INSTITUTE FOR FREE SPEECH

April 11, 2025

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

Re: Comment *In re Delete, Delete, Delete*, GN Docket No. 25-133

Dear Ms. Dortch:

The Institute for Free Speech submits this comment in response to the Public Notice issued by the Commission seeking public input on identifying FCC rules for the purpose of alleviating unnecessary regulatory burdens.[1] The Institute is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, press, assembly, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties.

The Commission should use this proceeding to revisit its interpretation of the Telephone Consumer Protection Act ("TCPA"), specifically the Commission's decision to extend to text messages the statutory obligations Congress imposed on voice calls. Section 227(b)(1)(A) of the TCPA provides that "[i]t shall be unlawful for any person … to make any ***call*** … using any automatic telephone dialing system or an artificial or prerecorded voice … to any telephone number."[2] "Since 2003," however, "the Commission has interpreted 'call' in section 227(b)(1)(A) … to include both voice calls ***and text messages***."[3] The result of the Commission's extension has been to prevent lawful political speech.

For many political campaigns and public interest organizations, text messages are an essential means of communicating ideas with the American people. Organizations of all ideological stripes regard text messaging as "an especially potent form of political outreach."[4]

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[1] *In re Delete, Delete, Delete*, Public Notice, GN Docket No. 25-133 (rel. Mar. 12, 2025) (DA 25-219).

[2] 47 U.S.C. § 227(b)(1)(A) (emphasis added).

[3] *In re Targeting and Eliminating Unlawful Text Messages*, Second Report and Order, CG Docket No. 21-402, ¶ 8 n.8 (FCC rel. Dec. 18, 2023) (FCC 23-107) (emphasis added).

[4] Rachel Cohen, *Campaigns may have lost their most effective — and annoying — outreach tool*, Vox (July 19, 2022), https://perma.cc/FP2B-HGJA; *see also, e.g.*, Sakura Gray, *"You can't help but look at it": Are campaign text messages effective?*, CBS News (Oct. 26, 2022), https://perma.cc/J5UW-MAWX ("It's a very high impact medium … it's an easy way for us to get in front of voters").

"Text messaging open rates are astronomically high,"[5] with some e-marketing professionals estimating that texts "hav[e] a 97 percent read rate within 15 minutes of being delivered."[6]

Many political campaigns and public interest organizations contact supporters and potential supporters using predefined contact lists. In *Facebook, Inc. v. Duguid*, the Supreme Court held that the TCPA does not prohibit this activity because the statute restricts calls made by an "autodialer" with "the capacity to use a random or sequential number generator to either store or produce phone numbers to be called" and not calls made to numbers stored in a "database."[7] However, because the TCPA contains a private right of action authorizing statutory damages of up to $1,500 for each call,[8] unscrupulous actors have a monetary incentive to continue targeting with nuisance suits even conduct the Supreme Court has held lawful.[9] In the political context, there is an additional incentive to use litigation to punish campaigns or issue communications made by partisan or ideological opponents.[10] Even when meritless, "the costs of litigation and the risk of a mistaken adverse finding by the factfinder" "necessarily chill speech."[11] For these reasons, the FCC's expansion of the TCPA to text messages chills core political speech.

The Commission's statutory interpretation is ripe for reconsideration. In 2003, the FCC asserted, without any textual or other analysis, that the term "call" in the TCPA "encompasses both voice calls and text calls."[12] There is reason to doubt that construction. The Supreme Court has "stressed over and over again in recent years" that "statutory interpretation" must "heed" "what a statute actually says."[13] The TCPA says "call" and, contrary to the FCC's rhetorical sleight of hand, "an ordinary speaker" in "everyday spee[ch]" does not "describe" a text message as a "call."[14] In its 2003 order, the FCC did not deny that the ordinary meaning of "call" excludes text messages, nor did it provide any basis for departing from that ordinary meaning. Statutory context

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[5] Emily Stewart, *The rise of text messaging, explained*, Vox (July 13, 2023), https://perma.cc/ZE83-9HE5.

[6] *Ibid.* (citing data from Insider Intelligence).

[7] 592 U.S. 395, 401, 409 (2011).

[8] *See* 47 U.S.C. §§ 227(b)(3), 227(c)(5).

[9] *See* U.S. Chamber of Commerce Institute for Legal Reform, *Expanding Litigation Pathways TCPA Lawsuit: Abuse Continues in the Wake of Duguid* 2 (April 2024), https://perma.cc/LL2C-AKYS ("verdicts have exceeded $200 million").

[10] *See, e.g.*, Corrado Rizzi, *Class Action Claims Bernie 2020 'Routinely' Sent Unsolicited, Automated Text Messages*, Classaction.org (June 17, 2020), https://perma.cc/EW4D-L5SD; Kathleen Scott et al., *TCPA Suits Against Political Campaigns on the Rise, with the Trump Campaign Facing Two Separate Class Action Suits*, Wiley Newsletter (May 2016), https://perma.cc/83H8-ANF5.

[11] *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 794 (1988).

[12] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14115 (2003); *see also In re Rules & Regulations Implementing the Controlling the Assault of Non-Solicited Pornography & Marketing Act of 2003*, 19 FCC Rcd 15927, 15934 (2004) (asserting, without analysis, "the TCPA prohibition on using automatic telephone dialing systems to make calls to wireless phone numbers applies to text messages … as well as voice calls").

[13] *Groff v. DeJoy*, 600 U.S. 447, 468 (2023).

[14] *See Bondi v. VanDerStok*, 604 U.S. __ (2025) (slip opinion at 11); *see also, e.g., Groff*, 600 U.S. at 469–70 (relying on "ordinary meaning"); *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 407 (2011) ("When terms used in a statute are undefined, we give them their ordinary meaning" (cleaned)).

also cuts in favor of the ordinary meaning of "call." Short message service texting technology did not even exist when Congress passed the TCPA in 1991,[15] so, unsurprisingly, Congress chose language that excludes it.

The Supreme Court has never addressed the validity of the Commission's interpretation. The *Duguid* Court clarified that this question remains open, stating in a footnote that it would only "assume" that the TCPA extends to text messages "without considering or resolving that issue."[16] The Sixth Circuit and the Ninth Circuit upheld the FCC's interpretation as applied to unsolicited text messages containing commercial advertisements. Still, those courts expressly relied on the now-discredited *Chevron* doctrine.[17]

As the Public Notice rightly explains, "the Supreme Court's *Loper Bright* decision overruled the *Chevron* framework."[18] Under *Loper Bright*, the TCPA "ha[s] a single, best meaning," and that "best reading" should control.[19] Furthermore, the President has directed that "agency heads shall … identify … regulations that are based on anything other than the best reading of the underlying statutory authority or prohibition" and seek "to rescind or modify these regulations, as appropriate."[20]

For all these reasons, and especially because of the burdens on core political speech, the Institute for Free Speech respectfully requests that the Commission use this proceeding to reexamine its interpretation of "call" in the TCPA as including text messages.

Respectfully Submitted,

David Keating
President

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[15] *See* Zoe Kleinman, *"Merry Christmas": 30 years of the text message*, BBC (Dec. 2, 2022) https://perma.cc/M3MS-2DBV (explaining "the first [text message] was sent to a mobile phone by a Vodafone engineer in Berkshire in the UK on 3 December 1992").

[16] *Duguid*, 592 U.S. at 400 n.2.

[17] *See Keating v. Peterson's Nelnet, LLC*, 615 F. App'x 365, 371 (6th Cir. 2015) (unpublished) ("It is clear that Congress did not address, or even intend to address, the treatment of text messages when considering and passing the TCPA.… We thus unhesitatingly afford deference to the agency[.]"); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) ("we find that the FCC's interpretation of the TCPA is reasonable, and therefore afford it deference").

[18] Public Notice at 4.

[19] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024).

[20] Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative, 36 Fed. Reg. 10583, 10583 (Feb. 25, 2025).