaurant Association; National Retail Federation; and Retail Litigation Center, Inc.

In support of Respondents: None known.

In support of neither party: None known.

B. Ruling Under Review

The ruling under review was released on July 10, 2015 by the Federal Communications Commission. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (2015). The Order is an omnibus declaratory ruling and order that addressed 21 separate requests for TCPA-related action from the Commission.

C. Related Cases

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). Petitioners are not aware of any other related case.

CORPORATE DISCLOSURE STATEMENT

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

1. ACA International, the Association of Credit and Collection Professionals, is a Minnesota nonprofit corporation with offices in Washington, DC, and Minneapolis, Minnesota. Founded in 1939, ACA represents nearly 3,700 members, including credit grantors, collection agencies, attorneys, asset buyers, and vendor affiliates. ACA produces a wide variety of products, services, and publications, including educational and compliance-related information; and articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers. ACA has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

2. Sirius XM Radio Inc. (Sirius XM) is the nation's largest satellite radio provider. Sirius XM Holdings Inc. owns all of the outstanding capital stock of Sirius XM Radio Inc. Liberty Media Corporation beneficially owns more than 50 percent of the outstanding capital stock of Sirius XM Holdings Inc.

3. Professional Association for Customer Engagement, Inc. (PACE) is a non-profit trade organization dedicated to the advancement of companies that use contact centers as an integral channel of operations. It has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

4. salesforce.com, inc. is a leading provider of enterprise cloud computing solutions. ExactTarget, Inc. is a provider of on-demand software solutions. salesforce.com, inc. has no parent corporation and no publicly held corporation owns 10 percent or more of its stock. ExactTarget, Inc. is wholly owned by salesforce.com, inc.

5. Consumer Bankers Association is a non-profit corporation and trade association representing the retail banking industry—banking services geared toward consumers and small businesses. It has no parent corporation, and no publicly held corporation owns a 10 percent or greater interest in it.

6. The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber is a non-profit, tax-exempt organization incorporated in the District of Columbia. It has no parent corporation and no publicly held corporation owns a 10 percent or greater interest in it.

7. Vibes Media, LLC is a leading provider of mobile marketing technology and services. It has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

8. Portfolio Recovery Associates, LLC, is a Delaware limited liability company. It is a subsidiary of PRA Group, Inc., a publicly traded company. PRA Group provides a broad range of revenue and recovery services, returning millions of dollars annually to business and government clients. No publicly held corporation owns 10 percent or more of PRA Group, Inc. stock.

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GLOSSARY

2003 Order	Declaratory Ruling and Order, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014 (2003)
APA	Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*
ATDS	Automatic Telephone Dialing System, defined in 47 U.S.C. § 227(a)(1)
Order	Declaratory Ruling and Order, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7691 (2015)
O'Rielly Dissent	Statement of Commissioner Michael O'Rielly Dissenting in Part and Approving in Part, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (2015)
Pai Dissent	Dissenting Statement of Commissioner Ajit Pai, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (2015)
TCPA	Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, codified at 47 U.S.C. § 227

INTRODUCTION

Every organization—schools, charities, political parties, small businesses, major corporations—must be able to reach people efficiently. Organizations must be able to issue safety alerts, solicit political or charitable support, notify consumers of new products and services, make individuals aware of problems with their accounts, or just tell people their pizza is coming. Those communications, which often occur by telephone or text message, are vital to contemporary society.

Congress has always recognized the importance of these communications. In the 1980s, however, a particular problem arose: telemarketers began to use specialized dialing equipment that automatically generated and dialed thousands of random or sequential numbers, often to deliver unwanted prerecorded messages. That practice became especially troublesome when those aimless calls reached cellular phones, tying up entire wireless networks in a given area and forcing recipients to pay pricey per-minute charges.

In response, Congress in 1991 enacted the Telephone Consumer Protection Act (TCPA) to prohibit calls to cellular and certain specialized telephone lines made using an "automatic telephone dialing system" (ATDS) without the "prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). Congress defined an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator;

and (B) to dial such numbers." *Id.* § 227(a)(1). Congress thus restricted calls from particularly defined equipment. It did not ban unsolicited calls generally, nor did it prohibit all computer-assisted dialing.

The Commission rewrote the TCPA in the Order under review. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (2015). *First*, the Order embraces an atextual and self-contradictory definition of ATDS that severely curtails a wide range of legitimate communications that Congress never sought to restrict. It asks whether equipment *could be modified* to have the ability to store or produce random or sequential numbers, or perhaps the ability to dial numbers randomly or sequentially, or perhaps the ability to dial telephone numbers without human intervention—rather than focusing on the *present ability* of equipment to perform *all* of the statutorily defined tasks. Contrary to the First Amendment and common sense, the Order threatens to turn even an ordinary smartphone into an ATDS.

Second, the Order imposes liability on callers who call or text numbers that were assigned to consenting customers but that, unbeknownst to the caller, were later reassigned to different users. This approach prevents callers from reasonably relying on their customers' consent. It makes an empty promise of Congress's assurance that callers may lawfully contact willing recipients, and it chills constitutionally protected expression.

Third, the Order authorizes individuals to revoke consent by "any reasonable means" of their choosing. This degree of customization of revocation methods makes it all but impossible for callers to track and process revocations, leaving everyone (including consumers) worse off. Just as impermissibly, the Order prohibits callers and recipients from *agreeing* on a specific means of revocation by contract.

The Order jeopardizes desirable communications that Congress never intended to ban. And it will further encourage massive TCPA class actions seeking crippling statutory damages. Its unlawful provisions should be vacated.

JURISDICTION

These are petitions for review of a final order of the Federal Communications Commission. The Commission had jurisdiction under 47 U.S.C. §§ 151-154, 201, 227, and 403. This Court has jurisdiction under 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342-2344, and 5 U.S.C. § 706. The Order was released on July 10, 2015, and the petitions—filed on July 10 (No. 15-1211), July 14 (Nos. 15-1218 and 15-1244), August 26 (No. 15-1290), September 1 (No. 15-1304); September 2 (No. 15-1306), September 4 (No. 15-1311), and September 8 (No. 15-

1314) of 2015—were timely filed within 60 days. *See* 47 U.S.C. §§ 402(a), 405(a); 28 U.S.C. § 2344; 47 C.F.R. § 1.4(b).[1]

ISSUES

1. Whether the Commission interpreted ATDS in a way that unlawfully turns on the equipment's potential rather than present abilities, nullifies the statutory random-or-sequential-number-generation requirement, and provides inadequate guidance to regulated parties.
2. Whether the Commission unlawfully prevented callers from reasonably relying on the "prior express consent of the called party" by imposing liability for innocent calls to reassigned numbers.
3. Whether the Commission unlawfully imposed an unworkable regime for handling revocation of consent.

STATUTES AND REGULATIONS

The Addendum contains all applicable provisions.

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[1] The Commission also published the Order in the *Federal Register* on October 9, 2015. Out of abundance of caution, Petitioners Sirius XM and PACE filed protective petitions on November 23, 2015, as did Petitioners ExactTarget.com, salesforce.com, and ACA International on November 24, 2015.

STATEMENT OF THE CASE

A. Congress Enacts the TCPA To Restrict Particular Practices

In the TCPA, Congress imposed two basic restrictions on calls to emergency-service numbers, hospital rooms, wireless numbers, and other specialized lines. *First*, Congress banned calls to such numbers "using ... an artificial or prerecorded voice" without "the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A); *see id.* § 227(b)(1)(B) (same for "residential telephone line[s]"). *Second*, Congress banned calls to specialized numbers using an ATDS—"equipment which has the capacity ... (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers"—without such consent. *Id.* § 227(a)(1), (b)(1)(A). Congress created a private right of action with statutory damages of $500 per violation and $1,500 per willful or knowing violation. *Id.* § 227(b)(3).[2]

The ATDS provision targeted harmful practices that emerged in the 1980s. Then, "telemarketers typically used autodialing equipment that either called numbers in large sequential blocks or dialed random 10-digit strings." *Dominguez*

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[2] The restrictions on ATDS and prerecorded calls do not apply to calls made "for emergency purposes" or (since November 2, 2015) to certain calls "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(a)(1), (b)(1); Bipartisan Budget Act of 2015, Public Law No. 114-74, 129 Stat. 584, § 301.

v. Yahoo, Inc., No. 14-1751, 2015 WL 6405811, at *2 (3d Cir. Oct. 23, 2015). Random dialing allowed callers to reach and tie up unlisted and specialized numbers. *See* S. Rep. No. 102-178, at 2 (1991). And sequential dialing allowed callers to reach all such numbers in an area, creating a "potentially dangerous" situation in which no outbound calls (including emergency calls) could be placed. H.R. Rep. No. 102-317, at 10 (1991).

Accordingly, the Commission "initially interpreted the [TCPA] as specifically targeting equipment that placed a high volume of calls by randomly or sequentially generating the numbers to be dialed." *Dominguez*, 2015 WL 6405811, at *2. In its first TCPA-related order, the Commission declared that equipment with "speed dialing," "call forwarding," and "delayed message" functions are not ATDSs, "because the numbers called are not generated in a random or sequential fashion." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, ¶47 (1992). It later explained that the TCPA's ATDS provisions do not apply to calls "directed to [a] specifically programmed contact number[]" rather than "to randomly or sequentially generated numbers." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd. 12391, ¶19 (1995). For fifteen years, the scope of the ATDS restriction remained settled.

B. The Commission's Subsequent Orders Generate Significant Confusion as Wireless Communications Increase Dramatically

Two developments—the Commission's further interpretation of the TCPA and the explosion of wireless communications—transformed the TCPA's narrow restriction of specific equipment into a high-stakes assault on legitimate, beneficial communications that Congress never meant to restrict.

1. The Commission's Orders Concerning Predictive Dialers Create Significant Confusion

By the mid-2000s, the TCPA had largely achieved its goal of eliminating the use of random or sequential number generators. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, ¶132 (2003) (2003 Order). Computer-assisted dialing, however, remained useful for calling targeted lists of numbers. *Id.* Those lists were often fed into "predictive dialers," which use "algorithms to automatically dial consumers' telephone numbers in a manner that 'predicts' the time when a consumer will answer the phone and [an agent] will be available to take the call." *Id.* ¶8 n.31. Some predictive dialers could call only from lists; others could generate and dial random or sequential numbers. *Id.* ¶131.

Starting in 2003, the Commission concluded that some predictive dialers qualify as ATDSs, *id.* ¶133, but its orders were "hardly a model of clarity," *Dominguez*, 2015 WL 6405811, at *2. The Commission quoted the random-or-

sequential-number-generator requirement, 2003 Order ¶129, and suggested that equipment does not lose the capacity to satisfy that requirement simply because it is "paired with predictive dialing software and a database of numbers," *id.* ¶133. But the Commission also suggested varied tests for liability: whether the equipment can *dial* "at random, in sequential order, or from a database of numbers," *id.* ¶131; whether it can "store or produce telephone numbers," *id.* ¶¶132-33; and whether it can "dial numbers without human intervention," *id.* at ¶132; *see also In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559, ¶¶12-14 (2008); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 15391, ¶2 n.5 (2012). The Commission further concluded that text messages qualify as "call[s]" under § 227(b)(1)(A). 2003 Order ¶165.

2. Wireless Communications Become Commonplace

The rise of wireless communications magnified the impact of these confusing statements. The number of wireless subscribers had increased from only six million in 1991 to 326 million in 2012. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7689, ¶7 (2015) (Order); *Hearing Before the Subcomm. on Commc'ns of the S. Comm. on Commerce, Science, and Transp.*, 102d Cong. 45 (1991) (statement of Thomas

Stroup). Moreover, although "fewer than three percent of adults" "were wireless-only" in 2003, "39 percent" were by 2013. Order ¶7.

The uses of wireless devices also changed significantly. In the early 1990s, cell phones were used almost exclusively for calls—and, given the price of sending and receiving calls, not too many. *See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, 10 FCC Rcd. 8844 (1995), tbls. 3-4 (60-minutes-per-month plan cost $63 in 1991). Today, by contrast, many plans allow subscribers to make and receive unlimited calls and text messages.

Businesses and other organizations contact people through wireless calls and text messages to provide many useful services. Schools reduce truancy by alerting parents when children are absent. Fairfax Cty. Pub. Schs. Comments, 2 (Apr. 15, 2015).[3] Non-profit organizations provide safety alerts, appointment reminders, and schedule-change notifications. Nat'l Council of Nonprofits Comments, 3 (Sept. 24, 2014). Utilities notify customers that payments are due. Nat'l Rural Elec. Coop. Ass'n Comments, 2-3 (Nov. 17, 2014). And businesses engage in targeted outreach that looks nothing like random or sequential dialing. Sirius XM, for instance, calls car owners who have satellite-radio subscriptions to explain the

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[3] Unless otherwise indicated, all cited agency record materials come from CG Docket No. 02-278.

service and ask whether they wish to extend it. *See* Sirius XM Radio Inc. Ex Parte, 4 (May 18, 2015).

C. TCPA Litigation Explodes

Litigants seized on the confusion created by the Commission's orders—and the significant statutory penalties for violations—and filed numerous class-action lawsuits challenging communications that bear no resemblance to the practices that troubled Congress. Between 2010 and 2014, TCPA lawsuits increased by more than 560 percent, *see* U.S. Chamber of Commerce *et al.* Letter, 2 (Feb. 2, 2015), with more than 2,000 filed in 2014 alone. Statement of Commissioner Michael O'Rielly Dissenting in Part and Approving in Part, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, at 124 (2015) (O'Rielly Dissent). These lawsuits target companies in almost every sector of the economy, threatening billions in statutory penalties.[4] One law firm even created an app that lets plaintiffs and the firm "laugh all the way to the bank" by matching incoming calls to a database of callers and forwarding the information to the firm so it can file a class action. http:// www.blockcallsgetcash.com; O'Rielly Dissent 131 n.36.

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[4] *See, e.g.*, *In re Capital One TCPA Litig.*, Dkt. No. 329 in MDL No. 2416, 1:12-cv-10064 (N.D. Ill.) (approving class settlement involving "approximately 1.9 billion phone calls" and *minimum* statutory damages of "$950 billion dollars").

The prevalence of number reassignment also has increased litigation. About 37 million wireless numbers are reassigned every year. Dissenting Statement of Commissioner Ajit Pai, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, at 117 (2015) (Pai Dissent). Yet consenting subscribers do not always inform callers of the change. Callers may dial a number that they have every reason to believe belongs to a consenting recipient, but that has been transferred to someone else.

As the Order recognizes, callers cannot avoid this problem. The largest database of reassigned numbers includes only "80 percent of wireless … numbers," Order ¶86 n.301, so companies that take elaborate precautions may still accidentally reach reassigned numbers, *see* DIRECTV, LLC Comments, 6-10 (Mar. 10, 2014); Twitter, Inc. Comments, 9 (Apr. 22, 2015). Some plaintiffs have even refused to tell the caller about the reassignment—letting the call roll into an uninformative voicemail or answering without identifying themselves—and then sued over "unwanted" calls. *See* Pai Dissent 120; Rubio's Rest., Inc. Petition, 2-3 (Aug. 15, 2014); *Gensel v. Performant Techs., Inc.*, No. 13-C-1196, 2015 WL 402840. at *2 (E.D. Wis. Jan. 28, 2015).

D. The Commission's Order

Against this backdrop, 21 parties asked the Commission to clarify or revise its view of the TCPA. A divided Commission issued an Order addressing the

statutory definition of ATDS, the handling of reassigned numbers, and the revocation of consent.

The Commission concluded that "the capacity of an [ATDS] is not limited" to what the equipment is capable of doing in its "current configuration[,] but also includes its potential functionalities," Order ¶16—that is, what it *could* do if modified, at least if those possible modifications are not too "theoretical" or "attenuated," *id.* ¶18. At one point, the Commission suggested that an ATDS must be able to "store or produce, and dial random or sequential numbers," but elsewhere it "reaffirm[ed]" its earlier orders and offered several different tests for the functions an ATDS must have the capacity to perform. *Id.* ¶10; *see also id.* ¶¶12-14.

The Order also addresses reassigned numbers. The Commission concluded that "called party" in the consent exception means the "current subscriber (or non-subscriber customary user of the phone)," not the "intended recipient of a call." *Id.* ¶72. A caller therefore faces liability if it tries to call a consenting customer but inadvertently reaches someone to whom the number has been reassigned. The Commission recognized "callers lack guaranteed methods to discover all reassignments immediately after they occur." *Id.* ¶85. To mitigate this "severe" result, *id.* ¶90 n. 312, the Commission allowed callers unaware of reassignment to make one liability-free call, *id.* ¶85. But regardless whether that call is answered

or the caller otherwise has *any* reason to suspect a reassignment, callers (and their affiliates and subsidiaries) are strictly liable for all subsequent calls if, in fact, the number has been reassigned. *Id.* ¶¶85, 88, 95.

Finally, the Commission concluded that customers may revoke consent through any individualized means they choose, so long as that method is "reasonable" under the "totality of the facts and circumstances." *Id.* ¶¶55, 64 n.233. It also prohibited a caller from "limit[ing] the manner in which revocation may occur." *Id.* ¶47.

Commissioners Pai and O'Rielly dissented. Both recognized that every ATDS must be able "to store or produce telephone numbers to be called, using a random or sequential number generator." Pai Dissent 114; O'Rielly Dissent 129. They also explained that interpreting "capacity" to include "potential functionalities" both "dramatically depart[ed] from the ordinary use of the term," Pai Dissent 115, and could transform "every smartphone, tablet, [and] VoIP phone" into an ATDS. Pai Dissent 115; *accord* O'Rielly Dissent 128.

As to reassigned numbers, the dissenting Commissioners concluded that interpreting "called party" to mean "expected recipient" is "by far the best reading of the statute," Pai Dissent 118, and the only way to avoid unconstitutionally chilling "communications that consumers have expressly consented to receiv[e]," *id.* at 120; *accord* O'Rielly Dissent 134. They also explained that the

Commission's one-call rule "demand[s] the impossible," Pai Dissent 121, because it is "absolutely ludicrous" to presume that one (perhaps unanswered) call or text makes the caller aware of the reassignment, O'Rielly Dissent 131.

Finally, the dissenters explained that the Commission's position on revocation inflicts unworkable burdens on callers. For instance, consumers could tell any retail salesperson that they want to revoke their consent, disregarding any centralized system established by the retailer for the orderly and effective intake and processing of such requests. Pai Dissent 123.

STANDARD OF REVIEW

Agency action must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right," or "in excess of statutory ... authority." 5 U.S.C. § 706(2). Under this standard, agency action is unlawful if it contradicts the governing statute, resolves statutory ambiguities unreasonably, fails to consider important aspects of the problem at hand, or adopts a solution contrary to the evidence. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

SUMMARY OF ARGUMENT

I. Anyone who calls wireless lines with an "automatic telephone dialing system" must have the consent of the called party. 47 U.S.C. § 227(b)(1)(A)(iii).

An ATDS is "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such calls." *Id.* § 227(a)(1). Two questions follow: what does it mean for equipment to have the "capacity" to perform the functions of an ATDS, and what are those functions? The Commission's substantively mistaken and hopelessly vague answers must be set aside.

A. "Capacity" refers to present ability—what equipment can do now, in its current configuration—not potential functionalities if modified. The Commission's interpretation contradicts the ordinary meaning, structure, and purposes of the TCPA. The Commission's interpretation also leads to absurd and unconstitutional results because virtually every kind of modern phone, including every smartphone and office phone, could be modified to generate random or sequential numbers.

The TCPA also addresses what functions any ATDS must be capable of performing. An ATDS must be able to (1) generate random or sequential numbers; (2) use the generator to store or produce numbers to be called; and (3) dial those numbers. Moreover, the ATDS must be able to perform these tasks automatically. The Order misinterprets the statute by suggesting that the mere ability to dial from any list of numbers suffices and that the equipment need not be able to work automatically.

B. The Commission's interpretations are also impermissibly vague and internally inconsistent. The Commission concluded that "capacity" includes "potential functionalities" that could be created by modifying the equipment, at least where those potential functionalities are not too "attenuated" or "theoretical." The Commission did not explain what that means other than to say that rotary phones are not ATDSs. Callers remain in the dark about what modifications are *too* theoretical or attenuated to turn a modern-day phone into an ATDS. Similarly, the Commission put forth self-contradictory descriptions of the functions that an ATDS must be able to perform—including suggesting that the ability to dial from any list of numbers (whether random or sequential or not) is, by itself, enough. It is arbitrary and capricious for the Commission to force regulated parties to guess about the scope of its speech-restrictive regime.

II. The Commission also made it impossible for callers to rely on consent they have received. The TCPA protects automated and prerecorded calls made "with the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). The Commission interpreted "called party" to mean "the current subscriber" or "non-subscriber customary user of the phone," Order ¶72, rather than the call's expected recipient. But this makes consent meaningless: how is a caller to know, *before* placing a call to the number associated with a consenting consumer, that the number has changed or that somebody else will answer?

A. In the context of the TCPA's consent exception, "called party" must mean the call's expected recipient. Callers that try to reach consenting individuals face a practical problem: as the Order recognizes, 100,000 wireless numbers are reassigned *daily*, but callers have no reliable means of tracking all of these reassignments. Interpreting "called party" to mean "expected recipient" is therefore necessary to give effect to the TCPA's protection of consensual calls. By contrast, interpreting "called party" to mean the phone's current subscriber or customary user renders this protection meaningless, and violates the First Amendment, by threatening strict liability for callers who unexpectedly reach someone other than the consenting consumer.

B. The Commission's "solution" of exempting the first call to a reassigned number does not fix the Order's defects. Calls often go unanswered, and texts unreturned. Imposing strict liability for all subsequent calls, *regardless* whether the first call gives the caller any reason to believe that the number has been reassigned, is arbitrary and capricious.

III. Finally, the Commission created an unworkable, unreasonable regime governing revocation of consent.

A. To ensure adequate recording and processing of revocations of consent, callers must be able to rely on uniform revocation procedures. The Commission could have allowed consumers to revoke consent without sabotaging

the need for uniformity by, for example, prescribing standard revocation procedures. It instead allowed each consumer to use any means of revoking consent that is "reasonable" under the "totality of the facts and circumstances," and it prevented callers from relying on any sort of centralized process for handling such requests. This case-by-case approach is arbitrary and capricious because it ignores callers' needs for uniformity and undermines consumers' ability to have their requests processed.

B. At a minimum, the Commission unlawfully concluded that callers and consumers may not voluntarily agree on means of revocation. Under the TCPA's common-law backdrop, parties may agree upon means of notice, including for revocations of consent. And even if the TCPA allows consumers to revoke consent however they wish, nothing in the statute overcomes the strong presumption that statutory rights are waivable by contract.

STANDING

"Only one of the petitioners needs to have standing to permit [this Court] to consider the petition for review." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). If a petitioner is "an object of the [agency] action (or forgone action) at issue—as is the case usually in review of a rulemaking and nearly always in review of an adjudication—there should be little question that the action or inaction has caused [it] injury, and that a judgment preventing or requiring the action will redress it."

Sierra Club v. EPA, 292 F.3d 895, 900 (D.C. Cir. 2002). Moreover, an association has standing if there is a "substantial probability that the FCC's order will harm the concrete and particularized interests of at least one of [its] members." *Am. Library Ass'n v. FCC*, 401 F.3d 489, 493 (D.C. Cir. 2005).

Each Petitioner has standing. Petitioner Sirius XM, and members of Petitioners ACA International, PACE, the Chamber, and the Consumer Bankers Association, communicate with customers by telephone calls or text messages, relying on equipment that the Order arguably treats as ATDSs. *See* Moore Declaration ¶4, Add. 8 (Sirius XM); Sailors Declaration, Add. 9-10 (PACE member CSG International); Brubaker Declaration, Add. 6 (PACE member InfoCision, Inc.); ACA Int'l Ex Parte, 2-5 (May 9, 2014); U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform Ex Parte, 2, 6 (June 11, 2015); U.S. Chamber of Commerce, Am. Bankers Ass'n, *et al.* Ex Parte, 1 (Mar. 4, 2014); Consumer Bankers Ass'n Petition, 8-9 (Sept. 19, 2014); *see also* Sundgaard Declaration, Add. 11 (explaining that Petitioner Portfolio Recovery Associates owns and wishes to use computerized dialers). For example, PACE members InfoCision, Inc. and CSG International, and ACA International member AllianceOne Receivables Management, Inc., call customers using computerized dialers. Brubaker Declaration, Add. 6; Sailors Declaration, Add. 9-10; ACA Int'l May 9, 2014 Ex Parte at 3.

For their part, Petitioners salesforce.com, ExactTarget, and Vibes Media provide their customers with technologies that the Order arguably treats as ATDSs. *See* ExactTarget, Inc. Comments, 2 (Aug. 8, 2014); salesforce.com, inc. and ExactTarget, Inc. Ex Parte, 1 (June 10, 2015); Vibes Media, LLC Ex Parte, 1 (June 10, 2015).

Because the Order took effect upon release, *see* Order ¶188, Petitioners or their members must either change their business practices or face the threat of liability for the use of this equipment, in either administrative enforcement actions, *see* 47 U.S.C. § 503(b)(1)(B), or private litigation, *see id.* § 227(b)(3). Indeed, Petitioners or their members already face lawsuits in which plaintiffs rely on the Order. *See In re Portfolio Recovery Assocs., LLC Telephone Consumer Protection Act (TCPA) Litig.*, No. 11-md-2295 (S.D. Cal.); *Hooker v. Sirius XM Radio Inc.*, No. 13-cv-00003 (E.D. Va.); *see also* Chamber June 11, 2015 Ex Parte at 3.

Separately, Petitioners or their members or customers also obtain and rely on consent to make calls arguably covered by the Commission's new interpretations. *See* Sailors Declaration ¶4, Add. 9 (PACE member CSG International); Brubaker Declaration ¶4, Add. 6 (PACE member InfoCision); *see also* salesforce.com & ExactTarget June 10, 2015 Ex Parte at 1; U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform Comments, 3 (Apr. 6, 2015); Consumer Bankers Sept. 19, 2014 Petition, at 8; Vibes June 10, 2015 Ex Parte at 2-4; Moore

Declaration ¶4, Add. 8 (Sirius XM). The Order's provisions on reassigned numbers and revocation of consent prevent Petitioners or their members or customers from relying on that consent. Again, Petitioners or their members or customers must choose between making calls and facing the threat of liability under the Order.

Petitioners also participated in the proceedings below. *See* Order Appendices B, D, F, G, K, L, N, R, U, & V; Sirius XM May 18, 2015 Ex Parte at 1; salesforce.com & ExactTarget June 10, 2015 Ex Parte at 1.

ARGUMENT

I. THE COMMISSION'S INTERPRETATION OF ATDS IS UNLAWFUL

The TCPA defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). This definition prompts two questions: what does it mean for equipment to have the "capacity" to perform the functions of an ATDS, and what are those functions? The Commission's answers misinterpret the TCPA, violate the Constitution, provide no guidance to regulated parties, and contradict themselves. They must be set aside.

A. An ATDS Must Have the Present Ability To Generate Random or Sequential Numbers and To Dial Such Numbers Automatically

1. "Capacity" refers to equipment's present abilities

Every relevant principle of statutory interpretation confirms that "capacity" refers to what equipment can do as is, not what it might be able to do if changed.

(a) Text and context confirm that "capacity" refers to what equipment can do in its unmodified state

Congress did not define "capacity," so its "ordinary meaning" controls. *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1182 (2011). In ordinary usage, "capacity" refers to present ability. Consider this sentence: "Lambeau Field has the capacity to seat 80,735 people." That means Lambeau can hold 80,735 people *now*—not that, although it actually seats only 75,735, it could be remodeled to accommodate 5,000 more. *See* Pai Dissent 115 & n.574. Similarly, one might say: "That program does not have the capacity to display pdfs, but it will after I install this update." If "capacity" included what the software might be rewritten to do, this sentence would make no sense. Although the program obviously *could have been* reprogrammed to open pdfs, it still lacked the capacity to do so when the speaker made the statement. Likewise, no one would say that a factory has the capacity to produce 1,000 widgets a day just because the company could add another 100-widget-per-day machine to its existing nine.

Dictionaries confirm this definition. "Capacity" is "the facility or power to produce, perform, or deploy," as in "a plan to double the factory's capacity."

Merriam-Webster's Collegiate Dictionary 182 (11th ed. 2003); *see also* MacMillan Dictionary (2015) ("the ability to do something," as in "Her poor health limits her earning capacity."). These definitions refer to *present* ability. If "capacity" accounted for hypothetical modifications, it would make no sense to speak of "a plan to double the factory's capacity."

Congress's other references to "capacity" confirm this understanding. Congress has authorized certain housing loans, provided the house "contain[s] a heating system that ... has the capacity to maintain a minimum temperature ... of 65 degrees Fahrenheit ...." 12 U.S.C. § 1715z-13a(j)(3)(A). Residents would be left cold by the argument that, although the system could not currently warm the house, it might be reconfigured to do so. Congress has also required certain substance-abuse programs to preferentially refer qualifying pregnant women "to a treatment facility that has the capacity to provide treatment" to them. 42 U.S.C. § 300x-27(b)(2)(A)-(B). That obligation would not be discharged by sending a woman to a hospital that could acquire the bed needed to care for her but has not.

Moreover, "Congress' use of a verb tense is significant," *United States v. Wilson*, 503 U.S. 329, 333 (1992), and here Congress said that an ATDS "is" equipment that "has" the requisite capacity. 47 U.S.C. § 227(a)(1). "Had Congress wanted to define [ATDS] more broadly it could have done so by adding tenses and moods, defining it as 'equipment which has ... or could have the

capacity.'" Pai Dissent 115; *cf.* 47 U.S.C. § 227(c)(1)(A), (B) (requiring the Commission to "evaluate the categories of ... entities that *would have the capacity*" to administer procedures for protecting residential subscribers' privacy rights (emphasis added)). That Congress chose not to do so confirms that the definition encompasses only *present* ability.

Finally, a "potential functionalities" test would sweep in "pretty much any calling device or software-enabled feature" because "[i]t's trivial to download an app, update software, or write a few lines of code that would modify" the device's software "to dial random or sequential numbers." Pai Dissent 115. As a result, a potential functionalities test would cover "every smartphone, tablet, [and] VoIP phone." *Id.* Indeed, that test "is so expansive that the [Commission] ha[d] to use a *rotary phone* as an example of a technology that would not be covered." O'Rielly Dissent 128 (emphasis added); *see* Order ¶18.

That cannot be right. *First*, it would nullify Congress's carefully worded requirement that an ATDS have the capacity "to store or produce telephone numbers to be called, *using a random or sequential number generator*." 47 U.S.C. § 227(a)(1)(A) (emphasis added). If every software-enabled telephone were an ATDS, that requirement would have no real limiting effect. Congress could not have meant for the lone word "capacity" to "do the bulk of th[e] provision's work" while the phrase "using a random or sequential number generator," which accounts

for "half of [the provision's] text," "lie[s] dormant in all but the most unlikely situations." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

Second, the results of a "potential functionalities" test would be absurd. *See Ark. Dairy Co-op. Ass'n v. USDA*, 573 F.3d 815, 829 (D.C. Cir. 2009) (absurdity canon applies at *Chevron* step one). Congress could not have intended for its restrictions on ATDSs to require consent for text messages from a smartphone to arrange lunch with a friend, invite an acquaintance to a fundraiser, or remind a customer of a cable-installation appointment. In fact, before the Order, many federal courts interpreted "capacity" to mean "present ability" to avoid precisely this absurdity.[5]

(b) The TCPA would violate the First Amendment if "capacity" included "potential functionalities"

A "potential functionalities" test sweeps in so much speech that it violates the First Amendment. At the very least, it raises "serious constitutional questions" that warrant rejecting the Commission's interpretation. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 588 (1988).

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[5] *See Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1291-92 (S.D. Cal. 2014); *Gragg v. Orange Cab Co., Inc.*, 995 F. Supp. 2d 1189, 1192-93 (W.D. Wash. 2014); *De Los Santos v. Millward Brown, Inc.*, No. 13-80670-CV, 2014 WL 2938605, at *6 (S.D. Fla. June 30, 2014); *Hunt v. 21st Mortg. Corp.*, No. 2:12-CV-2697, 2013 WL 5230061, at *4 (N.D. Ala. Sept. 17, 2013).

Regulations that target a particular medium of communication "often present serious First Amendment concerns," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 659 (1994), "and so are always subject to at least some degree of heightened First Amendment scrutiny," *id.* at 640-41. Time, place, and manner restrictions on speech are also subject to heightened scrutiny. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). They must, among other things, be "narrowly tailored to serve a significant governmental interest." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

In keeping with these principles, a restriction must be limited to speech that *actually* causes the problem the Government seeks to solve, rather than include speech that *might* do so. For example, in *Initiative & Referendum Institute v. U.S. Postal Service*, 417 F.3d 1299 (D.C. Cir. 2005), this Court held that "the *potential*" for harassment by those collecting petition signatures outside post offices could not justify a categorical ban; the Government must "targe[t] and eliminat[e] no more than the exact source of the 'evil' it seeks to remedy." *Id.* at 1307.

Although the Commission never acknowledged the sweeping effects of its "potential functionalities" approach on speech or explained what interests it believes that approach serves, it claimed elsewhere in the Order that the ATDS restriction prevents the "nuisance, invasion of privacy, cost, and inconvenience that

autodialed ... calls generate." Order ¶29. Those interests cannot justify the Commission's approach.

As an initial matter, courts scrutinizing speech restrictions must focus on the law's "actual purposes," "disallow[ing] after-the-fact rationalizations" that "were not actually considered by [Congress]." *Community-Service Broad. of Mid-Am., Inc. v. FCC*, 593 F.2d 1102, 1146 n.51 (D.C. Cir. 1978). The ATDS restriction's "actual purpose" was to prevent automated dialers from reaching unlisted specialized numbers by dialing *randomly* and from knocking specialized lines out of service by dialing *sequential* blocks of numbers. *See, e.g.*, H.R. Rep. No. 102-317, at 10 (1991). Had Congress's purpose been to prohibit all unsolicited, computer-assisted calls, Congress would have prohibited all unsolicited, computer-assisted calls. Instead, it restricted a particular kind of equipment. And had Congress been troubled by unwanted ATDS calls in general, it would have restricted them when made to residential landlines as well as specialized numbers.

Moreover, whatever the TCPA's actual purpose, the statute already brushes up against the First Amendment. Rather than prohibiting calls that are *in fact* autodialed, it restricts devices that have the present ability to autodial. This prophylaxis does not target the "exact source" of any problem. *Initiative & Referendum Inst.*, 417 F.3d at 1307.

Regardless whether the TCPA as written violates the First Amendment, the Commission's prophylaxis-upon-prophylaxis certainly does. Its interpretation restricts the use of equipment that could be modified in such a way that it could have the ability to autodial. This interpretation is even further removed than the statute from any possible harm. If call recipients neither know nor care whether the caller's phone could have been used to autodial, they certainly neither know nor care whether the phone *could be modified* so that it could be used to autodial.

Finally, beyond being divorced from any legitimate interest, the Commission's test covers more speech than the Constitution allows. Threatening crushing liability for millions of everyday calls simply because they came from devices that *could* be modified so that they *might* be able to generate random or sequential numbers "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Id.* The Commission may not "burn the house to roast the pig." *Sable Commc'ns v. FCC*, 492 U.S. 115, 127 (1989).

Unsurprisingly, the United States and a number of federal courts have read "capacity" to refer to "present ability" to stave off these constitutional concerns. *See, e.g., Millward Brown, Inc.*, 2014 WL 2938605, at *64 (agreeing with the United States, in response to defendant's argument that the TCPA is unconstitutionally broad, that "'capacity' refers to 'present, not potential,

capacity'"); *In re Jiffy Lube Int'l, Inc., Text Spam Litig.*, 847 F. Supp. 2d 1253, 1262 (S.D. Cal. 2012) (adopting the Government's position that "capacity" does not capture "smartphones" or "personal computers"). This Court should do the same.

(c) The Commission provided no plausible response to these deficiencies

The Commission provided little support for its contrary interpretation. Regarding the text, it stated only that interpreting "capacity" "to include 'potential ability' is consistent with formal definitions of 'capacity,' one of which defines 'capacity' as 'the potential or suitability for holding, storing, or accommodating.'" Order ¶19 (citation omitted). That definition, however, supports Petitioners. To be sure, "capacity" includes a sense of potentiality: a one-gallon bucket has the "capacity" to hold one gallon even when empty. But that does not mean it "ha[s] the capacity to hold two gallons of water" just because it could be *modified* to do so. Pai Dissent 114.

The Commission also asserted that a "present capacity test could render the TCPA's protections largely meaningless by ensuring that little or no modern dialing equipment"—which is generally programmed to call from lists but lacks the ability to generate random or sequential numbers—"would fit the statutory definition of an autodialer." Order ¶20; *see also id.* ¶19 (claiming the interpretation is needed to "ensure that the restriction on autodialed calls [is not]

circumvented"). This assertion only highlights the TCPA's *success* in restricting designated dialing equipment; "[i]f callers have abandoned that equipment, then the TCPA has accomplished the precise goal Congress set out for it." Pai Dissent 116. The Commission may not "update" the TCPA to cover different equipment: "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014). Moreover, the First Amendment does not tolerate prophylaxis-upon-prophylaxis under the guise of preventing circumvention. *See supra* 26-28.

Finally, the Commission stated that individual consumers "have [not] been sued based on typical use" of smartphones, and it suggested that such suits were unlikely because "friends, relatives, and companies with which consumers do business [do not] find those calls unwanted ...." Order ¶21. But the Commission cannot fend off charges of absurdity by swapping in a "typical use" test for smartphones; agencies may not "bring varying interpretations of the statute to bear, depending on whether" they like the result. *Walter O. Boswell Mem. Hosp. v. Heckler*, 749 F.2d 788, 799 (D.C. Cir. 1984). Moreover, the Commission's view ignores reality. Lawyers and (other) profit-seekers have proven eager to exploit the Commission's overreaching before, *see supra* 10-11, and will likely do so again. Regardless, courts reject erroneous statutory interpretations even if no one

seeks to exploit them, and the First Amendment does not leave people at the "mercy" of the Government's or a private litigant's "*noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010).

2. An ATDS must be able to automatically generate and dial random or sequential numbers

The Commission's conflicting answers to the second question of statutory interpretation—what functions ATDS equipment must be able to perform—are also unlawful.

(a) Subsection 227(a)(1) demands that ATDS equipment be able to automatically perform three key tasks

Subsection 227(a)(1) defines ATDS to mean equipment that "has the capacity … to store or produce telephone numbers, using a random or sequential number generator; and … to dial such numbers." 47 U.S.C. § 227(a)(1). This provision requires that an ATDS be able to do three things. *First*, the equipment must be able to generate random or sequential numbers. Otherwise, it cannot do anything "using a random or sequential number generator." *Id.* § 227(a)(1)(A). *Second*, the equipment must be able either to store or to produce numbers to be called by using that random or sequential number generator. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 950-51 (9th Cir. 2009); *Dominguez*, 2015 WL 6405811, at *3 n.1. *Third*, the equipment must be able to dial the numbers that it stores or produces with a random or sequential number generator. The

statutory text—"dial *such* numbers," 47 U.S.C. § 227(a)(1)(B) (emphasis added)—refers back to the stored or produced "telephone numbers to be called, using a random or sequential number generator," *id.* § 227(a)(1)(A).

The statute also requires that the equipment be capable of performing these functions *automatically*—without human intervention—as the Commission itself previously recognized. *See* 2003 Order ¶132. Subsection 227(a)(1) defines "*automatic* telephone dialing system," and the Court "cannot forget that [it] ultimately [is] determining the meaning of [that] term" when parsing subsections 227(a)(1)(A) and 227(a)(1)(B). *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004). Because something "automatic" can "work[] by itself with little or no direct human control," The New Oxford American Dictionary (1st ed. 2001), an "automatic" telephone dialing system must be able to perform the requisite functions without human assistance.

(b) The Commission erred by suggesting that the ability to call from any list suffices

These statutory requirements make clear that an ATDS must be able to do more than dial numbers from a prepared list; it must be able to automatically generate and then dial *random* or *sequential* numbers. The Order blurs that line. It states, for example, that equipment need only be able "to store or produce telephone numbers," not just random or sequential ones. Order ¶12. Elsewhere, it states that what matters is whether the equipment "has the capacity to store or

produce numbers and dial those numbers at random, in sequential order, *or from a database of numbers*." *Id.* ¶16 (emphasis added). Still elsewhere, it states that "the basic function" of an ATDS is "to dial numbers without human intervention," without clarifying whether those numbers must be random or sequential. *Id.* ¶17.

All of these alternatives are wrong. Reading the statute to cover equipment with the simple ability "to store or produce telephone numbers" erases the phrase "using a random or sequential number generator." Reading the statute to bar equipment that can dial "at random, in sequential order, or from a database" transforms the definition's number-*generation* requirement into a method-of-dialing requirement. That result is doubly wrong: the definition's only reference to dialing ("dial such numbers") says nothing about the manner of dialing, and adding "from a database" to this imaginary method-of-dialing requirement supplants the definition's number-generation provision.

Finally, subjecting callers to liability whenever their equipment operates without human intervention, Order ¶17, is even further off the mark. If the Commission meant to suggest that the absence of human intervention *suffices* to make equipment an ATDS, it again removed the phrase "using a random or sequential number generator" from the statute. And if the Commission concluded that the absence of human intervention is not a *necessary* feature of an ATDS, it wrote "automatic" out of "automatic telephone dialing system."

B. The Commission's Vague, Self-Contradictory Interpretation Violates the APA and Due Process

The Commission's vague explanation of its "potential functionalities" test and internally inconsistent account of the functions an ATDS must be able to perform violate the APA and the Due Process Clause.

1. The Commission must interpret the TCPA coherently

"[A]n agency's exercise of its statutory authority [must] be reasonable and reasonably explained." *Mfrs. Ry. Co. v. Surface Transp. Bd.*, 676 F.3d 1094, 1096 (D.C. Cir. 2012). "[C]ryptic" explanations that "ha[ve] no content" or "offer[] no meaningful guidance" must be set aside. *USPS v. Postal Regulatory Comm'n*, 785 F.3d 740, 754 (D.C. Cir. 2015); *see also, e.g., Tripoli Rocketry Ass'n v. BATF*, 437 F.3d 75, 81 (D.C. Cir. 2006).

Similarly, the Due Process Clause requires that the statute or regulatory scheme "give fair notice of conduct that is forbidden" and establish adequate standards to prevent "seriously discriminatory enforcement." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012); *see also Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015) (while "[e]ach of [a provision's] uncertainties ... may [have] be[en] tolerable in isolation, ... their sum ma[de] a task ... which at best could be only guesswork"). This requirement "applies with particular force in review of laws dealing with speech." *Cmty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1395 (D.C. Cir. 1990).

2. The Commission's interpretation of "capacity" lacks a meaningful limiting principle

The Commission violated these requirements by adopting an impermissibly vague interpretation of "capacity" that "includes [equipment's] potential functionalities." Order ¶16. Recognizing that virtually anything can be turned into something else with enough effort, the Commission added that "there must be more than a theoretical potential that the equipment could be modified to satisfy the 'autodialer' definition." *Id.* ¶18; *see also id.* (not "too attenuated"). The Commission's test, therefore, is this: equipment is an ATDS because of its "potential functionalities," unless that potential is merely "theoretical" or "attenuated."

This sheds zero light on the critical question callers face: how "theoretical" a modification is too theoretical, how "attenuated" a possibility is too attenuated? Indeed, the Commission admitted the limits of its "test," disclaiming any attempt to provide a standard "administrable industry-wide." *Id.* ¶17.

Applying the APA, this Court has regularly set aside similarly uninformative agency positions. For example, over an agency's assertion of deference, the court invalidated a test that turned on whether a change in mail-preparation requirements would "require mailers to alter a basic characteristic of a mailing in order ... to qualify" for the same rate they did before. *USPS*, 785 F.3d at 748. Like the Commission here, the agency indicated that one change (requiring more

informative barcodes and electronic scheduling) was a "basic alteration," while another (requiring stacking of certain flat boxes) was not, but otherwise provided no guidance on the "basic alteration" standard's meaning. *Id.* This "d[id] not come close to satisfying the requirement of reasoned decisionmaking" because the standard "ha[d] no content" and "offer[ed] no meaningful guidance to the Postal Service or its customers on how to treat future changes to mail preparation requirements." *Id.* at 754; *see also Tripoli Rocketry Ass'n*, 437 F.3d at 81 (setting aside "much faster" standard under the APA because the agency "sa[id] nothing about what *kind* of differential makes one [rate] 'much faster' than another"). This Court has similarly held that the Due Process Clause prohibits speech restrictions that turn on ill-defined matters of degree, such as one requiring that speakers use "a conversational tone." *Turner*, 893 F.2d at 1394-95.

The Commission's sparse, contradictory examples make things worse. It said a "rotary-dial phone" does not qualify as an ATDS because the possibility of modification is "too attenuated." But predictive dialers qualify because they only "lack[] the necessary software" to perform the requisite functions. Order ¶16; *see also id.* ¶16 n.63 ("[S]oftware-controlled equipment is designed to be flexible, both in terms of features that can be activated or de-activated and in terms of features that can be added to the equipment's overall functionality").

By contrast, smartphones—which can be programmed to generate random or sequential numbers "through the use of an app or other software," *id.* ¶21—fall within a twilight zone. As software-controlled equipment, they would seem to be covered by the Commission's test. But the Commission equivocated, noting that no one "*ha[d] been sued* based on *typical use* of smartphone technology," and that it would "continue to monitor ... private litigation[]" and "provide additional clarification as necessary." *Id.* (emphasis added).

These ambiguities reflect the emptiness of the Commission's test. They exonerate callers who dig up an antique rotary phone and dial by hand. But for real-world callers, who almost always use equipment that runs some piece of software, the Commission could not make up its mind about whether the hypothetical ability to modify that software renders the equipment an ATDS. Regulated parties cannot follow, so agencies cannot lawfully promulgate, such mush. *See USPS*, 785 F.3d at 756; *Tripoli Rocketry Ass'n*, 437 F.3d at 84; *Turner*, 893 F.2d at 1394-95.

3. The Commission contradicted itself in describing the functions of an ATDS

The Order also offers a contradictory account of the functions that an ATDS must be able to perform. As noted, the Commission suggested that an ATDS need only be able to dial from a list: it reiterated that equipment need only be able "to store or produce telephone numbers," Order ¶12, and it said that a predictive dialer

qualifies because, "when paired with certain software, [it] has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database." *Id.* ¶13. Neither definition comports with the statute, *see supra* 31-33, and in any event they are not the same.

The Commission's discussion of human intervention puts the confusion on full display. The Commission said that an ATDS's "basic functions" are "to dial numbers without human intervention and to dial thousands of numbers in a short period of time." *Id.* ¶17. It added that "[h]ow the human intervention element" applies "is specific to each individual piece of equipment" and therefore requires "a case-by-case determination." *Id.* Three paragraphs later, however, the Commission "reject[ed] PACE's argument that the Commission should adopt a 'human intervention' test"—that is, make it an "element" for "case-by-case" consideration—as inconsistent with the Commission's understanding of "capacity." *Id.* ¶20.

These "incoherent" positions provide no "meaningful guidance" to callers. *USPS*, 785 F.3d at 744, 754. Particularly when combined with the vagueness of the potential-functionalities test, these contradictions make application of the TCPA pure "guesswork." *Johnson*, 135 S. Ct. at 2560. Modern callers therefore must secure consent (itself now an illusory defense, *see infra* 39-54), use a rotary

phone, or not call at all. Both the APA and the Due Process Clause forbid the Commission from putting callers to that impossible choice.[6]

* * *

For these reasons, the parts of the Order interpreting ATDS should be set aside.

II. THE ORDER'S PROVISIONS REGARDING REASSIGNED NUMBERS ARE UNLAWFUL

The TCPA protects otherwise-prohibited calls if they are invited by the recipient—that is, made "with the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). The Commission misinterpreted this critical defense and violated the First Amendment by interpreting "called party" to mean the called phone number's "current subscriber or customary user," Order ¶73, rather than the call's expected recipient. Thanks to the Commission, a caller now faces liability if it tries to reach a consenting customer but inadvertently reaches someone else to whom the customer's number has been reassigned.

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[6] The Third Circuit has noted that the Order is "hardly a model of clarity," *Dominguez*, 2015 WL 6405811, at *2, and district courts have struggled to apply it, *see, e.g.*, *Gaza v. LTD Fin. Servs.*, No. 8:14-cv-1012, 2015 WL 5009741, at *4 (M.D. Fla. Aug. 24, 2015) (reading the Order to cover equipment that can randomly or sequentially generate numbers, predictive dialers, and perhaps all "dialing equipment").

Every day, 100,000 cell phone numbers are reassigned to new users, and callers lack any reliable means of identifying every number that has been reassigned. If the "called party" is the reassigned number's new subscriber or customary user—rather than the previous one who consented to be called and whom the caller expects to reach—the threat of unpredictable and unavoidable TCPA liability will deter calls even to people who expressly consented to be contacted. The Commission's interpretation of "called party" would therefore nullify Congress's decision to *permit* consensual calls. That interpretation also violates the First Amendment by imposing strict liability for calls to reassigned numbers and thereby chilling calls to consenting recipients.

The Commission tried to cure these flaws by allowing callers a single call to a reassigned number before they (and their affiliates and subsidiaries) incur liability. But that call may not even hint that the number has been reassigned; a call may go unanswered, or a text message unreturned. The "solution" thus does not come close to solving the serious problem that the Commission identified with its interpretation of "called party." In fact, it only made the Order's approach to reassigned numbers *more* arbitrary by deeming callers to have "constructive knowledge" that a number has been reassigned *no matter what happens* as a result of the first call.

A. The Commission Misinterpreted "Called Party"

The natural meaning of "called party" is the expected recipient of the call. Suppose "[y]our uncle writes down his telephone number for you and asks you to give him a call," and then "you dial that number." Pai Dissent 118. It would make perfect sense to "say you are calling … [y]our uncle," and to refer to your uncle, the person "you expect to answer," as the "called party." *Id.* That would remain true even if "your uncle wrote down the wrong number," "he lost his phone and someone else answered it," someone else "actually pays for the service," or his number was reassigned. *Id.*; *see also Westfax, Inc. Petition for Consideration and Clarification*, 30 FCC Rcd. 8620, 8624 (Consumer & Governmental Affairs Bur. 2015) (interpreting "recipient" in § 227(b)(1)(C) to mean "the consumer for whom the fax's content is intended"). In fact, the statutory context demonstrates that "expected recipient" is the only plausible reading of the statute.

1. The TCPA makes sense only if "called party" means "expected recipient"

Statutory provisions must be interpreted to fit with "the broader context of the statute": an agency's interpretation is unreasonable if it "produces a substantive effect" that is incompatible "with the design and structure of the statute as a whole." *Util. Air*, 134 S. Ct. at 2442. Here, Congress sought to balance "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade … in a way that protects the privacy of individuals and permits

legitimate telemarketing practices." 47 U.S.C. § 227 note. That is why every kind of communication restricted by the TCPA is permissible with consent. *See* 47 U.S.C. § 227(b)(1)(A), (b)(1)(B), (b)(1)(C). And people consent to all kinds of calls or text messages—for example, instant updates when Amazon announces a sale, a school faces a snow delay, a credit card registers a high-dollar purchase, or Bryce Harper hits a home run.

The Commission's interpretation would gut Congress's protection of such consensual communications, thereby upending the balance Congress struck between protecting consumers and safeguarding beneficial calling practices. Each year, around 37 million wireless telephone numbers are reassigned from one subscriber to another—around 100,000 a day. Pai Dissent 117; O'Rielly Dissent 130. Those reassignments pose unavoidable problems for callers who want to contact consenting consumers. There is no reliable way to ascertain whether a given cell phone number has been reassigned, because no available database tracks all reassignments. As the Commission acknowledged, although there are "tools [that] help callers determine whether a number has been reassigned," they "will not in every case identify numbers that have been reassigned." Order ¶85. Even the database extolled by the Commission claims to include only "80 percent of wireless and hard-to-find phone numbers." *Id.* ¶86 n.301. The consequences of

liability for "only" the remaining 20 percent of reassignments—$500 or $1,500 a call—could still prove catastrophic.

No matter what a caller does, then, it cannot escape the probability that it will call reassigned numbers. DIRECTV, for instance, has gone to great lengths to avoid calling reassigned numbers. It requires customers to "maintain and promptly update" their contact information, and it provides a 24/7 toll-free number for them to do so. When handling changes to a customer's account, DIRECTV's representatives verify the customer's phone number, and automated programs carry any changes throughout DIRECTV's systems. And if a customer calls from an unrecognized number, DIRECTV's representative asks if the customer's number has changed. DIRECTV Mar. 10, 2014 Comments at 6-10. Despite these steps, DIRECTV faces multiple class-action lawsuits from individuals holding reassigned numbers, some of whom never even answered DIRECTV's call. *Id.* at 10-12. DIRECTV is not alone. *See, e.g.*, Abercrombie & Fitch Co. and Hollister Co. Ex Parte, 2 (May 13, 2015).

Some TCPA plaintiffs even *exploit* the reassignment of phone numbers. Rubio's Restaurant sent automated texts to consenting employees to alert them to potential food safety problems, but one employee lost his phone and his number was reassigned. The new holder never asked Rubio's to stop texting him and instead waited to receive hundreds of food safety alerts before suing Rubio's for

$500,000. *See* Rubio's Aug. 14, 2014 Petition at 2-3; Pai Dissent 120. In another case, "[i]nstead of simply answering the phone and telling [the defendant] that she wasn't the person they were trying to reach," the plaintiff, "on the advice of counsel," "documented all the calls she received for a lengthy period of time" in a "transparent attempt to accumulate damages." *Gensel*, 2015 WL 402840, at *2. The Order tolerates and indeed encourages this abuse, because it expressly rules that even consumers who act in bad faith are entitled to collect penalties. Order ¶95.

Callers face an additional problem under the Order. Because it interprets "called party" to mean not just the "current subscriber" but also the "non-subscriber customary user" of a number, Order ¶73, a caller may call a number provided by the consenting subscriber, only to reach the phone's different customary user. Again, the caller has no way of discovering this information beforehand—how could it know if someone else primarily uses the number provided by a consenting customer? And what if there is more than one customary user of a number—whose choice controls? The Commission indicated that the consent of a customary user binds the subscriber if the caller accidentally reaches the subscriber, *see id.* ¶78, and the logic underlying that statement is that the subscriber's consent should bind the customary user as well, but the Order fails to make that clear. The Commission's approach is thus arbitrary and

capricious, because it still potentially exposes good-faith callers to unfair liability when they reach the customary user rather than the consenting subscriber, or when they reach a different customary user than the one who provided consent.

Interpreting "called party" to mean the new subscriber or customary user thus eviscerates the statute's consent exception. If every call risks triggering strict liability, callers will refrain from calling consenting consumers in the first place. *See, e.g.*, Nat'l Rural Elec. Coop. Ass'n Nov. 17, 2014 Comments at 6 (some rural utilities have shut down programs that involve contacting consenting customers "because of the risk of litigation" over reassigned numbers); Abercrombie and Hollister Co. May 13, 2015 Ex Parte at 4 (Abercrombie has curtailed texting to avoid reassigned-number liability). Suppressing these calls would defeat Congress's stated objective of "permit[ting] legitimate [calling] practices." 47 U.S.C. § 227 note.

By contrast, interpreting "called party" to mean "expected recipient" avoids these problems and "produces a substantive effect … compatible with" the statutory scheme. *Utility Air*, 134 S. Ct. at 2442. Under this interpretation, a caller who expects to reach a consenting person, but through no fault of its own reaches someone else, would still have made the call with the "prior express consent of the called party." This reading therefore protects the right of callers to make and consumers to receive consensual calls. Moreover, it adequately protects those who

do *not* wish to be called. They need only "inform[] [the] caller that he has the wrong number"—by, for example, sending a STOP message or speaking to the operator—and any subsequent call will trigger TCPA liability. Pai Dissent 119.

2. The Commission's interpretation of "called party" violates the First Amendment

The First Amendment forbids not only laws that directly prohibit protected speech, but also laws that chill it. *E.g.*, *Reno v. ACLU*, 521 U.S. 844, 872 (1997). Laws that hold speakers strictly liable for the consequences of their speech transgress this limitation: they "have the collateral effect of inhibiting the freedom of expression, by making the individual ... more reluctant to exercise it." *Smith v. California*, 361 U.S. 147, 151 (1959); *see, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (no strict defamation liability for speech on matters of public concern); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 611 (6th Cir. 2005) (unwittingly participating in a permitless march); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690-91 (8th Cir. 1992) (selling violent videos to children). These principles are all the more significant when private parties as well as government officials may sue to enforce speech restrictions. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014).

The Commission's interpretation of "called party" violates the First Amendment. If callers cannot reliably discover reassignments, any caller that uses an ATDS or prerecorded message—pretty much everyone under the Commission's

view, *see supra* 24-25—risks at least $500 in damages per call. These communications are often the only means for delivering desired, time-sensitive information to many people. Deterring these communications through strict liability violates the First Amendment, just as chilling news reports, video rentals, or protest marches does. At a minimum, interpreting "called party" to mean "current subscriber or customary user" raises "substantial constitutional questions," and the term should be interpreted to avoid them, *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

3. The Commission did not justify its interpretation of "called party"

The Commission's rationales for its interpretation of "called party" do not withstand scrutiny.

First, the Commission cited decisions stating that "caller intent" is not "relevant" to the consent exception. Order ¶78 (citing *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637 (7th Cir. 2012); *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014)). These decisions predated the Commission's record-based determination that, even using best practices, callers "will not in every case identify numbers that have been reassigned." Order ¶85. Indeed, they assumed that "[o]ther options remain" for callers to identify reassigned numbers. *Soppet*, 679 F.3d at 642. They also did not consider the First

Amendment implications of interpreting "called party" to ignore the caller's good-faith expectations.

Moreover, the Commission itself parted ways with *Soppet* and *Osorio*, recognizing the relevance of a caller's expectation under a proper reading of the statute. It defined "called party" to include not just the current subscriber—that is, the person who pays the bills—but also "customary users," on the grounds that "it is reasonable for callers to rely on customary users" and "the caller … cannot reasonably be expected to divine that the consenting person is not the subscriber." Order ¶75. It also justified its one-call rule on the ground that after one call, the caller will have "actual" or "constructive" knowledge of the reassignment. *Id.* ¶¶90-91 & n.312. By accepting that liability should attach only if the caller knows of the reassignment, either in reality or by presumption, the Commission recognized that the caller's expectations matter.

Second, the Commission claimed that proving TCPA violations might be too difficult under an "expected recipient" approach because evidence for that "subjective standard" may lie in the "control of the caller." *Id.* ¶78. But the Commission could easily have avoided this problem by using an *objective* "expected recipient" approach, asking what a caller would reasonably expect rather than what the caller in fact expected. That approach would also protect consumers by forcing businesses to take reasonable steps to keep customer information up to

date; otherwise, callers cannot "reasonably expect" to reach a particular person when calling. Even under a *subjective* "expected recipient" approach, moreover, the Commission's concerns are overstated. Because courts routinely infer subjective states of mind from objective circumstances, *see, e.g.*, *Cramer v. United States*, 325 U.S. 1, 33 (1945), courts would have little trouble determining caller intent from business records, consumer testimony, and common sense. *See* Wells Fargo Ex Parte, Exhibit 7 (Jan. 26, 2015) (detailing ways intent can be determined objectively).

Third, the Commission stated that "the consent of one party cannot be binding on another." Order ¶78. But that principle is hardly absolute. *Cf., e.g.*, *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (police may conduct a search after receiving consent from a person who reasonably appears to, but does not in fact, have authority over the premises). Even the Commission agrees in some contexts, acknowledging that "the consent of a customary user ... *may* bind the subscriber." Order ¶78 (emphasis added). Similarly, the Commission's one-call rule allows the previous subscriber's consent to bind the new subscriber for that call. *Id.* ¶90 n.312.

Fourth, the Commission claimed that the TCPA elsewhere uses "called party" to mean "subscriber." Order ¶74. Yet "the presumption of consistent usage readily yields to context, and a statutory term ... may take on distinct characters

from association with distinct statutory objects." *Utility Air*, 134 S. Ct. at 2441-42. The TCPA uses "called party" differently in different provisions. For example, "called party" in subsection 227(d)(3)(B) must refer to the person who picks up the phone; it discusses what happens when "the called party has hung up." Elsewhere, "called party" must refer to the subscriber because only the subscriber is potentially "charged" for the call. 47 U.S.C. § 227(b)(2)(C). There is no obstacle, then, to interpreting "called party" to mean "expected recipient" in the TCPA's consent provision. Otherwise, callers cannot meaningfully use the consent exception the statute establishes, nor can they exercise their constitutionally protected right to contact those who wish to hear from them.

Finally, the Commission suggested that callers deal with its new approach to reassigned numbers by making *more* calls: they could "remove doubt" through "a single call ... to confirm identity." Order ¶84. Of course, because so many phones qualify as ATDSs under the Order's logic, *see supra* 24-25, it may be impossible to make even that call without risking liability. Moreover, it would be perverse to read a consumer protection statute to "require companies to repeatedly and frequently contact consumers" just to ask if their numbers have been reassigned. United Healthcare Servs., Inc. Petition, 5 (Jan. 16, 2014).

B. The Commission's One-Call Rule Exacerbates the Problems Created by Its Definition of "Called Party"

The Commission acknowledged that reading "called party" to mean "current

subscriber or customary user" creates the many problems discussed above: "no one perfect solution exists to inform callers of reassignment," Order ¶88, so callers will be liable under the Order for innocent calls to reassigned numbers. Purporting to mitigate the impossible demands imposed by its interpretation, the Commission gave callers one liability-free call. Order ¶89. But that approach does not solve the problem, because it would arbitrarily impose liability for later calls *regardless* whether the first call provides any reason to believe that the number has been reassigned or that the caller has reached the wrong person.

1. The one-call rule does not solve the problems created by the Commission's interpretation of "called party"

An agency that acknowledges a problem and sets out to address it must go some meaningful distance toward solving it. *See North Carolina v. EPA*, 531 F.3d 896, 907 (D.C. Cir. 2008) (per curiam) (setting aside an EPA rule purportedly designed to ensure that emissions from upwind states would not impede downwind states' ability to comply with environmental standards because it did not "achiev[e] something measurable toward [that] goal").

According to the Commission, the safe harbor "strikes the appropriate balance" between caller and recipient by giving "the caller [the] opportunity to take reasonable steps to discover reassignments and cease ... calling before liability attaches" without subjecting those holding reassigned numbers to numerous mistaken calls. Order ¶89; *see also id.* ¶¶91-92. But the one-call rule

does no such thing, and thus cannot salvage the Commission's interpretation of "called party." That one call may reveal nothing about reassignment—the call may go unanswered, ring busy, roll into an uninformative voicemail message, or otherwise shed no light on the identity of the current subscriber. *See* Wells Fargo Jan. 26, 2015 Ex Parte at 4. This is particularly true for text messages, whose senders have no opportunity to speak with a person or listen to a voicemail message, and often receive no response at all. O'Rielly Dissent 131. Even so, the Commission concluded that the caller, its affiliates, and its subsidiaries are deemed to have "constructive knowledge" that the number has been reassigned. Order ¶72 & n.261.

This leaves callers in an impossible situation. They cannot discover that the subscriber has changed *before* the first call because even those who deploy all of the "tools" the Commission discussed "may nevertheless not learn of reassignment." *Id.* ¶88. And they might not learn of reassignment *during* that call because, as the Commission again recognized, "a single call to a reassigned number will [not] always be sufficient for callers to gain actual knowledge of the reassignment." *Id.* ¶90 n.312. Nor is there any way for callers to determine who the "non-subscriber customary user" of a number is, since all available information relates to the actual subscriber.

The Commission's one-call-and-you're-out approach therefore does not "achiev[e] something measurable toward" the "goal" of solving the problem that the Commission identified. *North Carolina*, 531 F.3d at 907. Instead, it simply takes $500 off the potentially enormous bill that will result from the arbitrary and capricious liability the Order otherwise imposes.

2. The Commission offered no plausible explanation of how its purported safe harbor solves the problem that it identified

The Commission tried a number of tactics to get around the fundamental practical problems created by its misinterpretation of "called party." For example, it deemed callers to have "constructive knowledge" of reassignment after just one call. Order ¶91. But that "is absolutely ludicrous." O'Rielly Dissent 131. "Constructive knowledge" is "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." *Black's Law Dictionary* 1004 (10th ed. 2014). Imputing constructive knowledge—even though the Commission acknowledged that no amount of "reasonable care or diligence" can ensure that the caller is aware of a reassignment—makes the Order all the more arbitrary.

The Commission also attempted to justify its one-call rule by disclaiming, despite its earlier acknowledgments to the contrary, any obligation to make compliance with the TCPA possible. In the Commission's view, it could have

adopted a "traditional strict-liability" or "zero call" approach, so callers cannot complain about the uselessness of its one-call rule. Order ¶90 & n.312.

But callers are not stuck with the Commission's we-could-have-hurt-you-worse approach. The Commission cannot impose strict liability on innocent callers without violating the First Amendment. *See supra* 46-47. Moreover, even where an agency has discretion to "limit" the relief it provides, it "must do so in some rational way," not by "flipping a coin." *Judulang v. Holder*, 132 S. Ct. 476, 485 (2011); *see also, e.g.*, *Competitive Telecommc'ns Ass'n v. FCC*, 309 F.3d 8, 16-17 (D.C. Cir. 2002) (applying arbitrary and capricious review to the scope of a safe harbor). The Commission cannot limit its "solution" to the acknowledged problem of reassigned numbers to a useless one-call "safe harbor" any more than it could "solve" that problem by creating a "no TCPA liability on Thursdays" rule.

* * *

The Commission misinterpreted the term "called party" and set forth an arbitrary solution to the problem of reassigned numbers. This Court should therefore vacate these parts of the Order.

III. THE COMMISSION'S TREATMENT OF REVOCATION OF CONSENT IS UNLAWFUL

The Commission concluded that consumers who consent to prerecorded or ATDS-assisted calls may revoke that consent. Order ¶56. The Commission refused, however, to establish any standardized and workable method of revoking

consent, instead allowing individuals to use whichever methods they prefer, so long as the Commission or a jury later concludes it was "reasonable" under "the totality of the facts and circumstances." *Id.* ¶64 & n.233. This every-individual-is-a-law-unto-himself approach is arbitrary and capricious. Making matters worse, the Commission evidently prohibited callers and called parties from *agreeing* upon a means of revocation. *Id.* ¶70. That rejection of private agreements has no statutory basis.

A. The Commission's Unworkable Revocation-of-Consent Regime Is Arbitrary and Capricious

An agency's regulation is arbitrary and capricious if "compliance" with it "would be unworkable." *Almay, Inc. v. Califano*, 569 F.2d 674, 682 (D.C. Cir. 1977); *see also Wedgewood Village Pharmacy v. DEA*, 509 F.3d 541, 552 (D.C. Cir. 2007) (rejecting agency ruling as "unworkable for veterinary practice"); *N.Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 109 (2d Cir. 1996) (setting aside safety standard because it imposed a "patently unworkable burden on employers").

The Commission's revocation-of-consent regime violates this principle. The Commission could have prescribed uniform revocation procedures, or allowed parties to agree to reasonable standard processes for revocation. Instead, it allowed each customer to revoke consent by any "reasonable" method as determined by the "totality of the circumstances." That degree of individualization is impracticable

and deprives callers of the ability to craft efficient and reliable mechanisms for receiving and processing revocations.

Consider, for example, the problems the Commission's approach poses for those who send automated text messages to willing recipients. Before the Commission's Order, industry norms required marketers to inform customers that they can stop future text messages by replying with a keyword from a standardized list: "STOP, CANCEL, UNSUBSCRIBE, QUIT, END, and STOPALL." Vibes June 10, 2015 Ex Parte at 3. Per the Commission, however, a customer could claim freedom to use any nonstandard term, such as "no" or "halt" or "do not call." Because "technological barriers" preclude programming a system to recognize every way in which individuals might express their desire to revoke consent, *id.*, mobile marketers could determine which responses amount to revocations only through manual review, an utterly infeasible method that would eliminate every benefit of sending text messages *en masse*.

Other organizations face similar problems. Customers theoretically could tell the pizza-delivery guy that they no longer wish to receive promotional text messages. Or they could tell their cable installer that they no longer want to receive informational calls about outages. But organizations typically train only particular customer-service agents to deal with revocations of consent. Under the Commission's Order, just about every employee who might interact with a

customer would have to receive training in "the nuances of customer consent for TCPA purposes." Pai Dissent 123. An organization cannot tell in advance whether a customer's interaction with a particular employee will later be deemed a "reasonable" medium for revoking consent, so the only way to ward off liability will be to take exorbitant precautions.

Finally, consider more broadly the problems the Order poses for most callers that use dialing technology. Callers use these technologies rather than manual dialing because they wish to reach large numbers of consumers efficiently. Organizations must standardize such exchanges to keep interactions manageable and lawful. *Cf.* Restatement (Second) of Contracts § 211 cmt. a (1981) (describing "standardization" as "essential" to any "system of mass ... distribution"). By disregarding this imperative for uniformity, the Commission imposed on callers the impracticable task of forecasting every possible scenario under which a means of revoking consent could be deemed "reasonable" under the "totality of the circumstances," putting procedures in place to handle each scenario, and training personnel on all of these procedures. The open-endedness of the Order's "reasonableness" standard only compounds these problems. *Cf. Specialty Equip. Mkt. Ass'n v. Ruckelshaus*, 720 F.2d 124, 139-40 (D.C. Cir. 1983) (a regulation requiring parts manufacturers to reimburse vehicle manufacturers for certain

"reasonable expenses" was arbitrary and capricious, because the agency's failure to "flesh out these terms" threatened to "lead to costly, protracted disputes").

The Commission did not have to regulate this way. It overlooked proposals from a variety of commenters offering reasonable alternatives to its unworkable approach, such as requiring callers to designate a standard phone number or email address to which revocation requests should be addressed. *See* Santander Consumer USA, Inc. Comments, 3 (Nov. 17, 2014). Or it could have required automated text-messaging systems to recognize certain customer responses (such as "STOP") as revocations of consent. Or it could have required callers' customer-service lines to include an option (say, "press 7") for revoking consent. Rules like these would have allowed businesses to know what is required of them and to standardize their interactions with customers who want to revoke consent, while still protecting the rights of customers. It was arbitrary and capricious for the Commission not to address or adopt these reasonable proffered alternatives. *See Am. Gas. Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010) ("[W]here parties raise reasonable alternatives, "reasoned decisionmaking requires considering those alternatives."); *see also State Farm*, 463 U.S. at 48.

In fact, the Commission adopted just such an approach elsewhere in its Order. It ruled that, when a financial institution or healthcare provider sends an automated text about certain types of financial or healthcare information, "the

exclusive means by which consumers may opt out of such messages" is "replying 'STOP.'" Order ¶¶138, 147. If standardized revocation procedures suffice to protect people who get messages from banks and hospitals, why not from school districts and small businesses?

Congress has adopted similar standardized notification procedures. Under the TCPA itself, for example, a fax user must make a "request not to send future unsolicited advertisements to a telephone facsimile machine" "to the telephone or facsimile number of the sender" or through another method of communication identified by the Commission. 47 U.S.C. § 227(b)(2)(E). Other statutes that operate alongside the TCPA and likewise govern business communications with consumers commonly provide standard notification provisions. The Fair Debt Collection Practices Act, for example, establishes a comprehensive regulatory scheme regarding consumer consent for collections calls—including by specifying the manner in which consent must be obtained and requiring that any individual who wishes to revoke such consent must do so in writing. *See* 15 U.S.C. § 1692c(c); *see also, e.g.*, 12 U.S.C. § 2605(e) (homebuyers must submit complaints about mortgages to addresses that mortgage servicers designate); 15 U.S.C. § 1666(a) (consumers seeking correction of credit billing mistakes must submit written notice to addresses that creditors designate); *id.* § 1681s-2(a)(8)(D)

(consumers must submit disputes about credit reports to addresses that credit bureaus designate).

Although commenters raised these standardized revocation statutes with the Commission, *see, e.g.*, Santander Consumer USA Ex Parte, 2-5 (Aug. 11, 2014), the Commission failed to squarely address the issue. If the Commission decides to regulate permissible modes of revocation, notwithstanding the absence of any statutory requirement that it do so, it should at least act "consistent with other statutes that expressly address this issue." O'Reilly Dissent 136 & n.60.

The Commission's refusal to allow standardization imposes unworkable burdens on callers and ultimately harms consumers by depriving them of an effective method of revoking consent. Whatever benefits the Commission's approach might provide some consumers in the short run, that small benefit cannot outweigh the many harms the Order inflicts on callers and consumers themselves in the long run. *Cf. Michigan v. EPA*, 135 S. Ct. 2699, 2709 (2015) (regulations are not "appropriate" where their "costs are … disproportionate to the benefits").

B. The Commission Improperly Prevented Callers and Recipients from Agreeing to Reasonable Means of Revocation

The Commission's approach to revocation is also improper insofar as it precludes callers and consumers from agreeing to "an exclusive means to revoke." Order ¶63.

The Commission's interpretation contradicts the common-law backdrop against which the TCPA was enacted. When Congress borrows a concept from the common law, it "presumably knows and adopts the cluster of ideas that were attached to each borrowed word." *Morissette v. United States*, 342 U.S. 246, 263 (1952). In this case, "the TCPA's silence regarding the means of providing or revoking consent [indicates] that Congress sought to incorporate 'the common law concept of consent.'" *Osorio v. State Farm Bank, FSB*, 746 F.3d 1242, 1255 (11th Cir. 2014) (quoting *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 270 (3d Cir. 2013)). At common law, "[a]n explicit agreement among parties ... may prescribe a particular form that a [notification] must have to be effective." Restatement (Third) of Agency § 5.01, cmt. c (2006). For example, in *Credit Alliance Corp. v. Campbell*, 845 F.2d 725 (7th Cir. 1988), the Seventh Circuit held that a guarantor had not revoked consent to a guaranty because the method of revocation she used differed from the method she agreed to use. "Where the parties agree to a method for revoking," the Court explained, "that method should be followed." *Id.* at 729.

Because the TCPA "incorporate[s] 'the common law concept of consent,'" *Osorio*, 746 F.3d at 1255, and because that concept allows parties to agree on the means of revoking consent, the TCPA does too. That is why the Eleventh Circuit has already "conclude[d] that [consumers], *in the absence of any contractual restriction to the contrary*, [are] free to ... revoke any consent [under the TCPA]."

Id. (emphasis added). Indeed, the Commission itself elsewhere recognized the parties' common-law right to bargain about TCPA-related details. In response to the problem of reassigned numbers, it suggested that callers should contractually require consumers to update their contact information and then sue them for breach if they fail to do so. *See* Order ¶¶47, 86.

The Commission's disregard of the common law is particularly unreasonable because the Commission expressly relied on the common law in concluding that consent is revocable in the first place. *See* Order ¶58 ("Congress intended for broad common law concepts of consent and revocation of consent to apply."). It is unprincipled and unreasonable for an agency to insist that the common law provides important context when deciding whether revocation of consent is permissible at all, but that the common law does not matter when deciding which methods of revocation parties must use. *Cf. Michigan*, 135 S. Ct. at 2708 (an agency interpreting a statutory provision may not simultaneously treat neighboring statutory provisions as relevant context for some purposes, but as irrelevant for others).

In any event, even assuming that the TCPA protects consumers' right to revoke consent in any way they like, consumers may—and often do—waive that right by contract. In the absence of "affirmative indication of Congress's intent to preclude waiver," courts "presum[e] that statutory provisions are subject to waiver

by voluntary agreement of the parties." *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995); *accord, e.g.*, *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 611 (2013) (upholding contractual waiver of rights under ERISA); *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 80 (1953) (same under the Labor Management Relations Act). The TCPA includes no such "affirmative indication" regarding revocation of consent. So even if the statute grants consumers a right to use "any reasonable method" to revoke consent, they may still give up that right in voluntary agreements with callers. It was unreasonable for the Commission to conclude otherwise.

* * * * *

The Order misinterprets "ATDS" to consider potential rather than present ability, erases the random-or-sequential-number-generation requirement from the statute, and ensnarls regulated parties in uncertain and contradictory tests. It eviscerates the statutory consent defense and discourages protected speech by holding callers strictly liable for calls to reassigned numbers. And it encumbers callers with an unworkable system for processing revocations of consent, while preventing callers and consumers from overcoming this problem by private agreement. In short, the Commission's interpretation of the TCPA leads to a $500 pricetag on almost every routine call or text, transforming the statute's focused ban

on random or sequential calling into an expansive source of crippling class-action liability.

CONCLUSION

The petitions for review should be granted, and the challenged provisions of the Order vacated.

Dated: November 25, 2015

Respectfully submitted,

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CIRCUIT RULE 32(a)(2) ATTESTATION

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

Dated: November 25, 2015

/s/ Shay Dvoretzky
Shay Dvoretzky

CERTIFICATE OF COMPLIANCE

This brief complies with the Court's Order of October 13, 2015, because it contains 13,992 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1), as determined by the word-counting feature of Microsoft Word.

Dated: November 25, 2015

/s/ Shay Dvoretzky
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