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 of an Order of the Federal Communications Commission

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BRIEF *AMICI CURIAE* OF THE AMERICAN BANKERS ASSOCIATION, CREDIT UNION NATIONAL ASSOCIATION AND THE INDEPENDENT COMMUNITY BANKERS OF AMERICA IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *amicus* American Bankers Association is a nonprofit trade association of community, regional, and money center banks, holding companies, savings associations, trust companies, and savings banks. It does not offer stock and has no parent corporation.

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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *amicus* Credit Union National Association, Inc. is a non-profit trade association organized and existing under the laws of the state of Wisconsin. CUNA has no parent corporation and no publicly traded corporation owns ten percent (10%) or more of its stock.

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Amicus Curiae Independent Community Bankers of America ("ICBA") is a non-profit trade association organized and existing under the laws of the state of Minnesota. ICBA does not offer stock and has no parent corporation.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amici curiae* certify that:

(A) Parties, Intervenors and *Amici*

Parties, intervenors and *amici* are listed in the Joint Brief for Petitioners ACA International, Sirius XM, PACE, salesforce.com, ExacTarget, Consumer Bankers Association, U.S. Chamber of Commerce, Vibes Media, and Portfolio Recovery Associates ("Joint Petitioners Brief") , filed November 25, 2015.

In addition, other entities not now known to American Bankers Association, Credit Union National Association and Independent Community Bankers of America may file briefs *amici curiae,* or statements of intent to file such briefs, in this Court.

(B) Ruling under Review

The ruling under review was released on July 10, 2015 by the Federal Communications Commission. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 30 FCC Rcd 7961 (2015). The order is an omnibus declaratory ruling and order that addressed 21 separate requests for action from the Commission related to the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227.

(C) Related Cases

All petitions for review of the Commission's order were consolidated in this

Court under the lottery procedures set forth in 28 U.S.C. § 2112(a). Counsel are not aware of any other related cases.

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CERTIFICATE OF COUNSEL REGARDING AUTHORITY TO FILE AND SEPARATE BRIEFING

All parties to this proceeding have consented to the filing of this brief. Pursuant to Circuit Rule 29(d), counsel for *amici curiae* certify that filing of this separate brief is necessary because no other non-governmental *amicus* brief of which they are aware relates to the subjects addressed herein.[1]

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[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or its members made a monetary contribution intended to fund the preparation or submission of this brief.

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STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Joint Petitioners Brief.

IDENTITY AND INTEREST OF *AMICI CURIAE*

American Bankers Association (ABA) is the voice of the nation's $15 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $12 trillion in deposits and extend more than $8 trillion in loans.

The Credit Union National Association (CUNA) is the largest organization representing the nation's 6,300 credit unions and their more than 100 million members. Credit unions are member-owned financial cooperatives with the statutory mission of meeting the credit and savings needs of their members, often in low-income, rural or underserved populations.

The Independent Community Bankers of America (ICBA), a national trade association, is the nation's voice for more than 6,000 community banks of all sizes and charter types, and is dedicated exclusively to representing the interests of the community banking industry and its membership. ICBA member community banks seek to improve cities and towns by using local dollars to help families and are actively engaged in lending in the communities they serve.

An important function of ABA, CUNA and ICBA (collectively, the

Associations) is to represent the interests of their members in matters before Congress, the Executive Branch and the courts. As advocates for banks and credit unions, the Associations have a significant interest in, and a unique perspective on, the issues at stake in this proceeding, which directly impact their members' ability to serve and prevent harm to their customers and credit union members. The Associations believe that their members' perspective will assist the Court in resolving the issues presented in this case. *See* Fed. R. App. 29(b). The *amici* brief of the Associations also will promote judicial economy by reducing or eliminating the need for separate briefs by each Association and *amicus* briefs by individual members of each Association.

SUMMARY OF ARGUMENT

These consolidated cases seek review of the Federal Communications Commission's (FCC or Commission) order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) ("TCPA Order"). The TCPA Order reached erroneous conclusions concerning the scope and application of the TCPA that severely restrict the ability of financial institutions and other callers to engage in useful, and often urgent, communications with their customers or members (hereinafter referred to, collectively, as consumers).

The arguments made in this brief, and the examples cited below, are jointly

advanced by the ABA, CUNA and ICBA. Additionally, the brief articulates concerns specific to credit unions and community banks, many of which are small businesses.[2] If the TCPA Order is upheld, its onerous and burdensome requirements may force those entities that have limited staff and resources to restrict wireless communications with consumers. Furthermore, the risk of draconian liability under TCPA class actions threatens the very livelihood of these small financial institutions, and their ability to serve consumers. This could not have been the intent of Congress when it passed the TCPA.

ARGUMENT

I. Consumers Need Prompt, Efficient Communications from their Financial Institutions, Including Communications sent to Consumers' Mobile Devices

Of all the institutions with which people must stay connected, their banks and credit unions are among the most vital. Communications by financial institutions to consumers combat fraud and identity theft, provide notice of data security breaches and help consumers avoid missed payments and late fees. Automated telephone dialing systems enable financial institutions to provide these important communications to large numbers of consumers quickly, efficiently and economically.

[2] There are approximately 2,700 credit unions nationwide with five or fewer employees. Similarly, many small community banks are locally owned and operated, and operate with limited staff and resources.

A substantial percentage of automated notifications must be sent to mobile telephone numbers, given the large number of consumers who use only mobile phones to meet their telecommunications needs. CTIA-The Wireless Association reports that, as of year-end 2014, 44.0% of U.S. households were "Wireless Only."[3] The Centers for Disease Control and Prevention reports that, in the first half of 2015, 47.4% of U.S. households were "wireless-only," with that percentage rising to 71.3% for adults between 25 and 29.[4] Any impediment to automated contact with mobile consumers is sure to affect a significant and growing number of financial institution customers and members.

Several examples of the benefits that banks' and credit unions' non-telemarketing communications provide to consumers, which will be significantly curtailed and in some instances eliminated if these communications cannot be efficiently made, are summarized below.

A. Financial Institutions Must Communicate with Consumers in Order to Prevent and Mitigate Fraud and Identity Theft

Protecting consumers from fraud and identity theft is a high priority of the

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[3] CTIA-The Wireless Association, Annual Wireless Industry Survey, June, 2015 (last visited Dec. 1, 2015), available at http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey.

[4] Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2015*,available at http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201512.pdf (Tables 1 & 2).

financial services industry. Financial institutions have made significant investments in fraud monitoring to identify suspicious activities and transactions and to respond with timely messages to consumers that might be at risk. Institutions monitor the following activities and risk factors, among others, for these purposes:

- Characteristics of purchases that are unusual in kind for the consumer, such as purchase amounts, geographic areas of the purchases or types of merchant that depart from the consumer's established buying patterns.
- Sizes and types of transaction authorization requests that present a high likelihood of fraud, such as high-dollar transactions, ATM withdrawals and purchases of goods that can readily be converted to cash.
- Transaction requests involving geographic areas, merchants or merchant types that recently have experienced unusual levels of fraud.
- Suspicious non-monetary activities, such as changes of address closely accompanied by requests for new payment cards.[5]
- Requests for new online credentials, coupled with evidence of malware or phishing attacks.

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[5] The Red Flags Rule, adopted by the Federal Trade Commission and other federal regulators of financial institutions, prohibits a card issuer from complying with a request for an additional or replacement card that follows less than 30 days after an address change, until the issuer has notified the cardholder of the request. *See, e.g.,* 74 Fed. Reg. 22639, 22646 (May 14, 2009).

The volume of these required notifications, which average 300,000 to 400,000 messages per month for one large financial institution alone, cannot be accomplished at all, much less with acceptable speed, unless the process is automated.[6] Manual calls placed in these circumstances would too often come too late to prevent harm to the consumer. In the case of credit unions and community banks, the unsustainable regulatory burden of manually dialing diverts limited resources away from providing other necessary services on which consumers rely.

In addition, financial institutions are required, under the Fair Credit Reporting Act, to verify a consumer's identity before authorizing the establishment of any new credit plan or extension of credit where a fraud alert or an active duty alert (designed to protect active duty military personnel serving away from his or her regular duty station) has been placed on the consumer's credit reporting agency file.[7] Financial institutions rely on the efficiency of an automatic telephone dialing system (autodialer) and other automation technologies to contact these consumers quickly, with the goal of verifying identity and immediately accommodating the

---

[6] The greater efficiency of automated calling is suggested by a report issued by Quantria Strategies, LLC, which states that automated dialing permits an average of 21,387 calls per employee per month, as opposed to an average of 5,604 calls per employee per month when manual dialing is used. The gain in efficiency when automated methods are used is 281.6%. *See* J. Xanthopoulos, "Modifying the TCPA to Improve Services to Student Loan Borrowers and Enhance Performance of Federal Loan Portfolios" 9 (July 2013), available at http://apps.fcc.gov/ecfs/document/view?id=7521337606.

[7] Fair Credit Reporting Act § 605A, 15 U.S.C. § 1681c-1.

consumer's request. The inability to use automated calling methods is likely to delay the institution's ability to contact consumers and fulfill their desired financial transaction, resulting in embarrassment—or other hardship—for those consumers.

Financial institutions are also required to establish response and notification programs following any unauthorized access to consumers' personal information, under Section 501(b) of the Gramm-Leach-Bliley Act,[8] as well as under the data security breach notification statutes of 47 states and the District of Columbia.[9] Those statutes permit the required notifications to be made by telephonic or electronic means.

As with fraud and identity theft alerts, the volume of data security breach notifications—due to the number of reportable incidents and affected consumers that must be notified—necessitates the use of automated dialing, if the required notices are to be sent in timely and effective fashion. Between January 1 and December 1, 2015, 717 data breaches were reported, exposing 176,275,271 individual records.[10] Although the preponderance of these data breaches occurred

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[8] Gramm-Leach-Bliley Financial Services Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338, § 501(b).
[9] *See, e.g.,* Cal. Civ. Code § 1798.29; Fla. Stat. § 817.5681; 815 ILCS § 530/10(a); NY CLS Gen. Bus. § 899aa; N.C. Gen. Stat. § 75-65; Rev. Code Wash. § 19.255.010; A.C.A. § 4-110-105; Conn. Gen. Stat. § 36a-701; 6 Del. C. § 102(a); O.C.G.A. § 10-1-912; HRS § 487N-2; 28 Idaho Code § 28-51-105; La. R.S. § 51:3074; Minn. Stat. § 13.055; Mont. Code Ann. § 30-14-704; N.J. Stat. § 56:8-163.
[10] Identity Theft Resource Center, *Data Breach Reports, December 1, 2015*,

at retailers and other entities not part of banks or credit unions, financial institutions strive to protect consumers and limit the exposure of consumer financial accounts from these breaches. Accordingly, upon learning of a data breach at a merchant or other organization that potentially affects a financial institution's customers or members, the institution often seeks to contact those consumers to notify them of the breach and of any remedial action the consumer should take.

As a result, financial institutions must send a high volume of data security breach notifications in short order. A single financial institution might be responsible for sending 50,000 to 60,000 or more potential data security breach notifications per month.

B. Communications from Financial Institutions Promote Consumer Protection and Fee Avoidance

Financial institutions use automated telephone communications to protect consumers' credit and help them reduce or avoid fees. Institutions may alert consumers by voice or text about low account balances, overdrafts, over-limit transactions or past due accounts in time for those consumers to take action to reduce or avoid late fees, the accrual of additional interest or negative reports to

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available at http://www.idtheftcenter.org/images/breach/DataBreachReports_2015.pdf (last visited Dec. 2, 2015).

credit bureaus. As noted by the Director of the Bureau of Consumer Financial Protection, Richard Cordray, "With the fast-moving pace of our modern economy, consumers may engage in numerous transactions and pile up multiple overdraft charges before realizing what has happened and how much damage has been done."[11]

A financial institution's inability to communicate promptly with consumers who have missed payments or are in financial hardship can have severe, adverse consequences for those consumers. Consumers that institutions do not reach and that fail to resolve their payment issues are more likely to face repossession, adverse credit reports and referral of their accounts to collection agencies. Prompt communication can be a vital step for consumers to avoid these harmful outcomes.

Financial institutions also use autodialers to contact consumers experiencing financial hardship. The goal of those communications is to initiate early conversations with consumers who are behind on their credit obligations to inform them of alternative payment arrangements that the bank or credit union can offer. Autodialed and prerecorded messages permit large numbers of such calls to be placed, freeing customer service representatives and loss mitigation specialists to

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[11] Bureau of Consumer Financial Protection, *Prepared Remarks by Richard Cordray at the CFPB Roundtable on Overdraft Practices* (Feb. 22, 2012), *available at* http://www.consumerfinance.gov/newsroom/prepared-remarks-by-richard-cordray-at-the-cfpb-roundtable-on-overdraft-practices/.

devote their time to working with individual borrowers. Financial institutions hope that these efforts will prevent consumers from falling prey to fraudulent debt settlement companies and will prevent unnecessary litigation. These efforts, when successful, also promote the soundness and stability that banks and credit unions are required by statute and regulation to maintain.

C. Automated Calls Improve Customer Service

Financial institutions also rely upon the efficiency of autodialed and prerecorded message calling to provide valued and important customer services. Calls to consumers to resolve their service inquiries are often made using equipment that, under the TCPA Order, may constitute an impermissible autodialer. For example, if a consumer's inquiry requires prompt account research, a customer service representative often completes the necessary research and places a follow-up call to the consumer using software that may make the calling system an autodialer under the TCPA Order. Autodialed and/or prerecorded calls also are initiated to remind consumers that a credit or debit card they have requested was mailed and must be activated. Such a call not only provides consumers with improved service, but also mitigates potential stolen card fraud. Finally, autodialed and/or prerecorded calls are placed to consumers who have applied for secure cards, or who have opened deposit accounts, to remind them to fund the account and/or return documents to the bank or credit union to permit the

continued maintenance of the account.

II. The TCPA Order Will Prevent Many Valuable Communications Between Financial Institutions and Consumers

As the Commission recognized in 2008, nothing in the TCPA's legislative history suggests that Congress intended the TCPA to be used to burden unnecessarily the routine, necessary and often appreciated communications between a financial institution and consumers, such as those described in the preceding section of this brief.[12] Indeed, the report of the House Committee on Energy and Commerce accompanying the enactment of the TCPA clearly states that, under the TCPA, "a retailer, insurer, banker or other creditor would not be prohibited from using an automatic dialer recorded message player to advise a customer . . . that an ordered product had arrived, a service was scheduled or performed, or a bill had not been paid." [13]

However, the TCPA Order imposes significant impediments to these communications with those consumers who elect to conduct telecommunications by cell phone. Put simply, the Order effectively prevents financial institutions from using the most efficient means available to advise these consumers of

[12] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 23 FCC Rcd 559 (2008).
[13] H.R. Rep. 102-317 (Nov. 15, 1991).

important and time sensitive information affecting the consumers' accounts.[14] Fundamentally, congressional recognition of TCPA privacy rights applicable to mobile telephone subscribers was intended to provide consumers with *choice* of contact, not isolation from contact. Consumers who elect to conduct telecommunications solely by cell phone, or who choose to identify mobile telephone numbers as their preferred method of contact, have exercised the privacy choice protected by the TCPA. Making that choice more burdensome and less efficient—as the Commission has done in the TCPA Order—is contrary to Congress's intent.

[14] The TCPA Order grants financial institutions a limited exemption from the prior express consent requirement for fraud and identity theft related messages that are sent by automated means, to consumers' mobile devices, at no charge to the recipient. However, the exemption applies only to calls sent to a mobile number provided to the financial institution by the recipient. As a result of this requirement, many consumers, whose telephone numbers had changed since the relationship with the consumer was established, will not be contacted with time-sensitive messages intended to prevent fraud and identity theft, even where those messages are sent at no cost to the recipient. *TCPA Order,* 30 FCC Rcd at 8028-29, ¶¶ 137-138. For this reason, as well as other practical limitations that are of particular concern to small financial institutions, the exemption as articulated in the TCPA Order offers limited relief to financial institutions seeking to deliver valuable communications to their customers or members. Some small financial institutions have even concluded that the restrictions established by the FCC in the TCPA order result in a *de facto* ban on their ability to utilize the exemption.

A. The TCPA Order Impermissibly Sweeps all Non-Manual Dialing Technologies within the TCPA's Limited Autodialer Category

The Commission's interpretation of the definition of "automatic telephone dialing system" (autodialer) is arbitrary and capricious and should be vacated. In the TCPA Order, the Commission construed the definition of an autodialer so broadly that it sweeps in technologies used by financial institutions to send important messages to consumers that were never contemplated to fall within the definition of this term. The Commission's expansive interpretation of an autodialer effectively prohibits financial institutions from using many efficient dialing technologies unless the consumer's prior express consent has been obtained.

As the Joint Petitioners Brief shows, in 1991 Congress acted to regulate the use of a specific dialing technology to call mobile, emergency, healthcare-related and public safety-related telephone numbers.[15] As defined in the TCPA, an autodialer 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."[16] Significantly, an autodialer uses a random or sequential algorithm to

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[15] Joint Petitioners Brief at 5-6.
[16] 47 U.S.C. § 227(a)(1) (*emphasis added*).

generate numbers *without regard* to whether all of the numbers so generated have been assigned to subscribers, or whether those numbers are assigned to emergency services, healthcare providers or public safety agencies.[17]

This feature of the statutory autodialer definition—that numbers are generated without regard to their assignment to particular subscribers (such as customers or members of a financial institution)—excludes the types of devices that financial institutions would use to call their customers or members. Financial institutions, unlike the abusive telemarketers from which Congress intended to protect consumers, are interested only in calling the telephone numbers of actual customers and members, and have no desire or incentive to dial numbers generated randomly or in sequence. As written and properly understood, the statutory definition does not, and should not, apply to the devices that financial institutions use to make calls to non-random and non-sequential numbers.

However, the Commission's expansive definition of an autodialer—that it encompasses equipment that has the "*potential* ability" to function as an autodialer[18]—makes it even more challenging for financial institutions to send important messages to consumers efficiently. Because the Commission had ruled

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[17] Joint Petitioners Brief at 5-6, 31-33. Congress determined that these random or sequential dialing devices should not be used to call emergency, public safety and mobile numbers unless the prior express consent of the recipients had first been obtained.

[18] *TCPA Order*, 30 FCC Rcd at 7976, ¶ 19 (*emphasis added*).

previously that the defining characteristic of an autodialer is the capacity to dial "without human intervention,"[19] many financial institutions invested in systems that dial consumers' numbers only after receiving a command from a live agent, and that are not configured to dial without human intervention. Human-initiated dialing, however, is useful only when the volume of calls to be made is limited. These systems are far too inefficient to place the volume of calls needed for fraud prevention, consumer protection, fee avoidance, customer service and the other purposes described above. Fraud-related calls, in particular, simply cannot be sent through live agents that initiate each call if they are to address the threats at which they are aimed in time to prevent loss or inconvenience to the consumer.

The Commission's arbitrary and capricious reading of the autodialer definition means that even human-initiated dialing technologies may no longer be allowable, absent the consent of the called party, because these equipment have the potential ability to function as an autodialer. The practical effect is that many efficient dialing technologies—even those that do not use a random or sequential number generator—may be used only if the calling financial institution can demonstrate that it has received the consumer's prior express consent to call that number.

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[19] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 18 FCC Rcd 14014, 14092 (2003), ¶ 132.

B. The Commission's Broad Autodialer Definition Forces Financial Institutions to Rely More Heavily on Consumers' Prior Express Consent to Make Calls to Wireless Numbers, Significantly Limiting Institutions' Ability to Communicate with Their Customers or Members

By sweeping into the autodialer definition virtually all modern dialing technologies, the Commission imposes a prior express consent requirement for the vast majority of calls to cell phones—a requirement that significantly limits a financial institution's ability to communicate with consumers.

If a financial institution must obtain a consumer's prior express consent before placing a call, certain types of communications to consumers will be "impossible," as the Commission conceded with respect to fraud and identity theft calls, because the urgency in sending the communication does not allow time for consent to be obtained.[20] Indeed, recognizing the obstacle to effective communication presented by the prior express consent requirement, Congress recently voted to exempt from that requirement any autodialed, artificial or prerecorded voice call "made solely to collect a debt owed to or guaranteed by the United States."[21]

A prior express consent requirement significantly limits financial

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[20] *TCPA Order,* 30 FCC Rcd at 8025, ¶ 132.

[21] Bipartisan Budget Act of 2015, Pub. Law No. 114-74, § 301.

institutions' ability to communicate with consumers. First, although the FCC has concluded that a consumer's prior express consent to be called at a mobile number using automated means may be based upon the consumer's act of providing a mobile contact number to the caller,[22] courts have disagreed as to the types of consumer action and communication that satisfy the prior express consent requirement, thereby increasing the legal risks to financial institutions associated with reliance on consumers' consent.[23]

Second, the FCC's "provided number" rule does not help financial institutions when a contact number provided at the start of a relationship with a consumer no longer is in service or has been reassigned. Under such circumstances, the financial institution is not able to rely on the consent provided

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[22] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8769 (1992).

[23] *See, e.g., Leckler v. Cashcall, Inc.,* 554 F.Supp.2d 1025 (N.D. Cal. 2008), *vacated, Leckler v. Cashcall, Inc.,* 2008 U.S. Dist. LEXIS 974398 (N.D. Cal. 2008) (finding, in a decision subsequently vacated, that a loan applicant's act of providing a mobile contact number on that application did not constitute prior express consent to receive autodialed collection calls at that number); *Mais v. Gulf Coast Collection Bureau, Inc.,* Case No. 11-61936-CIV (S.D. Fla. 2013), *rev'd, Mais v. Gulf Coast Collection Bureau, Inc.,* No. 13-14008 (11th Cir. 2014) (district court finds, in a decision subsequently reversed, that a patient did not consent to receive autodialed collection calls from a radiologist's debt collector when the patient's wife provided a mobile contact number on a hospital admission form); *Lusskin v. Seminole Comedy, Inc.,* 2013 WL 3147339 (S.D. Fla. 2013) (finding that a person's act of providing a mobile contact number on an online ticket purchase form did not constitute prior express consent to receive promotional texts from the ticket issuer).

by the consumer when the institution seeks to contact him at a number obtained through other means (for example, from another family member).

In sum, the Commission's arbitrary and capricious expansion of the autodialer definition leaves financial institutions with no useful guidance as to the kinds of dialing devices they may use to contact consumers with fraud alerts, notices of breaches of customer data, customer service calls, notices of overdue payments and other communications that must be made promptly and in substantial volume. This Court should vacate the FCC's conclusions with respect to this aspect of the TCPA Order.

C. The Commission's Conclusions Concerning Reassigned Numbers Are Arbitrary, Capricious and Harmful to Consumers

The Commission's conclusion that financial institutions and other callers are liable for reassigned number calls is arbitrary, capricious and harmful to consumers. The ruling provides a strong disincentive for a financial institution to make calls to its customers or members, due to the risk that the call will be placed to a number for which the institution had received consent from its customer but was subsequently reassigned. The "one call" safe harbor the Commission established in the TCPA Order provides little comfort to financial institutions, as callers often do not learn whether a call has connected with the intended recipient—as opposed to a party to which the number may have been

reassigned—and thus do not receive notice when the number has been reassigned to another consumer.

As the Joint Petitioners Brief explains, financial institutions exercise care to obtain "prior express consent" from consumers before calls are placed to wireless numbers using an automatic telephone dialing system or a prerecorded voice. Moreover, there is no need or incentive for an institution to place a non-telemarketing, informational call to anyone other than the intended recipient. Financial institutions also make significant efforts to promote accuracy in the numbers they call, such as providing consumers multiple means to edit contact information, confirming a consumer's contact information during any call with the consumer, regularly checking to confirm that a landline number has not been transferred to a wireless number, or providing instructions for reporting a wrong number call.

However, financial institutions—which can place billions of informational calls annually—cannot completely avoid calling reassigned wireless telephone numbers.[24] Telephone companies recycle as many as 37 million telephone numbers each year,[25] and yet there is no public wireless telephone directory or tool available

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[24] Joint Petitioners Brief at 42-43.

[25] Alyssa Abkowitz, *Wrong Number? Blame Companies' Recycling*, Wall Street J. (Dec. 1, 2011), available at http://www.wsj.com/articles/SB10001424052970204012004577070122687462582#ixzz1fFP14V4h.

to identify numbers that have been reassigned. Consumers who change their wireless number *should* notify the businesses and organizations with whom they interact of the change; however, they often fail to do so. Thus, banks and credit unions inevitably will call reassigned telephone numbers despite efforts to contact only consumers who provided "prior express consent" to be called on that wireless number.[26]

Moreover, there are many instances when a financial institution will place a call to a number that has been reassigned but not learn, during the call, of the reassignment. A call could receive no response, be received by an answering machine that does not identify the recipient, or be answered by a live person who does not reveal that he or she is not the intended recipient of the call. Under the TCPA Order, any of these scenarios would constitute the one call to which no liability attaches. Any subsequent calls would subject the financial institution to liability, even if it had no actual knowledge that the number had been reassigned, as the Commission conceded in its Order.[27]

The potential liability for calls made in good faith to parties who have consented to receive them, but whose telephone number has subsequently been

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[26] *Id.*
[27] *See TCPA Order*, 30 FCC Rcd at 8000, ¶ 72 ("If this one additional call does not yield actual knowledge of reassignment, we deem the caller to have constructive knowledge of such.")

reassigned without notice to the financial institution, threatens to curtail important and valued communications between the institution and consumers. The numbers and magnitude of lawsuits demanding awards of statutory damages because of such inadvertent and good faith calls continue to grow. Imposing liability on callers that have properly obtained consent to call a number but inadvertently reached a consumer to whom the number was reassigned is unfair and inconsistent with the purpose of the TCPA. For banks and credit unions serving working families who may switch jobs, move or have another personal reason for changing phone numbers, it is illogical to penalize the financial institution for this change.

As the Joint Petitioners Brief explains, a number of parties asked the Commission to address this problem by finding, for example, that the "called party" is the caller's *intended* recipient, rather than the party who happens to answer.[28] The Commission refused those requests, based upon unfounded concerns, not supported in the record before it, that businesses had incentives to abuse any relief the Commission might grant.[29] Instead, the FCC adopted an illusory concession, finding that a caller might make one inadvertent "reassigned

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[28] Joint Petitioners Brief at 41-46.

[29] *TCPA Order,* 30 FCC Rcd at 8003, ¶ 79. To the extent that the Commission fears that businesses will abuse the relief granted to it to make debt collection calls, the proper agency to address this potential concern is the Bureau of Consumer Financial Protection, which is currently engaged in rulemaking on debt collection practices.

number" call to a party without incurring liability.[30]

In granting this purported relief, the Commission conceded that reassigned number calls often are inadvertent and that a "strict liability" approach to such calls is arbitrary and not supported by the statute.[31] However, by counting all initial reassigned-number calls, including those during which the caller is not informed that its customer or member no longer is the subscriber, toward the one-call maximum, the FCC *has* imposed the strict liability standard that it had conceded to be arbitrary. The Commission's reasoning is arbitrary, capricious and unsupported by the record, and should be vacated.

D. The TCPA Order Imposes an Unreasonable Compliance Burden on Financial Institutions Concerning Revocation of Consent to Receive Automated Calls

The TCPA Order imposes a requirement, found nowhere in the TCPA, that individuals who have consented to receive autodialed calls from a party must be permitted to revoke that consent by *any means* the consumer chooses.[32] Although the Associations fully support and respect consumers' choice to opt out of receiving autodialed calls, the requirement in the TCPA Order harms consumers by preventing financial institutions from designating certain communications

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[30] *Id.,* at 8007, ¶ 85.
[31] *Id.*
[32] *TCPA Order,* 30 FCC Rcd at 7993, ¶ 55.

channels where consumers' revocations could be efficiently processed. Instead, the TCPA order requires financial institutions to receive revocations through any and all communication channels by which institutions receive communications and by any employee who works for the institution or, potentially, who works for a partner of the institution. As the Joint Petitioners Brief observes, there is no basis in the statute or legislative history for such a broad requirement, which Congress easily could have supplied if it had intended.[33]

As discussed in Part I of this brief, financial institutions communicate with consumers for a variety of purposes, concerning a wide range of products and services. In order to ensure that consumers' choices are honored, revocations of consent should be applied only to the particular types of communications (*e.g.,* account balance notifications) that the consumer no longer wants to receive. If, for example, a consumer desires not to receive future communications concerning account balances, but wants to receive notices of suspicious transactions, that consumer's desire will be frustrated if his or her bank or credit union applies the revocation request to *all* communications. The threat of class action liability, however, may cause institutions to apply an opt-out request broadly, frustrating consumers and exposing them to inconvenience and even fraud.

[33] Joint Petitioners Brief at 59-60.

The open-ended revocation right announced by the TCPA Order makes it very difficult, if not impossible, to ensure that consumers' intentions are always understood and carried out. In the case of financial institutions, it means that *any* consumer statement—made at *any* branch or to a third-party service provider to the institution, through any communications channel—that might be construed as a revocation of consent must be understood and acted upon by the institution. Even if the consumer's statement is unclear, and even if the employee receiving the statement is unable to obtain clarification as to the purported revocation's scope, the institution must honor the revocation request. The requirement may also be interpreted as requiring debit, prepaid and credit card-issuing banks and credit unions to record and honor revocation requests communicated to retailers and others with whom those financial institutions jointly brand their payment cards. The absurdity of training employees of these retail businesses to understand the range and variety of revocations that consumers might try to convey, and somehow to communicate those revocations to the card-issuing institution, demonstrates the arbitrariness and unreality of the Commission's conclusion.

There is no reasonable basis for prohibiting financial institutions from establishing one or more convenient and clearly articulated methods by which consumers can express—to properly trained personnel at their bank or credit union—their desire not to receive particular communications. By refusing to

permit businesses to specify the means of revoking consent, the Commission has created an environment that will generate a new wave of frivolous class-action suits and that will complicate, rather than facilitate, the honoring of consumers' preferences. Accordingly, the Commission's conclusions should be vacated.

CONCLUSION

For all of the reasons stated herein, the erroneous conclusions of the Commission's TCPA Order should be vacated.

Respectfully submitted,

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