

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)
)

PETITION FOR DECLARATORY RULING OF PERDUE FOR SENATE, INC.

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Summary

Perdue for Senate, Inc. (“Perdue for Senate”) requests that the Federal Communications Commission (“FCC” or “Commission”) clarify that delivery of a voice message directly to a voicemail box through ringless voicemail (“RVM”) technology does not constitute a “call” subject to prohibitions on the use of an automatic telephone dialing system (“ATDS”) or an artificial or prerecorded voice under Section 227(b)(1)(A)(iii) of the Telephone Consumer Protection Act (“TCPA”) or Section 64.1200(a)(1)(iii) of the FCC’s rules.

RVM technology allows for the delivery of a voice message directly to voters’ voicemail boxes without placing a “call” “to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.”¹ Therefore, RVM technology falls outside of the TCPA’s regulatory scope and the FCC’s rules on making wireless calls using either ATDS or an artificial or prerecorded voice. Further, RVM technology presents substantial public interest benefits: (1) the technology allows non-profit entities, including political campaigns and get-out-the-vote (“GOTV”) organizations, to efficiently provide voters with critical and localized election-related information; and (2) it enables such organizations to communicate with potential voters in a manner that does not raise the same privacy concerns that trigger the TCPA. For example, voicemails delivered by RVM technology do not disrupt potential voters’ lives with ringtones that prompt the individual to pick up the phone; do not result in any charge for the individual’s receipt of the message; and can be listened to only if and when voters choose. Indeed, for political campaigns, the ability to efficiently reach voters in a nonintrusive way is a bipartisan issue that affects campaigns across the nation.

¹ 47 U.S.C. § 227(b)(1)(A)(iii).

Perdue for Senate therefore respectfully requests that the Commission issue a declaratory ruling to clarify that the TCPA was not designed to, and ultimately does not, regulate RVM technology under its wireless call prohibitions.

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I. INTRODUCTION AND SUMMARY

In accordance with Section 1.2 of the Federal Communications Commission’s (“FCC” or Commission”) rules,² Perdue for Senate, Inc. (“Perdue for Senate”)³ hereby requests that the FCC issue a declaratory ruling that the delivery of a ringless voicemail (“RVM”) directly to a voicemail box does not constitute a “call” subject to the wireless prohibitions on the use of an automatic telephone dialing system (“ATDS”) or an artificial or prerecorded voice.⁴ Such a ruling by the FCC would ensure that non-profit organizations, including political campaigns and advocacy groups across the political spectrum, can send important information to voters in a non-intrusive manner that minimizes the possibility of costly TCPA litigation.

RVM technology, which Perdue for Senate’s vendor used in its get-out-the-vote (“GOTV”) efforts for the January 2021 U.S. Senate runoff elections in Georgia, enables non-

² 47 C.F.R. § 1.2.

³ Perdue for Senate is currently involved in litigation against a voter in the Georgia January 2021 U.S. Senate election who alleges that Perdue for Senate violated the TCPA by sending him a ringless voicemail message the day before the January 5, 2021 runoff election without his consent. First Amended Complaint, *Wreyford v. Perdue for Senate, Inc.*, No. 1:21-cv-02054 (N.D. Ga. May 14, 2021), ECF No. 2.

⁴ 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 7980 n.102, 8020 (2015) (“*Omnibus Declaratory Ruling*”).

profit organizations to deliver voice messages directly to potential voters' voice mailboxes without a ringtone prompting the individual to respond. Specifically, RVM technology does not make a "call" "to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier radio service" (collectively, "wireless service")⁵ because (1) RVM transmissions do not constitute a functional equivalent of a call under the statute; (2) RVM technology does not use a wireless network to transmit messages; and (3) RVM technology does not bill potential voters for receiving voice messages. This technology therefore falls outside of both the TCPA and the Commission's rules regarding calls to a wireless service using ATDS or an artificial or prerecorded voice.

Further, RVM technology is a beneficial alternative to robocalls and robotexts. Direct-to-voicemail ringless services do not disrupt the lives of potential voters with ringtones or cause charges to be added to individuals' phone bills. Instead, RVM technology allows non-profit GOTV campaigns across the political spectrum to effectively reach a wide swath of potential voters to provide them with critical and timely election-related information. Contacted potential voters may listen to the voicemail as many times as they want, delete it, or ignore it, at no cost to them. As a greater number of consumers opt to rely solely on wireless services, Democratic and Republican campaigns and political committees alike will require efficient and non-invasive methods to reach potential voters on short timeframes.

While, as demonstrated below, the characteristics of RVM technology place it outside of the regulatory ambit of the TCPA's rules related to wireless calls, the environment of abusive litigation that surrounds the statute makes the relief requested herein essential. Given the marked increase in TCPA class action lawsuits since 2008, the astronomical cost of defending such suits,

⁵ 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii).

and the risk that a judgement or settlement could hamstring or bankrupt small or even sizable organizations, this petition directly affects Democratic and Republican campaigns and political committees across the country.

II. RVM DIRECT-TO-VOICEMAIL MESSAGING TECHNOLOGY DOES NOT CONSTITUTE A “CALL” UNDER THE TCPA.

The TCPA provides, in relevant part:

“(b) Restrictions on the use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

* * *

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.”⁶

RVM transmissions do not trigger these TCPA prohibitions because they do not result in a “call” under the TCPA. Specifically, (1) RVM transmissions do not constitute a functional equivalent of a call under the statute; (2) RVM technology does not use a wireless network to transmit messages; and (3) RVM technology does not bill potential voters for receiving voice messages.

⁶ 47 U.S.C. § 227(b).

A. RVM Transmissions Are Not “Functionally Equivalent” to a Traditional Telephone Call.

RVM transmissions do not constitute a functional equivalent⁷ of a phone call under the Commission’s TCPA precedent because they do not use a wireless network to transmit messages and do not implicate the same consumer privacy harms as traditional phone calls or text messages. In the *Omnibus Declaratory Ruling*, in determining the TCPA’s applicability to Internet-to-phone text messaging technology, the Commission found that Internet-to-phone texting providers *use wireless cellphone networks* to complete communications, similar to phone-to-phone text messaging services.⁸ The FCC additionally found that Internet-to-phone texting services present the same consumer privacy concerns as phone-to-phone text messaging services because they “pose the same cost and annoyance . . . regardless of whether they originate from a phone or the Internet.”⁹

RVM technology, however, is not a functional equivalent of either a traditional phone call or a text message under the TCPA. *First*, RVM technology does not use a wireless network to transmit messages. Instead, RVM technology establishes a direct server-to-server connection between the RVM vendor and the voicemail system that bypasses wireless networks.¹⁰ *Second*, RVM technology does not result in the same “annoyance to consumers” as traditional phone

⁷ See *Omnibus Declaratory Ruling*, 30 FCC Rcd. at 8020, ¶ 115 (considering whether Internet-to-phone text messaging is “functionally equivalent” to phone-to-phone text messaging for TCPA applicability purposes).

⁸ See *id.* ¶ 113 (“There is no dispute that Internet-to-phone text messaging technology is used to initiate calls that ultimately are *carried over wireless carriers’ networks* to wireless consumers via their respective unique telephone numbers.”) (emphasis added).

⁹ *Id.* ¶ 115.

¹⁰ See generally Petition for Declaratory Ruling of All About the Message, LLC, CG Docket No. 02-278, Exhibit A (filed Mar. 31, 2017) (“*AATM Petition*”) (describing RVM technology in general).

calls.¹¹ When a voicemail is delivered via RVM, the phone does not ring.¹² RVM technology, rather, delivers the voicemail directly to a recipient’s voicemail box, which may result in a visual or auditory notification to the user, depending on the mobile provider and the user’s settings. Recipients may then listen when convenient for them. Additionally, if the message contains important election-related information, such as where a potential voter’s nearest polling place is or how to complete a mail-in ballot, RVM technology allows the individual to play it back as many times as they want. *Third*, RVM technology does not present the same financial or temporal costs as traditional calls or text messages.¹³ With RVM technology, no call appears on a recipient’s phone bill and no charge is assessed for delivery of the message. Accordingly, using RVM technology is not functionally equivalent to a phone call as regulated by the TCPA.

B. RVM Technology Does Not Use Wireless Networks to Complete Its Direct-to-Voicemail Transmissions.

RVM technology is also not regulated under the TCPA’s prohibition related to wireless calls or texts because this type of messaging service does not operate over a wireless network. RVM technology bypasses the wireless telephone and telephone subscriber.¹⁴ Instead of receiving a “call,” potential voters receive a notification from their voicemail provider that they have a message waiting in their voicemail box. The form of the notification will vary based on the carrier and user settings. This server-to-server communication bypasses the potential voter’s cellular network and establishes a direct communication between the RVM vendor and potential

¹¹ *Omnibus Declaratory Ruling* ¶ 115.

¹² *See AATM Petition* at Exhibit A (explaining that RVM technology “drop[s] a voicemail directly into an individual’s voicemail inbox, without making a call or ringing the person’s phone line”).

¹³ *See, e.g., Grigorian v. FCA US LLC*, 838 F. App’x 390, 393-94 (11th Cir. 2020) (finding lack of TCPA standing where plaintiff could not demonstrate that she lost money or time by listening to a single ringless voicemail).

¹⁴ *See AATM Petition* at 3.

voter's voicemail provider.¹⁵ Accordingly, RVM technology is not regulated by the TCPA because there is never an active call being processed by a switch or a server on a wireless network, as contemplated by Section 227(b)(1)(A)(iii) of the TCPA or Section 64.1200(1)(a)(iii) of the Commission's rules.

Essentially, RVM transmissions are voicemails delivered without having to place a call over a wireless network. As such, they are not covered under the TCPA, because the statute regulates "calls."¹⁶ Moreover, the Commission does not have broad jurisdiction over voicemail services. Voicemail is an information service, and the Commission's practice has been not to regulate, or at most, to lightly regulate information services.¹⁷ Consistent with this longstanding practice, Title I does not impose consent requirements on ringless voicemail delivery.

C. RVM Technology Does Not Bill Potential Voters for Receiving Messages.

Voters are also not charged for receiving RVM GOTV messages. Reviewing courts have concluded that if a call is not made to a consumer's cell phone, liability only exists under the

¹⁵ See, e.g., *id.* at Appendix A ("Our Direct Voicemail Messaging service creates a direct session to the telephone company's voicemail server.").

¹⁶ 47 U.S.C. § 227(b)(1)(A)(iii).

¹⁷ See, e.g., *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd. 20599, ¶ 314 (1998) (holding that voice message services are not "telecommunications services" regulated under Title II of the Communications Act); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket Nos. 96-115 and 96-149, Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd. 8061, ¶ 46 (1998) ("Commission precedent has treated 'information services' and 'telecommunications services' as separate, non-overlapping categories, so that information services do not constitute 'telecommunications' within the meaning of the 1996 Act."); *U.S. W. Commc'ns v. Hix*, 183 F. Supp. 2d 1249, 1254 (D. Colo. 2000) (noting that providers of information services are not subject to Title II regulations).

TCPA if a call is made to “any [other] service for which the party is charged. . . .”¹⁸ RVM message transmissions do not appear on a potential voter’s phone bill, and no charge is assessed for the delivery of a message.¹⁹ Accordingly, the Commission should make clear that RVM transmissions are not covered by the TCPA.

III. RVM TECHNOLOGY ALLOWS NON-PROFIT ORGANIZATION GOTV CAMPAIGNS TO PROVIDE IMPORTANT ELECTION MESSAGES TO POTENTIAL VOTERS IN A MANNER THAT RESPECTS AND PRESERVES PRIVACY.

RVM technology features allow non-profit organization GOTV campaigns to contact potential voters without ever calling their mobile phones. Once the RVM message is available for listening, the potential voter receives a visual or auditory notification from their voicemail provider that there is a message waiting, the form of which may vary based on carrier and user settings. This ringless delivery technology allows GOTV campaigns to send voicemails to voters that contain information about election details, such as polling places and how to vote early. Voters can then play back and listen to the voicemail as many times as they would like, and they are not charged for receiving the voicemail.

RVM technology also allows non-profit organizations to reach a broader audience than is otherwise possible through traditional means. As of 2020, 61.8 percent of American adults (155 million Americans) reported that they lived in a wireless-only house.²⁰ That is, well over one-

¹⁸ See 47 U.S.C. § 227(b)(1)(A)(iii); see also *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1257-58 (11th Cir. 2014) (“[W]e conclude that the phrase ‘for which the called party is charged for the call’ modifies only ‘any service’ and not the other terms of the series.”); *AATM Petition* at 10.

¹⁹ *AATM Petition* at Appendix A (explaining that “the subscriber is never bothered or charged for a call” with ringless voicemail technology).

²⁰ Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2020*, Nat’l Center for Health Statistics, at 3 (Feb. 2, 2021), <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless202102-508.pdf>.

half of American adults report living in a household without a landline phone. Indeed, the Commission has noted that, as of June 2019, there were only 54 million landline telephone subscriptions, as compared to 351 million mobile telephone subscriptions during the same time period.²¹ Automated direct-to-voicemail messages are extremely effective in GOTV efforts, ensuring that a broad and diverse range of voters may receive important and timely information from political campaigns and other types of advocacy organizations, not just voters who still have a landline.²² Accordingly, RVM technology allows non-profit organizations to deliver critical communications in a non-intrusive and efficient manner that is designed to preserve potential voter privacy and eliminate the harassing characteristics associated with robocalls, while at the same time, ensuring that *all* potential voters can receive critical information about federal, state, and local elections.

The ability to reach voters in a non-invasive and effective manner is a bipartisan issue for political campaigns, GOTV organizations, interest groups, and other non-profit organizations. In *Barr v. American Association of Political Consultants, Inc.*, the Supreme Court explicitly recognized the importance of political outreach, “including political speech, charitable fundraising, issue advocacy,” and other categories of electoral communication.²³ GOTV outreach became increasingly difficult during the COVID-19 pandemic, which eliminated many

²¹ Indus. Analysis Div. Off. of Econ. And Analytics, Voice Telephone Services: Status as of June 30, 2019 (Apr. 2021), <https://docs.fcc.gov/public/attachments/DOC-372275A1.pdf>.

²² Daniel Kling & Thomas Stratmann, *The Efficacy of Political Advertising: A Voter Participation Field Experiment with Multiple Robo Calls and Controls for Selection Effects* (GMU Working Paper No. 16-31, 2016) (automated calls can increase voter turnout by up to one percentage point). *See also* Remarks of FCC Commissioner Michael O’Rielly, ACA Int’l Washington Insights Conference (May 16, 2019) (explaining the “disparate harm to [wireless-only] consumers, who are more likely to be younger and lower-income” that results from the wireless call prohibitions.)

²³ *Barr v. Am. Ass’n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2347 (2020).

door-to-door canvassing operations for Republican and Democratic campaigns alike.²⁴ As a result, campaigns and other entities engaged in GOTV efforts were forced to turn to digital contact and other means of advocacy during the pandemic.²⁵ As a non-invasive means of contacting potential voters with election-related information, RVM technology is a safe and proven method for political outreach that the Commission should encourage, not stifle.

The legislative history of the TCPA and the FCC’s past decisions implementing the statute appreciate the need to balance consumer privacy interests with the ability of non-profit organizations such as political campaigns and committees to reach consumers with important information.²⁶ Congress recognized that calls made by non-profit organizations such as political campaigns do not implicate the same consumer privacy concerns as telemarketing calls.²⁷ The Commission has, moreover, emphasized the value of both calls by “political campaigns” and calls regarding “political contributions or elections” because they “fall outside of the types of

²⁴ Eli Yokley, *COVID-19 Changed Campaigns. Some of Those Changes Are Here to Stay*, Morning Consult (Mar. 11, 2021), <https://morningconsult.com/2021/03/11/covid-pandemic-campaigns-midterms/>.

²⁵ Molly Wood, *It’s a lot harder to get out the vote during a pandemic*, Marketplace Tech (July, 22, 2020), <https://www.marketplace.org/shows/marketplace-tech/get-out-the-vote-covid-19-pandemic-voter-outreach-apps-data/>.

²⁶ See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd. 8752, ¶ 3 (1992) (“1992 TCPA Order”) (finding that the “task . . . is to implement the TCPA in a way that reasonably accommodates individuals’ rights to privacy as well as the legitimate business interests . . .”); Statement of the Hon. Mr. Hollings, 137 Cong Rec S 16204 (Nov. 7, 1991) (describing the purpose of the TCPA as to protect privacy of homes and calls to numbers for which recipient is charged for the call); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd. 1830, 1832, ¶ 4 (2012) (“Section 227(b)(2)(C) authorizes the Commission to exempt from this provision calls to a number assigned to a wireless service that are not charged to the consumer, subject to certain conditions intended to protect consumers’ privacy rights.”).

²⁷ See H.R. Rep. No. 102-317, at 16 (1991) (concluding that “most unwanted telephone solicitations are commercial in nature” and that “the two main sources of consumer problems—high volume of solicitations and unexpected solicitations—are not present in solicitations by nonprofit organizations”).

commercial telemarketing activity the TCPA seeks to regulate.”²⁸ Perdue for Senate used a vendor that utilized RVM technology for a noncommercial purpose – to contact potential voters with important information regarding how they can exercise their right to vote. Regardless of the particular usage of RVM technology employed, however, the technology falls outside of the scope of the TCPA because the technology does not make “calls” as defined under the statute.

IV. THE RELEVANT TCPA PROVISIONS HAVE BEEN THE SUBJECT OF SUBSTANTIAL LITIGATION ABUSE.

As the Commission is well aware, the TCPA has been subject to widespread abuse by serial class action plaintiffs and their attorneys.²⁹ As former Chief of Staff for former Commissioner Clyburn explained: “[A]ll is not well. Somewhere along the line, the reasonable balance that was originally intended shifted away from business into the hands of activist plaintiffs’ lawyers, and they have taken it all the way to the bank.”³⁰ The litigation costs for such

²⁸ See *The Telephone Consumer Protection Act of 1991 (Clas. No. 920242)*, Notice of Proposed Rulemaking, 7 FCC Rcd. 2736, ¶ 10 (1992); *1992 TCPA Order*, ¶ 41 (1992).

²⁹ Former U.S. Senator Fritz Hollings (D-SC), who was a cosponsor of the TCPA, intended for the statute to allow consumers to obtain a set amount of cash for violations in small claims court. *TCPA Lawsuits are How Expensive??*, U.S. Chamber of Commerce Institute for Legal Reform (Nov. 30, 2018), <https://instituteforlegalreform.com/tcpa-lawsuits-are-how-expensive/>. News outlets have reported extensively on serial abusers of the law. See, e.g., Christian Hetrick, *Meet the robocall avenger: Andrew Perrong, 21, sues those pesky callers for cash*, *The Philadelphia Inquirer* (Nov. 2, 2018), <https://www.inquirer.com/philly/business/robocall-lawsuits-verizon-citibank-andrew-perrong-20181102.html>; Karen Kidd, *Phoney Lawsuits: Polish Immigrant Concludes Six-Figure Run By Settling 31st Lawsuit*, *Forbes* (Jan. 17, 2018), <https://www.forbes.com/sites/legalnewsline/2018/01/17/phoney-lawsuits-polish-immigrant-concludes-six-figure-run-by-settling-31st-lawsuit/?sh=5f209aea4c75>; John O’Brien, *Phoney Lawsuits: A federal law is giving litigious people a new income stream*, *Legal Newsline* (Mar. 15, 2017), <https://legalnewsline.com/stories/511092957-phoney-lawsuits-a-federal-law-is-giving-litigious-people-a-new-income-stream>.

³⁰ A. Hoffman, *Does TCPA stand for ‘total cash for plaintiffs’ attorneys’?*, *The Hill* (Feb. 17, 2016), <http://thehill.com/blogs/pundits-blog/technology/269656-does-tcpa-stand-for-total-cash-for-plaintiffs-attorneys>.

lawsuits, moreover, can and do bankrupt small businesses.³¹ According to research, the average cost to settle a TCPA lawsuit in 2019 was \$6 million; from 2016 to 2019, approximately 4,000 TCPA suits were filed annually.³²

Moreover, several critical issues regarding the statute's scope – including whether RVM technology falls within the regulatory ambit of the TCPA – remain unresolved, which causes uncertainty and exposes entities, including political campaigns and other non-profit organizations, to enormous liability risk. Indeed, as demonstrated by petitions for declaratory ruling filed by VoAPPs, Inc.³³ and All About the Message, LLC,³⁴ the applicability of the TCPA to RVM technology is an urgent and open compliance question for businesses and non-profit organizations alike. The FCC should resolve this uncertainty by clarifying that the TCPA does not apply to ringless voicemails.

³¹ *Did the Telephone Consumer Protection Act Just Get Even Worse for Small Businesses?*, U.S. Chamber of Comm. Inst. for Legal Reform (Sept. 17, 2018), <https://institutelegalreform.com/did-the-telephone-consumer-protection-act-just-get-even-worse-for-small-businesses/>.

³² *Practical Advice on How to Avoid a TCPA Lawsuit*, CompliancePoint, <https://www.compliancepoint.com/articles/practical-advice-on-how-to-avoid-a-tcpa-lawsuit/> (last visited June 29, 2021).

³³ Petition for Expedited Declaratory Ruling of VoAPPs, Inc., CG Docket No. 02-278 (filed July 31, 2014).

³⁴ *AATM Petition*.

V. CONCLUSION

Pursuant to the foregoing, the Commission should issue a declaratory ruling that RVM technology does not fall within the TCPA's scope regarding calls to wireless services. Such a declaratory ruling would help stem the tide of abusive TCPA lawsuits while ensuring that political campaigns and other non-profit organizations have an effective and non-intrusive method for contacting potential voters with important and timely election-related information.

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