Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Consumer and Governmental Affairs Bureau	)	CG Docket No. 18-152
Seeks Comment on Interpretation of the	)	
Telephone Consumer Protection Act in Light of	)	
The D.C. Circuit's ACA International Decision	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

NCTA – The Internet & Television Association (NCTA) supports the Commission's efforts to reexamine its regulatory regime implementing the Telephone Consumer Protection Act of 1991 (TCPA), and in particular its interpretation of the statutory definition of an automatic telephone dialing system (ATDS), in light of the recent decision by the U.S. Court of Appeals for the Ninth Circuit in *Marks v. Crunch San Diego, LLC*.[1] Consistent with the plain statutory text, congressional intent, and the reasoning of the U.S. Court of Appeals for the D.C. Circuit in *ACA International v. FCC,*[2] NCTA encourages the Commission to reject the interpretation adopted by the Ninth Circuit and find that equipment qualifies as an ATDS only if it uses a random or sequential number generator to store or produce numbers and dials those numbers without human intervention. Any other reading would render every smartphone (and any

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1 *Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's Marks v. Crunch San Diego, LLC Decision,* CG Docket Nos. 18-152, 02-278, Public Notice, DA 18-1014 (rel. Oct. 3, 2018) (*Notice*); *Marks v. Crunch San Diego, LLC*, 2018 U.S. App. LEXIS 26883 (9th Cir. 2018).

2 *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

other phone with speed-dial or redial capability) an ATDS subject to the TCPA's restrictions, potentially subjecting hundreds of millions of phone users to statutory damages merely for placing a call or sending a text.

INTRODUCTION

The TCPA defines an automatic telephone dialing system as "equipment which has the capacity - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[3] The Ninth Circuit in *Marks* found the statutory language facially ambiguous and interpreted the language expansively so that an ATDS is "not limited to devices with the capacity to call numbers produced by a 'random or sequential number generator,' but also includes devices with the capacity to store numbers and to dial stored numbers automatically.'"[4] The court found that Congress intended to "regulate devices that make automatic calls," including "equipment that made automatic calls from lists of recipients,"[5] and that Congress gave its "tacit approval" to the expansive interpretation adopted in the Commission's 2015 *TCPA Order*[6] by leaving the ATDS definition unchanged in subsequent legislation.[7]

The Ninth Circuit's reading stands in stark contrast to the D.C. Circuit's holding earlier this year in *ACA International v. FCC*.[8] There, the D.C. Circuit appropriately held that the expansive interpretation espoused in the *TCPA Order* represented "an

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3 47 U.S.C. § 227(a)(1).

4 *Marks*, 2018 U.S. App. LEXIS 26883 at *23.

5 *Id.* at *21.

6 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961 (2015) (*2015 TCPA Order*).

7 *Marks,* 2018 U.S. App. LEXIS 28663 at *22.

8 *ACA Int'l v. FCC,* 885 F.3d 687 (D.C. Cir. 2018).

unreasonable, and impermissible interpretation of the statute's reach" that would "render every smartphone an ATDS subject to the TCPA's restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent."[9]

NCTA appreciates the Commission's prompt decision to seek comment on how best to move forward in light of the *Marks* decision. The *Marks* decision exposes all types of companies, including cable operators, to unwarranted TCPA liability, making it extremely difficult for businesses to communicate with their customers. At the same time, and just as importantly, the *Marks* decision puts consumers at risk of legal exposure for calling and texting and may have other similarly unintended consequences.

The Commission should adopt the reasoning of *ACA International* and find that equipment qualifies as an ATDS only if it uses a random or sequential number generator to store or produce numbers and dials those numbers without human intervention; and that these functions must be actually (not potentially or theoretically) present and active in a device at the time the call is made. Such an interpretation will ensure that companies and consumers alike are not paralyzed in communicating and exposed to unwarranted and very costly litigation.[10]

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[9] *Id.* at 697.

[10] In addition, NCTA reiterates its request for the Commission (a) to prevent unwarranted liability for inadvertent calls to reassigned numbers by interpreting the term "called party" to mean "intended recipient," (b) to establish a more robust safe harbor from TCPA liability that does not penalize callers who reasonably believe they have received the requisite consent to make the call, and (c) to clarify the requirements for revocation of consent to level the playing field for law-abiding companies. *See* Comments of NCTA – The Internet & Television Association, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278, at 6-10 (June 13, 2018). In the absence of such clarification, companies are encountering a variety of challenges in communicating with customers (e.g., customers with no phone number through which they can be contacted for service or collection purposes without creating a risk of TCPA liability).

I. THE *MARKS* DECISION IS INCONSISTENT WITH STATUTORY LANGUAGE AND CONGRESSIONAL INTENT

The TCPA defines an ATDS as "equipment which has the capacity - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[11] Congress crafted this definition to target specific practices that were emerging when it enacted the TCPA in 1991: the use of "equipment that either called numbers in large sequential blocks or dialed random 10-digit strings."[12] *Marks*, on the other hand, defined ATDS far more expansively, as "equipment which has the capacity - (1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator – and to dial such numbers automatically."[13]

"It is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[14] Yet the interpretation adopted by the *Marks* court renders the phrase "random or sequential number generator" superfluous: If *every* device that can store numbers were an ATDS, no further purpose would be served by *also* addressing devices that produce numbers to be called using a random or sequential number generator. Rather, Congress could have simply defined ATDS as a device that stores numbers to be dialed automatically.

The *Marks* court's construction is also ungrammatical: If Congress had intended

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11 47 U.S.C. § 227(a)(1).

12 *Dominguez v. Yahoo, Inc.*, No. 14-1751, 2015 WL 6405811, at *2 (3d Cir. Oct. 23, 2015) (explaining legislative history).

13 *Marks*, 2018 U.S. App. LEXIS 28663 at * 27.

14 *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted).

the TCPA to cover equipment that merely had the capacity to store numbers, it would have done so by adding a comma after "store." Instead, Congress used the phrase "using a random or sequential number generator" to modify *both* "store" and "produce." Such a reading is not only more coherent as a grammatical matter, but it comports with Congress's intent to target devices that pose particular harms (e.g., to public safety) by dialing random numbers or large blocks of sequential numbers.

II. THE COMMISSION SHOULD ADOPT A NARROWER INTERPRETATION OF THE ATDS DEFINITION

The Commission should exercise its discretion to interpret the ATDS definition narrowly, consistent with the specific purposes for which the statute was drafted. As noted above, the Ninth Circuit's interpretation, which requires only that the device have the capacity "to store numbers to be called" and "to dial such numbers automatically (even if the system must be turned on or triggered by a person),"[15] would render every smartphone in the country—and indeed every telephone with any speed-dial functionality whatsoever—an ATDS. Such an interpretation, if allowed to remain in place, would result in a severe chilling of consensual communications between businesses and their customers, as the use of virtually any modern telephone equipment would potentially subject ordinary and desired communications to the TCPA's "prior express consent" requirement,[16] and thereby expose individuals or businesses engaging in such communications to the threat of substantial statutory damages if they do not satisfy that requirement.[17] Even apart from the significant First Amendment problems with an

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15 *Marks*, 2018 U.S. App. LEXIS 26883, at *9.

16 47 U.S.C. § 227(b)(1)(A)(iii).

17 47 U.S.C. § 227(b)(3).

interpretation that has such a broad and unjustifiable chilling effect on speech, this outcome is precisely the one that Chairman Pai and Commissioner O'Rielly correctly called on the Commission to avoid,[18] and the outcome that the D.C. Circuit found to be "untenable" in *ACA International*.[19]

Moreover, the Commission's adoption of a reasonable, narrower construction of ATDS in this proceeding will prove effective at preventing these harms as that construction will be entitled to *Chevron* deference in courts throughout the country—including in the Ninth Circuit, notwithstanding the *Marks* decision. The Supreme Court confronted an analogous scenario in *NCTA v. Brand X*, in which the Commission had interpreted the Communications Act in a manner that diverged from an earlier interpretation adopted by the Ninth Circuit.[20] There, the Ninth Circuit issued a subsequent decision that adhered to its earlier interpretation without according deference to the Commission's intervening interpretation.[21] The Supreme Court reversed, finding that "the Court of Appeals erred in refusing to apply *Chevron* to the Commission's

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18 *See, e.g.*, *2015 TCPA Order*, 30 FCC Rcd at 8075 (dissenting statement of then-Commissioner Pai) (expressing concern that, under the interpretation adopted in 2015, "each and every smartphone, tablet, VoIP phone, calling app, texting app—pretty much any calling device or software-enabled feature that's not a 'rotary-dial phone'—is an automatic telephone dialing system," and that lawsuits challenging "the ordinary use of smartphones" are "sure to follow"); *id.* at 8088 (dissenting statement of Commissioner O'Rielly) (noting similar concerns regarding an interpretation that would sweep in smartphones).

19 *See ACA Int'l*, 883 F.3d at 698 ("It is untenable to construe the term 'capacity' in the statutory definition of an ATDS in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country. It cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact.").

20 *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 979-80 (2005).

21 *Id.*

interpretation."[22] The Court explained that "allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute" would "allow a court's interpretation to override an agency's" in a manner that runs counter to "*Chevron*'s premise"—"that it is for agencies, not courts, to fill statutory gaps."[23] Here, too, the Commission's new interpretation of an ambiguous statutory term will merit *Chevron* deference going forward, even in jurisdictions like the Ninth Circuit where prior case law embraces a different interpretive approach.

CONCLUSION

Consistent with the plain statutory text, congressional intent, and the reasoning of the D.C. Circuit in *ACA International,* the Commission should find that equipment qualifies as an ATDS only if it uses a random or sequential number generator to store or produce numbers and dials those numbers without human intervention. Any other reading would have grave ramifications for American businesses and consumers.

Respectfully submitted,

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[22] *Id.* at 984.

[23] *Id.* at 982.