FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act and Interpretations in Light of the D.C. Circuit's ACA International Decision	)))))	CG Docket No. 02-278 CG Docket No. 18-152

Reply Comments of

National Consumer Law Center

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These comments are respectfully submitted to the Federal Communications Commission (FCC or Commission) by the **National Consumer Law Center** (NCLC) on behalf of its low-income clients, pursuant to the comments we filed on behalf of **forty-one other national and state public interest groups and legal services organizations in this proceeding**.[1] Our primary comments[2] already provide comprehensive responses to most of the statements filed by the various industry callers in this proceeding. We ask that these reply comments be considered as an addendum to our primary comments, only to address issues that we did not cover in those comments.

Summary

The FCC's Request for Comments[3] indicates that, in this proceeding, the FCC will make decisions that will affect the lives of every one of the hundreds of millions of American consumers

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[1] The national public interest organizations on whose behalf our primary comments were filed were: Americans for Financial Reform, Consumer Action, Consumer Federation of America, Consumers Union, NAACP, National Association of Consumer Advocates (NACA), National Association of Consumer Bankruptcy Attorneys (NACBA), National Legal Aid & Defender Association, Prosperity Now, Public Justice, Public Knowledge, US PIRG; the state public interest and legal services programs were Arkansans Against Abusive Payday Lending, Housing and Economic Rights Advocates, California, Public Good Law Center, California, Connecticut Legal Services, Inc., Jacksonville Area Legal Aid, Inc., Florida, Florida Alliance for Consumer Protection, LAF, Illinois, Greater Boston Legal Services, Massachusetts on behalf of its low-income clients, Public Justice Center, Maryland, Michigan Poverty Law Program, Legal Aid Center of Southern Nevada, Legal Services of New Jersey, Public Utility Law Project of New York, Bronx Legal Services, New York, Brooklyn Legal Services, New York, Long Term Care Community Coalition, New York, Manhattan Legal Services, New York, Queens Legal Services, New York, Staten Island Legal Services, New York, Financial Protection Law Center, North Carolina, North Carolina Justice Center, Legal Aid Society of Southwest Ohio, South Carolina Appleseed Legal Justice Center, Texas Legal Service Center, Virginia Poverty Law Center, Washington Defender Association, West Virginia Center on Budget and Policy, Mountain State Justice, West Virginia, and One Wisconsin Now.

[2] Comments of National Consumer Law Center on behalf of its low-income clients and forty-one other national and state public interest groups and legal services organizations, *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act and Interpretations in Light of the ACA International Decision, CG Dockets 02-278 and 18-152 (June 13, 2018) [hereinafter NCLC Primary Comments], *available at* https://ecfsapi.fcc.gov/file/106131272217474/Comments%20on%20Interpretation%20of%20TCPA%20in%20Light%20of%20ACA%20International.pdf.

[3] 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

who carry a cell phone. If the FCC issues definitions of "automated telephone dialing system" and "call" that are as narrow as the calling industry urges, no currently operating systems will be covered. This will mean that all automated calls using a live caller, as well as all automated texts, will no longer be subject to the consumer protections of the Telephone Consumer Protection Act (TCPA).[4] Callers and texters would no longer be required to have consent before making automated calls and texts to cell phones—which would mean that consumers would no longer have the right to stop the calls, either. We strongly urge the FCC not to take this route but, instead, to write definitions that will ensure that the consumer protection law it is charged with implementing is effective in protecting the sanctity of Americans' privacy.

The industry also seeks to nullify TCPA protections by urging the FCC to rule that consumers cannot revoke consent that is provided in a contract. Since most consents are provided by consumers in a contractual context, such a ruling would make the TCPA's fundamental protection of consent effectively meaningless. It would mean that consumers could never revoke consent that was provided as part of a contract, but could be subjected to robocalls from that caller for the rest of their lives.

The industry pushes for a "reasonable reliance" standard for calling reassigned numbers that is entirely unsupported in the language of the TCPA, which is essentially a strict liability statute. And many in the debt collection industry ask the FCC—completely illegally—to allow collectors of any debt—whether it is a government debt, a credit card debt, or any other type of debt—to enjoy the same exemptions from the requirement of consent as Congress allowed collectors of debt owed the federal government.

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.

[4] 42 U.S.C. § 227.

In our primary comments, we urged the FCC to rethink its Broadnet Ruling.[5] The beneficiaries of that ruling argue, also incorrectly, that just because there have been no cases citing that ruling, consumers have not suffered as a result, so NCLC's petition for reconsideration should be dismissed. But we have submitted many examples of harm to consumers due to relentless calls to collect government debt.[6] The fact that those callers have cited the Budget Act rather than the Broadnet Ruling to justify their calls does not mean that there is no problem. The reason that these callers have relied solely on the Budget Act is probably because the Broadnet Ruling is confined to entities acting as agents for the federal government, and few government contracts currently specify an agency relationship. The Broadnet Ruling, unless reconsidered, leaves a second set of floodgates in place, ready to open.

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

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

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I. The TCPA Covers Informational Calls

Industry callers repeatedly argue—incorrectly—that the TCPA is being misapplied to calls from "legitimate callers," and that the true focus of the TCPA was intended to be only on telemarketing calls. As spelled out at length in our primary comments, Congress could not have been clearer when it enacted the TCPA that its express purpose was to protect the privacy of Americans from abusive automated calls, not just to protect consumers from telemarketing scams.[7]

The structure of the statute itself also makes it plain that it was intended to cover, and that it does cover, more than just telemarketing calls. The term "telephone solicitation" is a separately defined term applicable to marketing calls only (in 42 U.S.C. § 227(a)(4)), which then triggers different treatment from other calls that do not involve solicitation. The entire section of the statute at issue in this case—§ 227(b)(1)(A)—does not even mention the word solicitation. The focus in that section is instead on calls made using "*any* automatic dialing system or an artificial or prerecorded voice."[8] The fact that the statute itself contains one set of standards for calls that do not involve solicitations, and another set for those that do, is clear proof that automated *informational* calls are intended to be protected by the requirement for consent for those calls. If the FCC were to ignore the express protections required by Congress to protect consumers' privacy from unwanted informational calls, it would be making an arbitrary and capricious determination.

[7] NCLC Primary Comments, *supra* note 2, at 2.

[8] 42 U.S.C. § 227(b)(1)(A) (emphasis added).

II. The Definition of Automated Telephone Dialing System is Intended to be Broad.[9]

The calling industry, led by the U.S. Chamber Institute for Legal Reform,[10] restates the same arguments in all of its filings: that an automated telephone dialing system[11] must be able to *both* "generate numbers . . . and . . . to store or produce those numbers using a random or sequential number generator," and dial those numbers.[12] However, the definition the industry is seeking does not define any equipment actually being used today. That is because the proposed definition makes no sense, and it would cover no equipment that is currently being used, or indeed has been used for the past twenty-five years, if ever.[13] The words "produce" and "generate" mean the exact same thing.[14] As we have pointed out, it is not possible for one system both to store and to generate numbers. Those two functions are mutually exclusive. If the system already has the numbers in it (stored), then there would be no need for it to produce or generate the numbers.[15] Numbers cannot be stored using a random or sequential number generator, so the phrase "using a random or

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[9] We have comprehensively articulated our legal arguments regarding the statute's required definition of an ATDS in our primary comments. To the extent that the points made in these reply comments replicate those in the primary comments that is only because they are necessary to illustrate the new arguments made in these reply comments.

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

[11] 42 U.S.C. § 227(a)(1).

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

[13] It is a technological fact that the industry's proposed definition covers no equipment that is now in operation. This fact was stated by Randall A. Snyder, a technology and industry expert in wireless and cellular telecommunications. For more information about Mr. Snyder, see http://www.wirelessresearchservices.com/.

[14] *See* Merriam-Webster Dictionary: generated; generating: transitive verb. 1: to bring into existence: such as a: procreate, beget; b: to originate by a vital, chemical, or physical process: produce generate electricity; 2: to be the cause of (a situation, action, or state of mind) these stories … generate a good deal of psychological suspense; 3: to define or originate (something, such as a mathematical or linguistic set or structure) by the application of one or more rules or operations; especially: to trace out (something, such as a curve) by a moving point or to trace out (a surface) by a moving curve. https://www.merriam-webster.com/dictionary/generate.

[15] *Id.*

sequential number generator" must modify only the word "produce." Storage is an entirely separate function from generation of numbers, and is an alternative in the statute to production. For example, one might store milk generated by a cow, but one would not store milk using a cow. As industry's proposed definition would cover no equipment that is in operation today, such a definition would be even more arbitrary and capricious than the one complained of by the industry in *ACA International v. F.C.C.*[16] [hereinafter *ACA International*].

Moreover, the TCPA was specifically designed to be a dynamic law that evolves with time and covers equipment that was not in operation in 1991, when the law first passed in Congress. This was made explicit by Senator Hollings, as he introduced the negotiated final bill to the Senate:

> Mr. HOLLINGS.
> Mr. President, I am pleased to report that we have come to an agreement with the House on a bill to restrict invasive uses of telephone equipment.
> * * *
> The FCC is given the authority to exempt certain types of calls, and the FCC is not limited to considering existing technologies. The FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies.[17]

The TCPA's application to evolving technology is evident in the finding by the FCC that text messages are calls covered by the protections of the statute in its 2003 Order.[18] This was reiterated—without challenge—in subsequent orders, including the 2015 Omnibus Order that was the subject of *ACA International*.[19] Indeed, this view was explicitly endorsed in 2016 by the U.S. Supreme Court when it held that "[a] text message to a cellular telephone, it is undisputed, qualifies

[16] 885 F.3d 687 (D.C. Cir. 2018).

[17] 137 Cong. Rec. S18781-02, 1991 WL 252592, Senate Proceedings and Debates of the 102nd Congress, First Session (Nov. 27, 1991) (emphasis added).

[18] *In* re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*,* CG Docket No. 02-278, Report and Order, 18 FCC Rcd. 14014, 14115 ¶ 165 (F.C.C. July 3, 2003).

[19] *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 ¶¶ 108-122 (F.C.C. July 10, 2015); *In re* Rules and Regulations Implementing the Controlling the Assault of Non–Solicited Pornography and Marketing Act of 2003 and Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*,* CG Docket Nos. 04-53 and 02-278, Order, 19 FCC Rcd. 15927, 15934 ¶ 16 (F.C.C. Aug. 12, 2004).

as a 'call' within the compass of §227(b)(1)(A)(iii)."[20] Other courts have reached the same conclusion.[21] However, text messages are covered as calls under the TCPA only if they are sent on equipment that qualifies as an ATDS. As the calling industry's proposed definition does not cover any equipment actually in existence, the result would necessarily be that text messages, even those sent *en masse* to tens of thousands of consumers, would not be covered by the TCPA.

The recent determination of the Third Circuit case *Dominguez v. Yahoo, Inc.*[22] vividly illustrates the consequences of a ruling that a system that clearly stores numbers and dials those numbers must also be able to generate the numbers randomly or sequentially. The Third Circuit found that a completely automated text messaging system used by Yahoo to send 27,809 unwanted text messages to the consumer was not an ATDS because the consumer did not prove that it had the present capacity to generate random or sequential numbers.[23] As explained by the first appellate decision in this case, the consumer had bought a cell phone that came with a reassigned number. The previous

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[20] Campbell-Ewald Co. v. Gomez, ___ U.S. ___, 136 S. Ct. 663, 667, 193 L. Ed. 2d 571 (2016), *aff'g* 768 F.3d 871 (9th Cir. 2014).

[21] Van Patten v. Vertical Fitness Grp., 847 F.3d 1037, 1041–42 (9th Cir. 2017); Keating v. Peterson's Nelnet, L.L.C., 615 Fed. Appx. 365 (6th Cir. 2015); Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 952 (9th Cir. 2009) ("a text message is a 'call' within the meaning of the TCPA"); Griffith v. ContextMedia, Inc., 235 F. Supp. 3d 1032 (N.D. Ill. 2016) (unwanted text messages encroach on consumers' freedom to choose how their telephones are used just as much as unwanted calls do; recipients have Article III standing even though text messaging did not exist when TCPA was passed); Reardon v. Uber Technologies, Inc., 115 F. Supp. 3d 1090 (N.D. Cal. 2015); Scott v. Merchants Ass'n Collection Div., Inc., 2012 WL 4896175 (S.D. Fla. Oct. 15, 2012); Connelly v. Hilton Grand Vacations Co., L.L.C., 2012 WL 2129364 (S.D. Cal. June 11, 2012); Buslepp v. Improv Miami, Inc., 2012 WL 1560408 (S.D. Fla., May 4, 2012); Buslepp v. B&B Entm't, L.L.C., 2012 WL 1571410 (S.D. Fla. May 3, 2012); Pimental v. Google Inc., 2012 WL 691784 (N.D. Cal. Mar. 2, 2012); Lo v. Oxnard European Motors, L.L.C., 2011 WL 6300050 (S.D. Cal. Dec. 15, 2011); Kramer v. Autobytel, 759 F. Supp. 2d 1165 (N.D. Cal. 2010); Lozano v. Twentieth Century Fox Film Corp., 702 F. Supp. 2d 999 (N.D. Ill. 2010); Kazemi v. Payless Shoesource Inc., 2010 WL 963225 (N.D. Cal. Mar. 12, 2010); Abbas v. Selling Source, L.L.C., 2009 WL 4884471 (N.D. Ill. Dec. 14, 2009); Joffe v. Acacia Mortg. Corp., 121 P.3d 831 (Ariz. Ct. App. 2005). *See also In re* Jiffy Lube Int'l, Inc., Text Spam Litig., 847 F. Supp. 2d 1253 (S.D. Cal. 2012); Daniel L. Hadjinian, *Reach Out and Text Someone: How Text Message Spam May Be a Call Under the TCPA*, 4 Shidler J. L. Com. & Tech. 3 (2007).

[22] Dominguez v. Yahoo, Inc., ___ F.3d ___, 2018 WL 3118056 (3d Cir. June 26, 2018).

[23] *Id.* at *4 ("Ultimately, Dominquez cannot point to any evidence that creates a genuine dispute of fact as to whether the Email SMS Service had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers." (emphasis added)).

owner of the number had subscribed to an email-notification service offered by Yahoo, which sent a text message to the owner's phone number every time an email was sent to the 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 seventeen months, the consumer brought suit under the TCPA. After the case was filed, the messages finally stopped.[24]

Yahoo's defense in this case was that it was not using an ATDS to generate these automated text messages. The controversy before the court was concentrated around the concepts of "capacity" and "sequential" in the statutory language defining an ATDS. Yet, as Yahoo explained in its brief to the Third Circuit, the system was entirely automated. Yahoo never argued that a human being actually punched in the individual letters forming the words for any of the 27,809 messages to Dominguez. Indeed, citing the declaration of Yahoo's Senior Director of Engineering, Yahoo's brief to the Third Circuit explained the entirely automated system that drove these messages:

> When an email was sent to a Yahoo email account, Yahoo's internal network protocol used for email transmission would transmit the email to the user's mailbox and query the MSDB to determine whether the incoming email message matched any of the "rules" the Yahoo user had created in setting up the Email SMS Service. If there was such a match, the system would execute the rule to forward the email as a text alert.
>
> When forwarding a text message alert requested by a user, the Email SMS Service would transmit to Athena the recipient's Yahoo ID, the sender's email address, the subject of the incoming email, and the text from the body of the incoming email. Athena would then retrieve from the UDB the telephone number inputted by the user, and query a third-party service called Net Number that identified the wireless carrier associated with the telephone number. If necessary, Athena would truncate

[24] Dominguez v. Yahoo, Inc., 629 Fed. Appx. 369, 370–71 (3d Cir. 2015).

> the text of the email to include only the first 115 characters for inclusion in the text message alert. Athena would then deliver the text of the message and the Yahoo user's telephone number to the proper wireless carrier.[25]

Thus because the court accepted the argument that, to meet the ATDS definition, the system had to both store and generate numbers, even though there was no dispute that Yahoo's system stored numbers and automatically dialed them.

As we argued in our primary comments, the statutory definition plainly covers a system that stores and dials numbers. The requirement to produce numbers using a random or sequential number generator is an alternative to the requirement to store numbers. The juxtaposition of the facts of the *Yahoo* case (with its 27,809 unstoppable text messages) with the industry's arguments in this proceeding highlights the necessity for the FCC to consider the legislative intent and the actual effect of the use of the automated system on consumers when providing the definition for an ATDS. Accepting the industry's arguments would leave both consumers and the FCC powerless to prevent companies from flooding consumers' cell phones with thousands of unwanted text messages. As we requested in our primary comments,[26] the FCC should take care to include in the definition of an ATDS equipment that is essentially automated and that does initiate *en masse* calls (whether single calls or texts to many people, or many calls or texts to the same person).

III. The Right of Revocation is Essential to Make Consent Meaningful.

A. Most Consents Are Provided in a Contractual Context.

If the FCC were to rule as the industry requests and hold that consent provided as part of a contract cannot be unilaterally revoked by the consumer, such a ruling would effectively eradicate the TCPA's requirement for express consent for automated calls. Although the statutory language

[25] Dominguez vs. Yahoo Holdings, Case No. 17-1243, Pacer Doc. 003112674129, at 14 (3d Cir. filed July 14, 2017) (Appellee's Brief) (internal citations omitted).

[26] NCLC Primary Comments, *supra* note 2, at 25-27, section 2(D).

requires "prior express consent," the FCC has ruled previously that this consent can be implied when the consumer supplies a cell phone number in a transaction.[27] The FCC has even determined that consent given to one seller may transfer to a third-party contractor performing services for that seller (such as debt collection).[28]

As we stated in our primary comments,[29] the D.C. Circuit's decision in *ACA International* confirms the FCC's conclusion in its 2015 Order[30] that consumers have the right to revoke consent:

> It is undisputed that consumers who have consented to receiving calls otherwise forbidden by the TCPA are entitled to revoke their consent.[31]

The only distinction that the *ACA International* court made in relation to contractually provided consent, was that the method of revocation might be limited by contract, because the issue was not before the court.

> Nothing in the Commission's order thus should be understood to speak to parties' ability to agree upon revocation procedures.[32]

Whether parties can agree contractually on a reasonable method of revoking consent is a very different question from the request of the callers that a contract be permitted to trump the essential right of revocation and bar revocation altogether.

To adopt such a position would be inconsistent with the structure of the TCPA. Its prohibition of "*any* call" other than "*a call* … made with the prior express consent of the called party"[33] is written to apply to each individual call. The logical conclusion is that the consent

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[27] *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 27 F.C.C. Rcd. 1830, 1841 ¶ 28 (F.C.C. Feb. 15, 2012).

[28] *See id.*

[29] NCLC Primary Comments, *supra* note 2, at 35-40, section IV.

[30] *See In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961, 7993 ¶ 56 (F.C.C. July 10, 2015)..

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

[32] *Id.* at 710 (D.C. Cir. 2018) (emphasis added; citation omitted).

[33] 47 U.S.C. § 227(b)(1)(A) (emphasis added).

requirement applies separately to each call. This means that the consumer's consent must be current consent, so past consent must be revocable regardless of whether it was obtained through a contract or other means.

It is essential that the FCC bear in mind that most of the automated calls about which consumers complain are either telemarketing calls or debt collection calls.[34] For calls 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. 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 presumed to have been provided when a consumer gave her telephone number to open a charge account in a store. Providing a telephone number when applying for credit is hardly express consent to be contacted months or years later by a debt collector.[35] 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.[36]

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 had provided her phone number in a contract, she could never stop a debt collector's automated calls by withdrawing that consent.

One Second Circuit decision, *Reyes v. Lincoln Automotive Financial Services*,[37] erroneously held that the consumer's consent is irrevocable when it is part of a binding contract. However, that

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[34] See section III(B), *infra,* for more discussion about unwanted and unstoppable debt collection calls.

[35] "[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 Docker No. 92-90, Report and Order, 7 F.C.C. Rcd. 8752, 8769 ¶ 31 (Oct. 16, 1992).

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

[37] Reyes v. Lincoln Auto. Fin. Services, 861 F.3d 51, 58 (2d Cir. 2017).

decision failed 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."[38] The *Reyes* decision also failed to understand that in several other circuit court decisions upholding the consumer's right to revoke consent, consent had also been provided in a contractual context.[39]

B. If Revocation is Not Permitted, Calls Will Be Even More Abusive and Unstoppable.

In our primary comments, we provided a number of examples of cases in which debt collectors believed they did not have to stop calling when consumers asked them to stop. These included the 1,845 calls made by Conns Appliance to one consumer (Ms. Stevens) who was making payments on her debt, albeit slightly behind.[40] And it included the hundreds of complaints made by student loan borrowers, their families, and the unlucky owners of reassigned numbers against Navient for abusive, unstoppable calls, as detailed in our request to the FCC to enforce the law against Navient (which included 599 complaints made just about *the communication tactics of* this one company to the Consumer Financial Protection Bureau (CFPB)).[41]

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[38] *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, 7996 ¶ 62 (F.C.C. July 10, 2015). *See* Ginwright v. Exeter Fin. Corp., 280 F. Supp. 3d 674 (D. Md. 2017) (declining to follow *Reyes*; noting its inconsistency with FCC's ruling).

[39] *See* Gager v. Dell Fin. Services, 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).

[40] *See* NCLC Primary Comments, *supra* note 2, at 7 and Appendix 1.

[41] *See* NCLC Primary Comments, *supra* note 2, at 51.

We know that debt collection callers comprise *eighteen of the top twenty robocallers* in the United States.[42] And we know that debt collection calls are among those calls that are routinely complained about and blocked by the called parties.[43]

In 2018, the National Consumer Law Center sent a Freedom of Information Act (FOIA) request to the Federal Trade Commission asking for a breakdown of the 608,535 debt collection complaints reported in the Consumer Sentinel Network: Data Book 2017.[44] Data provided to NCLC in response to this FOIA request[45] indicated that the two most common categories of law violations reported by consumers with debt collection complaints were related to debt collection calls that continued after a formal request to cease all communications was made, and repetitive or continuous calls from the collectors.[46]

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[42] *See* YouMail Robocall Index, *available at* https://robocallindex.com/ (last accessed June 8, 1018). To come up with the names of the callers, we simply called the numbers listed on the website to see who answered.

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

[44] Federal Trade Commission, Consumer Sentinel Network: Data Book 2017 (Mar. 2018), *available at* https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2017/consumer_sentinel_data_book_2017.pdf (compiling complaints from a variety of sources that are detailed in this Data Book's Appendix at A2-A4).

[45] Email from Kamay Lafalaise, Federal Trade Commission, Office of the General Counsel, to April Kuehnhoff, National Consumer Law Center (May 29, 2018) (providing FOIA response in an attached spreadsheet).

[46] The "cease communication" request referred to in the FTC's list presumably includes only written requests to debt collectors covered by the Federal Fair Debt Collection Practices Act to stop all communications. Other than the TCPA, there is no federal law that provides an equivalent right for consumers to request that communications cease from creditors collecting their own debt. For example, if Ms. Stevens had complained to a government agency about Conns' continued calls, her complaint would not be included in this number, because the FDCPA does not apply to creditors, like Conns, collecting their own debts. (See the detailed explanation of Ms. Stevens' efforts to stop collection calls to stop in NCLC Primary Comments, *supra* note 2, at 7.) As a result, the 227,917 number of complaints in this table about calls after a "cease communication" request is likely to understate significantly the number of complaints made to government agencies about continued calls to collect debts after a request for the calls to stop.

Complaints Nationwide to Government Agencies and Other Sources
Related to Debt Collection Calls in 2017
Compiled by the Federal Trade Commission[47]

Calls Debtor After Getting "Cease Communication" Notice	227,917
Calls Any Person Repeatedly or Continuously	210,238

These 438,155 complaints were made to state and federal agencies just about repeated or unstoppable calls to collect debts. And we know from the many of the cases filed[48] that many of these callers persist in making the calls even in the face of repeated requests for the calls to stop. 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.[49] We can only imagine the nightmarish 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.

IV. Reassigned Numbers and Reasonable Reliance

The FCC's 2015 Order articulated—for what appears to be the first time—an approach purportedly allowing callers to "reasonably rely" on the consent of the person intended to be called for the first call made after a number was reassigned. This analysis was explained in a footnote:

> Specifically, the TCPA anticipates the caller's ability to rely on "prior express consent," 47 U.S.C. 227(b)(1), and we interpret that to mean reasonable reliance, and the balancing we adopt herein reflects our construal of reasonable reliance. We find no basis in the statute or the record before us to conclude that callers can reasonably rely on prior express consent beyond one call to reassigned numbers.[50]

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[47] The FOIA response from the FTC broke out the law violations by state. These numbers represent the total number of complaints reported nationally in 2017.

[48] *See* NCLC Primary Comments, *supra* note 2,, at 6-9, section I(C).

[49] For example, this was the reason provided by Conns Appliance as to why its calls kept coming even after repeated requests to stop the calls.

[50] *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, 8009 ¶ 90 n.312 (F.C.C. July 10, 2015).

Members of the calling industry appealed the FCC's creation of a one-call safe harbor under the Administrative Procedure Act, and in *ACA International* the D.C. Circuit held that the FCC had not articulated a sufficient rationale for choosing a single call as the safe harbor. The court did not, however, address the underlying premise of whether establishing a reasonable reliance test for callers is appropriate *or legally justified* under the terms of the strict liability regime set out in the TCPA. This issue was not appealed and not reviewed.[51] The sole issue reviewed by the court was whether the FCC's proposed use of this test to allow a safe harbor for just one call was arbitrary and capricious.[52]

The *ACA International's* court's determination that the FCC's one-call safe harbor was arbitrary cannot be construed as approval of the use of a reasonable reliance test. Instead, it illustrates that, if such a test is used, it will be closely examined to ensure that it is clear, logical, legally justified, and not arbitrary.

The *ACA International* court noted with approval the FCC's consideration of the development of a reassigned number database.[53] Indeed, it is only in the context of this proposed database that any concept of reasonable reliance must be considered. The explicit language of the TCPA is strict liability. There is absolutely no language in the statute that provides room for consideration of the intentions of the callers. Should the FCC permit a safe harbor for certain calls made after the caller has checked the database, that safe harbor must be closely linked to the purposes of the TCPA and limited to circumstances in which the caller used due diligence but was

[51] ACA International v. F.C.C., 885 F.3d 687, 706 (D.C. Cir. 2018) ("Having instead embraced an interpretation of the statutory phrase 'prior express consent' grounded in conceptions of reasonable reliance, the Commission needed to give some reasoned (and reasonable) explanation of why its safe harbor stopped at the seemingly arbitrary point of a single call or message. The Commission did not do so.").

[52] *See id.* at 705.

[53] *See id.* at 709.

misled by an actual error in the database.[54] If a safe harbor were to allow a caller to avoid liability after calling consumers with reassigned numbers when the caller had failed to check the database in a timely fashion, or had misdialed the number, or had failed to stop calling after the called party informed the caller that it was the wrong number, the caller would not have been reasonable to rely on the database.[55]

V. The FCC Has the Authority and the Mandate to Closely Regulate Calls to Collect Federal Debts.[56]

Some creditors and debt collectors have asked the FCC to extend the exemption permitted for calls to collect federal debt to all debt collection calls. It should not be necessary to point out that this would be a completely illegal extension of a specific and limited exemption passed just for the collection of federal debt as part of the 2015 Budget Act.[57]

Servicers and collectors of federal debt also wrongly argued that the FCC does not have the authority to issue the consumer protection regulations it provided in 2016 (which were never implemented because the request for approval was withdrawn from the Office of Management and Budget[58]).

The FCC has ample rulemaking authority under two separate provisions of the Budget Act amendments to the TCPA. Along with the exemption language in the TCPA, Congress specifically *required* the Commission to prescribe regulations to implement the Budget Act amendments, in

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[54] We have set out the specific requirements for what we believe would be a legal and limited safe harbor for callers using the database in our primary comments. *See* NCLC Primary Comments, *supra* note 2, at 32-34, section 3B.

[55] These are some of the many, fairly absurd, proposed bases for safe harbors proposed by the calling industry in its comments in this docket.

[56] NCLC Primary Comments, *supra* note 2, provide detailed responses to the questions asked by the FCC in relation to these rules at pages 50-66, section VI.

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

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

section 301(b).[59] Notably, this general rulemaking authority, which the servicers never cite or even acknowledge, is *in addition to* the Commission's more specific discretionary authority set forth in section 227(b)(2)(H) to restrict the number and duration of these calls. This general rulemaking authority parallels the rulemaking authority created by section 227(b)(2), which also uses the language "the Commission shall prescribe regulations to implement the requirements [of § 227(b)]." However, the pre-existing rulemaking authority set forth in section 227(b)(2) is subject to numerous restrictions and requirements, while the new authority in section 301(b) is not. If Congress wanted the Commission to regulate just the number and duration of calls, section 301(b) would be entirely superfluous. The Budget Rules issued by the FCC in 2016[60] fall easily within the scope of the Commission's discretionary authority to limit the number and duration of calls, but even if they did not, they are well within the more general authority conferred by section 301(b).

Finally, the callers pose the alarming scenario that debtors subject to these unconsented-to calls should not be permitted to stop the calls. Yet we know from the experience to date with these servicers and collectors that harassment through multiple calls is a primary way in which they seek to collect debts. (Multiple examples of these abusive calling patterns are set out in our primary comments.[61]) If debtors—or their families, or consumers who inherit reassigned numbers from debtors or their families—were not permitted to tell these callers to stop calling, the number of unwanted and abusive calls from these collectors would skyrocket. Not permitting consumers to stop the calls would be a gross misreading of the consumer protection purposes of the TCPA.

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

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

[61] *See* NCLC Primary Comments, *supra* note 2 at 50-66, section VI.

VI. The Dangers of the Broadnet Ruling are Displayed in the Abusive Calling Patterns of Some Collectors of Federal Debt.

We provided full answers to the questions asked by the FCC about the Broadnet Ruling[62] and its interplay with the debt collection rules in our primary comments.[63] However, the federal contractors that stand to benefit from the release from compliance with the TCPA afforded by the Broadnet Ruling repeatedly stated in their comments that the problems we predicted would come to pass, as the result of the Broadnet Ruling, have not materialized. This proves, these commenters say, that our fears and statements of urgency to FCC to reconsider and rescind the Broadnet Ruling were overblown.

Any claim that there have not been problems with calls by federal contractors since the Broadnet Ruling is completely unfounded, as shown by the deplorable activities of Navient Solutions, LLC, a servicer of federal student loan debt. Navient's relentless telephone calls and refusals to stop calling are detailed extensively in NCLC's June 2017 request asking the Commission to bring an enforcement action against Navient for its massive and continuous violations of the TCPA against student loan debtors.[64] The enforcement request describes numerous, repeated and deliberate flouting of the strictures of the TCPA that have caused considerable harm to student loan debtors and their families.[65] It is true that Navient has attempted to shield its actions by citing the

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

[63] NCLC Primary Comments, *supra* note 2, at 40-50, section V.

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

[65] The enforcement request provides details of numerous instances in which Navient deliberately engaged in a campaign of harassing and abusing consumers through the use of repeated, unconsented-to robocalls, calling consumers' cell phones hundreds and—in some cases—thousands of times after being asked to stop. Many

Budget Act amendments to the TCPA rather than the Broadnet Ruling, but these problems illustrate why the Broadnet Ruling is so ill-advised.

The reason that federal contractors like Navient, which have been harassing consumers with unwanted and unstoppable calls, have tended to cite the Budget Act rather than the Broadnet Ruling is probably that they are not sure whether they fall under the Broadnet Ruling. The Broadnet Ruling applies only to federal contractors "acting as the government's agent in accord with the federal common law of agency."[66] Yet, as the Professional Services Council's Comments in this proceeding make clear, "government contractors are typically not agents of the government."[67] If federal contractors have not yet cited the Broadnet Ruling as justification for their actions, it is only because their current contracts still treat them as independent contractors rather than agents.

Conclusion

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

Respectfully submitted,

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of these calls occur multiple times a day, often numerous times a week. These calls are frequently made to consumers while they are at work, even after they have explicitly explained to Navient that they cannot accept personal calls at work. Indeed, Navient's internal policies permit up to eight calls per day in the servicing of student loan debt. *See, e.g.*, McCaskill v. Navient Solutions, Inc., 178 F. Supp. 3d 1281, 1286 (M.D. Fla. 2016).

[66] *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petitions for Declaratory Ruling by Broadnet Teleservices LLC, National Employment Network Association, RTI International, CG Docket No. 02-278, Declaratory Ruling, 31 FCC Rcd. 7394, 7401 ¶ 16 (July 5, 2016), *available at* https://ecfsapi.fcc.gov/file/0705087947130/FCC-16-72A1.pdf.

[67] Comments of Professional Services Council, *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket Nos. 02-278 and 18-152, at 5 (filed June 13, 2018), *available at* https://ecfsapi.fcc.gov/file/10613492614312/Comments%20of%20PSC%20re%20TCPA%20Public%20Notice.PDF.

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