Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: The Commission

COMMENTS OF SIRIUS XM RADIO INC.

Sirius XM Radio Inc. ("SiriusXM") submits these comments in response to the Consumer and Governmental Affairs Bureau's Public Notice[1] seeking further comment on the Commission's interpretation of the Telephone Consumer Protection Act ("TCPA"), given the recent decision in *Marks v. Crunch San Diego, LLC*.[2] For the reasons explained below, the Commission should reject *Marks*'s overinclusive interpretation of the TCPA.

[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," DA 18-1014 (rel. Oct. 3, 2018).

[2] No. 14-56834, 2018 WL 4495553 (9th Cir. Sep. 20, 2018).

SUMMARY

Say you're a responsible driver (and a conscientious friend) who wants to make sure that those who text you understand that you won't be able to respond until you have arrived at your destination. There's an app for that. If you own an iPhone—as 44% of the hundreds of millions of Americans with smartphones do[3]—a preinstalled feature of the phone's operating system lets you easily solve the problem. Go to "Settings," then "Control Center," then "Customize Controls." Tap "Do Not Disturb While Driving," and everything else happens automatically: "If someone sends you a message, they receive an automatic reply letting them know that you're driving."[4] You can even choose to have the phone send automatic replies only to particular lists of callers stored on your phone—recent callers, favorites, or all contacts. The hundreds of millions of Americans who prefer different operating systems (such as Android) for their smartphones have similar options.[5] And of course, these apps aren't just useful for those who wish to respond while driving. Apple's Do Not Disturb, for example, can be customized to send automatic responses to anyone who calls or texts you during a particular time frame, or to send such messages to only a select group of contacts who reach out to you during that window.[6]

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[3] *See* Statista, *Subscriber Share Held by Smartphone Operating Systems in the United States from 2012 to 2018*, https://goo.gl/zLAqWv (2018).

[4] Apple, *How To Use Do Not Disturb While Driving*, https://apple.co/2w8nurH (Sep. 17, 2018). Technically, this setting comes baked in only for iOS versions 11.0 and later. As of October 10, 2018, 57.9 percent of iPhones ran iOS version 11.0 or later. *See* Apteligent Data, *iOS Distribution and iOS Market Share*, https://bit.ly/2I1y6BL (Oct. 10, 2018).

[5] *See, e.g.*, Nancy Messieh, *How To Send Automatic Replies to Text Messages on Android*, https://bit.ly/2IRgGWA (May 10, 2017) (discussing third-party apps such as SMS Auto Reply Text Message and If This Then That); Verizon, *Turn On Auto Reply—Verizon Messages—Android Smartphone*, https://vz.to/2A5tqpH (discussing how to activate Verizon's auto-reply functionality for its messaging app).

[6] *See, e.g.*, Nick Douglas, *Add an Auto-Responder to Do Not Disturb*, Lifehacker, https://bit.ly/2NDKQxg (May 7, 2018) (discussing how to set Do Not Disturb to "auto-respond when you're at the theater or in a meeting" or simply to "limit[] distractions").

Every single one of these millions of smartphones "has the capacity … to store numbers to be called … and to dial such numbers" automatically.[7] And according to the Ninth Circuit, every single one of these millions of smartphones is therefore an "automated telephone dialing system" subject to the TCPA's $500-per-call-or-text restrictions, for every call or text it makes.[8]

That can't be right. As the D.C. Circuit recently held when unanimously invalidating the Commission's 2015 Declaratory Ruling, the "statutory definition of an ATDS" cannot be "construe[d] … 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."[9] The TCPA does not allow, let alone compel, that absurd result. By its plain terms, it covers only equipment that performs its tasks by "using a random or sequential number generator," not just by dialing from a list. Its clear purpose and unequivocal legislative history point in the same direction: Congress meant to alleviate the unique threats posed by random or sequential dialing to specialized numbers, not to prohibit targeted efforts to reach known customers. Because nothing in the Ninth Circuit's opinion proves otherwise—and because the Ninth Circuit acknowledged the Commission had discretion to reject its views anyway—the Commission should limit the ATDS to its proper bounds.

[7] *Marks*, 2018 WL 4495553, at *9.

[8] *See id.* (interpreting the TCPA's definition of an ATDS in this fashion).

[9] *ACA International v. FCC*, 885 F.3d 687, 698 (D.C. Cir. 2018).

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ARGUMENT

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."[10] The Act generally makes it unlawful "to make any call … using any automatic telephone dialing system" to certain emergency telephone lines, hospital lines, and wireless numbers.[11]

Sirius XM previously explained that these statutory provisions raise three questions that, if answered as compelled by the plain text of the statute and the D.C. Circuit's decision in *ACA International*, avoid the unlawful result reached by the *Marks* court. First, what are the functions of an ATDS? The functions of an ATDS consist of automatically generating and dialing random or sequential telephone numbers. Second, what does it mean to have the "capacity" to perform these functions? A device has the necessary "capacity" if the device, as programmed at the time of the call, has the ability to perform those functions. Third, what does it mean to "us[e]" an ATDS? A caller uses an ATDS if it makes a call using the capacity that makes the device an ATDS—in other words, if the caller uses the capacity to automatically generate and dial random or sequential telephone numbers.

Marks speaks only to the first of these three questions: what are the functions of an ATDS? Despite *Marks*, the statutory obligation to analyze the functions of an ATDS remains the same: an ATDS must automatically generate and dial random or sequential telephone numbers, and not simply dial from a list.

[10] 47 U.S.C. § 227(a).

[11] *Id.* § 227(b)(1)(A).

A. The Commission should not adopt the interpretation set forth in *Marks*.

1. *Marks* held that a device is an ATDS if it "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."[12] As a result, a device qualifies if it can "ma[ke] automatic calls from lists of recipients," even if it lacks the capacity to "dia[l] blocks of sequential or randomly generated numbers."[13] This interpretation of the TCPA is incorrect, and the Commission should decline to adopt it in revising its own ATDS definition.

First, the Ninth Circuit's interpretation creates the same overbreadth problem that led to the D.C. Circuit's decision to vacate the Commission's 2015 Declaratory Ruling. The 2015 Declaratory Ruling concluded that "app downloads and other software additions of that variety—and the enhanced functionality they bring about—are appropriately considered to be within a device's 'capacity.'"[14] But because "[i]t'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,"[15] the Commission's interpretation of "capacity" treated every smartphone on the market as an ATDS. The D.C. Circuit held that "eye-popping sweep" went far beyond anything Congress could have imagined when enacting the TCPA in 1991, creating a restriction "utterly unreasonable in [its] breadth."[16]

Marks's interpretation leads to the same result, just through a different statutory route. Millions of existing smartphones—including every iPhone running iOS version 11 or later—have

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[12] *Marks*, 2018 WL 4495553, at *9.

[13] *Id.* at *8.

[14] *ACA International*, 885 F.3d at 696.

[15] *Id.* (quoting 2015 Declaratory Ruling, 30 FCC Rcd. at 8075 (Comm'r Pai, dissenting)).

[16] *Id.* at 697, 699.

the ability, *as presently programmed*, to "store numbers to be called … and to dial such numbers" automatically.[17] Every one of these phones can "store" the number from an incoming call or message and then "dial" that number (or the text-messaging equivalent) when sending an automatic reply.[18] They can also automatically send replies only to numbers on stored lists of recent callers, favorites, or all contacts. But the D.C. Circuit has already held that, no matter what ambiguities the TCPA might otherwise contain, it cannot reasonably be construed to cover so much ordinary equipment.[19] The Commission should not bring that unlawful result in through the back door after the D.C. Circuit rejected it at the front.

Second, the Ninth Circuit's interpretation does not make sense as a matter of statutory interpretation. For one thing, it fails to give any effect to key statutory terms. In defining an ATDS, the Act uses the distinctive phrase "using a random or sequential number generator." The Act does *not* use other phrases such as "using a list of numbers" or "using a database of numbers." This is telling, because these two sets of phrases refer to fundamentally different practices. As the D.C. Circuit recognized, "[a] reference to 'dialing random or sequential numbers' cannot simply mean dialing form a set list."[20] Instead, the Court held that there is a "difference between calling from a list of numbers, on one hand, and … dialing a random or arbitrary … numbers, on the other hand."[21] The Ninth Circuit's reading, however, gives no effect to Congress' decision to use only the phrase "using a random or sequential number generator"—and not the phrase "using a list" or

[17] *Marks*, 2018 WL 4495553, at *9.

[18] *See supra* ii–iii.

[19] *See ACA International*, 885 F.3d at 697–99.

[20] *See id.* at 702.

[21] *Id.*; *see also id.* ("[N]umbers that are 'randomly or sequentially generated' differ from numbers that 'come from a calling list.'").

"using a database." In so doing, the Ninth Circuit contradicted the D.C. Circuit's reasoning in *ACA International*.

The Ninth Circuit's interpretation also contorts the language that Congress enacted. In order to explain that interpretation, the Ninth Circuit had to redraft the statute—adding words here, moving words around there. The statute defines an ATDS as equipment that has the capacity to "store or produce telephone numbers to be called, using a random or sequential number generator."[22] The Ninth Circuit, by contrast, defined an ATDS as a device that "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."[23] In other words, the Ninth Circuit lifted the phrase "numbers to be called," detached it from the modifier "using a random or sequential number generator," applied the unmodified phrase to one of two conjoined verbs ("store"), reattached the modifier, and then applied the modified phrase to the other of the two conjoined verbs ("produce"). That is simply not what the statute says, nor can the statute be justifiably read in that tortured manner.

As a matter of English grammar, the statute as written will not bear the reading given to it by the Ninth Circuit. The statutory definition of ATDS consists of a pair of conjoined verbs ("store or produce"), followed by a shared direct object ("telephone numbers to be called"), a comma, and then a modifier ("using a random or sequential number generator"). The modifier applies to *both* of the conjoined verbs, not just to one of them. For example, in the phrase "grow or harvest wheat, using modern equipment," the term "using modern equipment" unambiguously modifies both "grow" and "harvest." In the same way, in the phrase "store or produce telephone numbers to be called, using a random or sequential number generator," the term "using a random or sequential

[22] 47 U.S.C. § 227(a)(1).

[23] *Marks*, 2018 WL 4495553, at *9.

number generator" unambiguously modifies both "store" and "produce." Indeed, the whole point of the comma between "telephone numbers to be called" and "using a random or sequential number generator" is to make clear that the modifier covers each element in the series preceding it—in other words, to make it clear that the modifier covers both "store" and "produce."

Finally, the Ninth Circuit's interpretation disregards the purposes of the TCPA's ATDS provisions. Congress enacted the TCPA to address the unique problems posed by "autodialing equipment that either called numbers in large sequential blocks or dialed random 10-digit strings."[24] The problem Congress was trying to address was that random dialing allowed callers to reach and tie up specialized numbers—emergency rooms, hospital rooms, fire departments, and the like.[25] And sequential dialing allowed callers to reach, tie up, and overwhelm *all* the telephone lines in a hospital, police station, or fire department, or even an entire cell phone network.[26]

Automated dialing from a handpicked list does not pose similar problems. While random and sequential dialers can reach specialized lines such as 911, dialers that rely on prepared lists can reach only those people whom the caller deliberately chooses to call. Nobody deliberately calls a police station or a fire department or a hospital room to sell products. Similarly, random and sequential dialers do not distinguish between people who care about the caller's message and people who do not. In contrast, organizations that prepare lists of people to call "ha[ve] an incentive to direct calls to those likely to be interested."[27] For example, Sirius XM's vendors call consumers who have already received subscriptions to Sirius XM's satellite radio service; they do not call everybody in the phone book. Finally, while sequential dialers occupy blocks of consecutive

[24] *Dominguez v. Yahoo, Inc.*, 629 Fed. App'x 369, 372 (3d Cir. 2015).

[25] *See* S. Rep. No. 102-178, at 2 (1991).

[26] *See* H.R. Rep. No. 102-317, at 10 (1991).

[27] *Unsolicited Telephone Calls*, 77 FCC 2d 1023, 1037 (1980).

numbers—sometimes seizing entire cell phone networks, at least when the TCPA was passed in 1991—dialers that rely on handpicked lists do not. Whatever the pros and cons of dialers capable of calling from a list, these dialers do not raise the concerns that led Congress to enact the TCPA's ATDS restrictions.

2. The Ninth Circuit offered a series of textual and contextual justifications for its contrary interpretation of the statute. But these justifications are unpersuasive.

The Ninth Circuit first reasoned that the statutory language is "ambiguous on its face," because neither party's reading makes perfect sense of the statutory language.[28] According to the court, it "does not make sense to read 'store' as applying to 'telephone numbers to be called, using a random or sequential number generator," because "a number generator is not a storage device."[29] But that concern is misplaced. For example, if a telephone were programmed to store every number that a number generator spits out, the telephone would certainly store numbers "using" a number generator. In contrast, the textual problems raised by the Ninth Circuit's alternative interpretation are far more serious: The Ninth Circuit had to rewrite the statute entirely in order even to set out that reading, and the result it reached covers (at least) tens of millions of ordinary devices.

Turning from text to structure, the Ninth Circuit sought support in "provisions in the TCPA allowing an ATDS to call selected numbers"—for example, provisions permitting the use of an ATDS to call "persons who had consented to such calls" and to "collect a debt owed to or guaranteed by the United States."[30] The Ninth Circuit reasoned that a caller can take advantage of these exemptions only by "dial[ing] from a list of phone numbers," not by "dialing a block of

[28] *Marks*, 2018 WL 4495553, at *8.

[29] *Id.*

[30] *Id.* at *8 (citing 47 U.S.C. § 227(b)(1)(A)).

random or sequential numbers."[31] But this argument ignores the TCPA's structure. The statute prohibits "mak[ing] any call (other than a call … made with the prior express consent of the called party) using an [ATDS] *or an artificial or prerecorded voice*" to certain lines.[32] Even if it may be difficult to secure consent for random calls, current technology makes it easy—and common—to secure consent for artificial or prerecorded voice calls, leaving plenty of work for that part of the statute to do. Moreover, if the Commission maintains its view—notwithstanding the D.C. Circuit's decision—that the statute prohibits calls from equipment that has a particular capacity (and not just calls using that capacity), this supposed problem disappears: a caller who has equipment that happens to have ATDS functionalities can of course secure consent to make targeted calls to hand-picked numbers using that same equipment.

The Ninth Circuit also reasoned that Congress acquiesced in its interpretation of the TCPA. According to the panel, the Commission previously had interpreted the statutory definition "to include devices that could dial numbers from a stored list," and Congress validated that definition by amending the TCPA in 2015 to exclude calls aimed at collecting a government (or government-backed) debt.[33]

This is a remarkable and unsustainable line of reasoning. *ACA International* vacated the FCC's 2015 Declaratory Ruling, including the FCC's prior statements therein about dialing from a list, precisely because the FCC had "espouse[d] competing interpretations in the same order."[34] For Congress to "ratif[y]" an agency's interpretation, the "consensus" about the meaning of the statute was "so broad and unquestioned that [a court] must presume Congress knew of and

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[31] *Id.*

[32] 47 U.S.C. § 227(b)(1)(A) (emphasis added).

[33] *Marks*, 2018 WL 4495553, at *8.

[34] 885 F.3d at 703.

endorsed it."[35] There can hardly be such "consensus" when *the Commission itself* had not settled on a consistent interpretation. Indeed, when Congress amended the TCPA in 2015, the legal landscape as a whole was radically unsettled: (1) as the D.C. Circuit recognized, the Commission's previous orders "offer[ed] no meaningful guidance" about the meaning of the ATDS definition, leaving parties "in a significant fog of uncertainty about how to determine if a device is an ATDS"[36]; (2) the Commission itself had suggested at times that dialing from a list does not suffice[37]; (3) a challenge to the Commission's interpretation was pending before the D.C. Circuit[38]; and (4) the Third Circuit had already rejected the dial-from-a-list interpretation.[39] Congress's decision in 2015 to spare the government's own ox from the scourge of TCPA litigation cannot be understood to have ratified an interpretation that the agency had not clearly adopted, that some agency rulings contradicted, that was the subject of a pending judicial challenge in one circuit, and that another circuit had already rejected.

Finally, it is worth noting what the Ninth Circuit failed to discuss in its reasons for its interpretation. Although it acknowledged the critical role that smartphones played in the D.C. Circuit's reasoning in *ACA International*,[40] it never mentioned whether smartphones or other common equipment would be covered under its reading of the statute. As explained above, the Ninth Circuit's interpretation would necessarily sweep in such equipment—and perhaps even more equipment, such as any phone with a contact list or an autodial button. *ACA International* rightly forbade that "eye-popping" result.

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[35] *Jama v. ICE*, 543 U.S. 335, 349 (2005).

[36] *ACA International*, 885 F.3d at 703.

[37] *Id.* at 701.

[38] *Id.*

[39] *Dominguez*, 629 Fed. App'x at 372–73.

[40] *See Marks*, 2018 WL 4495553, at *5.

B. At worst, *Marks* leaves the Commission with the discretion to decide whether to adopt the interpretation set out in that opinion—discretion it should exercise by rejecting the Ninth Circuit's interpretation.

Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[41] a federal agency has the power to adopt any reasonable interpretation of an ambiguous federal statute that the agency administers. In *National Cable & Telecommunications Association v. Brand X Internet Services*,[42] the Supreme Court explained how the *Chevron* framework interacts with judicial precedent. The Court ruled that "a court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[43] Put another way: "Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[44]

In *Marks*, the Ninth Circuit stated that "the statutory text is ambiguous on its face."[45] It repeated that "the statutory language is ambiguous."[46] And it partially retreated from another panel's earlier pronouncement that "the statutory text is clear and unambiguous," explaining that "[this] statement … referred to [a different] aspect of the text."[47] In other words, *Marks* is the opposite of "a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation"—it forthrightly acknowledged that, at best, the statute is ambiguous about

[41] 467 U.S. 837 (1984).

[42] 545 U.S. 967 (2005).

[43] *Id.* at 982.

[44] *Id.* at 982–83.

[45] *Marks*, 2018 WL 4495553, at *8.

[46] *Id.*

[47] *Id.* at *8 n.6.

whether the capacity to dial from a list of numbers suffices. It is thus up to the Commission to decide whether to adopt *Marks*'s interpretation.

For all the reasons given above, even if the Commission could decide to follow the Ninth Circuit's interpretation, it should not do so. That interpretation is (at least) in serious tension with the statute's key limiting text and Congress's obvious purpose. Perhaps most damningly, that interpretation would lead to what all must acknowledge is an unwise (indeed, absurd) result: subjecting millions of ordinary Americans to the prospect of $500 in damages every time they use their ordinary phones to call or text someone without that person's prior express consent. Even if the Commission had the statutory leeway to do so, it should not foster that bizarre outcome.

CONCLUSION

Consistent with the clear direction of the D.C. Circuit, the statute itself, and the substantial weight of the record before the agency, the Commission should confirm than an ATDS must have the capacity to generate and automatically dial random or sequential numbers.

Respectfully submitted,

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