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May 24, 2019

Daniel S. Blynn

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Via ECF Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: Notice of *Ex Parte* Presentation by NorthStar Alarm Services, LLC, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278

Dear Secretary Dortch:

Pursuant to Section 1.1206 of the Federal Communication Commission's ("FCC") rules, the undersigned counsel hereby provides notice that, on May 23, 2019, NorthStar Alarm Services, LLC's General Counsel, Jared Parrish, and Venable LLP attorneys Daniel Blynn, Ian Volner, Liz Clark Rinehart, and Meryl Nolan (collectively "NorthStar") met with Nicholas Degani and Zenji Nakazawa of Chairman Pai's Office. During the meeting, NorthStar reiterated points made in its earlier meetings with the Consumer and Governmental Affairs Bureau and the Commissioners' offices regarding its Petition for expedited declaratory ruling in the above-referenced proceeding[1] seeking clarification that the use of soundboard technology does not constitute the use of "an artificial or prerecorded voice to deliver a message" under Section 227(b)(1)(B) the Telephone Consumer Protection Act ("TCPA").

NorthStar also provided the Chairman's office with the *ex parte* notice from its earlier meetings with the Bureau and the Commissioners' offices,[2] as well as an *ex parte* notice NorthStar submitted discussing recent testimony by the National Consumer Law Center that mischaracterizes the soundboard technology relevant to NorthStar's Petition.[3] Although it was not discussed at the

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1 NorthStar Alarm Services, LLC, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Jan. 2, 2019).

2 Notice of *Ex Parte* Presentation by NorthStar Alarm Services, LLC, CG Docket No. 02-278 (filed Apr. 30, 2019) (attached hereto as Exhibit "A").

3 Notice of Written *Ex Parte* Presentation by NorthStar Alarm Services, LLC, CG Docket No. 02-278 (filed May 16, 2019) (attached hereto as Exhibit "B").

meeting, NorthStar believes that the attached testimony from Commissioner O'Rielly discussing the harm of TCPA class actions on legitimate businesses should be submitted as part of the record.[4]

Respectfully submitted,

Daniel S. Blynn

Counsel for NorthStar Alarm Services, LLC

Enclosures

cc: Mark Stone
Kurt Schroeder
Kristi Thornton
Karen Schroeder
Richard Smith
Christina Clearwater
Michael Scurato
Travis Litman
Commissioner Michael O'Rielly
Arielle Roth
Jamie Susskind
Nicholas Degani
Zenji Nakazawa

[4] Accountability and Oversight of the Federal Communications Commission: Hearing before the Subcommittee on Communications and Technology, House, 115th Cong. (2019) (Testimony of Commissioner O'Rielly) attached hereto as Exhibit "C."

Exhibit A

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April 30, 2019

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Marlene H. Dortch, Secretary
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Re: Notice of *Ex Parte* Presentation by NorthStar Alarm Services, LLC, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278

Dear Secretary Dortch:

Pursuant to Section 1.1206 of the Federal Communication Commission's ("FCC") rules, the undersigned counsel hereby provides notice that, on April 29, 2019, NorthStar Alarm Services, LLC's General Counsel, Jared Parrish, and Venable attorneys Daniel Blynn, Ian Volner, and Liz Clark Rinehart (collectively "NorthStar") met with the following in the Consumer & Governmental Affairs Bureau: Mark Stone, Deputy Bureau Chief; Kurt Schroeder, Chief, Consumer Policy Division; Kristi Thornton, Associate Chief, Consumer Policy Division; Karen Schroeder, Attorney Advisor; Richard Smith, Attorney Advisor, Consumer Policy Division; and Christina Clearwater, Attorney Advisor. That same day, NorthStar also met separately with Michael Scurato, Legal Advisor for Media and Consumer Protection for Commissioner Geoffrey Starks; Travis Litman, Chief of Staff and Wireline and Public Safety Advisor for Commissioner Jessica Rosenworcel; Commissioner Michael O'Rielly and Arielle Roth, Wireline Legal Advisor to Commissioner O'Rielly; and Jamie Susskind, Chief of Staff and Wireline and Consumer Protection Legal Advisor to Commissioner Brendan Carr.

During the meetings, NorthStar urged the Commission to grant its pending Petition for expedited declaratory ruling in the above-referenced proceeding (the "Petition").[1] In the Petition, NorthStar seeks clarification that the use of soundboard technology does not constitute the use of "an artificial or prerecorded voice to deliver a message" under Section 227(b)(1)(B) the Telephone Consumer Protection Act ("TCPA"). Critically, soundboard technology involves a live operator on ***every*** call placed to consumers, ensuring that the communications are interactive and tailored to the

[1] NorthStar Alarm Services, LLC, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Jan. 2, 2019).

consumer's unique requests and responses. As used by the company that NorthStar engaged to generate leads, Yodel Technologies, LLC, the soundboard technology was deployed in a strict one-to-one manner (*i.e.*, a single, live soundboard agent having a single conversation with a single consumer at a time) with the agent on the call every second, and no soundboard audio clip being played without that agent's conscious decision and affirmative action to play such clip. NorthStar reiterated that application of Section 227(b)(1)(B) to every call that has a recorded message is inconsistent with the language of the TCPA, its purpose, and the public interest. NorthStar further explained that it also would lead to inconsistent, unintended, and absurd results as to how Section 227(b)(1)(B) applies with respect to other provisions of the TCPA, such as Section 227(d)(3)(A)'s identification requirements,[2] as well as other statutes and regulations, including the "recorded message that must play" provision of the call abandonment safe harbor of the Federal Trade Commission's Telemarketing Sales Rule,[3] and state laws and attorney general settlements requiring that call monitoring disclosures be provided at the outset of calls by way of a prerecorded message.[4] In short, as NorthStar noted at the meetings, callers may be faced with a Catch 22 – either treat each soundboard audio clip as the delivery of a separate message under the TCPA and violate other laws, or vice-versa.

As we have noted, NorthStar is currently the defendant in a certified TCPA class action directly related to the issues raised in its Petition, and the Court has set May 8, 2019 as the deadline for summary judgment motions on these very issues. During the April 29, 2019 meetings at the Commission, NorthStar handed out excerpts from the transcript of a recent hearing in that case and noted the Court's various statements explaining the value of guidance from the Commission on whether soundboard technology "delivers a message" as proscribed by Section 227(b)(1)(B): "admittedly, if we had final agency action with holy water poured on it by the DC Circuit, that would command a broader national compliance, if you will, then my ruling and then the Tenth Circuit's ruling. . . . The FCC certainly has something to offer on that score that a strictly Article

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[2] For example, if each soundboard audio clip were construed to deliver the singular, passive message that the TCPA was designed to prohibit, then each separate audio clip used to have a dynamic, real-time, two-way conversation with a consumer itself would have to identify the caller's name, and phone number or address.

[3] 16 C.F.R. § 310.4(b)(4)(iii).

[4] *See., e.g., California v. Wells Fargo Bank, N.A.*, No. BC611105 (Cal. Super. Ct. Mar. 28, 2016), Stip. Final Judgment, ¶ 3 ("Wells Fargo . . . shall make a clear, conspicuous, and accurate disclosure (the 'Recorded Call Disclosure') to any such consumer of the fact of recording, and to make such disclosure immediately at the beginning of any such communication."). Other examples of such unintended and absurd results were set forth in NorthStar's reply comments in support of its Petition. See NorthStar Reply Comments, at 3 n.6 & 4.

III approach does not have to offer . . ."[5] As evident from the Court's comments, the Commission's silence on this issue is unfair to both NorthStar and antithetical to the public interest.

For the reasons discussed in its Petition and above, NorthStar respectfully requests that the Commission move quickly to grant its Petition and declare that the use of soundboard technology – either generally or in the manner used relevant to the calls at issue in the TCPA litigation – does not constitute the use of an artificial or prerecorded voice that "delivers a message" under Section 227(b)(1)(B) the TCPA.

Respectfully submitted,

Daniel S. Blynn

Counsel for NorthStar Alarm Services, LLC

Enclosure

cc: Mark Stone
Kurt Schroeder
Kristi Thornton
Karen Schroeder
Richard Smith
Christina Clearwater
Michael Scurato
Travis Litman
Commissioner Michael O'Rielly
Arielle Roth
Jamie Susskind

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[5] *Braver v. NorthStar Alarm Services LLC, et al.*, No. 5:17-cv-00383-F (W.D. Okla.), Mar. 6, 2019 Tr. of Hrg. on NorthStar's Mot. to Stay, at 53:18-21, 55:9-10. A copy of the excerpted transcript of the hearing on NorthStar's Motion to Stay is attached to this letter as Exhibit "A" for the record.

Exhibit A

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT H. BRAVER,

Plaintiff,

vs. Case No. CIV-17-383-F

NORTHSTAR ALARM SERVICES, LLC, and YODEL TECHNOLOGIES, LLC,

Defendants.

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE STEPHEN P. FRIOT

UNITED STATES DISTRICT JUDGE

MARCH 6, 2019

2:30 P.M.

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

Tracy Thompson, RDR, CRR
United States Court Reporter
U.S. Courthouse, 200 N.W. 4th St.
Oklahoma City, OK 73102 * 405.609.5505

APPEARANCES

FOR THE PLAINTIFF:

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600 Massachusetts Ave. NW
Washington, DC 20001

MS. ANNE E. ZACHRITZ
Andrews Davis, PC
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briefing being completed and oral argument.

THE COURT: You may continue.

MR. FREELAND: And, Your Honor, the third point about class notice -- and, again, this is something that is an issue in any class action where you've got movement -- you know, potential movement of class members, you know, after the complaint is filed, before certification, after certification -- Your Honor obviously has wide discretion in determining a class notice.

One way to alleviate that could be to notify them that there is this proceeding at the FCC and that the case has been stayed pending that determination and that class members are welcome to submit comments with the FCC. That's just one idea to deal with that, Your Honor.

THE COURT: Thank you.

MR. FREELAND: And with that, Your Honor, unless you have any other questions, I will sit down.

THE COURT: Okay. Thank you.

MR. FREELAND: Thank you, Your Honor.

THE COURT: Ms. Zachritz, again, I certainly don't mean to cut you off.

MS. ZACHRITZ: I have nothing to add, Your Honor.

THE COURT: Okay. Thank you.

Counsel, just -- if you would, stand by for just a moment.

I do have the benefit of not only good briefing -- and I

certainly have -- but good arguments, which I also certainly have. And I do appreciate the time and the effort and the professionalism that went into the briefing, as well as the arguments. And I'm not just saying that. I really do mean that.

Obviously, the framework for my determination as to whether to stay this action falls into two spheres: One is the doctrine of primary jurisdiction, the other one is my inherent power to control my own docket. And if the defendants persuade me on either one, then the action gets stayed.

Turning to the first framework first, and that is the doctrine of primary jurisdiction, of course, as we all know in one sense, or at least in the sense that Article III courts usually use the word "jurisdiction," it's not strictly speaking a subject matter jurisdiction issue. Subject matter jurisdiction is not a matter addressed to a Court's discretion. And I think I can fairly say that application of the doctrine of primary jurisdiction is addressed to the Court's carefully guided discretion and certainly not unbridled discretion.

The Court of Appeals has made it clear that -- first, that there is no fixed formula for applying the doctrine of primary jurisdiction. That's actually from the U.S. Supreme Court. And taking its cue from that, the Court of Appeals has given us what I consider to be very valuable guidance, and that guidance is to be found in cases like the Crystal Clear Communications

case and other cases from the Court of Appeals.

Interestingly enough, a good many of the primary jurisdiction cases evaluate the issue to be addressed either by a court or by a regulatory agency as an issue of fact, and I think here I have perhaps either an issue of fact or a mixed question of fact and law, but that's not really briefed by the parties and so I'm not going to dwell on that, nor do I think that makes much difference.

But we are taught by the Court of Appeals that one thing I look at is whether the resolution of this issue, be it an issue of fact or law -- and, again, a good many of the cases look -- deal with issues of fact -- I examine whether or not the issue that one party proposes that I lateral to an administrative agency or defer to an administrative agency for resolution is or is not within the conventional experience of judges.

The second factor that I look at is whether -- it's not a factor, this is an alternative basis for primary jurisdiction, whether the matter requires the exercise of administrative discretion.

The third consideration is whether the matter requires uniformity and consistency in the regulation of the business entrusted to the particular agency.

And relevant to that is the fact that it's -- it is not inappropriate to take notice of the fact that a given issue, as to which primary jurisdiction arguments are addressed, is, in

fact, pending before the agency in question, as it is here.

What -- that is the framework under which I am to address the matter as a question of primary jurisdiction.

What it boils down to is that the overriding issue -- and it doesn't very often work out quite this way -- but the overriding issue is as to how the import of a statutory phrase, "artificial or prerecorded voice," and probably it's not even that long, it's probably just "prerecorded voice," how that statutory phrase stacks up against the way this soundboard technology works.

I do note that the FCC has not been asked to promulgate a formal regulatory exemption. Instead, the FCC has been asked to do what I'm asked to do in this case, and that is interpret how that statutory phrase -- or what that statutory phrase means and how it applies to the facts of the technology involved in this case.

And, frankly, there's probably not much, if any, and probably not any real dispute in this case, in this court, at least, as to how the soundboard technology, in fact, works.

So the FCC is being asked to do something that both regulatory agencies and courts regularly do, and a court is correspondingly being asked to do something that both courts and regulatory agencies do, namely, look at statutory language and decide what it means.

And that brings me back to the question of whether under

these Tenth Circuit considerations that I've already alluded to I should defer for an undetermined length of time to the Federal Communications Commission.

On that score, the issue -- the aspect of the matter that for me carries the day is the very simplicity of the issue. I do not see this as an issue that is going to result in either me or the FCC having to work through an administrative record that includes boxes and boxes of materials, other than perhaps comments at the FCC, I don't see that there's an issue that requires extensive study of exactly how the soundboard technology works.

The papers that are already before the Court demonstrate to me that the essential features of the functioning of the soundboard technology are not difficult to understand, especially as relevant to how they square up with the very short concise statutory phrase at issue.

I have to determine whether, as Mr. Freeland calls it, "the snippets" which are already recorded do or do not square up with the language "an artificial or prerecorded voice."

I'm entirely unpersuaded that the complexity of this issue is such that I should stay this action for an undetermined duration by hitching my docket to the docket of the Federal Communications Commission, let alone the docket of the DC Circuit.

And make no mistake about it, this is a matter which would

end up in the DC Circuit from the FCC, because any meaningful action taken by the FCC is going to leave one side or the other deeply aggrieved with the outcome.

And I'm sure the FCC will take final agency action within the meaning of the applicable administrative legislation so that that final agency action will be fair game for review in the DC Circuit.

Now, in the same breath, I want to say that the one part of it that gives me pause is really the third consideration given to us by the Court of Appeals, and that is whether there is -- is a need for uniformity and consistency in the regulation of the business entrusted to the particular agency. In this case, there is.

But as I see it, it's going to be a while, whether it be through the FCC, to the DC Circuit, or from this Court to the Tenth Circuit, it's going to be a while before we get anything that is definitive in any national sense.

And, admittedly, if we had final agency action with holy water poured on it by the DC Circuit, that would command a broader national compliance, if you will, than my ruling and then the Tenth Circuit's ruling.

But I really don't see any glaring discrepancy, glaring difference, between the uniformity and consistency that is available within a reasonable period of time from the judicial branch, from here to Denver, than would be available from the

FCC to the DC Circuit.

Going to the first factor considered by the Court of Appeals and that is -- not factor, these are alternative disjunctive bases for primary jurisdiction -- whether the matter is within the conventional expertise of judges, I can tell you without hesitation that the application of this statute to these facts is far less complex than matters that are routinely entrusted to the judicial branch by way of interpretation of statutory language in light of a hideously complex factual record that happens day in and day out.

Yes, this is a matter within the conventional experience of judges, and I say that acknowledging in the same breath that it's also a matter within the conventional experience of the FCC.

The suggestion that this issue might require the exercise of administrative discretion seems to me to be a bit hollow for this reason: I have a hard time imagining that, in light of language of this kind, a legislative expression this concise, administrative discretion in the sense that has been suggested here that they might decide, well, handicapped people ought to have a break, we ought to interpret this language in a certain way to give handicapped people a break -- I don't see that sort of leeway in the statutory language.

The plaintiff may be right as a matter of interpretation or may be wrong, but I don't see that sort of leeway or, for

that matter, any other substantial playing field, if you will, for importing generalized policy considerations into the interpretation of the statute.

So the most telling factor from the defendant's perspective in my view is the need for uniformity and consistency but, for the reasons I've said, I am not terribly impressed by that in terms of just exactly how we would get that uniformity and consistency.

The FCC certainly has something to offer on that score that a strictly Article III approach does not have to offer but, after all, it's going to end up in an Article III court one way or another in any event.

Now, the argument on the other side of that is, well, if it goes to the Tenth Circuit, then that's just one circuit court, whereas if it goes to the Court of Appeals in Washington, that is one circuit court addressing a determination of nationwide import. I do understand that.

But either way, it can get Court of Appeals treatment without undo delay from this Court to the Tenth Circuit Court of Appeals, which is probably where it would end up in any event if the matter is resolved by this Court.

Many of the same considerations do inform my evaluation of the matter in terms of my inherent authority to control my docket and lead me to the same conclusion, and that is that a stay should be denied on that basis, as well.

And in terms of my inherent authority to control my docket, I can be a bit more unvarnished in my expression of my concern about the time factor. And I don't get from the Tenth Circuit cases on primary jurisdiction that the time factor is the be all and end all and, for that reason, I do not evaluate primary jurisdiction by letting the time factor be the be all and end all.

But the time factor becomes, I think, significantly more prominent when it is taken into account as a factor informing my evaluation of the application of my inherent authority to control my docket. That's where I am every day required to take into account Rule 1 of the Federal Rules of Civil Procedure. I decline to hitch my docket to the FCC's docket for what is very clearly an undetermined length of time. And for that reason, the motion to stay is denied.

That does bring us to the motion to approve class action notice. I'm prepared to address that motion very promptly, and I assure counsel on both sides that I will address that matter very promptly.

Anything further in this matter from the plaintiff?

MR. CATALANO: No, Your Honor.

THE COURT: From the defendant?

MR. FREELAND: No, Your Honor.

THE COURT: From the other defendant?

MS. ZACHRITZ: No, Your Honor.

THE COURT: Court will be in recess.

(COURT ADJOURNED.)

CERTIFICATE OF OFFICIAL REPORTER

I, Tracy Thompson, Federal Official Realtime Court Reporter, in and for the United States District Court for the Western District of Oklahoma, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 13th day of March 2019.

/S/ Tracy Thompson

Tracy Thompson, RDR, CRR
Federal Official Court Reporter

Exhibit B

VENABLE LLP

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May 16, 2019

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Via ECF Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: Notice of Written *Ex Parte* Presentation by NorthStar Alarm Services, LLC, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278

Dear Secretary Dortch:

The purpose of this letter, submitted on behalf of our client, NorthStar Alarm Services, LLC ("NorthStar") is to bring to the Commission's attention certain developments that have occurred since NorthStar's April 29, 2019 meetings with the Commission. Specifically, statements made in testimony before Congress leave no room for doubt that the opposition to NorthStar's request for clarification filed by the National Consumer Law Center ("NCLC") is based upon a fundamental misunderstanding or a mischaracterization of the manner in with the soundboard technology was deployed in the certified class action pending against NorthStar.[1] To the extent that the other oppositions to NorthStar's Petition address the merits of soundboard technology, they suffer from the same defect.

In the testimony, which it submitted to Congress on April 30, 2019 – the day after our visits to the FCC – the NCLC lays bare its fundamental objection to the soundboard technology at issue in the *Braver* litigation, a technology that it characterizes as "robot calls."[2] Yet, NCLC's Congressional testimony does not use that term. Perhaps that is because it was not used by the Congress in its deliberations on and passage of the TCPA, nor does it appear anywhere in the Commission's rules or its rulemaking decisions. Nonetheless, the obvious use of the word "robot" in NCLC's Reply Comments to NorthStar's Petition is a red herring attempt to analogize the soundboard technology as it was deployed in *Braver* with the much dreaded and reviled "robo-calls," which are the subject

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1 *See* NorthStar's Jan. 2, 2019 Petition, at 5-6 (describing *Braver v. NorthStar Alarm Services, LLC, et al.*, No. 5:17-cv-00383-F (W.D. Okla.) litigation); *see also* NorthStar's Mar. 15, 2019 Comments, at 4 n.4 (describing how soundboard technology was deployed relevant to the litigation).

2 *See* Mar. 26, 2019 NCLC Reply Comments, at 1.

of a number of dockets now pending before the Commission. NCLC's Congressional testimony makes clear that, in its view, the term "robo-call" means a call initiated through an ATDS and the term "robot call " means a call any portion of which contains a prerecorded segment. It is self-evident (to NCLC) that these calls are "unwanted" and, therefore, purportedly illegal unless the requisite consent has been obtained.[3]

In its testimony, the NCLC describes what it characterizes as "evasions" of these definitions, the most "brazen" of which involves the use of "clicker agents" – human beings who manually launch calls and, then, transfer the calls to live "closer agents." NCLC takes the position that these calls are unlawful because "***clicker agents do not participate in the calls*** . . ."[4] NCLC goes on, in a footnote, to distinguish what it calls "preview dialers" in which "the human ***is*** involved."[5] NCLC correctly concludes that these calls are "quite distinct" from the calls that fall within the definition of "robo calls" It follows as a matter of basic logic that the claimed analogous category called "robot calls" are also "quite distinct" from "robo calls" and for exactly the same reason: whether the consumer wants to receive them or not, Section 227(b)(1)(B) of the TCPA does not purport to regulate calls in which a "human is involved" in a two-way interactive dialogue between the calling party and the recipient.[6]

And, that is precisely why the oppositions to Northstar's Petition for Clarification must be rejected. At best, NCLC and the other objectors have mischaracterized the way the soundboard technology was used in the *Braver* litigation. There is no claim in that litigation that the calls at issue were initiated through an ATDS (because the calls were to residential landlines), nor can it be claimed that the only human involvement was that of a "clicker agent" who launches calls at a certain

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3 *See* NCLC Congressional Testimony, at 4-6 (enclosed herewith for the record as Exhibit "A").

4 *Id.* at 11 (emphasis added).

5 *Id.* at 12 n.46 (emphasis added).

6 *TCPA of 1991*, Proceedings and Debates of the 102nd Congress, First Session, 137 Cong. Rec. H11307-01, H11312 (Nov. 26, 1991) (Rep. Cooper Statement) ("[R]obotic calls by machines such as autodialers and computer-generated voices to be a much greater threat to the privacy of our homes than calls by live operators. At least you can vent your anger to a real person if they have interrupted your dinner. You can ask them questions and hold them accountable to some extent. At least a live person can only call one person at a time."). Further, courts have held, for example in the autodialer context, that there is no TCPA violation where, instead of a machine predictively dialing numbers one after another, a human performs the exact same function in the exact same potentially indiscriminate and rapid succession. *See, e.g.*, *Collins v. Nat'l Student Loan Program*, 2018 WL 6696168, at *4-5 (D.N.J. Dec. 20, 2018) ("seem[ingly] minimal" level of human involvement to click a button to launch a call was sufficient for platform not to be an autodialer); *Hatuey v. IC Sys., Inc.*, 2018 WL 5982020, at *6-7 (D. Mass. Nov. 14, 2018) (same); *Fleming v. Assoc. Credit Servs., Inc.*, 342 F. Supp. 3d 563, 571-78 (D.N.J. 2018) (same); *Ramos v. Hopele of Fort Lauderdale, LLC*, 334 F. Supp. 3d 1262, 1273-76 (S.D. Fla. 2018); *Arora v. Transworld Sys., Inc.*, 2017 WL 3620742, at *2-4 (N.D. Ill. Aug. 23, 2017); *Gaza v. LTD Fin. Servs., L.P.*, 2015 WL 5009741 (M.D. Fla. Aug. 24, 2015).

cadence designed to ensure that a representative would be available whenever the recipient answers the phone.[7] To the contrary, as several of the Commission staff observed during the course of our April 29, 2019 meetings "there is always a live operator" on the call from start to end: the operator responds to consumer inquiries and otherwise interacts with the consumer either by selecting and playing the appropriate scripted audio clip or by responding with his or her own voice, whichever is most responsive. And, as relevant to *Braver*, the technology only permitted the representative to conduct one call at a time so that the whole notion of indiscriminate robotic-like calling simply did not occur. As a result, there is no basis for the conclusion that granting the relief requested in the Petition will somehow open the floodgates to further and broader uses of the technology in ways that do offend the TCPA. Put more bluntly, the sky is not falling.

In the final analysis, it is difficult to escape the conclusion that the objections filed in this matter are based upon the conclusion that unwanted calls are, or ought to be by definition, illegal in all circumstances. That is a position that the neither the Commission nor Congress can accept for Constitutional and policy reasons, not the least of which are the numerous pro-consumer benefits articulated in NorthStar's Petition, Comments, and Reply Comments. There is, thus, utterly no basis for withholding action on the Petition so that, at the least, the *Braver* Court has – as it has itself stated – the benefit of the FCC's views on the narrow but fundamental issue presented here.

Respectfully submitted,

Daniel S. Blynn

Counsel for NorthStar Alarm Services, LLC

Enc.

cc: Mark Stone
Kurt Schroeder
Kristi Thornton
Karen Schroeder
Richard Smith
Christina Clearwater
Michael Scurato
Travis Litman
Commissioner Michael O'Rielly

---

[7] *See* NorthStar's Jan. 2, 2019 Petition, at 3-6; *see also* NorthStar's Mar. 15, 2019 Comments, at 4 n.4; NorthStar's Mar. 29, 2019 Reply Comments, at 2,6.

Arielle Roth
Jamie Susskind
Matthew Berry
Nicholas Degani
Zenki Nakazawa

Exhibit A

Testimony before the

HOUSE COMMITTEE ON ENERGY AND COMMERCE

Subcommittee On Communications and Technology

Regarding

"Legislating to Stop the Onslaught of Annoying Robocalls"

Testimony written and presented by:

Margot Freeman Saunders
Senior Counsel
National Consumer Law Center

On behalf of
the low-income clients of the
National Consumer Law Center

and

Consumer Federation of America
Consumer Action
National Association of Consumer Advocates

April 30, 2019

Margot Saunders
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Legislating to Stop the **Onslaught of Annoying Robocalls**
April 30, 2019

Chairman Doyle, Chairman Pallone, Congressman Latta, and Members of the Committee, I appreciate the opportunity to testify to strongly support H.R. 946: the Stopping Bad Robocalls Act. I provide my testimony here today on behalf of the low-income clients of the **National Consumer Law Center (NCLC),**[1] and on behalf of **Consumer Action, Consumer Federation of America,** and the **National Association of Consumer Advocates.**

I. Introduction

Americans were subjected to *5.2 billion* robocalls last month--an increase by a remarkable 370% just since December 2015.[2] This explosion of robocalls invades our privacy, distracts us, disrupts our lives, costs us money, and undermines the utility of the American telephony system.

These problem robocalls are not just overt scams, such as calls made by criminals to steal identities or defraud people into making payments to avoid spurious threats. As I explain in section II below, and illustrate in the attached Appendix, major American corporations, many of which are household names, significantly contribute to the proliferation of robocalls plaguing Americans every day. These corporations are the defendants in actions in the federal courts in almost every state, and, more tellingly, they are generally the leaders in the effort currently waging in the halls of the Federal Communications Commission (FCC) to weaken critical interpretations of the Telephone Consumer Protection Act (TCPA).[3] These callers are claiming to be the victims of a TCPA crisis—but it is a crisis of their own creation. The primary goals of this testimony are to illustrate this, and show why passage of H.R. 946 is necessary to protect consumers.

The premise of the TCPA is straightforward. It does not prohibit all robocalls. The TCPA and the regulations that implement the TCPA have two simple requirements with respect to robocalls and robotexts. First, a call or text can be made to a cell phone using an automatic telephone dialing system (ATDS) or a prerecorded voice only with the prior express consent of the person called, and the consent must be in writing if it is a telemarketing call. Second, prior express written consent is also required for any prerecorded telemarketing call to a residential line. (There are exceptions for

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[1] This testimony was written with the substantial assistance of NCLC Deputy Director Carolyn Carter and researcher Emily Green Caplan.

[2] *See* YouMail Robocall Index, *available at* https://robocallindex.com/ (last accessed Apr. 4, 2019).

[3] 47 U.S.C. § 227.

calls relating to an emergency or to collection of a debt owed to the United States.[4]) The elegance of this construct is that it gives us—the people being called-- control over our own phones.

The problem is that the callers want to make the robocalls without worrying about having that consent. And they do not want to stop calling when consumers say "stop."

The Federal Communications Commission (FCC) currently has pending before it several proceedings in which critical interpretations of the TCPA will be provided, many of which were necessitated by the D.C. Circuit's decision last year in *ACA International v. F.C.C.*[5] This decision sent back to the FCC important issues about how to define covered automated telephone dialing systems, how to deal with wrong number calls, and how to deal with revocation of consent. The FCC requested comments on these issues and related ones in the spring of 2018.[6]

The FCC already has the authority to make all the right decisions under the current version of the TCPA. However, the same callers that are responsible for so many of the robocalls plaguing our cellphones are also pushing both the FCC and the courts to create loopholes and allow evasions of the rules in the TCPA so that these callers can make more robocalls, unrestrained by the consent requirements of the law. Section 2 of H.R. 946 will protect consumers from unwanted robocalls by ensuring that the FCC will not make the wrong decisions on these interpretative questions. The other sections of H.R. 946 are also critically important to protect consumers from unwanted robocalls regardless of the FCC's interpretations of the TCPA.

In this testimony, I will first address the fact that it is major American corporations that are responsible for most of the robocalls we all deplore, and discuss why the number of calls is escalating so alarmingly. I will then discuss the need for each of the provisions of H.R. 946.

II. Major American Corporations Are Responsible for the Majority of Robocalls.

The majority of robocalls are made by, or at the behest of, major American corporations—

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[4] Just last week, however, the exception allowing calls to collect debt owed the federal government was ruled unconstitutional by the Fourth Circuit. Am. Ass'n of Political Consultants, Inc. v. Fed. Commc'ns Comm'n, ___ F. 3d ___, 2019 WL 1780961 (4th Cir. Apr. 24, 2019) (exemption is content-based restriction on speech in violation of Free Speech Clause and is severable from remainder of TCPA).

[5] 885 F.3d 687 (D.C. Cir. 2018)

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

large, respected national corporations with whom many of us do business every day are responsible for hundreds of millions of unwanted robocalls every month. The majority of robocalls made every day to our home phones and our cell phones are not overt scam calls, but calls made by so-called "legitimate businesses."[7]

Telemarketing. Major American corporations make directly—or are responsible for—a vast number of intrusive, annoying, repeated telemarketing calls to our landlines and cell phones--selling car insurance,[8] health insurance,[9] car warranties,[10] home security systems,[11] resort vacations,[12] and more. Some of these calls push products and services that are shoddy, overpriced, or of dubious value, and some may push real bargains, but all of these calls annoy us, interrupt us, and invade our privacy. If the rate of telemarketing calls continues at the current pace, in 2019 there will be almost 10 billion telemarketing robocalls made in the United States.[13]

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[7] In 2018, the average monthly breakdown of robocalls by category, as reported by YouMail's Robocall Index, was: 37% scams, 23% debt collection calls (including payment reminders), 18% telemarketing, and 22% alerts and reminders. In March of 2019, that same breakdown was 47% scams, 20% alerts and reminders, 17% debt collection calls (including payment reminders), and 16% telemarketing. www.Robocallindex.com.

The YouMail Robocall Index estimates the monthly robocall volume in the U.S. by extrapolating data collected from calls made to its users. In a letter from YouMail's CEO Alex Quilici to NCLC Senior Counsel Margot Saunders, Mr. Quilici noted that YouMail's analysis generally classifies calls dialed for debt collection, telemarketing, and other legitimate business purposes as scam calls if the caller "spoofs" the call to mask its true origins, so the 47% figure includes both calls by outright fraudsters and these spoofed calls from legitimate American businesses.

[8] *See* Smith v. State Farm Mut. Auto. Ins. Co., 30 F. Supp. 3d 765 (N.D. Ill. 2014).

[9] *See* Sullivan v. All Web Leads, Inc., 2017 WL 2378079 (N.D. Ill. June 1, 2017). *See also* Northrup v. Innovative Health Ins. Partners, L.L.C., 329 F.R.D. 443 (M.D. Fla. 2019) (text messages).

[10] *See* Mey v. Enterprise Fin. Group, Case No. 2:15-cv-00463 (M.D. Fla. filed Aug. 3, 2015).

[11] *See In re* Monitronics Int'l Inc., Telephone Consumer Prot. Act. Litig., Case No. 1:13-md-02493 (N.D. W. Va. filed Feb. 28, 2014). *See also* Braver v. NorthStar Alarm Servs., L.L.C., 329 F.R.D. 320 (W.D. Okla. 2018) (regarding 75 million prerecorded voice calls to sell home security systems).

[12] *See* Glasser v. Hilton Grand Vacations Co., L.L.C., 341 F. Supp. 3d 1305 (M.D. Fla. 2018), *appeal to 11th Circuit pending.*

[13] Taking the average monthly robocall totals for the first three months of 2019, as reported by YouMail in its Robocall Index (www.Robocallindex.com), U.S. consumers will receive an estimated 61.2 billion robocalls in 2019. Over the same three-month period, YouMail estimates that 15.7% of robocalls were telemarketing calls. If telemarketing calls continue at the current pace, U.S. consumers will receive nearly 10 billion telemarketing robocalls in 2019. (The monthly average for all robocalls in the first three months of 2019 is 5.1 billion; the average telemarketing percentage is 15.7%. The estimate for the total for all robocalls in 2019 is 61.2 billion; 15.7% of that total is 9.6 billion.) And these numbers do not reflect the calls that YouMail has not included in the telemarketing numbers because the caller IDs were spoofed, which calls were therefore included in the count for scam calls.

There are dozens of cases against corporate defendants seeking redress for tens of millions of unwanted and illegal telemarketing robocalls. Just a few of these cases holding American corporations responsible for making hundreds of millions of telemarketing calls include—

- **Insurance:** *Smith v. State Farm Mut. Auto. Ins. Co.*[14] In this case, the court held State Farm liable for the TCPA violations of a lead-generator marketing company it had used to market its insurance products. Calls were made to over 80,000 consumers.
- **Home Security Systems:** *Mey v. Monitronics Int'l, Inc.*[15] The named plaintiff had received over 19 calls from a broker calling to sell home security services, even though she had listed her telephone number on the national Do Not Call Registry. These telemarketing calls were made by lead generators on behalf of a Monitronics dealer. Calls were made to more than 7.7 million phone numbers. Monitronics claimed that it was not responsible for these calls made by others to sell its services.
- **Cruises:** *McCurley v. Royal Seas Cruises, Inc.*[16] This case challenged the legality of 634 million calls[17] to the cell phones of 2.1 consumers[18] in violation of the TCPA. The court allowed the case to proceed as a class action despite the cruise line's claim that it was not responsible for the calls made by lead generators, who referred interested consumers to Royal Seas after telemarketing calls.
- **Mortgage Lending**: *Ott v. Mortgage Investors Corp. of Ohio, Inc.*[19] A mortgage lender robocalled over 3.5 million people to push them into refinancing their mortgages with loans guaranteed by the U.S. Department of Veterans Affairs.
- **Vacations:** *Glasser v. Hilton Grand Vacations Co., L.L.C.*[20] This case challenges whether 56 million calls made to sell Hilton vacations were covered by the TCPA, as the telemarketer claimed the robocalls were not made with a covered autodialer.
- **Satellite Television:** *Krakauer v. Dish Network, L.L.C.*[21] This case challenged the millions of robocalls made by Dish's independent contractors, for which Dish disclaimed liability. The trial court held Dish liable.
- **Film Studio:** *Golan v. Veritas Entertainment, L.L.C.*[22] A film studio made over three million unsolicited calls as part of a six-day telemarketing campaign to promote the film "Last Ounce of Courage."
- **Business Services Provider:** *Thomas v. Dun & Bradstreet Credibility Corp.*[23] This provider made repeated telemarketing calls, even after requests to stop, to advertise business

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[14] 30 F. Supp. 3d 765 (N.D. Ill. 2014).

[15] 959 F. Supp. 2d 927 (N.D. W. Va. 2013). *See also In re* Monitronics Int'l, Inc., Telephone Consumer Prot. Act. Litig., Case No. 1:13-md-02493 (N.D. W. Va. filed Aug. 31, 2017) (settlement agreement)

[16] 2019 WL 1383804 (S.D. Cal. Mar. 27, 2019).

[17] *Id.* at *9.

[18] *Id.* at *10.

[19] 65 F. Supp. 3d 1046 (D. Or. 2014).

[20] 341 F. Supp. 3d 1305 (M.D. Fla. 2018), *appeal to 11th Circuit pending.*

[21] 311 F.R.D. 384 (N.D.N.C. 2015)

[22] 2017 WL 2861671 (E.D. Mo. July 5, 2017).

services to over one million individuals.

There are dozens of similar cases filed in courts around the nation every month. Appendix 1 is a list of just 33 samples of the cases addressed by the courts in the past two years, provided to illustrate the pervasiveness of these telemarketing calls from American businesses, as well as the variety of excuses that these businesses typically provide for why their automated calls to American households should not be covered by the TCPA. And a review of the enforcement actions filed by the Federal Trade Commission (FTC) shows that, in the past 10 years, it filed 151 cases for illegal telemarketing, almost all of which were against American businesses.[24] Indeed, some of the defendants in the actions brought by the FTC then turned around and asked the FCC for exemptions or retroactive waivers of liability for their TCPA violations.[25] Similarly, many of the actions brought by the FCC against illegal robocallers are against American businesses.[26]

Debt Collection Calls. In addition to telemarketers, major American corporations make an enormous number of robocalls to collect debts. The creditors with whom we all do business regularly make millions of unwanted robocalls daily to collect debts,[27] and debt collectors admit to making at least a billion debt collection calls per year.[28]

Many of these robocallers repeatedly and flagrantly violate the consumer protections of the TCPA, simply paying off consumers when they are sued, and then continuing their pattern of calling.

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[23] Case No. 2:15-cv-03194 (C.D. Cal. filed Apr. 28, 2015).

[24] The results of an advanced search on the FTC's website are available at: https://www.ftc.gov/enforcement/cases-proceedings/advanced-search?combine=&field_case_action_type_value=All&field_federal_court_tid=All&field_matter_number_value=&field_industry_tid=All&field_enforcement_type_tid=All&field_mission_tid_1=2973&field_competition_topics_tid=All&field_consumer_protection_topics_tid=236&field_release_date_value%5Bmin%5D%5Bdate%5D=&field_release_date_value%5Bmax%5D%5Bdate%5D=&date_filter%5Bmin%5D%5Bdate%5D=&date_filter%5Bmax%5D%5Bdate%5D=&items_per_page=100.

[25] *See, e.g.,* NorthStar Alarm Services, Petition for Expedited Ruling Clarifying 47 U.S.C. § 227(b)(1)(B) of the Telephone Consumer Protection Act (filed Jan. 2, 2019), *available at* https://ecfsapi.fcc.gov/file/10103290733918/NorthStar%20FCC%20Petition.pdf.

[26] See Federal Commc'ns Comm'n, Telephone Consumers Division – Robocall, *available at* https://transition.fcc.gov/eb/tcd/Robocall.html.

[27] Credit card companies admit that their collectors make 3 to 15 calls *per account* per day. *See* Consumer Fin. Prot. Bureau, The Consumer Credit Card Market 313 (Dec. 2017), *available at*

https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2017.pdf.

[28] ACA International White Paper, Methodological and Analytical Limitations of the CFPB Consumer Complaint Database 7 (May 2016), *available at* https://www.acainternational.org/assets/research-statistics/aca-wp-methodological.pdf ("It is estimated that the debt collection industry makes over one billion consumer contacts on an annual basis . . . .").

But debt collection robocalls remain a top complaint by consumers. Many debt collection calls are made to people who owe money and are behind on their payments, but many others are made to people who have nothing to do with the debts.

Below are just a few examples of problematic debt collector robocallers. These cases all involve hundreds—if not thousands—of calls, and all involve multiple calls after repeated requests from the consumer to stop calling.

1. *Robertson v. Navient Solutions.*[29] Shortly after Ms. Robertson acquired a Certified Nursing Assistant certificate, which she had funded with student loans, she experienced health problems, and also had to care for her dying father. She was unable to work, and applied for disability benefits. She received a forbearance on her federal student loans, but not for her private student loans. Ms. Robertson made payments when she was able. However, payments did not stop the calls. In total, Navient called Ms. Robertson a total of 667 times, and called 522 times after she told them to stop calling. Navient would call back the same day even when Ms. Robertson told the collection agent that she would not have any money to pay until the following month.
2. *Gold v. Ocwen Loan Servicing, L.L.C.*[30] The plaintiff consented to being contacted about his mortgage debt, and answered several collection calls, but then asked for the calls to stop. However, the servicer called his cell phone at least 1,281 times between April 2, 2011 and March 27, 2014, despite repeated requests to stop.
3. *Montegna v. Ocwen Loan Servicing, L.L.C.*[31] The servicer called the plaintiff on his cell phone at least 234 times, even after he requested that the calls stop.
4. *Todd v. Citibank.*[32] Some time in January 2016, the bank began calling the plaintiff's cell phone. The 350 calls were often made twice a day, even after repeated requests to stop calling.[33]
5. *Critchlow v. Sterling Jewelers Inc.* (aka Jared).[34] The complaint alleges that Jared robocalled Mr. Critchlow more than 300 times, several times a day and on back-to-back days, even after he begged for the calls to stop, saying he simply did not have the money to pay the debt. The case was settled with a confidentiality agreement.

Most of these cases are settled, and in return for the settlement consumers are generally required to sign **confidentiality clauses** that prohibit them and their lawyers from disclosing the details of the settlements. These confidentiality clauses prevent reviewing courts from evaluating the repeated and persistent nature of the robocallers' behavior. By suppressing that information,

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[29] Case No. 8:17-cv-01077 (M.D. Fla. filed May 8, 2017).

[30] 2017 WL 6342575 (E.D. Mich. Dec. 12, 2017).

[31] 2017 WL 4680168 (S.D. Cal. Oct. 18, 2017).

[32] 2017 WL 1502796 (D.N.J. Apr. 26, 2017).

[33] *Id.* at *8.

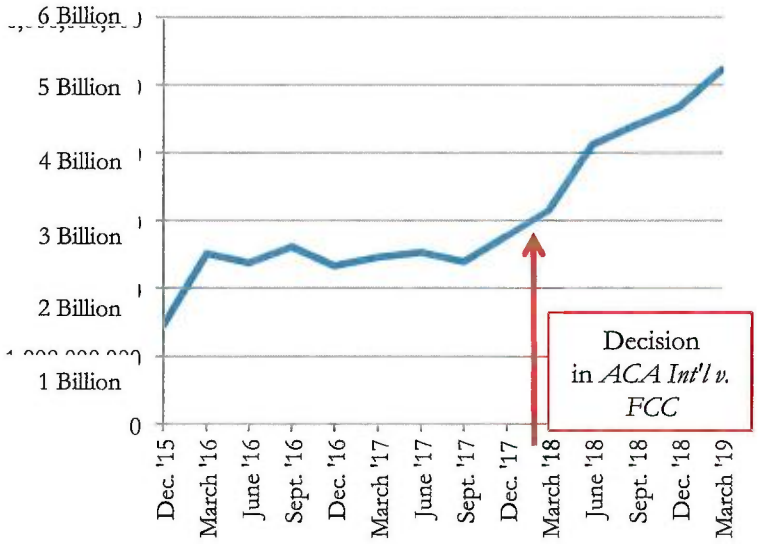
[34] Case No. 8:18-cv-00096 (M.D. Fla. filed Jan. 12, 2018).

robocallers are more likely to evade the TCPA's treble damages provision for knowing or willful violations.

III. Why Are the Calls Increasing?

A significant reason for the escalation in robocalls is that many robocallers are anticipating a caller-friendly response to the many requests they have submitted to the FCC to *loosen* restrictions on robocalls. This is evidenced by the spike in calls that occurred right after last year's decision in March 2018 by the D.C. Circuit Court in *ACA International v. F.C.C.*[35] That decision set aside a 2015 FCC order[36] on the question of what calling technology is included in the definition of an automatic telephone dialing system (ATDS),[37] and raised the specter that the term might be interpreted not to cover the autodialing systems that are currently used to deluge cell phones with unwanted calls.

Increase in Robocalls December 2015 through March 2019



The calling industry's response to this decision is perfectly illustrated by the petition to the FCC filed by the U.S. Chamber Institute for Legal Reform (U.S. Chamber),[38] joined by 16 major

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[35] 885 F.3d 687 (D.C. Cir. 2018)

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

[37] 47 U.S.C. § 227(a)(1).

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

national industries,[39] to *loosen* restrictions on robocalls. **It is essential to understand, that if the request of the U.S. Chamber were to be granted, the scourge of robocalls will skyrocket.**

Additionally, losing defendants in judicial actions often seek protection from the FCC by asking for retroactive waivers for the liability they face after courts have found that they have made millions of robocalls without consent. And there are dozens of petitions currently pending at the FCC asking for special interpretations or exemptions, which seek to allow industries to ignore the basic rule of the TCPA that express consent must be provided before automated calls can be made to our cell phones. Allowing waivers and exemptions undermines compliance, and leads to increased unwanted robocalls. If the FCC rules the wrong way on these pending TCPA issues, Section 2 of H.R. 946 is essential.

IV. H.R. 946 is Needed to Protect Consumers.

Passage of H.R. 946 would create a powerful tool that will stop most unwanted robocalls in the United States. Congress should pass the entire bill, despite the robocallers' objections. Passage will save our telephone system. Each section of H.R. 946 accomplishes an important objective, responding to a different facet of the robocalling problem. Section 2 of H.R. 946 amends the TCPA in ways that are particularly important to consumers. While the current language in the TCPA already clearly permits the FCC to correctly interpret the TCPA to protect consumers from unwanted robocalls, passage of this section will ensure that consumers remain protected, regardless of potentially incorrect interpretations of the current provisions by the FCC.

Following is a section-by-section analysis of H.R. 946, illustrating the need for each provision, along with recommendations on behalf of consumers to protect all telephones from robocalls.

A. TCPA Covered Autodialers Include Systems that Call From Stored Lists--Section 2(a).

In its current form, the TCPA defines an ATDS as equipment that "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."[40] In our view, and the view of a number of courts,[41] the current definition

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[39] These industries include: ACA International, American Association of Healthcare Administrative Management, American Bankers Association, American Financial Services Association, Consumer Bankers Association, Consumer Mortgage Coalition, Credit Union National Association, Edison Electric Institute, Electronic Transactions Association, Financial Services Roundtable, Insights Association, Mortgage Bankers Association, National Association of Federally-Insured Credit Unions, National Association of Mutual Insurance Companies, Restaurant Law Center, and Student Loan Servicing Alliance.

[40] 47 U.S.C § 227(a)(1).

in the TCPA encompasses both systems that store numbers and dial them automatically, and systems that generate numbers and dial them automatically, and only the latter must use a random or sequential number generator to be covered. Other courts, however, take the position that a system must use "a random or sequential number generator" to qualify as a covered ATDS under the TCPA.[42] As described above, much of corporate America is applying heavy pressure on the FCC (and the courts) to interpret the TCPA's definition of "automatic telephone dialing system" (ATDS or "autodialer") narrowly, which would result in an effective nullification of the law's prohibition against autodialed calls and texts to cell phones without the called party's consent.

The issue is of great importance, because robodialing and robotexting technology is what enables so many billions of calls to be made every year. Yet many of the calling systems in use today do not call numbers randomly. Instead, they are "predictive dialers" that generate call lists from a database of numbers, and then robodial or robotext those numbers. For example, a telemarketer may purchase a list of consumers who have proven to be easy marks in the past; a debt collector may call numbers believed to belong to debtors; or a seller may buy a list of consumers who are believed to be interested in a certain type of product. If the definition of ATDS were interpreted as requested by the U.S. Chamber and other industries, the meaning would be so narrow that it would not apply to dialing systems that automatically dial from lists—those systems that are in use today—and there would be no way to stop this robocall onslaught.

The Third Circuit's decision in *Dominguez v. Yahoo, Inc.*[43] is an example of an interpretation of an ATDS that dangerously undermines the scope of the TCPA. In that case, Yahoo's completely

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[41] Marks v. Crunch San Diego, L.L.C., 904 F.3d 1041 (9th Cir. 2018). *Accord* Evans v. Pa. Higher Educ. Assistance Agency, 2018 WL 6362637 (N.D. Ga. Oct. 11, 2018). *See also* Getz v. DirecTV, L.L.C., 359 F. Supp. 3d 1222 (S.D. Fla. 2019); Adams v. Ocwen Loan Servicing, L.L.C., ___ F. Supp. 3d ___, 2018 WL 6488062 (S.D. Fla. Oct. 29, 2018); Davis v. Diversified Consultants Inc., 36 F. Supp. 3d 217 (D. Mass. 2014); Echevvaria v. Diversified Consultants, Inc., 2014 WL 929275 (S.D.N.Y. Feb. 28, 2014), *adopted by* 2014 WL 12783200 (S.D.N.Y. Apr. 22, 2014).

[42] *See, e.g.,* Pinkus v. Sirius XM Radio, Inc., 319 F. Supp. 3d 927 (N.D. Ill. 2018). *Accord* Thompson-Harbach v. USAA Fed. Sav. Bank, 359 F. Supp. 3d 606 (N.D. Iowa Jan. 9, 2019). *See also* Johnson v. Yahoo!, Inc., 346 F. Supp. 3d 1159 (N.D. Ill. 2018); Gary v. Trueblue, Inc., 346 F. Supp. 3d 1040 (E.D. Mich. 2018).

[43] 894 F.3d 116 (3d Cir. 2018). Two other cases of uncontrolled technology resulting in a deluge of unwanted robocalls or texts are *Gonzalez-Pagan v. Redwood Capital Group* and *Schuster v. Uber Technologies, Inc.* In *Gonzalez-Pagan v. Redwood Capital Group*, a local developer called Mr. Gonzalez-Pagan approximately 5,000 times for years, often making more than 50 calls a day on back-to-back days, even though Mr. Gonzalez-Pagan owed nothing to the developer and had no idea how it put his cell number in its robodialing campaign. The calls continued even after Mr. Gonzalez-Pagan drove to the defendant's apartment complex and begged for the calls to stop. Over 500 calls were made even after the lawsuit was filed in federal court. Case No. 8:2017-cv-02184 (M.D. Fla.

automated text messaging system sent 27,809 unwanted text messages to one consumer.[44] The previous owner of the number had subscribed to an email-notification service offered by Yahoo, which sent a text message to the former owner's phone number every time an email was sent to the former owner's linked Yahoo email account. The consumer tried to halt the messages by replying "stop" and "help" to some texts. When he asked Yahoo's customer service for help, he was told that the company could not stop the messages, and that as far as Yahoo was concerned the number would always belong to the previous owner. The consumer then sought help from the FCC. In a three-way call with the consumer and Yahoo, the FCC tried to convince Yahoo to stop the messages, but was similarly unsuccessful. After receiving 27,809 text messages from a machine over 17 months, the consumer brought suit under the TCPA. Only after the case was filed did the messages finally stop.[45] Alarmingly, the Third Circuit ruled that the system was not an ATDS because the consumer did not prove that it had the present capacity to generate random or sequential numbers. This ruling, if accepted by other courts or the FCC, would leave every cell phone in America vulnerable to the same deluge of unstoppable text messages.

The issue of how to define an ATDS is currently pending at the FCC. The language in Section 2(a) would ensure that the dialers currently in use to make automated calls and texts are covered by the TCPA's protections.

Action Requested: Section 2(a) should be passed because it resolves this issue by clarifying that TCPA-covered calls are those made "using equipment that makes a series of calls to stored telephone numbers, including numbers stored on a list, . . ."

B. Covered Autodialers Include Systems Designed to *Evade* TCPA Coverage--Section 2(a).

Perhaps the most brazen attempt to evade the TCPA's protections against autodialed calls to cell phones is clicker-agent calling systems. These systems are entirely automated, but insert a human "clicker agent" into the process. These human clicking agents do not participate in the calls, and simply have the job of repeatedly clicking a single computer button, which sends telephone numbers on an already-created list to an automated dialer in an another locale. The seller then claims that the insertion of this human as an automaton means

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filed Sept. 21, 2017). In *Schuster v. Uber Technologies, Inc.*, Mr. Shuster sued Uber for sending 1,050 text messages without consent and despite repeated requests to cease. Case No. 8:18-cv-02389 (M.D. Fla. filed Sept. 27, 2018).

[44] Dominguez v. Yahoo, Inc., 629 Fed. Appx. 369, 371 (3d Cir. 2015).

[45] *Id.* at 370–71.

that the calls are not governed by the TCPA, so the calls can be made without consent and the called party has no way to stop them.[46]

If this position were accepted, it would profoundly impair our ability to control unwanted calls to our cell phones. For example, a single seller, Hilton Grand Vacations Co., used a clicker-agent system to make *56 million calls* to cell phones to sell vacation packages, and then claimed that they were not made with an ATDS and thus that the TCPA did not apply and no consent was required.[47] And that is just one company. Allowing clicker-agent calls to evade the TCPA would amount to an invitation to every telemarketer—both those pushing overt scams and those making less shady, but equally intrusive, calls—to make millions of calls without consent. Clicker-agent systems not only result in mass unwanted automated calls to cell phones, but also produce the same problems of dropped calls and delays after answering the phone that calls made by all autodialers produce.[48]

Consumer groups have asked the FCC to rule on these evasion efforts and clarify that systems that use human clicker agents to process phone numbers that are then automatically dialed are covered by the TCPA. However, the FCC has not yet issued a response.

Section 2(a) would assure that systems that are highly automated but developed just to evade coverage—and thus avoid the TCPA's requirement for prior express consent—would clearly be covered.

Action Requested: Section 2(a) should be passed because it resolves this issue by exempting only equipment "that the caller demonstrates requires substantial additional human intervention to dial or place a call after a human initiates the series of calls; …"

C. Ensuring that Consumers Can Revoke Consent—Section 2(b).

The TCPA was written explicitly to protect Americans from the "scourge of robocalls" by giving consumers control over whether they receive robocalls. Congress did so by giving consumers

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[46] These clicker-agent systems are quite distinct from systems in which there is actually a human that makes the calls. In these systems, the human agent caller brings up the information about a particular consumer on a screen, and then the agent makes a conscious decision to call that consumer and presses a button and the call is made. The human is involved in deciding whether and when to make the call, and the call is made only when the human presses the button to make it. Systems like this are typically called "preview dialers."

[47] Glasser v. Hilton Grand Vacations Co., L.L.C., 341 F. Supp. 3d 1305 (M.D. Fla. 2018), *appeal to 11th Circuit pending.*

[48] According to the record in the case, Hilton's documents included an illustration of the two systems side by side. Doc. 104-7, at 2. The two systems appear to be identical *except for* the addition of the superfluous clicker agent for the TCPA-covered calls.

the right to chose whether to consent—and implicitly to withhold or revoke that consent—to automated calls.

The calling industry has asked the FCC to issue a ruling that consent provided as part of a contract cannot be unilaterally revoked by the consumer.[49] Such a ruling would effectively eradicate the TCPA's requirement for express consent for automated calls.

The D.C. Circuit's decision in *ACA International* confirmed the FCC's conclusion in its 2015 Order[50] that consumers have the right to revoke consent.[51] However, the *ACA International* court did not take a position on whether the FCC had authority to determine that revocation of contractually provided consent might be limited by contract, because the issue was not before the court.[52]

Most of the automated calls about which consumers complain are either telemarketing calls or debt collection calls. For calls made by debt collectors, the FCC has explicitly allowed consent to be presumed whenever consent was provided in the original credit contract with the creditor or the seller. But those contracts are adhesion contracts, in which consumers have no bargaining power and no ability to change the terms. So it is already a stretch for the FCC to have said that consent for debt collection calls—which is required by statute to be *express*—can be *implied* when a consumer gives her telephone number to open a charge account in a store. Providing a telephone number when applying for credit hardly constitutes express consent to be contacted months or years later by a debt collector.[53] Courts have stretched the notion of express consent even farther by holding that consent can be transferred from the original creditor to a debt buyer, and then from the debt buyer to a collector it hires.[54]

It would be a true overextension for the FCC to take the next step down the road to unlimited automated calls and hold that, once a consumer has provided her phone number in a contract, she

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[49] *See, e.g.*, Comments of U.S. Chamber Institute for Legal Reform, *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket Nos. 02-278 and 18-152, at 21, 27 (filed June 13, 2018), *available at* https://ecfsapi.fcc.gov/file/1061348977655/ILR-US%20Chamber%20TCPA%20Public%20Notice%20Comments.pdf.

[50] 2015 Order at 7993.

[51] ACA International v. F.C.C., 885 F.3d 687, 709 (D.C. Cir. 2018).

[52] *Id.* at 710 (emphasis added; citation omitted).

[53] "[P]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 92-90, Report and Order, 7 F.C.C. Rcd. 8752, 8769 ¶ 31 (Oct. 16, 1992).

[54] *See* Selby v. LVNV Funding, L.L.C., 2016 WL 6677928, at *8 (S.D. Cal. June 22, 2016).

could never stop a debt collector's continuing automated calls by withdrawing that consent. One Second Circuit decision, *Reyes v. Lincoln Automotive Financial Services*,[55] erroneously holds that the consumer's consent is irrevocable when it is part of a binding contract. That decision fails to give appropriate weight to the FCC's 2015 Order ruling that, "[w]here the consumer gives prior express consent, the consumer may also revoke that consent."[56] The *Reyes* decision also mistakenly holds that no other Circuit had addressed the question, when in fact several other Circuits had upheld the consumer's right to revoke consent that was given in a contractual context.[57]

If revocation is not permitted, robocalls will be even more abusive and unstoppable. Debt collection callers comprise nineteen of the top twenty robocallers in the United States.[58] As detailed above, debt collection calls are among the top calls about which consumers complain. Often, debt collectors and creditors collecting their own debts are now routinely refusing to stop calling, despite pleas from consumers, and are instead arguing that the Second Circuit's *Reyes* decision applies to them and that consent cannot be revoked. We can only imagine the nightmare scenario that will impact tens of millions of people across the U.S. if the FCC rules that consent granted by contract cannot be revoked.

Section 2(b) will ensure that when a consumer says to a robocaller "stop calling," the caller will know that it must stop calling, or face pay statutory damages for calls made after the demand to stop was made.

Action Requested: Section 2(b) should be passed because it resolves this issue by clarifying that "prior express consent may be revoked at any time and in any reasonable manner, regardless of the context in which consent was provided."

D. Preventing Callers' Evasive Actions to Avoid TCPA Compliance—Section 2(c).

Robocallers—particularly the "legitimate businesses" that can actually be traced and called to account for their violations—go to great lengths to devise ways to bombard us with calls without our

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[55] 861 F.3d 51, 58 (2d Cir. 2017).

[56] 2015 Order at 7996. *See* Ginwright v. Exeter Fin. Corp., 280 F. Supp. 3d 674, 683 (D. Md. 2017) (declining to follow *Reyes*; noting its inconsistency with FCC's ruling).

[57] *See* Gager v. Dell Fin. Servs., L.L.C., 727 F.3d 265 (3d Cir. 2013) (consent provided in application for credit). *See also* Schweitzer v. Comenity Bank, 866 F.3d 1273 (11th Cir. 2017) (consent provided in credit card application can be revoked, and consumer can revoke consent in part); Van Patten v. Vertical Fitness Grp., 847 F.3d 1037, 1047–49 (9th Cir. 2017) (consent provided in gym membership application); Osorio v. State Farm Bank, 746 F.3d 1242 (11th Cir. 2014) (consent provided in application for credit card, although the court allows that the *method* of revoking consent may be limited by the contract).

[58] *See* YouMail Robocall Index, *available at* https://robocallindex.com/ (last accessed Apr. 9, 2019).

consent yet evade liability. One strategy they use is deploying "lead generators" or "data brokers" to place the calls. On these calls from data brokers, once a consumer indicates an interest in the product being sold ("Press 2 now if you want to hear more about available health insurance in your area."), the broker passes along the consumer's information to the company selling the product. When the seller (who is paying the robocaller for the leads that result from the unwanted telemarketing calls) is sued, it typically defends by saying it did not know about, or is not responsible for, the TCPA violations committed by these independent third parties.[59]

Another strategy is to hire others to make the calls and then claim that the actual callers were independent contractors for whom the seller is not responsible. The seller may put a clause in its contract with the independent contractor that purports to require it to comply with the TCPA, and then claim that it can't possibly be held liable since the independent contractor promised to obey the law.

This ploy was outlined—and strongly disapproved of—in the case of *Krakauer v. Dish Network, L.L.C.*[60] Dish Network's telemarketers had made millions of illegal and unwanted calls to consumers,[61] and had persisted in doing so despite numerous complaints, and promises made to 46 state attorneys general. The court adjudicating the case found that the independent contractors were agents of Dish Network, and that Dish was vicariously liable for the calls made by the independent

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[59] *See, e.g.,* McCurley v. Royal Seas Cruises, Inc., 2019 WL 1383804 (S.D. Cal. Mar. 27, 2019) (defendant claimed it was not responsible for the 634 million calls made by the lead generator); Aranda v. Caribbean Cruise Line, Inc. 179 F. Supp. 3d 817 (N.D. Ill. 2016) (defendant claimed it was not responsible for millions of calls made by third party.); Hossfeld v. Gov't Employees Ins. Co., 88 F. Supp. 3d 504 (D. Md. 2015) (GEICO claimed it was not responsible for calls made third parties and transferred to GEICO); Smith v. State Farm Mut. Auto. Ins. Co. 2015 WL 13658072 (N.D. Ill. Jan. 13, 2015) (over 80,000 consumers called; defendant denied responsibility for calls made by third party).

[60] 311 F.R.D. 384 (N.D.N.C. 2015)

[61] United States v. Dish Network, L.L.C., 75 F. Supp. 3d 942, 1022 (C.D. Ill. 2014) ("[T]he United States established in Count I that Dish and the Telemarketing Vendors made millions of outbound telemarketing calls to telephone numbers on the Registry as part of this nationwide pattern and practice of telemarketing."), *opinion amended on reconsideration sub nom.* United States v. Dish Network, L.L.C., 80 F. Supp. 3d 914 (C.D. Ill. 2015), and *opinion vacated in part on reconsideration sub nom.* United States v. Dish Network, L.L.C., 80 F. Supp. 3d 917 (C.D. Ill. 2015).

contractors to sell Dish products.[62] Yet sellers still commonly raise this subterfuge in case after case as a means of avoiding liability for the illegal calls made on their behalf.[63]

Yet another tactic of some robocallers is to use "soundboard technology" to make telemarketing calls to consumers, for example selling cruises and home security systems. This technology allows telemarketers to play prerecorded clips to consumers who answer the phone. A single telemarketer will often conduct more than one call simultaneously, playing prerecorded clips selected to appear to be responsive to the consumer and to keep the consumer on the phone. In one case, NorthStar Alarm Services[64] was responsible for over 75 million soundboard calls to sell home security systems to people who had no prior relationship with the company; the telephone numbers were all purchased from a data seller.[65] The telemarketer used Caller ID spoofing to display bogus telephone numbers to consumers. Because the calls were made with soundboard technology, which uses audio snippets of a prerecorded voice in calls to consumers, NorthStar claimed these calls should not be governed by the explicit requirements and limitations imposed on calls with a prerecorded voice under the TCPA.[66] Indeed, after the court allowed the case to proceed, NorthStar petitioned the FCC to hold that calls with audio snippets of a prerecorded voice should not be treated as calls with a prerecorded voice.[67] That petition is still pending.

There are many dozens of these cases, cumulatively involving hundreds of millions of calls to consumers, all defended by American businesses trying to sell their goods or services through robocalling our telephones. When sued for TCPA violations, these telemarketers come up with a range of excuses for why they should not be held liable for their violations. The Appendix provides a

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[62] *See* Krakauer v. Dish Network L.L.C., 2017 WL 2242952, at *3 (M.D.N.C. May 22, 2017 ("The OE Retailers collectively generated hundreds of millions of dollars a year in revenue for Dish. Dish's contract with SSN gave it virtually unlimited rights to monitor and control SSN's telemarketing. In a settlement agreement with dozens of state attorneys general in 2009, Dish confirmed that it had this power over all of its marketers.").

[63] *See, e.g.*, Bakov v. Consol. World Travel, Inc., 2019 WL 1294659 (N.D. Ill. Mar. 21, 2019) (defendant claimed it was not responsible for the millions of calls made by an agent using soundboard technology); Armstrong v. Investor's Business Daily, Inc., 2018 WL 6787049 (C.D. Cal. Dec. 21, 2018) (defendant claimed it had no vicarious liability for calls by third parties).

[64] Braver v. NorthStar Alarm Servs., L.L.C., 329 F.R.D. 320 (W.D. Okla. 2018) (defendant claimed that soundboard technology did not use a "prerecorded voice" as defined by the TCPA).

[65] Braver v. NorthStar Alarm Servs., 15-cv-383, Doc. 42 (W.D. Okla.).

[66] 47 U.S.C. § 227.

[67] NorthStar Alarm Services, Petition for Expedited Ruling Clarifying 47 U.S.C. § 227(b)(1)(B) of the Telephone Consumer Protection Act (filed Jan. 2, 2019), *available at* https://ecfsapi.fcc.gov/file/10103290733918/NorthStar%20FCC%20Petition.pdf.

list of just 33 of them, along with the excuses the callers made to evade responsibility for their unwanted and illegal calls.

While the FCC has ruled appropriately on some of these issues, the language of Section 2(c) will unambiguously direct the FCC to ensure that no evasions are permitted.

Action Requested: Section 2(c) should be passed because it addresses these attempted evasions by requiring the FCC to issue regulations that "prevent circumvention or evasion . . . ."

E. Limiting Exemptions—Section 3.

Section 3 sets a number of appropriate consumer protection limits on any exercise of the FCC's authority to make exemptions from the TCPA's requirements. It relates to two provisions of the TCPA that give the FCC exemption authority. First, it relates to section 227(b)(2)(B), which allows the FCC to exempt non-commercial calls from the restrictions on prerecorded calls to land lines, and calls for a commercial purpose if they do not include advertisements and do not adversely affect the privacy rights the TCPA is intended to protect. Second, it relates to section 227(b)(2)(C), which allows the FCC to exempt free-to-end-user calls from the restrictions on prerecorded or autodialed calls to cell phones—again, as long as the calls do not adversely affect the privacy rights the TCPA is intended to protect.

Section 3 would require any such exemptions to include requirements regarding the classes or categories of parties that may make such calls and the parties to whom such calls may be made; the purposes for which such calls may be made; and the number of calls that a calling party may make to a particular called party. It would also require any robocaller making use of such an exemption to give the called party an opt-out mechanism, with which the caller must abide.

We thank the drafters of this bill for including limits on exemptions. Like the drafters, we are concerned about the constant stream of exemption requests from robocallers to the FCC. Even though the FCC's exemption authority is not unbounded, and is limited by the TCPA to certain enumerated circumstances, these exemption requests could do a great deal of harm. If the FCC were to grant even a small portion of the exemption requests it receives, it would riddle the TCPA with holes.

Section 3's list of requirements that any exemptions must meet will also help ensure that any exemptions are crafted to achieve their purpose with the least possible negative effect on the privacy interests that the TCPA is intended to protect. For example, section 3 would not allow the FCC to grant an exemption that allowed unlimited unwanted calls. Instead, any exemption would have to include a limit on the number of calls that the robocaller could make to a particular consumer.

Section 3 would also require any exemption to give the consumer a conspicuous opt-out mechanism by which the consumer could require the robocaller to stop calling.

Requirements like these are important not just as a policy matter. Last week, the Fourth Circuit issued a decision, *American Association of Political Consultants, Inc. v. Federal Communications Commission,*[68] holding that the 2015 amendment to the TCPA that created an exemption for calls to collect government debt was unconstitutional because it created different rules for speech based on the content of the speech. A major element in the court's conclusion was its view that the exemption was not narrowly tailored.

The time for the parties to petition for rehearing has not passed, and several lower courts have taken a different view,[69] so this decision cannot be considered the last word on the question. Nonetheless, it highlights the importance of narrowly framing any exemptions so that they will not interfere with the privacy protection purposes of the TCPA.

We also recommend that the Committee consider whether to rework the section's language so that any exemption must articulate the purposes for which the exempted calls may be made. The recent Fourth Circuit decision held that the exemption for calls to collect government debts was content-based and therefore triggered First Amendment scrutiny. It might be better simply to require that any exemption identify clearly the calls or callers that are exempted.

Action Requested: Section 3 should be passed to place limits on the FCC's exemption authority.

F. Dealing Effectively with Wrong Number Calls—Section 4.

Section 4(a) requires the establishment of a reassigned number database to provide a mechanism for callers to determine whether the numbers they want to call are still used by the persons from whom they obtained consent. FCC Chairman Pai has already established a reassigned number database,[70] and he deserves substantial credit for doing so. Further, although the FCC did

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[68] ___ F.3d ___, 2019 WL 1780961 (4th Cir. 2019).

[69] Gallion v. Charter Commc'ns, Inc., 287 F. Supp. 3d 920 (C.D. Cal. 2018); Greenley v. Laborers' Int'l Union of N. Am., 271 F. Supp. 3d 1128 (D. Minn. 2017) (emergency and government debt exceptions are content-based, but serve a compelling governmental interest so are constitutional); Holt v. Facebook, Inc., 240 F. Supp. 3d 1021, 1032–1034 (N.D. Cal. 2017) (neither government debt nor emergency exception renders TCPA unconstitutional); Brickman v. Facebook, Inc., 230 F. Supp. 3d 1036 (N.D. Cal. 2017) (TCPA withstands strict scrutiny despite exceptions for emergency calls and government debt collection calls), *motion to certify interlocutory appeal granted*, 2017 WL 1508719 (N.D. Cal. Apr. 27, 2017); Mejia v. Time Warner Cable Inc., 2017 WL 3278926 (S.D.N.Y. Aug. 1, 2017).

[70] *In re* Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59, Second Report and Order, FCC 18-177 (Rel. Dec. 13, 2018), *available at*

adopt a safe harbor for callers that relied on information in the database to make wrong number calls, it appropriately limited the safe harbor to those callers that *properly used* the database and relied on it to make the call that turned out to be to a wrong number.[71] Section 4(a) will endorse this initiative and codify it into statute, protecting it from challenges that the calling industry might mount.

Section 4(b) also deals with the problem of wrong number calls by addressing the—rather absurd—insistence of many robocallers that the term "called party," as used throughout the TCPA, means the person the caller "intended to call," rather than the person actually reached.[72] The FCC is considering this very issue in a pending proceeding.[73] Passage of Section 4(b) will ensure that the FCC does not adopt the robocallers' illogical and dangerous interpretation, which would leave us unprotected from unwanted robocalls made by callers who would then have no incentive to ensure that they were only calling the people who had consented to be called.

It is important to note that the litigation around reassigned number calls is caused by *repeated and unstoppable* calls to the wrong number, not just one or two mistaken calls. Consumers are begging callers to stop the calls, and it is only when they don't that the consumer must resort to seeking legal advice to stop the calls and obtain legal redress. Some recent examples—from many similar cases—include:

1. *Allen v. JPMorgan Chase.*[74] Sheila Allen received about 80 calls from Chase regarding an auto loan that was not hers. The calls continued despite repeated requests that they stop.

2. *Lebo v. Navient.*[75] Zachary Lebo received 100 calls from Navient over two months for a "Justine Sulia," sometimes as many as five calls a day. He had never given permission for

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https://consumerfinancialserviceslaw.us/files/2018/12/FCC-18-177A1-Final-Report-and-Order-on-Reassigned-Number-Database.pdf.

[71] *Id.* at 20, ¶¶ 55, 56.

[72] *See, e.g.,* Soppet v. Enhanced Recovery Co., L.L.C., 679 F.3d 637, 640 (7th Cir. 2012) ("The phrase 'intended recipient' does not appear anywhere in § 227, so what justification could there be for equating 'called party' with 'intended recipient of the call'?"); Moore v. Dish Network L.L.C., 57 F. Supp. 3d 639, 648-649 (N.D. W. Va. 2014) (rejecting argument that only "called party" has standing; "No portion of § 227 states that only the intended recipient of a call can recover under it."); Swope v. Credit Mgmt., L.P., 2013 WL 607830, at *3 (E.D. Mo. Feb. 19, 2013) (finding no support for the argument that only a "called party" has standing; "Furthermore, even if the TCPA limits standing to 'called parties' the plaintiff qualifies as a called party under the facts of this case. Numerous courts that have considered this issue have held a party to be a 'called party' if the defendant intended to call the individual's number, and that individual was the regular user and carrier of the phone.").

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

[74] Case No. 1:13-cv-08285 (N.D. Ill. filed Nov. 18, 2013).

Navient to call him, and he revoked permission over the phone; yet the calls continued.

3. *Waite v. Diversified Consultants.*[76] Patricia Waite and her daughter Heather received about 166 calls from Diversified Consultants for "Marcy Rodriguez," whom neither of them knows. Diversified continued calling multiple times a day despite being told that it had a wrong number.

4. *Moseby v. Navient Solutions,* Inc.[77] Terrance Moseby received dozens of calls from Navient for a "Joshua Morris" or "Andrea." Mr. Moseby has never had any relationship with Navient or either of these people. He told Navient that it had the wrong number, but the calls continued.

As these cases illustrate, to protect consumers it is imperative that the pressure be maintained on callers to ensure that they are calling the correct number: the number that belongs to the consumer from whom they have consent to call. Mistakes do happen. But these lawsuits are not about a single mistake. These lawsuits are about callers who persist in calling numbers they have repeatedly been told do not belong to the person who provided consent. These cases are brought against callers that clearly did not have enough of a financial incentive to make sure that they stopped calling—and harassing—consumers with whom they had no relationship, who had not provided consent, and who begged the callers to stop the calls.

The robocallers' argument that "called party" should be interpreted to mean the person the robocaller "intended" to call, rather than the person who was actually called, is weak. It was rejected by the Seventh Circuit *in Soppet v. Enhanced Recovery Co.*,[78] in an opinion that the D.C. Circuit found "persuasive."[79] The term "called party" is used in several other places in the statute where it can be interpreted only to mean the party actually called, and it would go against the rules of statutory construction, as well as common sense, to hold that the term means one thing in one part of a statute and something else in another part of the same statute. Yet the FCC appears to be considering the adoption of exactly that interpretation.[80]

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[75] Case No. 2:17-cv-00154 (D. Wyo. filed Sept. 15, 2017).

[76] Case No. 5:13-cv-00491 (M.D. Fla. filed Oct. 7, 2013).

[77] Case No. 4:16-cv-00654 (E.D. Ark. filed Sept. 9, 2016).

[78] 679 F.3d 637 (7th Cir. 2012)

[79] ACA International v. F.C.C., 885 F.3d 687, 706 (D.C. Cir. 2018).

[80] *See* Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Seeks Comments on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, CG Docket Nos. 18-152 and 02-278, at 3-4 (Rel. May 14, 2018), *available at* https://ecfsapi.fcc.gov/file/0514497027768/DA-18-493A1.pdf.

Callers' exposure to liability for making wrong number calls provides an essential incentive for them to spend the time and money to limit wrong number calls. Once the reassigned number database is operational, using it correctly will be the best way to ensure that callers are not calling reassigned numbers. If the definition of "called party" were interpreted to mean "intended recipient," there would be no reason for callers to use the database, as they would not face any liability for calls to reassigned numbers whether or not they used it.

Action Requested: Section 4(b) should be passed to ensure that the definition of "called party" can be interpreted only to mean the party actually called.

G. Improving Enforcement Mechanisms—Section 5.

Section 5 of H.R. 946 provides enhanced enforcement mechanisms for violations of the TCPA by extending the statute of limitations and reducing some of the requirements for actions brought by the FCC in prosecuting violations of the TCPA.

It is important that the FCC be able to bring effective enforcement actions against violators of the TCPA, largely because without enforcement there is little deterrence. Unfortunately, FCC enforcement does not accomplish this goal. According to a recent article in the Wall Street Journal, the FCC has collected only $6,790 in fines against violators of the TCPA.[81]

Individual actions are essential for providing redress to individual consumers, but provide little deterrent effect on the callers. These callers simply pay up and repeat the pattern with other victims. Obviously, routinely violating the law and paying damages to the few consumers who actually file actions is more financially beneficial than complying with the law—else these robocallers would not keep repeating the pattern, as they are now doing. Moreover, TCPA litigation can be complicated and expensive, and the statute does not allow for the recovery of attorneys' fees, making individual claims about a small number of calls non-viable as a practical matter.

In contrast, private enforcement through class actions provides significant deterrence against illegal robocalls. The calling industry complains incessantly about the "nuisance class actions" brought by plaintiffs' attorneys, and cites these cases as a basis for requesting a variety of changes in the interpretation of TCPA terms. However, class actions drive compliance with the law and the FCC's

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[81] Sarah Krouse, *The FCC Has Fined Robocallers $208 Million. It's Collected $6,790,* The Wall Street Journal, Mar. 28, 2019, *available at* https://www.wsj.com/articles/the-fcc-has-fined-robocallers-208-million-its-collected-6-790-11553770803. The article cites as a source for the analysis "records obtained by The Wall Street Journal through a Freedom of Information Act request."

rules. In addition to strengthening the FCC's enforcement tools, Congress should preserve and strengthen the ability of consumers themselves to enforce the TCPA.

Repeat violators of this 40-year-old law cry foul when forced to answer for their transgressions. Lost in the rhetoric is the fact that many of the same corporations are violating the same law while ignoring the same pleas for the calls to stop. It seems that corporations have made the business decision that ignoring the TCPA is more profitable than compliance. Even more troubling, the consumers who experienced these violations of federal law are then sworn to secrecy through confidentiality clauses and subject to liquidated damages of potentially thousands of dollars if they share their stories.

Because class actions cost the calling industry money when they are held accountable for failing to follow the simple requirements for obtaining consent before they make robocalls, callers are more likely to change their behavior to avoid being held liable in a class action case. As the federal district court judge noted in a telemarketing case against Dish Network involving millions of calls:

> [T]he legislative intent behind the TCPA supports the view that class action is the superior method of litigation. "[I]f the goal of the TCPA is to remove a 'scourge' from our society, it is unlikely that 'individual suits would deter large commercial entities as effectively as aggregated class actions and that individuals would be as motivated ... to sue in the absence of the class action vehicle.'"[82]

Indeed, in another opinion related to this case, the court recited the failure of the defendant to comply with its promise to government enforcers, explaining its rationale for awarding treble damages for the defendant's willful violations of the TCPA:

> The Court concludes that treble damages are appropriate here because of the need to deter Dish from future violations and the need to give appropriate weight to the scope of the violations. The evidence shows that Dish's TCPA compliance policy was decidedly two-faced. Its contract allowed it to monitor TCPA compliance, and it told forty-six state attorneys general that it would monitor and enforce marketer compliance, but in reality it never did anything more than attempt to find out what marketer had made a complained-about call. It never investigated whether a marketer actually violated the TCPA and it never followed up to see if marketers complied with general directions concerning TCPA compliance and or with specific do-not-call instructions about individual persons. Dish characterized people who pursued TCPA lawsuits not as canaries in the coal mine, but as "harvester" plaintiffs who were illegitimately seeking money from the company. The Compliance Agreement did not cause Dish to take the TCPA seriously, so significant damages are appropriate to emphasize the seriousness of such statutory violations and to deter Dish in the future.
> . . .

[82] Krakauer v. Dish Network L.L.C., 311 F.R.D. 384, 400 (M.D.N.C. 2015) (emphasis added; citation omitted).

> This case does not involve an inadvertent or occasional violation. It involves a sustained and ingrained practice of violating the law.
>
> Dish did not take seriously the promises it made to forty-six state attorneys general, repeatedly overlooked TCPA violations by SSN, and allowed SSN to make many thousands of calls on its behalf that violated the TCPA. Trebled damages are therefore appropriate.[83]

Most of the litigation under the TCPA relates to calls to cell phones, because violations trigger damages after the first call. However, these cases are costly and complex to litigate, requiring experts to opine on technical issues such as whether the caller used an ATDS, or to assist in determining the number of covered calls, as well as analyze issues of consent. Calls to landlines are much less protected. Private litigation should be encouraged and facilitated by the laws governing robocalls, by allowing courts to award attorneys' fees to successful plaintiffs.

Additionally, the routine violation of the Do Not Call Registry by telemarketers illegally calling our residential phones has been a significant reason that many people have abandoned their residential landlines. Senator Durbin is introducing a bill that remedies this problem by making damages for violations of the Do Not Call Registry on the same basis as those available for making illegal calls to cell phones.

Action Requested:

1) Section 5 of H.R. 946 should be passed;

2) The TCPA should be amended to make it easier for victims of unwanted robocalls to bring actions against callers who violate the TCPA, by allowing courts to award plaintiffs attorneys' fees; and

3) The TCPA should be amended to provide equivalent damages for violating the Do Not Call Registry as are provided for making illegal calls to cell phones.

H. Improving the Reliability of Caller ID—Sections 6 and 7.

To decide whether to answer the phone one must know who is calling. This requires that both the name displayed—if a name is displayed—and the phone number displayed be accurate. In this era of incessant robocalling, if we can't actually identify who the real caller is, we don't have good information about whether to answer the phone.

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[83] Krakauer v. Dish Network L.L.C., 2017 WL 2242952, at *12–13 (M.D.N.C. May 22, 2017) (emphasis added; internal citations omitted.).

Currently the TCPA contains this provision dealing with Caller ID spoofing:

> (e) It shall be unlawful for any person within the United States, in connection with any telecommunications service or IP-enabled voice service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value, unless such transmission is exempted pursuant to paragraph (3)(B).[84]

Sections 6 and 7 of H.R. 946 take important steps to improve Caller ID reliability. While these are important steps, they do not go far enough to fully address the problem of spoofing. First, under the current statutory language, which H.R. 946 does not change, spoofing is illegal *only* if done with the specified wrongful intent. This is a very difficult standard to prove. This law, even with the new language in H.R. 946, will not prevent telemarketers and debt collectors from spoofing phone numbers

Another problem, as outlined recently in an article in the New York Times, illustrates that even ensuring authentic Caller ID information will not fully address the problem of anonymous robocalls. When discussing the new Stir/Shaken protocol now being employed by some telephone providers—and which they will be required to use if S. 151[85] (known as the TRACED Act) is enacted—the article noted that:

> The new standard hasn't yet been rolled out, and there are already cheap and easy ways to circumvent it. Scammers who can't hide behind spoofed numbers can just buy real ones — for $1 a month or less — and make tens of thousands of calls from each of them.
>
> "Many such services today require only a credit card, so that a robocaller can easily acquire a number, use it for robocalls until the number makes its way onto too many blacklists to be useful and then pick a new one," said Henning Schulzrinne, a professor of computer science at Columbia University who was a chief technology officer at the F.C.C. from 2012 to 2014 and again in 2017.[86]

To deal with this additional threat to our ability to know who is calling us, the FCC should be required to determine additional means to ensure that telephone service providers be able to

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[84] 42 U.S.C. § 227(e)(1) (emphasis added).

[85] This bill, sponsored by U.S. Sens. John Thune (R-S.D.) and Ed Markey (D-Mass.), is the Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act, S. 151.

[86] Tara Siegel Bernard, *Phone Companies Are Testing Tech to Catch Spam Calls. Let's Hope It Works.*, The New York Times, Apr. 26, 2019, *available at* https://www.nytimes.com/2019/04/26/your-money/robocalls-spam-calls.html.

identify who is using their system to place calls. These sections, as well as the TRACED Act[87] are good starts on the effort to authenticate Caller IDs, but it does not provide a mandate to address this additional threat posed by callers' ability to purchase untraceable phone numbers.

Action Requested:

1) Sections 6 and 7 of H.R. 946 should be clarified to mandate that the FCC require that the implementation of technological and other solutions to ensure that all robocallers are clearly identifiable and clearly traceable;

2) The TCPA should be amended specifically to prohibit the transmission of misleading or inaccurate caller ID information, except in limited circumstances necessary for law enforcement or the protection of the caller (while still permitting caller ID suppression altogether); and

3) Caller ID requirements should be clarified so that telephone service providers are required to prevent the connection of calls (or texts) for which accurate Caller ID information is not attached to a known customer whose name and address matches the originating call provider's information for that number.

V. Consumer Support for Other Pending Anti-Robocall Bills.

In recognition of extent of the current robocall crisis, there are several other excellent bills pending in the House to deal with unwanted robocalls. Among those others, and without limitation, we strongly support the following:

1. H.R. 1421, the "HANGUP Act, the "Help Americans Never Get Unwanted Phone calls (HANGUP) Act of 2019." The HANGUP Act would rescind section 301 of the Bipartisan Budget Act of 2015 exempting calls "made solely to collect a debt owed to or guaranteed by the United States" from the TCPA so that these debt collectors did not have to get consent from consumers before calling.

2. H.R. 2355, the "Regulatory Oversight Barring Obnoxious (ROBO) Calls and Texts Act." Among other things, this bill would require the FCC to implement regulations to compel carriers to adopt technological standards to prevent robocalls and periodically update those regulations.

3. H.R. 2298, the "Repeated Objectionable Bothering Of Consumers On Phones Act." Among other things, this bill would mandate call blocking of illegal robocalls and hold telephone service providers liable for failing in their obligations under the bill.

Thank you for caring about the concerns of consumers. I am available to answer any questions.

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[87] S. 151.

Respectfully submitted:

Margot Saunders
Senior Counsel
National Consumer Law Center

Appendix
Illustrative Recent Telemarketing Cases
Against American Businesses -- with their Stated Defenses

1. Pine v. A Place for Mom, Inc., 2019 WL 1531689 (W.D. Wash. Apr. 9, 2019) (Defendant claimed it calls were not made on an ATDS).

2. Bennett v. GoDaddy.com L.L.C., 2019 WL 1552911 (D. Ariz. Apr. 8, 2019) (Defendant claimed the telemarketing calls to cell phones were not covered because the cell phones were used for business purposes).

3. McCurley v. Royal Seas Cruises, Inc., 2019 WL 1383804 (S.D. Cal. Mar. 27, 2019) (Defendant claimed it was not responsible for the 634 million calls made by the lead generator.).

4. Wakefield v. ViSalus, Inc., 2019 WL 1411127 (D. Or. Mar. 27, 2019) (Defendant claimed it had consent and was not responsible for the 1,850,436 calls made to consumers).

5. Bakov v. Consol. World Travel, Inc., 2019 WL 1294659 (N.D. Ill. Mar. 21, 2019) (Defendant claimed it was not responsible for the millions of calls made by an agent using soundboard technology).

6. Parker v. Universal Pictures, 2019 WL 1521708 (M.D. Fla. Feb. 28, 2019) (Text marketing campaign for a movie, with over 500,000 calls).

7. Getz v. DirecTV, L.L.C., 359 F. Supp. 3d 1222 (S.D. Fla. Feb. 20, 2019) (DirecTV sent thousands of text messages to consumers, defendant claimed text messages were not sent with ATDS).

8. Katz v. Liberty Power Corp., L.L.C, 2019 WL 957129 (D. Mass. Feb. 27, 2019) (Liberty Power called hundreds of consumers, claimed the TCPA is unconstitutional).

9. Armstrong v. Investor's Business Daily, Inc., 2018 WL 6787049 (C.D. Cal. Dec. 21, 2018) (479,000 unique mobile numbers contacted, defendant claimed it had no vicarious liability for calls by third parties).

10. Pedro-Salcedo v. Haagen-Dazs Shoppe Co., Inc., 2017 WL 4536422 (N.D. Cal. Dec. 13, 2018) (Haagen-Dazs sent thousands of text messages, claimed texts sent were not telemarketing).

11. Bowman v. Art Van Furniture, Inc., 2018 WL 6444514 (E.D. Mich, Dec. 10, 2018) (Art Van Furniture made over one million telemarketing calls marketing its furniture).

12. Krakauer v. Dish Network, L.L.C, 2018 WL 6305785 (M.D.N.C. Dec. 3, 2018) (Dish Network claimed it had no vicarious liability for over 51,000 calls made to consumers by third party contractors).

13. Peralta v. Rack Room Shoes, Inc., 2018 WL 6331798 (E.D. La. Dec. 3, 2018) (Defendant sent thousands of text messages to consumers, and claimed texts were not sent with an ATDS).

14. Lee v. Branch Banking & Tr. Co., 2018 WL 5633995 (S.D. Fla. Oct. 31, 2018) (Defendant claimed it had no vicarious liability for thousands of calls made).

15. Mattson v. Quicken Loans, Inc., 2018 WL 52552288 (D. Or. Oct. 22, 2018) (Quicken Loans claimed that procedures regarding repeated calls were adequate).

16. Abramson v. Oasis Power L.L.C., 2018 WL 4101857 (W.D. Pa. July 31, 2018), *report and recommendation adopted by* 2019 WL 4095538 (W.D. Pa. Aug. 28, 2018) (Oasis Power claimed calls were not made with an ATDS and it had consent to contact consumers).

17. Somogyi v. Freedom Mortg. Corp., 2018 WL 3656158 (D.N.J. Aug. 2, 2018) (Defendant claimed hundreds of thousands telemarketing calls were not made with an ATDS because there was human intervention).

18. Coulter v. Ascent Mortgage Resource Group L.L.C., 2017 WL 2219040 (E.D. Cal. May 18, 2017) (Defendant claimed it the phone numbers contacted were not generated by ATDS equipment and the company had consent to contact consumers).

19. Youngman v. A&B Ins. & Fin. Inc., 2018 WL 1832992 (M.D. Fla. Mar. 22, 2018), *report and recommendation adopted by* 2018 WL 1806588 (M.D. Fla. Apr. 17, 2018) (Defendant placed calls to 330,511 unique telephone numbers).

20. Gould v. Farmers Ins. Exch., 288 F. Supp. 3d 963 (E.D. Mo. Jan. 19, 2018) (Defendant claimed there were insufficient facts to show that an ATDS was used, and that it had no vicarious or direct liability for the thousands of text message advertisements sent).

21. Braver v. Northstar Alarm Servs., L.L.C., 329 F.R.D. 320 (W.D. Okla. 2018) (Defendant claimed that millions of telemarketing calls were not made with a prerecorded voice, because the calls employed the Soundboard system, in which only snippets of a prerecorded voice were used, and that it did not have vicarious liability for thousands of calls made).

22. Glasser v. Hilton Grand Vacations Co., L.L.C., 341 F. Supp. 3d 1305 (M.D. Fla. 2018), *appeal to 11th Circuit pending* (Hilton claimed that calls made to potentially thousands of class members were not through an ATDS because of human intervention).

23. Sasin v. Enterprise Fin. Group, 2017 WL 10574367 (C.D. Cal. Nov. 21, 2017) (Defendant claimed calls were not made to residential numbers to thousands of class members).

24. Melito v. American Eagle Outfitters, Inc., 2017 WL 3995619 (S.D.N.Y. Sept. 11, 2017) (appeal filed 2d Cir. Oct. 10, 2017) (American Eagle claimed it was not liable for text messages sent by third party in mass marketing campaign).

25. Golan v. Veritas Entertainment, L.L.C., 2017 WL 2861671 (E.D. Mo. July 5, 2017) (Over three million calls made, defendant claimed it had no vicarious liability).

26. O'Shea v. American Solar Solution, Inc., 2017 WL 2779261 (S.D. Cal. June 27, 2017) (American Solar Solution contacted nearly 900,000 consumers).

27. Hooker v. Sirius XM Radio, Inc., 2017 WL 4484258 (E.D. Va. May 11, 2017) (One of at least four class actions challenging unwanted telemarketing calls; defendant moved to compel arbitration).

28. Liotta v. Wolford Boutiques, L.L.C., 2017 WL 1178083 (N.D. Ga. Mar. 30, 2017) (Defendant sent text messages to over 4,000 consumers).

29. Gibbs v. SolarCity Corp., 239 F. Supp. 3d 391 (D. Mass. Mar. 8, 2017) (SolarCity made telephone calls to thousands of consumers).

30. Hoover v. Sears Holding Corp., 2017 WL 639893 (D.N.J. Feb. 16, 2017) (Sears claimed it had consent to send text messages to thousands of consumers).

31. Meyer v. Bebe Stores, Inc., 2017 WL 558017 (N.D. Cal. Feb. 10, 2017) (Defendant claimed that there was no proof that ATDS was used, and claimed that it had consent to send text messages to 38,600 class members).

32. Mohamed v. American Motor Co., L.L.C., 320 F.R.D. 301 (S.D. Fla. 2017) (Defendant claimed it had no vicarious liability for the text messages sent to thousands of consumers).

33. Stevens-Bratton v. TruGreen, Inc., 675 Fed. Appx. 563 (6th Cir. 2017) (Defendant claimed that the system used to contact consumers was not an ATDS).

Exhibit C

Statement of FCC Commissioner Michael O'Rielly

Before the
Subcommittee on Communications and Technology
Committee on Energy and Commerce
U.S. House of Representatives

Hearing on
"Accountability and Oversight of the Federal Communications Commission"
May 15, 2019

Good morning. It is a pleasure to appear before this Subcommittee once again as it conducts further oversight of the Federal Communications Commission. I appreciate the opportunity to be here and welcome any questions you may have.

One word that we will hear a lot today and in the coming months around D.C. is infrastructure, and, in the context of the FCC, there's plenty to cover. The communications industry continues to change as technologies advance and as networks grow, and under Chairman Pai's leadership the Commission has made a strong effort to modernize our regulations to keep up with innovation. Make no mistake, this is hard work. And, it's made no easier by those with an interest in protecting the status quo. However, we have made progress despite the headwinds, and I am excited to see further growth and strengthening of our nation's communications infrastructure.

The four areas of communications infrastructure that I will touch on today are: 1) the need to quickly deploy more mid-band spectrum; 2) the need to protect taxpayer money from being used to overbuild existing infrastructure; 3) the need to address robocalls; and finally, 4) the need to end theft of 9-1-1 fees by states for programs not related to 9-1-1 emergency communications infrastructure.

Wireless Infrastructure: Freeing Additional Spectrum

The Commission continues to make great strides to ensure U.S. leadership in 5G by allocating the necessary millimeter wave frequencies, but, over the past three years, I have focused most of my energy on crucial mid-band spectrum. There is now near universal realization that far more needs to be

done to free up additional mid-bands given its propagation characteristics and opportunities for global spectral harmonization.

Finding additional mid-band spectrum is extremely hard. There is no fallow spectrum, incumbent users are everywhere, and a multitude of interested parties exist with different visions, interests, and needs. I faced these very issues when, with the Chairman's blessing, I led the process to review and revise our 3.5 GHz rules. Today, 3.5 GHz is nearly ready to go to auction and will support many functions, including 5G deployment. Unfortunately, software reconfiguration, the testing process, and other reasons seem to delay our auctions, meaning the priority access licenses are probably not going to be auctioned until the second quarter of 2020, at best. And, while 3.5 GHz is a good start, this supply cannot meet overall demand, especially since providers are seeking 100 megahertz channels. Continuing what the Chairman has put in motion, the Commission must redouble its efforts to allocate additional mid-band frequencies for next-generation licensed services.

Highest on our priority list must be the 3.7 to 4.2 GHz band, or the C-band. The Commission continues a deliberative process to consider the market-based approach, along with other options presented in the record. One of my foremost concerns is to ensure that the mechanism selected allows for the quickest reallocation of the band. I believe that the majority of relevant stakeholders are working through how best to accommodate the current incumbents and provide a sufficiently transparent process. Further, I remain hopeful that the satellite incumbents recognize the great need for such frequencies and are willing to part with closer to 300 megahertz, assuming the requisite technology can accommodate this amount.

In addition to 3.5 GHz and C-band, there needs to be a greater effort to identify more federal agency holdings in the mid bands for reallocation. I suggest that the 3.45 to 3.55 GHz band can be made available for commercial use, and additional feasibility studies should be initiated to determine the extent of commercial offerings that can be introduced in 3.1 to 3.45 GHz. This spectrum can be

combined with spectrum at 3.5 and 3.7 to 4.2 GHz to create the channel sizes required for true 5G services. Further, we should also start looking to the 7.125 to 8.5 GHz band to ensure that there is sufficient spectrum for the many providers that want to offer 5G services.

At the same time, the Commission must also consider mid-band spectrum for unlicensed use, such as the 4.9, 5.9, and 6 GHz bands. The community serving this incredibly valuable function needs larger spectrum swaths to meet the speed, capacity, and latency expectations demanded of next-generation Wi-Fi and other unlicensed uses.

Broadband Infrastructure: Deployment & Overbuilding

One of the many things my fellow colleagues and I agree on is the critical importance of broadband infrastructure to the American people. It is hard to imagine any part of our current society that hasn't been integrated with Internet connectivity: from education and information, to employment and health care, broadband serves as a key component to modern American life and has improved our standard of living in so many ways. This is true no matter the underlying characteristics of the technology used to provide digital access—wired or wireless. In fact, both serve interchangeable functions for increasing numbers of Americans and will likely continue to do so going forward.

Similarly, there is consensus among FCC Commissioners that all Americans—including those living in areas with challenging topography and sparse populations—should have the opportunity to access broadband Internet, if they wish to do so. While broadband availability has improved over the years, many unserved areas remain, and we must continue our efforts to expand access in an efficient and timely manner. That is why I have spent so much time over the years promoting better incentives and greater efficiency within our Universal Service Fund programs, and why I have repeatedly called for the implementation of the Remote Areas Fund (RAF) auction—in order to serve those Americans in the hardest to reach communities, which tend to be more rural and of lower economic status. I know that

Chairman Pai is committed to this goal as well, and I was very pleased to hear him announce that the Commission is moving forward on addressing the RAF—in some form—in the near future.

At the same time, I worry that the desire to expand broadband infrastructure will lead to wasteful and duplicative spending and adverse consequences for consumers. Recently, Congress allocated new funding for broadband programs at the Department of Agriculture, and there appears to be interest in funding broadband buildout via the Department of Commerce as well. While I would reiterate my humble request from previous testimony that Congress consider the FCC's Universal Service Fund (USF) as a primary means to distribute new funding, it is my foremost concern that any new funding go to unserved areas, rather than areas where broadband service already exists. Coordination among the various agencies and departments would be helpful, and there are new legislative efforts to help facilitate this. However, coordination can mean different things to different government agencies and their employees. Only through clear legislative direction and necessary oversight can Congress ensure that funding does not duplicate existing programs and goes only to those Americans without broadband today.

Failure to prevent overbuilding can undermine providers' existing and future investments and result in extremely problematic outcomes. In particular, providers serving hard to reach areas can face serious financial difficulties if a new government-subsidized provider "competes" to serve existing customers—or worse—takes only the most highly profitable customers. I have seen this situation firsthand within the Commission's own USF program. It recently came to my attention that new E-Rate-subsidized fiber networks were overbuilding local USF-funded Texas broadband providers and stealing their core anchor customers. By manipulating the contracting process to favor the bids of particular providers or self-provisioned service, some local school districts have been actively undermining local USF-supported providers' existing investments, and as a result, making it even more difficult to serve surrounding communities where some households may lack any Internet access at all.

Consumer Telephone Infrastructure: Stopping Illegal Robocalls & Protecting Legal Calls

The Commission has rightfully focused time and attention on addressing the surge of illegal robocalls in this country. These calls, many from overseas, are at best irritating; at worst, they serve to scam susceptible consumers out of their hard-earned money. Implementation of new technology should substantially reduce this menace, as will cooperation with foreign governments, but it is clear that eliminating such calls altogether is likely impossible.

In considering this issue, it is important to maintain a careful and nuanced approach. Not all robocalls are illegal or scams, and we must be precise in describing the actual problem at issue. Members of this Subcommittee deserve credit on this front, as efforts to engage in careful rhetoric were evident at your last robocall hearing. Many honest, legitimate businesses use automatic dialing technologies to communicate needed information to their customers and doing so is perfectly within the scope and intent of the TCPA. These legal and legitimate calls and texts share no part in the true robocall problem facing the nation's communications networks.

More fundamentally, any approach to illegal robocalls should not expose law-abiding and legitimate organizations to indeterminate and potentially crippling legal risk. Unfortunately, an aggressive few TCPA lawyers have taken advantage of the previous FCC's expansive and unclear rules to obtain unfair judgments and extract enormous, disproportionate settlements from businesses in virtually all industries.[1] This trend continues despite the U.S. Court of Appeals for the D.C. Circuit's rightful decision in *ACA Int'l v. FCC* to set aside the previous FCC's rules on the definition of an automatic telephone dialing system (ATDS) and one-call safe harbor in the reassigned numbers context. Rather than deferring to FCC expertise and staying TCPA cases pending the Commission's decision, various courts have issued a medley of confusing and conflicting rulings on the definition of ATDS in the

[1] U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* (August 2017), https://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf.

aftermath of *ACA Int'l*.[2] I would welcome any efforts to codify a more reasoned and clearer approach to these issues.

Returning to the problem of *illegal* calls, I applaud those innovative companies and carriers that have offered or are in the process of offering free call authentication and call blocking services to their customers. To protect and encourage these initiatives, I strongly support the adoption of a safe harbor to protect carriers from Communications Act liability in their call blocking efforts, as well as the one the FCC authorized for a reassigned numbers database. At the same time, carriers must adopt expeditious processes for correcting false-positives and ensuring that legal and legitimate calls are not incorrectly labeled or blocked.

Emergency Communications Infrastructure: Ending 9-1-1 Fee Diversion by States & Territories

The last issue that I will touch upon today is one that I've been very vocal about for the past several years, and that is 9-1-1 fee diversion. This is a very significant problem in terms of importance, though not as widespread as it once was, thankfully. Every month, millions of consumers pay their phone bills and if they look closely enough, they'll see a line item that generally refers to 9-1-1 emergency services, though the exact wording varies by jurisdiction. In accordance with the line item, consumers appropriately expect that those funds will go toward maintaining and upgrading 9-1-1 emergency calling systems. In some states and territories, however, this money flows into the general treasury and, as a result, only some portion of the collected fees ends up going toward emergency services. On top of being downright deceptive, this is a serious public safety matter that directly affects emergency call centers and personnel, not to mention all the people who live in or visit these states who expect that when they call 9-1-1 the system is up to date. Following the FCC's December report,[3] the

[2] Eric Troutman, *Waiting Game: Taking Stock of the TCPA One-Year Removed from ACA Int'l*, National Law review (March 26, 2019), https://www.natlawreview.com/article/waiting-game-taking-stock-tcpa-one-year-removed-aca-int-l.

[3] Tenth Annual Report to Congress on State Collection and Distribution of 911 and Enhanced 911 Fees and Charges for the Period of January 1, 2017 to December 31, 2017 (Dec. 17, 2018), https://www.fcc.gov/files/lothannual9llfeereporttocongresspdf.

states and territories guilty of diverting these critical funds for 2017 were: New York, New Jersey, Rhode Island, Montana, Nevada, West Virginia, and the U.S. Virgin Islands.

Several Members of this Committee have been outspoken on this issue as well, in particular Representatives Eshoo and Shimkus as leaders of the Congressional NextGen 9-1-1 Caucus, and I thank them for their efforts. For the new members of the Committee or Members who are less familiar with this issue, the Commission has been issuing an annual report for the last decade, pursuant to federal law, that measures the amount of money that gets diverted, if any, by each state on a total funding and a percentage basis. The report also provides an assessment of whether the diverted funds were used for purposes related in some capacity to public safety or completely unrelated. You may find it shocking that the diversion rate was as high as 90 percent in one state (New York).

Beyond creating a problem of public confidence in the fee system itself, fee diversion also shortchanges the budgets of emergency call centers and has prevented much needed upgrades. I've been to public safety answering points (PSAP) and I've met with the dedicated emergency communications professionals in many of the states subject to diversion. I can assure you that they are continually frustrated by their state politicians who do not have the will to do the right thing. However, I would be remiss if I didn't also address the positive side of our report. There are many states and territories that have made a concerted effort to get off the list, especially in some cases where the problem was an accounting technicality, and in others where public officials simply did the right thing and rectified their state budget practices. West Virginia has committed to do just this. To those states and their leaders, I tip my cap, and I know that in the long run the people in their states will be better off and their emergency communications systems will be stronger and more reliable.

It is also important to remind those states and territories that continue this despicable practice: they remain ineligible for new federal funding to modernize their call centers as the shift to Next Generation 9-1-1 occurs. NG911 will be costly, but its effectiveness and the resulting improvements to

the system will be vital to saving lives. In the Middle Class Tax Relief and Job Creation Act of 2012, this Subcommittee helped created a new grant program for 9-1-1, E9-1-1, and NG911, and the law specifically excluded states and territories that divert fees from receiving these grants.

In closing on this topic, I respectfully request the Subcommittee's assistance. The "name and shame" process generated by our annual report has only been so helpful. The state leaders of certain recalcitrant states—New York, New Jersey, and Rhode Island—don't seem to care about the shaming part. Moreover, other states and territories seem to spring up after seeing a lack of substantial penalties and decide to divert for a few years to address a budget shortfall or provide new spending for a pet project. I believe new legislation is needed, in addition to that already introduced on the topic, and that it will take a more forceful approach to end diversion once and for all. I would be pleased to work with any Members who are interested in this issue.

* * *

Thank you to the Chairmen and Republican Leaders for inviting me to testify today. I welcome the questions of any members of the Committee related to the topics I have covered or any others that are important to you and your constituents.