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,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents

On Petitions for Review of an Order of the Federal Communications Commission

BRIEF OF RETAIL LITIGATION CENTER, INC., NATIONAL RETAIL FEDERATION, AND NATIONAL RESTAURANT ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Dated: December 2, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

To conform to D.C. Circuit Rule 28(a)(1), amici certify that:

(A) Parties and Amici

All parties, intervenors, and amici appearing in this court are listed in the Petitioner's Opening Brief.

(B) Rulings under Review

References to the rulings at issue appear in the Petitioner's Opening Brief.

(C) Related Cases

References to the related cases appear in the Petitioner's Opening Brief.

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief.[1] Amici filed notice of their intent to participate as amici curiae on December 1, 2015.

In accordance with D.C. Circuit Rule 29(d), amici certify that this separate brief is necessary because no other amicus brief of which they are aware will address the issues raised in this brief: namely, the practical impact of the order on review on retailers. Amici have joined in a common brief, rather than filing three separate ones, in order to avoid burdening the Court with duplicative filings.

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

RULE 26.1 CORPORATE DISCLOSURE STATEMENTS

To comply with Fed. R. App. P. 26.1 and D.C. Circuit Rules 26.1 and 29(b), amici curiae disclose the following:

1. The Retail Litigation Center, Inc. is not a publicly held corporation or other publicly held entity, has no parent corporation, and no publicly held company owns 10% or more of its stock.

2. The National Retail Federation is not a publicly held corporation or other publicly held entity, has no parent corporation, and no publicly held company owns 10% or more of its stock.

3. The National Restaurant Association is not a publicly held corporation or other publicly held entity, has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTEREST OF AMICI CURIAE

The retail industry is the nation's largest private-sector employer, supporting more than 42 million jobs and contributing significantly to the national economy. Besides employing millions of people throughout the United States, retailers provide goods and services to tens of millions more and account for trillions of dollars in annual sales. The industry encompasses a range of businesses offering a broad variety of goods and services to the public—from grocery stores to pharmacies, and from restaurants to home improvement stores. This brief collectively refers to all of these businesses as "retailers." The retail sector includes hundreds of thousands of small, individual, and family-owned businesses with limited resources to defend against class action litigation based on infeasible rules.

The Retail Litigation Center, Inc. (the "Center") is a public-policy organization that identifies and engages in legal proceedings affecting the retail industry. The Center's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The Center seeks to provide courts with retail-industry perspectives on important legal issues and to highlight the potential industry-wide consequences of significant pending cases.

The National Retail Federation (the "Federation") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries. The Federation's *This is Retail* campaign highlights the retail industry's opportunities for life-long careers, how retailers strengthen communities, and the critical role that retail plays in driving innovation.

The National Restaurant Association (the "Association") is the leading business association for the restaurant and foodservice industry. The Association's mission is to help members build customer loyalty, rewarding careers, and financial success. Nationally, the industry is made up of one million restaurant and foodservice outlets employing fourteen million people—about ten percent of the American workforce. Despite being an industry of mostly small businesses, the restaurant industry is the nation's second-largest private-sector employer.

Many members of amici organizations communicate with their customers and employees by phone and by text messages, and many are defendants in suits filed under the Telephone Consumer Protection Act, Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. § 227 (1991)) ("TCPA"), based on such communications. Amici therefore have a strong interest in the proper interpretation and application of the statute. Amici believe that the Federal

Communications Commission's ("FCC" or "Commission") recent order interpreting the TCPA is arbitrary, capricious, and not in accordance with law. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (July 10, 2015) ("Order"). If permitted to stand, the FCC's interpretations of the statute will harm the nation's retailers, the consumers they serve, and the millions of people they employ.

INTRODUCTION

When Congress enacted the TCPA, it made clear that "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be *balanced* in a way that protects the privacy of individuals and permits legitimate telemarketing practices." Pub. L. No. 102-243, § 2(9), 105 Stat. at 2394 (emphasis added). Over time, however, the "balanced" approach directed by Congress to deal with certain telemarketing phone calls has been replaced by a badly unbalanced one. All too often, the statute has been interpreted in ways that threaten legitimate businesses engaged in normal commercial activity with massive liability for communications far removed from the kind of harassing, cold-call telemarketing that motivated the TCPA's enactment. This has occurred even though call recipients now have myriad technological tools unavailable when the TCPA was enacted to avoid unwanted calls. Because there is no cap on aggregate statutory damages, the statute has become a powerful engine for lawyer-driven litigation,

much of it on behalf of putative classes seeking millions or even billions in statutory damages.

Retailers and other legitimate businesses had hoped that the FCC would restore balance to the statute in these omnibus proceedings. Those hopes were largely dashed. Instead of interpreting the statute in commonsense ways that would have protected consumers without imposing impractical obligations on businesses seeking to communicate with their consenting customers using modern technologies, the FCC majority did the opposite. On issue after issue, the FCC majority adopted interpretations of the decades-old statute divorced from today's technological and commercial realities. The result will be even more litigation, much of it seeking significant money penalties from businesses for their failure to do the impossible. The FCC's approach to the TCPA will also chill valuable communications. Indeed, one major retailer has entirely stopped sending texts to consumers who have requested them because of its inability to prevent liability under the TCPA as interpreted by the FCC.

Petitioners have shown the many defects in the order on review. This brief will focus on two of them in particular and provide retailers' perspective on the unworkability of the FCC's approach.[1]

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[1] Amici agree with petitioners that the FCC's interpretation of the term "automatic telephone dialing system" in the TCPA is unlawful, *see* Pet'rs Br. 21-

First, the FCC determined that callers should be liable for calls or texts they unknowingly place to wrong or "recycled" numbers. Order, ¶¶71-97. These communications occur when the caller receives consent from a consumer to be contacted at a given number (*e.g.*, a consumer signs up to receive text notifications of sales or monthly payment reminder calls) but the consumer either has provided the wrong number or later gives that number up, allowing it to be reassigned. The three-Commissioner majority determined that callers should be liable for making such communications on the theory that callers lack consent from the phone number's *new user*. The FCC reached that conclusion notwithstanding its concessions that there exists no consistently effective means for callers to know when a number has been reassigned and that many such communications are made in complete good faith and without any intention of calling the wrong party.

The FCC half-heartedly responded to those concerns by offering a one-communication, post-reassignment so-called "safe harbor." This "solution," however, does nothing to solve the problem because a caller unaware of a

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39. The TCPA defines an ATDS as a system with the capacity to randomly or sequentially dial numbers. 47 U.S.C. § 227(a)(1). When retailers reach out to lists of their own customers, they do not use systems that randomly or sequentially dial, and it should not matter that the modern computerized equipment in use could hypothetically be *altered* to do so. While amici do not focus on this issue in this brief, they agree with petitioners that the FCC majority's interpretation of the provision is fatally flawed and should be vacated.

reassignment before that single call or text will generally remain unaware after it (for example, when no one answers the call or when the new user does not respond to a text). Nonetheless, the Commission stated categorically that after this single communication, the caller will be deemed to have "constructive knowledge" that the number was reassigned.

Second, the FCC concluded that consumers may opt out of future communications using any method that "reasonably" conveys their desire not to be called. *Id.* ¶¶55-70. Given this loose standard, retailers and other businesses can no longer adopt uniform policies specifying how consent may easily be revoked, *e.g.*, by responding to a text using a specific word, such as "STOP." Instead, callers must allow consumers to revoke consent by any "reasonable" means, with little guidance on what is "reasonable." The FCC stated that "reasonable means" could include *oral* statements to in-store personnel, but the FCC made no attempt to limit this to specific in-store personnel or rule out any other form of communication.

Here too, the FCC adopted a reading of the TCPA that imposes an impossible standard on businesses and exposes them to liability for failing to meet it. Retailers with tens of thousands of employees involved in hundreds of thousands of daily interactions with customers cannot realistically be expected to receive and process opt-out requests made during such interactions. Moreover,

retailers will be hard pressed to prove the negative when a plaintiff claims she orally revoked consent during an in-store conversation and sues for all calls or texts after that supposed revocation. Even if the defendant in such a case ultimately prevails, it may have done so only after suffering the crippling costs of class action litigation.

Agency action that imposes impossible standards of conduct is the epitome of arbitrary and capricious decision making. *See All. for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 940 (D.C. Cir. 1991) ("Impossible requirements imposed by an agency are perforce unreasonable."). The Order's provisions relating to reassigned numbers and revocation of consent should be vacated.

ARGUMENT

Retailers endeavor to provide their customers with the information they want, when and how they want it. Properly construed, the TCPA should be no barrier to such consented-to communications. The Commission, however, has interpreted the statute in ways that will chill such beneficial communications, while arbitrarily subjecting retailers and other legitimate businesses to liability for good-faith conduct.

I. RETAILERS AND OTHER BUSINESSES PROVIDE CUSTOMERS AND EMPLOYEES WITH DESIRED INFORMATION USING MOBILE TECHNOLOGY

A. Retailers Have Responded To Consumers' Preferences By Developing New Technologies Catering To Consumers' Needs

When the TCPA was enacted in 1991, cell phones and caller ID were rare, so an individual typically had to answer a ringing landline telephone simply to know whether the caller was a relative in distress or a telemarketer. Smartphones, however, have changed everything. Consumers can now see who is calling, can control their notification preferences, and can receive and send text messages and emails, all from the compact personal computer that is today's wireless device.

Retailers have adapted to consumers' increasing preference for tailored and timely communications via those devices by utilizing a range of innovative technologies. These methods help consumers receive the information they need when and how they want it. Among these technologies are:

- ***On-demand messages*.** Consumers increasingly expect a concierge-like personalized retail experience for making purchases on demand. Retail Industry Leaders Association,[2] Petition for Declaratory Ruling,

[2] The Retail Industry Leaders Association is affiliated with amicus Retail Litigation Center, Inc.

3 (Dec. 30, 2013).[3] Retailers have responded by offering on-demand messaging services. In a typical scenario, a consumer sees an in-store display with an offer like "Text 'discount' to 12-345 for 20% off your next purchase." An interested consumer can then use her phone to send a text message containing the word "discount" to the given number. In response, the consumer receives a text message containing the desired electronic coupon. The consumer may then immediately use the coupon to make a purchase. *Id.*[4]

- ***Integration of online and in-store shopping.*** As consumers increasingly shop using the Internet, they expect a seamless integration between a retailer's online portal and its brick-and-mortar outlets. Retail Industry Leaders Association, Comments, 2 (Dec. 2, 2013). For example, a consumer may purchase a product online for in-store pickup. When the consumer does so, she expects the retailer to notify her electronically as soon as the item is available. And when she arrives at the store, she may choose to remain in her vehicle and simply message the retailer to bring the requested item out. Retailers

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[3] All citations to comments and filings at the FCC are to CG Docket No. 02-278.

[4] The Commission correctly concluded that such on-demand texts do not violate the TCPA. Order, ¶¶103-06. Amici support that portion of the Order, which is not challenged in this case.

have developed automated messaging systems to coordinate these online and real-world presences.

- ***Direct advertising.*** Many consumers prefer the convenience of direct advertisements to their wireless devices rather than those found in traditional print, radio, or television media. Such consumers may sign up to join a mobile loyalty program and receive text messages containing promotional offers, coupons, or valuable information about a retailer's products. Abercrombie & Fitch Co. and Hollister Co., Notice of Ex Parte, 2 (May 13, 2015).
- ***Conventional uses.*** Retailers also use telephone communications in many of the same ways that they always have—to reach out to customers. Only now many consumers prefer to receive those communications on their wireless telephones, and have provided those cell numbers as their primary points of contact. Retailers are thus expected to call or deliver text or prerecorded messages informing customers of important information, including "(1) delivery dates; (2) in-store appointment times; (3) installation or repair appointments; (4) product recalls; and (5) to provide information about special order[s] or services." National Retail Federation, Comments, 2 (May 21, 2010).

In addition to responding to their customers' desire for new and better information services, retailers have also responded to similar expectations from their employees. Retailers often must rapidly communicate with large numbers of employees, such as to notify them of safety concerns, unexpected store closures, or local weather warnings. Given the ubiquity of personal mobile devices with unlimited service plans and employees' preference to carry a single device, many employers communicate with employees through their own phones. Rubio's Restaurant, Inc., Petition for Expedited Declaratory Ruling, 1-2 (Aug. 15, 2014) (detailing Rubio's use of automated mobile communications for food safety notices). Automated systems that deliver text or pre-recorded messages directly to employees thus enhance the ability of employers to disseminate this time-sensitive and vital information that ultimately benefits consumers. United Healthcare Services, Inc., Reply to Comments, 4-5 & n.13 (Mar. 24, 2014) (collecting comments).

B. Regulators Require Or Encourage Communications That Often Must Be Provided To Consumers' Mobile Devices

Retailers and other businesses have also increasingly communicated with consumers on their mobile devices at the behest of regulators. In light of the increase in "cord-cutting" by consumers using mobile phones instead of conventional land-lines, reaching a consumer on a wireless device may be the only

way to do so. Order, Dissenting Statement of Commissioner Ajit Pai, 120 n.602 ("Pai Dissent").[5]

For example, a majority of states now require retailers and other businesses to notify affected customers of any security breach, and a message sent to a consumer's wireless device will often be the only way to comply with that requirement. National Retail Federation, Comments, 3. Other regulations require businesses to contact consumers by telephone to convey fraud alerts, to inform of delinquency on a mortgage, and to warn about unauthorized access to personal information. United Healthcare Systems, Notice of Ex Parte, 3-4 (July 28, 2014) (collecting examples).

In a variety of contexts, the Commission itself has recognized the benefits of automated communication to wireless devices for quick dissemination of relevant information. The Commission has acknowledged, for example, that consumers benefit when businesses are able to notify consumers promptly about product recalls using automated telephone messages. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 20 FCC Rcd. 10,736, 10,738 (June 15, 2005). It accordingly determined that those calls are not subject to the TCPA's do-not-call regulations. *Id.*

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[5] Citations to the dissenting statements from Commissioners Pai and O'Rielly reference the page numbers in FCC release FCC 15-72.

The Commission has likewise recognized that certain healthcare-related calls subject to the Health Insurance Portability and Accountability Act "ensure continued consumer access to health care-related information"; it therefore exempted those calls from many of the TCPA's requirements. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 1830, 1853-54 (Feb. 15, 2012). In that same order, the FCC refused to require that callers obtain written consent before placing purely informational calls so as not to "unnecessarily impede" dissemination of information consumers want and need. *Id.* at 1838.

And in the Order at issue here, the Commission acknowledged that consumers benefit from retailers' use of certain on-demand messaging. Order, ¶104 ("consumers welcome such text messages"). It recognized that one-time messages sent in response to a consumer's request for a discount or coupon are not subject to the TCPA's rules regulating "telemarketing" and that the consumer's "initiating text" requesting an on-demand message "clearly constitutes consent" under the Act. *Id.* ¶¶104-06; *see supra* note 4.

II. THE COMMISSION'S TREATMENT OF CALLS TO RECYCLED AND WRONG NUMBERS IS IMPRACTICAL AND IRRATIONAL

The TCPA excludes from liability calls "made with the prior express consent of the called party." 47 U.S.C. § 227(b)(1). As petitioners demonstrate, the term "called party" is most naturally read to mean the intended recipient of the call. *See*

Pet'rs Br. 39-50. The Commission, however, rejected that straightforward interpretation, instead erroneously interpreting "called party" to mean any "subscriber" or "customary user" of the number, even where the caller is not trying to reach that person and has no idea that the number has been reassigned. Order, ¶¶73-74. That reading creates arbitrary results and Russian-roulette liability exposure for callers acting in complete good faith.

A. There Is No Consistently Effective Means Of Determining Whether A Number Has Been Recycled

The problem with the FCC's reading of the statute is rooted in this common fact pattern: a consumer provides her wireless phone number to a business and consents to contact at that number, but the consented-to calls or texts end up being received by someone else. This can occur because the consumer mistakenly provided the wrong number. Or, in an increasingly common scenario, the customer may have surrendered her wireless number after she consented to contact at that number. The Commission refers to those abandoned numbers as "recycled" or "reassigned" because wireless carriers reassign them to new subscribers. Order, ¶86 & n.303. Carriers recycle almost 37 million phone numbers each year. Pai Dissent, 117. Even though calls or texts to recycled numbers are often placed through no fault of the unknowing caller, plaintiffs have sued for receiving them on the theory that they were made without the "prior express consent of the called

party," 47 U.S.C. § 227(b)(1)(A), *i.e.*, the new user of the phone number. In the Order, the FCC arbitrarily endorsed this theory of liability.

1. *Retailers and other businesses have taken numerous steps to address the problem of recycled numbers*

When retailers attempt to contact their customers, they have no interest in contacting someone else who may have acquired the customer's number. Retailers and other businesses thus have on their own initiative taken a variety of steps to avoid placing calls or sending texts to numbers that have been shifted to new users, but none is perfect. These approaches include:

- ***Stop/Quit Commands.*** When retailers send requested text messages to customers through an automated system, many include a simple instruction telling the customer how to opt out of future messages. For most systems, a "STOP" or "QUIT" response by the phone user directly to a message will end any further communications. *E.g.*, Stage Stores, Inc., Petition for Expedited Declaratory Ruling, 3 (June 4, 2014). Cell phone users are familiar with such basic command responses, and by taking this simple step, a new subscriber can inform the caller that the number no longer belongs to the consenting customer who previously had the number.
- ***Pre-recorded opt-out instructions.*** Similarly, when a business sends a pre-recorded voice message, many systems will include instructions

on opting out. *E.g.*, Wells Fargo, Notice of Ex Parte, 3 (May 15, 2014). Ending further messages can be as simple as pressing a single key on the recipient-phone's key pad.

- ***Periodic verification.*** When retailers have other means of contacting consumers, they may choose to send a periodic email or letter requesting updated contact information. Retailers and other businesses also typically give customers who maintain online accounts an easy way to update telephone numbers online.
- ***Directories.*** A limited number of the largest businesses pay for access to databases containing lists of subscriber names and the numbers assigned to them. They then use software to scrub their customer number lists for discrepancies.

2. *All technological and commercial solutions to the problem of recycled numbers are imperfect*

Even with retailers' best efforts, however, there is no fail-safe solution to the problem of wrong and recycled numbers. Many of the methods, for example, rely on consumers to take the initiative by either providing updated information or informing a caller that it has the wrong number. Many recipients do not do so, as one retailer found out the hard way. *See* Pet'rs Br. 43-44 (recounting experience of Rubio's Restaurant with TCPA plaintiff who intentionally exploited a reassigned

number to bring suit). The Commission's order will incentivize more such opportunistic behavior.

The record also shows that methods based on subscriber lists and similar sources of information cannot guarantee reliability. At best, such solutions give a "confidence score," or a probability percentage indicating how likely it is that a number still belongs to the consumer that requested notifications. Wells Fargo, Notice of Ex Parte, 6 & n.33 (July 21, 2014). Indeed, even the wireless carriers told the Commission that they have "no practical way" to know whether a number has been reassigned, because number portability laws allow customers to take their phone number with them when they switch carriers. CTIA – The Wireless Association, Comments, 7 (March 10, 2014). That makes it impossible for a single carrier to track who has which number. And, if it is impossible for the carriers, retailers who are even farther removed from the information should not be expected to do so.

Subscriber-list-based methods, moreover, generate lists of potential reassigned numbers that are both under- and over-inclusive. The Commission acknowledged that the largest database of reassigned numbers includes only 80% of wireless numbers. *See* Order, ¶86 n.301. Moreover, of the active numbers in the database, more than 25% do not include any name associated with the number;

the subscriber is listed only as "wireless caller." Wells Fargo, July 21 Notice of Ex Parte, 6 n.33.

And the lists of potential reassigned numbers are over-inclusive because of difficulties accounting for nicknames or shared business or family plans. Often a retailer receives consent to call a customer at a line on a family plan—consent that would be valid for a call under the Commission's rules, Order, ¶73. Because the line is part of a family plan, however, the wireless carrier may associate a different subscriber name with the number. When a retailer checks its customer list against the carrier's for potential reassigned numbers, therefore, the system is likely to flag that customer's number as a "reassigned" number because of the name mismatch. Yet the number was not in fact reassigned and still belongs to the customer that requested calls from the retailer.

B. The Commission Recognized The Fundamental Problem With Its Approach But Arbitrarily Adopted An Ineffective Solution To It

As explained above, a business operating in total good faith using all available methods to avoid calling "recycled" numbers will unavoidably do so on occasion. And the Commission knows that. It recognized that "callers using the tools discussed above may nevertheless not learn of reassignment before placing a call." Order, ¶88; *see also, e.g.*, *id.* ¶85 ("[W]e agree with commenters who argue that callers lack guaranteed methods to discover all reassignments immediately after they occur.").

Having identified what it admitted was a "severe" result following from its interpretation of the statute, Order, ¶90 n.312, however, the Commission adopted a supposed solution that does not even come close to solving the problem and ultimately results in the arbitrary imposition of liability. In particular, the Commission fashioned an exemption from TCPA liability for the first call to a wireless number following reassignment. *Id.* ¶¶89-90. It justified that one-call window on the ground that "the caller *must* have a reasonable opportunity to discover the effective revocation." *Id.* ¶91 (emphasis added). Yet after that one call—whether or not it yields any relevant information—strict liability follows. *See id.* ¶72 ("If this one additional call does not yield actual knowledge of reassignment, we deem the caller to have constructive knowledge of such."). The Commission adopted that rule even though the caller will typically not learn that the called number has been reassigned based on that single communication.

1. *The "one-call" exemption is arbitrary and capricious*

The Commission's "one-call" window does nothing to alleviate the fundamental problem with the Commission's reading of the statute or afford callers the "reasonable opportunity to discover the effective revocation" the FCC said they must have, *id.* ¶91. The supposed safe harbor is, therefore, *itself* arbitrary and capricious. The Commission arbitrarily disregarded or down-played evidence demonstrating that a regime allowing liability for the second call or text to a

recycled number is irrational for the same reasons as one allowing liability for the first.

As numerous commenters point out, many of the communications that consumers expect from retailers and other businesses are one-sided and do not involve any direct human interaction. *E.g.*, Vibes Media, LLC, Notice of Ex Parte, 2 (June 10, 2015); Abercrombie, Notice, 2; Order, Statement of Commissioner Michael O'Rielly Dissenting in Part and Approving in Part, 130 ("O'Rielly Dissent"). If a consumer asks a retailer to send her text messages with a weekly coupon, for example, a one-text window likely will not give the retailer any greater opportunity to discover a reassignment than no window at all. The retailer will be entirely at the mercy of the receiving party, who is free to choose either to reply "STOP" or to allow the messages to continue and later file suit. O'Rielly Dissent, 131 n.36 (warning that "consumers acting in bad faith" could now "entrap" businesses). Likewise, if a consumer does not answer the phone, then the caller is in exactly the same position after that call as it was before.

2. *None of the FCC's other attempts to ameliorate the unfairness of its rule succeeds*

In an attempt to downplay the problems its reading of the statute would create, the Commission suggested several additional methods for detecting a wrong or reassigned number. But none solves the problem created by the Commission's approach.

The FCC posited that callers can use automated "triple-tone" detection equipment to recognize the message that carriers supply when a disconnected number is called and can then remove that number from their databases. Order, ¶86 & n.303. But wireless carriers often reassign numbers before retailers have a reasonable opportunity to detect that a number has been disconnected. If the first post-recycling call comes after reassignment, as will often be the case, then reliance on "triple-tone" detection equipment will be ineffective.

The Commission also suggested that businesses could address the problem by entering into "contractual obligation[s]" with customers to keep their contact information updated and then "seek[ing] legal remedies" against the customer "for violation of the agreement[s]." *Id.* ¶86 & n.302. The fact that the FCC made the straight-faced suggestion that businesses should sue their own customers for failure to update their contact information shows just how far afield from commercial realities the agency has traveled when construing the TCPA.

* * * * *

The FCC's adoption of a regime under which callers may be found liable for calls made with a reasonable, good faith belief that the answering party had consented, Order, ¶93 & n.315, is particularly irrational in light of callers' incentives separate and apart from the TCPA. Retailers and other businesses trying to deliver targeted information to their consenting customers have no incentive to call wrong numbers. Instead, they have powerful business reasons to maintain call databases that are as accurate as possible in order to ensure that their own customers—not strangers who inherited the customers' wireless numbers—receive the relevant information. Wells Fargo, July 21 Notice of Ex Parte, 7. The TCPA and statutes like it are meant to deter conduct that defendants might otherwise choose for business reasons. That rationale for liability is completely inapplicable here, where callers have no business reason to engage in the conduct at issue—and compelling business reasons not to.

III. THE COMMISSION'S TREATMENT OF REVOCATION OF CONSENT IS IMPRACTICAL AND IRRATIONAL

The FCC blinded itself to practical realities in another significant respect when it refused to permit businesses to establish uniform procedures for call recipients to follow when revoking consent to be contacted. Instead, the FCC adopted an amorphous standard under which consumers may revoke consent in an unlimited array of ways (provided that such ways meet an undefined

"reasonableness" standard) that retailers and other businesses cannot reliably record and process. To make matters worse, the Commission imposed this entirely new standard in a declaratory order, not notice-and-comment rulemaking, thus depriving businesses of any advance notice of what would be required of them. The result of this procedurally and substantively flawed process will be an increase in TCPA litigation initiated by previously-consenting customers claiming to have revoked that consent.

A. Retailers' Existing Methods Already Satisfy Consumers' Need For Simple Opt-Out Procedures

No responsible business wants to continue calling or texting a previously-consenting customer after she revokes that consent. Retailers and other legitimate businesses are harmed, not benefited, if they annoy their actual or potential customers.

Retailers therefore provide consumers with numerous reasonable methods to stop receiving texts and autodialed or prerecorded calls. As already explained, when retailers send an automated text message, the message typically contains simple instructions on how to avoid additional messages, *e.g.*, "Reply STOP to stop receiving text messages." When retailers make a pre-recorded or artificial voice call, those messages generally include instructions for revoking consent for future calls, such as through the simple step of pressing a number on the telephone key pad. And when a customer service representative contacts a customer by

telephone, the representative is typically trained to respond appropriately to requests to stop future calls.

B. There Is No Basis For Allowing Additional Means Of Consent Revocation When Reasonable Ones Are Already Available

The Commission made no finding that utilizing such straightforward methods of revoking consent burdens consumers. Yet the Commission refused to permit businesses to rely on them. Instead, the Commission determined that callers may not contact a previously consenting consumer after the consumer revokes consent "in *any* manner that clearly expresses a desire not to receive further messages." Order, ¶63 (emphasis added). In so concluding, the Commission rejected requests that callers be allowed to designate specific methods for revoking consent. *Id.* The FCC likewise declined to promulgate uniform consent-revocation procedures by prospective rule. Instead, the FCC interpreted the TCPA as requiring retailers and other businesses to have procedures to respond to a revocation made in myriad ways, for example, "orally," "in writing," "by way of a consumer-initiated call," "directly in response to a call initiated or made by" the retailer, or "at an in-store bill payment location." *Id.* ¶64. But that list is not exhaustive; retailers must respond to "any reasonable method" for revocation. *Id.* That approach is arbitrary in several respects.

1. *It is arbitrary to hold retailers liable when they provide easy paths to revoke consent but a consumer attempts to revoke consent in some other way*

The FCC's "any reasonable method" approach to consent revocation will create serious practical problems for retailers and other businesses that have established uniform, reliable, and easy-to-use means for allowing consumers to revoke consent. For example, the automated systems that allow consumers to receive the information they want by text "must be pre-programmed to recognize certain words as an opt-out request." Vibes Media, Notice, 3. Senders of commercial texts have therefore programmed them to recognize and respond to keywords like "STOP," "CANCEL," "UNSUBSCRIBE," "QUIT," "END," and "STOP ALL." *Id.* Retailers inform recipients that they may respond with these keywords to opt out of future messages.

It is reasonable to expect a consumer wishing to stop receiving texts to text back using one of those specified words—rather than attempting to revoke consent in some other way. Indeed, elsewhere in the Order, the Commission provided that a consumer wishing to stop receiving automated texts containing certain healthcare or financial information may do so *only* by using "the *exclusive* means" of "replying 'STOP.'" Order, ¶¶138, 147 (emphasis added). Outside of the narrow context of those particular kinds of communications, however, a text recipient would not be so restrained. Instead, according to the Order, she may sign up to

receive loyalty program texts one day, through a double opt-in procedure, but then ask to stop communications "in any manner that clearly expresses a desire not to receive further messages," *Id.* ¶63, such as in a conversation with in-store personnel the very next day. A consumer may also attempt to revoke consent by providing a reply text using a potentially endless number of words different from those specified. But automated systems can respond only to specifically identified combinations of characters, so expecting them to process the entire range of arguably "reasonable" revocation requests—like "pls dont msg me" or "if you send me more texts I'll call a lawyer"—is unrealistic. *See* Vibes Media, Notice, 3.

The Commission's determination that consumers may revoke consent "orally," even where a retailer offers alternative and easy means of doing so, is likewise arbitrary. Many retailers have thousands of stores around the country that collectively employ tens or hundreds of thousands of full- and part-time employees. And staff at many retail locations tend to turn over relatively quickly. Under those circumstances, retailers have no practical means to develop a system to train tens or hundreds of thousands of staff to (1) recognize that a customer is asking to withdraw consent for automated phone calls, (2) understand what information is required for withdrawal and accurately collect it, (3) transmit that information to the correct internal department for processing, so that (4) future calls can be stopped in a timely manner. *See* Pai Dissent, 122 ("Would a harried

cashier at McDonald's have to be trained in the nuances of customer consent for TCPA purposes?").

The impracticability of the FCC's approach is compounded by the need to accurately make records of all customer-staff interactions so that a retailer could have some hope of proving the *absence* of a revocation when faced with the inevitable lawsuit. *See* American Financial Services Association, Comments, 2 (Sept. 2, 2014). Indeed, it is not far-fetched to imagine a dedicated TCPA plaintiff giving consent, purporting to revoke it in a conversation with a cashier at a retailer, and then filing suit after accumulating enough calls or texts to seek significant damages. In such a situation, the retailer will have limited ability to prove that the oral request did not happen.

To be sure, a court might conclude that the consumers' means of revoking consent was not reasonable in one of these scenarios. But perhaps not. Reasonableness is a fact-specific inquiry, and how courts will assess it in any given case is difficult to predict. *See* Order, ¶64 n.233 (reasonableness to be determined by "totality of the facts and circumstances"). Even if the caller ultimately prevails, it has suffered the significant expense and distraction of undertaking discovery and defending litigation. The result will be an increase in litigation and uncertainty, and a chilling effect on legitimate businesses' ability to provide information to consumers who want it.

2. *The CFPB has recognized the problems inherent in processing oral requests*

Unlike the FCC, other agencies have recognized the impracticability of requiring businesses to respond to similar oral requests from consumers. For example, the Consumer Financial Protection Bureau administers a statute that requires lenders to follow certain formal procedures when a borrower asserts an error in the servicing of its loan. *See* 12 U.S.C. § 2605(k)(1)(c). The Bureau requested comments on whether to require triggering of those procedures when the borrower orally asserts the error. In response, the agency received scores of comments demonstrating the impracticability of administering a system for responding to oral requests from consumers. Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,738 (Feb. 14, 2013); *see also* Santander Consumer USA, Inc., Reply Comments, 10-11 (Sept. 15, 2014) (giving examples of other agency regulations that require consent revocations in writing).

After reviewing these difficulties, the Bureau determined that formal procedures should be required only when lenders receive the notice of error in writing. 78 Fed. Reg. at 10,738. For oral notices, lenders should "inform[] borrowers of the procedures for submitting written notices." 12 C.F.R. § 1024.38(b)(5). That approach "strikes the appropriate balance between ensuring responsiveness to consumer requests and complaints and mitigating the burden on

servicers of following and demonstrating compliance with specific procedures with respect to oral notices." 78 Fed. Reg. at 10,738; *see also* O'Rielly Dissent, 136 (detailing other "pro-consumer statutes" where Congress struck a similar balance).

The FCC's approach lacks any such balance and should be set aside.

CONCLUSION

For the foregoing reasons and those provided in petitioners' brief, amici respectfully request that the Court vacate the Order's provisions relating to ATDS, reassigned numbers, and revocation of consent.

Respectfully submitted,

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CIRCUIT RULE 32(a)(2) ATTESTATION

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

Dated: December 2, 2015

/s/ Joseph R. Palmore
Joseph R. Palmore

CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that:

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 6,120 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1), as determined by the word-counting feature of Microsoft Word.

This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on December 2, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 2, 2015 /s/ Joseph R. Palmore