

# Applying the Telephone Consumer Protection Act to Shared Phones

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The [Telephone Consumer Protection Act](#) (TCPA) is one of the primary federal statutes that regulates robocalls made to residential and wireless phones. The Act is enforced by the [Federal Communications Commission](#) (FCC) but also includes a private right of action, under which individuals may sue telemarketers for certain violations. On June 30, 2023, the U.S. Court of Appeals for the Ninth Circuit decided *Hall v. Smosh Dot Com, Inc.*, a case that addresses which individuals may sue when the person who subscribes to the phone at issue is not the phone’s primary user.

The plaintiff in *Hall* is a mother who purchased a cell phone, placed the phone’s number on the national do-not-call registry, allowed her thirteen-year-old son to use the phone, and then filed a lawsuit alleging that a business sent unsolicited text messages to the phone. The Ninth Circuit held that the mother—as the phone’s owner and subscriber—alleged a concrete injury from receipt of the unwanted messages and therefore had standing to sue. The court made clear, however, that deciding the standing question did not resolve the merits of the TCPA claim. That merits analysis could, according to the court, raise questions about the scope of liability under the TCPA’s private right of action. This Legal Sidebar summarizes some of those questions, which may be of interest to Congress.

## The TCPA and the National Do-Not-Call Registry

Section 227(c) of the [TCPA](#) directs the FCC to prescribe rules that “protect residential telephone subscribers’ privacy rights to avoid receiving telephone solicitations to which they object.” The FCC’s implementing [regulations](#) allow a subscriber to register his or her telephone number on the national do-not-call registry. If an individual registers a number on the national do-not-call registry but then receives multiple unsolicited telephone calls from the same entity during a twelve-month period, Section 227(c)(5) of the TCPA provides a right to sue. The FCC has [construed](#) the term “calls” for these [purposes](#) to encompass “both voice calls and text calls to wireless numbers.” In *Hall*, the plaintiff brought a claim under Section 227(c), alleging that the text messages described in her complaint violated the TCPA and its implementing regulations.

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## The Issue Decided in *Hall*

The U.S. District Court for the Eastern District of California [dismissed](#) *Hall* for lack of [Article III](#) standing. The Supreme Court has [held](#) that Article III of the Constitution limits “the federal judicial power to the resolution of ‘Cases’ and ‘Controversies.’” Plaintiffs in federal courts [must](#) therefore “demonstrate their personal stake” in a case to establish standing to sue. The demonstration [requires](#) showing (1) an actual or imminent concrete and particularized injury (2) that was likely caused by the defendant and (3) may likely be redressed through judicial relief.

The district court in *Hall* reasoned that the plaintiff lacked standing because she did not claim in her complaint that she was the cell phone’s primary user or the actual recipient of unsolicited text messages. Allegations that the plaintiff was “[merely](#) . . . the subscriber/owner of the phone” did not, according to the district court, satisfy the injury, causation, and redressibility standard that governs standing analysis.

The plaintiff appealed the district court’s judgment, and the Ninth Circuit reversed. The Ninth Circuit had held in an [earlier case](#) that receipt of unsolicited text messages in violation of the TCPA is a concrete injury sufficient to establish standing. In *Hall*, the court [explained](#) that the “National Do-Not-Call Registry is directed at preserving the privacy of the residential subscriber,” and the plaintiff—the phone’s subscriber—alleged that she had placed the number at issue on the registry. Regardless of whether the plaintiff or her son was the phone’s primary *user*, the court [concluded](#), *subscribers* can allege the type of injury that confers standing, and the plaintiff had done so.

## Issues Left Undecided in *Hall*

The Ninth Circuit made clear it was holding only that the plaintiff had standing to pursue her TCPA claim; it took no position on the merits of that claim. Instead, throughout the opinion, the court identified a number of questions about TCPA liability that could be raised if the case proceeds. The court [noted](#) that a caller may be able to avoid TCPA liability by “show[ing] that it obtained the consent of a phone’s ‘consumer,’ even if the phone’s consumer is someone other than the phone’s subscriber.” Because it was “remand[ing] all merits questions to the district court,” the court [declined](#) to decide “who qualifies as a consumer or relevant third-party, how consent is demonstrated, whether a minor can give such consent, and, if so, what law a court should look to in evaluating consent.” The court similarly [did not decide](#) “whether Hall qualifies as a ‘called party,’” a term the FCC has [defined](#) to mean the current subscriber or a “non-subscriber customary user of a telephone number included in a family or business calling plan.” The “called party” designation could affect liability in some cases because the TCPA [excepts](#) calls “made with the prior express consent of the called party” from certain prohibitions.

These issues, the court [reasoned](#), are “relevant only to the scope of the cause of action created by the TCPA, not to the question of Article III standing.” The court “[recognize\[d\]](#)” that this reasoning—which “allow[s] lawsuits to proceed [even] when the ultimate phone user consent[ed]” to the communications at issue—“may cause telemarketers difficulties.” According to the [court](#), “it is up to Congress or implementing agencies to address any such supposed difficulties.”

## Considerations for Congress

The Ninth Circuit’s primary holding in *Hall* was based on Article III standing, a [constitutional doctrine](#) that [cannot be abrogated](#) by Congress. The TCPA’s private right of action, however, is governed by statute and regulation and is subject to congressional amendment. Several Members of Congress have introduced bills in recent years that would modify aspects of TCPA liability. For example, versions of the Deter Obnoxious, Nefarious, and Outrageous Telephone Calls Act or the DO NOT Call Act—which would

increase the severity of some penalties imposed by the TCPA—have been introduced in the 115th Congress ([S. 3149](#)), 116th Congress ([S. 1826/H.R. 3810](#)), 117th Congress ([S. 1913/H.R. 4919](#)), and 118th Congress ([H.R. 800](#)). The 116th Congress also saw the introduction of the Protecting American Consumers from Robocalls Act ([S. 1241/H.R. 3605](#)), a bill that would have amended the TCPA to remove the requirement that a plaintiff receive “more than one telephone call within any 12-month period” before bringing suit. *Hall* identifies ways in which the scope of the TCPA’s private right of action is developing through litigation: courts are grappling with questions concerning which individuals may sue and which individuals must consent to robocalls when a phone’s subscriber and user (alternatively, the “consumer” or “called party”) are different individuals. The terms “subscriber,” “user,” “consumer,” and “called party” all appear in the TCPA, and Congress could weigh in on their meaning.

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