FINAL VERSION

ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1211 (and consolidated cases)

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

ACA INTERNATIONAL ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents

ON PETITION FOR REVIEW FROM AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

JOINT REPLY BRIEF FOR INTERVENORS MRS BPO LLC; CAVALRY PORTFOLIO SERVICES, LLC; DIVERSIFIED CONSULTANTS, INC.; MERCANTILE ADJUSTMENT BUREAU, LLC; COUNCIL OF AMERICAN SURVEY RESEARCH ORGANIZATIONS; MARKETING RESEARCH ASSOCIATION; NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS; CONIFER REVENUE CYCLE SOLUTIONS, LLC; AND GERZHOM, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ix

GLOSSARY xi

INTRODUCTION 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE ORDER'S DEFINITION OF ATDS IS INCONSISTENT WITH THE TCPA'S TEXT, HISTORY, AND PURPOSE. 3

A. The TCPA's Text Is Clear and Forecloses the FCC's Interpretation. 3

B. The TCPA Is Unambiguous with Respect to What an ATDS Must Have the Capacity To Do. 5

C. The Order's Interpretation of ATDS Is Unreasonable in Light of the TCPA's History and Purpose. 9

II. THE FCC'S INTERPRETATION OF "CALLED PARTY" IS INCONSISTENT WITH THE STATUTE. 12

A. The FCC's Interpretation Exposes Callers to an Unworkable and Unavoidable Risk of Liability. 12

B. The FCC Fails To Consider that Businesses Have No Incentive To Target Reassigned Numbers. 15

C. The One-Call Safe Harbor Provision Is Meaningless. 16

III. THE "ANY REASONABLE MEANS" METHOD OF REVOKING PRIOR EXPRESS CONSENT IS ARBITRARY AND CAPRICIOUS. 17

CONCLUSION 18

CIRCUIT RULE 32(A)(2) ATTESTATION

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

DC01\PavaM\1446020.10

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. JPMorgan Chase Bank, NA et al.,
1:13-cv-08285 (N.D. Ill. 2015) 14

Consumer Elecs. Ass'n v. FCC,
347 F.3d 291 (D.C. Cir. 2003) 8

* *Cont'l Air Lines, Inc. v. DOT*,
843 F.2d 1444 (D.C. Cir. 1988) 9, 10

Dep't of Energy v. Ohio,
503 U.S. 607 (1992) 4

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 4

Franklin v. Wells Fargo Bank, N.A.,
3:14-cv-02349 (S.D. Cal. 2014) 14

Ft. Stewart Schools v. Fed. Labor Relations Auth.,
495 U.S. 641 (1990) 5

In re Capital One Telephone Consumer Protection Act Litigation,
MDL No. 2416, 1:12-cv-10064 (N.D. Ill. 2014) 14

* *Jenkins v. Wash. Area. Transit. Auth.*,
895 F. Supp. 2d 48 (D.C. Cir. 2012) 16

Michigan v. EPA,
135 S. Ct. 2699 (2015) 18

Rose v. Bank of America Corp.,
5:11-cv-02390 (N.D. Cal. 2011) 14

Sherman v. Kaiser Foundation Health Plan, Inc.,
3:13-cv-00981 (S.D. Cal. 2013) 14

* Authorities upon which we chiefly rely are marked with an asterisk.

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Wilson,
503 U.S. 329 (1992)..4

Utility Air Regulatory Group v. EPA,
134 S. Ct. 2427 (2014)..12

* *Wedgewood Vill. Pharm. v. DEA*,
509 F.3d 541 (D.C. Cir. 2007)..15

Statutes

ATDS Provision, 47 U.S.C. § 227(a)(1)...3, 5

Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(A).....................passim

Other Authorities

137 Cong. Rec. 35,302 (Nov. 26, 1991)..9

H.R. Rep. No. 101-633, at 3 (1990)...9

H.R. Rep. No. 102-317, at 10 (1991)...9

Letter from Monica S. Desai, Counsel toWells Fargo, to Marlene H. Dortch, FCC, CG Docket No. 02-278, at Exh. 5-6 (filed Jan. 26, 2015)...13

S. Rep. No. 102-178, at 2 (1991)...9

Administrative Materials

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, FCC 03-153 (2003)...10

* *In the Matter of Rules and Regulations Implementing the TCPA of 1991*, 30 FCC Rcd. 7961 (2015) (Declaratory Ruling and Order).............passim

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GLOSSARY

2003 TCPA Order	Report & Order, *Rules & Regs. Implementing the Tel. Cons. Prot. Act of 1991*, 18 FCC Rcd. 14014 (2003)
Autodialer or ATDS	Automatic telephone dialing system, defined as "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers" (47 U.S.C. § 227(a)(1))
Autodialed Calls	Calls made using an autodialer, as regulated by 47 U.S.C. § 227(b)(1)(A)
Br.	Brief for Respondents Federal Communications Commission and United States of America
FCC or Commission	Federal Communications Commission
Order	Declaratory Ruling & Order, In re *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7691 (2015)
O'Reilly Dissent	Dissenting Statement of Commissioner Michael O'Reilly, Dissenting in Part and Approving in Part, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7691 (2015)
Pai Dissent	Dissenting Statement of Commissioner Ajit Pai, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7691 (2015)
Prerecorded Calls	Calls made using an artificial or prerecorded voice, as regulated by 47 U.S.C. § 227(b)(1)(A) and (B)
TCPA	Telephone Consumer Protection Act of 1991, Pub. L. No. 5 Stat. 2394, *codified as amended* at 47 U.S.C. § 227

INTRODUCTION

The Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(A) ("TCPA"), was enacted to prevent telemarketers from using automated dialers to dial large blocks of random or sequential telephone numbers, thereby reaching unlisted numbers and tying up emergency lines. Since the TCPA's enactment, calling technology has changed radically and businesses have improved their efforts to reach only "intended" customers. Despite this progress, the FCC's 2015 Declaratory Ruling and Order (the "Order") has expanded the scope of the TCPA's restrictions—transforming the statute via administrative fiat into a wholly unworkable regime.

The FCC fails to explain how its overbroad, inconsistent, and expansive interpretation of the TCPA accords with the text or purpose of the statute. Intervenors agree with Petitioners in this regard. Intervenors remain deeply concerned that the FCC fundamentally has failed to recognize how the Order's requirements will impair their ability to effectively communicate messages that customers desire to receive. The interpretation, therefore, must be set aside.

SUMMARY OF ARGUMENT

The definition of an automatic telephone dialing system ("ATDS") adopted in the Order is foreclosed by the text of the TCPA, and is inconsistent with the Act's history and purpose. The FCC asserts that the TCPA does not

"unambiguously limit" the definition of an ATDS to a device's present capacity because the statutory definition does not contain the word "present." In so arguing, the FCC takes the term "capacity" out of context, blithely ignoring the clear import of the ATDS provision read as a whole. Indeed, the Commission goes a step further, apparently contending that as long as a device has the "potential" to dial numbers—regardless of whether those numbers are randomly or sequentially generated—it may be treated as an ATDS. This novel interpretation is at odds with the plain language of the TCPA and creates potentially calamitous uncertainty for financial institutions, market research companies, healthcare providers, and other businesses that regularly contact customers on their cellular phones.

The FCC's interpretation of "called party" likewise is illogical and unworkable because it allows for imposition of liability when a cell phone number has been reassigned without the caller's knowledge, and the caller is not alerted to the reassignment by the first call. This interpretation undermines a basic tenet of the TCPA—that a caller who obtains consent to contact a particular telephone number cannot be held liable for calls to that number—and exposes callers to potentially crippling class-action liability for innocent mistakes.

Lastly, the FCC's determination that a recipient of a call can revoke prior express consent by "any reasonable means" is arbitrary and capricious. The lack

of a standardized method for revoking consent will lead to additional costs and burdens for businesses and create a system that is impossible to implement.

ARGUMENT

I. THE ORDER'S DEFINITION OF ATDS IS INCONSISTENT WITH THE TCPA'S TEXT, HISTORY, AND PURPOSE.

The TCPA states in clear and certain terms that an ATDS includes only equipment that "*has* the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; *and* (B) to dial such numbers." 47 U.S.C. § 227(a)(1) (the "ATDS provision") (emphases added). Ignoring that statutory command, the Order construes ATDS to include equipment that "lacks the 'present ability' to dial randomly or sequentially," as long as it has the "potential" to do so. Order ¶¶ 15, 16. That construction contravenes the TCPA's text, history, and purpose, and is otherwise arbitrary and capricious. It must be overturned.

A. The TCPA's Text Is Clear and Forecloses the FCC's Interpretation.

The FCC contends (Br. 27) that the TCPA does not "unambiguously limit[] the autodialer restrictions to devices with the 'present' capacity to autodial numbers at the time a call is made" because the statute does not contain the word "present." That is simply incorrect.

The TCPA defines ATDS in terms of what a device "has the capacity" to do. Congress's use of the present tense demonstrates that it intended to limit the scope

of the term ATDS to devices with the present ability to dial random or sequential numbers. *See*, *e.g.*, *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes"). Had Congress wanted to include devices with the "potential" ability to dial randomly or sequentially, it would have drafted the statute to cover equipment that "has or could have" the requisite capacity. By choosing the formulation "has the capacity," Congress made clear that it intended to limit the statute's reach to a device's present capacity. Reaching this conclusion does not require "add[ing] a word that 'do[es] not appear in the statute'" (Br. 27), as the FCC contends. It simply requires reading the phrase "has the capacity" as a whole, according to its ordinary meaning, giving effect to Congress's choice of the present tense.

In an effort to create ambiguity where none exists, the FCC focuses on the meaning of the term "capacity" in isolation (Br. 28)—completely ignoring the fact that "capacity" appears in a clause phrased in the present tense. *See e.g. Dep't of Energy v. Ohio*, 503 U.S. 607, 622 (1992) ("The term's context, of course, may supply a clarity that the term lacks in isolation."); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("The meaning … of certain words or phrases may only become evident when placed in context."). But even if "capacity" could have the meaning the FCC ascribes to it in isolation, "here it is not in isolation, but forms part of a paragraph whose structure, as a whole" makes

clear that Congress intended to focus on the present capacity. *Ft. Stewart Schools v. Fed. Labor Relations Auth.*, 495 U.S. 641, 646 (1990).

The FCC attempts to obfuscate that fact, arguing (Br. 30) that "Congress could … have used the present tense" if it "wanted to unambiguously address only devices with the present capacity to autodial numbers," listing other present-tense formulations that Congress could have chosen. But Congress did use the present tense in defining ATDS. That Congress could have used other formulations to achieve the same result is irrelevant.

B. The TCPA Is Unambiguous with Respect to What an ATDS Must Have the Capacity To Do.

The TCPA's ATDS provision also makes clear what an ATDS must have the "capacity" to do—store or produce random or sequential numbers, and dial those numbers. *See* 47 U.S.C. § 227(a)(1). Although the Order sometimes appears to recognize this statutory requirement, *see, e.g.*, Order ¶ 15 ("autodialers need only have the 'capacity' to dial random and sequential numbers"), the FCC elsewhere suggests that, to qualify as an ATDS, a device (in the absence of an ill-defined modicum of human intervention) need only be able to store, and then dial, a list of numbers, regardless of whether the numbers stored and then dialed are randomly or sequentially generated. *See* Br. 38-43; *see also* Order ¶¶ 12, 13 (concluding that the ability to call a "fixed set of numbers"—standing on its own—may be sufficient to qualify a device as an ATDS). Indeed, the FCC in its brief

goes one step further, arguing that "the text of the statute *cannot* be read to require that the telephone numbers [to be dialed] must be random or sequential numbers." Br. 39 (emphasis added).

Although the FCC implies that this contention is on all fours with its prior ruling that "predictive dialers" fall within the statutory definition of ATDS, it is actually much broader. A predictive dialer is an automated dialing system that uses algorithms to dial telephone numbers automatically in a manner that attempts to reach consumers most efficiently. *See* 2003 TCPA Order ¶ 8 n.31. Today, the majority of devices that dial numbers from preset lists are used to dial subscribers' telephone numbers (which by definition are ***not*** generated randomly or sequentially), and do not dial those numbers pursuant to an algorithm—even if the devices could be modified to do those things. Financial institutions, for example, use such dialers to send mass alerts (via call or text) to customers regarding fraud, identity theft, and data breaches, as well as to protect consumers' credit and help them reduce or avoid fees. Likewise, educational institutions use similar technology to send automated text and voice alerts to parents and students with important notifications regarding school closings or emergencies. These vital communications cannot be made manually because the alerts would arrive too late to be useful, and sending the messages would be too time consuming and expensive.

The FCC goes to great pains to suggest that the TCPA covers these types of devices, even though they are not actually used as predictive dialers or used to dial random or sequential numbers, simply because these functions *could* be added or activated to accomplish these goals. *See* Br. 38-43; *see also* Order ¶ 16 & n.63 ("even when the equipment presently lack[s] the necessary software, it nevertheless ha[s] the requisite capacity to be an autodialer" because "[t]he functional capacity of software-controlled equipment is designed to be flexible"). In defending this position, the FCC focuses on the placement of the phrase "using a random or sequential number generator" in the statute, arguing that it cannot be read to modify either the "numbers to be called" or the numbers to be "stored." Br. 38. The FCC goes on to argue that "any device that can call a stored list of telephone numbers has the capacity to call random or sequential numbers, simply by using a list of random or sequential numbers as the calling list." *Id.*

The FCC's reasoning proves too much. Taking the FCC's argument to its logical conclusion, the TCPA could be construed to cover virtually any telephone in existence today (which would be absurd), including devices with the capacity to perform speed dialing, which the FCC elsewhere has expressly disclaimed being covered by the TCPA, *see* Order ¶ 17. It cannot be the case that any device that can dial numbers from present lists satisfies the requirements of an ATDS simply because that list theoretically could (but need not) be made up of randomly or

sequentially generated numbers. As a matter of statutory construction and logic, the "numbers to be called" must have some relation to a "random or sequential number generator." Otherwise, the phrase "random or sequential number generator" is read completely out of the statute, and any piece of dialing equipment, regardless of how it is used, may constitute an ATDS covered by the TCPA.

The FCC attempts to bolster its tortured reading of the TCPA by arguing (Br. 44) that there is "no sensible reason why Congress would have sought to prohibit automated calls to lists of random or consecutive numbers, but not to any other lists of numbers." But the legislative history makes clear why Congress made that choice—because devices that dial large blocks of random or sequential numbers risk tying up emergency lines in a given area, and thus pose a risk to public safety. Targeting only those devices served Congress' purpose in enacting the TCPA, without unduly restricting legitimate business activities.

Nor is the FCC's congressional ratification argument (Br. 49-52) convincing. As this Court has consistently recognized, congressional inaction is not probative of a statute's meaning. *See, e.g.*, *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 299 (D.C. Cir. 2003) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such

inaction, including the inference that the existing legislation already incorporated the offered change.").

C. The Order's Interpretation of ATDS Is Unreasonable in Light of the TCPA's History and Purpose.

Even if the TCPA's ATDS provision were ambiguous, the FCC's interpretation of ATDS is unreasonable and for that reason must be set aside.

The TCPA's legislative history confirms that Congress intended to limit the definition of ATDS to devices with the present capacity to dial randomly or sequentially. *See, e.g., Cont'l Air Lines, Inc. v. DOT*, 843 F.2d 1444, 1449 (D.C. Cir. 1988) (reasonableness of agency's interpretation is determined "by reference both to the agency's textual analysis (broadly defined, including where appropriate resort to legislative history) and to the compatibility of that interpretation with the Congressional purposes informing the measure"). As described in detail in Intervenors' opening brief (at 17-18), the TCPA was enacted to address a particular problem that was prevalent in the 1990s—telemarketers' use of autodialing technology to indiscriminately dial large blocks of random or sequential numbers. Congress was concerned that telemarketers would use this technology to reach unlisted numbers with automated messages and tie up telephone lines (particularly, emergency services lines) for long periods of time.[1] Accordingly, it drafted the

[1] *See, e.g.*, 137 Cong. Rec. 35,302 (Nov. 26, 1991); H.R. Rep. No. 101-633, at 3 (1990); H.R. Rep. No. 102-317, at 10 (1991); S. Rep. No. 102-178, at 2 (1991).

TCPA to impose limits on calls using *that* technology, not any and all dialing technology.

The FCC's approach—construing "capacity" to cover any device with the "potential" to dial randomly or sequentially—is completely inconsistent with this purpose. *See Cont'l Air Lines*, 843 F.2d at 1450 (court must assess whether "the agency's interpretation is compatible with Congress' purposes informing the measure"). The effect of the FCC's broad reading is to potentially cover a range of devices that Congress never considered, including the modern smartphone, that pose none of the harms that the TCPA was designed to address, thereby curtailing legitimate business activity.[2] This could not have been Congress's intent.[3]

Tellingly, the FCC never argues that its interpretation of the TCPA is more consistent with congressional intent as to *the meaning of the ATDS provision* than

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[2] The FCC claims (Br. 34) that the Order does not cover smartphones because in the Order the FCC (1) specifically declined to address smartphones, and (2) claimed there was no evidence in the record indicating that there had been TCPA lawsuits regarding smart phones. That the Order states that it is not addressing smartphones, however, does not mean that the natural reading of the Order would not include smartphones. Nor does the claim that there was *no evidence in the record* of TCPA lawsuits regarding smartphones imply as much. The interpretation of ATDS adopted in the Order appears to cover smartphones (although that would be unconstitutional and in abrogation of the law for a host of other reasons); lawsuits alleging violation of the TCPA stemming from use of a smartphone are inevitable.

[3] *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, FCC 03-153 (July 3, 2003) (reviewing legislative history and nothing that "[t]he TCPA does not ban the use of technologies to dial telephone numbers.").

the one advanced by Petitioners. The FCC instead argues that limiting the definition of ATDS to devices with the present capacity to dial randomly or sequentially is "flawed as a matter of policy" because there is no clear line between "present" and "potential" abilities. Br. 31. But the line the FCC draws in the Order is just as difficult, if not more difficult, to administer. Under the FCC's interpretation, a device could be construed as an ATDS if its "potential functionalities" include the capacity to dial randomly or sequentially—regardless of whether that capacity is actually activated or in use—as long as that capacity is not "too attenuated" or "theoretical." Order ¶ 18. Yet the FCC offers no explanation of how to gauge the unacceptable level of attenuation. The only example the FCC provides of a device for which the requisite capacity would be too attenuated—the rotary phone—demonstrates the lack of any real, practical limiting principle to the interpretation adopted in the Order. Accordingly, it is impossible for callers to know what constitutes an ATDS and what does not. As a result, businesses may have to abandon calling technology that they are not using to dial random or sequential numbers—and bear the cost of hiring and training additional staff to fill the gap—to avoid the specter of massive TCPA liability. Indeed, many businesses already have. Additionally, these businesses are left without any form of reasonable guidance from the FCC about what dialing technologies would not be an ATDS and thus have been left to speculate about

what new technologies to implement (and to consider whether rotary telephone dialing is the only safe alternative). Thus, the FCC's interpretation is arbitrary and capricious, and should be set aside.

II. THE FCC'S INTERPRETATION OF "CALLED PARTY" IS INCONSISTENT WITH THE STATUTE.

In its brief, the FCC contends that the phrase "consent of the called party" is ambiguous, and, accordingly, any interpretation it puts forward, no matter how unworkable, will suffice. Br. 54-56. The case law is not so deferential. *See, e.g., Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014) (interpretation must fit "the broader context of the statute"). The agency's interpretation is inconsistent with the TCPA's text and wholly fails to account for the substantial liability that businesses face for innocent mistakes. Moreover, the purported "savior" of the one-call safe harbor is illusory, because it fails to protect callers who are not actually informed of a reassigned number.

A. The FCC's Interpretation Exposes Callers to an Unworkable and Unavoidable Risk of Liability.

The FCC's brief essentially concedes that obtaining the called party's prior express consent is meaningless when a cellular telephone number has been reassigned. Br. 58. Apparently, callers can only aim to "limit their liability," not avoid it altogether. *Id.*; *see also* Order at ¶ 85 ("We agree with commenters who argue that callers lack guaranteed methods to discover all reassignments

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immediately after they occur."). With damages of at least $500 per call to a reassigned number, potential liability extends to millions of dollars for even the most cautious caller. In response to this obvious pitfall, the Commission states only that "[c]allers have a number of options that, over time, *may* permit them to learn of reassigned numbers," *id.* ¶ 86 (emphasis added), citing a database that self-servingly purports to identify 80% of wireless numbers. Although the FCC attempts to minimize the frequency of this problem, 37 million wireless numbers are reassigned each year.[4] If 20% of those numbers are not captured—which is the case only if the technology the FCC cites is as effective as claimed—callers are exposed to potential liability for up to 7.4 million numbers per year that might be called, or at least **$3.7 billion** in potential exposure for unknown calls.

The enormous threat of liability as a result of class-action lawsuits cannot be discounted,[5] yet the FCC's brief mentions this colossal concern only fleetingly, and indeed, dismissively. The Commission argues that claims of "catastrophic" liability are "overblown" and suggests that class action lawsuits brought by non-consenting recipients of calls to reassigned numbers would struggle to achieve class certification. Br. 59 n.14. But the cost to defend a TCPA lawsuit can itself

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[4] *See* Pai Dissent at p. 117, n. 589 (JA1260).

[5] *See* O'Reilly Dissent (noting that more than 2,000 TCPA class action lawsuits were filed in 2014 alone); *see also* Letter from Monica S. Desai, CG Docket No. 02-278, at Exh. 5-6, (JA886-JA887) (filed Jan. 26, 2015) (providing statistics on the breadth of TCPA litigation).

run into the millions of dollars—whether or not class certification is achieved. As the FCC knows, recent TCPA class action settlements have reached into the tens of millions of dollars.[6] Yet the FCC failed to consider how its interpretation of "called party" would bolster attempts to extract huge settlements for innocent mistakes.

The FCC's brief naively states that "most people don't sue over a wrong-number call; they politely tell the caller that he or she has the wrong number and hang up." Br. 59. While this unsubstantiated contention may be true in some circumstances, extensive liability can—and does—result when only a handful of individuals decide to bring a class action. Moreover, the Order went out of its way to declare that recipients have no duty to notify the caller that the number it reached had been reassigned, creating an incentive for recipients *not* to notify the caller to establish grounds for a lawsuit to collect statutory remedies.[7]

To be sure, the FCC's brief offers a laundry list of additional actions that companies might take (Br. 58-59) to discover reassigned numbers, but never

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[6] *See, e.g., In re Capital One Telephone Consumer Protection Act Litigation*, MDL No. 2416, 1:12-cv-10064 (N.D. Ill. 2014) (settlement of $75.5 million); *Rose v. Bank of America Corp.*, 5:11-cv-02390 (N.D. Cal. 2011) ($32 million settlement); *Franklin v. Wells Fargo Bank, N.A.*, 3:14-cv-02349 (S.D. Cal. 2014)) (case settled less than three months after filing for $14.5 million); *Allen v. JPMorgan Chase Bank, NA et al.*, 1:13-cv-08285 (N.D. Ill. 2015) (settlement of $10.2 million); *Sherman v. Kaiser Foundation Health Plan, Inc.,* 3:13-cv-00981 (S.D. Cal. 2013) (settlement of $5.35 million).

[7] *See* Pai Dissent at p. 120 (JA1263) (Order "creates a trap" for callers).

suggests that even these actions would be sufficient to identify all numbers that are reassigned without the callers' knowledge. In the end, there is nothing a caller can do to ensure that the consent it obtained is still valid at the time the call is made. *See Wedgewood Vill. Pharm. v. DEA*, 509 F.3d 541, 552-53 (D.C. Cir. 2007) (decision is arbitrary and capricious when it is based on an interpretation that is unworkable in practice). The FCC's interpretation of a called party thus undermines the most basic premise of the TCPA—that callers can obtain consent to make otherwise objectionable calls.[8]

B. The FCC Fails To Consider that Businesses Have No Incentive To Target Reassigned Numbers.

The sole policy reason the FCC offers for this unworkable scheme is that "unwitting recipients of reassigned numbers might face a barrage of telemarketing voice calls and texts" otherwise. Br. 57. But an unwanted barrage of calls or texts would still be actionable if the standard were actual knowledge, under which liability would attach once the caller learns of the reassigned number (such as if the recipient "politely tell[s] the caller that he or she has the wrong number" (Br. 59)); the only difference is that the called party would be required to inform the caller of

[8] The FCC claims that a call to these reassigned numbers is not "consensual" because the current subscriber has not provided consent (Br. 58). But a caller cannot obtain consent from a person it does not know it is calling in the first place. Imposing liability for such calls is not consistent with the letter or spirit of the TCPA.

the reassigned number before being able to sue for statutory damages. The FCC arbitrarily dismissed this option.

C. The One-Call Safe Harbor Provision Is Meaningless.

The FCC argues that the one-call safe harbor provision operates to reduce callers' potential liability when the caller fails to learn that a number has been reassigned. Br. 60. However, one call—especially a call that is not answered or where the recipient refuses to inform the caller of the mistake—*cannot* result in the caller obtaining "constructive knowledge" of the number's reassignment when that call is not answered or where the recipient refuses to inform the caller of the mistake. *See Jenkins v. Wash. Area. Transit. Auth.*, 895 F. Supp. 2d 48, 78 (D.C. Cir. 2012) (defining "constructive knowledge" as "what the user knew or reasonably should have known"). Indeed, the FCC's interpretation creates an incentive *not* to inform callers of the reassignment to create grounds for a TCPA lawsuit.

The FCC does not respond to these concerns. In fact, the FCC recognizes that the safe harbor provision will not address the issue of liability for innocent calls to reassigned numbers. Order ¶ 90 n.312 (acknowledging that "we do not presume that a single call to a reassigned number will always be sufficient for callers to gain actual knowledge of the reassignment, nor do we somehow 'expect callers to divine from [the called party's] mere silence the current status of a

telephone number'"). In its brief, however, the FCC urges that "someone must 'bear the risk in situations where robocalls are placed to reassigned wireless numbers,'" and that "someone" must be the caller—even if the caller acted in good faith. Br. 60. Imposing that risk without offering a means of avoiding it is a classic example of an arbitrary and capricious action. For these reasons, the FCC's interpretation of "called party" must be set aside.

III. THE "ANY REASONABLE MEANS" METHOD OF REVOKING PRIOR EXPRESS CONSENT IS ARBITRARY AND CAPRICIOUS.

The FCC's brief fails to seriously address the burdens that will be placed on businesses as a result of having to implement the FCC's revocation of consent by the "any reasonable means" standard, rather than by permitting businesses to implement uniform revocation procedures. Proposed solutions—such as employing "live operators" to field attempted revocations (Br. 66)—create additional costs for businesses attempting to operate in good faith without any guarantee that these measures will be effective in ensuring compliance with the TCPA. Moreover, the FCC never explains how such "live operator" employees would be trained to identify and process customer consent for TCPA purposes.[9]

Because an agency's position is arbitrary and capricious when compliance with a provision imposes impractical burdens, *see*, *e.g.*, *Michigan v. EPA*, 135 S. Ct. 2699, 2709 (2015), the FCC's revocation-of-consent regime is unlawful.

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[9] *See* Pai Dissent at p. 123 (JA1266).

CONCLUSION

In support of Petitioners, Intervenors assert that all petitions for review should be granted, and the challenged provisions of the Order vacated.

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Respectfully submitted,

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CIRCUIT RULE 32(a)(2) ATTESTATION

In accordance with D.C. Circuit Rule 32(a)(2), I hereby attest that all other parties on whose behalf this brief is filed consent to its filing.

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CERTIFICATE OF COMPLIANCE

This brief complies with the Court's Order of October 13, 2015, because it contains 4,250 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1), as determined by the word-counting feature of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2016, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system (initial version), which will send notification of the filing to all parties or their counsel of record.

I hereby certify that on February 24, 2016, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system (final version), which will send notification of the filing to all parties or their counsel of record.

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