

Testimony before the
SENATE COMMITTEE ON COMMERCE, SCIENCE & TRANSPORTATION

Regarding

The Escalating Problem of Unwanted Robocalls and What To Do About It

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On behalf of
the low-income clients of the
National Consumer Law Center

and

Americans for Financial Reform
Consumer Federation of American
National Association of Consumer Advocates
Public Citizen
Public Knowledge
U.S.PIRG

April 18, 2018

The Escalating Problem of Unwanted Robocalls and What To Do About It April 18, 2018

Chairman Thune, Senator Nelson, and Members of the Committee, I appreciate the opportunity to testify today on the importance of maintaining the integrity of the Telephone Consumer Protection Act (TCPA) for consumers. I provide my testimony here today on behalf of the low-income clients of the **National Consumer Law Center¹ (NCLC)**, **Americans for Financial Reform**, **Consumer Federation of American**, **National Association of Consumer Advocates**, **Public Citizen**, **Public Knowledge** and **U.S.PIRG**.

I. The Scope of the Robocall Problem

Unwanted robocalls are an invasion of privacy. As was forcefully stated by Senator Hollings, the TCPA's sponsor, "[c]omputerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall."² I speak today for the 4.5 million Americans who complained last year about the barrage of unwanted robocalls we all receive.

Let me tell you about just one case, which is typical of so many:

Tonya Stevens of Tampa, Florida purchased some appliances from Conns Appliances, Inc., a Texas company, in late 2014. Although she was making her payments, they were not always on time. Nevertheless, over the next fourteen months Conns called Ms. Stevens on her cell phone 1,845 times, over one hundred times a month, often as much as eight or nine times a day.³ These calls were made despite Ms. Stevens' repeated requests that Conns' agent stop calling. During one call, she said, "I am at my grandmother's death bed, quit calling." Conns' position is

¹ The **National Consumer Law Center** (NCLC) is a non-profit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace. NCLC has expertise in protecting low-income customer access to telecommunications, energy and water services in proceedings at state utility commissions, the FCC and FERC. We publish and annually supplement nineteen practice treatises that describe the law currently applicable to all types of consumer transactions, including *Access to Utility Service* (5th ed. 2011), covering telecommunications generally, and *Federal Deception Law* (3d ed. 2017), which includes a chapter on the Telephone Consumer Protection Act. This testimony was prepared with the substantial assistance of Carolyn Carter and Stephen Rouzer.

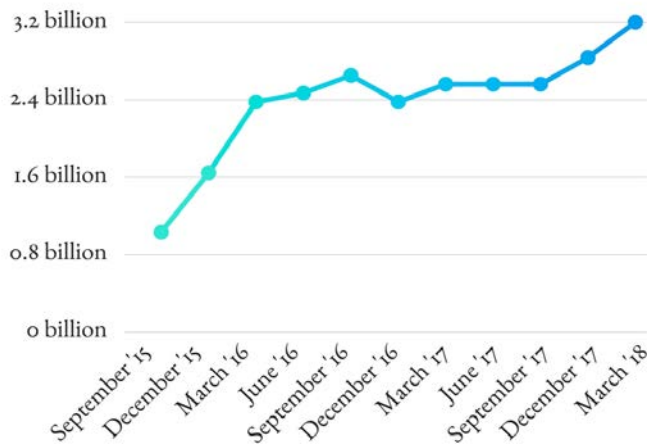
² 137 Cong. Rec. 30,821–30,822 (1991) (also quoting Justice Brandeis, in *Olmstead v. U.S.*, 277 U.S. 438, 479, 48 S. Ct. 564, 72 L. Ed. 944 (1928), declaring "the right to be let alone - the most comprehensive of rights and the right most valued by civilized men"). See also S. Rep. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972–1973 ("The Committee believes that Federal legislation is necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services."); 137 Cong. Rec. S18781-02 (quoting Sen. Hollings as stating "These calls are a nuisance and an invasion of our privacy."); *Mims v. Arrow Fin. Services, L.L.C.*, 565 U.S. 368, 370 132 S. Ct. 740, 181 L. Ed. 2d 881 (2012) (noting that the TCPA "bans certain practices invasive of privacy").

³ As this case is in arbitration, there is no formal complaint. However, Appendix 1 is a calendar showing the number of times these calls were made each day and each week.

that once Ms. Stevens provided consent to be called on her cell phone she could never revoke that consent.

This case is emblematic of the problem Americans are facing with robocalls. The calls are unrelenting. The callers will not stop, despite consumers’ pleas. The Federal Trade Commission’s (FTC) “Biennial Report to Congress”⁴ reveals a surge in consumer complaints about robocalls in 2017, with 4.5 million complaints filed in 2017 compared to 3.4 million in 2016. This rise in complaints is consistent with an increased use of intrusive and disruptive robocall technology. But the problem is far worse than the FTC’s complaint numbers show. Industry data shows that over two *billion* robocalls are made *every month*, many of which are unwanted and illegal. Over 3 billion robocalls were made just in February 2018. Robocalls increased from 831 million in September 2015 to 3.2 billion in March 2018 – a 285% increase in less than three years.

Table 1
Monthly Number of Robocalls



Congress passed the Telephone Consumer Protection Act⁵ (TCPA) in 1991 in direct response to “[v]oluminous consumer complaints about abuses of telephone technology—for example, computerized calls dispatched to private homes.”⁶ Yet 27 years later, the problem is only growing worse. The complaints are still pouring in. Private litigation and public enforcement have not kept pace with the problem—both the number of calls and the number of complaints by consumers increase every month. Robocalls are very inexpensive to make. Callers can discharge tens of millions of robocalls over the course of a day at only a penny per call.⁷

⁴ [https://www.ftc.gov/system/files/documents/reports/biennial-report-congress-under-do-not-call-registry-fee-extension-act-2007-operation-national-do-not/biennial do not call report fy 2016-2017 0.pdf](https://www.ftc.gov/system/files/documents/reports/biennial-report-congress-under-do-not-call-registry-fee-extension-act-2007-operation-national-do-not/biennial%20do%20not%20call%20report%20fy%202016-2017%200.pdf)

⁵ 47 U.S.C. § 227.

⁶ *Mims v. Arrow Fin. Servs., L.L.C.*, 565 U.S. 368, 370-371 132 S. Ct. 740, 181 L.Ed. 2d 881 (2012).

⁷ See, e.g., [Robodial.org](https://www.robodial.org/), which costs 1 cent a call for calls up to 15 seconds, at <https://www.robodial.org/instantpricequote/> (last accessed Apr. 12, 2018); Call-Em-All Pricing, which quotes pricing from a high of 6 cents per call to \$7.50 per month “for one inclusive monthly fee. Call and text as much as you need.” <https://www.call-em-all.com/pricing> (last accessed Apr. 12, 2018).

A. Who Is Making These Calls?

The problem of abusive, unwanted robocalls is not limited to scam calls. Scam calls—calls that are selling products or services they do not intend to provide, or that are pretexts for identity theft—are only one small part of the invasive robocall problem in the United States.

We know who is making robocalls because call-blocking technologies track the identity of callers. The Robocall Index created by one call-blocking app provider, YouMail, identifies the biggest robocallers every month.⁸ The biggest robocallers are not scammers; scammers actually account for only a small fraction of the robocalls to consumers in the United States. In March of 2018, only two scam callers (those marked in bold in Table 2, below) made the list of the top 20 sources of robocalls. Banks, credit card companies, retailers, and debt collectors, all of whom were collecting debts according to the robocall blocker, took 17 of the top 20 spots.

Table 2
Top Twenty Robocallers in the United States
March 2018⁹

1. Capital One	8. Loan scam	14. Barclaycard
2. <i>Portfolio Recovery Associates</i> (debt collection)	9. AT&T	15. First Premier Bank
3. Wells Fargo	10. <i>Enhanced Recovery Corporation</i> (debt collection)	16. PayPal
4. Santander	11. Fingerhut	17. Chase Bank
5. A health insurance scam	12. <i>Transworld Systems</i> (debt collection)	18. Chase Bank (alternate number)
6. Comcast	13. <i>Encore Receivables Management</i> (debt collection)	19. Kohl's
7. Job availability call (substitute teachers)		20. Citibank

By no means do I intend to minimize the problem with scam calls. They are a real problem that must be dealt with. But they are also not, by any measure, the entire problem. In the first two months of 2018, scam calls accounted for only a quarter of all robocalls:

⁸ The existence of these third-party call-blocking technologies does not fully address the problem. Unfortunately, many consumers do not use them. Moreover, many consumers, particularly traditional landline users, lack access to effective robocall-blocking tools.

⁹ See YouMail Robocall Index, available at <https://robocallindex.com/> (last accessed Apr. 12, 2018). To come up with the names of the callers, we simply called the numbers listed on the website to see who answered.

Table 3
Estimated National Robocalls By Type¹⁰

Category	January	February
Alerts and Reminders	27%	28%
Payment Reminders	33%	32%
Telemarketing	15%	16%
Scams	25%	24%

This list of robocallers begs the question of which calls are objected to by consumers. We know the answer from the developers of one of the leading robocall-blocking apps: YouMail’s Robocall Blocker.¹¹ All of the calls in the bottom two categories—Telemarketing and Scams—are routinely blocked by users of the call-blocking program.¹² Very few of the calls in the first category—Alerts and Reminders—are blocked. Most of the calls in the second category—Payment Reminders (which is a polite characterization for the debt collection callers)—are blocked by their recipients.¹³

B. Debt Collection Robocalls are a Huge Problem That Often Only the TCPA Can Address.

As can be surmised from the huge number of debt collection robocalls made in the U.S., one third of all American consumers have accounts in collection.¹⁴ Indeed ACA International, “a trade group located in the United States representing collection agencies, creditors, debt buyers, collection attorneys and debt collection industry service providers,”¹⁵ has been a primary driver of efforts before the Federal Communications Commission (FCC) to roll back the consumer protections in the TCPA¹⁶ both prior to and after the FCC’s 2015 Omnibus Order.¹⁷ This organization was also, of course, the lead petitioner in the appeal of the FCC’s pro-consumer order issued in 2015, which led to the recent decision of the D.C. Circuit Court in *ACA International v. F.C.C.*¹⁸

¹⁰ Press Release, YouMail, YouMail Releases Detailed Breakdown of U.S. Robocalls in February (Mar. 21, 2018), *available at* <https://www.prnewswire.com/news-releases/youmail-releases-detailed-breakdown-of-us-robocalls-in-february-300616969.html> (last accessed Apr. 12, 2018).

¹¹ See <https://www.youmail.com/home/feature/stop-robocalls> (last accessed Apr. 12, 2018).

¹² This information was provided by Alex Quilici, CEO of YouMail, on March 28, 2018.

¹³ *Id.*

¹⁴ See Urban Institute, Debt in America: An Interactive Map (last updated Apr. 5, 2018), *available at* <https://apps.urban.org/features/debt-interactive-map/> (last accessed Apr. 12, 2018).

¹⁵ https://en.wikipedia.org/wiki/ACA_International.

¹⁶ See e.g. ACA International, Petition for Rulemaking of ACA International (filed Feb. 11, 2014), *available at* <https://ecfsapi.fcc.gov/file/7521072801.pdf>.

¹⁷ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961 (F.C.C. July 2015) [hereinafter 2015 TCPA Omnibus Order].

¹⁸ 885 F.3d 687 (D.C. Cir. 2018).

It is a common misconception that the federal Fair Debt Collection Practices Act¹⁹ (FDCPA) provides sufficient protections for consumers against invasive and abusive debt collection calls. Unfortunately, that is the not case, for several reasons. The primary reason is that the FDCPA does not cover collection efforts made by creditors to collect their own debts; it covers only third-party debt collectors—those collecting debts originally owed to others.²⁰ So of the 20 top robocallers listed in Table 2, only four (those whose names are in italics) were even covered by the FDCPA. Debt collection calls by all of the remaining robocallers were not covered by the FDCPA because they were collecting their own debts.

This leaves the TCPA as the principal federal law providing protections against harassing and unrelenting debt collection calls to consumers' cell phones. Below are just a few examples of the significance of the problem of debt collector robocallers. All of these cases are recent; all involve hundreds—if not thousands—of calls; and all involve multiple calls after repeated requests from the consumer to stop calling:

1. **Robertson v. Navient Solutions.**²¹ Shortly after Ms. Robertson acquired a Certified Nursing Assistant certificate, which she had funded with student loans, she experienced health problems and, also, had to care for her dying father. She was unable to work, and applied for disability. She received a forbearance on her federal student loans, but not for the private loans. Ms. Robertson made payments when she was able. However, payments did not stop the calls. In total, Navient called Ms. Robertson a total of 667 times, and called 522 times after she told them to stop calling. Navient would call back the same day even when Ms. Robertson would tell the collection agent that she would not have any money to pay until the following month.
2. **Gold v. Ocwen Loan Servicing.**²² The plaintiff consented to being contacted about his mortgage debt, and answered several collection calls, but then asked for the calls to stop. However, the servicer called his cell phone at least 1,281 times between April 2, 2011 and March 27, 2014, after the repeated requests to stop.
3. **Montegna v. Ocwen Loan Servicing.**²³ The servicer called the plaintiff on his cell phone at least 234 times, even after he requested that the calls stop.
4. **Todd v. Citibank.**²⁴ Some time in January 2016, the bank began calling the plaintiff's cell phone. The calls, often made twice a day, totaled 350 calls, even after repeated requests to

¹⁹ 15 U.S.C. § 1692.

²⁰ 15 U.S.C. § 1692a(6).

²¹ *Robertson v. Navient Solutions, Inc.*, Case No.: 8:17-cv-01077-RAL-MAP (M.D. Fla. filed May 8, 2017).

²² 2017 WL 6342575 (E.D. Mich. Dec. 12, 2017).

²³ 2017 WL 4680168 (S.D. Cal. Oct. 18, 2017).

²⁴ 2017 WL 1502796 (D.N.J. Apr. 26, 2017).

stop calling. “The purported injury here is Plaintiff’s ‘privacy, peace, and quiet’ was disturbed by the numerous telephone calls.”²⁵

C. Real Telemarketers Are Making Many of the Unwanted Robocalls.

Telemarketing calls are also the source of millions of unwanted, and illegal, robocalls. Telemarketers with real products to sell (car insurance, home security networks, even marketing an independent film) bombard consumers’ homes and cell phones with illegal robocalls. It is important to note that “real” telemarketing calls, often with a human caller at the other end of the phone, are not scammers. Their caller IDs are sometimes—although not always—truthfully displayed. So addressing scams and spoofing will not deal with these maddening and invasive—and illegal—calls.

Often a single consumer is hounded by persistent telemarketing calls from the same company.²⁶ With many telemarketing campaigns, however, the campaign will make millions of illegal calls, but only one or two to any given consumer. The only effective way to enforce the TCPA’s protections against these illegal calls is through public enforcement or private class actions. That is because the TCPA allows a consumer to recover only \$500 to \$1500 per call, and does not require the defendant to reimburse the consumer for the attorney fees incurred to prosecute the case. As a result, individual suits regarding just one or two calls are not economically feasible. (And a million individual suits for a million-robocall campaign would overwhelm the court system in any event).

One example of a particularly intrusive telemarketing campaign is the case of *Golan v. Veritas Entertainment*, decided by a federal court in Missouri in 2017.²⁷ In its efforts to market a political film, the company made so many calls in violation of the TCPA—over 3.2 million calls—that the judge ordered the statutory damages award reduced to just \$10 per call. If he had stuck with \$500 per call, the total would have been \$1.6 billion, which he held to be so disproportionate as to violate due process. In reducing the award, the court noted:

This reflects the severity of the offense, a six-day telemarketing campaign which placed 3.2 million telephone calls, as well as respecting the purposes of the TCPA to have a deterrent effect and to account for unquantifiable losses including the invasions of privacy, unwanted interruptions and disruptions at home, and the wasted time spent answering unwanted solicitation calls or unwanted voice messages.²⁸

This sentiment was emphasized in another large class action case, *Krakauer v. DISH Network*,²⁹ in which the court refused to unwind the jury’s award of \$400 per call, trebled by the court, for each of 51,000 telemarketing calls. The court pointed out:

²⁵ *Id.* at *8.

²⁶ *See, e.g.*, *Jenkins v. MGage, L.L.C.*, 2016 WL 4263937 (N.D. Ga. Aug. 12, 2016) (individual action challenging 150 text messages promoting events at a nightclub despite 17 requests to stop).

²⁷ 2017 WL 3923162 (E.D. Mo. Sept. 7, 2017).

²⁸ *Id.* at *4 (emphasis added).

²⁹ 2017 WL 4417957 (M.D.N.C. Oct. 3, 2017).

It is not ‘grossly excessive’ to require Dish to pay treble damages for the more than 50,000 willful violations it committed, given the nature of the privacy interests repeatedly invaded and Dish’s continuing disregard for those interests, the extent of the violations, and the need to advance reasonable governmental interests in deterring future violations³⁰

The court went on to treble the damages awarded by the jury, which the court found appropriate here in light of the seller’s “sustained and ingrained practice of violating the law,” and the need for deterrence.³¹

Below are just a few examples of pending or resolved class action lawsuits that used the TCPA to obtain redress for consumers for tens of millions of illegal robocalls:

1. **Ott v. Mortgage Investors Corp.**³² In this case, which settled in 2016, there were over 64 million illegal telemarketing calls made to millions of veterans to convince them to refinance their VA loans. The consumers reported receiving dozens of unwanted calls from the defendant, who repeatedly failed to remove their telephone numbers from its call list upon demand. The defendant’s telemarketing efforts were so aggressive that thousands of consumers filed complaints with the FTC and other agencies regarding the unwanted and harassing telemarketing calls. The technology used was an autodialer with a human agent.
2. **Strache v. SCI Direct, Inc.**³³ This class action involved over four million calls made by a company selling cremation services. One of the consumers kept receiving these calls, even after sending emails, calling back and requesting that the calls stop, and filing an FTC complaint.
3. **Smith v. State Farm Mutual Ins. Co.**³⁴ This class action was filed after a marketing company made 350 million phone calls to consumers from a list of numbers it found in the White Pages. During each call, a recording instructed recipients to “press 1 now” for a better deal on auto insurance. Recipients who pressed 1 were transferred to a live “screener,” who asked questions and then transferred the call to insurance agents, including agents for State

³⁰ *Id.* at *11 (M.D.N.C. Oct. 3, 2017) (emphasis added). *See also* U.S. v. DISH Network, 256 F. Supp. 3d 810 (C.D. Ill. 2017) (similar case brought against Dish Network by the United States, as well as the states of California, Illinois, North Carolina and Ohio; the court ordered DISH to pay a civil penalty of \$168,000,000 “for Dish’s violation of the TSR done with knowledge or knowledge fairly implied,” plus statutory damages of \$84,000,000).

³¹ *Krakauer v. DISH Network, L.L.C.*, 2017 WL 2242952, at *12–*13 (M.D.N.C. May 22, 2017).

³² *Ott v. Mortg. Investors Corp. of Ohio*, 65 F. Supp. 3d 1046 (D. Or. 2014).

³³ Case No. 1:17-cv-04692 (N.D. Ill.); original case was *Allard v. SCI Direct, Inc.*, Case No. 3:16-cv-01033 (M.D. Tenn.).

³⁴ Case No. 1:13-cv-02018 (N.D. Ill.)

Farm Mutual Automobile Insurance Company. The calls resulted in leads to State Farm agents for at least 62,827 unique cell phone numbers. State Farm agents continued to employ the marketers' services for over six months after the lawsuit was brought.

4. **Holtzman v. Turza.**³⁵ This case involved 8,430 junk faxes sent by an attorney who was advertising his law practice to CPAs. The defendant litigated the case for over ten years, until the Seventh Circuit Court of Appeals put a stop to it.³⁶

II. Class Actions are Not the Problem.

Robocallers like to point to the numbers of class actions as fodder for their claim that TCPA rules are out of control. Class actions regarding TCPA violations have increased over the past several years, but they have not increased nearly as dramatically as the number of robocalls has increased. The annual number of robocalls increased from 14 billion in 2015 to 30 billion in 2017, a 115% increase in just three years—see Table 4. (And the steep climb in the number of robocalls per month is even more alarming, as that number has increased 285% from September 2015 to March 2018. Even if the monthly rate does not increase beyond March's total of 3.2 billion, we will see 38.4 billion robocalls this year).

The number of complaints to government agencies has also increased dramatically--a 100% increase during the same three-year period, from 3.5 million to 7.1 million.³⁷ Yet the number of TCPA lawsuits *of all types*—both class actions and individual actions—increased only 19%, from 3687 in 2015 to 4392 in 2017. The key point is that robocalls are rapidly increasing, which is clearly upsetting the Americans subjected to them.

³⁵ 728 F.3d 682 (7th Cir. 2013).

³⁶ ABA Journal, *7th Circuit rejects another appeal by lawyer ordered to pay up to \$4.2M for sending junk faxes*, Nov. 16, 2017, available at http://www.abajournal.com/news/article/7th_circuit_rejects_another_appeal_by_lawyer_ordered_to_pay_up_to_4.2m_for/.

³⁷ Growth calculated through analysis of 2015 and 2017 figures. Federal Trade Commission, National Do Not Call Registry Data Book FY 2017, at 6, (Dec. 2017), available at https://www.ftc.gov/sites/default/files/filefield_paths/dnc_data_book_fy2017.pdf (last accessed Apr. 14, 2018).

Table 4
Comparing Lawsuits to Complaints to Robocall Numbers

	TCPA Lawsuits Filed ³⁸	Complaints to FTC & FCC ³⁹	Total Number of Robocalls in U.S. ⁴⁰
2015	3687	3,578,710	14,214,000,000
2016	4860	5,340,234	29,300,000,000
2017	4392	7,157,370	30,500,000,000

Class actions serve a critical role in deterring robocallers from violating the law as well as protecting consumers from TCPA violations. Without class actions there would be little incentive for callers to comply with the TCPA. As is evident from the comparison of the number of complaints filed by consumers with the FTC and the FCC, and the number of cases actually filed, only a tiny proportion of complaints actually mature into real lawsuits. As there are no fee-shifting provisions in the TCPA, the economics of bringing litigation under the TCPA require that there be significant numbers of violations (multiples of the \$500 statutory damages) before litigation regarding even the most blatant violations is feasible. These cases are time-consuming to litigate and they require expensive expert witnesses to prove the claims. The lawyers who bring these cases benefit from them—but only if they successfully prove the elements of the claims under the TCPA. That is why private enforcement is an effective mechanism of enforcing a consumer protection statute.

When cases settle, the unnamed class members typically receive a portion of what they would have been entitled to had the case proceeded to final judgment. That is why the cases settle—so that the defendants do not have to pay as much as they might if the case was litigated through to judgment. The compensation for the attorneys who handled the case for the consumers must be approved by the court and depends on the benefit they achieved for the consumers, so they have the incentive to get the best settlement possible for the class.

Consumers who are not members of the class also benefit from class actions, whether the actions are settled or resolved only after trial. Class actions provide a much-needed deterrent effect against violating the TCPA, which limits the number of unwanted calls and texts to cell phones for the rest of us.

In dissenting from the FCC’s 2015 Omnibus Order,⁴¹ Chairman (then Commissioner) Pai and Commissioner O’Rielly cited several TCPA cases that they felt were meritless. But this is not a reason to weaken the TCPA. With the exception of just one case (the *Rubio* case, discussed below),

³⁸ WebRecon, *Web Recon Stats for Dec 2017 & Year in Review*, available at <https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review/> (last accessed Apr. 14, 2018).

³⁹ See Federal Trade Commission, National Do Not Call Registry, *supra* note 37.

⁴⁰ 2016 and 2017 numbers derived from the sum of monthly totals. YouMail Robocall Index, *supra* note 9. The 2015 number is derived from the average number of calls in the six months for which totals are provided. *See id.*

⁴¹ 2015 TCPA Omnibus Order, *supra* note 17.

the courts dismissed those cases. In other words, our justice system, while not perfect, does a reliable job of weeding out meritless or abusive cases. For example:

1. *Emmanuel v. Los Angeles Lakers, Inc.*,⁴² mentioned by Commissioner Pai in his dissent.⁴³ In this case, the plaintiff attended a Lakers game during which attendees were invited to send a text message to a specified telephone number for the opportunity to have the message appear on the scoreboard. After the plaintiff sent the Lakers a text message, he received a confirmatory text back. He then sued, alleging that this confirmatory text violated the TCPA's prohibition against sending a consumer a text message without the consumer's prior consent.

The District Court granted the Lakers' motion to dismiss with prejudice. Taking a "common sense" approach, the court held that the challenged text message was not actionable under the TCPA. By sending his original message, the plaintiff expressly agreed to receive a return confirmatory text. This confirmatory text was not the type of intrusive communication prohibited by the TCPA because it responded directly to the plaintiff's original text.

2. *Gragg v. Orange Cab Co., Inc.*,⁴⁴ mentioned by Commissioner Pai in his dissent.⁴⁵ After the plaintiff requested a taxi, the dispatcher manually inputted pertinent information, and pressed "enter" to transmit the data to TaxiMagic to reach the nearest available driver. A driver transmitted his acceptance of the request by pressing "accept" on his Mobile Data Terminal and then sent the plaintiff a message that read "Taxi # 850 dispatched @ 05:20." The plaintiff brought a class action suit alleging that the text message violated the TCPA as it was made with an autodialer without prior express consent.

The court rejected the plaintiff's argument that the modem utilized by defendants to operate the TaxiMagic program was a "system" as envisioned by TCPA precedent: "The Court declines to adopt an interpretation of 'system' that would lead to an absurd result."⁴⁶ The court entered summary judgment against the consumer on the TCPA claim.

3. *Kinder v. Allied Interstate, Inc.*,⁴⁷ mentioned by Commissioner Pai in his dissent.⁴⁸ Soon after acquiring a pager number (619-999-9999), the plaintiff realized that it was receiving thousands of unwanted pages that were not meant for him. He then disconnected the pager, but recorded all the calls made to it and filed many suits regarding them. The appellate court

⁴² Case no. 2:12-cv-09936-GW-SH (C.D. Cal. Apr. 18, 2013).

⁴³ 2015 TCPA Omnibus Order, *supra* note 17, at 8072 (Pai, Comm'r, dissenting).

⁴⁴ 995 F. Supp. 2d 1189 (W.D. Wash. 2014)

⁴⁵ 2015 TCPA Omnibus Order, *supra* note 17, at 8072 (Pai, Comm'r, dissenting).

⁴⁶ 995 F. Supp. 2d 1189, 1192 (W.D. Wash. 2014) (emphasis added).

⁴⁷ 2010 WL 2993958 (Cal. Ct. App. Aug. 2, 2010).

⁴⁸ 2015 TCPA Omnibus Order, *supra* note 17, at 8072 (Pai, Comm'r, dissenting).

affirmed the trial court's finding that the plaintiff intentionally subjected himself to unwanted calls and that, as a matter of policy, this conduct precluded any recovery under the TCPA.⁴⁹

Both Commissioners Pai and O'Rielly also cited the case of Rubio's Restaurant, which was sued for repeatedly calling a reassigned number, relying on the called party's statements that it had blocked the calls.⁵⁰ Rubio's then filed a petition with the FCC requesting that a bad faith defense be allowed for TCPA claims. The FCC denied the request in the 2015 Omnibus Order, pointing out that once the caller affirmatively knew that the number was no longer assigned to the person from whom it had consent, it was incumbent on the caller to stop the calls.⁵¹

Indeed, without ensuring that callers have the obligation to update records regarding reassigned numbers, there would be no meaningful enforcement of the TCPA's proscription against robodialing numbers without consent. Hopefully, the FCC's pending proposal to establish a reassigned number database⁵² will resolve most, if not all, of the challenges relating to reassigned numbers.

The potential of class action lawsuits benefits not only consumers, but also businesses that want to comply with the law. Without the threat of class action lawsuits, their competitors would violate the law with little fear of consequences, putting the law-abiding business at a competitive disadvantage. The deterrent effect of class actions protects millions of consumers from receiving unwanted – and unconsented to – calls and texts to their cell phones on a daily basis. Courts are quite capable of ferreting out meritless TCPA lawsuits.

III. The Impact of the D.C. Circuit Court's Decision in *ACA International v. FCC*⁵³

On March 16, 2018, the D.C. Circuit issued its long-awaited decision in *ACA International v. FCC*,⁵⁴ an appeal filed by debt collectors and a number of other industry players from the 2015 Omnibus Order issued by the FCC.⁵⁵ *ACA International* addresses three major issues:

⁴⁹ 2010 WL 2993958, at *8 (Cal. Ct. App. 2010). *See also* Epps v. Earth Fare, Inc., 2017 WL 1424637 (C.D. Cal. Feb. 27, 2017) (dismissing case as “manufactured” lawsuit where plaintiff purported to revoke consent to receive commercial text messages by responding with long sentences rather than simply responding with the STOP command, as instructed in each message).

⁵⁰ Rubio's Restaurant, Inc., Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Aug. 15, 2014), *available at* <http://apps.fcc.gov/ecfs/document/view?id=7521768526>.

⁵¹ 2015 TCPA Omnibus Order, *supra* note 17, at 8012.

⁵² *In re* Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59, Second Further Notice of Proposed Rulemaking, 37 FCC Rcd. 56 (F.C.C. Mar. 2018), *available at* https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0323/FCC-18-31A1.pdf.

⁵³ NCLC has produced a comprehensive analysis of the decision in a memorandum entitled *The Effect of ACA International: What Does it Vacate, What Does it Undermine, What Rules Remain?* (Apr. 2, 2018), *available at* www.nclc.org.

⁵⁴ 885 F.3d 687 (D.C. Cir. 2018).

⁵⁵ 2015 TCPA Omnibus Order, *supra* note 17.

- The definition of “automatic telephone dialing system” (ATDS);
- Caller liability for calls to reassigned numbers; and
- The right of consumers to revoke consent to receive robocalls.

The TCPA prohibits the use of an autodialer (the statute uses the term “automated telephone dialing system” or ATDS) to call a cell phone without the called party’s consent.⁵⁶ This prohibition is critically important to consumers, as it is the primary bulwark against the tsunami of unwanted calls that would otherwise flood their phones.

The TCPA defines autodialer as equipment that has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers.⁵⁷ The FCC has interpreted this definition on several occasions.

In 2003, the FCC held that a device cannot be excluded from the definition because it dials from a given set of numbers rather than from randomly or sequentially generated numbers.⁵⁸ That ruling also holds that a predictive dialer is an autodialer, reasoning that, like earlier autodialers, the basic function of a predictive dialer is the capacity to dial numbers without human intervention. In 2008, the FCC issued another declaratory ruling reiterating that a predictive dialer is an autodialer.⁵⁹ Many decisions have held that these rulings are binding on courts.⁶⁰

⁵⁶ 47 U.S.C. § 227(b)(1)(A)(iii).

⁵⁷ 47 U.S.C. § 227(a)(1). *See also* 47 C.F.R. § 64.1200(f)(2) (similar definition).

⁵⁸ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd. 14,014 (F.C.C. July 2003).

⁵⁹ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd. 559 (F.C.C. Jan. 2008).

⁶⁰ *Zeidel v. A&M (2015) L.L.C.*, 2017 WL 1178150 (N.D. Ill. Mar. 30, 2017) (relying on FCC’s 2003 order to hold that device that sends text messages *en masse* is ATDS regardless of whether it has capacity to generate numbers sequentially or randomly; device is ATDS if it stores pre-programmed numbers or receives numbers from a computer database, can dial those numbers at random in sequential order or from a database of numbers, and its basic function is the capacity to dial numbers without human intervention); *Espejo v. Santander Consumer USA, Inc.*, 2016 WL 6037625 (N.D. Ill. Oct. 14, 2016) (relying on 2003 order to hold that predictive dialer is an ATDS); *Brown v. Credit Mgmt., L.P.*, 131 F. Supp. 3d 1332 (N.D. Ga. 2015) (relying on 2003 and 2008 orders to hold predictive dialer an ATDS); *Swaney v. Regions Bank*, 2015 WL 12751706 (N.D. Ala. July 13, 2015) (text message sending system is ATDS because it has ability to dial numbers without human intervention); *Brown v. Account Control Tech., Inc.*, 2015 WL 11181947 (S.D. Fla. Jan. 16, 2015) (relying on 2003 and 2008 orders to hold that a predictive dialer is an ATDS; dismissing defendant’s argument that predictive dialer is ATDS only if it has capacity to use random or sequential number generation); *Morse v. Allied Interstate, L.L.C.*, 65 F. Supp. 3d 407 (M.D. Pa. 2014) (2003 and 2008 orders are binding; predictive dialer that calls numbers without human intervention is ATDS); *Moore v. DISH Network L.L.C.*, 57 F. Supp. 3d 639 (N.D. W. Va. 2014) (predictive dialer is ATDS even if it lacks capacity to generate random or sequential phone numbers and even though humans create the lists of numbers to be called); *Sterk v. Path, Inc.*, 46 F. Supp. 3d 813 (N.D. Ill. 2014) (relying on 2003 and 2008 orders; a predictive dialer is an ATDS; here, device that sends text messages to call list is ATDS even if it lacks capacity to generate numbers randomly or sequentially); *Davis v. Diversified Consultants, Inc.*, 36 F. Supp. 3d 217 (D. Mass. 2014) (relying on 2003 and 2008 orders to hold that predictive dialer is ATDS even if it does not have capacity for random or sequential number generation); *Lardner v. Diversified Consultants,*

Robocallers have not been happy with these rulings. They have sought to create equipment that automatically calls millions of numbers a day but that does not quite meet the statutory definition, and they have also repeatedly petitioned the FCC to issue a narrow definition of “autodialer.” In 2015, in response to the latest batch of petitions, the FCC issued another declaratory order that reiterated the conclusions of the 2003 and 2008 orders and added further interpretations.⁶¹ The 2015 order held that, whether or not a particular call was placed through random or sequential generation of telephone numbers, a system is an autodialer if it has the present or potential capacity to generate numbers in this way.⁶² The order also made it clear that “the TCPA’s use of ‘capacity’ does not exempt equipment that lacks the ‘present ability’ to dial randomly or sequentially.”⁶³ Thus hardware that can store or produce telephone numbers to be called using a random or sequential number generator is an autodialer even if software necessary to accomplish that functionality has not yet been installed.⁶⁴

The industry appealed the 2015 order,⁶⁵ and in 2018, in *ACA International v. Federal Communications Commission*,⁶⁶ the D.C. Circuit set aside the portions of the 2015 order that dealt with the definition of autodialer. The court’s main concern was that the FCC’s broad interpretation of the term “capacity” in the autodialer definition could sweep in smartphones that consumers were using for ordinary purposes. It sent this part of the order back to the FCC to redo.

While *ACA International* sets aside the portions of the FCC’s 2015 order that dealt with the definition of ATDS, it leaves in place the FCC’s 2003 and 2008 orders, which remain binding on the courts.⁶⁷ The D.C. Circuit’s decision thus rolls the clock back to 2014, before the FCC had issued

Inc., 17 F. Supp. 3d 1215 (S.D. Fla. 2014) (relying on 2003 order and finding it reasonable; device is ATDS if it automatically dials numbers from a preprogrammed list); *Cabrera v. Gov’t Employees Ins. Co.*, 2014 WL 11881002 (S.D. Fla. Nov. 26, 2014) (relying on 2003 and 2008 orders to hold that any device that is able to dial numbers without human intervention, for example by calling numbers stored in a database, is an ATDS; LiveVox system is ATDS).

⁶¹ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961 ¶¶ 10, 23, 24 (F.C.C. July 10, 2015), *appeal resolved*, *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (setting aside portions of FCC’s 2015 order dealing with ATDS definition and treatment of reassigned cell phone numbers).

⁶² *Id.* at ¶ 15.

⁶³ *Id.*

⁶⁴ *Id.* at ¶¶ 16, 18–20.

⁶⁵ See National Consumer Law Center, Federal Deception Law § 6.2.4.3A (3d ed. 2017), *updated at* www.nclc.org/library.

⁶⁶ 885 F.3d 687 (D.C. Cir. 2018).

⁶⁷ The D.C. Circuit’s brief references to the 2003 and 2008 FCC orders in *ACA International* do nothing to undermine the conclusion that the opinion decides only the validity of the 2015 order. Except for a brief mention of the 2003 order in an introductory section describing the FCC’s history of rulemaking and declaratory rulings, *ACA International* mentions the FCC’s 2003 and 2008 orders only in section II(A)(2). 885 F.3d at 701. That section first addresses the question whether the existence of the 2003 and 2008 orders deprives the D.C. Circuit of jurisdiction to entertain the challenge to the 2015 order. This was a necessary prerequisite for the court to address the 2015 order. For more discussion of this point, see NCLC’s memorandum on the impact of the decision, *supra* note 54, at § I.A.3.

the portions of its 2015 order that relate to the definition of an ATDS. Accordingly, the role of courts after *ACA International* should be to interpret the statute in light of the 2003 and 2008 FCC orders, the decisions of the Court of Appeals for their Circuit, and any decisions of other courts that have persuasive value, but without the benefit of the 2015 order on this point. In our view, discussed in length in our published analysis of the effect of *ACA International*,⁶⁸ most dialers used by robocallers still fall within the definition of autodialer.

In *ACA International*, the D.C. Circuit also addressed the question of reassigned cell phone numbers. Often callers have claimed that a barrage of calls is legal because the called party's cell phone number was previously assigned to a consumer who had consented to the calls. Consumers have found these calls extremely difficult to stop. The FCC's 2015 order made it clear that a caller has to have the consent of the person it actually calls, and that, when a telephone number is reassigned from one consumer to another, the caller must have the new consumer's consent. In addition, however, the FCC created a safe harbor for the first call to a reassigned number while imposing liability for calls after that first call. The D.C. Circuit held that, while the rationale for requiring the caller to have the consent of the person it actually called was "persuasive," the FCC had not articulated a good enough rationale for the one-call safe harbor, so it set aside the entire portion of the order dealing with liability for calls to reassigned numbers and sent it back to the FCC to redo.

The D.C. Circuit rejected the other challenges to the FCC's 2015 order. It agreed that the FCC's ruling that consumers have the right to revoke consent by any reasonable means was reasonable, and it rejected a pharmacy chain's argument that a narrow, carefully crafted exception from the consent requirement for time-sensitive health care messages should have been broader. It left all the other portions of the 2015 order undisturbed.

IV. A Plan for Dealing with Robocalls

American consumers want robocalls to stop. Callers want to continue calling, and they do not want to be sued. But most responsible callers agree that consumers should have some control over the calls they receive. The way to thread our way through this conundrum is for the FCC to develop clear rules to guide callers, to cover all truly automated calls (otherwise consumers will have no control), to ensure that consumers can clearly and easily revoke consent, and to give consumers the means to block calls they do not want.

The FCC, under Chairman Pai, has already launched some important initiatives to deal with unwanted robocalls. These include permitting phone companies to allow call blocking,⁶⁹ consideration of a comprehensive reassigned number database that will enable callers to check that they have consent from the current subscriber of the phone before calling,⁷⁰ encouraging phone

⁶⁸ See NCLC's memorandum on the impact of the decision, *supra* note 54, at § I.A.3.

⁶⁹ *In re* Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59, Report and Order and Further Notice of Proposed Rulemaking, FCC 17-51 (F.C.C. Nov. 2017).

⁷⁰ *In re* Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59, Second Further Notice of Proposed Rulemaking, *supra* note 53.

companies to develop technologies that allow for reliable call authentication,⁷¹ and beginning the process of tightening regulations around caller ID spoofing.⁷²

But the first step must be to make sure that all of the invasive and unwanted calls are covered by the TCPA's consumer protections. This step involves ensuring that the TCPA's definition of an ATDS covers the automated calls being made. As explained in the previous section, we believe that if the FCC does nothing to change the existing law on the definition, then there is ample room for the courts to find that most autodialers currently being used are covered. But doing nothing to resolve the outstanding issues does not provide the clarity craved by responsible callers. And it would invite callers to continue trying to design equipment that barrages consumers with unwanted calls yet does not quite meet the definition of autodialer.

The TCPA requires consent for calls to cell phones that include either a prerecorded or artificial voice, or that are made with an autodialer (whether or not a human operator speaks to the consumer once the call is answered). As described in previous sections of this testimony, many of the worst calls about which consumers are now complaining are made with human operators and autodialers. Consumers would be substantially harmed if the FCC moved forward with a constricted definition of autodialer that excluded these calls. The definition of autodialer is central to coverage of the calls under the TCPA, not only for private enforcement, but for FCC enforcement as well.

Consider, for example, what happened in the case of *Dominguez v. Yahoo, Inc.*⁷³ In this case, Yahoo sent 27,809 wrong number text messages to Mr. Dominguez over 17 months. It refused to stop even after the consumer's many pleas, and even after he called a representative from the FCC, who then participated in a call (with Mr. Dominguez on the line) to Yahoo's customer service. Yahoo told Mr. Dominguez that the company could not stop the messages and that, as far as Yahoo was concerned, the number would always belong to the previous owner. Yahoo defended—and is still defending⁷⁴—its actions by saying that that the equipment sending the messages did not fit the statutory definition for an ATDS. Without a broad definition of autodialer, companies will be able to continue to thumb their noses like this at both consumers and the FCC.

If the FCC were to adopt a limited definition, the following calls, even if made by automated equipment from a call center, would be outside the scope of the TCPA's protections for cell phones, and neither the U.S. government nor consumers would have control over these calls.

- All texts to cell phones, since these do not use artificial voices. Consumers could try to put their cell phones on the FCC's Do Not Call list, but it applies only to residential phones, and only to telemarketing calls. The FCC has created something of a presumption that a cell phone is a residential phone, but this is not a universal rule.

⁷¹ *In re* Call Authentication Trust Anchor, CG Docket No. 17-97, Notice of Inquiry, 32 FCC Rcd. 5988 (F.C.C. July 2017).

⁷² See Press Release, Federal Communications Commission, FCC Proposes \$82 Million Fine for Spoofed Robocalls (Aug. 3, 2017); Press Release, Federal Communications Commission, Robocall Scammer Faces \$120 Million Proposed Fine for Massive Caller ID Spoofing Operation (June 22, 2017).

⁷³ 629 Fed. Appx. 369 (3d Cir. 2015).

⁷⁴ *Dominguez v. Yahoo!, Inc.*, 2017 WL 390267 (E.D. Pa. Jan. 27, 2017) (appeal filed 3d Cir. Feb. 2, 2017).

- Telemarketing calls that avoid artificial or prerecorded voices, including scam telemarketing calls that use humans, such as the IRS scam calls (“Your computer has a virus,” etc.). Consumers could register their cell phones on the FCC’s Do Not Call list, but, as noted in the preceding bullet, all cell phones may not be protected by the Do Not Call list.
- Debt collection calls, as long as they avoid prerecorded or artificial voices.
- Unwanted autodialed calls to emergency rooms, hospitals, etc., if they do not use prerecorded or artificial voices.

Below is our proposal for the next steps that we believe the FCC should take to deal with illegal and invasive robocalls.

1) Cover all the calls to cell phones that are made with automated equipment.

- This ensures that the FCC has authority over all problem calls;
- Clarity of coverage will assist the calling industry; and
- The statutory definition of ATDS provides ample room to do so (using either the language “store” numbers and “dial those numbers” or a broad definition of “capacity”).

2) To prevent application of a broad definition to ordinary personal use of a smart phone, use the FCC’s general authority to adopt rules implementing the TCPA to exclude equipment that does not routinely make *en masse* calls, possibly by:

- More closely defining the call abandonment rate; and
- Excluding equipment that does not have more than X abandoned calls.

3) Provide a safe harbor for one or more methods for consumers to revoke their consent to receive calls and text messages. This would:

- Encourage uniform methods of stopping calls;
- Mimic methods used by the text trade association (including in every call a simple way to stop future messages);
- Provide clarity for callers, which would reduce litigation; and
- Ensure protection for consumers who want to stop calls.

4) Require phone companies to implement call authentication, in which the caller is determined to be the person whose name appears on the caller ID, as soon as possible.

- This will drastically reduce scams;
- It will empower consumers to use personal blocking tools;
- It will make caller ID much more reliable, thereby empowering consumer choice of which calls to accept; and
- It will enable anti-spoofing rules to be more meaningful.

5) Promulgate more rigorous regulation of spoofing in order to:

- Prohibit all spoofing of numbers that callers do not have a right to use; and
- Allow caller IDs to be legitimately altered by callers, but only for legitimate purposes (*i.e.*, caller from call center in Iowa calling on behalf of Bank in Delaware can use Bank’s Delaware caller ID, but not a fake number, etc.).

6) Institute the proposed reassigned number database that features:

- A centralized system which is reliable, easy and inexpensive for callers to use; and
- A safe harbor only for calls made as the result of database mistakes, and for which callers otherwise complied with the TCPA.


7) Require telecommunication providers to make a free robust call blocking system available to consumers. This would:

- Provide consumers with control over their incoming calls; and
- Create a centralized appeals/whitelist system to address caller needs, yet always permit consumers to block specific numbers.



8) Implement congressionally-required rules limiting calls made to collect debt owed to the federal government by limiting the number of calls that can be made.

Thank you for the opportunity to bring our concerns and ideas to your attention. I would be happy to answer any questions.

Appendix 1
Calendar Showing Daily and Monthly Calls from Conns Appliances to Ms. Stevens

November 2014						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
26	27	28	29	30	31	1
2	3	4	5	6	7	8 
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	1	2	3	4	5	6
November's Total # of Calls = 2				Total # of Calls = 2		

December 2014						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
30	1	2	3	4	5	6
7	8	9	10	11 	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31	1	2	3
December's Total # of Calls = 2				Total # of Calls = 4		

January 2015						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
30	29	30	31	1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24 
25	26	27	28	29	30	31 
January's Total # of Calls = 5				Total # of Calls = 9		

