

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

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| <i>In the Matter of</i> |) | |
| |) | |
| Consumer and Governmental Affairs Bureau |) | CG Docket No. 18-152 |
| Seeks Further Comment on Interpretation of the |) | |
| Telephone Consumer Protection Act |) | |
| in Light of the Ninth Circuit's <i>Marks v.</i> |) | |
| <i>Crunch San Diego, LLC</i> Decision |) | |
| | | |
| Rules and Regulations Implementing the |) | CG Docket No. 02-278 |
| Telephone Consumer Protection Act of 1991 |) | |

COMMENTS OF THE CREDIT UNION NATIONAL ASSOCIATION (“CUNA”)

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Summary

The nation's nearly 5,500 credit unions are tax-exempt nonprofit democratically operated financial cooperatives that have a unique relationship with their more than 114 million member-owners. This special relationship necessitates a variety of communications between the credit union and its member-owners, ranging from timely and critical financial information to messages regarding governance issues and financial education. Members welcome and expect these informational communications.

When a credit union calls a member with such information at her home over a landline, the call does not require the member's prior consent. If the credit union, however, makes the same call to a member's cell phone, the rules are different. The Telephone Consumer Protection Act ("TCPA") and the Federal Communications Commission's implementing rules require prior express consent to make informational calls and texts to cell phones using an automatic telephone dialing system ("ATDS") or an artificial or prerecorded voice. No such consent is required for calls to landlines. By making these important calls and texts to member-owners' cell phones, credit unions risk ruinous class-action litigation should consent not have been obtained or documented. Because the only type of phone most Americans use today is a cell phone, and the vast majority of cell phone subscribers are not charged for incoming calls, this distinction between cell phone and landline calls is antiquated and due for revision.

Against this backdrop for much needed common-sense changes to the TCPA, the Credit Union National Association ("CUNA") submits these comments in response to the Commission's October 3, 2018 Public Notice due to the Ninth Circuit's *Marks v. Crunch San Diego, LLC* Decision. In *Marks*, the Ninth Circuit misinterpreted the definition of an ATDS,

concluding that a device need only have the capacity to dial stored numbers from a list to qualify as a restricted autodialer. The *Marks* decision is flawed and should be rejected.

To reach its erroneous definition of an ATDS, the Ninth Circuit disregarded the Commission's pre-2003 interpretation of the term and the TCPA's statutory text, misinterpreted Congressional intent, and ignored the D.C. Circuit's warnings against definitional vagueness and overbreadth in *ACA Int'l v. FCC*. Specifically, the Ninth Circuit ignores the Commission's original guidance on the definition of an ATDS, which found that an ATDS must have the functionality to randomly or sequentially generate numbers. The *Marks* court also disregards well-established canons of statutory construction—including precedent from its own circuit—that compel an interpretation that equipment must have this functionality to qualify as ATDS.

Moreover, the Ninth Circuit's reasoning that the TCPA's prior consent and federal debt collection exceptions support the conclusion that ATDS includes devices that solely call from lists is unpersuasive. The TCPA's legislative history demonstrates that Congress's primary concern was not with the use of autodialing technology generally, but specifically with telephony devices that dial randomly or sequentially generated numbers in order to deliver prerecorded messages. These arbitrarily dialed calls tied up emergency and business lines, creating public safety hazards, imposing additional costs on consumers, and interfering with commerce. Nothing in the legislative history or context of the prior consent or federal debt collection exceptions warrants the Ninth Circuit's conclusion that Congress meant to include in the ATDS definition devices that call from lists.

The result of the Ninth Circuit's erroneous analysis is a definition of ATDS that provides little meaningful guidance to callers and is untethered from the TCPA's text and purpose. Compounding this interpretational affront is the fact that the *Marks* decision possibly sweeps in

every smartphone—potentially subjecting nearly all American consumers to TCPA liability for their routine calls and texts. As the D. C. Circuit stated, “[i]t cannot be the case that every uninvited communication from a smartphone infringes federal law.” More than stemming the tide of abusive robocalling, the Ninth Circuit’s expansive definition will further open the floodgates to vexatious TCPA litigation. This will not benefit consumers but only plaintiffs’ attorneys, while leaving good-faith callers—like credit unions—more exposed to damaging class actions.

The Commission, therefore, should reject the Ninth Circuit’s flawed interpretation and confirm that a device qualifies as an ATDS only if it presently possesses the functions expressly stated in the TCPA’s statutory definition of ATDS. Specifically, the telephony device must actually be able (i) to store or produce numbers to be called, using a random or sequential number generator, and (ii) to dial those numbers. In other words, equipment that only dials numbers from lists does not qualify as an ATDS. Additionally, the Commission should confirm that human intervention in the calling process disqualifies a device from being an ATDS. To further clarify the reach of the TCPA, the Commission should also conclude that the TCPA only applies to calls or texts that are made using a device’s autodialing functionality. Properly defining an ATDS—according to the TCPA’s text and Congressional intent—will substantially reduce uncertainty and help mitigate the onslaught of TCPA litigation.

Lastly, the Commission should also take this opportunity to update antiquated distinctions between wireless and landline calls for informational calls and texts between businesses and their customers, as requested in CUNA’s petition for declaratory ruling. Specifically, the Commission should either (1) adopt an established business relationship (“EBR”) exemption for credit unions’ informational calls and text messages to their member-

owners' cell phones; or (2) exempt credit unions' informational calls or texts that are in fact free to the called party under the called party's wireless plan.

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Comments of the Credit Union National Association

The Credit Union National Association (“CUNA”), by and through its counsel, submits these comments in response to the *Marks Public Notice*.¹ In *Marks v. Crunch San Diego, LLC*, the Ninth Circuit misinterpreted the Telephone Consumer Protection Act’s (“TCPA”) definition of an “automatic telephone dialing system” (“ATDS”), concluding that an ATDS need only have the capacity to dial stored numbers.² The Ninth Circuit’s flawed conclusion disregards the statutory text of the TCPA, Congress’s intent, and the D.C. Circuit’s *ACA v. FCC* decision.³

Moreover, the Ninth Circuit’s definition is striking in its overbreadth, potentially sweeping in nearly every modern wireless phone and thereby potentially exposing nearly all American consumers to TCPA liability. The Commission, therefore, should correct the Ninth

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*, Public Notice, DA-1014 (rel. Oct. 3, 2018) [*Public Notice*]. See *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495552 (9th Cir. Sept. 20, 2018) [*Marks*]. The appellee, Crunch, has filed a petition for *en banc review*. *Appellee’s Petition for Rehearing En Banc*, Case No. 14-56834, Oct. 4, 2018.

² *Marks*, 2018 WL 4495553, at *9 (“[W]e read § 227(a)(1) to provide that the term automatic telephone dialing system means 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.”).

³ *ACA Int’l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

Circuit’s erroneous interpretation and confirm that equipment qualifies as an ATDS only if it actually possesses the functions expressly stated in the ATDS definition, namely (i) storing or producing numbers to be called, *using a random or sequential number generator*, and (ii) dialing those numbers. Additionally, the Commission should confirm that equipment qualifies as an ATDS only if it can perform these requisite functions without human intervention, and that the TCPA only applies to calls that are made using the autodialing functionality.⁴ Properly defining an ATDS—according to the TCPA’s text and Congressional intent—will substantially reduce uncertainty and help mitigate the onslaught of TCPA litigation. The Commission should also take this opportunity to update antiquated distinctions between wireless and landline calls when companies make informational calls to their customers or members, as requested in CUNA’s petition for declaratory ruling.⁵

I. Introduction.

CUNA is the largest national trade association in the United States serving America’s credit unions. With its network of affiliated state credit union associations, CUNA serves the nation’s nearly 5,500 credit unions, which are owned by more than 114 million members. Credit unions are community-based, tax-exempt nonprofit financial cooperatives. Credit union members not only contribute to the capital of their credit union as member-owners, but also democratically control that capital through the one-member-one-vote principle in credit union

⁴ CUNA was one of nearly 20 entities that joined with the U.S. Chamber Institute for Legal Reform in filing a Petition for Declaratory Ruling to revise the definition of an ATDS in light of the D.C. Circuit’s *ACA Int’l* decision. U.S. Chamber Institute for Legal Reform *et al.*, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed May 3, 2018) [*Chamber Petition*]. The Chamber Petition requests the Commission to confirm that to qualify as an ATDS, the equipment must use a random or sequential number generator to store or produce numbers to be called, and then to dial those numbers without human intervention. This functionality must be inherent in the equipment itself and must be used when making the call. Under this definition, predictive dialers would not qualify as ATDS.

⁵ Credit Union National Association Petition for Declaratory Ruling, CG Docket 02-278 (filed Nov. 21, 2017) [*CUNA Petition*].

policy setting and decision making.⁶ This means that every member has an equal voice in the governance of his or her credit union regardless of the amount of savings or loans he or she has with the credit union. There is thus a close and unique relationship between credit unions and their member-owners, who not only use their credit union's financial services but also participate in the governance of their credit union. This unique relationship is fostered and nourished by educational and governance-related communications with member-owners. Credit union communications relay both critical financial information and educational materials that aid members in fulfilling their responsibilities as owners of the cooperative enterprise.⁷

Congress never intended that the TCPA restrict these types of normal and expected business communications.⁸ Nevertheless, the Commission's confusing and at times conflicting interpretations and rulings have had a chilling effect on credit unions' communications with their members, depriving them of important or even vital information.

CUNA confirmed this chilling effect in a survey it conducted with its members regarding TCPA compliance. More than three-fourths (76%) of respondents reported that it is "very difficult" (30%) or "somewhat difficult" (46%) to determine whether their communications are compliant with the TCPA following the Commission's *2015 TCPA Order*. The same survey found that more than one in three credit unions (35%) that had used text messaging to

⁶ The credit union membership elects unpaid, volunteer officers and directors who establish the credit union's policies. In addition, officials and directors must be members of the credit union.

⁷ Commenting on the important role that credit unions play in educating and informing consumers, the former head of the Consumer Financial Protection Board ("CFPB") noted at a Credit Union Advisory Council meeting that "I have seen firsthand the important role that credit unions play in the lives of so many consumers and communities" and that credit unions "take your responsibility to your members very seriously, and many of you have been pacesetters as consumer educators." Richard Cordray, *Prepared Remarks of Richard Cordray Director of the Consumer Financial Protection Bureau*, CONSUMER FINANCIAL PROTECTION BUREAU - CREDIT UNION ADVISORY COUNCIL MEETING (Sept. 1, 2016), <http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-richard-cordray-director-consumer-financial-protection-bureau-fall-2016-cuac/> (last visited June 13, 2018).

⁸ The TCPA's restriction on calls to wireless numbers and other mobile devices was not meant to apply where "the called party has provided the telephone number of such a line to the caller for use in normal business communications. The Committee does not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their customers." H.R. REP. NO. 102-317, at 17 (1991).

communicate with their members in the past have cut-back or outright discontinued texting members.⁹ Three-fourths (75%) of credit unions that had used some form of an artificial or prerecorded voice messaging system in the past have curtailed or ceased completely such communications.¹⁰ Fear of TCPA lawsuits by aggressive plaintiff-attorneys seeking to exploit vague or overly broad interpretations has curtailed use of efficient communications technologies. The Ninth Circuit's ruling in *Marks* will undoubtedly further chill credit unions' efforts to communicate effectively and efficiently with their members.

The majority of this country's credit unions are small to very small businesses that lack the resources to untangle confusing rules or to hire more personnel to manually dial their members in order to avoid even the possibility of costly or potentially ruinous litigation. In the United States, more than half of all credit unions, 2,708 out of approximately 5,500 credit unions, have five or fewer full time employees. More than half (3,457) have assets of less than \$50 million. Moreover, credit unions with less than \$20 million in assets account for over 40% of all U.S. credit unions (2,369). It thus comes as no surprise that over 60% of credit unions that utilize artificial or prerecorded voice calls or place text messages to their members believe a TCPA lawsuit would be "very problematic—severely threatening the [credit union's] resources."¹¹

Therefore, clarity around the definition of an ATDS is crucial not only to credit unions' ability to communicate with their members, but also their economic viability. And because credit unions' members are also their owners, damaging class action litigation against credit

⁹ 2017 "Impact of TCPA Rules" Survey, CREDIT UNION NAT'L ASS'N, at 2. Texting is an extremely efficient method of communication. Text messages have a 98% open rate and 90% of all text messages are read in under three minutes. 45 Texting Statistics that Prove Businesses Need to Take SMS Seriously, ONEREACH (Sept. 10, 2015), <https://onereach.com/blog/45-texting-statistics-that-prove-businesses-need-to-start-taking-sms-seriously/> (last visited October 17, 2018).

¹⁰ *Id.*

¹¹ 2017 "Impact of TCPA Rules" Survey, CREDIT UNION NATIONAL ASSOCIATION, at 3.

unions hurts the very consumers the TCPA is intended to protect. Plainly, that was not Congress's intent. CUNA has sought to address the chilling effect vexatious TCPA litigation has on its critical communications with its members by filing a petition seeking to exempt wireless calls from the requirement of obtaining prior consent where there is an established business relationship with the intended recipient or such calls are in fact free of charge.¹²

II. The Commission Should Exercise its Authority to Correct the Ninth Circuit's Erroneous Interpretation and Confirm that an ATDS Must have the Present Capacity to Store and Produce Numbers Generated Randomly or Sequentially.

In the wake of *ACA*, courts have wrestled with the appropriate definition of an ATDS. For example, in *Dominguez v. Yahoo*, the Third Circuit appropriately concluded that an ATDS must have the "present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers."¹³ The Ninth Circuit in *Marks* rejected the *Dominguez* ruling and adopted an expansive and flawed definition of an ATDS, creating a split in the circuits and setting a troubling precedent that has the potential to open the floodgates to even more vexatious TCPA litigation in that circuit. Thus, *Marks* makes clear that the Commission should act quickly.

Critically, the Ninth Circuit's decision does not bind the Commission because the decision is predicated on the view that the statutory text is ambiguous. The Ninth Circuit's overbroad interpretation of what devices qualify as an ATDS would trump the Commission's contrary construction "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."¹⁴ The Ninth

¹² *CUNA Petition* at 7.

¹³ *Dominguez v. Yahoo, Inc.* 894 F.3d 116, 121 (3d. Cir. 2018); *see also Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 932–36 (N. D. Ill. 2018); *Fleming v. Acc. Credit Services, Inc.*, 2018 WL 4562460, at *9–10 (D. N. J. Sept. 9, 2018).

¹⁴ *FCC v. Brand X Internet Services*, 545 U.S. 967, 982 (2005).

Circuit found the statutory definition “ambiguous on its face.”¹⁵ Thus, *Marks* does not stand in the way of this Commission adopting a well-reasoned and common-sense construction of the definition of an ATDS. A key purpose of *Chevron* deference is that agencies must be able to use their delegated authority to revise “unwise judicial constructions of ambiguous statutes.”¹⁶

For the reasons described below, *Marks* was wrongly decided and leaves courts, businesses, and consumers with little practical guidance on the definition of an ATDS. The Commission, therefore, should not hesitate to reject the Ninth Circuit’s definition and adopt its own construction of the term.

III. The Ninth Circuit’s Reasoning in *Marks* Is Fundamentally Flawed.

The *Marks* court’s reasoning is seriously flawed. The Ninth Circuit ignores the Commission’s pre-2003 guidance on the definition of an ATDS. In analyzing the statute’s text, the *Marks* court also disregards well-established canons of statutory construction. Further, the court uses the TCPA’s legislative history to attempt to buttress a contextual analysis of two provisions of the TCPA—the exception for prior consent and Congress’s 2015 TCPA amendment exempting federal debt collection calls—that it maintains support for the definition of ATDS to include equipment that calls from lists. By failing to recognize the Commission’s earlier guidance, failing to undertake any textual analysis, and misreading the legislative history and context of the TCPA, the Ninth Circuit adopts an erroneous interpretation of an ATDS.

A. *Marks Ignores the Commission’s Pre-2003 Interpretation that an ATDS Must Randomly or Sequentially Generate Numbers.*

Marks correctly concludes that *ACA* struck the Commission’s rulings from 2003 until the *2015 Order* interpreting the definition of an ATDS—including that the definition applies to predictive dialers that call numbers from lists. But the court erroneously concludes that there is

¹⁵ *Marks*, 2018 WL 4495553, at *8.

¹⁶ *Brand X*, 545 U.S. at 983.

thus no Commission guidance on the issue and it is left to interpret the statutory text rather than defer to the Commission's interpretations. A better reading of *ACA*'s rejection of the Commission's 2003 to 2015 expansive views of the functions of an ATDS would be to give effect to the Commission's initial interpretation of the TCPA that ATDS must have the functionality to randomly or sequentially generate numbers.

As Chairman Pai explained in his dissenting comments to the *2015 Order*:

When the Commission first interpreted the statute in 1992, it concluded that the prohibitions on using automatic telephone dialing systems “clearly do not apply to functions like ‘speed dialing,’ ‘call forwarding,’ or public telephone delayed message services[], because the numbers called *are not generated in a random or sequential fashion.*” Indeed, in that same order, the Commission made clear that calls not “dialed using a random or sequential number generator” “are not autodialer calls.”¹⁷

The Commission's discussion of debt collection calls further clarifies this point. On the issue of whether artificial and prerecorded message calls from debt collectors must identify the caller, the Commission ruled that “the identification requirements will not apply to debt collection calls because such calls are not autodialer calls (*i.e.* dialed using a random or sequential number generator.)”¹⁸ In other words, debt collection calls are not made to arbitrarily dialed numbers, but instead they are made from numbers derived from lists. The Commission emphasized this point in its 1995 Order on reconsideration:

The TCPA requires that calls dialed to numbers generated randomly or in sequence (autodialed) . . . must identify the caller. . . Household correctly points out that debt collection calls “are not directed to randomly or sequentially generated telephone

¹⁷ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 8074 (July 10, 2015) (dissenting statement of Comm'r Pai) (quoting *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8776 para. 47 (1992)) (emphasis added by Pai). See also *id.* at 8089 (stating that “calling off a contact or from a database of customers . . . does not fit the definition [of an ATDS]”) (dissenting statement of Comm'r O'Rielly).

¹⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, 8773, para. 39 (1992).

numbers, but instead are directed to the specifically programmed contact numbers for debtors.”¹⁹

Overturing *Marks* would restore the Commission’s original interpretation of the statutory text that an ATDS must have the capacity to generate random or sequential numbers.

B. *The Ninth Circuit Failed to Apply Canons of Statutory Construction.*

The Ninth Circuit begins its statutory analysis of an ATDS by asserting that, while the parties “offer competing interpretations of the language,” “both parties fail to make sense of the statutory language without reading additional words into the statute.”²⁰ Despite this rebuke, the court then proceeds to adopt the exact interpretation advanced by *Marks*.²¹ By doing so, the court failed to apply well-established canons of statutory construction. In other words, rather than move directly to legislative history and context, the court should have followed Ninth Circuit guidance and first utilized common rules of statutory construction to analyze the statute’s text. Other courts applying standard methods of statutory construction have concluded that the best reading of the statute’s plain language is that ATDS must have the capacity to call randomly or sequentially generated numbers, not merely numbers from a list. Courts have reached this conclusion without having to rewrite the text, as the *Marks* court has done.

In concluding that the statutory language is unclear as to whether the clause “using a random or sequential number generator” modifies both “to store” and “produce,” or merely “produce,” the *Marks* court wrongly ignored the Ninth Circuit’s “punctuation canon” of statutory

¹⁹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum, Opinion and Order, 10 FCC Rcd 12391, 12400, para.19 (1995).

²⁰ *Marks*, 2018 WL 4495553, at *8.

²¹ *Compare id.* at *8 (“Marks contends that we should read the definition as providing that an ATDS is ‘equipment which has the capacity (A) to [i] store [telephone numbers to be called] or [ii] produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.’”), *with id.* at * 9 (“[W]e read § 227(a)(1) to provide that the term automatic telephone dialing system means 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.”).

construction.²² Under the canon, “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.”²³ This rule is an exception to the “last antecedent” rule, which construes a clause to modify only the immediately preceding term or phrase; in this instance the clause would only modify produce. The *Marks* court does not once cite *Yang* or the punctuation canon, or attempt to explain why the construction rule does not apply.

The Ninth Circuit also refused to give persuasive weight to the Third Circuit’s opinion in *Dominguez* for the dubious reason that the Third Circuit failed to resolve the “linguistic problem” of “how a number can be *stored* (as opposed to *produced*) using a ‘random or sequential number generator.’”²⁴ Courts, however, have resolved this “linguistic problem,” to the extent it really exists in the first place.²⁵

In *Pinkus*, the court noted that both “store” and “produce” are transitive verbs that require an object. Here, the object is the phrase “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.’”²⁶ The court then naturally questions, what kinds of telephone numbers? It answers the question by concluding that “[g]iven 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’ and ‘produce.’”²⁷

²² See *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1000 (9th Cir. 2017) (citing *Davis v. Devanlay Retail Grp., Inc.*, 785 F.3d 359, 364 n.2 (9th Cir. 2015)).

²³ *Id.*

²⁴ *Marks*, 2018 WL 4495553, at *23 n.8. (emphasis in original).

²⁵ See *Pinkus*, 319 F. Supp. 3d at 936–40.

²⁶ *Id.* at 937–38.

²⁷ *Id.* at 938.

Pinkus acknowledges that “it is hard to see how a number generator could be used to store numbers” but resolves the issue:

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 the phrase is best understood to describe the process by which those numbers are generated in the first place.²⁸

Under *Pinkus*, the key issue is not how numbers are dialed but rather the process for determining which kinds of numbers to dial. That analysis is consistent with *ACA*’s observation that even dialing from lists would entail either dialing randomly or sequentially, making the focus of the analysis number generation.²⁹

In short, *Pinkus* gives reasonable meaning to the statute’s plain text, reaching a result consistent with the Commission’s initial interpretation, and is far more faithful to the TCPA’s legislative history and overall structure than *Marks*.

C. *Congress’s Restrictions on the Use of ATDS Were Designed to Address Specific Problems with Random and Sequential Dialing, Not to Address General Privacy Concerns with Automated Artificial and Prerecorded Voice Calls.*

Despite the Ninth Circuit’s contrary interpretation, the textual conclusion that an ATDS must have the capacity to randomly or sequentially dial numbers is consistent with TCPA’s legislative history and the context in which the term ATDS is used. The *Marks* court recites congressional concerns regarding the use of automated or computerized calls to set the stage for its conclusion that ATDS are not restricted to calling random or sequentially generated numbers.³⁰ This legislative history, however, demonstrates that Congress’s primary concern was not with the use of autodialing technology *per se* but rather with the use of that technology to

²⁸ *Id.* at 938; *see also Fleming*, 2018 WL 4562460 (following *Pinkus*).

²⁹ *ACA Int’l*, 885 F.3d at 702.

³⁰ *Marks*, 2018 WL 4495553, at *2–6.

deliver prerecorded messages. This concern is evident in the very legislative history cited in *Marks*, but the court fails to appreciate its import.³¹

The concern over prerecorded messages implicates the definition of ATDS only to the extent that an ATDS is used to delivery such messages to numbers reached through the calling of randomly or sequentially generated numbers. Once such numbers are reached, the prerecorded messages—especially when sequentially dialed—seize the lines of emergency services (creating public safety hazards) or tie up the lines of businesses or reach cell phones (imposing additional costs).³² As noted by Senator Hollings, the threats to public safety and the adverse effects on interstate commerce caused by calling random or sequentially generated numbers associated with these specific categories of telephone lines eclipsed privacy concerns. 137 Cong. Rec. S16205 (“Even more important [than the invasion of privacy], these computerized calls threaten our personal health and safety. . . . Computerized calls tieup [sic] the emergency lines of police, fire, and medical services and prevent real emergency calls from getting through.”).

³¹ See, e.g., *id.* at *4–5 (noting the increase in call volume “due to the advent of machines that ‘automatically dial a telephone number and deliver to the called party an artificial or prerecorded voice message’”(quoting S. Rep. 107-178 at 2); *id.* at 5 (“automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by ‘live’ persons.”) (quoting S. Rep. No 178, at 4); *id.* (“These automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party’ and deprive customers of the ‘ability to slam the telephone down on a live human being.”)(citations omitted) (quoting S. Rep. 102-178, at 4 & n. 3).

³² See, e.g., S. Rep. 102-178 at 2 (“some automatic dialers will dial numbers in sequence, thereby tying up all lines of a business and preventing any outgoing calls); *id.* (“unsolicited calls placed to . . .cellular or paging telephone numbers often impose a cost on the called party”); see also H. Rep. 102-317 at 10 (“Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations . . . [o]nce a phone connection is made, automatic dialing systems can ‘seize’ a recipient’s telephone line and not release it until the prerecorded message is played.”); 137 Cong. Rec S. 18785 at 2 (noting autodialers can be programmed to “deliver a prerecorded message to thousands of sequential phone numbers. This results in calls to hospitals, emergency care providers, unlisted numbers and paging and cellular equipment. . . . There have been many instances of auto-dial machines hitting hospital switchboards and sequentially delivering a recorded message to all telephone lines.”) (statement of Sen. Pressler); Congressional Record, November 26, 1991, H 11310 (“automatic dialing machines place calls randomly, meaning they sometimes call unlisted numbers, or numbers of hospitals, police and fire stations.”) (statement of Rep. Markey); Hrg. Before the Subcomm. on Commc’ns of the Comm. on Commerce, Science, and Transp., S. Hrg. 102-960, at 46 (July 24, 1991) (“[S]equential calling by automatic dialing systems can effectively saturate mobile facilities, thereby blocking provision of service to the public. Because mobile carriers obtain large blocks of consecutive phone numbers for their subscribers, automatic dialer transmitted calls can run through whole groups of paging and cellular numbers at one time. This can result in seizure of a paging carrier’s facilities that effectively block service to its customers.”) (Statement of Thomas Stroup, Pres., Telocator).

Regarding cellular phones specifically, Congress’s concern was that users of wireless services incurred additional costs for incoming calls, causing a direct economic impact not incurred by residential landline telephone users receiving ATDS calls. The fact that Congress did not bar the use of ATDS to reach residential lines³³—which at the time was the overwhelming telephony medium—further shows that it was not primarily concerned with privacy invasions from the use of ATDS.

The Ninth Circuit, however, fails to recognize the distinct automated functions of random/sequential number generation and the delivery of prerecorded messages that can seize lines. Instead, it conflates the two functions noting, for example, that “autodialers” could seize lines.³⁴ But it is the prerecorded message that seizes lines. The distinct harm caused by automatic telephone dialing systems—as reflected in the legislative history and addressed in the definition of ATDS—is reaching these sensitive categories of numbers through by randomly or sequentially generating numbers to be called. The Commission certainly understood the distinction between the two functions: “We emphasize that the term [ATDS] does not include the transmission of an artificial or prerecorded voice.”³⁵

D. *The Ninth Circuit Reads too Much into the Prior Consent and Federal Debt Collection Exceptions.*

The Ninth Circuit attempts to buttress its conclusion that ATDS includes equipment that “merely dials numbers from a stored list” by pointing to the TCPA’s “prior express consent” exception and the Bipartisan Budget Act of 2015’s federal debts exception.³⁶ The Ninth Circuit opined that these exceptions “demonstrate[] that equipment that dials from a list of individuals . . .

³³ 47 U.S.C. § 227(b)(1)(B).

³⁴ *Marks*, 2018 WL 4495553, at *2.

³⁵ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991* (1992 Report and Order), 7 F.C.C.R. 8752, 8755 at ¶6 (Oct. 16, 1992).

³⁶ *Id.* at 8.

. is still an ATDS but is exempted from the TCPA’s strictures.”³⁷ Respectfully, the Ninth Circuit is wrong.

Contrary to the Ninth Circuit’s opinion, “equipment” is not “exempted from the TCPA’s strictures” because a call made using that equipment falls under the prior consent or federal debts exceptions. Rather, the *call* is exempted because the call is made with consent or to collect on a federal debt. The definition of an ATDS thus is not tied to either exception but instead stands independently. This is made explicit by the fact that the prior consent and federal debt collection exceptions not only apply to calls made using an ATDS but also apply to calls using an “artificial or prerecorded voice.”³⁸ The Ninth Circuit fails to recognize this and never once acknowledges that TCPA liability can extend to artificial or prerecorded voice calls regardless of whether the call is made using an ATDS.³⁹ This non-ATDS basis for TCPA liability underscores that the prior consent and federal debt collection exceptions do not turn on the definition of an ATDS and do not require that an ATDS include equipment that dials from stored lists.

1. The Prior Consent Exemption Provides No Basis to Conclude that an ATDS Includes Equipment that Only Calls from Lists.

The Ninth Circuit concludes that the “prior express consent” exception must mean ATDS includes equipment that automatically calls from lists of recipients who provided consent, or there would no reason for the exemption.⁴⁰ But this logic makes little sense. Calls from lists do not implicate the harms of autodialing random or sequential numbers and, therefore, fall outside

³⁷ *Id.*

³⁸ 47 U.S.C. § 227(b)(1)(A).

³⁹ *See, e.g., Marks*, 2018 WL 4495553, at *3 (“The TCPA **prohibited the use of an ATDS** to make ‘any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system **or an artificial or prerecorded voice**’ to emergency telephone lines, hospital rooms or other health care facilities, and paging and cellular telephones. 47 U.S.C. § 227(b)(1)(A) (1991).”) (emphasis added).

⁴⁰ *Id.* at 9.

the definition of ATDS.⁴¹ The prior express consent exception relied on by *Marks* applies to those categories of numbers that Congress was concerned would be tied up or create additional charges through random or sequential dialing—*e.g.*, emergency lines, patient rooms, and cellular phones.⁴² The court merely refers to these as “other provisions in the statute [that] prohibited calls to specified numbers,” but these are the very lines covered by the prior consent exception on which the court relies.⁴³ The court also fails to identify the one other category of numbers for which ATDS is barred: business lines.⁴⁴ Congress was specifically concerned that sequential dialing would tie up business lines, providing further evidence that ATDS were restricted because of their capacity to generate random or sequential numbers.⁴⁵ Simply put, the court’s argument that the prior express consent exception means ATDS must include devices that call from lists does not withstand scrutiny.

2. The Ninth Circuit’s Reliance on the Federal Debt Collection Exception Is Also Misplaced.

The Ninth Circuit’s only other contextual basis to conclude that devices that lack the ability to generate random or sequential numbers are nevertheless ATDS is Congress’s adoption in 2015 of an amendment to the TCPA to exempt calls to collect debts owed to or guaranteed by the federal government (“BBA Amendments”). With the BBA Amendments, Congress sought to address a very specific and important issue impacting taxpayers—federal debt—and not to

⁴¹ “There is...a sharp technological distinction between ‘random’ or ‘sequential’ number generation and ‘programmable’ number generation...Programmable equipment enables a business to transmit a standard...message quickly to a number of telephone subscribers...with whom the sender has a prior business relationship.” *Telemarketing Practices: Hearing Before the House Subcommittee on Telecommunications and Finance*, 40-41, 101 Con. (1989).

⁴² § 227(b)(1)(A)(i)-(iii).

⁴³ *Marks*, 2018 WL 4495553, at *8 n.7.

⁴⁴ § 227(b)(1)(D) (making it unlawful to “use any automatic dialing system in such a way that two or more telephone lines or a multi-line business are engaged simultaneously.”)

⁴⁵The court overlooks other nuances of the statute. It often cites legislative history indicating concern over the impact of “computerized calls” to residential lines. But the statute does not bar the use of ATDS for such calls. With respect to residential lines, the TCPA only bars the use of artificial or prerecorded messages. § 227(b)(1)(B).

rewrite the TCPA. And while the legislative history surrounding the BBA Amendments to the TCPA is sparse, the amendment is categorized as “debt collection improvements.”⁴⁶ From this label, the Ninth Circuit leaped to the conclusion that “this debt collection exception demonstrates that equipment that dials from a list of individuals who owe a debt to the United States is still an ATDS but is exempted from the TCPA’s structures.”⁴⁷ But this conclusion is premised on nothing from the statute’s text and nothing from the amendment’s legislative history but, instead, relies on the strained notion that congressional inaction is indicative of congressional intent.⁴⁸

The Supreme Court has long warned of the dangers of reading too much into congressional inaction. *See, e.g., Helvering v. Hallock*, 309 U.S. 106, 121 (1940) (“[W]e walk on quick-sand when we try to find in the absence of corrective legislation a controlling principle.”). Indeed, the Supreme Court noted that “several equally tenable inferences” may be drawn from Congressional inaction.⁴⁹ As such, the Supreme Court has consistently found that such inferences lack “persuasive significance.”⁵⁰

The Supreme Court has indicated that reading into Congressional silence on an agency’s or court’s interpretation of a statute is a slippery slope.⁵¹ In *Harrison*, for example, the Supreme Court rejected appeals to rely on what “the Committee and the Congress did not say” concerning

⁴⁶ Bipartisan Budget Act, Pub. L. No. 114–74, § 301 (2015).

⁴⁷ *Marks*, 2018 WL 4495553, at *8 .

⁴⁸ The case *Lorillard v. Pons*, 434 U.S. 575 (1978)—cited in the Ninth Circuit’s opinion in *Marks* as standing for the proposition that “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change”—is distinguishable from the 2015 BBA amendments to the TCPA. In *Lorillard*, the Supreme Court found that Congress acquiesced to certain interpretations of the Fair Labor Standards Act’s (FLSA) enforcement provisions when it incorporated those provisions of the FLSA into the Age Discrimination Employment Act. 434 U.S. at 580–581. In the 2015 BBA amendments, however, Congress has not “re-enacted” any provisions of the TCPA with respect to the FCC’s or courts’ definitions of ATDS, but merely carved out an exemption to the TCPA without needing to address underlying statutory definitions.

⁴⁹ *U.S. v. Wise*, 370 U.S. 405, 411 (1962).

⁵⁰ *Central Bank of Denver, N.A. v. First Interstate Bank*, 511 U.S. 164, 187 (1994) (citing *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

⁵¹ *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980).

a provision of the Clean Air Act.⁵² “In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue a theory of the dog that did not bark.”⁵³ This canon of relying on Congressional silence, known as “the dog that did not bark,” was rebuked by Justice Scalia in *Chisom v. Roemer*, stating that courts apply “the statute, not legislative history, and certainly not the absence of legislative history.”⁵⁴

The Ninth Circuit views Congress’s failure to correct the Commission’s (now overruled) expansive interpretation of ATDS as definitively suggesting Congress acquiesced to that interpretation. But any number of inferences can equally be drawn from Congress’s failure to address the definition of ATDS when it added the federal debts exceptions—and none are persuasive here. For example, one could conclude that Congress’s silence was due to the fact that Congress felt it was unnecessary to address the definition at that juncture. Or Congressional silence could just as readily be interpreted to indicate acquiescence in the narrower interpretation, as *ACA* noted that the Commission simultaneously espoused conflicting interpretations.⁵⁵ It is equally plausible that Congress believed courts would remedy the Commission’s interpretation given that various legal challenges to the FCC’s interpretation were ongoing in 2015.

The only apparent conclusion is that attempting to draw persuasive inferences from Congress’s inaction on the ATDS definition is an exercise in futility. Thus, the Ninth Circuit’s contextual analysis is unconvincing.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia J., dissenting).

⁵⁵ See *Central Bank*, 511 U.S. at 187; see also *ACA Int’l*, 885 F.3d at 702; *Fleming*, 2018 WL 4562460, at *8 (noting that “the FCC orders are confusing – at times seeming to require that a prohibited device possess the capacity to generate random or sequential numbers, but elsewhere prohibiting devices that lack that capacity.”).

IV. The Ninth Circuit Suggests an Overly Restrictive and Unworkable Standard for Human Intervention.

The Commission should confirm that minimal human intervention disqualifies equipment as an ATDS. Although *Marks* recognizes that some degree of human intervention would disqualify equipment as an ATDS, the court takes an ambiguous, yet cramped, view of the degree of human intervention required. The Ninth Circuit suggests that human intervention must occur at the dialing stage: “Crunch does not dispute that the Textmunication system *dials numbers automatically*, and therefore *has the automatic dialing function necessary* to qualify as an ATDS, even though humans, rather than machines, are needed to add phone numbers to the Textmunication platform.”⁵⁶ The court concludes that a telephony system is sufficiently automated to qualify as an ATDS where it “dial[s] . . . numbers automatically (even if the system must be turned on or triggered by a person).”⁵⁷ Instead of providing clarity, the Ninth Circuit’s definition adds further uncertainty as to what functionalities constitute automated dialing.

Moreover, this language suggests that anything short of humans manually dialing a number would be insufficient. If that is the court’s intent, it would effectively nullify the human intervention requirement, and it would be at odds with numerous cases holding that human

⁵⁶ *Marks*, 2018 WL 4495553, at *9 (emphasis added). The court appears to give short shrift to the extent of human involvement with the platform, which is substantial. As described in the opinion, Textmunication is “a web-based marketing platform designed to send promotional texts to a list of stored telephone numbers.” To send a text using the platform, “a Crunch employee logs into the Textmunication system, selects the recipient phone numbers, generates the content of the message, and selects the date and time for the message to be sent. The Textmunication system will then automatically send the text messages to the selected phone numbers at the appointed time.” *Id.* at *6. It appears to be the court’s view that any human involvement prior to the time of actually dialing the number does not count, contrary to the findings of other courts. See, e.g., *Jenkins v. mGage*, 2016 WL 4263937 (N. D. Ga. Aug. 12, 2016).

⁵⁷ *Marks*, 2018 WL 4495553, at *9.

intervention in the form of clicking on a number automatically to an agent or other pre-dialing activities are sufficient human intervention.⁵⁸

The Ninth Circuit bases its narrow reading of human intervention on its belief that Congress intended to target “equipment that could engage in automatic *dialing*, rather than equipment that operated without any human oversight or control.”⁵⁹ As is plain from the legislative history, Congress was not concerned with automatic dialing generally. Instead, it was concerned specifically with automatic dialing of randomly or sequentially generated numbers. In other words, Congress was concerned with calls resulting from automatically generated numbers, and not necessarily automatically dialed numbers. Therefore, the Ninth Circuit’s focus on the dialing stage in evaluating the level of human intervention is misguided. The evidence in *Marks* showed that the numbers called from the Textmunication platform were not generated randomly or sequentially but instead must be added by humans. By defining the human intervention inquiry to sweep in the Textmunication platform, the Ninth Circuit draws an arbitrary line that fails to effectuate Congressional intent.

The Commission should take this opportunity to both confirm that human intervention removes equipment from the definition of ATDS and, clarify the degree of human intervention required. With respect to the latter question, the Commission should confirm, as a number of courts have, that minimal human intervention preceding the dialing function—such as manually

⁵⁸ See, e.g., *Fleming*, 2018 WL 4562460; *Arora v. Transworld Sys. Inc.*, No. 15-cv-4941, 2017 WL 3620742 (N.D. Ill. Aug. 23, 2017); *Schlusberg v. Receivables Performance Mgmt.*, LLC, No. 15-7572, 2017 WL 2812884 (D.N.J. June 29, 2017); *Smith v. Stellar Recovery, Inc.*, No. 15-cv-11717, 2017 WL 1336075 (E.D. Mich. Feb. 7, 2017); *Pozo v. Stellar Recovery Collection Agency, Inc.*, No. 8:15-cv-929, 2016 WL 7851415 (M.D. Fla. Sept. 2, 2016); *Messina v. Green Tree Serv., LLC*, 201 F. Supp. 3d 992 (N.D. Ill. 2016); *Strauss v. CBE Grp., Inc.*, 173 F. Supp. 3d 1302 (S.D. Fla. Mar. 28, 2016); *Estrella v. Ltd Fin. Servs., LP*, No. 8:14-cv-2624, 2015 WL 6742062 (M.D. Fla. Nov. 2, 2015); *Gaza v. LTD Fin. Servs., L.P.*, No. 8:14-cv-1012, 2015 WL 5009741 (M.D. Fla. Aug. 24, 2015).

⁵⁹ *Marks*, 2018 WL 4495553, at *9.

clicking on a telephone number to initiate the dialing sequence—removes a telephony device from the definition of an ATDS.⁶⁰

V. The Ninth Circuit’s Definition of ATDS Has the Potential to Sweep in Nearly All Modern Wireless Phones and, Therefore, Suffers from the Same Infirmity as the FCC’s Prior Overbroad Standard.

In striking down the FCC’s prior ambiguous and expansive definition of an ATDS, the D.C. Circuit concluded that “[t]he 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.”⁶¹ The Ninth Circuit’s decision wrongly has the potential to do just that. In other words, despite the fact that the Ninth Circuit acknowledged that the D.C. Circuit “set aside the FCC’s interpretations of the definition of an ATDS [and] that the FCC’s prior orders on that issue are no longer binding on” it, the *Marks* court then went on to adopt the exact type of overbroad and ambiguous definition that the D.C. Circuit invalidated because it potentially included smartphones.⁶²

The D.C. Circuit found that it is “untenable” to interpret the term “capacity” in the ATDS definition in a way that sweeps in smartphones—“the most ubiquitous type of phone equipment known.”⁶³ While the Ninth Circuit did not reach the question of present versus potential “capacity,” the court’s ruling nonetheless has at least the potential effect of encompassing smartphones within its definition of an ATDS. Under the plain language of the Ninth Circuit’s ATDS definition, a device need only have the capacity to store numbers to be called and dial them automatically to qualify for TCPA liability. It is beyond dispute that smartphones have this

⁶⁰ See Comments of ADT LLC d/b/a ADT Security Services, CG Docket Nos. 18-152, 02-278, at 13 n.21 (filed June 13, 2018) (citing cases finding that manually clicking on the number to be called constitutes sufficient human intervention and rejecting claims that a human must manually dial the number).

⁶¹ *ACA Int’l*, 885 F.3d at 697.

⁶² *Marks*, 2018 WL 4495553, at *6.

⁶³ *ACA Int’l*, 885 F.3d at 698.

functionality. For example, by engaging in the trivial process of downloading a mobile app, smartphones can automatically send texts at a scheduled date and time, such as birthday texts and auto-replies.

Just like the FCC's *2015 Order*, which the D.C. Circuit struck down in *ACA*, a straightforward reading of the Ninth Circuit's decision impermissibly "invites the conclusion that all smartphones are autodialers."⁶⁴ The Ninth Circuit thus effectively adopted the arbitrary and capricious definition of an ATDS that the D.C. Circuit rejected. The *ACA* decision is binding on all other circuit courts under the Hobbs Act.⁶⁵

At best, the Ninth Circuit's decision "leave[s] uncertain whether the statutory definition applies to smartphones."⁶⁶ And, as the D.C. Circuit explained in finding the FCC's *2015 Order* arbitrary and capricious "any uncertainty on that score would have left affected parties without concrete guidance . . . even though the issue carries significant implications—including the possibility of committing federal law violations and incurring substantial liability in damages—for smartphone owners."⁶⁷ The D.C. Circuit went on to state that "even assuming the Commission's ruling could be conceived to leave room for concluding that smartphones do *not* qualify as autodialers, that result itself would be unreasonable and impermissible."⁶⁸ This is because "[i]f a 'purported standard is indiscriminate and offers no meaningful guidance' to affected parties, it will fail 'the requirement of reasoned decisionmaking.'"⁶⁹

The *Marks* decision—like the invalidated FCC rulings—provides "'no meaningful guidance' to affected parties in material respects on whether their equipment is subject to the

⁶⁴ *Id.* at 699.

⁶⁵ *See* 28 U.S.C. § 2342(1).

⁶⁶ *ACA Int'l*, 885 F.3d at 699.

⁶⁷ *Id.*

⁶⁸ *Id.* (emphasis added).

⁶⁹ *Id.* at 700 (quoting *United States Postal Serv. v. Postal Regulatory Comm'n*, 785 F.3d 740, 754 (D.C. Cir. 2015)).

statute's autodialer restrictions.”⁷⁰ The Ninth Circuit’s ruling leaves no ground for distinguishing between a run-of-the-mill autodialer and a smartphone under its ATDS definition. It may well be the case that the Ninth Circuit did not intend for its ATDS definition to extend to the cell phones that hundreds of millions of Americans use each day,⁷¹ but there is no way to know that from the text of the *Marks* decision. What is apparent is that the definition adopted by *Marks* is potentially as expansive and ambiguous as the prior FCC formulations that the D.C. Circuit rejected.

Because the Ninth Circuit’s ruling could be understood to support the conclusion that smartphones fall within the TCPA’s autodialer definition, the Ninth Circuit’s conclusion suffers from the same infirmity as the prior FCC rulings.⁷² As the D.C. Circuit made clear, an interpretation that all smartphones qualify as ATDS “is an unreasonably, and impermissibly, expansive one.”⁷³ Thus, the *Marks* decision is unpersuasive, unwise, and should be rejected.

VI. The Commission Should Take this Opportunity to Equalize Treatment of Landline and Wireless Informational Calls by Granting CUNA’s Petition.

The *ACA Public Notice* addresses the interpretation of several key statutory terms. Liability for violating the TCPA expands or contracts depending on those interpretations, but they do not resolve a fundamental shortcoming of the Commission’s overall regulatory approach. At the core of the TCPA, and Commission’s rules, is the question of consent and on this most fundamental of issues, the Commission has sustained an increasingly antiquated distinction between landline and wireless calling. Using discretionary authority delegated by Congress in section 227(b)(2)(B) of the TCPA, the Commission’s rules have always allowed informational

⁷⁰ *Id.* at 701 (quoting *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 785 F.3d 740, 754 (D.C. Cir. 2015)).

⁷¹ *Id.* at 697–98 (“[A]s of the end of 2016, nearly 80% of American adults had become smartphone owners. See *10 Facts About Smartphones as the iPhone Turns 10*, Pew Research Ctr., June 28, 2017, <http://www.pewresearch.org/fact-tank/2017/06/28/10-facts-about-smartphones> (last visited Dec. 18, 2017).”).

⁷² *Id.* at 700.

⁷³ *Id.*

calls to be made to residential landlines, regardless of calling technology, without the need for any prior consent. Section 64.1200(a)(3) of the Commission’s rules permits calls to “any residential line” without consent if the call is “not made for a commercial purpose” or is made for commercial purpose “but does not include or introduce an advertisement or constitute telemarketing.”⁷⁴ These noncommercial calls or commercial calls without advertising are often referred to as informational calls.

The Commission also has discretionary authority to exempt from prior consent requirements calls to cell phones that are “not charged to the called party.”⁷⁵ The Commission to date has used this authority very sparingly and subject to severe restrictions on call frequency and other conditions.⁷⁶ Thus, today, all manner of informational calls, including debt collection calls, may be made to residential lines using an autodialer or an artificial or prerecorded voice without any form of prior consent – but the same call for the very same purpose made to a wireless subscriber risks fines or litigation in the absence of consent. In an age when more than half of all telephone subscribers have “cut the cord”⁷⁷ and use a wireless phone for their residential “line,” and virtually all calls or texts to wireless phones are under unlimited plans and hence free to the end user, the distinction between residential and wireless informational calls is

⁷⁴ 47 C.F.R. § 64.1200(a)(3). *See also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd. 1830, 1845–48, ¶¶ 35–43 (2012).

⁷⁵ 47 U.S.C. § 227(b)(2)(C) (providing that the Commission “may, by rule order, exempt from the requirements of (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to the conditions as the Commission may prescribe as necessary in the interest of privacy rights this section is intended to protect.”). Subsection (1)(A)(iii) makes it unlawful, in the absence of prior consent, to use an autodialer to make any call to a “cellular telephone service . . . or any service for which the called party is charged for the call.” 47 U.S.C. 227(b)(1)(A)(iii).

⁷⁶ *See 2015 Omnibus TCPA Order*, 30 FCC Rcd. at 8024, ¶ 127, 8030, ¶ 144; *In the Matter of Cargo Airline Association Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, Order, 29 FCC Rcd. 3432, 3435–36, ¶ 12 (2014).

⁷⁷ Stephen J. Blumberg and Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey*, July-December 2016, NATIONAL CENTER FOR HEALTH STATISTICS, at 1 (May 2017), www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf (last visited June 11, 2018). This number is expected to increase to around 60 percent by the end of this year. *See Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141, at iii (filed May 4, 2018).

no longer fair or sustainable. The fact that there is a provision that exempts free calls to wireless phones further punctuates that Congress was primarily concerned with the costs borne by consumers for telemarketing calls to their wireless phones. Because the underlying policy for treating wireless calls differently than landline calls has all but vanished, so too should the distinction.

CUNA has thus urged the Commission to exempt wireless calls from the requirement of obtaining prior consent where such calls are in fact free of charge.⁷⁸ CUNA also proposed certain privacy-enhancing conditions for exempting free-to-end-user informational wireless calls, including limitations on call frequency and using and honoring easy to use opt-out mechanisms.⁷⁹ The free-to-end-user exemption would not be available for calls that do not comply with these limitations.

Alternatively, CUNA has proposed exempting, subject to the same limitations, informational wireless calls to consumers that have an established business relationship with the caller.⁸⁰ The Commission exempted from consent requirements both informational and telemarketing calls to residential lines in which the called party has an established business relationship (EBR) with the caller. The do-not-call rules still allow calls to registered numbers where there is an EBR. The Commission adopted the EBR in 1992 and maintained it until 2012, when it removed the EBR for telemarketing calls to residential lines. As explained in the *CUNA*

⁷⁸ *CUNA Petition* at 15-18. To date, to the limited extent the Commission has exempted free to end user calls, it has required the caller to demonstrate that it has entered into arrangements with third-party vendors or wireless carriers to ensure that calls are not subject to incremental charges. See *2015 TCPA Order*, 30 FCC Rcd. 8023, at ¶127. See also *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, *Mortgage Bankers Association Petition for Exemption*, CG Docket No. 02-278, Order, 31 FCC Rcd. 12484, 12488–89, ¶ 13 (2016), *pet. for review pending*. (denying exemption request where company failed to offer adequate assurance that it would enter into arrangements to ensure calls would be free). As CUNA has argued, entering into such arrangements may not be feasible for many of its very small credit union members, and paying third parties to ensure calls are free does not make sense when that vast majority of calls are already “free” under unlimited calling and texting plans.

⁷⁹ *CUNA Petition* at 19.

⁸⁰ *CUNA Petition* at 8-15.

Petition, the Commission has ample authority to adopt an EBR exemption for wireless informational calls and should do so.⁸¹

Congress's emphasis on the cost incurred by cell phone subscribers made sense in 1991 when the TCPA was adopted. Mass market cell phone use was just being deployed,⁸² and cellular subscribers were billed significant amounts for each minute of incoming as well as outgoing calls. Landline customers on the other hand were not billed at all for incoming calls; charges were only imposed on landline subscribers for *making outgoing* calls.⁸³ Because cell phone subscribers faced substantially different economic consequences than landline subscribers when receiving incoming calls, it is not surprising that Congress treated the two differently and focused on the charges that wireless subscribers faced.

As noted, today's telecommunications market place could not be more different. The Commission should use this opportunity and exercise its authority to devise rules that update the TCPA by eliminating the antiquated distinction between residential landline and wireless informational calling. Removing the element of consent, coupled with reasonable restrictions on call frequency to protect consumer privacy, provides a bright-line compliance regime that eliminates the need to ascertain interpretations of terms such as "called party" or "automated telephone dialing systems" or assess whether revocation of consent was reasonable. The revised

⁸¹ *CUNA Petition* at 11-15.

⁸² In 1991, when the TCPA was enacted, roughly 3 people out of a hundred had a cell phone and these were primarily professionals using their phones for business purposes. See *Mobile Cellular Subscriptions in the U.S.* available at <https://fred.stlouisfed.org/series/ITCELSETSP2USA>, (last visited October 17, 2018). The Commission did not begin reporting cellular phone usage until 1992, when it reported data compiled by the then-Cellular Telecommunications Industry Association showing some 7.5 million wireless subscribers in December 1991. See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, 10 FCC Rcd. 8844, 8873, Table 1 (1995) (First CRMS Competition Report).

⁸³ See e.g. *FCC Seeks Comment on CMRS "Calling Party Pays" Service Option*, 12 FCC Rcd. 17693 (Sept. 25, 1997) ("CMRS telephone consumers throughout the Nation typically pay on a per minute basis for all calls they initiate or receive. The main billing difference between wireline and wireless telephone service is that a wireline telephone subscriber typically does not pay any additional charges to receive telephone calls, whereas most CMRS telephone subscribers pay a per minute charge to receive calls."). The exemption being "toll free" 800 calls in which the called party, typically entities seeking to offer their customers or users a free method of calling them, assumed the costs of the call.

interpretations of these terms will hopefully provide clarity, but are unlikely to stem the tide of vexatious TCPA litigation. By not requiring consent in the first instance, yet ensuring consumer privacy through straightforward and reasonable calling restrictions, both industry and consumers will be better served.

VII. Conclusion

The Commission should restore the balance that Congress intended when it passed the TCPA and adopt the recommendations set forth above.

Respectfully submitted,

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