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

In the Matter of	)	
	)	CG Docket No. 05-338
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
	)	
Telephone Consumer Protection Act of 1991	)	
	)	
Professional Services Council		

Craig Cunningham's Comments Opposing Professional Service's Council's
<u>Petition for Reconsideration</u>

Commenter Craig Cunningham ("Cunningham") is the Plaintiff in a private putative TCPA class action currently pending in the United States District Court for the Eastern District of Virginia, styled as *Craig Cunningham v. General Dynamics Information Technology, Inc.*, 1:16 cv 545 (E.D. Va.). In that case, General Dynamics Information Technology ("GDIT") has argued that it is immune from suit because it allegedly made autodialed and/or prerecorded calls pursuant to a contract with the federal government. Accordingly, the Commission's decision on the Professional Service Council's ("PSC") August 4, 2016 Petition is directly relevant to Cunningham's case.[1]

In this opposition, Cunningham adopts all of the arguments contained in the National Consumer Law Center's July 26, 2016 Petition for Reconsideration,[2] and in the National

[1] The Commission sought comments on the PSC's Petition for Reconsideration on August 15, 2016. Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Seeks Comment on Professional Services Council Petition for Reconsideration of the FCC's Broadnet Declaratory Ruling, CG Docket No. 02-278 (Rel. Aug. 1, 2016) *available at* https://ecfsapi.fcc.gov/file/0815721428679/DA-16-924A1.pdf.

[2] Petition of National Consumer Law Center et al. for Reconsideration of Declaratory Ruling and

Consumer Law Center's September 9, 2016 Opposition to PSC's Petition for Reconsideration,[3] and incorporates them herein by reference.

Cunningham also wishes to add that PSC's apparent assumption that a government contractor is immune from suit pursuant to *Yearsly v. W.A. Ross Const. Co.*, 309 U.S. 18 (1940), as long as it is following the government's instructions, is incorrect. The Supreme Court has made clear that to the extent there even exists any immunity for government contractors for following the government's instructions in contracts or otherwise, that immunity does not cover circumstances where the government has instructed the contractor to violate clearly established law. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 673 (2016) (holding that contractor with the federal government did not have immunity to suit under *Yearsly* for TCPA violations because, among other things, the TCPA's requirements in that case were clearly established). This limitation on *Yearsly* immunity makes sense because even government employees do not have immunity in their individual capacities for lawsuits against them for violating clearly established law. *Campbell-Ewald*, 136 S. Ct. at 673. To interpret the Supreme Court to have granted federal contractors absolute immunity for violations of clearly established law when government employees in their individual capacities do not have such absolute immunity for such violations would make no sense. Indeed, a direction from the federal government to a contractor, whether in a contract or otherwise, to violate a clearly established law, would not be

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Request for Stay Pending Reconsideration, CG Docket No. 02-278 (filed July 26, 2016), *available at https://ecfsapi.fcc.gov/file/10726059270343/NCLC%20Petition%20for%20Reconsideration%20of%20Broadnet.pdf*.

[3] National Consumer Law Center's Comments Opposing Professional Service Council's Petition for Reconsideration C.G. Docket No. 02-278 (filed September 9, 2016), available at https://ecfsapi.fcc.gov/file/10909838826020/NCLC%20Comments%20on%20PSC%20Petition.pdf.

authority "validly conferred" on the contractor, and therefore, the contractor would have no immunity form suit under *Yearsly*. *See Campbell-Ewald*, 136 S. Ct. at 673.

Moreover, any contract between the federal government that requires a contractor to violate a clearly established law and any instruction by the federal government that requires a contractor to violate a clearly established law would be void as against public policy and entirely nonbinding. *See American Airlines, Inc. v. Austin*, 75 F.3d 1535, 1538 (Fed. Cir. 1996) ("Generally a provision in a government contract that violates or conflicts with a federal statute is invalid or void."); *UPMC Braddock v. Harris*, 934 F. Supp.2d 238, 246 (D.D.C. 2013) (same, citing cases), *vacated on other grounds and appeal dismissed sub nom. UPMC Braddock v. Perez*, 584 Fed. Appx 1 (D.C. Cir. 2014). *See also Reno Hilton Resorts v. N.L.R.B.*, 196 F.3d 1275. 1281 (D.C. Cir. 1999) (noting "the general principle that a party cannot exercise its contractual rights in violation of the law); *Jains v. First Nat. Realty Corp.*, 428 F.2d 1071, 1081-82 (D.C. Cir. 1970) (reading terms of housing code regulations into housing contract). Thus, contractors cannot argue that they are "required" by a government contract or government instruction to violate clearly established law under the TCPA, and they cannot be successfully sued for breach of contract by the Federal Government for refusing to abide by such a contract term or instruction.

CONCLUSION

PSC's Petition for Reconsideration should be denied, and the Commission should make clear that, as *Campbell-Ewald* provides, a federal government contract that directs a contractor to violate clearly established law under the TCPA, or an instruction by the federal government to a contractor to violate clearly established law under the TCPA, does not render the contractor

immune from suit under the TCPA.

Dated: September 13, 2016

Respectfully submitted,

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