Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
	)	
Petition for Declaratory Ruling of the Consumer Bankers Association	)	

Comments
of the

National Consumer Law Center
On Behalf of Its Low-Income Clients

and the

National Association of Consumer Advocates

Americans for Financial Reform

Consumer Action

Consumers Union

Public Citizen

U.S. Public Interest Research Group

filed November 17, 2014

The **National Consumer Law Center**,[1] on behalf of its low-income clients, along with the **National Association of Consumer Advocates**,[2] **Americans for Financial Reform**,[3] **Consumer Action**,[4] **Consumers Union,** [5]**Public Citizen**,[6] and **U.S. Public Interest Research Group**,[7] submit these comments in response to the Petition for Declaratory Ruling of the Consumer Bankers Association ("CBA"), which asks the Commission to limit the term "called party" under the Telephone Consumer Protection Act ("TCPA") to only those consumers who were the "intended recipients" of the call.[8] We urge the FCC to continue to protect consumers and deny the CBA petition.

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1 The **National Consumer Law Center ("NCLC")** is a non-profit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace. NCLC has expertise in protecting low-income customer access to telecommunications, energy and water services in proceedings at the FCC and state utility commissions and publishes *Access to Utility Service* (5th ed. 2011) as well as NCLC's *Guide to the Rights of Utility Consumers* and *Guide to Surviving Debt*. These comments were written by Margot Saunders of the National Consumer Law Center and NACA member Dan Marovitch of the Burke Law Offices, LLC.

2 The **National Association of Consumer Advocates ("NACA")** is a non-profit association of consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent, abusive, and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means. Many NACA members represent consumers who have been barraged by illegal robo-dialed and auto-dialed and artificial/prerecorded voice calls and as a result have a deep knowledge of the industry's practices.

3 **Americans for Financial Reform** is an unprecedented coalition of over 250 national, state and local groups who have come together to reform the financial industry. Members of our coalition include consumer, civil rights, investor, retiree, community, labor, faith based and business groups.

4 **Consumer Action** has been a champion of underrepresented consumers nationwide since 1971. Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change.

5 **Consumers Union** is the public policy and advocacy division of Consumer Reports. Consumers Union works for telecommunications reform, health reform, food and product safety, financial reform, and other consumer issues. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

6 **Public Citizen** is a national non-profit organization with more than 300,000 members and supporters. We represent consumer interests through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues including consumer rights in the marketplace, product safety, financial regulation, worker safety, safe and affordable health care, campaign finance reform and government ethics, fair trade, climate change, and corporate and government accountability.

7 **U.S. Public Interest Research Group (U.S. PIRG)** serves as the Federation of State PIRGs, which are non-profit, non-partisan public interest advocacy organizations that take on powerful interests on behalf of their members. For years, U.S. PIRG's consumer program has designated a fair financial marketplace as a priority. Our research and advocacy work has focused on issues including credit and debit cards, deposit accounts, payday lending and rent-to-own, credit reporting and credit scoring and opposition to preemption of strong state laws and enforcement.

8 *See* Public Notice, Consumer & Gov. Affairs Bureau Seeks Comment on Pet. for Declaratory Rulemaking from Consumer Bankers Ass'n, GC Docket No. 02-278 (Oct. 17, 2014) (available at http://www.fcc.gov/document/cgb-seeks-comment-petition-consumer-bankers-association); *Consumer Bankers Ass'n*, Petition for Declaratory Rulemaking, CG Docket No. 02-278 (filed Sept. 19, 2014) (available at http://apps.fcc.gov/ecfs/comment/view?id=6019372731) ("CBA Pet.").

I. Introduction – The Need for Strong Protections Against Wrong Number Calls

The vast majority of courts—including United States Courts of Appeal—have squarely rejected attempts to undermine the remedial purpose of the TCPA by permitting otherwise illegal calling practices simply because the caller "thought" it was calling someone for whom it had prior express consent to call. There are good reasons for this. Congress clearly intended for this statute to protect consumers from the detrimental impact of auto-dialed and prerecorded voice calls to their cell phones to which they had not consented, and even a cursory review of the text of the TCPA establishes that "called party" refers to the *actual* called party, not the person the caller intended to call.

"Wrong number" calls to reassigned numbers are largely the result of inadequate calling practices and a pervasive environment of industry indifference. Companies take for granted that they should be able to call consumers using an autodialer or artificial/prerecorded voice technology, whether their customers or other consumers actually want the calls or not.[9] The CBA's own petition reflects this, (1) arguing that manual dialing is simply too "impracticable" to use, (2) touting how much cheaper and more efficient it is for its members to use autodialers and artificial/prerecorded voice technology, and (3) asserting that, since the CBA's members apparently refuse to either manually dial or actually take effective steps to prevent prohibited calls, there will inevitably be further TCPA litigation unless the Commission "clarifies" the law in its favor.[10]

The CBA asks the Commission to broadly interpret "called party" as "intended recipient" under the TCPA—ostensibly for the narrow purpose of forestalling liability with respect to its members' "informational" or "non-telemarketing" calls to reassigned numbers (although the effects of such a ruling would be far broader). The CBA's assertion that companies might have "unknowingly called unintended persons" is generally false. Time and time again, NACA members and other attorneys who represent consumers confront companies that, despite espousing their consumer-friendly calling practices at the outset of litigation, ultimately turn out to have known that they were making prohibited calls. Frequently, the "informational, non-telemarketing" calls that the CBA promotes are simply a pretext for telemarketing.[11] Frequently, prerecorded voice calls fail to provide any mechanism to opt out or notify the caller that it is calling the wrong person. And frequently, consumers' do-not-call requests and notifications that a wrong number is being called are completely ignored.

A prime example of where non-telemarketing "wrong number" calls are absolutely rampant is in the debt collection industry, where collection agencies frequently make calls based on inaccurate

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9 In fact, it is now a common practice of many companies to include provisions in their consumer agreements—often hidden in the small print terms and conditions—that effectively "opt-in" the customer to autodialed or prerecorded calls, regardless of the content or purpose of the calls or whether the consumer actually knowingly consents to these calls.

10 CBA Pet. at 7-8.

11 *See, e.g., Kolinek v. Walgreen Co.*, No. 13-4806 (N.D. Ill. filed July 3, 2013) (Dkt. No. 1, Compl. ¶¶ 4-5, 14, 18) (alleging that defendant initiated a mass robocalling campaign to consumers who had previously filled prescriptions at its pharmacies, "reminding" them to refill their prescriptions at Walgreens, even though, in the named plaintiff's case, he had last filled a prescription with defendant several years prior and had been told that the defendant only needed his number then for "verification purposes").

skip-tracing or unverified contact information originally obtained by their creditor-clients months or even years prior.[12] As the Seventh Circuit explained:

> The situation is this: Customer incurs a debt and does not pay. Creditor hires Bill Collector to dun Customer for the money. Bill Collector puts a machine on the job and repeatedly calls Cell Number, at which Customer had agreed to receive phone calls by giving his number to Creditor. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559 ¶¶ 9, 10 (Jan. 4, 2008) (2008 TCPA Order). The machine, called a predictive dialer, works autonomously until a human voice comes on the line. If that happens, an employee in Bill Collector's call center will join the call. But Customer no longer subscribes to Cell Number, which has been reassigned to Bystander. A human being who called Cell Number would realize that Customer was no longer the subscriber. But predictive dialers lack human intelligence and, like the buckets enchanted by the Sorcerer's Apprentice, continue until stopped by their true master. Meanwhile Bystander is out of pocket the cost of the airtime minutes and has had to listen to a lot of useless voicemail. (We use Bill Collector as the caller, but this simplified description could as easily use an advertiser that relies for consent on earlier transactions with Customer, or a box that Consumer checked on a vendor's web site.)[13]

As with non-collection calls, many collection agencies' autodialed calls use prerecorded messages that do not provide a mechanism for the consumer to actually ask that the calling stop. More often than not, debt collection robocalls instruct the recipient to hang up if they are not the debtor, and many creditors and collection agencies, as a matter of policy, refuse to speak with anyone other than the debtor. Even worse, many consumers report that when they *are* able to speak with a representative to notify the collector that it is calling the wrong number and request that calls stop, such requests are ignored because the debt collector refuses to believe that the consumer is not the debtor—the "intended recipient" for whom it purportedly had consent to call. Some companies even have actual policies to call the numbers at least once after a wrong-number notification or do-not-call request is made, just to confirm that the party was not the debtor.

Even when steps are taken to ostensibly prevent calls to wrong numbers, these are often more for outward appearance than substantive compliance. For example, we have observed instances where the caller purportedly maintains a phone line for consumers to call if it reaches a wrong number or the consumer wants to make a do-not-call request, but then—apart from putting the onus on the consumer to take affirmative action to get the already prohibited calls to stop—fails to have an operating do-not-call mechanism when the consumer actually calls. Dialer records also routinely reveal that companies will continue to call the number affiliated with a particular "intended recipient," even though the dialer recognizes a triple tone or other indication that the number is no longer in use. Should the number later happen to be reassigned, the new consumer will undoubtedly begin receiving wrong number calls.

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12 *See, e.g., Lowe v. Diversified Consultants, Inc.*, No. 12-2009 (N.D. Ill.) (Dkt. No. 84, Am. Consol. Compl. ¶¶ 29-45) (consumer obtained new cell phone number after receiving repeated wrong number robocalls from debt collector—despite multiple oral and written requests to stop—only to then begin receiving wrong number collection robocalls to his new number for a different debtor *from the same collection agency*).

13 *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 638-39 (7th Cir. 2012).

Some companies even put the onus on the consumer to go out of his or her way to notify them of a wrong number—such as by identifying a phone number for the recipient to call to report that they received a wrong number call—without accounting for the fact that, even outside of the wrong number context, many consumers will obviously hang up without wasting additional time listening to the full, unwanted message from a party with whom they have no relationship, and may therefore not even be aware of the apparent opt-out mechanism or that the robocall was actually for someone else. Further, many consumers report being wary of calling unfamiliar numbers or pressing digits during a call to supposedly be removed from a call list, out of concern that the call may be malicious or that interacting with an unfamiliar caller will only result in more calls.

Wrong number calls are a serious problem faced by consumers across the country, and consumers who receive them—even those made solely for "informational, non-telemarketing" purposes—are routinely left with no effective way to get the unwanted calls to stop. It would be a great injustice for the Commission to placate the CBA and other industry representatives with a narrow interpretation of the TCPA at the expense of the consumer interests Congress has charged it to protect. The CBA's petition should be denied.

II. The FCC has no authority to "clarify" the definition of a "called party" or exempt otherwise illegal calls to reassigned numbers.

At the outset, the Commission lacks the authority to grant the CBA's petition. Congress expressly delineated the FCC's exemption powers under the TCPA. As to the prohibition on autodialed or prerecorded calls under 47 U.S.C. § 227(b)(1)(A), the statute limits this authority to exempting, if at all, only those "calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights the provision is intended to protect."[14]

Thus, there is no authority for the Commission to "clarify" the meaning of "called party" under the TCPA, or to otherwise permit calls that Congress has expressly prohibited simply because the caller incorrectly believed it had the called party's prior express consent—whether because of a reassigned number, mistake of law, or otherwise. Moreover, the FCC has already directly rebuked attempts to create a "good faith" exception under 47 U.S.C. § 227(b)(1)(A).[15]

III. Limiting "called party" to only the "intended recipient" of a call would contradict the plain language of the TCPA and drastically gut the protections afforded to consumers under the statute.

"Congress passed the TCPA to protect individual consumers from receiving intrusive and unwanted calls[,]"[16] including calls made using an autodialer or an artificial or prerecorded voice.[17]

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14 47 U.S.C. § 227(b)(2)(C).

15 *See In re Rules & Regulations Implementing the TCPA*, 18 FCC Rcd 14014, 14117-18, para. 172 (2003) ("*FCC 2003 Order*") ("[W]e reject proposals to create a good faith exception for inadvertent autodialed or prerecorded calls to wireless numbers and proposals to create implied consent because we find that there are adequate solutions in the marketplace to enable telemarketers to identify wireless numbers.").

16 *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 268 (3d Cir. 2013) (citing *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012)); *see also Mims*, 132 S. Ct. at 744 ("Voluminous consumer complaints about abuses of telephone technology—for example, computerized calls dispatched to private homes—prompted Congress to pass the TCPA.") (internal citations omitted); TCPA, Pub. L. No. 102-243, § 2(5-6) (1991), *codified at* 47 U.S.C. § 227 (containing

To that end, the TCPA generally prohibits making calls using an autodialer or an artificial or prerecorded voice to cell phone numbers, or initiating telemarketing calls to residential telephone lines using an artificial or prerecorded voice to deliver a message, except in instances of an emergency or with the "prior express consent of the called party."[18]

Despite assurances that protecting consumer privacy is "of paramount concern,"[19] the CBA asks the Commission to interpret "called party" in this context as "intended recipient," which would in effect permit companies to make otherwise prohibited calls unabated, so long as they can establish that they had the "prior express consent" of whoever they *intended* to call.[20] But the TCPA was enacted to protect recipients of unwanted calls, and that "wrong number" call recipients are of the most important classes of persons that should be protected. After all, *they* are the persons who receive these annoying calls. Because granting CBA's petition would eviscerate protections to wrong number call recipients and run counter to the TCPA's remedial purpose, it should be denied.

The phrase "intended recipient" is entirely absent from the text of the TCPA.[21] Rather, § 227(b)(1)(A)(iii) prohibits "mak[ing] any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone number assigned to a ... cellular telephone service[.]"[22]

Where the provision prohibits "mak[ing] a[] ... [prohibited] call ... to a[] telephone number[,]" and provides a limited exception where the otherwise prohibited call was made "with the prior express consent of the called party," the most straightforward, reasonable interpretation is that "called party" refers to the actual party called—not some third party unaffiliated with the telephone number and to whom the call was never actually made. This is especially true since the TCPA was intended to protect consumers from getting these intrusive, nuisance calls in the first place. Congress' own Statement of Findings issued in relation to the TCPA confirms that the required consent must relate to the person associated with the number actually called:

Congressional findings that, inter alia, "[u]nrestricted telemarketing ... can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety[,]" and that "[m]any customers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers"); S. Rep. No. 102-178, 6 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1974 ("The bill would accomplish the following: ... ***ban all autodialed calls, and artificial or prerecorded calls, to ... cellular phones***.") (emphasis added).

17 *See, e.g.,* TCPA, Pub. L. No. 102-243, § 2(13) ("[T]he evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call[.]").

18 47 U.S.C. §§ 227(b)(1)(A)(iii) and 227(b)(1)(B) (emphasis added). That the caller had the called party's "prior express consent" is an affirmative defense to be proven by the defendant. *See, e.g., In re Rules & Regulations Implementing the TCPA*, 23 FCC Rcd 559, 565, para. 10 (2008) ("[W]e conclude that the creditor should be responsible for demonstrating that the consumer provided prior express consent.").

19 CBA Pet. at 14.

20 CBA Pet. at 3.

21 *See Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 640 (7th Cir. 2012) ("The phrase "intended recipient" does not appear anywhere in § 227, so what justification could there be for equating 'called party' with 'intended recipient of the call'?").

22 *Compare* 47 U.S.C. § 227(b)(1)(B) (prohibiting "initiat[ing] any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under [47 U.S.C. § 227(b)(2)(B)]") (emphasis added).

> Banning ... automated or prerecorded telephone calls to the home, **except when the receiving party consents to receiving the call** or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.[23]

Other instances in which the term "called party" is used within the text of the TCPA further show that the term "called party" cannot possibly mean "intended recipient." For example, § 227(b)(1)(A)(iii) also prohibits making any call using an autodialer or an artificial or prerecorded voice to "any service for which the called party is charged for the call." Obviously, for the called party to be *charged* for the call, he or she must necessarily have been the actual recipient of the call and/or the telephone subscriber, as opposed to just some third party who may have previously given consent to be called at the since-reassigned number. The same logic applies to § 227(b)(2)(C), which references calls "not charged to the called party."

Even further, § 227(d)(3), which sets forth standards to be prescribed by the FCC relating to artificial or prerecorded voice message systems, provides that "any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls."[24] Here, the plain text of the TCPA clearly identifies the "called party" as the party who receives the artificial or prerecorded voice message call, and to whose line the system must disconnect within 5 seconds after the recipient hangs up. There is no way that the CBA's "intended recipient" would remotely fit in this context.

Likewise, under the CBA's warped interpretation, if the "prior express consent of the called party" refers to the consent of the "intended recipient" rather than the actual party called, then only the prior owner of a reassigned number can permissibly revoke consent for calls to his or her former number. This runs counter to the Commission's own affirmations that a consumer can revoke consent to be called.[25]

In short, the FCC would have to utterly ignore the legislative intent, remedial purpose, and plain statutory text of the TCPA to hold that "called party" means "intended recipient" under the statute. The CBA's petition should be denied.

IV. Courts have overwhelmingly rejected the "intended recipient" argument.

The CBA bizarrely argues that slight differences in judicial interpretation *rejecting* the "intended recipient" argument—*i.e.,* interpreting "called party" as the current primary user of the phone, the current subscriber, etc.—create confusion that somehow necessitates the FCC accepting the CBA's position. This argument defies logic.

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23 TCPA, Pub. L. No. 102-243, § 2(12) (1991) (emphasis added).

24 47 U.S.C. § 227(d)(3)(B).

25 *See, e.g., In re Rules & Regulations Implementing the TCPA*, 27 FCC Rcd 15391, 15394, para. 7 (2012) ("[A] consumer's prior express consent to receive text messages from an entity can be reasonably construed to include consent to receive a final, one-time text message confirming that such consent is being *revoked* at the request of that consumer.") (emphasis added).

Courts across the country have already ruled on this issue, repeatedly rejecting the CBA's position.[26] For example, the Seventh Circuit's *Soppet* decision referenced by the CBA, expressly rejects many of the arguments raised by the CBA, ultimately holding that "'called party' in § 227(b)(1) means the person subscribing to the called number at the time the call is made."[27] The Eleventh Circuit's *Osorio* decision agrees with *Soppet* and similarly rejects the "intended recipient" argument.[28] As the CBA notes in its petition, the Ninth Circuit's *Meyer* decision clarifies that for a TCPA claim to stand the call must have been made "without the *recipient's* prior express consent."[29] District court decisions from all over the country similarly reject the "intended recipient" argument, even outside of these Circuits.[30]

Further, courts have readily distinguished the unpublished decision of *Leyse v. Bank of Am., Nat'l Ass'n*, No. 09-7654, 2010 WL 2382400 (S.D.N.Y. June 14, 2010), and others the CBA cites as having accepted the "intended recipient" argument.[31] *Leyse*[32] presented a unique situation where the plaintiff merely intercepted a call meant for the plaintiff's roommate and to the plaintiff's roommate's phone.[33] The issue here does not involve "*incidental* recipients" of correctly placed calls; rather, it relates to calls to reassigned numbers and other instances in which the caller is calling the *wrong* person at a *wrong* number.[34]

The two other cases the CBA cites in an attempt to create the illusion that there is some kind of judicial confusion over whether "called party" means "intended recipient"—C*ellco P'ship v. Dealers Warranty, LLC*, No. 09-814, 2010 WL 3946713 (D.N.J. 2010), and *Kopff v. World Research Group, LLC*, 568 F. Supp. 2d 39 (D.D.C. 2008)—are similarly unpersuasive. Not only did *Kopff*, like *Leyse*, deal with an "incidental recipient" and not a wrong number call, but it is further irrelevant because it

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26 This issue is frequently presented in terms of statutory standing; in other words, whether the "intended recipient," current subscriber, or current primary user has standing for a cause of action under § 227(b)(3). *See, e.g., Olney v. Progressive Cas. Ins. Co.*, 993 F. Supp. 2d 1220, 1224 (S.D. Cal. 2014) ("Defendant's position that only the intended recipient has standing to bring a claim under the TCPA has been squarely rejected in no less than twenty cases, cases that are factually similar to the instant case.") (citations omitted). As the *Page* decision illustrates*, infra* at footnotes 29 and 31, this actually confuses standing with the "prior express consent of the called party" affirmative defense.

27 *Soppet*, 679 F.3d at 643.

28 *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1250-52 (11th Cir. 2014).

29 *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2361 (2013).

30 *See, e.g., Moore v. Dish Network L.L.C.*, No. 13-36, 2014 WL 5305960, at *8 (N.D. W. Va. Oct. 15, 2014); *Davis v. Diversified Consultants, Inc.*, No. 13-10875, 2014 WL 2944864, at *3 (D. Mass. June 27, 2014); *Swope v. Credit Mgmt., LP*, No. 12-832, 2013 WL 607830, at *3 (E.D. Mo. Feb. 19, 2013); *Kane v. Nat'l Action Fin. Servs., Inc.*, No. 11-11505, 2011 WL 6018403, at *7 (E.D. Mich. Nov. 7, 2011); *Anderson v. AFNI, Inc.*, No. 10-4064, 2011 WL 1808779, at *8 (E.D. Pa. May 11, 2011).

31 CBA Pet. at 11-12.

32 *Leyse* is also simply legally flawed, confusing the "prior express consent of the called party" affirmative defense with statutory standing under 47 U.S.C. § 227(b)(3). *See, e.g., Page v. Regions Bank*, 917 F. Supp. 2d 1214, 1217 (N.D. Ala. 2012) ("In concluding that the roommate was not the "called party" and did not have standing, the court in *Leyse* failed accurately to reflect the plain language of the TCPA. Instead, the *Leyse* court cites § 227(b)(3) for the proposition that "[a] called party who receives such a call is permitted to bring suit to collect $500 in statutory damages." .... As explained above, the term "called party" does not even appear in § 227(b)(3).").

33 *Leyse*, 2010 WL 2382400, at *5-6.

34 *See, e.g., Fini v. Dish Network L.L.C.*, 955 F. Supp. 2d 1288, 1295 (M.D. Fla. 2013) (distinguishing *Leyse* and finding that "[a]lthough Defendant had the unforeseeable misfortune of being provided the wrong number by its customer, this is not the same as calling the correct number and accidentally reaching another member of the household or office"); *Page v. Regions Bank*, 917 F. Supp. 2d at, 1219 (distinguishing *Leyse* and holding that the wrong-number call recipient plaintiff—the regular user of but not the subscriber to the particular number called—was "much more than an incidental recipient of a correctly placed phone call").

involved alleged violations of the TCPA's "junk fax" provisions under § 227(b)(1)(C), which nowhere reference a "called party."[35] The unpublished *Cellco P'ship* decision—which itself heavily relied on *Leyse* and *Kopff*—also dealt, not with wrong number calls to consumers, but with statutory standing regarding an attempt by Verizon Wireless and OnStar to sue under the TCPA for calls made to their subscribers.[36]

Where an overwhelming majority of courts that have considered this issue have held that "called party" does not mean "intended recipient"—and where, to the benefit of consumers, businesses have long been operating under these holdings and the common sense reading of the TCPA to ensure that they have the express consent of the called party before calling using an autodialer or an artificial or prerecorded voice—there is no good reason to modify this accepted, straightforward interpretation of the statute. The CBA's petition should be denied.

V. Companies have the means and ability to follow the law; that some make the strategic business decision to violate the TCPA is not a reason to change it.

Notwithstanding the TCPA's enactment over twenty years ago, consumer privacy is still under constant assault; in fact, even more so. The number of active registrations with the National Do-Not-Call Registry—a total of 223,429,112 in 2013—continues to increase year after year.[37] Nonetheless, the number of consumers receiving unwanted calls *also* continues to increase. Although the actual number of complaints is only a representative fraction of the total number of unwanted calls, the sheer number of these complaints illustrates that consumers are frustrated and that the protections of the Registry are too often ignored. The FTC reported 3,748,655 telemarketing complaints in 2013, of which at least 2,182,161 were reported as including a recorded message.[38]

The FCC likewise recognizes that "[d]espite establishing a National Do-Not-Call Registry and adopting other consumer protection rules, ... consumers continue to receive unwanted robocalls."[39] The FCC's data mirrors the FTC's in showing a continued increase in consumer complaints about unwanted calls.[40] NACA members continually receive complaints from consumers expressing disappointment at the ineffectiveness of the Do-Not-Call Registry. Given that these violations have done nothing but increase exponentially since the TCPA was enacted over

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35 *See Kopff*, 568 F. Supp. 2d at 42 (finding that wife who received allegedly illegal faxes in her capacity as Executive Assistant to her husband, the President of a company, did not have standing where "[t]he faxes ... were sent to Gary Kopff, by name, and not a single fax was sent to Judy Kopff[,]" but noting that "the Court might think otherwise were the faxes addressed generically-e.g. to 'Employee of Heritage Management'-or were they not addressed at all").

36 *Cellco P'ship*, 2010 WL 3946713, at *9-10.

37 Federal Trade Commission, *Nat'l Do Not Call Registry Data Book FY 2013*, at 4 (Dec. 4, 2013) (available at http://www.ftc.gov/sites/default/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2013/131204dncdatabook.pdf).

38 *Id.* at 5.

39 *In re Rules & Regulations Implementing the TCPA*, 27 FCC Rcd 1830, 1866, para. 2 (2012).

40 Statement of Eric J. Bash, FCC Enforcement Bureau Associate Chief, at Hearing Before the Senate Committee on Commerce, Science, and Transportation's Subcommittee on Consumer Protection, Product Safety, and Insurance, *Stopping Fraudulent Robocall Scams: Can More Be Done?* ("[Given] ... the ready availability and low cost of phone service and the software needed to make the calls, as well as the ability of callers to 'spoof' the number from which they are calling in an attempt to disguise who they are and avoid detection[,] ... [i]t is no surprise ... that robocalls are an increasing source of consumer complaints in recent years at the FCC, with the number of complaints about the topic doubling in the past two years to over 100,000 filed in 2012. While this is only a fraction of the total number of robocall complaints filed each year at various agencies, the volume at the FCC alone still speaks volumes, so to speak, about the extent of the problem.") (available at http://www.gpo.gov/fdsys/pkg/CHRG-113shrg85765/html/CHRG-113shrg85765.htm).

twenty years ago, the Commission should not entertain industry attempts to restrict its protections further, especially on issues such as this that have been so definitively ruled on by the judiciary.

Consumers hate unsolicited calls, period—whether made by "mistake" or otherwise. While the CBA and other business representatives love their old standby of painting consumer advocates as greedy opportunists filing "frivolous" lawsuits, an objective analysis of complaint and filing data shows that the actual number of TCPA lawsuits is utterly insignificant compared to the immense number of prohibited calls, amounting to less than 0.05% of the total number of telemarketing complaints to the FTC alone in 2013.[41] Further, where the current fee for filing a case in federal court is $400—just $100 shy of the statutory damages generally available under § 227(b)(3)—relief under the TCPA, or even the realistic ability to obtain legal representation, is unfortunately largely unavailable to consumers absent a class action or a significant number of violations. The consumer privacy interests that the TCPA was intended to protect are simply not being adequately addressed.

The fact that a prohibited call was to a wrong number is immaterial under the TCPA: The consumer still received an autodialed or prerecorded call to his or her cell phone without consent. It would be nonsensical, then, for this particular subset of consumers to be less protected than others whose privacy interests Congress intended to protect, just because businesses contend they make compliance more difficult. As the Seventh Circuit opined about the possibility of Congress substituting "'called party' with 'intended recipient of the call[,]' ... [t]hat substitution would expose new subscribers to unwanted calls and unjustified expense. Congress might have thought the current approach preferable, as a safeguard of persons assigned to recycled numbers, even though this protection comes at some cost to [the caller]."[42]

We appreciate that companies are not perfect, and that genuine mistakes may occur resulting in wrong number calls to consumer phones. However, this is no reason to effectively rewrite the TCPA to permit otherwise prohibited calls to wrong numbers. We firmly believe that companies, if they choose to, can comply with the TCPA. Some, unfortunately, choose not to do so.

There is nothing forcing companies to use autodialer or artificial/prerecorded voice technology. If a company is calling a consumer for the first time or after a period of no contact, it just makes sense to call the person manually to confirm his or her use of the number first, before using an autodialer or an artificial or prerecorded voice. Businesses can also use reverse-lookup providers, such as Neustar, which, while not perfect, will further ensure that the correct person is being called. Debt collectors and other callers who obtain contact information from third parties such as skip-tracers can independently verify the numbers manually and/or verify with the third party that the number is correct and obtain indemnity for any later violation.[43] Companies can ensure that, if their dialers identify triple tones or other indications of an unused number, that the number is removed from the list to be called or simply verified manually, and not just continually robocalled until a new person to whom it is reassigned complains. Requiring companies that choose to use autodialer or prerecorded voice technology to take steps to ensure that the people they call in

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41 According to the U.S. Chamber of Commerce, consumers filed only 1,862 TCPA lawsuits in 2013, compared to the 3,748,655 complaints reported by the FTC for that year. *See Written Ex Parte Commc'n In re Application of Rules and Regulations Implementing the TCPA: ACA Int'l Pet. for Rulemaking*, CG Docket No. 02-278, at 2 (Mar. 27, 2014).

42 *Soppet*, 679 F.3d at 642.

43 Calling numbers obtained through skip-tracing also raises questions of prior express consent, so debt collectors should be cautious about this practice even aside from the risk of calling someone other than the debtor.

fact actually consented to being called is not an unreasonable request, and has been the law for more than two decades. The CBA's petition should be denied.

VI. Conclusion

For the reasons explained above, we respectfully request that the CBA's petition be denied.

Respectfully submitted,

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