October 17, 2018

Submitted via electronic filing: http://apps.fcc.gov/ecfs/

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

RE: Consumer and Government 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 No. 18-152, CG Docket No. 02-278

Dear Ms. Dortch:

ACA International ("ACA") respectfully submits these comments in response to the Federal Communication Commission's ("FCC" or "Commission") request for further comment[1] on issues related to interpretation and implementation of the Telephone Consumer Protection Act ("TCPA"), following the recent decision of the U.S. Court of Appeals for the Ninth Circuit in *Marks v. Crunch San Diego, LLC*).[2] ACA has long maintained that consumers are best protected when the accounts receivable management industry and all other industries, have clear and workable rules for how they can communicate with consumers about much needed information. We implore the Commission to recognize that the status quo is not working for either the consumers that need information or the thousands of legitimate businesses that continue to suffer because of predatory litigation under the TCPA. In the current landscape, onerous and unreasonable requirements have resulted in a significant resource burden for those simply engaging in standard business communications.

Unfortunately, the *Marks* decision represents a step backwards in the quest for fair and workable rules, and is a clear example of the judicial overreach that plagues those seeking to comply with the TCPA. It blatantly disregards the text and Congressional intent of the TCPA,[3] prior FCC interpretations of the TCPA, and the recent U.S. Court of Appeals for the District of Columbia ("D.C. Circuit") decision[4] in ACA's lawsuit challenging the 2015 TCPA Declaratory Ruling and

[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 (Oct. 3, 2018) ("Public Notice for *Marks*").
[2] *Marks* v. *Crunch San Diego, LLC*, ___ F.3d ___, 2018 U.S. App. LEXIS 26883, at *23 n.6 (9th Cir. Sept. 20, 2018). ("*Marks*")
[3] 47 U.S.C. § 227(a)(1).
[4] *ACA International* v. *FCC*, 885 F.3d 687 (D.C. Cir. 2018). ("*ACA Int'l*")

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Order.[5] *Marks*, unfortunately, punishes legal businesses seeking to engage in informational communications, yet will have no beneficial impact on illegal telemarketing calls or other scam calls that consumers do not want. Accordingly, we urge the FCC to act quickly to address the deficiencies in this decision and to issue ACA's requested clarifications by:

- Providing an appropriately tailored interpretation in line with Congressional intent of what is considered to be an automatic telephone dialing system ("ATDS") as outlined in the U.S. Chamber Petition that ACA co-signed in May 2018,[6] clarifying that not all predictive dialers qualify as an ATDS;
- Confirming that "capacity" under the TCPA means present ability and explaining that when human intervention is required for a call, the call is not made using an ATDS;
- Addressing the flawed reasoning in *Marks* by confirming the TCPA's text means that "using a random or sequential number generator" is an integral, not an optional or alternative, part of the definition of an ATDS;
- Clarifying that contrary to the *Marks* reasoning, the threshold for statutory coverage under the TCPA for "dialing random or sequential numbers" is not met simply by dialing from a set list of numbers in random or other sequential order; and
- Confirming that despite the erroneous interpretations in *Marks*, in order to be an ATDS, equipment must be able to perform at least three functions:

    - First, the equipment must be able to generate random or sequential numbers. Otherwise, it cannot do anything "using a random or sequential number generator."
    - Second, the equipment must be able to store or produce numbers to be called by using that random or sequential number generator, that is, the numbers must be generated randomly or sequentially, rather than being either stored or produced for dialing.
    - Third, the equipment must be able to dial the numbers that it stores or produces with a random or sequential number generator. The statutory text "dial such numbers" refers back to the stored or produced "telephone numbers to be called, using a random or sequential number generator."

I. Background

Enacted nearly 30 years ago in 1991, the TCPA and corresponding FCC implementing regulations have not kept up with numerous technological advancements. Notably, communications with consumers on cell phones and by text messages are no longer revolutionary. Rather, these communication methods have been widely popular for well over a decade and have proven to be consumers' preferred method of communication.[7] Yet, in recent

[5] Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd. 7961 (2015). ("2015 Order")

[6] See U.S. Chamber Institute for Legal Reform et al., Petition for Declaratory Ruling, CG Docket No. 02-278 (filed May 3, 2018). ("Chamber Petition").

[7] National Center for Health Statistics. Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2017, available at https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201712.pdf. More than one-half of American homes (52.5%) had only wireless telephones (also known as cellular telephones, cell phones, or mobile phones) during the

years the Commission has declined to provide much needed clarification for legitimate businesses in regulated industries that need to communicate with consumers about non-marketing information on their cell phones. This uncertainty has proven a detriment to both consumers and businesses in their efforts to comply with the TCPA. Unfortunately, consumer harm and harm to debt collection agencies has resulted when in many instances lawful debt collection calls have been curtailed as a result of unclear FCC interpretations of the TCPA. This is concerning because consumers who are deprived of information regarding an outstanding debt and ways to resolve it can suffer serious adverse consequences. Examples of problems resulting from unpaid debt include an inability to access credit, the restriction of availability to only expensive credit, and the risk of facing litigation rather than having the opportunity to work out a payment plan.

We applaud the FCC for seeking input on these important issues surrounding the TCPA and for its recent focus on enforcing the law against illegal and fraudulent actors. As the D.C. Circuit highlighted in *ACA Int'l*, the FCC has more work to do to address flaws in the 2015 Order and other past TCPA interpretations. In this regard, ACA also appreciates that the FCC in May requested feedback on key questions from its lawsuit. As ACA pointed out in its June letter to the FCC concerning the Public Notice for *ACA Int'l*,[8] since the D.C. Circuit's *ACA Int'l* decision in March, we have seen conflicting case law handed down showing not only confusion, but questionable liberties being taken by the judiciary.[9] This judicial overreach, as evidenced by *Marks*, is fortified by the current gap left by the D.C. Circuit decision in *ACA Int'l*. Although the D.C. Circuit set aside the FCC's unreasonably expansive interpretation of what equipment constitutes an ATDS, the Ninth Circuit blatantly ignored not only this decision but also other FCC interpretations of the TCPA. Therefore, the FCC must act immediately to fill the holes remaining from *ACA Int'l*, provide much-needed clarity on the issues muddled by the overreach in the *Marks* decision, and address other outstanding issues as outlined in our previous comments[10] surrounding past TCPA interpretations so that courts do not continue to misdirect consumers and businesses.

The recent decision in *Marks* is a prime example of how the lack of clarity on TCPA compliance has spiraled out of control since the TCPA's enactment and is compounded by the current gaps and inconsistencies from FCC interpretations of it. The FCC has the ability to guide the court to threshold issues including the Ninth Circuit's faulty reasoning that the statute is ambiguous.[11] Moreover, the ACA decision in the D.C. Circuit is binding precedent on all other federal circuit

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first half of 2017—an increase of 3.2 percentage points since the first half of 2016. Nearly three-quarters of all adults aged 25-34 were living in wireless-only households; more than two-thirds (70.7%) of adults renting their homes were living in wireless-only households.

[8] Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, CG Docket Nos. 18-152, 02-278 (rel. May 14, 2018). ("Public Notice for *ACA Int'l*")

[9] *See* Comments of ACA International for the Public Notice for *ACA Int'l*, available at https://www.acainternational.org/assets/comments/aca-international---comments-public-notice-tcpa.pdf (June 13, 2018).

[10] *Id.*

[11] The FCC should reinforce the interpretation that the statutory language is not ambiguous and therefore open to judicial interpretation. At the same time, if a court were to conclude the statute was ambiguous, the FCC's interpretation of the language would then be entitled to judicial deference. *Chevron* v. *NRDC*, 467 U.S. 837 (1984).

courts under the Hobbs Act,[12] and as a result it is clear that the Ninth Circuit acted inappropriately in distinguishing the *Marks* case from *ACA Int'l*. The FCC should confirm this.

A. *Marks* Creates a New Statutory Interpretation of an ATDS under the TCPA as Well as a Split among the Circuit Courts

The district court's decision in *Marks* correctly held that in order to be an ATDS, dialing equipment must have "a random or sequential number generator," and that merely having the capacity to call a list of stored phone numbers without human intervention does not fit within that definition. However, on appeal, the Ninth Circuit vacated the district court's decision rendering it null and void. In doing so, it held that "the statutory definition of 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 dial stored numbers automatically."[13] The court came to the flawed conclusion that the statutory text of the TCPA, which defines an ATDS, was "ambiguous on its face". This, as outlined in our comments, is inconsistent with other courts and decades of precedent on this issue.

The *Marks* holding as discussed in our comments is inconsistent with the statute's unambiguous plain language and canons of statutory construction regarding the words "random and sequential number generator" in the statutory text. The Ninth Circuit looked to the "structure and context of the TCPA" and incorrectly concluded that "Congress intended to regulate devices that make automatic calls," including devices that make "automatic calls from lists of recipients." The Ninth Circuit further declared that it was Congress' intent for the definition of ATDS to encompass "dial[ing] a curated list," pointing to exceptions in the "TCPA allowing an ATDS to call selected numbers." Additionally, the court decided that the TCPA exceptions allowing the use of an ATDS to either make calls: (1) "with the prior express consent of the called party," or (2) to collect debt owed to the United States "demonstrates that equipment that dials from a list of individuals" who consented to such calls or "who owe a debt to the United States is still an ATDS but is" excused from the TCPA's restrictions. Finally, the court went on to find that Congress tacitly approved of the FCC's interpretation of the term ATDS to include equipment that merely dials telephone numbers from a stored list when in 2015 Congress created the government debt collection exception but chose not to amend the statutory definition of ATDS.

The *Marks* holding on its face applies an extremely overbroad interpretation of an ATDS, and plainly stated, grasps at straws to create seemingly newly discovered (after nearly 30 years) interpretations of the TCPA. The Ninth Circuit also held that the TCPA includes all equipment that "engages in automatic *dialing*," not just "equipment that operate[s] without any human oversight or control."[14] The court applied the flawed reasoning that "[c]ommon sense indicates that human intervention of some sort is required before an autodialer can begin making calls,

[12] *See* 28 U.S.C. § 2342(1).
[13] *Marks*, 2018 U.S. App. LEXIS 26883.
[14] *Id.*

whether turning on the machine or initiating its functions." Therefore, the court concluded that the gym operator's equipment in *Marks*, which dials numbers automatically, but not randomly or sequentially, "qualifies as an ATDS, even though humans, rather than machines, are needed to add phone numbers."[15] Such reasoning, as indicated in the Public Notice for *Marks*, could lead to an interpretation of the TCPA that potentially sweeps in an entirely new category of calling devices. Specifically, this could include smartphones and other technologies that have clearly been considered by other courts not to be covered by the TCPA.

In *ACA Int'l,* the D.C. Circuit found that the FCC's broad and expansive definition of "capacity" swept ordinary cell phones into the definition of an ATDS. Such an expansive interpretation, the court found, was unreasonable and impermissible.[16] "If every smartphone qualifies as an ATDS, the statute's restrictions on autodialer calls assume an eye-popping sweep."[17] The D.C. Circuit rejected the FCC's interpretation in the 2015 Order in *ACA Int'l* stating

> Those sorts of anomalous outcomes are bottomed in an unreasonable, and impermissible, interpretation of the statute's reach. The TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act's restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent. [18]

The same flawed interpretation was used by the Ninth Circuit in *Marks*. If a device only must have the ability to store numbers and then to call them automatically, a smartphone under the *Marks* court could be swept in. This is in direct conflict with *ACA Int'l* and the precedent it created.

Also of great concern, the Ninth Circuit's decision in *Marks* creates a circuit split with decisions from two other sister circuit courts of appeals – the Second and Third Circuits, which also considered the issue of interpreting the legal definition of an ATDS but reached the opposite conclusion. In June, both the Second Circuit in *King v. Time Warner Cable, Inc.*[19] and the Third Circuit in *Dominguez v. Yahoo, Inc.* [20] held that a device is not considered an ATDS under the TCPA unless it currently has the capability to dial randomly generated or sequential phone numbers and not simply call stored numbers from a list. The direct conflict between the circuits now put the issue of what constitutes an ATDS on the path for a possible rehearing *en banc* by the entire slate of Ninth Circuit Court judges. However, if the *Marks* decision is unsuccessfully appealed, it will become precedential, authoritative law in the Ninth Circuit upon which lower federal courts subject to the Ninth Circuit's jurisdiction (ie., Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington) must rely. This would be extremely

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[15] *Id.*
[16] *ACA Int'l*, 885 F.3d 700.
[17] *ACA Int'l*, 885 F.3d 687.
[18] *Id.*
[19] 2018 WL 3188716 __F.3d.___, (2nd Cir., June 29,2018).
[20] Dominguez v. Yahoo, Inc., 629 F. App'x 369, 372 (3d Cir. 2015). ("*Dominguez*")

challenging for those seeking to understand requirements across the country, creating different, conflicting, and arguably certain nonsensical requirements for TCPA compliance depending on the state in which a company is located.

B. Navigating the Current Status of the Law

The ongoing confusion over the definition of what constitute an ATDS and whether certain technologies are in fact predictive dialers that should be defined as an ATDS has for years created uncertainty and compliance burdens on ACA International's members. The FCC in its *2003 and 2008 Predictive Dialer Rulings* [21] held that an ATDS includes a predictive dialer. However, as the D.C. Circuit pointed out, not all random or sequential number generators have the present capacity to use this functionality, so if they do not randomly or sequentially generate or dial numbers, prior court decisions have held that type of telephony equipment is not an ATDS.

The D.C. Circuit's decision in *ACA Int'l* ultimately struck down the FCC's expansive definition of ATDS [22] but it did not answer the "basic question raised by the statutory definition [about] whether a device must itself have the ability to generate random or sequential telephone numbers to be dialed," or whether it would be "enough if the device can call from a database of telephone numbers generated elsewhere." Instead, the D.C. Circuit explained that the FCC could "adopt either interpretation," but not both. As a result, courts around the country, including the Ninth Circuit, have been left unrestrained to interpret the TCPA to define an ATDS until the FCC acts.

There have been approximately 36 decisions since *ACA Int'l,* however, in approximately half of those cases the district courts have found that the ACA decision was not binding on them in terms of the FCC's prior interpretation as to what constitutes a predictive dialer. At the same time, as noted above, both the Second Circuit in the *King* case and the Third Circuit in the *Dominguez* case upheld the binding precedent set forth by the D.C. Circuit.[23] *Marks*, therefore is unique because a circuit court, outside of the D.C. Circuit, redefined the language of the TCPA at a time when it was public knowledge that the FCC was about to issue rules on the very subject.

Although the Congressional record is clear that the TCPA was enacted to address concerns regarding telemarketing calls,[24] the TCPA has created significant negative consequences for the public and private sectors seeking to reach consumers for informational, non-telemarketing purposes. Additionally, the TCPA continues to fuel a wildfire of lawsuits by opportunistic plaintiffs' attorneys that are overburdening the courts, and the accounts receivables management

[21] CG Docket No. 02-278, FCC 03-153; CG Docket No. 02-278, FCC 07-232 (Jan 4, 2008).
[22] In its 2015 Declaratory Rule, the FCC expanded the definition of capacity to mean not only current capacity but the potential future capacity to store or produce and dial random or sequential numbers.
[23] Administrative Orders Review Act (aka the Hobbs Act) provides exclusive jurisdiction to the federal court of appeals [D.C. Circuit] to determine the validity of all final orders of the FCC.
[24] *Chamber Petition*.

industry, while providing nominal relief to consumers.[25] An appropriately tailored definition of an ATDS under the TCPA will help ensure that legitimate, non-telemarketing debt collection calls (and their resulting positive economic impact on the public and private sectors) are not unfairly impeded.

C. In Light of *Marks* It is Even More Critical that the FCC Act to Define an ATDS

a. Capacity should be defined as Present Ability

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.[26] The Public Notice for *ACA Int'l* stated that in the 2015 Order the Commission had interpreted the term capacity to include a device even if, for example, it requires the addition of software to actually perform the functions described in the definition an expansive interpretation of capacity that has the apparent effect of embracing any and all smartphones.[27] As the Public Notice for *ACA Int'l* acknowledged, the D.C. Circuit set aside this overly expansive interpretation.

As ACA and other Petitioners recently discussed in the Chamber Petition, the Commission must confirm that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention. This straightforward interpretation flows from the functions of an ATDS outlined in the text of the TCPA. In his dissent to the 2015 Order, Chairman Pai specifically addressed the confusion around what can be considered an ATDS stating,[28]

> The Order's expansive reading of the term "capacity" transforms the TCPA from a statutory rifle-shot targeting specific companies that market their services through automated, random or sequential dialing into an unpredictable shotgun blast covering virtually all communications devices. Think about it. It's trivial to download an app, update software, or write a few lines of code that would modify a phone to dial random or sequential numbers. So, under the Order's reading of the TCPA, 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.

We agree with his concerns and so did the D.C. Circuit. When human intervention is required to generate the list of numbers to call or to actually initiate the call, it is not an ATDS. Furthermore, a predetermined list created by a human that is then imported into a calling system should not qualify as an ATDS. We urge the Commission to provide much needed clarity on these points,

[25] 47 U.S.C. § 227(a)(1).
[26] *ACA Int'l*, 885 F.3d 687.
[27] 47 U.S.C. § 227(a)(1)(emphasis added).
[28] *ACA Int'l*, 885 F.3d 687.

specifically that if human intervention is required at any time in generating a list of numbers to call or in the process of making calls, the result is not covered under the TCPA.

It is also critical that the FCC rectify past problematic interpretations that incorrectly looked to potential capacity, rather than present capacity. The Commission should issue an interpretation that acknowledges that ATDS functions must actually, not theoretically, be present and active in a device at the time the call is made. Further, the Commission should find that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions. The D.C. Circuit in *ACA Int'l* noted that the FCC's expansive interpretation of ATDS could be addressed by reinterpreting the statutory phrase "make any call using [an ATDS]," to mean that a device's ATDS capabilities must actually be used to place a call for TCPA's restrictions to attach.

Commissioner O'Rielly also highlighted this issue in his dissent to the 2015 Order stating,[29]

> I don't think we should start with a presumption that companies are intentionally breaking the law. But it seems that this could be handled as an evidentiary matter. If a company can provide evidence that the equipment was not functioning as an autodialer at the time a call was made, then that should end the matter. For example, a company could show that the equipment was not configured as an autodialer, that any autodialer components were independent or physically separate, that use as an autodialer would require a separate log in, or that the equipment was not otherwise used in an autodialer mode.

We urge the FCC to clarify this issue to ensure that when callers are not using ATDS functions, they should not be subject to TCPA requirements. Finding that "capacity" must mean "present ability" is consistent with the TCPA's plain language, the Commission's rulemakings prior to the 2015 Order, the everyday meaning of the term and the legislative history of the statute.

b. Not All Predictive Dialers are an ATDS

A predictive dialer can fall within the statutory meaning of an ATDS. However, many predictive dialers are not an ATDS.[30] As ACA outlined in detail in our previous TCPA Petition in 2014, we take issue with several previous FCC's rulings on this point.[31] It is critical that the Commission confirm that, simply because a predictive dialer can be an ATDS for purposes of the TCPA, this does not mean that a predictive dialer is an ATDS under the TCPA. Pursuant to the statute, to be

[29] Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd. 7961 (2015), Dissenting Statement of Commissioner Ajit Pai. ("Pai 2015 Order Dissent")

[30] Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd. 7961 (2015), Dissenting Statement of Commissioner Michael O'Rielly, 2015 TCPA Order. ("O'Rielly 2015 Order Dissent")

[31] *ACA Int'l*, 885 F.3d 687 at 27. The D.C. Circuit recognized, at least some predictive dialers, as explained, have no capacity to generate random or sequential numbers.

an ATDS under the TCPA, equipment must have the listed elements. A predictive dialer that does not contain those statutory elements by definition is not an ATDS under the statute.

The Public Notice in *ACA Int'l* notes that the statute prohibits, "mak[ing] any call using any automatic telephone dialing system leading to the question does the bar against making any call using an [automatic telephone dialing system] apply only to calls made using the equipment's[automatic telephone dialing system] functionality?"[32] It then asks, if a caller does not use equipment as an automatic telephone dialing system, does the statutory prohibition apply?[33]

ACA strongly argues that it should not. Specifically, the FCC should clarify that if a predictive dialer does not contain the statutory elements of an ATDS, then it is not an ATDS. Clarifying this definition and rejecting earlier unreasonable expansions that sweep all predictive dialers into the category of an ATDS is critical to restoring Congress' intent for what constitutes an ATDS.[34]

II. ACA Outlined the Following Points to the Ninth Circuit.

A. The statute's text and context confirm that "using a random or sequential number generator" is an integral, not an optional or alternative, part of the definition.

As previously noted, the TCPA defines an ATDS as equipment which has the capacity (A) to store or produce telephone numbers, using a random or sequential number generator; and (B) to dial such numbers."[35]

When Congress enacted the TCPA in 1991, the statute and its definition of an ATDS targeted harmful practices that had emerged in the 1980s, when "telemarketers typically used autodialing equipment that either called numbers in large sequential blocks or dialed random 10-digit strings."[36] Random dialing let a caller reach and tie up unlisted and specialized numbers,[37] and sequential dialing let a caller reach all such numbers in an area, creating a "potentially dangerous" situation in which no outbound calls (including emergency calls) could get through.[38]

Accordingly, the FCC "initially interpreted the [TCPA] as specifically targeting equipment that placed a high volume of calls by randomly or sequentially generating the numbers to be dialed."[39] The Commission's first TCPA-related order declared that equipment with "speed dialing," "call forwarding," and "delayed message" functions are not an ATDS "because the

[32] Petition for Rulemaking of ACA International, CG Docket No. 02-278 (filed Jan. 31, 2014).
[33] Public Notice for *ACA Int'l*, supra note 7 at 3.
[34] *Id.* at 3.
[35] 47 U.S.C. § 227(a)(1).
[36] *Dominguez* v. *Yahoo, Inc*., 629 F. App'x 369, 372 (3d Cir. 2015).
[37] *See* S. Rep. No. 102-178, at 2 (1991).
[38] H.R. Rep. No. 102-317, at 10 (1991).
[39] *Dominguez*, 629 F. App'x at 372.

numbers called are not generated in a random or sequential fashion."[40] The Commission later explained that the TCPA does not apply to calls "directed to . . . specifically programmed contact numbers," as distinct from calls "to randomly or sequentially generated numbers."[41] For a decade and a half, those rulings settled the scope of what constituted an ATDS.

By the mid-2000s, the TCPA had largely achieved its goal of eliminating the use of random or sequential number generators.[42] But computer-assisted dialing remained useful for calling targeted lists of numbers that were fed into "predictive dialers," which use "algorithms to automatically dial consumers' telephone numbers in a manner that 'predicts' the time when a consumer will answer the phone and [an agent] will be available to take the call."[43] Some predictive dialers could call only from lists; others could generate and dial random or sequential numbers.[44]

A predictive dialer may or may not be an ATDS within the statutory definition, depending on whether the predictive dialer could generate and dial random or sequential numbers. But, as previously noted in 2003, the FCC held that a "predictive dialer" which it defined as "equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls"[45] "falls within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress."[46] In 2008, the Commission "affirm[ed] that a predictive dialer constitutes an automatic telephone dialing system and is subject to the TCPA's restrictions on the use of autodialers."[47] Under the doctrine of primary jurisdiction, the 2003 and 2008 rulings were binding on the courts.

The FCC reiterated its 2003 and 2008 rulings about predictive dialers in its 2015 Order ruling about the TCPA which was challenged, and ultimately set aside (at least with respect to predictive dialers), in *ACA Int'l*. Under the primary-jurisdiction doctrine, the D.C. Circuit's decision has nationwide precedential effect.[48]

B. On Appeal, the Ninth Circuit misread the statute.

The TCPA defines an ATDS as "equipment which has the capacity . . . to store or produce telephone numbers, using a random or sequential number generator; and . . . to dial such numbers."[49] Thus, to be an ATDS equipment must be able to perform at least three functions:

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[40] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, ¶ 47, 7 FCC Rcd. 8752, 8776 (FCC 1992).
[41] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, ¶ 19, 10 FCC Rcd. 12391, 12400 (FCC 1995).
[42] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, ¶ 133, 18 FCC Rcd. 14014 (FCC 2003).
[43] *Id*., ¶ 8 n. 31.
[44] *Id*., ¶ 131.
[45] *Id*.
[46] *Id*., ¶ 133 at 14093.
[47] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, ¶ 12, 23 FCC Rcd. 559, 566 (FCC 2008); accord id.,¶ 13.
[48] *ACA Int'l,* 885 F.3d 687.
[49] *See*, e.g., King v. Time Warner Cable Inc., 894 F.3d 473, 476 n.3 (2d Cir. 2018); *Marshall* v. *CBE Grp., Inc*., No. 2:16-cv-02406-GMN-NJK, 2018 U.S. Dist. LEXIS 55223, at *12 (D. Nev. Mar. 30, 2018) ("The Court rejects

- First, the equipment must be able to generate random or sequential numbers. Otherwise, it cannot do anything "using a random or sequential number generator."
- Second, the equipment must be able to store or produce numbers to be called by using that random or sequential number generator[50] that is, the numbers must be generated randomly or sequentially, then either stored or produced for dialing.[51]
- Third, the equipment must be able to dial the numbers that it stores or produces with a random or sequential number generator. The statutory text, "dial such numbers"[52] refers back to the stored or produced "telephone numbers to be called, using a random or sequential number generator."[53]

The D.C. Circuit's ruling in *ACA Int'l* confirms that view,

> Anytime phone numbers are dialed from a set list, the database of numbers must be called in some order either in a random or some other sequence. As a result, the ruling's reference to "dialing random or sequential numbers" cannot simply mean dialing from a set list of numbers in random or other sequential order: if that were so, there would be no difference between "dialing random or sequential numbers" and "dialing a set list of numbers," even though the ruling draws a divide between the two. It follows that the ruling's reference to "dialing random or sequential numbers" means generating those numbers and then dialing them.[54]

On Appeal, the Ninth Circuit reached a different result only by manufacturing an ambiguity that no court had ever before noticed, reading the definition so that "using a random or sequential number generator" modified only "produce" and not "store." But the statutory text does not permit that result without being materially rewritten, as one federal court explained (at some length, but with a compelling grasp of the grammar and syntax) in *Pinkus* v. *Sirius XM Radio, Inc*.:

Plaintiff's argument that *ACA Int'l* does not bind this Court."); *Stephens* v. *Comenity, LLC*, No. 2:17-cv-00670-MMD-NJK, 2017 U.S. Dist. LEXIS 202958, at *14 (D. Nev. Dec. 8, 2017) ("the result of *ACA* will be binding on this Court"); Menchacha-Estrada v. Synchrony Bank, No. 2:17CV831DAK, 2017 U.S. Dist. LEXIS 180381, at *2–3 (D. Utah Oct. 30, 2017) (embracing a defendant's argument "that the D.C. Circuit's ruling [on the 2015 TCPA Order] will be binding on all district courts nationwide");see also *Cunningham* v. *Homeside Fin., LLC*, Civ. No. MJG-17-2088, 2017 U.S. Dist. LEXIS 197712, at *5 (D. Md. Dec. 1, 2017) ("Because the D.C.Circuit Court has exclusive jurisdiction to review the FCC ruling, 28 U.S.C.§ 2342(1), its ruling will be binding.").

[50] *See* 47 C.F.R. § 64.1200(f)(2) (" The terms automatic telephone dialing system and autodialer mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers." (emphasis in original)).

[51] *See Satterfield* v. *Simon & Schuster, Inc.*, 569 F.3d 946, 950–51 (9th Cir. 2009); Dominguez v. Yahoo, Inc., 629 F. App'x 369, 372 n.1 (3d Cir. 2015).

[52] *See Pinkus* v. *Sirius XM Radio, Inc*., F. Supp. 3d, 2018 U.S. Dist. LEXIS 125043, at *28–29 (N.D. Ill. July 26, 2018) ("Because the phrase 'using a random or sequential number generator' refers to the kinds of 'telephone numbers to be called' that an ATDS must have the capacity to store or produce, it follows that that phrase is best understood to describe the process by which those numbers are generated in the first place.").

[53] 47 U.S.C. § 227(a)(1)(B) (emphasis added).

[54] 47 U.S.C. § 227(a)(1)(A).

According to *Pinkus*, the placement of the adverbial phrase "using a random or sequential number generator" indicates that it modifies only the verb "produce" and not the verb "store." On that reading, and given the disjunctive "or" separating "store" and "produce," a device's having the "capacity to produce telephone numbers to be called, using a random or sequential number generator" (and then to dial those numbers) is only one possible way a device can qualify as an ATDS. Another way is for the device to simply have the "capacity . . . to store and dial numbers." Because any predictive dialer has the latter capacity specifically, in *Pinkus's* view, the capacity to store numbers from a "pre-determined list" *Pinkus* argues that Sirius's Rule 12(c) motion must be denied because the operative complaint alleges that the devices that were used to call him were predictive dialers.

Pinkus's reading of the statute would be convincing if subsection (a)(1)(A) were rearranged to read: "to store or, using a random or sequential number generator, to produce Telephone numbers to be called." Rearranging the text in that manner would make it clear that "using a random or sequential number generator" modified only "produce" and not "store." But it is an unconvincing reading of the statute that Congress in fact drafted, with the adverbial phrase following both verbs. Understanding why requires some explanation. Like "produce," "store" is a transitive verb, and so requires an object.[55]And the object of the verbs "store" and "produce" is "telephone numbers to be called." As a result, despite the disjunctive "or" linking "store" and "produce," "store" is not a grammatical orphan, rather, like "produce," it is tied to the object, "telephone numbers to be called." The TCPA thus defines as an ATDS a device that has the capacity "[1] to store or produce [2] telephone numbers to be called" and then "to dial such numbers." 47 U.S.C. § 227(a)(1).

But what kind of numbers? Given its placement immediately after "telephone numbers to be called," the phrase "using a random or sequential number generator" is best read to modify "telephone numbers to be called," describing a quality of the numbers an ATDS must have the capacity to store or produce. Had Congress meant "using a random or sequential number generator" to modify the verbs "store" and "produce," Congress would have placed the phrase immediately after those verbs and before "telephone numbers to be called" with subsection (a)(1)(A) reading, "to store or produce, using a random or sequential number generator, telephone numbers to be called." Indeed, it would be odd to read the phrase "using a random or sequential number generator" as modifying "store" and "produce." The comma separating "using a random or sequential number generator" from the rest of subsection (a)(1)(A) makes it grammatically unlikely that the phrase modifies only "produce" and not "store,"[56] ("[B]oth we and our sister circuits have recognized the punctuation canon, under which a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one where the phrase is separated from the antecedents by a comma.") (brackets and internal quotation

[55] *See* Merriam-Webster (2018), https://www.merriam-webster.com/dictionary/store; Oxford English Dictionary (2018), http://www.oed.com/view/Entry/190929?rskey=pdyROA&result=2#eid
[56] *See Yang* v. *Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1000 (Ninth Cir. 2017).

> marks omitted) (citing decisions from the Second, Third, Eleventh, and Federal Circuits), and yet it is hard to see how a number generator could be used to "store" telephone numbers.
>
> Because the phrase "using a random or sequential number generator" refers to the kinds of "telephone numbers to be called" that an ATDS must have the capacity to store or produce, it follows that that phrase is best understood to describe the process by which those numbers are generated in the first place. True, the statute does not use the verb "generate." But the phrase "using a random or sequential number generator" indicates that a number generator must be used to do *something* relevant to the "telephone numbers to be called" most naturally, either to generate the numbers themselves, or to generate the order in which they will be called.[57]

The *Marks* court misread the statute by disregarding the "punctuation canon" that is, by disregarding the statute's grammar and syntax then manufacturing an unnecessary "ambiguity" through which the *Marks* decision materially altered the statute's meaning.

C. The *Marks* manufactured ambiguity collides with the Ninth Circuit's own precedent, and contradicts the one other federal appellate court that has reached the issue.

The *Marks* manufactured ambiguity collides with the Ninth Circuit's own precedent. The Ninth Circuit held in *Satterfield* that "the statutory text is clear and unambiguous."[58] The *Marks* holding tried to explain away the collision by claiming that the *Satterfield* court was referring only to the word "capacity," not to the rest of the definition.[59] But the *Satterfield* court wrote that,

> When evaluating the issue of whether equipment is an ATDS, the statute's clear language mandates that the focus must be on whether the equipment has the *capacity* "to store or produce telephone numbers to be called, using a random or sequential number generator." Accordingly, a system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it.

The *Satterfield* court refers twice, once in each of the two sentences just quoted, to the verbs "store" and "produce" in connection with random-or sequential-number generation. Both references treat "store" and "produce" as integral parts of the definition, not as if the concept of random-or sequential-number generation involved only the verb "produce" but not the verb "store."

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[57] *Dominguez*, 894 F.3d 116.
[58] *Satterfield* v. *Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009). ("*Satterfield*").
[59] *Marks, 2018 U.S. App. LEXIS 26883.*

The *Marks* court manufactured ambiguity also contradicts the Third Circuit's ruling in *Dominguez*[60], which *Marks* dismisses as "unpersuasive," an "unreasoned assumption" that "merely avoided the interpretive questions."[61] *Marks* criticized the *Dominguez* court because "the Third Circuit failed to resolve the linguistic problem it identified in an unpublished opinion in the same case, where it acknowledged that 'it is unclear how a number can be *stored* (as opposed to *produced*) using "a random or sequential number generator."[62] The answer is fairly obvious: a number cannot be generated and produced without being, at least momentarily, stored in memory. Other courts have understood that point: "Nothing in the TCPA indicates that Congress intended a narrow definition of the storage concept that would limit the statute's application to technology that stores telephone numbers for an extended period of time."[63]

The *Marks* court discovery of a 27-year-old "ambiguity" shows that it lacked a basic understanding of how a "random or sequential number generator" works. That lack of understanding has resulted in an indefensible misinterpretation.

III. Conclusion

When Congress enacted the TCPA in 1991 it was for the purpose of limiting abusive telemarketing calls that primarily bothered consumers on their landline during dinner time and other inconvenient times. Today the telecommunications landscape is completely different, and consumers live in a world where they rely on their cell phone, and have shown a preference for timely and instant communications about important information such as their financial situation. While the FCC's efforts to crack down on illegal and unwanted telemarketing calls remain a laudable public policy objective, impeding standard business communications by enabling frivolous TCPA related litigation serves to harm both legitimate businesses and those who need the information sought to be provided.

Over the past two decades as a result of several onerous FCC interpretations of the TCPA and a deluge of judicial overreach, compliance and predatory litigation concerns surrounding the TCPA have increased exponentially.[64] Arguably in light of *Marks*, and other judicial advocacy surrounding the TCPA, it is now more important than ever for the FCC to set the record straight and address the severely outdated and confusing approaches courts have taken to interpreting the TCPA. The circuit split and the inventive arguments made by the Ninth Circuit that do not align with the TCPA legislative history, purpose, or even FCC interpretations make clear that more guidance is needed.

We greatly appreciate the FCC's efforts to solicit input on these critical issues as it considers what actions must be taken. ACA asks that the Commission act immediately for the protection of

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[60] *Dominguez, 894 F.3d 116, 120.*
[61] *Marks, 2018 U.S. App. LEXIS 26883, at *26 n.8.*
[62] *Id.*
[63] *Heard v. Nationstar Mortg. LLC, No. 2:16-cv-00694-MHH, 2018 U.S. Dist. LEXIS 143175, at *15 (N.D. Ala. Aug. 23, 2018); see also Lardner v. Diversified Consultants, Inc., 17 F. Supp. 3d 1215, 1221 (S.D. Fla. 2014) ("The statute has no requirement on how long a telephone number is stored.").*
[64] See TCPA Litigation Sprawl, U.S. Chamber Institute for Legal Reform at 2, http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf; see also Testimony of Scott Delacourt before the Senate Comm. on Commerce, Science & Transportation, 115th Cong. (Apr. 18, 2018).

legitimate businesses seeking to navigate the rules for contacting consumers, and provide the clarifications outlined in this comment.

Respectfully submitted,

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