

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

Comments Opposing the Petition for Declaratory Ruling and Waiver

by
National Consumer Law Center
on behalf of its low-income clients

and

Consumer Action
Consumer Federation of America
EPIC
National Association of Consumer Advocates
U.S. PIRG

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Summary

These comments, on behalf of a broad swath of national organizations representing consumers in the United States, oppose the request for a declaratory ruling submitted by Perdue for Senate, Inc., which seeks a ruling that would allow unfettered voicemail messages to swamp the voicemail boxes of consumers' cell phones. The Petition in this case seeks a ruling that voicemail messages that are inserted into consumers' cell phone voicemail boxes without ringing the cell phones are exempt from the Telephone Consumer Protection Act. Yet these voicemail messages are just as invasive, expensive, and annoying as calls and texts to cell phones. Granting the Petitioner's request would allow ringless voicemail messages regarding telemarketing, debt collection, and outright scams to overwhelm the voicemail boxes of consumers. Unlike its ability to limit calls and texts, current technology does not give consumers any way to block unwanted voicemail messages from particular callers.

Technologically, ringless voicemail messages are unquestionably calls to cell phones, as the cell phone telephone number must be used to deliver the message, and the wireless network is used by the recipient to access the message. The technology is identical to that used for texts, so there is no technological or legal reason for them not to be covered by the same rules under the Telephone Consumer Protection Act.

Ringless voicemail messages are absolutely hated by telephone subscribers, who find them invasive, annoying, and deliberately deceptive. The Commission should deny the Petition of Perdue for Senate, Inc.

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I. Introduction

Pursuant to the Public Notice¹ issued by the Consumer and Governmental Affairs Bureau, the **National Consumer Law Center** (NCLC)² files these comments on behalf of our low-income clients and **Consumer Action, Consumer Federation of America, EPIC, National Association of Consumer Advocates, and U.S. PIRG**. We respectfully oppose, in all respects, the requests in the Petition of Perdue for Senate³ to exclude voicemail messages that are directly deposited into consumers' voice mailboxes from the consumer protections of the Telephone Consumer Protection Act (TCPA).⁴

The Perdue for Senate Petition requests that the Federal Communications Commission (Commission or FCC) “issue a declaratory ruling that the delivery of a ringless voicemail (‘RVM’) directly to a voicemail box does not constitute a ‘call’ subject to the wireless prohibitions on the use of an automatic telephone dialing system (‘ATDS’) or an artificial or prerecorded voice.”⁵

¹ Public Notice, Federal Commc’ns Comm’n, Consumer and Governmental Affairs Bureau Seeks Comment on Perdue for Senate, Inc. Petition for Declaratory Ruling Under the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 (Rel. Sept. 3, 2021), *available at* <https://ecfsapi.fcc.gov/file/09030004400288/DA-21-1102A1.pdf>.

² The National Consumer Law Center is a nonprofit 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.

³ *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Petition for Declaratory Ruling of Perdue for Senate, Inc., CG Docket No. 02-278 (filed July 2, 2021), *available at* <https://ecfsapi.fcc.gov/file/10702030121344/RVM%20Petition.pdf> [hereinafter *Petition*].

⁴ The TCPA is codified at 47 U.S.C. § 227. The Commission’s implementing rules are codified at 47 CFR § 64.1200. The TCPA and/or the related rules, among other things, prohibit any call to a telephone number assigned to a “paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call” using any automatic telephone dialing system or an artificial or prerecorded voice other than a call made for emergency purposes; made with the prior express consent of the called party; or made solely to collect a debt owed to or guaranteed by the United States. 47 U.S.C. § 227(b)(1)(A)(iii); 47 CFR § 64.1200(a)(1)-(2).

⁵ Petition, *supra* note 3, at 1.

The primary rationale offered is to avoid “costly TCPA litigation.”⁶ But litigation is triggered only by telephone subscribers who are sufficiently distressed by the calls they have received to go to the considerable trouble of a) determining whether they have a litigable claim, b) finding an attorney to take their case, and c) working with the attorney on the multipart process of initiating and prosecuting a lawsuit in federal court to obtain redress for that abuse of their phone. Indeed, it was just that type of infuriation over a ringless voicemail message delivered to his inbox that prompted Hayden Wreyford to bring a case against Senator Perdue’s campaign (even after he voted for Senator Perdue in the 2021 runoff election).⁷ And apparently it was this Georgia case that triggered the campaign to file this Petition with the FCC.

We strongly oppose the Perdue Petition. These voicemail messages are just as invasive, expensive, and annoying as calls and texts to cell phones. Indeed, in some ways they are even more annoying and time-consuming to deal with than calls and texts, as they require more time to retrieve (instead of just answering one’s phone and hanging up, retrieving and deleting ringless voicemail messages requires a multi-step process). If left unregulated by the TCPA, ringless voicemail messages regarding telemarketing, debt collection, and outright scams could easily overwhelm the voicemail boxes of consumers. Unlike their ability to limit calls and texts, consumers have no way to block unwanted voicemail messages from particular callers. These messages appear to be delivered using technology that is identical to that used for texts, so there is no technological or legal reason for them not to be covered by the same rules under the TCPA.

Moreover, it would be entirely inappropriate for the Commission to usurp the role of the courts in this manner. A federal court in Georgia is in the process of applying the law to the facts of

⁶ *Id.*

⁷ Wreyford v. Perdue for Senate, Inc. & Georgians for Kelly Loeffler, Inc., No. 1:21-cv-02054-LMM, Brief in Opposition to Defendants’ Motion to Dismiss at 4 (N.D. Ga. filed June 8, 2021).

the case—as the facts are developed and proven in the process of the litigation. There is no need for the Commission to become involved. Additionally, the Commission has no procedure to take sworn testimony and develop a factual record upon which to base a legal analysis. Any support for the Petition might have the improper impact of attempting to usurp the role of a federal trial court.

While the Petition only requests a determination that ringless voicemail are not calls for purpose of triggering compliance with the rules applicable to calls to wireless lines pursuant to 47 U.S.C. § 227(b)(1)(A),⁸ such a determination could have an impact on calls to residential landlines governed by § 227(b)(1)(B) as well. Calls using a prerecorded voice to deliver a message to residential lines also require consent, unless exempted by the Commission under § 227(b)(1)(B). The Commission recently limited the number of non-telemarketing calls using a prerecorded voice⁹ that can be made without consent to residential lines to three a month.¹⁰ This determination was issued as the result of the express instruction from Congress in the TRACED Act¹¹ to limit the number of automated calls.¹² If the Commission were to make the declaration sought by the Petition, it would have an effect exactly *opposite* to Congress’s clear intent when it passed the TRACED Act to reduce the number of automated calls.

⁸ See Petition, *supra* note 3, at 1.

⁹ In these comments we use “prerecorded voice” to refer to both prerecorded voice and artificial voice calls.

¹⁰ *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, Report and Order, FCC 20-186 (Rel. Dec. 30, 2020), *available at* https://ecfsapi.fcc.gov/file/1230701817809/FCC-20-186A1_Rcd.pdf.

¹¹ Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, 133 Stat. 3274 (Dec. 30, 2019).

¹² *Id.* at § 8.

II. Left Unregulated, Ringless Voicemail Would Flood Consumers' Mailboxes.

The technology at issue—namely ringless voicemail (RVM)—works to deliver targeted, pre-recorded voice messages—including telemarketing and debt collection voice messages—*en masse* to the voicemail boxes of cellular subscribers. The technology is essentially a perverted use of the standard voicemail system. Instead of leaving a typical voicemail message only when a cellular subscriber is unavailable to receive a call, RVM works to deliver a pre-recorded voicemail message directly to the cellular subscriber's voicemail box without ever giving the consumer the opportunity to answer—or to block—the incoming call.¹³

The leaving of an RVM message in the consumer's voicemail box then triggers an audible notification of the presence of a voicemail message, depending on the consumer's settings, just as notification of a call is dependent on the choice of settings. With some cell phones, the deposit of the RVM message into the consumer's voicemail box will also cause a notification to appear on the consumer's visual voicemail application, using up data on the consumer's data plan.

The duration of each RVM message is limited only by the maximum time, in minutes, supported by each carrier's voicemail offering, generally around three to five minutes or longer.¹⁴

All cell phone plans appear to have limited voicemail capacity in terms of the number of messages that can be left on the systems and the permissible length of the messages, and the number is generally limited to 20 to 40 messages, depending on carrier and type of phone used.¹⁵ The same is

¹³ See, e.g., Comments on Petition for Expedited Declaratory Ruling Filed by All About the Message, LLC, CG Docket No. 02-278 (filed May 16, 2017), *available at* <https://ecfsapi.fcc.gov/file/10516277901362/Snyder%20FCC%20All%20About%20the%20Message%20Comments%20051617.pdf> [hereinafter Snyder Comments]. These comments were filed by Randall A. Snyder in the previous docket on this subject the consideration of the identical Petition filed by All About the Message.

¹⁴ *Id.* at Exhibit F.

¹⁵ See Verizon, Voicemail Comparison Chart, *available at* <https://www.verizon.com/support/voicemail-comparison/>; AT&T, Explore voicemail options, *available at* <https://www.att.com/support/article/wireless/KM1009209/>; Sprint Mobile, Know how many

true for landline voicemail systems.¹⁶ This means that each unwanted and unconsented-to RVM message has the potential to exclude from the consumer's voicemail box messages that the consumer wants and needs. (See a sample of reactions of real consumers to RVMs in Section V, *infra*.)

Consumers have absolutely no control over who can leave an RVM message, how long the messages are, or how often the messages are left on their voicemail. Unlike standard calls and texts to cell phones, which can be blocked, there is currently no method that allows recipients to block RVM messages. Also, while text messages are limited in length by the underlying technology, there is no inherent limit for RVM messages—they can be any length. Indeed, it is entirely possible that debt collectors using this method of communicating might hijack a consumer's voicemail box—filling it with RVM messages—until the consumer pays the debt.¹⁷ There is no technological reason that this could not occur. If the TCPA were found to be inapplicable to these messages, that determination would eliminate the essential control consumers now have to stop receiving automated messages: by declining to provide consent for them. While the Fair Debt Collection Practices Act (FDCPA) allows consumers to require debt collectors to cease communication with them,¹⁸ that law applies

messages can be stored in your voicemail box, *available at* <https://www.sprint.com/en/support/solutions/services/know-how-many-messages-can-be-stored-in-your-voicemail-box.html>.

¹⁶ See Strata Networks, *Landline Voicemail Packages*, *available at* <https://www.stratanetworks.com/landline-voicemail-packages>; Xfinity, *Set Up Your Voicemail From Your Home Phone*, *available at* <https://www.xfinity.com/support/articles/setting-up-voicemail>; RCN, *How To Use Voicemail*, *available at* <https://www.rcn.com/boston/phone/rcn-phone-features/rcn-voicemail/>.

¹⁷ See Richard Read, *From Stone Age to Drone Age: Debt Collection Goes High-Tech*, *Ctpost*, Apr. 18, 2017, *available at* <https://www.ctpost.com/business/personalfinance/article/From-Stone-Age-to-Drone-Age-Debt-Collection-Goes-11081136.php> (This article was first published on [NerdWallet.com](http://nerdwallet.com)). See also Do-Not-Call Protection, *Ringless Voicemail*, *available at* <http://www.donotcallprotection.com/ringless-voicemail>.

¹⁸ 15 U.S.C. § 1692c(c).

only to certain debt collectors, not to most servicers or to creditors collecting their own debts, or to calls that are not for the purpose of debt collection.

To access RVM messages, consumers must call into their voicemail systems. This is much more time-consuming for consumers than answering a call or looking at a text message. Moreover, at least 22 million American subscribers are on limited-minute phone plans.¹⁹ Included in that number are approximately three million households participating in the Lifeline program.²⁰ Every call for these consumers, even those to their own voicemail, counts against those precious minutes, reducing the available minutes for essential life tasks.

Additionally, even those consumers who have unlimited minutes on their calling plans when at home generally have significantly fewer minutes when roaming away from home in a foreign country,²¹ and with some plans, even when roaming within the U.S.²² When the consumer is roaming, just leaving the RVM message can trigger roaming charges to the recipient—even if the consumer does not retrieve the message. Retrieving the message will trigger additional roaming

¹⁹ According to the FCC's most recent mobile competition report, 18% of connections (about 77 million) were on prepaid plans. *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Twentieth Report 73, WT Docket No. 17-69 (F.C.C. Rel. Sept. 27, 2017), *available at* <https://docs.fcc.gov/public/attachments/FCC-17-126A1.pdf>. Of those 77 million, a little over 26 million had Tracfone plans, about three quarters of which are limited-minute plans. *See* Tracfone, Plans, *available at* <https://www.tracfone.com/shop/plans>. Adding Tracfone's approximately 19 million limited-minute subscribers to the three million limited-minute Lifeline subscribers (see note 20, *infra*) yields about 22 million subscribers on limited minute plans.

²⁰ *See* Universal Service Administrative Co., Program Data (July 2021 Subscriber Count), *available at* <https://www.usac.org/lifeline/resources/program-data/>. We estimate that about half of the six million Lifeline subscribers are on limited-minute plans.

²¹ *See* Verizon, How to Avoid Roaming Charges, *available at* <https://www.verizon.com/articles/how-to-minimize-and-avoid-roaming-charges/>.

²² *See, e.g.*, Boost Mobile, Frequently Asked Questions – Domestic Roaming, *available at* <https://www.boostmobile.com/support/faq/plans-services/domestic-roaming.html>. *See also id.*

charges. For example, under some plans, AT&T charges consumers when they are abroad for both calling time and data usage when a voicemail message is left on their system:

How am I charged for receiving voicemail messages while roaming internationally?

When receiving standard voicemail messages:

Standard voicemail messages received when roaming outside of the U.S. are charged at international roaming calling rates, based on the international roaming feature on your account, or if you have not selected a feature, pay-per-use rates will apply.

When receiving Visual Voicemail messages:

Visual Voicemail messages received when roaming outside of the U.S. are charged at international roaming data rates, based on the international roaming feature on your account, or, if you have not selected a feature, pay-per-use rates will apply.²³

The potential impact on consumers from unregulated RVM messages is massive. For example, Drop Cowboy, just one of many companies offering RVM technology to businesses, advertises on its website that it can send up to 40,000 messages *per minute*,²⁴ which is 2.4 million per hour and 19 million per 8-hour day.

One of the explicit concerns that prompted Congress to enact the TCPA was complaints by residential and business telephone users that “automated calls fill the entire tape of an answering machine, preventing other callers from leaving messages.”²⁵ This is exactly the problem—translated to cell phones--that the Petition would unleash. If unregulated, RVMs will likely overwhelm consumers’ voicemail systems and consumers will have no way to limit, control or stop these messages. Callers could potentially hijack a consumer’s voicemail with unwanted messages, eliminating access by callers whose messages are wanted and needed by the consumer.

²³ AT&T, Frequently Asked Questions, *available at* [https://www.att.com/international/\(emphasis added\)](https://www.att.com/international/(emphasis%20added)) (accessed Sept. 29, 2021).

²⁴ Drop Cowboy, Ringless Voicemail and Text Message Pricing Plans, *available at* <https://www.dropcowboy.com/pricing/> (accessed Sept. 29, 2021).

²⁵ S. Rep. No. 178, 102d Cong., 1st Sess. 2 (1991) (statement of Sen. Hollings).

III. Technologically, RVM Messages are Calls to Cell Phones.

As explained more specifically by telecommunications experts Randall Snyder²⁶ and Jeffrey Hansen²⁷ in their filings in the previous docket on this subject triggered by the RVM provider All About the Message,²⁸ RVM messages possess the following critical characteristics that make them calls covered by the TCPA:

1. Upon receiving a voicemail message, cell phones will alert the consumer with a tone or “ring.”²⁹
2. In one method of delivering RVM messages, a centralized computer platform is used to communicate directly with a cellular carrier’s voicemail system to “(i) take a recorded voice message file and programmatically and automatically include it as the content for each prerecorded voice message to be sent to cellular subscribers included in a particular campaign; (ii) programmatically and automatically provide and/or pass to the carrier’s voicemail system each cellular telephone number (from a list provided in an uploaded file) used to identify the individual voicemail box that is the destination of each prerecorded voice message; (iii) programmatically and automatically replicate the prerecorded voice message content for each message and assemble the entire prerecorded voice message to be sent to the cellular carrier’s voicemail system; and, (iv) initiate the transmission of the

²⁶ See Snyder Comments, *supra* note 13.

²⁷ See *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Declaration of Jeffrey A. Hansen on the Petition for Declaratory Ruling of All About The Message, LLC, CG Docket No. 02-278 (filed May 2017), available at <https://ecfsapi.fcc.gov/file/10515968513445/decl%20of%20jeffrey%20hansen%20ringless%20voicemail%20-%20202.pdf>.

²⁸ *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Petition for Declaratory Ruling of All About the Message, LLC, CG Docket No. 02-278 (filed Mar. 31, 2017).

²⁹ Snyder Comments, *supra* note 13, at ¶ 24.

prerecorded voice messages that are sent *en masse* to the cellular carriers' voicemail systems for subsequent retrieval by individual cellular subscribers."³⁰

3. In the delivery system described in paragraph 2, *supra*, the RVM system is using a "backdoor" channel to leave messages in cell phone subscribers' voice mail. This method of accessing the carrier's voicemail system is not likely to have been established for that purpose, or even approved by the carrier, and is likely outside the authorizations provided by the carrier to callers.
4. Consumers pay for their voicemail as part of their telephone service and are often charged for accessing voicemail messages. As illustrated in section II, *supra*, cell phone mailboxes are limited in size. When RVM messages are left, they use up the limited space, and can easily eliminate the consumer's ability to receive desired voicemail messages.
5. Receiving prerecorded messages requires a consumer to spend substantial amounts of time reviewing and deleting voicemail messages.
6. The method by which a computer-to-computer connection is used to deliver RVMs *en masse* is essentially the same technology that is used for sending SMS-based telemarketing text messages to cellular subscribers *en masse*. Exhibit 1, attached, illustrates the similarities between the two technologies.³¹
7. In addition to being like a text technologically, an RVM message is also conceptually just like a text because it is a message the consumer must do something to access. But, unlike texts, which a consumer can block, RVM messages cannot be blocked. Also, unlike automated texts, RVM messages are not limited in length.

³⁰ Snyder Comments, *supra* note 13, at ¶ 36.

³¹ The illustration in Exhibit 1 was first presented to the Commission in Randall Snyder's Comments on Petition for Expedited Ruling Filed by All About the Message, LLC as his Exhibit E. *See* Snyder Comments, *supra* note 13, at Exhibit E. The illustration was created by Randall Snyder.

IV. RVM Messages are Legally Calls under the TCPA

Petitioners argue that RVM messages are not calls covered by the TCPA because “(1) RVM transmissions do not constitute a functional equivalent of a call under the statute; (2) RVM technology does not use a wireless network to transmit messages; and (3) RVM technology does not bill potential voters for receiving voice messages.”³²

We disagree on all three counts: The messages are calls under the TCPA; wireless telephone networks are absolutely implicated in the receipt of RVMs to wireless subscribers (when the recipient accesses their mailbox to hear their messages); and as explained in section III, *supra*, recipients do pay for their voicemail messages.

A. RVM Messages are Calls Covered by the TCPA.

There are numerous courts that have explicitly held that the delivery of RVM messages involve calls, requiring consent under the TCPA.³³ As was stated in one case in which a vendor sent the

³² See Petition, *supra* note 3, at 3.

³³ See *Gurzi v. Penn Credit Corp.*, 449 F. Supp. 3d 1294, 1298 (M.D. Fla. 2020) (“use of direct-to-voicemail messages falls within the plain language of the TCPA” and “the broader context of the statute as a whole supports the Court’s finding that direct-to-voicemail messages fall within the TCPA”); *Caplan v. Budget Van Lines, Inc.*, 2020 WL 4430966, at *4 (D. Nev. July 31, 2020) (“TCPA is applicable to ringless voicemail; focusing on the method of delivery, as urged by defendant, “elevates form over substance”); *Grant v. Regal Auto. Group, Inc.*, 2020 WL 8254283, at *5 (M.D. Fla. July 30, 2020) (ringless voicemail is a “call” and therefore subject to TCPA), *adopted*, 2020 WL 8224838 (M.D. Fla. Sept. 29, 2020); *Schaevitz v. Braman Hyundai, Inc.*, 437 F. Supp. 3d 1237 (S.D. Fla. 2019); *Picton v. Greenway Chrysler-Jeep-Dodge, Inc.*, 2019 WL 2567971 (M.D. Fla. June 21, 2019) (rejecting argument that ringless voicemails are not subject to TCPA); *Dickson v. Direct Energy, L.P.*, 2019 WL 2396717, at *2 (N.D. Ohio Mar. 18, 2019) (ringless voicemails are attempts to communicate via telephone” within purview of TCPA); *Saunders v. Dyck O’Neal, Inc.*, 319 F. Supp. 3d 907, 911 (W.D. Mich. 2018) (use of direct to voicemail technology is a “call” under TCPA; “[t]he effect on [the plaintiff] is the same whether her phone rang with a call before the voicemail is left, or whether the voicemail is left directly in her voicemail box”); *Somogyi v. Freedom Mortg. Corp.*, 2018 WL 3656158 (D.N.J. Aug. 2, 2018) (applying TCPA’s restrictions on autodialed and prerecorded calls to ringless voicemail without identifying any issues that would complicate application of TCPA). See also *Smith v. Leif Johnson Ford, Inc.*, ___ S.W.3d ___, 2021 WL 3626402

consumer approximately thirty ringless voicemail messages over a one-year period, the effect on the consumer was the same whether her phone rang before the voicemail was left or whether the message was left directly in her voicemail box.³⁴ The court noted that the impact was the same as if the consumer had received a text message (which is clearly covered by the TCPA), commenting that “voicemails are arguably more of a nuisance to consumers than text messages.”³⁵ Further, the court found that limiting the TCPA to instances where the caller specifically dialed the consumer’s phone number and then reached her voicemail, thereby providing an exclusion for the “back door” into the consumer’s voicemail box, would produce “an absurd result,” as “[t]he TCPA was created to limit the harassment and nuisance that automated calls and messages place on consumers.”³⁶

The decisions cited here are based on the analysis that the RVM technology is nearly identical to the mass text messaging technology that the courts and the Commission have repeatedly found to constitute “calls” requiring full compliance with the TCPA.

When the Commission made this determination in 2015 it analyzed whether using a computer to communicate with a cell phone subscriber via a text message is a covered “call” under the TCPA. This finding was grounded in the recognition “that Internet-to-phone text messaging technology is used to initiate calls that ultimately are carried over wireless carriers’ networks to wireless consumers via their respective unique telephone numbers.”³⁷

113. . . . The carrier’s domain name performs the same function as routing data existing within the telephone network and used in a “traditional” voice or text call to

(Mo. Ct. App. Aug. 17, 2021) (affirming order certifying class action alleging that ringless voicemail campaign violated TCPA).

³⁴ *Saunders v. Dyck O’Neal, Inc.*, 319 F. Supp. 3d 907, 911 (W.D. Mich. 2018).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961 ¶¶ 113-122 (F.C.C. July 10, 2015) [hereinafter 2015 Omnibus Order].

identify the called party's carrier so that the call can be routed to the correct carrier for completion to the called party's wireless telephone number.³⁸

In the same paragraph, the Commission noted that “[t]he TCPA’s text and legislative history reveal Congress’s intent to give the Commission broad authority to enforce the protections from unwanted robocalls as new technologies emerge.”³⁹

Moreover, the Commission has explicitly held that voicemail messages are considered calls covered under the TCPA:

[V]oice message calls, as prerecorded messages, would be subject to the prohibitions of § 227(b)(1) and § 64.1200(a) of our rules. Thus, voice message calls could not be directed to an emergency line, a health care facility, radio common carrier services or other services for which the called party is charged for the call except in an emergency or with the prior express consent of the called party.⁴⁰

B. Wireless Telephone Networks are Used to Deliver RVMs to Wireless Subscribers

The prohibition in the TCPA against automated calls to cell phones prohibits “calls” “to any telephone number assigned to a . . . cellular telephone services”⁴¹ The Petition seeks to escape coverage under the TCPA because it maintains that the wireless network is not used to leave the RVM message.⁴² But this argument misses four critical points:

1) that the wireless carrier’s assigned *number* is used to identify the voicemail box into which the message should be inserted;

2) that when the message hits the voicemail box, it triggers an audible notice to the subscriber (which may or may not be of the same sound or duration as the one triggered by a call or text); and

³⁸ *Id.* at ¶ 113.

³⁹ *Id.*

⁴⁰ *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 92-90, Report and Order, 7 F.C.C. Rcd. 8752 ¶ 47 (F.C.C. Oct. 16, 1992).

⁴¹ 47 U.S.C. § 227(b)(1)(iii).

⁴² *See* Petition, *supra* note 3, at 2, 4, 5.

3) that the only way the recipient can access the message is through the wireless network.

Moreover, the FCC has already determined in the context of sending messages, that addressing a message to a particular telephone number assigned to a cell phone is a call as that term is used in the TCPA. On this issue, the FCC concluded its analysis of internet-to-text calling by stating:

114. We conclude that by addressing a message using the consumer's wireless telephone number (e.g., 5555551111@sprint.messaging.net or entering a message on a web portal to be sent to a consumer's wireless telephone number) and sending a text message to the consumer's wireless telephone number, the equipment dials a telephone number and the user of such technology thereby makes a telephone call to a number assigned to a wireless service as contemplated in section 227(b)(1) of the Act⁴³

The courts had already made the same determination. In *Satterfield v. Simon & Schuster, Inc.*,⁴⁴ the Ninth Circuit addressed the concept of mass texts from a text messaging server and found that a text message is a "call" within the meaning of the TCPA.⁴⁵ The court noted that the dictionary definition of "call" in this context was "to communicate with or try to get into communication with a person by a telephone."⁴⁶ Based on that definition, the Ninth Circuit found that, when enacting the TCPA:

Congress intended to regulate the use of an [automatic telephone dialing system] to communicate or *try to get into communication* with a person by a telephone.⁴⁷

⁴³ 2015 Omnibus Order, *supra* note 37, at ¶ 114 (emphasis added).

⁴⁴ 569 F.3d 946 (9th Cir. 2009).

⁴⁵ *Id.* at 952.

⁴⁶ *Id.* at 953–954 (quoting Webster's Third New International Dictionary (2002)).

⁴⁷ *Id.* at 954 (emphasis added). *See also* Fillichio v. M.R.S. Assocs., Inc., 2010 WL 4261442, at *3 (S.D. Fla. Oct. 19, 2010).

In *Joffe v. Acacia Mortg. Corp.*,⁴⁸ the court also addressed the definition of the word “call” in the TCPA, and expressly rejected the idea that only the usual two-way real-time voice intercommunication was prohibited, stating:

It is the act of making a call, that is, of attempting to communicate to a cellular telephone number using certain equipment, that the TCPA prohibits. Whether the call had the potential for a two-way real time voice communication is irrelevant.⁴⁹

The text message cases, including the two cited above, are supportive of this premise and consistent with it. The *Satterfield* court held that mass text messaging was a call and in violation of the TCPA, and the *Joffe* court held the same for messages that were sent in the form of computer-generated emails to the consumer’s cellular carrier, and addressed to the consumer’s cell phone number in order to be converted into text messages for transmission to his cell phone. Computer-generated texts sent to email addresses or to a carrier’s text server are not traditional telephone handset-to-telephone handset communications, yet they are within the definition of “call” and are prohibited by the TCPA. RVM messages are no different.

The technology that appears to be at issue in this case used to deliver RVM messages makes a data connection to a voicemail server instead of a text server by accessing the wireless network’s voicemail server. The technology then passes the cellular telephone number of the intended recipient to the voicemail server⁵⁰ in order to identify the particular voicemail box of the intended recipient-cellular phone user. This is exactly the same procedure as in the text message scenario. The message is then deposited in the voicemail box of the intended recipient, just as the text is then deposited in the text message server. The voicemail box server then alerts the user of a message and the message is retrieved. An alert tone is played, a visual message is displayed, and, with many

⁴⁸ 121 P.3d 831 (Ariz. Ct. App. 2005).

⁴⁹ *Id.* at 836 (emphasis added).

⁵⁰ *Id.* at 838.

phones today, a transcription of the message is sent to the phone. All of this is done without the user's consent.

C. Consumers are Charged for RVM Messages.

Contrary to the assertions made in Part II(C) of the Petition, the transmission of RVM messages falls under section 227(b)(1)(A)(iii) for a second reason—because, even if these calls were not made to telephone numbers assigned to cellular telephone services, they are often made to telephone numbers “assigned to ... any *service* for which the called party is charged for the call.” As explained in Section II, *supra*, above, and with more detail in the filings of two telecommunications experts, consumers are charged for these messages, as the voicemail system on a consumer's cell phone plan is part of the cell phone plan, voicemail boxes are limited in size, and when subscribers receive their voicemail through the visual voicemail function available on some cell phones, each new voicemail message uses up data allotments.

A cell phone carrier's voicemail box is clearly a service, and the Commission's rulings have repeatedly made it clear that consumers are “charged” when a call or message cuts into a limited number of minutes or a limited amount of data allowed under the consumer's plan. Indeed, unless there are carriers that provide an unlimited amount of voicemail capacity for their customers, all voicemail messages eat into limits under the consumer's plan.

V. Conclusion: RVMs are Significant Invasions of Privacy for Consumers

The courts have repeatedly recognized that ringless voicemail can cause significant injuries to consumers: including, variously, invasion of privacy, nuisance, aggravation, conversion, and trespass. These injuries are exactly the kinds of harm that the TCPA was enacted to prevent.⁵¹ Courts have

⁵¹ *See, e.g.*, *Caplan v. Budget Van Lines, Inc.*, 2020 WL 4430966, at *4 (D. Nev. July 31, 2020) (“At bottom, RVMs are still a nuisance delivered to the recipient's phone by means of the phone

allowed cases challenging RVMs to proceed based on allegations that consumers have experienced inconvenience, annoyance, and disruption to their daily lives, as well as economic costs associated with ringless voicemails.⁵² The potential breadth of such harms from RVMs is exemplified by direct marketing campaigns that feature thousands of calls made by just one sender.⁵³

The degree to which ringless voicemail is considered an invasion of privacy is illustrated by the **thousands** of individuals who have taken it upon themselves to file comments with the

number.”); *Schaevitz v. Braman Hyundai, Inc.*, 437 F. Supp. 3d 1237, 1250-1251 (S.D. Fla. 2019) (where plaintiff alleged “actual harm, including invasion of privacy, aggravation, annoyance, intrusion on seclusion, trespass, and conversion,” court found that these injuries were “not mere ‘procedural’ statutory violations; rather, they are precisely the kinds of harm the TCPA aims to prevent”); *Saunders v. Dyck O’Neal, Inc.*, 319 F. Supp. 3d 907, 911 (W.D. Mich. 2018) (“[t]he effect on [the plaintiff] is the same whether her phone rang with a call before the voicemail is left, or whether the voicemail is left directly in her voicemail box”); *Albrecht v. Oasis Power, L.L.C.*, 2018 WL 11269232, at *2 (N.D. Ill. Oct. 11, 2018) (allegation of calls made without consent and invading plaintiff’s privacy sufficient for TCPA standing); *Silbaugh v. Censtar Energy Corp.*, 2018 WL 4558409, at *3 (N.D. Ohio Sept. 21, 2018) (denying motion to dismiss for lack of standing; receipt of ringless voicemail is a concrete injury regardless of whether it causes the consumer’s phone to ring, as messages take up space in consumer’s voicemail box, may result in consumer having to pay a charge, and deplete phone’s battery; crediting allegations of “actual harm in the form of nuisance/invasion of privacy, monetary cost, and waste of time and resources”).

⁵² *See, e.g.*, *Schaevitz v. Braman Hyundai, Inc.*, 437 F. Supp. 3d 1237 (S.D. Fla. 2019) (plaintiff alleged that message inconvenienced him and disrupted his daily life); *Albrecht v. Oasis Power, L.L.C.*, 2018 WL 11269232, at *1, 2 (N.D. Ill. Oct. 11, 2018) (plaintiff alleged that four ringless voicemail messages resulted in invasion of privacy, aggravation, annoyance, intrusion on seclusion, trespass, and conversion; allegation of calls made without consent and invading plaintiff’s privacy sufficient for TCPA standing); *Silbaugh v. Censtar Energy Corp.*, 2018 WL 4558409 (N.D. Ohio Sept. 21, 2018) (finding that receipt of ringless voicemail is a concrete injury regardless of whether it causes consumer’s phone to ring, as messages take up space in consumer’s voicemail box, may result in consumer having to pay a charge, and deplete phone’s battery; crediting allegations of “actual harm in the form of nuisance/invasion of privacy, monetary cost, and waste of time and resources”).

⁵³ *See Grant v. Regal Auto. Group, Inc.*, 2020 WL 8254283 (M.D. Fla. July 30, 2020) (class action alleging that telemarketing campaign called for vendor to send 10,000 ringless voicemails), *adopted*, 2020 WL 8224838 (M.D. Fla. Sept. 29, 2020); *Smith v. Leif Johnson Ford, Inc.*, ___ S.W.3d ___, 2021 WL 3626402 (Mo. Ct. App. Aug. 17, 2021) (plaintiff produced evidence of contract showing that marketing agency would send 8,408 ringless voicemails; lower court’s finding of typicality confirmed where owners of 3,769 cell phone numbers were alleged to have received ringless voicemails in violation of TCPA).

Commission opposing this and related petitions.⁵⁴ Just a small sample of the comments from some of these individuals include the following:

- “As a **small business owner** allowing this change would have financial impact on my business [as a]loss of productivity by having to sort out meaningless voice mail and [f]inancial impact resulting from additional unneeded data being sent increasing my data expenditure. Please do not allow this bad idea to go any further[.]” * Jason Norige (Kirkland, WA)⁵⁵
- “My voice messaging service is important to me for both **my business and for my family security**. I do not want companies or political parties filling my voice mail with robo calls which de facto prevent me from receiving timely calls from clients or family members. Such use would deny me the functional voice messaging system which I pay for.” * Nicole Marchant (Seattle, WA)⁵⁶
- “**My phone is, at times, my livelihood** - allowing unsolicited advertisements to clog my voicemail and potentially prevent me from doing my job is unconscionable.” * Shawn Tetzlaff (Santa Ana, CA)⁵⁷
- “**As the Director of a procedural area in a major Boston hospital, my personal voicemail is crucial** to me to get information I need to help direct the care of patients that enter my department. Please do not create a situation where my personal voicemail can be filled up by spam that literally no one wants. By allowing this to happen, personal voicemail boxes will get filled to capacity (currently, cellular service providers cap the number of voicemail messages your voicemail inbox can hold), causing people to miss important personal and professional messages. Please do not allow yet another company to make money by harassing the American people; please work for us rather than corporate interests for a change!” * Chris Mercurio (Watertown, MA)⁵⁸
- “**As a mother and doctor, I need to be able to get to important voice mails, not sift through spam.**” * Tracy Javaherian (Jordan, MN)⁵⁹
- “The repercussions can be very **serious as in the case of healthcare providers**. A full voicemail box will result in patients not being able to leave urgent messages to healthcare

⁵⁴ See Federal Comm’n’s Comm’n Express Comment Filings at [https://www.fcc.gov/ecfs/search/filings?express_comment=1&limit=25&offset=75&proceedings_name=02-278&q=\(%22ringless%20voicemail%22\)&sort=date_disseminated,DESC](https://www.fcc.gov/ecfs/search/filings?express_comment=1&limit=25&offset=75&proceedings_name=02-278&q=(%22ringless%20voicemail%22)&sort=date_disseminated,DESC).

⁵⁵ Available at <https://www.fcc.gov/ecfs/filing/1060604357295> (emphasis added).

⁵⁶ Available at <https://www.fcc.gov/ecfs/filing/1060690139423> (emphasis added).

⁵⁷ Available at <https://www.fcc.gov/ecfs/filing/10606656311342> (emphasis added).

⁵⁸ Available at <https://www.fcc.gov/ecfs/filing/10607301215866> (emphasis added).

⁵⁹ Available at <https://www.fcc.gov/ecfs/filing/1060323223345> (emphasis added).

providers (or healthcare providers may not be able to leave urgent messages for patients).” * D. Lopez (Chicago, IL)⁶⁰

- “I am strongly opposed to ringless voicemail. This is a public safety issue when a company can inundate and essentially block others access to a person’s voicemail box. **Our county uses Reverse 911 to notify residents of forest fires, floods and other disasters. If voicemail boxes are full due to ringless voicemails, people will not get these emergency government messages and lives will be lost.**” * Paul Strong (Steamboat Springs, CO)⁶¹
- **“Those of us who pay for our service . . . pay for data usage and minutes. . . .** Do you realize what cell phone service is like in WV? It is little to none in most rural areas of WV. Our voicemail boxes would be full in no time, as we have to travel to have service to receive our messages and then to think an important message did not get through to us because of some useless telemarketer message is just ridiculous! Don't say we can depend on our landline service for important calls because that just isn't true. . . . **DO NOT PASS “ringless voicemail.”** * Mary Jane Ferrell (Middlebourne, WV)⁶²
- “I choose not to answer any call I receive when I do not recognize the caller. . . . If you allow these calls to go to voice mail that requires me to call and get my messages. **Those calls cost me money.**” * Margaret Jaccoi (Sun City Center, FL)⁶³
- “I am an older citizen and do not use my phone daily. To save money, am on a plan that requires paying \$2 daily when used and **retrieving ringless voice mails requires a call and generates a \$2 fee.**” * Ilene Richman (New York, NY)⁶⁴

The Commission should be aware of the substantial intrusion upon the privacy of telephone subscribers caused by ringless voicemail, and refuse to allow purveyors of this invasive technology to escape the requirements that consent must be provided before calls with prerecorded voice are made to wireless telephone subscribers.

⁶⁰ Available at <https://www.fcc.gov/ecfs/filing/1060613349374> (emphasis added).

⁶¹ Available at <https://www.fcc.gov/ecfs/filing/10605178204139> (emphasis added).

⁶² Available at <https://www.fcc.gov/ecfs/filing/10607136188818> (emphasis added).

⁶³ Available at <https://www.fcc.gov/ecfs/filing/10606082012705> (emphasis added).

⁶⁴ Available at <https://www.fcc.gov/ecfs/filing/106041544923987> (emphasis added).

Respectfully submitted:

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On behalf of:

The low-income clients of the National Consumer Law Center, and
Consumer Action
Consumer Federation of America
EPIC
National Association of Consumer Advocates
U.S. PIRG

**Exhibit 1
Diagram by Randall Snyder**

