

UNITED STATES COURT OF APPEALS  
FOR DISTRICT OF COLUMBIA CIRCUIT  
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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CONSUMER BANKERS )  
ASSOCIATION, )  
 )  
 *Petitioner,* )  
 )  
 v. )  
 )  
 FEDERAL COMMUNICATIONS )  
 COMMISSION, )  
 )  
 *Respondent.* )

Case No. 15-1304

**PETITION FOR REVIEW**

Pursuant to 5 U.S.C. § 706, 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1), 2343 and 2344, and Federal Rule of Appellate Procedure 15(a), the Consumer Bankers Association (CBA) hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of the Declaratory Ruling and Order (“Order”) released July 10, 2015 by the Federal Communications Commission (FCC) captioned *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, FCC 15-72 (rel. July 10, 2015). A copy of the Order is attached as Attachment A to this petition.

## A. NATURE OF THE PROCEEDINGS

The Order, which was adopted by the FCC on June 18, 2015 and released on July 10, 2015, was issued by the FCC to address certain “requests for clarification or other action regarding the [Telephone Consumer Protection Act] or the [FCC’s] rules and orders[.]” Order ¶ 2. The Telephone Consumer Protection Act (TCPA) was enacted by Congress in 1991 and is codified at 47 U.S.C. § 227; the FCC’s implementing rules are codified at 47 C.F.R. § 64.1200. *See* 47 U.S.C. § 227; 47 C.F.R. § 64.1200.

In relevant part to these proceedings, the TCPA specifies various prohibitions and conditions on the making of telephone calls using an “automatic telephone dialing system” or an “artificial or prerecorded voice.” *See* 47 U.S.C. § 227(b)(1)(A). The TCPA exempts from liability calls made with the “prior express consent of the called party.” *See* 47 U.S.C. § 227(b)(1)(A).

The Order addresses petitions related to the TCPA filed by various entities, including a Petition for Declaratory Ruling filed by CBA. Order ¶¶ 3, 71-97, 169. The Petition for Declaratory Ruling of CBA – filed with the FCC September 19, 2014 in CG Docket No. 02-278 – was denied by the FCC. Order ¶ 169. Now, CBA hereby petitions the Court for review of the Order.

## **B. FACTS ON WHICH VENUE IS BASED**

Venue is necessarily proper in the Court pursuant to 28 U.S.C. § 2343, which states that a petition for review may be brought “in the United States Court of Appeals for the District of Columbia Circuit.” 28 U.S.C. § 2343. On July 24, 2015, the United States Judicial Panel on Multidistrict Litigation consolidated petitions for review of the Order in the United States Court of Appeals for the District of Columbia Circuit Court. Thus venue is proper in the Court.

## **C. GROUNDS ON WHICH RELIEF IS SOUGHT**

- (1) The FCC abused its discretion and acted arbitrarily and capriciously, and otherwise not in accordance with the protections contained in the First and Fifth Amendments of the Constitution, the TCPA, and other laws, in finding that the “capacity” of an automatic telephone dialing system (“ATDS”) “is not limited to its current configuration but also includes its potential functionalities” and that an ATDS is any equipment that has “more than a theoretical potential” of being “modified to satisfy the [ATDS] definition” at an undefined future point in time. *See* 47 U.S.C. §§ 227(a)(1), (b)(1); Order ¶¶ 10, 15, 16, 18.
- (2) The FCC abused its discretion and acted arbitrarily and capriciously, and otherwise not in accordance with the protections contained in the

First and Fifth Amendments of the Constitution, the TCPA, and the Administrative Procedure Act, in finding that “called party” for purposes of the TCPA’s exemption for calls made with the “prior express consent of the called party” (47 U.S.C. § 227(b)(1)(A)) means the “subscriber” or the “non-subscriber customary user of a telephone number included in a family or business calling plan[,]” rather than “intended recipient” or “expected recipient.” Order ¶ 73.

- (3) The FCC abused its discretion and acted arbitrarily and capriciously, and otherwise not in accordance with the protections contained in the First and Fifth Amendments of the Constitution, the TCPA, and other laws including the requirements for rulemaking under the Administrative Procedure Act, in establishing a “one-call” exemption from TCPA liability for calls made to a telephone number for which the caller has been provided “prior express consent” but which has been reassigned to a new subscriber, and imposing liability for every call made by the caller to that phone number thereafter, whether or not the call was answered, or whether or not the caller had knowledge that the telephone number has been reassigned. Order ¶ 90.
- (4) The FCC abused its discretion and acted arbitrarily and capriciously, and otherwise not in accordance with the protections contained in the

First and Fifth Amendments of the Constitution, the TCPA, and other laws, in prohibiting callers from establishing the means by which “prior express consent” may be withdrawn, even where the means established are reasonable. Order ¶ 47.

- (5) The FCC abused its discretion and acted arbitrarily and capriciously, and otherwise not in accordance with the law, in finding that “text messages” are “calls” for purposes of the TCPA, and that there should be no distinctions between text messages and telephone calls when assessing TCPA liability and applicability. Order ¶ 107.

**D. RELIEF PRAYED**

Consumer Bankers Association respectfully requests that the Court:

- (1) Hold that the FCC’s findings that the “capacity” of an ATDS is “not limited to its current configuration but also includes its potential functionalities” and that “ATDS” is defined as any equipment for which “there is more than a theoretical potential that the equipment could be modified to satisfy the [ATDS] definition” are arbitrary and capricious or otherwise unlawful;
- (2) Hold that the FCC’s definition of “called party” within the context of the TCPA exemption from liability for calls made with the “prior express consent of the called party” as “subscriber” or the “non-

subscriber customary user of a telephone number included in a family or business calling plan” is arbitrary and capricious or otherwise unlawful;

- (3) Hold that the “one-call” exemption for reassigned numbers established by the FCC is arbitrary and capricious or otherwise unlawful;
- (4) Hold that the FCC’s finding that callers are prohibited from establishing the means by which consent given under the TCPA may be withdrawn, even if those means are reasonable, is arbitrary and capricious or otherwise unlawful;
- (5) Hold that the FCC’s finding that “text messages” are “calls” for TCPA purposes is arbitrary and capricious or otherwise unlawful;
- (6) Hold that the FCC’s finding that there should be no distinctions between text messages and telephone calls when assessing TCPA liability and applicability is arbitrary and capricious or otherwise unlawful;
- (7) Vacate those portions of the Order the Court finds to be arbitrary and capricious or otherwise unlawful or defective;
- (8) Remand to the FCC for proceedings consistent with the Court’s findings; and/or

(9) Provide such other relief as the Court deems appropriate.

Dated: September 1, 2015

Respectfully Submitted,

A handwritten signature in cursive script that reads "Monica S. Desai". The signature is written in black ink and is positioned above a horizontal line.

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and the Court's Rule 26.1, Consumer Bankers Association (CBA) respectfully submits the following corporate disclosure statement.

Founded in 1919, CBA is a non-profit corporation and trade association representing the retail banking industry – banking services geared toward consumers and small businesses. CBA's members are established financial institutions that play a pivotal role in the U.S. economy and collectively hold well over half of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business. CBA has no parent corporation and no publicly held company owns more than 10% interest in CBA.