

**Statement of Megan L. Brown, Partner, Wiley Rein LLP**  
**On behalf of the U.S. Chamber Institute for Legal Reform**  
*U.S. Senate Committee on Commerce, Science, & Transportation, Subcommittee on*  
*Communications, Media, and Broadband*

***Protecting Americans from Robocalls***

Thank you Chair Lujan, Ranking Member Thune, and members of the Subcommittee. My name is Megan Brown, and I am a partner in the Telecom, Media and Technology practice at Wiley Rein LLP. I am here on behalf of the U.S. Chamber Institute for Legal Reform (“ILR”). The U.S. Chamber is the world’s largest business federation, representing the interests of more than three million businesses of all sizes and sectors, as well as state and local chambers and industry associations. The ILR is a division of the U.S. Chamber that promotes civil justice reform through regulatory, legislative, judicial, and educational activities at the global, national, state, and local levels. Thank you for the opportunity to testify today about the robocalling landscape and how American businesses are protecting consumers.

I would like to leave the Subcommittee with four main points today:

- ***First***, legitimate businesses support efforts to crack down on illegal and abusive robocalls in order to create a safe communications ecosystem; businesses have every incentive to ensure that consumers continue to trust the ecosystem and answer calls and texts.
- ***Second***, Congress can ensure that its already-substantial efforts to address illegal robocalls bear fruit by ensuring that federal agencies—and particularly the Department of Justice (“DOJ”)—make illegal robocalls an enforcement priority.
- ***Third***, the Telephone Consumer Protection Act’s (“TCPA”) private right of action continues to fuel abusive litigation against American businesses. This difficult operating environment hurts businesses and consumers, and Congress should distinguish between good calls—such as appointment reminders, notifications about school closures, and other communications that consumers want—and bad calls, such as fraudulent and harassing communications that originate from bad actors.
- ***Fourth***, the Subcommittee could consider modest changes to the TCPA to limit the abuse of our judicial system through class actions that do nothing to stop bad actors—many of whom flagrantly and repeatedly violate existing laws.

**I. INDUSTRY SUPPORTS A SAFE AND TRUSTWORTHY COMMUNICATIONS ECOSYSTEM AND IS DEVOTING RESOURCES TO PROTECTING CONSUMERS FROM SCAMMERS.**

Legitimate businesses have no interest in the perpetuation of illegal and abusive robocalls. The illegal robocalls that continue to plague U.S. consumers originate with bad actors that seek to defraud consumers and exploit the brand names and goodwill of trusted American companies. The business community abhors this conduct and shares Congress’s concerns about protecting

consumers.

Indeed, the entire business community suffers when consumers cannot trust calls and text messages. Legitimate businesses use automated tools every day to communicate with the public. As former FCC Commissioner Michael O’Rielly explained, “information is often better and more accurately conveyed by dialing automatically from a list or through pre-recorded messages rather than through a live operator.”<sup>1</sup> For example, businesses may opt to use robocalls or robotexts to deliver “flu shot reminders,” “food delivery order alerts,” “customer satisfaction surveys,” and other messages.<sup>2</sup> But if consumers are inundated with illegal and abusive robocalls, they may ignore or doubt the veracity of these helpful communications.<sup>3</sup>

Further, legitimate businesses, including small businesses, are also victims of illegal and abusive robocalls. For example, businesses face the serious risk from illegal robocalls of dilution of their brand through impersonation fraud. Indeed, “1 in 3 businesses” report having “had their name used by an impersonator making scam calls.”<sup>4</sup> The Federal Trade Commission (“FTC”) concurred with this data, finding last year in a notice of proposed rulemaking that business “impersonation fraud is” both “prevalent” and “harmful.”<sup>5</sup> This fraud carries serious consequences for businesses: 13% of consumers “have since switched brands after receiving an impersonation call.”<sup>6</sup> The U.S. Chamber supports the FTC’s continued enforcement in this space to address business impersonation fraud.

The risks to businesses from impersonation fraud do not stop at the business being impersonated. For example, a common scam is for fraudsters to impersonate representatives from Internet search engines and threaten to delist businesses from search results if they do not hand over personal information. With their livelihood on the line, these businesses may comply, exposing

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<sup>1</sup> Remarks of FCC Commissioner Michael O’Rielly Before the Washington Insights Conference, FCC, at 3-4 (May 16, 2019), <https://www.fcc.gov/document/orielly-remarks-aca-intl-washington-insights-conference> (“O’Rielly Remarks”).

<sup>2</sup> TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits, U.S. Chamber Institute for Legal Reform, at 4-5 (Aug. 2017), <https://instituteforlegalreform.com/research/tcpa-litigation-sprawl-a-study-of-the-sources-and-targets-of-recent-tcpa-lawsuits/> (“TCPA Litigation Sprawl”).

<sup>3</sup> See State Of The Call 2023, Hiya, at 11, available at <https://www.hiya.com/state-of-the-call> (updated June 2023) (“State Of The Call 2023”) (“17% of businesses report a decline in answer rates due to spam calls”).

<sup>4</sup> *State Of The Call 2023* at 9.

<sup>5</sup> *Trade Regulation Rule on Impersonation of Government and Businesses*, Notice of Proposed Rulemaking, 87 Fed. Reg. 62,741, 62,746 (Oct. 17, 2022).

<sup>6</sup> *State Of The Call 2023* at 10.

companies to identity theft.<sup>7</sup> This scam creates two business victims—the company being impersonated and the company being targeted.

Because of significant harms to consumers and businesses from robocall scams, companies are fighting back against robocallers directly. For example, a major hotel chain brought its own trademark lawsuit against malicious robocallers and earlier this year obtained an injunction against a marketing agency that placed millions of calls illegally using its brand name.<sup>8</sup> Other companies are devising innovative technologies to ward off illegal calls, such as analytics-powered software.<sup>9</sup>

The private sector partners with the Government in tackling illegal and abusive robocalls. The Industry Traceback Group (“ITG”), is a group of “companies from across the wireline, wireless, VoIP, and cable industries” that “collaborate to trace, source, and ultimately, stop illegal robocalls.”<sup>10</sup> The ITG has conducted more than 10,000 tracebacks over the past three years<sup>11</sup> supporting state and federal investigations. As the FCC explained, the ITG’s efforts have “played a key role in combating the scourge of illegal robocalling campaigns.”<sup>12</sup>

The telecommunications industry also has developed technology to help in the fight. Industry technologists developed a standard called STIR/SHAKEN to authenticate caller ID information for calls carried over an IP network to “combat illegal spoofing.”<sup>13</sup> With the TRACED Act, Congress mandated the use of this industry-spearhead approach.<sup>14</sup>

These are just a few examples of the business community’s many efforts to address illegal and

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<sup>7</sup> See *Robocall Scam of the Week: Google Business Scam, YouMail* (Feb. 22, 2023), <https://blog.youmail.com/2023/02/robocall-scam-of-the-week-google-business-scam/>.

<sup>8</sup> See *Marriott Int'l, Inc. v. Dynasty Mktg. Grp. LLC*, No. 1:21-CV-0610, 2023 WL 2230433 (E.D. Va. Feb. 6, 2023), *report and recommendation adopted*, 2023 WL 2226782 (E.D. Va. Feb. 24, 2023).

<sup>9</sup> See Haley Henschel, *7 of the Best Robocall Blocking Apps and Tools for Avoiding Phone Spam*, Mashable (Apr. 26, 2023), <https://mashable.com/roundup/best-robocall-blocking-apps>.

<sup>10</sup> See *Industry Traceback Group*, <https://tracebacks.org/> (last visited Sep. 25, 2023).

<sup>11</sup> FCC Report to Congress On Robocalls and Transmission of Misleading or Inaccurate Caller Identification Information, FCC, at 19 (Dec. 23, 2022), <https://docs.fcc.gov/public/attachments/DOC-390423A1.pdf> (“2022 TRACED Report”).

<sup>12</sup> *Id.*

<sup>13</sup> *Call Authentication Tr. Anchor; Implementation of Traced Act Section 6(a) -Knowledge of Customers by Entities with Access to Numbering Res.*, Report and Order and Further Notice of Proposed Rulemaking, 35 FCC Rcd. 3241, ¶ 5 (2020).

<sup>14</sup> See Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, § 4(b)(1)(A)-(B), 133 Stat. 3274, 3277 (2019).

abusive robocalls.

## II. CONGRESS SHOULD ENSURE THAT PROSECUTING ILLEGAL ROBOCALLERS IS A PRIORITY.

### A. Fraudulent And Abusive Robocalls Are Already Illegal.

Illegal and abusive robocalls do not stem from a lack of laws on the books. To the contrary, the TCPA and its associated rules prohibit autodialed and artificial or prerecorded voice robocalls to personal numbers unless the consumer consents or the call is otherwise permitted (*e.g.*, calls made for emergency purposes).<sup>15</sup> The TCPA also establishes a number of other robust protections for consumers with respect to telemarketing and solicitation calls—regardless of the technology being used to place the call.<sup>16</sup> Further, the TCPA is not the only tool in enforcers’ toolbox to fight illegal actors. For example, the Truth in Caller ID Act of 2009—strengthened by the TRACED Act—broadly prohibits callers from “spoofing” their numbers “with the intent to defraud, cause harm, or wrongfully obtain anything of value.”<sup>17</sup> Congress also empowered the FTC to “implement and enforce a national do-not-call registry,”<sup>18</sup> and under the FTC’s Telemarketing Sales Rule (“TSR”), it is illegal to place most kinds of telemarketing calls to a number on the registry.<sup>19</sup> The TSR also prohibits deceptive and abusive telemarketing tactics and can be a powerful tool to go after bad actors.<sup>20</sup>

Illegal robocallers face serious potential criminal penalties. Fraud is of course a federal crime. Specifically, the wire fraud statute provides for up to 20 years imprisonment for “devis[ing] any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises” over the phone.<sup>21</sup> In addition, the TRACED Act imposes criminal fines of \$10,000 per violation of the prohibition on fraudulent spoofing.<sup>22</sup> Further, the Communications Act’s general penalty provision provides that willful and knowing violators of the TCPA and its associated rules may be imprisoned and fined.<sup>23</sup>

In sum, the robocallers that target and harass American consumers and businesses with fraudulent scams have not found a legal loophole. Rather, they are already openly flouting the

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<sup>15</sup> 47 U.S.C. § 227(b)(1)(B), (2)(B); 47 C.F.R. § 64.1200(a).

<sup>16</sup> *See e.g.*, 47 C.F.R. § 64.1200(b), (c)(2).

<sup>17</sup> 47 U.S.C. § 227(e).

<sup>18</sup> 15 U.S.C. § 6151.

<sup>19</sup> 16 C.F.R. § 310.4(b)(1)(iii)(B).

<sup>20</sup> *Id.* §§ 310.4, 310.5.

<sup>21</sup> 18 U.S.C. § 1343.

<sup>22</sup> 47 U.S.C. § 227(e)(5)(B).

<sup>23</sup> 18 U.S.C. § 501.

law.

B. There Has Been Progress In Stopping Illegal Robocalls.

Thankfully, we have seen progress in combatting the bad actors responsible for illegal robocalls. As the FCC’s most recent report to Congress detailed, that agency pursues forfeitures for tens—and sometimes hundreds—of millions of dollars against the biggest robocalling operations targeting Americans.<sup>24</sup> Among these recent enforcement actions are the largest forfeitures in the agency’s history: \$225 million levied against a group of businesses that placed one billion fraudulent robocalls.<sup>25</sup> The FTC is also active, having recently initiated a lawsuit against a Voice over Internet Protocol (“VoIP”) provider that funneled “hundreds of millions of illegal robocalls through its network.”<sup>26</sup>

Businesses and States are supplementing these federal enforcement efforts. A recently filed FTC complaint cites as evidence of robocalling violations “over 100 Traceback Requests” from the ITG, highlighting industry’s crucial role in identifying illegal robocallers.<sup>27</sup> The States are likewise engaged. In July, a host of federal agencies joined “attorneys general from all 50 states and the District of Columbia” in launching “Operation Stop Scam Calls”—an enforcement initiative to crack down on illegal telemarketing calls.<sup>28</sup> And last year, a coalition of 50 state attorneys general formed a bipartisan Anti-Robocall Litigation Task Force that issued civil investigative demands to gateway providers suspected of routing “a majority of foreign robocall traffic.”<sup>29</sup>

These efforts are yielding results. As one data point, consumers filed more than 100,000 informal

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<sup>24</sup> See 2022 TRACED Report at 5-6; *FCC Fines Telemarketer \$225 Million for Spoofed Robocalls*, FCC (Mar. 18, 2021), <https://www.fcc.gov/document/fcc-fines-telemarketer-225-million-spoofed-robocalls>. See also *FCC Assesses Nearly \$300M Forfeiture for Unlawful Robocalls*, FCC (Aug. 3, 2023), <https://www.fcc.gov/document/fcc-assesses-nearly-300m-forfeiture-unlawful-robocalls>.

<sup>25</sup> *Id.* at 6.

<sup>26</sup> Press Release, FTC, *FTC Sues to Stop VoIP Service Provider That Assisted and Facilitated Telemarketers in Sending Hundreds of Millions of Illegal Robocalls to Consumers Nationwide* (May 12, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-sues-stop-voip-service-provider-assisted-facilitated-telemarketers-sending-hundreds-millions>.

<sup>27</sup> Complaint ¶¶ 31–36, *United States v. Xcast Labs, Inc.*, No. 2:23-CV-3646 (C.D. Cal. May 12, 2023), ECF No. 1.

<sup>28</sup> Press Release, FCC, *FCC Joins Federal and State Robocall Partners to Launch ‘Operation Stop Scam Calls’* (July 18, 2023), <https://docs.fcc.gov/public/attachments/DOC-395216A1.pdf>.

<sup>29</sup> Press Release, NCDOJ, *Attorney General Josh Stein Leads New Nationwide Anti-Robocall Litigation Task Force* (Aug. 2, 2022), <https://ncdoj.gov/attorney-general-josh-stein-leads-new-nationwide-anti-robocall-litigation-task-force/>.

FCC complaints about robocalls in 2018, but they filed under 40,000 in 2022.<sup>30</sup> Nevertheless, there is still a long way to go.

C. Robust Enforcement Is The Way To End Illegal Robocalls.

Despite all of this activity—including headline-grabbing FCC forfeiture orders—the federal government is not doing enough to hold bad actors accountable. A lack of DOJ enforcement presents the biggest obstacle at this time.

DOJ has not been pursuing in court the forfeiture orders adopted by the FCC. The FCC recently reported that in “calendar year 2022,” DOJ “did not collect any forfeiture penalties or criminal fines for violations of [the TCPA] that the Commission has referred.”<sup>31</sup> This is a missed opportunity for DOJ.

Nor is DOJ taking enough action to prosecute bad actors that actively and openly flout the law and seek to defraud Americans. DOJ has ample authority under the wire fraud statute and other provisions, as earlier described. And it has the means to use that authority because the ITG and other industry groups provide DOJ with tracebacks and other information that it could use. At the end of the day, however, it is DOJ that has to make the decision about whether to prosecute. While the DOJ has partnered with the FTC and others on some cases against robocallers,<sup>32</sup> DOJ does not appear to have made material prosecutions a high priority, which is particularly disappointing when it comes to recidivist robocall abusers.<sup>33</sup> As a former DOJ official myself, I see this as a profoundly squandered opportunity.

As lawmakers consider additional avenues to protect the public from illegal robocalls, it should consider ways to spur additional action from DOJ, such as:

- Requiring DOJ to file an annual report with Congress explaining enforcement activity it

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<sup>30</sup> See 2022 TRACED Report at 5.

<sup>31</sup> See 2022 TRACED Report at 7.

<sup>32</sup> Press Release, DOJ Office of Public Affairs, U.S. Department of Justice, Federal Trade Commission, Federal Communications Commission and Other Federal and State Law Enforcement Agencies Announce Results of Nationwide Initiative to Curtail Illegal Telemarketing Operations (July 18, 2023), <https://www.justice.gov/opa/pr/us-department-justice-federal-trade-commission-federal-communications-commission-and-other#:~:text=The%20department's%20Consumer%20Protection%20Branch,that%20transmitted%20illegal%20phone%20calls>.

<sup>33</sup> *In the Matter of Sumco Panama SA et al.*, Forfeiture Order, File No. EB-TCD-21-00031913, FCC 23-64, ¶ 12 (Aug. 3, 2023) (“Cox and Jones, key participants in the Enterprise, are currently banned from any form of telemarketing, and have been since 2013 and 2017, respectively. However, they have continued illegal telemarketing practices by using an international network of companies to conceal their involvement.”).

has undertaken in the last calendar year to combat illegal robocalls and its handling of FCC referrals, including the pursuit of forfeiture amounts. This requirement would be similar to the TRACED Act's annual TCPA reporting requirement for the FCC and should require DOJ to explain if and why it has not pursued FCC referrals.<sup>34</sup>

- Prioritizing DOJ funds for investigations and enforcement actions against illegal robocallers.
- Requiring DOJ to establish a robocall enforcement and education office.

However Congress might proceed, know that American businesses stand ready to assist DOJ and others in the fight against illegal and abusive robocalls.

### **III. THE TCPA'S PRIVATE RIGHT OF ACTION CONTINUES TO BE THE SOURCE OF ONGOING LITIGATION ABUSE, WHICH DOES NOT ADDRESS THE URGENT ISSUE OF COMBATTING BAD ACTORS.**

Although the TCPA has helped protect consumers, the same cannot be said for its private right of action. That provision is presently being abused by plaintiff's attorneys to seek enormous payouts from American businesses. Private TCPA lawsuits and the threat of litigation make it perilous for U.S. businesses to communicate with consumers. Although there was some initial thinking that the Supreme Court's 2021 decision in *Facebook v. Duguid*<sup>35</sup> would significantly improve the situation, well-meaning businesses continue to be harassed by harmful and opportunistic TCPA lawsuits. This ultimately harms the ability of consumers to utilize modern communications tools and access innovative services. Ultimately, any discussion of robocalling and the TCPA must distinguish between legitimate and lawful communication on the one hand, and abusive scam calls on the other.

#### **A. Not All Automated Calls Are Bad.**

Automated calls and texts can provide an efficient and effective means of communication to which consumers regularly and willingly consent. As a former FCC Commissioner explained: "There are good and legal robocalls, and there are scam and illegal robocalls, and it's the latter that are wreaking havoc on the nation's communications networks."<sup>36</sup> Such a distinction is critical. Consider some of the ways in which institutions use robocalls and robotexts to communicate:

- "Alerts from a school that a child did not arrive at school, or that the building is on lockdown."

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<sup>34</sup> 47 U.S.C. § 227(h).

<sup>35</sup> *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021).

<sup>36</sup> *O'Rielly Remarks* at 3.

- “Notifications regarding storm alerts, utility outages, and service restoration.”
- “Immunization reminders for underserved, low-income populations.”
- “Updates from airlines” to provide critical flight information to passengers.
- “Text messages from taxi and ridesharing services to alert customers when their driver has arrived.”<sup>37</sup>

Such automated communications are not merely convenient; they are effective. For example, “significantly more patients who received automated telephone messages regarding hypertension treatment achieved blood pressure control than patients who received ordinary care only.”<sup>38</sup> Likewise, energy companies have reported survey data showing “that customers would like outage and restoration notifications, and prefer communications via text message or telephone call, with email being the least requested method of contact.”<sup>39</sup>

These beneficial communications are also protected by the First Amendment. The Supreme Court has long recognized that the Government may not “suppress the dissemination of concededly truthful information about entirely lawful activity,” even when dissemination is “commercial” in nature.<sup>40</sup> In striking down part of the TCPA as unconstitutional in 2020, the Supreme Court confirmed that robocalls constitute speech protected by the First Amendment.<sup>41</sup>

In sum, there are many beneficial robocalls that provide customers with timely, convenient, and desirable information. The Chamber urges this body to avoid conflating those calls with the fraudulent and harmful calls placed by scammers and abusers.

#### B. The TCPA Encourages Litigation Against American Businesses Instead Of Bad Actors.

Unfortunately, the TCPA continues to be abused and inhibits constitutionally protected pro-

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<sup>37</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8084-85 (2015) (O’Rielly, Comm’r, dissenting in part and approving in part) (“*2015 TCPA Declaratory Ruling and Order*”).

<sup>38</sup> *Id.* at 8085 (alterations omitted).

<sup>39</sup> *Id.* at 8086 (internal quotations omitted).

<sup>40</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-73 (1976).

<sup>41</sup> *See Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2347 (2020) (plurality) (“The law here focuses on whether the caller is *speaking* about a particular topic.” (emphasis in original)); *id.* at 2357 (Sotomayor, J., concurring) (concluding that relevant provision of the TCPA unconstitutionally burdened “robocall speech” (internal quotations omitted)); *id.* at 2364 (Gorsuch, J., concurring) (“no one doubts the TCPA regulates speech.”).



consumer communications. The Chamber’s research has repeatedly shown how the TCPA has created a cottage industry of unnecessary and often abusive class-action litigation, burdening how businesses reach their customers, while doing little to stop truly abusive robocalls and protect consumers.<sup>42</sup> This litigation cash cow has become a major obstacle, inhibiting legitimate and lawful communications between businesses—large and small—and their customers. It places businesses at risk for potential litigation each time they pick up the phone or send a text message. And it does nothing to address the real bad actors: repeat scammers who abuse our communications networks to harm consumers.

Indeed, just a handful of plaintiff’s lawyers—and some professional *pro se* plaintiffs—are responsible for the majority of the thousands of TCPA cases brought each year.<sup>43</sup> Repeat TCPA plaintiffs also come up with ways to game the system—such as purchasing dozens of prepaid cellphones—to procure huge cash payouts.<sup>44</sup> One serial TCPA plaintiff in New Jersey has filed over 30 TCPA lawsuits, pocketing as much as \$800,000.<sup>45</sup> Another has filed more than fifty cases in the Northern District of Texas in the last decade.<sup>46</sup>

ILR’s members know firsthand the difficulties with this kind of “gotcha” operating environment. The statute’s private right of action is expansive. Any person who receives an unlawful robocall may bring a lawsuit to recover \$500–\$1,500 per call.<sup>47</sup> There is no cumulative limit to these damages, leading some plaintiff’s lawyers to seek mind-boggling damages awards. Further, massive classes—such as a recent class certification of over one million people in a TCPA case

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<sup>42</sup> See, e.g., *TCPA Litigation Sprawl*; Ill-Suited: Private Rights of Action and Privacy Claims, U.S. Chamber Institute for Legal Reform (July 2019), [https://instituteforlegalreform.com/wp-content/uploads/2020/10/Ill-Suited\\_-\\_Private\\_Rights\\_of\\_Action\\_and\\_Privacy\\_Claims\\_Report.pdf](https://instituteforlegalreform.com/wp-content/uploads/2020/10/Ill-Suited_-_Private_Rights_of_Action_and_Privacy_Claims_Report.pdf); Turning the TCPA Tide: The Effects of Duguid, U.S. Chamber Institute for Legal Reform (Dec. 2021), [https://instituteforlegalreform.com/wp-content/uploads/2021/12/1323\\_ILR\\_TCPA\\_Report\\_FINAL\\_Pages.pdf](https://instituteforlegalreform.com/wp-content/uploads/2021/12/1323_ILR_TCPA_Report_FINAL_Pages.pdf) (“*Turning the TCPA Tide*”).

<sup>43</sup> See e.g., *Johansen v. Bluegreen Vacations Unlimited, Inc.*, No. 20-81076-CIV, 2021 WL 4973593, at \*1 (S.D. Fla. Sept. 30, 2021), *aff’d*, No. 22-10695, 2022 WL 17087039 (11th Cir. Nov. 21, 2022) (“Plaintiff appears to have an extensive history with filing lawsuits alleging violations of the TCPA. (See Pl. Dep. (estimating that, prior to 2020, Plaintiff had filed sixty (60) TCPA lawsuits and estimating that, since 2014, Plaintiff has made on average \$60,000 per year from TCPA lawsuits).”) (some internal citations omitted); see also *TCPA Litigation Sprawl* at 4 (“around 60% of the TCPA lawsuits examined in the study’s 17-month period were brought by only 44 law firms/lawyers, with two firms filing well over 200 TCPA litigations each.”).

<sup>44</sup> *TCPA Litigation Sprawl* at 15.

<sup>45</sup> *Id.*

<sup>46</sup> *Hunsinger v. Offer, LLC*, No. 3:21-CV-2846, 2022 WL 18143951 (N.D. Tex. Dec. 7, 2022).

<sup>47</sup> 47 U.S.C. § 227(b)(3).

against a bank<sup>48</sup>—is often sufficient to drive companies into a coercive settlement. For example, one lawsuit alleging violations of the TCPA for advertisements led to a class action settlement fund of \$35 million with 1,237,296 class members.<sup>49</sup> Other examples include a class action settlement with a telecommunications company for \$45 million<sup>50</sup> and another with a utility services company for \$38.5 million.<sup>51</sup>

With enormous potential damages in play, plaintiffs have little incentive to go after criminal or overseas scammers, who offer a miniscule chance to generate easily such large payouts.<sup>52</sup> Instead, TCPA plaintiffs have opted to target legitimate businesses—many of them household names—and not the offshore robocallers flooding Americans’ phones with fraud and scam calls. Consider some examples of recent targets of TCPA lawsuits:

- The City of Albuquerque was sued after sending text messages to local residents during the COVID-19 pandemic, notifying them of the opportunity to engage in socially-distanced town halls.<sup>53</sup>
- Serve All, Help All, a non-profit company that provides financial aid and assistance to those with housing needs, was sued by a serial *pro se* litigant<sup>54</sup> for an automated phone call offering a Public Service Announcement for homeowners in default.<sup>55</sup>
- A ride-share company was sued for notifying a driver that he needed to update an expired

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<sup>48</sup> *Head v. Citibank, N.A.*, 340 F.R.D. 145, 149 (D. Ariz. 2022).

<sup>49</sup> *Drazen v. Pinto*, 41 F.4th 1354 (11th Cir. 2022), *reh’g en banc granted, opinion vacated*, 61 F.4th 1297 (11th Cir. 2023).

<sup>50</sup> Final Judgment ¶ 14, *Joel Hageman v. AT&T Mobility LLC*, No. 1:13-CV-00050 (D. Mont. April 9, 2013), ECF No. 68.

<sup>51</sup> *Jenkins v. Nat’l Grid USA Serv. Co., Inc.*, No. 15-CV-1219, 2022 WL 2301668, at \*3 (E.D.N.Y. June 24, 2022).

<sup>52</sup> See David Adam Friedman, *Impostor Scams*, 54 U. Mich. J.L. Reform 611, 658 (2021), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2527&context=mjlr> (explaining that parties “increasingly responsible for the majority of TCPA violations are located overseas” and are often “judgment proof.”).

<sup>53</sup> *Silver v. City of Albuquerque*, No. 1:22-CV-00400, 2023 WL 2413780 (D.N.M. Mar. 8, 2023).

<sup>54</sup> The plaintiff filed 11 TCPA lawsuits in the Western District of Washington in 2021, two lawsuits in 2022, and this lawsuit in 2023.

<sup>55</sup> *Barton v. Serve All, Help All, Inc.*, No. 3:21-CV-05338, 2023 WL 1965905, at \*1 (W.D. Wash. Feb. 13, 2023), *motion to certify appeal denied*, No. 3:21-CV-05338, 2023 WL 2372904 (W.D. Wash. Mar. 6, 2023).

driver's license.<sup>56</sup>

This litigation environment makes it hard to communicate. Indeed, much of the recent litigation involves technical errors and honest mistakes. In one recent case where a technical glitch resulted in a company accidentally misdialing consumers, the defendant settled almost immediately to avoid potentially paying more than \$4 million for the 8,645 alleged violations of TCPA.<sup>57</sup> In another case, a court treated the TCPA as a strict liability statute, finding that a company could be on the hook for damages where it called a number for which consent had been obtained but—unbeknownst to the company—the number was subsequently reassigned to a different consumer.<sup>58</sup> The court so held, notwithstanding a regulatory “safe harbor” that is designed to prevent this problem.<sup>59</sup>

The end result is that well-meaning businesses committed to compliance can nevertheless be subject to bet-the-company liability every time they call or text.

This system does not protect against the scammers and bad actors who continue to prey on consumers.<sup>60</sup>

C. Facebook v. Duguid Has Not Materially Improved The Situation.

There was some optimism after the Supreme Court's decision in *Facebook v. Duguid* that we would see a decline in frivolous TCPA lawsuits. In that case, the Court clarified that an “automatic telephone dialing system”—a key term in the TCPA—must use a random or sequential number generator.<sup>61</sup> Because some lower courts had previously found that *any* system capable of storing numbers could trigger TCPA liability, this interpretation clarified the statute's language and should have limited some lawsuits against callers. Several courts since have heeded the Supreme Court's interpretation and rejected efforts to evade it with strained arguments about equipment.<sup>62</sup>

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<sup>56</sup> *Eller v. Uber Technologies, Inc.*, No. 4:23-CV-03526 (S.D. Tex. Sept. 19, 2023).

<sup>57</sup> *Fralish v. Ceteris Portfolio Services, LLC*, No. 3:22-CV-00176, 2022 WL 19920239 (N.D. Ind. Mar. 7, 2022).

<sup>58</sup> *Hylton v. Titlemax of Virginia, Inc.*, No. 4:21-CV-163, 2022 WL 16753869, at \*1 (S.D. Ga. Nov. 7, 2022).

<sup>59</sup> *Id.* at \*5-\*8; *see also* 47 C.F.R. § 64.1200(m).

<sup>60</sup> *In the Matter of Sumco Panama SA et al.*, Forfeiture Order, File No. EB-TCD-21-00031913, FCC 23-64, ¶ 1 (Aug. 3, 2023).

<sup>61</sup> *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1173 (2021).

<sup>62</sup> The Ninth Circuit and Third Circuit have followed the Supreme Court's interpretation. In *Borden v. eFinancial, LLC*, the Ninth Circuit held that an automatic telephone dialing system

Unfortunately, that has not happened. An ILR study concluded that although there was a short term reduction immediately following *Duguid* in the volume of TCPA lawsuits filed, most lawsuits were still “allowed to proceed to discovery instead of being dismissed at the pleadings stage.”<sup>63</sup> Given the expense of discovery, plaintiff’s attorneys still have ample leverage to coerce companies into massive settlements in a post-*Duguid* world.

Worse, that initial slowdown in TCPA lawsuits has now been reversed. TCPA filings year-to-date are up 16.8% from last year.<sup>64</sup> Even more problematic, there has also been an increase in class action lawsuits. More than 50% of the 2,457 TCPA cases filed in federal court in 2022 and so far in 2023 have been class actions.<sup>65</sup> In August 2023 alone, 66.2% of all TCPA lawsuits filed were class actions.<sup>66</sup>

Thus, *Duguid* has not led to long-term meaningful protections against opportunistic TCPA lawsuits. Worse still, there have also been suggestions that the FCC should unilaterally revise key terms defined by Congress and definitively interpreted by the Supreme Court, suggesting that even this limited protection could be on the chopping block.<sup>67</sup>

#### D. The TCPA’s Private Right Of Action Harms Consumers.

In all this talk about precedent and statistics, I do not want to lose track of what is at stake here. The TCPA’s private right of action hurts businesses and consumers. Given that even innocent

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must “randomly or sequentially generate telephone numbers, not just any number.” *Borden v. eFinancial, LLC*, 53 F.4th 1230, 1233 (9th Cir. 2022). Similarly, in *Panzarella v. Navient Solutions, Inc.*, the Third Circuit held that use of a system with the capacity to be an automatic telephone dialing system is not sufficient to establish a TCPA violation. Judgment, *Panzarella v. Navient Solutions, Inc.*, No. 20-2371 (3d Cir. June 14, 2022), ECF No. 60.

<sup>63</sup> *Turning The TCPA Tide* at 2.

<sup>64</sup> Eric J. Troutman, *HUGE INCREASE: TCPA Lawsuits Up Double Digits From Last Year—Class Action Numbers Spike*, TCPA World (Sept. 12, 2023), <https://tcpaworld.com/2023/09/12/huge-increase-tcpa-lawsuits-up-double-digits-from-last-year-class-action-numbers-spike/>.

<sup>65</sup> Westlaw Litigation Analytics, *Telephone Consumer Protection Act* (last visited Sept. 25, 2023).

<sup>66</sup> Eric J. Troutman, *HUGE INCREASE: TCPA Lawsuits Up Double Digits From Last Year—Class Action Numbers Spike*, TCPA World (Sept. 12, 2023), <https://tcpaworld.com/2023/09/12/huge-increase-tcpa-lawsuits-up-double-digits-from-last-year-class-action-numbers-spike/>.

<sup>67</sup> See Review of the FY 2024 Budget for the Federal Communications Commission: Hearing Before the S. Comm. on Appropriations’ Subcommittee on Financial Services and General Government, 118th Cong. (2023) (statement of Jessica Rosenworcel, Chairwoman, Federal Communications Commission), <https://docs.fcc.gov/public/attachments/DOC-397034A1.pdf>.

missteps can lead to business-ending liability, some companies may understandably choose to “cease communicating” altogether.<sup>68</sup> But, as explained above, many consumers *want* these communications. They want to know if their flight has been delayed, if their medication is ready for pickup, or if their child did not arrive at school. An *in terrorem* litigation environment that chills these communications is fundamentally anti-consumer.

#### IV. MODEST CHANGES TO THE TCPA COULD LIMIT LITIGATION ABUSE.

Since the TCPA’s 1991 enactment and in more recent legislation to address illegal robocalling, Congress has tried to strike a balance by addressing the abuse of mass communication tools while protecting the ability of businesses to communicate with customers using modern technology by delivering desired and timely communications in an efficient manner. The current litigation climate has seriously undermined that balance. If Congress wants to address the calling ecosystem, it could take steps to rein in the counterproductive abuse of the TCPA’s statutory damages provision and the near-strict liability approach that has developed.

To restore that balance, Congress should consider modest changes to reduce abusive litigation under the TCPA, including:

- **Cumulative Damages Cap:** Total exposures in TCPA cases can become extraordinary because of the combination of statutory damages and large numbers of class members who may have received only one errant call and experienced no meaningful harm. Facebook in the *Duguid* case faced billions in potential damages, and there are countless examples of eyepopping settlements and damage calculations.<sup>69</sup> Congress should consider adding a cap on the TCPA’s damages to help alleviate the specter of crushing liability for simple mistakes. The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) offers a model for this approach. It caps penalties in tiers based on the culpability of the violator, with the low tier limiting the statutory penalty amount to “\$100 for each such violation, except that the total amount imposed on the person for all such violations of an identical requirement or prohibition during a calendar year may not exceed \$25,000.”<sup>70</sup> Congress could similarly impose a limit on the “total amount” of damages available under the TCPA.
- **Safe Harbor:** The law should provide businesses an opportunity to cure inadvertent alleged violations of the TCPA without being subjected to liability. Safe harbors allow businesses to remedy good-faith mistakes, thereby leaving consumers better off and allowing enforcers to better focus their efforts on true bad actors. The idea of a safe harbor is not unfamiliar in important societal issues. For example, the FTC’s Children’s

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<sup>68</sup> 2015 TCPA Declaratory Ruling and Order at 8093.

<sup>69</sup> See, e.g., *Wakefield v. ViSalus, Inc.*, No. 3:15-CV-1857, 2019 WL 2578082 (D. Or. June 24, 2019) (denying request to treble \$925,220,000 damage award).

<sup>70</sup> 42 U.S.C. § 1320d-5(a)(3)(A).

Online Privacy Protection Act (COPPA) Safe Harbor Program allows industry groups to be considered in compliance with COPPA regulations if their proposed COPPA oversight programs are approved by the FTC.<sup>71</sup> Additionally, in May of this year, Florida amended the Florida Telephone Solicitation Act to allow consumers to respond with “STOP” to cease further text message solicitations.<sup>72</sup> However, the law also provides a safe harbor period of 15 days for solicitors to react to the “STOP” text, and no action can be brought against a telephone solicitor unless a text is received more than 15 days after the initial “STOP” message was sent.<sup>73</sup>

- **Limit Attorney’s Fees:** Congress should consider limiting attorney’s fees that may be available in TCPA cases. One reason for the onslaught of TCPA litigation is that attorneys are incentivized to go after American businesses, regardless of culpability or actual consumer harm because large damage awards can generate large attorney’s fees. Reasonable limits on attorney’s fees could blunt that distorted incentive. Congress could borrow from other federal statutes that limit attorney fee recoveries, ensuring that any damages award benefit consumers.

Each of these approaches offer Congress a way to limit some of the most abusive TCPA litigation without undermining efforts to crack down on the bad actors responsible for harmful and abusive robocalls.

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The business community wants to end illegal robocalls and foster a safe and trustworthy communications ecosystem for businesses and their customers. Companies take pains to comply with the TCPA and stand ready to continue assisting state and federal partners to go after scammers and those who intentionally flout federal and state law. As Congress considers paths forward, enforcement should remain a top priority of all federal agencies and Congress should consider reforms to prevent legitimate businesses from being ensnared in abusive TCPA litigation.

I want to again thank the Subcommittee for the opportunity to discuss these important issues. I look forward to answering your questions.

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<sup>71</sup> 16 CFR § 312.11(b).

<sup>72</sup> H.B. 761, 2023 Leg., Reg. Sess., § 1 (Fla. 2023).

<sup>73</sup> Fla. Stat. § 501.059(10)(c).