

**DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, WC Docket No. 07-135

Congress passed the Telephone Consumer Protection Act (TCPA) to crack down on intrusive telemarketers and over-the-phone scam artists. It prohibits telemarketing in violation of our Do-Not-Call rules and prohibits any person from making calls using the tools that telemarketers had at their disposal in 1991. And the TCPA includes a three-prong enforcement mechanism for remedying violations: States, the FCC, and individual consumers can all take illegal telemarketers to court with statutory penalties starting at \$500 per violation.¹

Yet problems persist. Last year, the FCC received 96,288 complaints for violations of federal Do-Not-Call rules, more than any other category of complaints.² On June 10, the Senate Special Committee on Aging held a hearing on ending the epidemic of illegal telemarketing calls.³ At that hearing, the Attorney General of Missouri testified that the *number one* complaint of his constituents is illegal telemarketing. His office alone received more than 52,000 telemarketing complaints in 2014.⁴ And the Federal Trade Commission has reported that “increasingly, fraudsters, who often hide in other countries in an attempt to escape detection and punishment, make robocalls that harass and defraud consumers.” The FTC noted that a single scam artist made over 8 million deceptive robocalls to Americans.⁵

The bottom line is this: Far too many Americans are receiving far too many fraudulent telemarketing calls. I know because my family and I get them on our cellphones during the day and on our home phones at night. It’s a problem that’s only getting worse.

And none of this should be news to the FCC. As I remarked in this very room back in January: “Unwanted telemarketing calls in violation of the National Do-Not-Call Registry are on the rise. In fact, such complaints made up almost 40 percent of consumer complaints in our latest report—and the number of complaints jumped dramatically last year from 19,303 in the first quarter to 34,425 in the third. Let’s fix this problem.”⁶ What has the Commission done since then to enforce the rules? It has issued a single citation to a single potential violator of federal Do-Not-Call rules.⁷ That’s not going to solve the problem.

The courts haven’t been better. The TCPA’s private right of action and \$500 statutory penalty could incentivize plaintiffs to go after the illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters. But trial lawyers have found legitimate, domestic businesses a much more profitable target. As Adonis Hoffman, former Chief of Staff to Commissioner Clyburn, recently wrote in *The Wall*

¹ 47 U.S.C. §§ 227(b)(3), 227(c)(5), 227(g), 503(b).

² See FCC, Quarterly Reports – Consumer Inquiries and Complaints, <http://go.usa.gov/3VFkB> (summing complaints for 2014 from the “Top Complaint Subjects” tables).

³ Hearing before U.S. Senate Special Committee on Aging, “Ringling Off the Hook: Examining the Proliferation of Unwanted Calls” (June 10, 2015), *available at* <http://go.usa.gov/3wVHY>.

⁴ Overview of Statement of Attorney General Chris Koster, Special Committee on Aging Panel Discussion, at 1 (June 10, 2015), *available at* <http://go.usa.gov/3VFkQ>.

⁵ Federal Trade Commission, Prepared Statement on Combatting Illegal Robocalls: Initiatives to End the Epidemic, United States Senate Special Committee on Aging, at 4 (June 10, 2015), *available at* <http://go.usa.gov/3VFkw>.

⁶ Statement of Commissioner Ajit Pai on FCC Consumer Help Center: A New Consumer Gateway (Jan. 29, 2015), *available at* <http://go.usa.gov/3VF9k>.

⁷ *FreeEats.com Inc.*, File No. EB-TCD-13-00007717, Citation and Order, 30 FCC Rcd 2659 (Enf. Bur. 2015).

Street Journal, a trial lawyer can collect about \$2.4 million per suit by targeting American companies.⁸ So it's no surprise the TCPA has become the poster child for lawsuit abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in the first nine months of 2014.

Here's one example. The Los Angeles Lakers offered its fans a fun opportunity: Send a text-message to the team, and you might get to place a personalized message on the Jumbotron at the Staples Center. The Lakers acknowledged receipt of each text with a reply making clear that not every message would appear on the Jumbotron. The trial bar's response? A class-action lawsuit claiming that every automated text response was a violation of the TCPA.

Or here's another. TaxiMagic, a precursor to Uber, sent confirmatory text messages to customers who called for a cab. Each message indicated the cab's number and when the cab was dispatched to the customer's location. Did customers appreciate this service? Surely. But one plaintiffs' attorney saw instead an opportunity to profit, and a class-action lawsuit swiftly followed.

Some lawyers go to ridiculous lengths to generate new TCPA business. They have asked family members, friends, and significant others to download calling, voicemail, and texting apps in order to sue the companies behind each app. Others have bought cheap, prepaid wireless phones so they can sue any business that calls them by accident. One man in California even hired staff to log every wrong-number call he received, issue demand letters to purported violators, and negotiate settlements. Only after he was the lead plaintiff in over 600 lawsuits did the courts finally agree that he was a "vexatious litigant."

The common thread here is that in practice the TCPA has strayed far from its original purpose. And the FCC has the power to fix that. We could be taking aggressive enforcement action against those who violate the federal Do-Not-Call rules. We could be establishing a safe harbor so that carriers could block spoofed calls from overseas without fear of liability. And we could be shutting down the abusive lawsuits by closing the legal loopholes that trial lawyers have exploited to target legitimate communications between businesses and consumers.

Instead, the *Order* takes the opposite tack. Rather than focus on the illegal telemarketing calls that consumers really care about, the *Order* twists the law's words even further to target useful communications between legitimate businesses and their customers.⁹ This *Order* will make abuse of the TCPA much, much easier. And the primary beneficiaries will be trial lawyers, not the American public.

I respectfully dissent.

I.

The *Order* dramatically expands the TCPA's reach. The TCPA prohibits a person from making "any call" to a mobile phone "using any automatic telephone dialing system,"¹⁰ except in certain defined circumstances. The statute defines an "automatic telephone dialing system" as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number

⁸ Adonis Hoffman, "Sorry, Wrong Number, Now Pay Up," *The Wall Street Journal* (June 16, 2015), available at <http://on.wsj.com/1GuwfMJ>; see also John Eggerton, "FCC's Hoffman Looks Back, Moves Forward," *Broadcasting & Cable* (Mar. 23, 2015), available at <http://bit.ly/1GEQYNR> (quoting Hoffman as saying "This consumer protection, anti-telemarketing statute has been leveraged by aggressive plaintiffs' lawyers to line their pockets lavishly with millions, while consumers usually get peanuts. . . . I think the TCPA should be known by its real acronym—'Total Cash for Plaintiffs' Attorneys.' This is just one example where the public interest is not being advanced responsibly.").

⁹ The *Order* notes that the "TCPA makes it unlawful for any business—'legitimate' or not—to make robocalls that do not comply with the provisions of the statute." *Order* at note 6. Of course it does; rare is the statute that limits its scope to only illegitimate businesses. The point is that *Order* redirects the TCPA's aim away from undesirable practices commonly used by telemarketers (the elimination of which benefits consumers) and toward desirable communications between businesses and consumers (litigation against which benefits trial lawyers). As the very name makes clear, the TCPA is a consumer protection statute, not a trial-lawyer protection statute.

¹⁰ 47 U.S.C. § 227(b)(1)(A)(iii).

generator; and (B) to dial such numbers.”¹¹ As three separate petitions explain, trial lawyers have sought to apply this prohibition to equipment that *cannot* store or produce telephone numbers to be called using a random or sequential number generator and that *cannot* dial such numbers.¹²

That position is flatly inconsistent with the TCPA. The statute lays out two things that an automatic telephone dialing system must be able to do or, to use the statutory term, must have the “capacity” to do.¹³ If a piece of equipment *cannot* do those two things—if it *cannot* store or produce telephone numbers to be called using a random or sequential number generator and if it *cannot* dial such numbers—then how can it possibly meet the statutory definition? It cannot. To use an analogy, does a one-gallon bucket have the capacity to hold two gallons of water? Of course not.

That’s long been the FCC’s approach. When the Commission first interpreted the statute in 1992, it concluded that the prohibitions on using automatic telephone dialing systems “clearly do not apply to functions like ‘speed dialing,’ ‘call forwarding,’ or public telephone delayed message services[], because the numbers called *are not generated in a random or sequential fashion.*”¹⁴ Indeed, in that same order, the Commission made clear that calls not “dialed using a random or sequential number generator” “are not autodialer calls.”¹⁵

Confirming this interpretation (what some proponents call the “present capacity” or “present ability” approach¹⁶) is the statutory definition’s use of the present tense and indicative mood. An automatic telephone dialing system is “equipment which has the capacity” to dial random or sequential numbers,¹⁷ meaning that system actually can dial such numbers at the time the call is made. Had Congress wanted to define automatic telephone dialing system more broadly it could have done so by

¹¹ 47 U.S.C. § 227(a)(1). A random number generates numbers randomly: 555-3455, 867-5309, etc. A sequential number generator generates numbers in sequence: 555-3455, 555-3456, etc.

¹² TextMe, Inc. Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (Mar. 18, 2014); Glide Talk, Ltd. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Oct. 28, 2013); Professional Association for Customer Engagement Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking, CG Docket No. 02-278 (Oct. 18, 2013).

¹³ See Webster’s New International Dictionary at 396 (2nd ed. 1958) (defining “capacity” in relevant part to mean “power of receiving, containing, or absorbing,” “extent of room or space,” “ability,” “capability,” or “maximum output”).

¹⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8776, para. 47 (1992) (emphasis added).

¹⁵ *Id.* at 8773, para. 39.

¹⁶ See, e.g., Chamber Comments on PACE Petition at 5; CI Comments on Glide Petition at 3–4; Covington Comments on PACE Petition at 4–5; DIRECTV Comments on PACE Petition at 2–3; Fowler Comments on PACE Petition at 1; Glide Reply Comments on PACE Petition at 6; Global Comments on PACE Petition at 2; Internet Association Comments on TextMe Petition at 2–3; NCHER Reply Comments on PACE Petition at 2; Nicor Comments on PACE Petition at 7; Noble Systems Comments on Glide Petition at 4; Path Comments on Glide Petition at 22; Twilio Comments on Glide Petition at 13; YouMail Reply Comments on PACE Petition at 4; Letter from Monica S. Desai, Counsel to Wells Fargo, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1–2 (June 11, 2015); Letter from Steven A. Augustino, Counsel to Five9, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1–2 (June 11, 2015); Letter from Monica S. Desai, Counsel to ACA International, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2–6 (June 11, 2015); Letter from Stephanie L. Poday, Vice President and Associate General Counsel, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2–3 (June 10, 2015); Letter from Jennifer D. Hindin, Counsel to Sirius XM Radio, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2 (June 8, 2015).

¹⁷ 47 U.S.C. § 227(a)(1).

adding tenses and moods, defining it as “equipment which has, has had, or could have the capacity.”¹⁸ But it didn’t. We must respect the precise contours of the statute that Congress enacted.¹⁹

The *Order* reaches the contrary conclusion and holds that the term “automatic telephone dialing system” includes equipment that *cannot* presently store or produce telephone numbers to be called using a random or sequential number generator and that *cannot* presently dial such numbers. The apparent test is whether there is “more than a theoretical potential that the equipment could be modified to satisfy the ‘autodialer’ definition.”²⁰ To put it kindly, the *Order*’s interpretation is a bit of a mess.

For one, it dramatically departs from the ordinary use of the term “capacity.” Although the *Order* points to dictionaries to suggest that the word “capacity” means “the potential or suitability for holding, storing, or accommodating,”²¹ those definitions in fact undermine the *Order*’s conclusion. No one would say that a one-gallon bucket has the “potential or suitability for holding, storing, or accommodating” two gallons of water just because it could be modified to hold two gallons. Nor would anyone argue that Lambeau Field in Green Bay, Wisconsin, which can seat 80,000 people, has the capacity (i.e., the “potential or suitability”) to seat all 104,000 Green Bay residents just because it could be modified to have that much seating.²² The question of a thing’s capacity is whether it can do something presently, not whether it could be modified to do something later on.

For another, the *Order*’s expansive reading of the term “capacity” transforms the TCPA from a statutory rifle-shot targeting specific companies that market their services through automated random or sequential dialing into an unpredictable shotgun blast covering virtually all communications devices. Think about it. It’s trivial to download an app, update software, or write a few lines of code that would modify a phone to dial random or sequential numbers. So under the *Order*’s reading of the TCPA, each and every smartphone, tablet, VoIP phone, calling app, texting app—pretty much any calling device or software-enabled feature that’s not a “rotary-dial phone”²³—is an automatic telephone dialing system.²⁴

Such a reading of the statute subjects not just businesses and telemarketers but almost all our citizens to liability for everyday communications. One need not bother with the legislative history to realize that lawmakers did not intend to interfere with “expected or desired communications between businesses and their customers.”²⁵ And one need not be versed in the canon of constitutional avoidance²⁶

¹⁸ See, e.g., *United States v. Wilson*, 503 U.S. 329, 333 (1992) (“Congress’ use of a verb tense is significant in construing statutes.”); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 (1987) (“Congress could have phrased its requirement in language that looked to the past . . . , but it did not choose this readily available option.”).

¹⁹ See *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94 (2002) (explaining that “like any key term in an important piece of legislation, the [statutory provision in question] was the result of compromise between groups with marked but divergent interests in the contested provision” and that “[c]ourts and agencies must respect and give effect to these sorts of compromises”); see also John F. Manning, *Second-Generation Textualism*, 98 Cal. L. Rev. 1287, 1309–17 (2010) (arguing that respecting legislative compromise means that courts “must respect the level of generality at which the legislature expresses its policies”).

²⁰ *Order* at para. 18.

²¹ See *Order* at para. 19.

²² The *Order* responds that the analogy is “inapt” because “modern dialing equipment can often be modified remotely without the effort and cost of adding physical space to an existing structure.” *Order* at para. 16. This misses the point. If asked the seating capacity of Lambeau Field, no one would first study whether one could seat more than 80,000 “without the effort and cost of adding physical space” (perhaps by adding benches). Instead, they’d respond with how many the stadium could seat as is, without *any* modification.

²³ *Order* at para. 18.

²⁴ Indeed, the *Order* both acknowledges that smartphones are swept in under its reading, *Order* at para. 21, and explicitly sweeps in all Internet-to-phone text messages via email or via a web portal, *Order* at para. 111.

²⁵ Report of the Energy and Commerce Committee of the U.S. House of Representatives, H.R. Rep. 102-317, at 17 (1991) (*House Report*).

to know that courts and administrative agencies normally eschew statutory interpretations that chill the speech of every American that owns a phone.²⁷ Yet the *Order*'s interpretation does precisely that.

Let me give just one example. Jim meets Jane at a party. The next day, he wants to follow up on their conversation and ask her out for lunch. He gets her cellphone number from a mutual friend and texts her from his smartphone. Pursuant to the *Order*, Jim has violated the TCPA, and Jane could sue him for \$500 in statutory damages.

In response, the *Order* tells smartphone owners not to worry: "We have no evidence that friends, relatives, and companies with which consumers do business find those calls unwanted and take legal action against the calling consumer."²⁸ That's little solace. There is no evidence of smartphone class-action suits yet because no one has thought the TCPA prohibited the ordinary use of smartphones—at least not before now. Now that they do, the lawsuits are sure to follow.²⁹

The *Order* then protests that interpreting the statute to mean what it says—that automatic telephone dialing equipment must be able to dial random or sequential numbers—"could render the TCPA's protections largely meaningless by ensuring that little or no modern dialing equipment would fit the statutory definition of an autodialer."³⁰ But what the Commission deems defeat is in fact a victory for consumers. Congress expressly targeted equipment that enables telemarketers to dial random or sequential numbers in the TCPA. If callers have abandoned that equipment, then the TCPA has accomplished the precise goal Congress set out for it. And if the FCC wishes to take action against newer technologies beyond the TCPA's bailiwick, it must get express authorization from Congress—not make up the law as it goes along.

Next, the *Order* seeks refuge in Commission precedent, claiming that it has "already twice addressed the issue."³¹ Not quite. Those two rulings both involved "predictive dialers," which the FCC described as having "the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers."³² In 2003, the FCC explained that pairing automatic telephone dialing equipment "with predictive dialing software and a database of numbers" (and calling the combination a predictive dialer) would not exclude that equipment from the statutory prohibition.³³ (...continued from previous page)_____

²⁶ See *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (describing the canon as "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts").

²⁷ See U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . ."). Notably, the constitutional question is not whether this interpretation of the TCPA would meet the less strict standard governing "commercial speech," see *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 562–63 (1980), because the TCPA restricts the making of "any call"—not just commercial calls—using an automatic telephone dialing system, 47 U.S.C. § 227(b)(1)(A) (emphasis added). Instead, the question is whether this interpretation is "narrowly tailored to serve the government's legitimate, content-neutral interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). How could anyone answer that question in the affirmative given that the majority of Americans carry a smartphone (what the *Order* now labels an automatic telephone dialing system) in their pockets?

²⁸ *Order* at para. 21.

²⁹ This is underscored by the *Order* itself, which opens by emphasizing its position that the TCPA applies not "just [to] bad actors attempting to perpetrate frauds, but also [to] 'legitimate businesses' employing calling practices that consumers find objectionable," and that the FCC "[has] not viewed 'legitimate' businesses as somehow exempt from the statute, nor do we do so today." *Order* at note 6. Having opened the door wide, the agency cannot then stipulate restraint among those who would have a financial incentive to walk through it.

³⁰ *Order* at para. 20.

³¹ *Order* at para. 15.

³² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14091, para. 131 (2003) (*2003 TCPA Order*).

³³ See *id.* at 14092, para. 133.

And in 2008, the FCC found that using such equipment was still prohibited even “when it dials numbers from customer telephone lists” and not “randomly or sequentially.”³⁴ The key issue in each decision was that the equipment *had the capacity* to dial random or sequential numbers at the time of the call, even if that capacity was not in fact used. Or, as the Commission phrased it later, it doesn’t matter “whether or not the numbers called actually are randomly or sequentially generated or come from a calling list”³⁵; if the equipment has the requisite capacity, it’s an automatic telephone dialing system. That’s exactly what the statute requires, and it’s a far cry from the issue we confront here.

In short, we should read the TCPA to mean what it says: Equipment that cannot store, produce, or dial a random or sequential telephone number does not qualify as an automatic telephone dialing system because it does not have the capacity to store, produce, or dial a random or sequential telephone number. The *Order*’s contrary reading is sure to spark endless litigation, to the detriment of consumers and the legitimate businesses that want to communicate with them.

II.

The *Order* opens the floodgates to more TCPA litigation against good-faith actors for another reason as well. There is no TCPA liability if a caller obtains the “prior express consent of the called party.”³⁶ Accordingly, many businesses only call consumers who have given their prior express consent. But consumers often give up their phone numbers and those numbers are then reassigned to other people. And when that happens, consumers don’t preemptively contact every business to which they have given their number to inform them of the change. So even the most well-intentioned and well-informed business will sometimes call a number that’s been reassigned to a new person. After all, over 37 million telephone numbers are reassigned each year.³⁷ And no authoritative database—certainly not one maintained or overseen by the FCC, which has plenary authority over phone numbers—exists to “track all disconnected or reassigned telephone numbers” or “link[] all consumer names with their telephone numbers.”³⁸ As four separate petitions explain, trial lawyers have sought to apply a strict liability standard on good-faith actors—so even if a company has no reason to know that it’s calling a wrong number, it’ll be liable.³⁹

Imposing strict liability is not usually how the law works. Indeed, the Commission has previously rejected an interpretation of the TCPA that would have imposed strict liability on callers after a consumer ports his number from a landline to a wireless phone.⁴⁰ Instead, the FCC endorsed the view

³⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd 559, 566, para. 12 (2008) (*2008 TCPA Order*).

³⁵ *Implementation of the Middle Class Tax Relief and Job Creation Act of 2012; Establishment of a Public Safety Answering Point Do-Not-Call Registry*, CG Docket No. 12-129, Report and Order, 27 FCC Rcd 13615, 13629, para. 29 (2012).

³⁶ 47 U.S.C. § 227(b)(1)(A); *see also* 47 U.S.C. § 227(b)(1)(B) (only prohibiting calls made “without the prior express consent of the called party”).

³⁷ Alyssa Abkowitz, “Wrong Number? Blame Companies’ Recycling,” *The Wall Street Journal* (Dec. 1, 2011), available at <http://on.wsj.com/1Txmowl>.

³⁸ Letter from Richard L. Fruchterman, Associate General Counsel to Neustar, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1 (Feb. 5, 2015).

³⁹ Consumer Bankers Association Petition for Declaratory Ruling, CG Docket No. 02-278 (Sept. 19, 2013); Rubio’s Restaurant, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Aug. 15, 2014); Stage Stores, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (June 4, 2014); United Healthcare Services, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Jan. 16, 2014).

⁴⁰ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 19 FCC Rcd 19215, 19219, para. 9 (2004).

that “[i]t is a flawed and unreasonable construction of any statute to read it in a manner that demands the impossible.”⁴¹ That logic should apply here.

Perhaps more to the point, the statute takes into account a caller’s knowledge. Recall that the statute exempts calls “made with the prior express consent of the called party.” Interpreting the term “called party” to mean the expected recipient—that is, the party expected to answer the call—is by far the best reading of the statute.⁴²

Start with an example of ordinary usage. Your uncle writes down his telephone number for you and asks you to give him a call (what the TCPA terms “prior express consent”). If you dial that number, whom would you say you are calling? Your uncle, of course.

No one would say that the answer depends on who actually answers the phone. If your uncle’s friend picks up, you’d say you were calling your uncle. So too if the phone is picked up by the passenger in your uncle’s vehicle or your uncle’s houseguest. Nor would your answer change if your uncle wrote down the wrong number, or he lost his phone and someone else answered it. Who is the called party in each and every one of these situations? It’s obviously the person you expected to call (your uncle), not the person who actually answers the phone.

And no one would say that the answer depends on who actually pays for the service. If your uncle and aunt share a landline, you’d still say you were calling your uncle even if your aunt’s name was on the bill. And if your uncle and aunt are on a wireless family plan, it’s still his number you’re dialing even if she’s picking up the tab. In other words, it doesn’t matter who the actual subscriber is; what matters when placing a call is whom you expect to answer.

Given ordinary usage, it should be no surprise that the FCC has implicitly endorsed this approach before. As the Commission wrote in 2008, “calls to wireless numbers provided by the called party . . . are made with the ‘prior express consent’ of the called party.”⁴³ In other words, the called party is the person who consented to a call and the person who would ordinarily be expected to answer.

The expected-recipient approach respects Congress’s intent that the TCPA “balanc[e] the privacy rights of the individual and the commercial speech rights of the telemarketer.”⁴⁴ On the one hand, the expected-recipient approach gives individuals the right to stop unwanted, wrong-number phone calls in the first instance. Once an individual informs a caller that he has the wrong number, the caller can no

⁴¹ *McNeil v. Time Ins. Co.*, 205 F.3d 179, 187 (5th Cir. 2000).

⁴² Most commenters term this the “intended recipient” approach. See, e.g., CBA Petition at 3; AFSA Comments on CBA Petition at 2; Nonprofits Comments on Rubio’s Petition at 4, 6; Twitter Comments on Stage Petition at 9–11; Letter from Monica S. Desai, Counsel to Wells Fargo, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1 (June 11, 2015); Letter from Monica S. Desai, Counsel to ACA International, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 6–7 (June 11, 2015); Letter from Tracy P. Marshall, Counsel to NRECA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2 (June 10, 2015); Letter from Monica S. Desai, Counsel to Abercrombie & Fitch Co. and Hollister Co., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1–4 (May 13, 2015).

⁴³ *2008 TCPA Order*, 23 FCC Rcd at 564, para. 9. The *Order* tries to play gotcha by claiming that the next sentence of that same ruling “directly supports our finding here.” *Order* at note 264. Not quite. That sentence states that “the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber regarding the debt.” *2008 TCPA Order*, 23 FCC Rcd at 564, para. 9. Like the previous sentence in that order, its clear import is that a creditor may rely on a debtor’s provision of a number to call that number (at least so long as the creditor can reasonably expect to reach the debtor at that number). But the *Order*’s alternative reading would eviscerate that reliance since the creditor would become liable if the debtor wrote down the wrong number or if the debtor was not the subscriber but instead the customary user. Such a result would be doubly strange since the *Order* itself claims that the TCPA “anticipates” a reliance interest on the part of callers, *Order* at note 313, and the *Order* itself rejects the notion that only the subscriber can consent to receiving calls, *Order* at para. 75.

⁴⁴ *House Report* at 10.

longer expect to reach the party that consented and no longer claim to have to consent to continue calling. And so the expected-recipient approach rightfully sanctions the bad actors—often debt collectors⁴⁵—that repeatedly call after an individual has told them they’ve got the wrong number.

On the other hand, the expected-recipient approach gives legitimate businesses a clear and administrable means of complying with the law and engaging in “normal, expected or desired communications [with] their customers.”⁴⁶ A good actor can refuse to call anyone without first securing an individual’s consent, and a good actor can stop calling as soon as it learns that a number is wrong. Although taking these steps may not always be easy, they are an administrable means of complying with the statute and a way for any legitimate business to conduct its communications lawfully.

The expected-recipient approach also aligns the incentives of all parties to welcome legitimate calls and punish bad behavior. Businesses will have every incentive to secure prior express consent before making a call,⁴⁷ to ensure that a number is properly dialed,⁴⁸ and to stop calling as soon as they learn that a number is wrong because those actions shield businesses from strict liability. And the approach gives individuals the incentive to tell callers that they’ve got the wrong number, leading to fewer intrusive calls.

Confirming the expected-recipient interpretation is the canon of avoidance, which counsels that if one interpretation of a statute “would raise a multitude of constitutional problems, the other should prevail.”⁴⁹ Here, the expected-recipient interpretation fosters useful and desirable communications between businesses and their customers—communications that consumers have expressly consented to receiving. In contrast, the *Order*’s strict liability interpretation chills such communications by threatening a company with crippling liability even if it reasonably expects to reach a consenting consumer when making a call. It is difficult to see how chilling desired communications in this manner is “narrowly tailored to serve the government’s legitimate, content-neutral interests.”⁵⁰

In contrast, the *Order* rejects the expected-recipient approach and endorses a mishmash interpretation. According to the *Order*, callers are subject to strict liability after a single attempted call to number that’s been reassigned to a new subscriber. Its interpretation is a veritable quagmire of self-

⁴⁵ See, e.g., Letter from Margot Saunders, Counsel to National Consumer Law Center, to Marlene Dortch, Secretary, FCC, CG Docket No. 02-278, at 9 (June 6, 2014) (“The Consumer Financial Protection Bureau’s Annual Report for 2013 shows that 33% of debt collection complaints involved continued attempts to collect debts not owed, which include complaints that the debt does not belong to the person called.”); NCLC *et al.* Comments on CBA Petition at 4; NCLC *et al.* Reply Comments on CBA Petition at 2.

⁴⁶ *House Report* at 17.

⁴⁷ Indeed, the incentive to secure prior express consent is greater than under a strict liability approach. Under the expected-recipient approach, consent is more valuable because it is a shield from liability for every call made in good faith. In contrast, strict liability reduces consent’s value to one free call. Given the substantial cost of securing consent, more businesses are likely to spend the resources in an expected-recipient regime than under strict liability.

⁴⁸ Notably, the caller would not be liable for calls where the consenting party wrote down a wrong number (since the caller would still expect to reach the consenting party by dialing the number given) but would be liable for its own mistakes (since the caller could not expect to reach the consenting party by dialing a number different than that given).

⁴⁹ *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005); see *id.* at 380 (“It is not at all unusual to give a statute’s ambiguous language a limiting construction called for by one of the statute’s applications, even though other of the statute’s applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.”).

⁵⁰ *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). As noted earlier, the constitutional question is not whether this interpretation of the TCPA would meet the less strict standard governing “commercial speech,” see *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 562–63 (1980), because the TCPA restricts the making of “any call”—not just commercial calls—using an automatic telephone dialing system or a prerecorded or artificial voice, 47 U.S.C. §§ 227(b)(1)(A), 227(b)(1)(B) (emphasis added).

contradiction and misplaced incentives.

For one, the *Order*'s chief legal theory does not hold water. The *Order* insists that the "called party" for purposes of consent must be the subscriber because the TCPA elsewhere prohibits certain calls to "any service for which the called party is charged for the call" and restricts exemptions to calls "that are not charged to the called party."⁵¹ But Congress did not use the phrase "called party" consistently throughout the TCPA. For example, the TCPA requires the FCC to prescribe technical standards for "systems that are used to transmit any artificial or prerecorded voice message via telephone" and requires those systems to release a line "within 5 seconds of the time notification is transmitted to the system that *the called party has hung up*."⁵² The Commission has never interpreted this requirement to only apply when the actual subscriber hangs up the phone, which would leave a rather large loophole in the TCPA's enforcement regime. And the *Order* does not appear to embrace this absurd theory either. Instead, the law remains what it always has, that the called party for purposes of this provision is whoever picks up the phone.

What is more, the *Order* does not even subscribe to its own legal theory on the question at hand. Not one paragraph after positing the theory, the *Order* reinterprets the term "called party" to include a number's customary user even if that customary user is not charged for the call because a caller "cannot reasonably be expected to divine that the consenting person is not the subscriber."⁵³ But the *Order* can't have it both ways: Either the legal theory is right and a customary user is not the called party, or the legal theory is wrong.

For another, the *Order*'s strict liability approach leads to perverse incentives. Most significantly, it creates a trap for law-abiding companies by giving litigious individuals a reason *not* to inform callers about a wrong number. This will certainly help trial lawyers update their business model for the digital age.

This isn't mere hypothesis; it is fact. Take the case of Rubio's, a West Coast restaurateur. Rubio's sends its quality-assurance team text messages about food safety issues, such as possible foodborne illnesses, to better ensure the health and safety of Rubio's customers. When one Rubio's employee lost his phone, his wireless carrier reassigned his number to someone else. Unaware of the reassignment, Rubio's kept sending texts to what it thought was an employee's phone number. The new subscriber never asked Rubio's to stop texting him—at least not until he sued Rubio's in court for nearly half a million dollars.

The *Order*'s defenses are underwhelming. The *Order* points out that callers have the option of "manually dialing"⁵⁴ but forgets that dialing a number by hand still violates the TCPA if the equipment is an automatic telephone dialing system (which almost all equipment is under the *Order*).⁵⁵ The *Order* claims a one-call exemption for reassigned numbers would not "demand the impossible"⁵⁶ but then

⁵¹ See *Order* at para. 74; 47 U.S.C. §§ 227(b)(1)(A)(iii), 227(b)(2)(C).

⁵² 47 U.S.C. § 227(d)(3)(B) (emphasis added).

⁵³ *Order* at para. 75.

⁵⁴ *Order* at para. 84.

⁵⁵ See *Order* at note 70 (agreeing that any call made from an automatic telephone dialing system triggers liability, even if the "functionalities" making that equipment an automatic telephone dialing system are not actually used to make a particular call).

⁵⁶ *Order* at note 312. The authority the *Order* relies on for its one-call exemption is less than clear. At one point, it says it is interpreting the phrase "prior express consent." *Order* at note 300. Elsewhere, the *Order* says that the TCPA "anticipates" a caller's "reliance" on prior express consent, which it then interprets to mean one call's worth of reliance for reassigned numbers (and zero call's worth of reliance for wrong numbers). *Order* at note 312. Still elsewhere, the *Order* is more forthright that it is just "balancing the caller's interest in having an opportunity to learn of reassignment against the privacy interests of consumers to whom the number is reassigned," *Order* at para. 85, which is to admit that the *Order* is rewriting the TCPA, not interpreting it.

imposes liability on callers even if the new subscriber does not tell them that the number has been reassigned. The *Order* rejects a knowledge standard as “unworkable” because “once there is actual knowledge, callers may not honor do-not-call requests”⁵⁷ but ignores the fact that good actors cannot implement a one-call standard while bad actors won’t honor that standard anyway. And the *Order* offers a laundry list of ways that a caller might determine that a number has been reassigned⁵⁸ but declines to adopt a safe harbor for good actors that carry out these practices and instead subjects them to wrong-number litigation.

Perhaps most shocking is the *Order*’s claim that the answer to wrong-number calls is for companies to turn the liability back on their own customers. “Nothing in the TCPA or our rules prevents parties from creating . . . an obligation for the person giving consent to notify the caller when the number has been relinquished,” the *Order* states before noting that “the caller may wish to seek legal remedies for violation of the agreement.”⁵⁹ In other words, companies can sue their customers. To be sure, this will create yet more work for the primary beneficiaries of the *Order*: attorneys. But nothing in the TCPA or our rules suggests that Congress intended the TCPA as a weapon to be used against consumers that forget to inform a business when they switch numbers.

In short, we should not inject a strict liability standard into the TCPA. Instead, we should interpret the words of the statute in the way most would and make clear that “prior express consent of the called party” means the prior express consent of the party the caller expects to reach. The *Order*’s contrary reading is sure to encourage yet more litigation, to the detriment of consumers and the legitimate businesses that want to communicate with them.

III.

The *Order* will also make it harder to enforce our prohibitions on illegal telemarketing. The TCPA’s chief sponsor in the Senate, Fritz Hollings, once called indiscriminate telemarketing calls “the scourge of modern civilization.”⁶⁰ So it is unsurprising that the TCPA places additional restrictions, such as compliance with federal Do-Not-Call rules,⁶¹ on telemarketing calls whether they are “telephone solicitations” or “unsolicited advertisements.”⁶²

The *Order* undermines these protections with a special carve-out for the prison payphone industry. This dispensation lets that industry repeatedly make prerecorded voice calls to consumers in order to “set up a billing relationship” to pay for future services.⁶³ You might have no interest in receiving phone calls from those behind bars, but prison payphone providers will be able to robocall you anyway. This exemption opens the door to more actual robocalls—the same types of robotic calls that made “Rachel from Cardholder Services” infamous.

Indeed, the rationale provided by the Commission to justify this decision provides a roadmap for those seeking a lawful way to avoid our telemarketing rules. That’s because we cannot exempt calls that “include or introduce an advertisement or constitute telemarketing.”⁶⁴ So the *Order* must (and does) find that robocalling to “set up a billing relationship” is not advertising the “commercial availability . . . of . . .

⁵⁷ *Order* at para. 88.

⁵⁸ *Order* at para. 86.

⁵⁹ *Order* at para. 86 & note 302.

⁶⁰ 137 Cong. Rec. S9874 (daily ed. July 11, 1991) (statement of Sen. Hollings).

⁶¹ See 47 U.S.C. § 227(c).

⁶² See 47 U.S.C. §§ 227(a)(4)–(5).

⁶³ *Order* at para. 42.

⁶⁴ See 47 C.F.R. § 64.1200(a)(3)(iii); see also 47 U.S.C. § 227(b)(2)(B)(ii) (prohibiting the FCC from exempting commercial calls that “include the transmission of any unsolicited advertisement”).

services” even though no one would agree to set up billing relationship to pay for a service that isn’t commercially available.⁶⁵ And so the *Order* must (and does) find that robocalling to “set up a billing relationship” is not “encouraging the purchase . . . of . . . services” even though the entire point of the call is to get the consumer to agree to pay for services not yet performed.⁶⁶ What telemarketer will continue to hock goods the old-fashioned way when it can escape the TCPA’s particular constraints on telemarketing by claiming to just set up billing relationships for services not yet performed? In other words, the one type of call consumers hate most—telemarketing calls—just got easier.⁶⁷

I do not support creating such a loophole. In my view, apart from truly exigent circumstances, the FCC should not condone new robocalls to American consumers, period.

* * *

There is, of course, much more to the *Order*. Many of the decisions just reiterate well-known, settled law that I support. Yes, the TCPA applies to text messages as the Commission decided back in 2003.⁶⁸ Yes, consumers have the right to revoke prior express consent as we confirmed in 2012.⁶⁹ And yes, a consumer may opt-in to a carrier’s call-blocking services—which has been the law of the land since at least 2007.⁷⁰ None of these are surprising outcomes, but none advance the ball.

As for the decisions that strike new ground, a few are good law—for instance, app providers won’t face TCPA liability because they don’t initiate calls placed by their users.⁷¹ But most just shift the burden of compliance away from telemarketers and onto legitimate businesses, sometimes in absurd ways.

For instance, how could any retail business possibly comply with the provision that consumers can revoke consent orally “at an in-store bill payment location”?⁷² Would they have to record and review every single conversation between customers and employees? Would a harried cashier at McDonald’s have to be trained in the nuances of customer consent for TCPA purposes? What exactly would constitute revocation in such circumstances? Could a customer simply walk up to a McDonald’s counter, provide his contact information and a summary “I’m *not* lovin’ it,” and put the onus on the company? The prospects make one grimace.

In all, the *Order* is likely to leave the American consumer, not to mention American enterprise, worse off. That’s not something anyone should support. I certainly don’t and accordingly dissent.

⁶⁵ *Order* at para. 42; 47 C.F.R. § 64.1200(f)(1).

⁶⁶ *Order* at para. 42; 47 C.F.R. § 64.1200(f)(12).

⁶⁷ In responding that it has crafted a “narrow exemption” reflecting “unique factual and legal circumstances” in a “unique context,” *Order* at para. 42 & note 178, the *Order* misses the point. Of course non-prison payphone telemarketers won’t qualify for this particular exemption. But telemarketers can now avoid federal Do-Not-Call regulations because the *Order* narrows the definitions of telemarketing and advertising to exclude calls to “set up a billing relationship.” That’s not even a loophole—that’s an invitation for more robocalls.

⁶⁸ See *Order* at para. 107; 2003 TCPA Order, 18 FCC Rcd at 14115, para. 165.

⁶⁹ See *Order* at paras. 56–57; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 27 FCC Rcd 15391, 15397, para. 11 (2012).

⁷⁰ See *Order* at paras. 154, 160; *Just and Reasonable Rate for Local Exchange Carriers; Call Blocking by Carriers*, WC Docket No. 07-135, Declaratory Ruling and Order, 22 FCC Rcd 11629, 11631–32, para. 6 & n.21 (Wireline Comp. Bur. 2007).

⁷¹ See *Order* at paras. 32, 36.

⁷² *Order* at para. 64.