FINAL VERSION

ORAL ARGUMENT NOT YET SCHEDULED

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

Case No. 15-1211 (and consolidated cases)

ACA INTERNATIONAL, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

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

BRIEF FOR AMICUS CURIAE CTIA—THE WIRELESS ASSOCIATION® IN SUPPORT OF PETITIONERS

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February 24, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

Parties and amici appearing in this Court are listed in the Joint Brief for Petitioners ACA International, Sirius XM Radio Inc., Professional Association for Customer Engagement, Inc., salesforce.com inc., ExactTarget, Inc., Consumer Bankers Association, Chamber of Commerce of the United States of America, Vibes Media, LLC, and Portfolio Recovery Associates, LLC.

B. Ruling Under Review

The ruling under review is the FCC's Declaratory Ruling and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (2015) ("*Order*") (JA1144).

C. Related Cases

The *Order* has not previously been the subject of a petition for review by this Court or any other court. All petitions for review of the *Order* have been consolidated in this Court, and counsel are unaware of any other related cases pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. R. 26.1, CTIA—The Wireless Association® ("CTIA") submits the following corporate disclosure statement.[1] CTIA is a section 501(c)(6) not-for-profit corporation organized under the laws of the District of Columbia and represents the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and Internet companies, and other industry participants. CTIA has not issued any shares or debt securities to the public, and CTIA has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

[1] CTIA was founded in 1984 as the Cellular Telecommunications Industry Association. In 2000, CTIA merged with the Wireless Data Forum and became the Cellular Telecommunications & Internet Association. In 2004, the name was changed to CTIA—The Wireless Association®.

CERTIFICATE OF COUNSEL REGARDING NECESSITY OF SEPARATE AMICUS CURIAE BRIEF

Pursuant to D.C. Cir. R. 29(d), CTIA hereby certifies that a separate brief is necessary for its presentation to this Court due to the specialized nature of its distinct interests and expertise. As the representative of the wireless communications industry, CTIA is focusing on the wireless industry perspective; none of the amici of which we are aware will be in a position to address the unique impact of the FCC's *Order* on wireless carriers and their customers.

Accordingly, CTIA, through counsel, certifies that filing a joint brief would not be practicable.

/s/ Bryan N. Tramont
Bryan N. Tramont

February 24, 2016

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GLOSSARY

FCC	Federal Communications Commission
House Report	H.R. REP. No. 102-317, at 17, 1st Sess., 102nd Cong. (1991)
Order	Declaratory Ruling and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (2015) (JA1144)
O'Rielly Dissent	Statement Dissenting in Part and Approving in Part of Commissioner Michael O'Rielly to *Order* (JA1267)
Pai Dissent	Dissenting Statement of Commissioner Ajit Pai to *Order* (JA1255)
Petitioners	Petitioners ACA International, Sirius XM Radio Inc., Professional Association for Customer Engagement, Inc., salesforce.com inc., ExactTarget, Inc., Consumer Bankers Association, Chamber of Commerce of the United States of America, Vibes Media, LLC, and Portfolio Recovery Associates, LLC
Petitioners' Brief	Joint Brief for Petitioners ACA International, Sirius XM Radio Inc., Professional Association for Customer Engagement, Inc., salesforce.com inc., ExactTarget, Inc., Consumer Bankers Association, Chamber of Commerce of the United States of America, Vibes Media, LLC, and Portfolio Recovery Associates, LLC (Nov. 25, 2015)
TCPA	Telephone Consumer Protection Act of 1991, codified at 47 U.S.C. § 227

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE AS AMICUS CURIAE

CTIA is an international nonprofit membership organization that represents the wireless communications industry. Membership in the association includes wireless carriers and their suppliers, as well as providers and manufacturers of wireless data services and products.

CTIA and its members supported the TCPA's adoption in 1991, and have participated in the FCC's implementation efforts since then, including the agency proceedings below. CTIA is concerned that, left unchanged, the *Order*'s treatment of two matters – calls to reassigned numbers and consent revocation – will cause many wireless industry callers and message senders to cease to offer the information, services, and communications that wireless customers desire and consent to receive. This result would diminish the utility and value of wireless services. CTIA, therefore, has an established interest in the outcome of this case.

To its knowledge, CTIA is the only amicus focusing on the wireless industry perspective. An understanding of the dynamics of the wireless marketplace and the impact of the FCC's *Order* on wireless subscribers is important for the Court's consideration of the case, and will aid the Court in reaching an appropriate decision. *See* Fed. R. App. P. 29(b).

Undersigned counsel for CTIA represent that all parties have consented to the filing of this brief. *See* D.C. Cir. R. 29(b).

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money intended to fund the preparation or submission of this brief, and no person other than CTIA, its members, and its counsel contributed money intended to fund the preparation or submission of this brief.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the Petitioners' Brief.

BACKGROUND/SUMMARY OF ARGUMENT

In their opening brief, Petitioners demonstrate, among other things, that the FCC's interpretation of the statutory term "called party" is arbitrary and capricious and otherwise unlawful, and the FCC's "one-call" exemption does not cure this defect. Petitioners also show that the FCC's decision allowing consumers to revoke consent in virtually any manner is arbitrary and capricious and otherwise unlawful.

The wireless industry, too, is deeply concerned about the *Order*'s treatment of these issues. As the record before the FCC made clear, wireless subscribers want, and consent to receive, certain automatic and/or prerecorded calls and messages in an expansive variety of contexts. Desired and valuable communications include prescription reminders, mobile coupons, service-and billing-related calls, flight delay notifications, account authentication messages (*i.e.*, codes sent via text to an account-affiliated telephone number to enable an

individual logging into a website to prove she is who she purports to be), "tweets" sent via text, and myriad others. These messages contribute to the convenience, efficiency, and value that mobile wireless services provide to consumers. The FCC's conclusions regarding two core issues, however – (1) treatment of calls to reassigned or wrong numbers and (2) consent revocation – threaten subscribers' ability to receive the calls and messages they want, with especially severe implications for low-income users who rely disproportionately on wireless communications. The *Order* subjects callers and message senders to the risk that they will incur liability when they inadvertently call or message a reassigned or wrong number, or when an opportunistic plaintiff "revoke[s]" consent through means calculated to be ineffective and then waits for "unwanted" calls to trigger massive damages under the TCPA. Indeed, the record included evidence of this phenomenon. To mitigate or avoid these risks, many callers and message senders will cease to offer the information, services, and communication that wireless subscribers desire and consent to receive, undercutting the value and convenience of mobile wireless service and harming consumers. This result is arbitrary and capricious.

For these reasons, and those set forth in the Petitioners' Brief, the Court should grant the petitions for review and vacate the challenged portions of the *Order*.

ARGUMENT

I. THE *ORDER*'S TREATMENT OF CALLS TO REASSIGNED OR WRONG NUMBERS IS ARBITRARY AND CAPRICIOUS.

Each year, approximately 37 million mobile phone numbers are recycled, which means that an average of 100,000 numbers are reassigned to new users *every day*. Wells Fargo 6/5/15 Letter at 5 (JA1013). The record before the FCC made clear, however, that individuals often do not notify the entities whose communications they have consented to receive when their numbers are reassigned, and that TCPA plaintiffs and their lawyers have developed a cottage industry based on calls or messages delivered in good faith. The *Order*'s determinations regarding the definition of the term "called party" (which the *Order* construes to mean the wireless subscriber or customary user of the phone that receives the call or message, irrespective of the sender's intent) and its treatment of calls and messages sent to reassigned or wrong numbers (strict liability) will vastly expand the potential liability faced by organizations sending autodialed or prerecorded calls and messages that consumers *desire* and *have consented to*. Moreover, the *Order*'s one-call exception does nothing to cure this defect, because it presumes constructive knowledge of a reassignment after just one call, regardless of whether or not the caller has any reason to know that the number was reassigned. The *Order* thus fails to achieve the balance Congress intended. For

these reasons, it is arbitrary, capricious, and contrary to Congressional intent. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

A. Congress Intended the TCPA to Deter Unwanted Communications Without Inhibiting Desired and Consented-to Communications.

Wireless phones have, for many consumers, become a (if not *the*) primary means of transmitting and receiving information, whether by call, text, or otherwise. As the record before the FCC demonstrated, consumers affirmatively desire, and consent to receive, myriad types of information, services, and offers on their wireless phones from a wide range of organizations. Consumers request to receive calls and messages containing prescription reminders, mobile coupons, service- and billing-related information, and even tweets, to name just a few of the examples in the record. *See, e.g.*, United 1/16/14 Petition at 2 (JA395); Vibes 6/10/15 Letter at 1 (JA1060); Comcast 3/10/14 Comments at 2-3 (JA492-93); NRECA 11/17/14 Comments at 2-3 (JA806-07); Twitter 8/8/14 Comments at 2 (JA680).

In enacting the TCPA in 1991, Congress sought to prohibit calls delivered without the recipient's prior express consent, *see* 47 U.S.C. § 227(b)(1)(A)(iii), without inhibiting communications that wireless consumers seek out and consent to receive, *Order* ¶105 (JA1199) ("[The] TCPA legislative history … indicates the

law is not intended to disrupt communications that are 'expected or desired … between businesses and their customers,' including messages that 'advise a customer (at the telephone number provided by the customer) that an ordered product had arrived, a service was scheduled or performed, or a bill had not been paid.'") (quoting House Report at 17).[2]

The FCC, of course, may not interpret the TCPA in a manner contrary to Congressional intent and consumers' interests. Rather, the agency must construe the statute in a manner that properly effectuates the balance Congress sought to achieve between deterring unwanted communications and promoting the delivery of desired calls and messages. *See Int'l All. of Theatrical & Stage Emps., Local 39 v. NLRB*, 334 F.3d 27, 35 (D.C. Cir. 2003) (agency interpretation is unreasonable and therefore invalid even under more forgiving *Chevron* "step two" where it "upsets the statutory balance struck by Congress and leads to irrational results in practice").

B. The *Order* Will Undermine, Not Promote, Congress's Objectives By Chilling Desired and Consented-to Communications.

The record made clear that the rising tide of predatory class action lawsuits poses real and significant threats to the continued delivery of the valued

[2] The wireless industry shared Congress's concerns, and supported the TCPA's adoption. Wireless carriers continue to undertake substantial efforts to ensure that unwanted and harmful communications to customers are limited.

communications that consumers seek out. Even worse, the "situation has a disproportionately negative impact on lower-income households, particular age groups, and residents located in certain parts of the United States," given that these groups are especially reliant on mobile phones. Chamber 2/2/15 Letter at 2 (JA910). The *Order's* interpretations of the TCPA exacerbate the risks faced by those originating calls and messages, chilling the transmission of such communications and thus undermining, not promoting, Congress's objectives. The FCC's conclusions are therefore arbitrary and capricious and should be vacated.

1. The *Order*'s Interpretation of the Term "Called Party" Is Unlawful.

As the *Order* acknowledges, "[i]n enacting the TCPA, Congress made clear that '[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.'" *Order* ¶2 (JA1147) (quoting Pub. L. No. 102-243, 105 Stat. 2394 § 2(9) (1991)). To preserve this balance, Congress created an exception for calls made with a customer's "prior express consent." *See, e.g.*, Wells Fargo 1/26/15 Letter at 4 (JA872) ("Congress did not intend for the TCPA to be an impediment to American businesses contacting their own customers.") (citing House Report at 17); *see also* Salesforce 6/10/15 Letter at 5-6 (JA1057-58) (noting that, through the prior express consent

exception, "Congress intended to create an exemption from liability for the calling party"); ACA 6/11/15 Letter at 7 (JA1114).

The *Order*'s approach to the term "called party," however, threatens to chill calls and messages that consumers desire in exchange for, at best, a negligible consumer protection gain. The TCPA allows callers to make autodialed or prerecorded calls to wireless numbers "with the prior express consent of the called party…." 47 U.S.C. § 227(b)(1)(A)(iii). The *Order* construes the term "called party" to mean "the subscriber, *i.e.*, the consumer assigned the telephone number dialed and billed for the call, or the non-subscriber customary user of a telephone number included in a family or business calling plan." *Order* ¶73 (JA1183). Yet when customers change numbers, they often do not notify all of the businesses and organizations to which they have provided consent, and businesses seeking to reach customers who have asked to receive their communications are thus likely to continue to call or send messages to the number at issue until notified of the change. This is not because they benefit from communications to recipients who do not desire them. Rather, it is because they have not been informed that the number has been reassigned.

Companies sending such calls and messages face tremendous risk. The TCPA imposes damages of $500 per call or message, and that amount can be tripled where the court finds a knowing or willful violation. *See* 47 U.S.C. §

227(b)(3). These damages add up very quickly when multiple plaintiffs pursue claims together. As a coalition of nearly 60 trade associations and business groups representing hundreds of thousands of companies and organizations from virtually every sector of the economy put it, today entities originating calls and messages face "a tsunami of class action TCPA lawsuits driven not by aggrieved customers, but by opportunistic plaintiffs' firms taking advantage of uncertainty in the law." AAHAM 2/2/15 Letter at 2 (JA906). As a result of such suits, "important communications are increasingly being chilled, organizations making the calls are increasingly being subjected to frivolous litigation, and consumers are increasingly missing important communications." *Id.* (JA906).

Thus, as parties made clear in the record below, the *Order*'s approach obliterates the balance Congress struck. As Wells Fargo explained, "'prior express consent' becomes meaningless if a company relies on the express consent it receives, only to be made liable later when the number is transferred to a different subscriber without the knowledge of the caller, and without any way of knowing with any acceptable degree of confidence that the number has been reassigned." Wells Fargo 6/5/15 Letter at 8 (JA1015); *see also* CTIA 3/10/14 Comments at 6-7 (JA507-08) ("Congress did not express any intent to expose callers to TCPA liability when callers, in good faith, make informational and other non-telemarketing calls, using autodialers and prerecorded voices, to wireless numbers

for which prior express consent has been obtained, but where such numbers have been reassigned without the caller's knowledge.").[3]

Under the *Order*'s regime, consumers will avoid, at best, the very occasional, inadvertent call from a good actor attempting to reach a consenting customer. For this meager gain, customers will pay a significant price: Fearing class-action suits, entities originating calls and messages will drastically curtail their activities, knowing that even when they act in good faith they can be subject to millions of dollars in strict liability. Customers, consequently, will cease to receive many of the calls and messages that they desire. Moreover, consumers will likely continue to receive intrusive calls and messages from bad actors, many of whom may be judgment-proof.[4]

[3] The FCC responds that "[c]allers may use prior express consent to defend against liability when they obtain such consent from the 'called party,'" *Order* ¶78 (JA1185), but this claim simply ignores the legal landscape created by the agency's unlawful interpretations of the TCPA. Many would-be callers and message senders will choose not to make and send the communications consumers desire, *regardless of whether they have obtained or could obtain prior express consent*, due to the potential for crushing liability if they accidentally deliver calls or messages to reassigned or wrong numbers.

[4] In this regard, the *Order*'s finding that "once there is actual knowledge [of reassignment,] callers may not honor do-not-call requests," *Order* ¶88 (JA1192), is entirely unpersuasive. Such bad actors would be subject to TCPA liability regardless of the FCC's interpretation of "called party" because they would have actual knowledge that the number was reassigned. The record demonstrated as much, *see, e.g.*, CBA 12/1/14 Reply at 5 (JA833), and the *Order* has no response.

The FCC could easily have avoided this outcome. As Commissioner Pai explained in his dissent, an "intended-recipient" or "expected-recipient" approach to the term "called party" (under which the term "called party" would mean "intended recipient" or "intended called party," and originators would be free from liability when they believe in good faith that the recipient has consented to the communication) would have

> give[n] legitimate businesses a clear and administrable means of complying with the law and engaging in "normal, expected or desired communications [with] their customers." A good actor can refuse to call anyone without first securing an individual's consent, and a good actor can stop calling as soon as it learns that a number is wrong.

Pai Dissent at 119 (JA1262) (quoting House Report at 17). The intended/expected recipient approach also would "rightfully sanction[] the bad actors … that repeatedly call after an individual has told them they've got the wrong number." *Id.* (JA1262). The FCC could, and should, have adopted such an approach. Its failure to do so was arbitrary and capricious, and contravened Congressional intent. *See Chevron*, 467 U.S. at 844; *State Farm*, 463 U.S. at 43.

In this regard, as Petitioners have demonstrated, the *Order*'s strict liability approach is especially inconsistent with the statute. Petitioners' Brief at 45. More broadly, the FCC's approach conflicts with the doctrinal bar against inferring strict liability where the statute does not call for such liability. *See Laird v. Nelms*, 406

U.S. 797, 802 (1972) (holding that the imposition of strict liability was inappropriate where not explicitly authorized under statute, as this approach would "judicially admit at the back door that which has been legislatively turned away at the front door"); *see also Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013) (where a strict liability regime made compliance impossible, manufacturer, a drug company, was not required to cease its business as a means of compliance); Pai Dissent at 118 (JA1261) (quoting *McNeil v. Time Ins. Co.*, 205 F.3d 179, 187 (5th Cir. 2000), for proposition that "[i]t is a flawed and unreasonable construction of any statute to read it in a manner that demands the impossible").

2. The *Order*'s Conclusions Regarding Reassigned Numbers Are Arbitrary and Capricious.

The *Order* fails to grapple with record evidence making clear that "there is no reasonable means for companies … to know if [wireless] numbers are actually assigned to someone other than the consenting party or if they have been reassigned." CTIA 3/10/14 Comments at 4 (JA505). Moreover, the *Order* fails to address the fact that even compliance "in most circumstances" would leave organizations with unacceptable risk of potentially crushing class-action liability.[5]

[5] In the last two years alone, there have been at least a dozen TCPA settlements of greater than $5 million, *see* Twitter 8/8/14 Comments at 7 (JA685), including some that have reached eight figures. *See* AFSA 2/21/14 Letter at 2 (JA430) (discussing $32 million settlement); ACA 3/24/14 Comments at 8-9 (JA569-70) (listing multimillion dollar settlements with multimillion dollar attorneys' fees). The cost

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For these reasons alone, the *Order* is arbitrary and capricious. *See State Farm*, 463 U.S. at 43 (agency failure to consider an "important aspect of the problem" is arbitrary and capricious); *Achernar Broad. Co. v. FCC*, 62 F.3d 1441, 1446 (D.C. Cir. 1995) (failure to "weigh the entire record" constitutes reversible error).

The *Order* cites several "options available" which, "over time, *may* permit [organizations originating calls and messages] to learn of reassigned numbers." *Order* ¶86 (JA1190) (emphasis added). These include: (1) using an existing database to determine whether a number has been reassigned; (2) including an interactive opt-out mechanism so that recipients may easily report a reassigned or wrong number; (3) implementing procedures for recording wrong number reports; (4) implementing processes for recording new phone numbers when receiving calls from customers; (5) periodically sending email or mail requests to update contact information; (6) employing mechanisms to recognize the "triple-tones" used to identify disconnected numbers; (7) establishing policies for determining that a number has been reassigned when there has been no response to a "two-way" call;

(footnote continued)
to defend a TCPA suit, even if frivolous, can itself be millions of dollars. *See* Wells Fargo 8/8/14 Comments at 4 (JA701).

and (8) enabling customers to update contact information by responding to any text message they receive.[6] *Id.* (JA1190).

As the record makes clear, however, these options present numerous practical challenges. First and foremost, as the FCC recognizes, they are not foolproof. *See id.* ¶85 (JA1189) ("[W]e agree with commenters who argue that callers lack guaranteed methods to discover all reassignments immediately after they occur.").[7] Options that "may" allow callers to learn of reassigned numbers, *id.* ¶86 (JA1190), offer little comfort to those that nevertheless may face class-action suits and massive damages. *Any* uncertainty with respect to liability for calls and messages that an organization justifiably believes it has prior express consent to originate could very well chill many of the communications consumers want.

The *Order* also fails to consider the substantial burden that its purported mitigation "options" present. Because "even the most stringent compliance program cannot guarantee that the intended recipient will always be the person who answers the call," companies must "employ expensive and ultimately

[6] Notably, most of these options require action by the recipient, refuting any suggestion that callers and senders can and should always learn of reassignments on their own.

[7] The FCC notes further that, although tools exist to help callers determine whether a number has been reassigned, the tools "will not in every case identify numbers that have been reassigned." *Order* ¶85 (JA1189).

inadequate measures to try to ascertain mobile telephone number reassignments." CBA 9/19/14 Petition at 9 (JA777). Such measures include "costly third party systems," *id.* (JA777), *i.e.*, the "database tools" on which the FCC largely bases its conclusion that compliance with its regime will be feasible. *See Order* ¶83 (JA1188) ("[T]he existence of database tools combined with other best practices, along with one additional post-reassignment call, together make compliance feasible."). Thus, even if a "fool-proof solution for businesses to adequately verify whether a customer's number is still assigned to the consenting individual" existed, it still represents "a large and potentially costly burden on all businesses, particularly small businesses…."[8] Chamber 4/23/15 Letter at 6 (JA973). But again, the *Order* failed to address the record evidence regarding the cost and burden the "options" available to callers and message senders entail.

Moreover, the FCC's suggestion that callers obtain consent through other means before sending a communications covered by the TCPA would prompt a net *increase* in the number of communications to the consumer. For example, before sending a communication covered by the TCPA (such as an automated call or message), an originator might need to contact consumers through means not barred by the TCPA to confirm that the recipient's telephone number had not been

[8] While companies and organizations with substantial resources may be able to implement several of these measures to detect reassigned numbers (and weather the liability risk), smaller companies and organizations may not.

reassigned. This result is flatly inconsistent with Congress's goal of reducing nuisance communications. As one party noted below, "a statute intended to reduce unwanted contacts to consumers should not be read to require companies to repeatedly and frequently contact consumers to learn if their numbers have changed." United 1/16/14 Petition at 5 (JA398). Again, although this concern was raised in the record, the *Order* failed to address it.

Finally, the mechanisms identified by the *Order* would not save an organization from an opportunistic actor that attempts to entrap a potential originator by waiting for substantial liability to accrue before providing any indication that a number has been reassigned. As one commenter put it, "[p]otential plaintiffs [are] perversely incentivized not to provide any notification after receiving a text message meant for the entity previously assigned the phone number"; "[i]nstead, the potential plaintiffs would be able to increase their statutory award simply by waiting for more messages to arrive." Vibes 6/10/15 Letter at 2-3 (JA1061-62). This logic would apply equally to telephone calls. *See* O'Rielly Dissent at 131 (JA1274) (noting that "[a] person could take a call, never let on that it's the wrong person, and receive subsequent calls solely to trip the liability trap"). Likewise, given that a called party's bad faith is no defense against liability, *see Order* ¶95 (JA1194), an individual could "consent" for

communications to be delivered to a friend, allowing the friend to later bring suit and collect damages for "unwanted" calls and messages.

As the record below revealed, these concerns are firmly rooted in reality. For example, one party detailed a case in which a wireless subscriber with a reassigned number falsely indicated that an issue involving receipt of unwanted automatic text messages had been resolved, then waited until receiving 876 text message alerts (allowing for damages of $438,000 to $1.3 million), and ultimately filed suit. Rubio's 8/11/14 Petition at 3 (JA729). Another party showed that one law firm "routinely sends demand letters to companies for alleged TCPA violations" with "purported 'plaintiffs' [that] appear to be attorneys, paralegals, and other staff of the law office who initiate the text messages by affirmatively signing up to receive offers." Vibes 6/10/15 Letter at 2-3 n.6 (JA1061-62). The "purported 'plaintiffs'" "then wait for multiple texts to arrive," after which the firm "sends a letter with unsupported and inaccurate allegations of TCPA violations … mak[ing] large settlement demands and threaten[ing] class action treatment." *Id*. (JA1061-62). The *Order* fails to consider the ways in which its approach to reassigned numbers will further open the door to such predatory behavior. Indeed, the unaddressed possibility of opportunistic plaintiff behavior alone belies the *Order's* assertion that the steps identified by the FCC "significantly reduce, if not

eliminate, [callers'] TCPA liability for robocalls to reassigned wireless numbers…." *Order* ¶82 (JA1187).

For each of these reasons, the *Order*'s treatment of calls to reassigned and wrong numbers is arbitrary and capricious. *See State Farm*, 463 U.S. at 43; *Achernar*, 62 F.3d at 1446.

C. The *Order*'s One-Call Exception Does Not Cure Defects in Its Approach to Reassigned Numbers.

The *Order* acknowledges that there is "no one perfect solution … to inform callers of reassignment," and therefore offers the one-call exception to avoid "making every call after reassignment subject to liability." *Order* ¶88 (JA1192). But, as the record made clear, the one-call exception does not cure the problems discussed above. Indeed, the only safe course for a good-faith caller whose call is not picked up or whose message receives no response would be to remove from its prior consent list any individual who fails to answer *any call* or return *any message* subject to the TCPA.[9] There are limitless reasons why a call or message recipient may not pick up the phone or respond to a text message, almost all of which do *not*

[9] This is especially problematic for text messages, particularly informational ones, for which "no response is expected or routinely provided," O'Rielly Dissent at 131 (JA1274) (citing Genesys 6/11/15 Letter at 2 (JA1136)), and no direct human interaction is typical. *See* Vibes 6/10/15 Letter at 2 (JA1061). For example, "there is no expectation by consumers that they should have to respond to texts providing information such as power outage notifications or product recalls." Genesys 6/11/15 Letter at 2 (JA1136).

involve number reassignment. Given the risks posed by class-action TCPA litigation, the end result of the FCC's "called party" interpretation, even with the one-call exception, will be that many consumers will cease to receive the messages they want and have consented to.

The one-call exception is especially inadequate given that the one call need not "connect to a person, answering machine or voicemail, or … otherwise provide the caller with actual knowledge of reassignment" before liability attaches. *Order* ¶85 n.300 (JA1190); *see also id.* ¶72 (JA1182). In Commissioner O'Rielly's words, "the idea that, after one call, a caller would have 'constructive knowledge' that a number has been reassigned – even if there was no response – is absolutely ludicrous." O'Rielly Dissent at 131 (JA1274). In reality, there can be many reasons why the called party did not respond:

> [A] person may be busy and not be able to answer the call. The ringer may be off, the phone may be in airplane mode, the power may be out or the battery may be dead and the ringer or phone may not work. A person may use a child's voice on an answering machine message. An automatic telephone dialer may not be able to recognize the contents of a voice message. A message may not contain any name or any personal information at all. A person may not have set up any voicemail at all or instead may use the default voicemail message, which is typically just an automated reading of the dialed number. The caller may not be able to understand the message (for example, if the message is in a foreign language). Or call forwarding could lead to mistaken conclusions about a reassignment. In those and other cases, it is impossible to accurately discern whether or not the number has been

reassigned.

Wells Fargo 6/5/15 Letter at 4 (JA1011).

Nevertheless, the *Order* simply declares, without support from the record, logic, or common sense, that "[a] caller receives constructive knowledge of reassignment by making or initiating a call to the reassigned number, which often can provide a reasonable opportunity for the caller to learn of the reassignment in a number of ways…." *Order* ¶82 n.293 (JA1188). This is nonsense. In a wide variety of cases, the recipient will have no reason to respond to a call or message, and the originator will have no reason at all to infer reassignment. Indeed, reassignment may be among the *least* likely explanations for non-response, particularly in the context of informational communications to which no response would be expected in the first place.

Even if an inference of reassignment were appropriate in *some* cases, this would be insufficient, because "constructive knowledge" is not ordinarily presumed where one *often* could learn of something. Rather, it is established only where one *should* learn of something. *See, e.g.*, *Constructive Knowledge*, Black's Law Dictionary (10th ed. 2014) (defining constructive knowledge as "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person"); *Kolb v. ACRA Control, Ltd.*, No. 14-2352, 2015 U.S. App. LEXIS 20164, at *14 (4th Cir. Md. Nov. 20, 2015) (quoting same).

Moreover, the exception does little or nothing to reduce the potential for crushing liability imposed on organizations that, in good faith, try to provide the information and services consumers seek. In fact, the one-call exception fails entirely to protect good-faith callers from opportunistic plaintiff actions. As one commenter noted, the one-call exception leaves the door wide open for "creative plaintiffs – and their even more creative attorneys – to bring frivolous claims." Vibes 6/10/15 Letter at 2 (JA1061).

* * *

As the record made clear, the *Order*'s treatment of calls and messages to reassigned and wrong numbers establishes an unworkable framework that chills the communications consumers consent to receive and otherwise conflicts with Congressional intent. In light of the record evidence showing the harms that would flow from the FCC's interpretation, the Court must set aside the *Order*'s arbitrary treatment of calls to reassigned and wrong numbers where the caller had prior express consent. *See Wedgewood Vill. Pharm. v. DEA*, 509 F.3d 541, 552-53 (D.C. Cir. 2007) (finding arbitrary and capricious decision interpreting statute but failing to consider argument that the interpretation was unworkable in practice).

II. THE *ORDER*'S DECLARATION THAT CONSUMERS CAN REVOKE CONSENT THROUGH VIRTUALLY ANY MEANS IS ARBITRARY AND CAPRICIOUS.

The *Order* holds that a "called party may revoke consent *at any time and through any reasonable means*," *Order* ¶47 (JA1172) (emphasis added), "including *orally or in writing*," *id.* ¶64 (JA1179) (emphasis added). The FCC failed to provide guidance on what constitutes "reasonable means," *see, e.g.*, Chamber 6/11/15 Letter at 5 (JA1142), instead indicating that it (and, presumably, courts) would review the "totality of the facts and circumstances surrounding that specific situation…." *Order* ¶64 n.233 (JA1179). It declined, in the text-message context, to defer to "a widely recognized and published set of opt-out keywords" such as "STOP," "CANCEL," "UNSUBSCRIBE," "QUIT," "END," and "STOPALL." *See* Vibes 6/10/15 Letter at 3 (JA1062) (citing CTIA Short Code Monitoring Program: Short Code Monitoring Handbook); *see also* O'Rielly Dissent at 136 (JA1279). And it declined to allow callers to designate *specific* reasonable means of revoking consent that recipients would agree to when consenting in the first place. *See* Santander 7/10/14 Petition at 9-14. (JA649-54). The approach it chose, which requires callers to effectuate revocation delivered through virtually any means, is impractical and will chill communications that consumers desire. It also will hamstring compliance efforts by good-faith actors and place them at risk of opportunistic entrapment. Because the FCC "failed to

consider [these] important aspect[s] of the problem," its decision must be set aside as arbitrary and capricious. *State Farm*, 463 U.S. at 43; *accord Achernar*, 62 F.3d at 1446.

First, the *Order* ignored evidence that the chosen approach would chill communications that consumers desire, disturbing the balance struck by Congress in the TCPA. The FCC's highly subjective "we know it when we see it" approach to reasonable revocation perpetuates just the sort of ambiguity that many of the underlying petitions before the agency sought to rectify. *See Order* ¶8 (JA1154) ("Through [their] petitions, businesses and business groups have sought clarity about the TCPA's consumer-privacy protections so they can offer potentially useful, innovative services in a cost-effective, lawful manner."). The reasonableness of revocation will be assessed not by the FCC alone, but also by dozens or hundreds of federal district courts considering whether plaintiffs in particular cases had revoked consent. Business entities simply cannot know in advance what type of revocation will and will not be deemed "reasonable." The *Order* will thus have a substantial chilling effect, forcing would-be senders of calls and messages to be overly cautious and to incur significant cost in ensuring that they are prepared to recognize and act on revocations delivered in all possible ways, however reasonable they may be. *See, e.g.*, AFSA 9/2/14 Letter at 2 (JA753); CCIA 9/2/14 Comments at 5 (JA750).

Second, the *Order* disregarded evidence that the open-ended approach adopted will provide yet another opportunity for predatory behavior. *See, e.g.*, CCIA 9/2/14 Comments at 5 (JA750); AFSA 9/2/14 Letter at 2 (JA753); Santander 2/13/15 Letter at 3 (JA919). Individuals seeking damages can sign up for automatic calls or text messages, purposely "revoke" consent in a means calculated to be ineffective and undetected by the caller, wait for the calls or messages to accumulate, and then seek damages in a hand-picked jurisdiction they deem likely to find their revocation "reasonable." Even worse, because the *Order* places the burden of proof on the caller, such a bad actor need not actually revoke consent at all – he could simply allege that he did so to a court, hoping that a caller will settle rather than face enormous liability if it is unable to prove the negative (*i.e.*, that the caller had not in fact revoked consent).[10]

Third, the *Order* disregarded evidence that allowing consumers to revoke consent through practically any means creates a compliance nightmare. The U.S. Chamber of Commerce explained that many large American companies employ hundreds or thousands of individuals, spread across numerous offices and utilizing

[10] Indeed, the *Order* makes clear that the evidentiary burden falls entirely on the caller. *See Order* ¶70 (JA1181) (stating expectation that "responsible callers, cognizant of their duty to ensure that they have prior express consent under the TCPA and their burden to prove that they have such consent," will maintain proper business records and affirming that consumers "do not bear the burden of proving that a caller did not have prior express consent for a particular call").

multiple phone numbers. According to the Chamber, allowing consent revocation through any "reasonable" means would open the possibility that a consumer could "call any company phone number, or send a letter to any company address, or send an email to any company email address, or talk to some affiliated entity" in order to revoke consent. Chamber 6/11/15 Letter at 5 (JA1142). The resulting ambiguity creates an untenable situation for callers: "It would be impossible for a company to monitor all possible means of communications for such revocations, particularly oral ones, and so the FCC should rethink adopting a position that consumers can revoke prior consent by any means they wish." *Id.* (JA1142); *see also* AFSA 9/2/14 Letter at 2 (JA753) (describing such a monitoring solution as "so expensive as to be completely impractical").

To this end, Commissioner Pai aptly wondered how "any retail business [could] possibly comply" if, as the *Order* holds, consumers can revoke their consent orally at "an in-store bill payment location[.]" Pai Dissent at 123 (JA1266) (quoting *Order* ¶64 (JA1179)).[11] The record showed that a regime in which businesses have to record and review every single conversation between

[11] "Would a harried cashier at McDonald's have to be trained in the nuances of customer consent for TCPA purposes? What exactly would constitute revocation in such circumstances? Could a customer simply walk up to a McDonald's counter, provide his contact information and a summary 'I'm *not* lovin' it,' and put the onus on the company?" Pai Dissent at 123 (JA1266).

customers and employees to document potential consent revocation is simply unworkable. *See, e.g.*, AFSA 9/2/14 Letter at 2 (JA753).

Thus, the evidence demonstrated that callers are left with an impossible choice when they seek to provide the services and information that consumers desire: (1) refrain from providing such services and information altogether; or (2) risk potentially crushing liability. Such a result is plainly discordant with the balance Congress struck in the TCPA between protecting individuals and permitting legitimate practices and communications sought by consumers. *See supra* Section I; *Order* ¶2 (JA1147). Moreover, the FCC's failure to address record evidence showing the harms that would flow from the agency's interpretation is precisely the type of agency error this Court has found arbitrary and set aside. *See Wedgewood Vill. Pharm.*, 509 F.3d at 552-53 (D.C. Cir. 2007). The Court must do likewise here.

CONCLUSION

For the reasons stated herein and in the Petitioners' Brief, the Court should grant the petitions for review and vacate the challenged portions of the *Order*.

Respectfully submitted,

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February 24, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Cir. R. 32(e)(2)(C), I hereby certify that the foregoing brief complies with the type-volume limitation of D.C. Cir. R. 32(e)(3) and Fed. R. App. P. 29(d) because this brief contains 6,076 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(e)(1). This certification is made in reliance on the word count function of the word processing system used to prepare this brief (Microsoft Word 2010).

Further, I certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (14-point Times New Roman).

/s/ Bryan N. Tramont
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February 24, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on February 24, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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