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Before the  
Subcommittee on Constitution and Civil Justice  
Judiciary Committee  
U.S. House of Representatives  
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Chairman King, Ranking Member Cohen and other Members of the Subcommittee, I appreciate the opportunity to discuss with you the important issues regarding the continued efficacy of the Telephone Consumer Protection Act of the 1991 (“TCPA”) and appropriate proposals for its reform.

I am the founding partner of Tycko & Zavareei LLP, a private public interest law firm that represents small businesses, consumers, and whistleblowers. I am also a board member of Public Justice, a nonprofit foundation that pursues high impact lawsuits to combat social and economic injustice, protect the Earth’s sustainability, and challenge predatory corporate conduct and government abuses. Before forming my firm, I litigated on behalf of corporate clients for seven years at Gibson, Dunn & Crutcher LLP. Since then, I have litigated class actions and individual actions in state and federal courts across the country. I am a frequent speaker on subjects relating to class action litigation, including the TCPA. I provide this testimony in my individual capacity.

**I. Introduction**

Congress passed the TCPA twenty-five years ago to protect consumers from runaway telemarketing that was threatening the privacy of Americans through new technologies. The TCPA was deliberately broad and flexible, drafted in such a way that it would allow the FCC to protect consumers as telecommunications technology advanced. Today, Americans rely more and more on their cellular telephones and smart phones, which have become our last bastion of privacy. Americans closely guard their cell phone numbers, which are generally not listed and not publicly available. But some businesses believe that they should have the right to reach into people’s pockets and call or text them on the numbers that they reserve for family, friends, medical emergencies, and other important personal and business matters.

Fortunately, the FCC has determined the TCPA’s coverage of cell phones includes text messages. As such, private enforcement of the TCPA has served as one of the only bulwarks against bombardment of our cell phones by big businesses that wield big data as the primary tool for targeting their ever-invasive marketing campaigns. Despite the hue and cry of businesses complaining about the massive liability imposed by the TCPA, the truth is that these businesses know the rules and know how to play by them. If they want to reach their own consumers, all they need to do is obtain consent—which is a complete defense to all TCPA actions. Consumers are not clamoring for Congress to make it easier for businesses to clog their phones with text messages and robocalls. What is happening is a reaction by big business to a law that puts

consumers first and places modest limits on when and how businesses can reach into our cell phones and demand our attention.

The TCPA was enacted to put restrictions on how far businesses may go into our private spaces—our workplaces, our cars, our bedrooms. Congress should not relax these important and effective privacy protections. If anything, Congress should fortify the TCPA to provide greater protection of privacy.

## **II. The Need For The TCPA’s Protections Is Greater Today Than Ever Before**

Senator Fritz Hollings, a strong protector of consumer rights and one of the TCPA’s original sponsors, eloquently explained the need for the TCPA: “Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.” 137 Cong. Rec. 30821–30822 (1991). The reasons undergirding the TCPA apply with equal strength today to modern telecommunications and telemarketing, which is centered on the primacy of smart phones and cell phones.

Concurrent with passing the TCPA in 1991, Congress made several findings supporting the need for the TCPA, all of which remain relevant today:

- Congress found that more than 300,000 telephone solicitors called more than 18,000,000 Americans every day. Telephone Consumer Protection Act of 1991, PL 102–243, December 20, 1991, 105 Stat 2394, at Section 2(3);
- Congress likewise found that “[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.” *Id.* at 2(5);
- It similarly found “that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy,” and that “consumers [we]re outraged over the proliferation” of such calls. *Id.* at 2(6), 2(10); and
- Congress found that unsolicited calls placed to fax machines, and cellular or paging telephone numbers often impose a cost on the called party (fax messages require the called party to pay for the paper used, cellular users must pay for each incoming call, and paging customers must pay to return the call to the person who originated the call).

*See* S. Rep. 102-178 (Oct. 8, 1991). In short, the TCPA was enacted to protect the privacy rights of Americans against intrusive telemarketing.<sup>1</sup>

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<sup>1</sup> *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (“The purpose and history of the TCPA indicate that Congress was trying to prohibit the use of ATDSs to communicate with others by telephone in a manner that would be an invasion of privacy.”); *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 268 (3d Cir. 2013) (“Congress passed the TCPA to protect individual consumers from receiving intrusive and unwanted calls.”); *Ung v. Universal Acceptance Corp.*, \_\_\_ F. Supp. 3d \_\_\_, No. CV 15-127 (RHK/FLN), 2017 WL 1288378, at \*2 (D. Minn. Apr. 6, 2017) (The TCPA “was aimed at slowing (if not stopping) the rapid increase in

Today, the primary target for telemarketing is our cell phones—which have become almost engrafted to the minds and bodies of consumers. Invasions of this last bastion of privacy are anathema to consumers’ expectations of peace and privacy. Absent the protections of the TCPA, consumers’ voicemail boxes would fill up rapidly—squeezing out room for personal messages. The same goes for spam text messages, which would rapidly clutter our phones and make it difficult to sort through junk texts to find important personal messages. When their cell phones become bombarded with telemarketing calls, consumers are less likely to answer the phone, causing them to miss important personal calls. And these unwanted calls and texts messages are most costly for those who can least afford to pay for them. While some Americans have unlimited minutes data and call plans, that is by no means the case for low-income Americans. Indeed, by the fourth quarter of 2016, the top five branded prepaid operators collectively had 76.7 million prepaid subscribers.<sup>2</sup> Thus, these unwanted calls and texts have a real economic impact on millions of low-income Americans.

As explained by Senator Nelson, the TCPA is incredibly popular, and there is no constituent demand by the general public for its reform or repeal:

This law is one of the preeminent and most loved consumer protection statutes we have . . . There are few things that unite Americans more than their visceral dislike of robocalls. Go anywhere in this country and ask the average consumer: Do you want to receive more unwanted robocalls? How about more robocalls on your mobile phone? You may just get a mobile phone thrown at you. . . . For most of us, our cell phone is our lifeline and our haven. If we allow those annoying robocalls to begin freely bombarding folks’ mobile phones, where do those people go to escape the harassment? What happens when people start to ignore calls to their mobile phones from unknown numbers so they don’t have to hear another recording, only to miss an important call about a loved one or friend? What about elderly and low-income Americans? Many of these consumers still subscribe to cell phone calling plans that are restricted in the number of minutes they can use per month. . . . But make no mistake: outside this hearing room, outside the corporate boardrooms, outside the offices of defense counsel or debt collectors, the idea of allowing greater access for robocalls to consumers’ cell

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telemarketing calls.”); *US Fax Law Ctr., Inc. v. iHire, Inc.*, 362 F. Supp. 2d 1248, 1252 (D. Colo. 2005) (“The TCPA is designed to protect privacy interests.”); *Joseph N. Main P.C. v. Elec. Data Sys. Corp.*, 168 F.R.D. 573, 575 (N.D. Tex. 1996) (“TCPA’s purpose is to protect the individual telephone consumer by discouraging and preventing those annoying telephone calls which come in the middle of dinner, prerecorded sales pitches which fill an entire answering machine tape, and unsolicited faxes which waste time, paper and ink.”)

<sup>2</sup> See Fourth Quarter 2016 Prepaid Mobile Subscriber Numbers By Operator, Prepaid Phone News, February 14, 2017, available at <http://www.prepaidphonenews.com/2017/02/fourth-quarter-2016-prepaid-mobile.html>.

phones without their consent is an idea that is dead on arrival with the American people.<sup>3</sup>

In light of the massive numbers of consumer complaints about robocalls and unsolicited text messages, now is *not* the time to relax the strictures of the TCPA. As Congressman Frank Pallone, Jr. wrote in connection with a 2016 House Energy and Commerce Committee hearing on the TCPA, consumers still receive 2.6 billion robocalls per month.<sup>4</sup> In 2016, the FCC and FTC received almost 4 million complaints about robocalls and telemarketing.<sup>5</sup> And while businesses might want to water down the TCPA, “constituents are rightfully growing impatient with these calls, and they expect [Congress] to fix the problem.” *Id.* Curtailing the TCPA would only add to the problem that “most of us have dealt with on a personal level: pesky robocalls. Many constituents have contacted my office in search of a solution to stop the unwanted calls, and I am sure the same is true for my colleagues.”<sup>6</sup>

### **III. The TCPA Has Successfully Curtailed Intrusive Telemarketing Practices Of Legitimate Businesses, Who May Still Text And Robocall Customers**

#### *A. The TCPA Was Deliberately Directed At Legitimate Businesses*

Most of the attacks on the TCPA are clothed in concern for “legitimate businesses,” suggesting that the TCPA was only enacted to impact fraudulent actors.<sup>7</sup> Indeed, the defense bar and other opponents of the TCPA seem to believe legitimate businesses should be immune from

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<sup>3</sup> Statement of Ranking Member Senator Bill Nelson, May 18, 2016 hearing, The Telephone Consumer Protection Act at 25: Effects on Consumers and Business, available at [https://www.commerce.senate.gov/public/index.cfm/hearings?Id=7FDEF85E-BF1F-475C-BE3F-1E011EA5A909&Statement\\_id=E69644B4-ECA4-4050-8809-83766F04AF01](https://www.commerce.senate.gov/public/index.cfm/hearings?Id=7FDEF85E-BF1F-475C-BE3F-1E011EA5A909&Statement_id=E69644B4-ECA4-4050-8809-83766F04AF01).

<sup>4</sup> See Congressman Pallone Statement at Robocalls Hearing, Sept. 22, 2016, available at <http://docs.house.gov/meetings/IF/IF16/20160922/105351/HHRG-114-IF16-MState-P000034-20160922.pdf> (“Just this past month a record 2.6 billion robocalls flooded our cell phones, work phones, and home phones. These calls are more than just a nuisance. They can add up to harassment or even outright fraud.”).

<sup>5</sup> See [https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2016/dnc\\_data\\_book\\_fy\\_2016\\_post.pdf](https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2016/dnc_data_book_fy_2016_post.pdf); [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-333676A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-333676A1.pdf).

<sup>6</sup> Congressman Fred Upton, Statement at Robocalls Hearing, Sept. 22, 2016, available at <http://docs.house.gov/meetings/IF/IF16/20160922/105351/HHRG-114-IF16-MState-U000031-20160922.pdf>.

<sup>7</sup> See, e.g. Herb Weisbaum, Businesses Are Asking Congress to Weaken Robocall Laws, NBC News, May 23, 2016, available at <http://www.nbcnews.com/business/consumer/businesses-are-asking-congress-weaken-robocall-laws-n578716> (“The ‘explosion of class action litigation’ involving prohibited robocalls to mobile phones—with potential penalties that could reach into the billions—is a serious problem, said Harold Kim, executive vice president of the U.S. Chamber of Commerce Institute for Legal Reform. ‘This litigation has created an enormous amount of risk and has had a chilling effect on legitimate businesses, large and small, who are trying to communicate with their customers,’ Kim told NBC News.”)

the protections of the TCPA. But the TCPA was never intended only to target fraudulent businesses. As explained above, the primary focus of the TCPA was to limit the overwhelming telemarketing that was deluging people almost endlessly. This telemarketing was not being conducted by scam operations, but by so-called legitimate businesses.

As one assistant Attorney General explained, the telemarketers manipulating vulnerable consumers were not “just some fly-by-night operator who lurks in the shadow. It’s Publisher’s Clearinghouse, Reader’s Digest, American Family Publishers, Fingerhut, and United States Postal Exchange that consumers are losing money to.”<sup>8</sup> Thus, the TCPA was meant to prevent all manner of improper robocalls, including by legitimate businesses that are most capable of exploiting their access to big data to intrude on telephone customers’ privacy and inundate them with telemarketing calls, texts, and faxes.

Indeed, this is where the TCPA has been most effective. As a result of the TCPA, and its highly effective private enforcement regime, legitimate businesses know that they cannot engage in certain unlawful conduct proscribed by the TCPA.<sup>9</sup> For example, Senator Thune, Chairman of the Senate Commerce Committee, acknowledged that the TCPA is working, and “[a]s a result of TCPA, a number of abusive and disruptive telemarketing practices have been significantly reduced or eliminated.”<sup>10</sup>

#### *B. Businesses May Text And Call Customers With Consent*

Critics of the TCPA claim that it goes too far and limits necessary communications: “Many companies use these calls to alert us about fraud and identity theft; to confirm transactions; to remind us of appointments or due dates; to help avoid overdraft fees; and generally to facilitate better customer service or relations. These calls are innocuous.”<sup>11</sup> In fact,

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<sup>8</sup> Darice Bailer, *Those Too Friendly Telemarketers: Lessons to Head*, NY TIMES (Sept. 7, 1997), available at <http://www.nytimes.com/1997/09/07/nyregion/those-too-friendly-telemarketers-lessons-to-head.html>.

<sup>9</sup> Spencer Weber Waller *et. Al.*, *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 LOY. CONSUMER L. REV. 343, 374–75 (2014) (“The TCPA has been relatively successful at reducing the number of junk fax complaints and unwanted telemarketing calls. Legitimate companies are largely deterred by the TCPA’s private right of action. This, coupled with limited government enforcement, has perpetuated a dependency on the private right of action. However, the government’s decision to implement the Do-Not-Call Registry, and the period of increased enforcement by the FCC from 2006-2008 demonstrate the positive impact that government involvement has on the success of TCPA regulation.”)

<sup>10</sup> See Statement of Chairman Thune, May 18, 2016 hearing, The Telephone Consumer Protection Act at 25: Effects on Consumers and Business, [https://www.commerce.senate.gov/public/index.cfm/hearings?Id=7FDEF85E-BF1F-475C-BE3F-1E011EA5A909&Statement\\_id=CC6EE0B6-6C2F-4DA5-A277-33ECE979A8E4](https://www.commerce.senate.gov/public/index.cfm/hearings?Id=7FDEF85E-BF1F-475C-BE3F-1E011EA5A909&Statement_id=CC6EE0B6-6C2F-4DA5-A277-33ECE979A8E4).

<sup>11</sup> Adonis Hoffman, *Sorry, Wrong Number, Now Pay Up*, Wall Street Journal, June 15, 2015, <https://www.wsj.com/articles/sorry-wrong-number-now-pay-up-1434409610?K>.; see also Allison Frankel, *Why does big business want the FCC to ease telemarketing rules?* Reuters,

the TCPA does *not* prevent legitimate business from using robocalls and text messages to reach their consumers if the consumers actually want to receive them. As Senator Nelson noted at the same hearing, “there is already an answer to that—just get the consumer’s consent first as businesses have been able to do since the law was passed in 1991.”<sup>12</sup>

And businesses and other entities operate with incredibly wide latitude because of the broad definitions of consent. Unless a call is telemarketing, “express consent” can actually be given implicitly by the provision of a phone number. Indeed, in 2015, the FCC ruled as such, when it found that the FCC’s rules do not “require any specific method by which a caller must obtain such prior express consent,” and, that the means by which express consent can be obtained include situations where an individual “without instructions to the contrary, [] give[s] his or her wireless number of the person initiating the autodialed or prerecorded call.” *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, ¶¶ 49, 52 (2015). And the vast majority of cases to address the issue have held that the telephone customer who provides a phone number consents to receive calls or texts from that party.<sup>13</sup>

Most notably, this means that if a person provides his or her phone number to a debt collector, the collector can call or text without going afoul of the TCPA. *See In the Matter of*

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February 3, 2015, available at <http://blogs.reuters.com/alison-frankel/2015/02/03/why-does-big-business-want-the-fcc-to-ease-telemarketing-rules/> (“Meanwhile, Kim [of the Chamber of Commerce’s Institute for Legal Reform] said, the Chamber gets calls at least once a week from members – small businesses as well as large companies – worried about the TCPA... ‘The defendants in these cases are no longer just the telemarketers that Congress targeted; they are businesses, big and small alike, forced to choose between settling the case or spending significant money defending an action where the alleged statutory damages may be in the millions, or even billions, of dollars,’ the Chamber letter said. ‘The wide-spread litigation and the specter of devastating class action liability has or may spur some businesses and organizations to cease communicating important and time-sensitive non-telemarketing information via voice and text to the detriment of customers, clients, and members.’”)

<sup>12</sup> Statement of Ranking Member Senator Bill Nelson, May 18, 2016 hearing, The Telephone Consumer Protection Act at 25: Effects on Consumers and Business, available at [https://www.commerce.senate.gov/public/index.cfm/hearings?Id=7FDEF85E-BF1F-475C-BE3F-1E011EA5A909&Statement\\_id=E69644B4-ECA4-4050-8809-83766F04AF01](https://www.commerce.senate.gov/public/index.cfm/hearings?Id=7FDEF85E-BF1F-475C-BE3F-1E011EA5A909&Statement_id=E69644B4-ECA4-4050-8809-83766F04AF01).

<sup>13</sup> *See, e.g., Van Patten v. Vertical Fitness Grp., LLC*, 22 F. Supp. 3d 1069, 1073-77 (S.D. Cal. 2014); *Baird v. Sabre Inc.*, 995 F. Supp. 2d 1100, 1106 (C.D. Cal. 2014); *Emanuel v. L.A. Lakers, Inc.*, No. CV 12-9936-GW(SHx), 2013 WL 1719035 (C.D. Cal. Apr. 18, 2013); *Roberts v. PayPal, Inc.*, No. C 12-0622 PJH, 2013 WL 2384242 (N.D. Cal. May 30, 2013); *Olney v. Job.com, Inc.*, No. 1:12-CV-01724-LJO, 2014 WL 1747674, at \*5 (E.D. Cal. May 1, 2014); *Pinkard v. Wal-Mart*, No. 3:12-cv-02902-CLS, 2012 WL 5511039 at \*2 (N.D. Ala. Nov. 9, 2012); *Murphy v. DCI Biologicals Orlando, LLC*, No. 6:12-cv-1459-Orl-36KRS, 2013 WL 6865772 (M.D. Fla. Dec. 31, 2013); *Steinhoff v. Star Media Co., LLC*, No. 13-cv-1750 (SRN/JSM), 2014 WL 1207804 (D. Minn. Mar. 24, 2014); *Andersen v. Harris & Harris*, No. 13-CV-867-JPS, 2014 WL 1600575 (E.D. Wis. Apr. 21, 2014); *Reardon v. Uber Techs, Inc.*, 115 F. Supp. 3d 1090, 1097-99 (N.D. Cal. 2015).

*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 F.C.C. Rcd. 559, ¶ 9 (2008) (“We conclude that the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.”).

C. *The TCPA Is A Narrow Statute That Does Not Apply To Important Non-Telemarketing Communications*

There are also carve-outs for emergency messages. Indeed, sections B(1)(A) and (b)(1)(B) of the TCPA exempt calls made or initiated “for emergency purposes.” The FCC broadly defined “emergency purposes” as “calls made necessary in any situation affecting the health and safety of consumers.” 47 C.F.R. § 64.1200(f)(4). It has also provided a number of examples of the scope of emergency purposes, to buttress this broad definition. For example, it has stated that “emergency purposes” could include calls or texts about “[s]ervice outages and interruptions in the supply of water, gas or electricity,” *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, ¶ 51 (1992), calls made under the Commercial Mobile Alert System or Warning, Alert and Response Network (“WARN”) Act, *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 1830, ¶ 17 (2012), or “calls or messages [from schools] relating to weather closures, incidents of threats and/or imminent danger to the school due to fire, dangerous persons, health risks (*e.g.*, toxic spills), and unexcused absences.” *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 31 F.C.C. Rcd. 9054, ¶ 21 (2016).

With respect to medical information, the FCC has enacted what has sometimes been referred to as the “Health Care Rule,” *see Zani v. Rite Aid Headquarters Corp.*, \_\_\_ F. Supp. 3d \_\_\_, at \*6 (S.D.N.Y. Mar. 30, 2017), which reduces the burden of obtaining consent with respect to certain health care-related calls. 47 C.F.R. § 64.1200(a)(2). And the FCC recently confirmed that schools may lawfully make robocalls and send automated text messages to student families without prior consent.<sup>14</sup> In the same ruling the FCC similarly confirmed that utilities may send text messages and robocalls to their customers relating to the utility service, including service outages or warnings about potential interruptions. *Id.*

Despite the rhetoric of its opponents, the TCPA is narrowly crafted. And most legitimate businesses know the rules and are playing by them. That is because of the potentially high cost of violating the law—which has successfully deterred unlawful conduct. If Congress takes away those guardrails, the current deluge of calls and texts will multiply exponentially. Why? Because everyone wants to get into our cell phones—*especially* big, legitimate businesses. Cell phones are the ultimate captive audience.

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<sup>14</sup> *In re Blackboard, Inc.*, FCC 16-88, available at [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-16-88A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-88A1.pdf).

D. *Where The TCPA Does Not Apply, Legitimate Businesses Are Abusing Their Access To Consumers' Cell Phones—Illustrating That the TCPA Works When It Does Apply*

We know this because where the TCPA does not restrict telemarketing, the so-called legitimate businesses are engaging in aggressive telemarketing. This is perhaps most pronounced in the highly lucrative debt collection business—which mostly targets low income Americans. The CFPB's 2015 Annual Report showed that 40 percent of debt collection complaints involved repeated attempts to collect *debts not owed*, including complaints that the debt did not belong to the person being called.<sup>15</sup>

One such legitimate business is Navient Solutions, Inc. (“Navient”), a Fortune 500 loan servicing company. As part of its student loan collection business, Navient aggressively contacts student loan holder (and others who Navient falsely believes are student loan holders) as part of its collection efforts. Navient has deliberately engaged in a campaign of harassing and abusing consumers through the use of repeated, unconsented-to robocalls, calling consumers' cell phones hundreds, and—in some cases—thousands of times *after* being asked to stop. Many of these calls occur multiple times a day, often numerous times a week. These calls are frequently made to consumers while they are at work, even after they have explicitly explained to Navient that they cannot accept personal calls at work. Indeed, Navient's internal policies permit up to eight calls per day in the servicing of student loan debt.<sup>16</sup> Since 2014, there have been over 18,389 complaints reported to the CFPB just about Navient's practices.<sup>17</sup> In one class action, the plaintiffs allege that that Navient “placed 9,688,533 autodialed calls to 276,874 unique cellular telephone numbers, from May 4, 2011 through May 4, 2015, after its own records included a wrong number designation for each of them. In other words, during a recent four-year period, Navient placed over nine million autodialed calls to over a quarter of a million cellular telephone users or subscribers, each of whom previously informed Navient they did not want to receive calls from it. And during the same time period, Navient used an artificial or prerecorded voice in connection with autodialed calls it placed to 123,371 cellular telephone numbers it earlier labeled as wrong numbers.” *Johnson v. Navient Solutions, Inc.*, Case No. 1:15-cv-0716-LJM-MJD (S.D. Ind. filed May 4, 2015), Plaintiff's Summary Judgment Motion.

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<sup>15</sup> See Consumer Financial Protection Bureau, Consumer Response Annual Report 16 (January 1 - December 31, 2015) available at [http://files.consumerfinance.gov/f/201604\\_cfpb\\_consumer-response-annual-report-2015.pdf](http://files.consumerfinance.gov/f/201604_cfpb_consumer-response-annual-report-2015.pdf). In fact, 18 percent of all the complaint to the CFPB about debt collectors were about debt collection communication tactics. Similarly, a 2009 Scripps Survey Research Center (Ohio University) study found that 30 percent of respondents received calls regarding debts that were not theirs. See Marcia Frellick, Survey: Debt collection calls growing more frequent, aggressive, Creditcard.com, Jan. 28, 2010, available at <http://www.creditcards.com/credit-card-news/debt-collectors-become-more-aggressive-break-law-1276.php>.

<sup>16</sup> See, e.g., *McCaskill v. Navient Solutions, Inc.*, 178 F. Supp. 3d 1281, 1286 (M.D. Fla. 2016).

<sup>17</sup> See Consumer Fin. Prot. Bureau, Dataset of Navient Complaints, available at <https://data.consumerfinance.gov/dataset/navient-complaints/xas4-kc2q>.

The Navient example begs the question of why, in the face of the TCPA, would a legitimate business engage in such aggressive conduct. The answer is that Navient believes its conduct is exempt from the TCPA because it had express prior consent—namely, the provision of a telephone number. In numerous lawsuits regarding these practices, Navient has also claimed that the prior express consent requirement for robocalls no longer applies because of an amendment to the TCPA in the Budget Act of 2015.<sup>18</sup> Regardless of whether this is correct—and I believe it is not—Navient’s behavior demonstrates what happens when legitimate businesses believe that they have *carte blanche* to bombard our telephones with robocalls: they bombard our telephones with robocalls. For this reason it is incredibly important that Congress tread lightly when considering any changes to the TCPA.

#### **IV. TCPA Litigation Is A Highly Effective Free Market Mechanism For Curtailing Robocalls And Spam Text Messages**

Another false narrative is the contention that legitimate businesses are being buried by an avalanche of frivolous lawsuits that are bankrupting small businesses who are just trying to serve their customers. As discussed above, the TCPA is very narrow. And I know from personal experience that these lawsuits are very challenging. Consent is a complete defense—and businesses are free to communicate with current customers if they provided their numbers to the business for any purpose. A 2014 study showed that the private enforcement mechanism of private enforcement through litigation has been highly effective in limiting intrusive robocalls and text messages:

Private parties are largely responsible for the enforcement of the TCPA, and have done so primarily through the class action mechanism. While this has drawn some criticism because of the provision of high statutory damages, the threat of class action[s] has provided a significant deterrent to violators. Historically the government has only enforced the TCPA to a limited extent, yet the statute has been relatively successful in reducing the conduct it was intended to regulate.<sup>19</sup>

The sheer numbers of lawsuits are often touted as evidence that the TCPA is being abused. But such numbers—in a void without further analysis—are not evidence of abuse. The following chart, prepared by the National Consumer Law Center, shows that while there are millions of complaints about robocalls, the lawsuits actually brought are a small fraction of those complaints.<sup>20</sup>

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<sup>18</sup> Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 § 301 (Nov. 2, 2015) (directing the FCC to implement regulations allowing calls to cell phones without consent relating to the servicing of federal student loans owned or guaranteed by the United States).

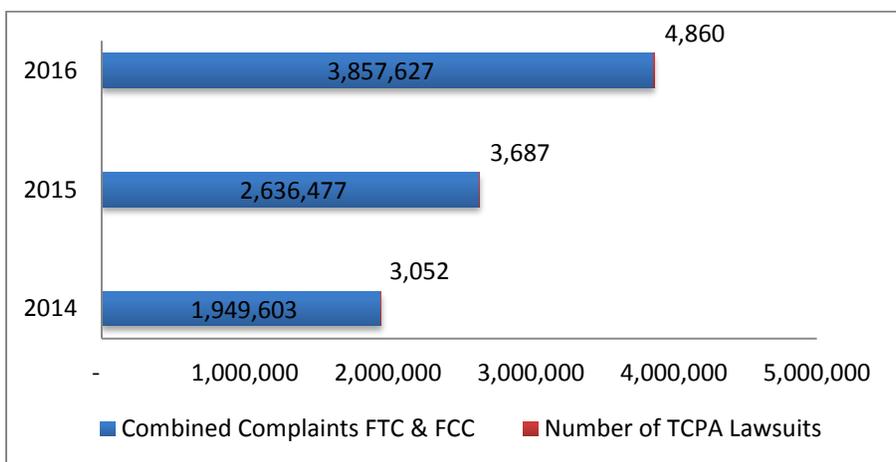
<sup>19</sup> Waller, 26 LOY. CONSUMER L. REV. 343, at 348.

<sup>20</sup> The NCLC obtained this data from the following sources:

<https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2014/dncdatabookfy2014.pdf>;

<https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2015/dncdatabookfy2015.pdf>;

<https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2016/dncdatabookfy2016.pdf>



These data show that in 2014, 2015 and 2016 actual TCPA lawsuits amounted to only .1% of all robocall complaints to the FCC and FTC. Other data indicate that the number of TCPA lawsuits appears to be falling. For example, in February of 2017, the number of TCPA lawsuits went down by 6.7% compared to the same month in 2016.<sup>21</sup> This is consistent with my anecdotal experience and conversations with other attorneys, which indicates that as legitimate businesses better understand the rules of the road under the TCPA, they are less likely to violate the law.

These data also must be considered in light of the larger body of federal cases filed. For example, in 2015 there were 280,037 civil cases initiated in federal court.<sup>22</sup> In 2016 there were 277,290 civil cases filed in federal court.<sup>23</sup> As a whole then, TCPA cases amounted to only 1.3% (2015) and 1.8% (2016) of all civil cases filed. Another statistic is also noteworthy as the Subcommittee explores changes to the TCPA that could impact the ability to bring class action cases—only 24% of TCPA cases are brought as class actions.

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[fiscal-year-2016/dnc\\_data\\_book\\_fy\\_2016\\_post.pdf](#);  
[https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-333676A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-333676A1.pdf);  
<https://opendata.fcc.gov/Consumer-and-Government-Affairs/Consumer-Complaints-Data-Unwanted-Calls/vakf-fz8e>; <https://opendata.fcc.gov/Consumer-and-Government-Affairs/Consumer-Complaints-Data-Unwanted-Calls/vakf-fz8e>; <https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/>.

<sup>21</sup> *Webrecon Stats for Feb 2017: Consumer Litigation Down a Bit, Up a Bit ... CFPB Complaints Explode*, WebRecon LLC blog, available at <https://webrecon.com/webrecon-stats-for-feb-2017/>.

<sup>22</sup> *Table C-3—U.S. District Courts—Civil Statistical Tables For the Federal Judiciary*, United States Courts (Dec. 31, 2016), available at <http://www.uscourts.gov/statistics/table/c-3/statistical-tables-federal-judiciary/2016/12/31>.

<sup>23</sup> *Table C, U.S. District Courts—Civil Cases Commenced, Terminated, and Pending*, United States Courts (Dec. 31, 2015-Dec. 31, 2016), available at [http://www.uscourts.gov/sites/default/files/data\\_tables/stfj\\_c\\_1231.2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/stfj_c_1231.2016.pdf).

Finally, the rising number of lawsuits from 2014 to 2016 correlates directly with the dramatic increases in the use of wireless data. In 2016 U.S. wireless traffic totaled 13.72 trillion megabytes—an increase of 238 percent over the prior two years.<sup>24</sup> Similarly, the average amount of time adults spend using their cell phones has gone from one hour and twenty three minutes in 2014 to two hours and thirty two minutes in 2016. *Id.* Thus, the increase in TCPA class actions is likely a natural consequence of the increased use of cellular telephones.

The TCPA was designed as a private enforcement mechanism with good reason. There has been scant public enforcement by the FTC or the FCC relating to robocalls or unwanted text messages. Congress established an incentive system that has worked by making it costly for legitimate businesses to invade American’s privacy by reaching into their homes and their cell phones to sell them goods and services. Americans expect and are entitled to control their own telephones. The TCPA works because it makes it cost prohibitive for telemarketers to invade this last realm of privacy. Businesses may want to take over our phones with their telemarketing, but that is not what the American public wants.

## **V. The Courts Are Well-Equipped To Handle Abusive Litigation Practices**

Purported concerns about individuals who have not been harmed “manufacturing” standing in order to bring TCPA lawsuits are overblown. Indeed, courts are well-equipped to and have demonstrated the ability to weed out dubious claims brought by plaintiffs with questionable motives. For example, in the recent case of *Epps v. Earth Fare, Inc.*, a plaintiff brought a TCPA claim based on having received text messages after having purportedly opting out of receiving such messages. No. 16-08221 SJO (SSx), 2017 WL 1424637, at \*1 (S.D. Cal. Feb. 27, 2017). In analyzing the plaintiff’s claim, Judge Otero of the Central District of California observed that the plaintiff purposely chose to opt-out via questionable means, rather than simply sending a text message with the word “STOP,” as the defendant instructed. *Id.* at \*5. Based on this fact, and evidence that the plaintiff had filed duplicate cases elsewhere, the court had no difficulty finding that the TCPA claim amounted to “a ‘manufactured’ lawsuit,” and dismissed the case for failure to state a claim. *Id.* There is simply no need to modify the TCPA out of a concern for “manufactured” lawsuits. Rather, the better approach is to allow courts to filter out artificial claims, which courts like *Epps* have no difficulty doing in the TCPA or any context. This reasonable approach will ensure that individuals with legitimate TCPA claims continue to have access to courts.

## **VI. Congress Should Strengthen, Not Weaken, The Protections Of The TCPA**

If anything, the TCPA should be expanded, to make it harder—not easier—for businesses to bombard consumers with unwanted robocalls. Two modest adjustments would go a long way.

First, Congress could clarify that “express consent” may not be given by simply providing a business a telephone number. As Black’s Law Dictionary states, “express consent” is “consent that is clearly and unmistakably stated.” Black’s Law Dictionary 323 (8th ed. 2004).

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<sup>24</sup> CTIA, Wireless Snapshot 2017, <https://www.ctia.org/docs/default-source/default-document-library/ctia-wireless-snapshot.pdf>.

This definition runs directly contrary to the notion that *express* consent can be obtained through mere provision of a telephone number, as this alone would require a significant *inference*, which falls well short of being “clear” or “unmistakable.” Although the FCC in 2008 did directly rule that provision of a cellular telephone number *to a creditor* amounts to express consent to be contacted *regarding the debt*, 23 F.C.C. Rcd. 559, ¶ 9, it has made no analogous holding regarding telephone calls outside of the debt collection context. Many courts, however, have expanded that reasoning to apply outside of the debt collection context, so that the provision of a telephone number in all contexts has frequently been found to amount to express consent. A better approach would be for Congress to explicitly recognize that “express consent” cannot possibly come in the context of merely providing a cell phone number, with nothing more, an uncontroversial concept recognized by trial courts interpreting the TCPA. *See, e.g., Lusskin v. Seminole Comedy, Inc.*, No. 12-62173-Civ., 2013 WL 3147339 (S.D. Fla. June 19, 2013) (holding that although it may “be reasonable to infer that a person who gives his or her cell number to another party has consented to later be contacted, by that party, at that number through an automatic-dialing-system,” that is “just an inference” and does not amount to express consent); *In re Jiffy Lube Int’l, Inc., Text Spam Litig.*, 847 F. Supp. 2d 1253, 1258 & n.7 (S.D. Cal. 2012) (finding it “doubtful” that alleged “express consent” in the form of “provision of a telephone number on [an] invoice” amounted to consent that was “clearly and unmistakably stated”) (citing *Satterfield*, 569 F.3d at 955).

Second, the definition of “make or initiate,” as it pertains to calls and texts, should be clarified. Currently, the TCPA does not define how a party “makes” or “initiates” an autodialed call or text message. In many cases, telemarketers are avoiding liability by successfully arguing that downstream entities (even private individuals) are making or initiating its text messages—even when the texts are sent through the telemarketer’s calling system and number in the millions. Congress should clarify the “make” or “initiate” language by stating that, unless the third-party *entirely* controls the selection of the destination telephone numbers, content of the text messages, *and* the timing of delivery, the mobile app provider “makes” or “initiates” a text message for purposes of the TCPA when the mobile app provider’s calling system is used to send the text.

## **VII. Conclusion**

The TCPA is working. It is a highly popular statute that is deliberately crafted to employ private enforcement to protect consumers’ privacy. Class actions serve as a strong deterrent to the impulse by some businesses to use big data to bombard American cell phones with telemarketing calls and text messages. These businesses know the rules and are following them more and more. Congress should not do anything to interfere with this highly effective mechanism for protecting Americans’ privacy rights.

I thank the Subcommittee allowing me to testify today, and I look forward to answering any questions that the Members of the Subcommittee may have.